

THE SKETCHLEY LAW FIRM, P. A.

www.sketchleylaw.com

Twyla L. Sketchley, Attorney
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Exploitation In Florida

EXPLOITATION means knowingly, by deception or intimidation, obtaining or using, or attempting to obtain or use the adult's funds, assets, or property with the intent to temporarily or permanently deprive the adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult. Misuse or abuse of a power of attorney is exploitation.

An EXPLOITER is: a person who stands in a position of trust and confidence with a vulnerable adult; a person who knows or who should know that the vulnerable adult lacks the capacity to consent; and not always known by the victim.

A VULNERABLE ADULT means a person age 18 or older whose ability to perform the normal activities of daily living, and/or to provide for his or her own care or protection, is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or due to the infirmities of aging.

ABUSE: any willful act or threatened act by a relative, caregiver, or household member which causes or is likely to cause significant impairment to a vulnerable adult's physical, mental, or emotional health. It includes acts and omissions.

NEGLECT: the failure or omission on the part of the caregiver or vulnerable adult to provide the care, supervision, and services necessary to maintain the physical and mental health of a vulnerable adult. It means the failure of a caregiver or vulnerable adult to make a reasonable effort to protect a vulnerable adult from abuse, neglect or exploitation by others. It is also a repeated conduct or a single incident of carelessness which produces or could reasonably be expected to result in serious physical or psychological injury, or a substantial risk of death.

A GUARDIAN is a person who has been appointed by the court to act on behalf of a ward's person or property, or both. A guardian can be used to protect a vulnerable adult from abuse, neglect and/or exploitation.

An EMERGENCY TEMPORARY GUARDIAN is appointed if a court finds there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken.

If you suspect abuse, neglect or exploitation contact the elder abuse hotline immediately. 1-800-96-ABUSE. **All information obtained during an investigation is confidential, and can be used as evidence in any subsequent court proceedings. All reporters can remain anonymous if desired.**

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ADVANCE PLANNING TOOLS AT A GLANCE

Advance Directives: General term used to describe those documents that provide instructions to caregivers and professionals, and provide a legal means for your business to be carried out and decisions to be made for you in the event of your incapacity.

FINANCIAL TOOLS

Durable Power of Attorney: (*Chapter 709 Florida Statutes*) A document in which an individual (principal) designates another (attorney in fact) to act on his or her behalf with regard to a wide range of transactions, especially financial transactions. As long as its durability is clearly stated, Florida law allows the attorney in fact to continue to act on behalf of the principal even after the principal's incapacity. A principal **MUST** have capacity to sign the Durable Power of Attorney.

Springing Durable Power of Attorney: (*Chapter 709 Florida Statutes*) A Durable Power of Attorney that does not go into effect or allow the attorney in fact to act on behalf of a principal until the principal has been found by his or her doctor to be incapable of handling his or her affairs.

Trust: (*Chapter 736 Florida Statutes*) A right to use or get the benefit of property or money that is held by one person (trustee) for the benefit of another (beneficiary). The trustee continues to manage the trust property even after a beneficiary has been determined to be incapacitated.

HEALTH CARE TOOLS

Health Care Surrogate: (*Chapter 765 Florida Statutes*) The individual (surrogate) designated by an individual (principal) to make health care decisions for him or her in the event of incapacity.

Health Care Proxy: (*Chapter 765 Florida Statutes*) The individual designated by Florida law to make healthcare decisions for an individual in the event of the individual's incapacity.

Living Will: (*Chapter 765 Florida Statutes*) A document announcing an individual's intent and wish regarding the health care he or she would like to receive or would like withdrawn in the event the individual should be found to have an end stage condition or be found to be in a permanent vegetative state.

Do Not Resuscitate Order: (*Chapter 401 Florida Statutes*) A medical order instructing paramedics, EMS, and other medical personnel not to resuscitate an individual in the event of cardiac or respiratory arrest.

Anatomical Gift: (*Chapter 765 Florida Statutes*) The individual provides for the donation of his or her body, organs or tissue upon his or her death.

GUARDIANSHIP

Designation of Pre-Need Guardian: (*Florida Statute § 744.3045*) An individual's written declaration naming another to serve as his or her guardian in the event of his or her incapacity.

Guardianship: (*Chapter 744 Florida Statutes*) A guardianship is an extraordinary legal procedure in which a court appoints someone to assist a ward in the event of the ward's incapacity. A guardianship is usually instituted because there are none of the other planning tools discussed above available.



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Finding & Maintaining Good Caregivers For Aging Parents

By Twyla Sketchley, Esquire

Most elders who need care and assistance live at home.¹ Providing the necessary assistance often becomes the responsibility of family members who provide the care themselves or hire someone to provide assistance. Hiring someone to care for a frail aging parent can be nerve-wracking, and the consequences of hiring an inappropriate caregiver can be catastrophic. Everyone has heard at least one story of a bad caregiver harming or taking advantage of someone's vulnerable loved one. Although the stress of hiring in-home care cannot be eliminated, following these few simple steps can reduce the likelihood of hiring bad caregivers and reduce the stress to you and your loved one:

1. Know what you need. Determine exactly what kind of care or assistance your loved one needs. In-home care services can be divided into four categories: personal care (bathing, eating, toileting, dressing, etc.); homemaker services (cooking and cleaning); health care (medication management, therapy, nursing services); and, emotional care (conversation, activities and companionship).² These services require varying skills, abilities and licensure. For example: A housekeeper may not have the necessary training or licensure to assist with bathing or medication management.

Many in-home care services are available through agencies or businesses that provide home health care, companion services and housekeeping. Additionally, some healthcare services may be paid for by Medicare or private insurance, depending on your loved one's circumstances.

If you know the kinds of services your loved one needs, but do not know where to find them, contact the Florida Elder Helpline at (800) 963-5337. The Elder Helpline is a statewide information and referral service that can direct you to services and assistance in your local area.

If you are unsure what services may be needed, a free evaluation of your loved one can be sought from the Florida Department of Elder Affairs, CARES program.³ One objective of the CARES program is to assist in finding in-home and community services so that Floridians can remain in their homes as long as possible. Finally, private geriatric care managers or case managers can also conduct needs assessments, make referrals to local providers, and help coordinate in-home care.

2. Create a written description of job duties. Next, based on the services your loved one needs, write a job description. This written job description provides you with a set of criteria for hiring and a guide by which to judge the caregiver's performance. If you are hiring a caregiver from an agency, carefully review the agency's written job description to be sure that it includes the services listed in your job description.

3. Have a contract. Whether it is a private contract drafted by your attorney or a contract with an agency, make sure that you have a written contract with the caregiver. A contract sets the boundaries of the relationship and informs both parties of their rights and responsibilities. It should include the rate of compensation, the description of services provided, bonding or insurance requirements, the termination process, and any other expectations you or the caregiver have. It should also state whether the caregiver is an employee or independent contractor. Make sure you know the legal effects and limitations of both.

4. Gather and verify information about the potential caregiver. Before you hire a caregiver, ask for references and past employers, these are common requests for caregivers and

should not offend them. Always check references and employment histories. Always ask the references how they know the potential caregiver and for how long. Bad employment histories, criminal records and references who do not know the potential caregiver in a care-giving setting may be warning signs of a bad caregiver. If the potential caregiver claims to hold licenses, verify those licenses and whether there have been any complaints against them.

In addition to basic employment and licensure information, require a criminal background check. With a caregiver's social security number and date of birth you can check his/her Florida criminal history and with a finger print you can check his/her national criminal history with the FBI through the Florida Department of Law Enforcement.⁴ Obviously, you should not hire an individual with a criminal history, particularly of abuse, neglect, exploitation, violence, fraud, dishonest, theft, etc. Make sure that any agency from which you are hiring a caregiver conducts similar background checks on its employees and can verify for you that it has done so.

5. Interview. Interview all potential caregivers, even if you are hiring the individual from an agency. An interview gives you an opportunity to get to know the person, determine if he/she can meet your loved one's needs, and learn about his/her background. Ask about the individual's job history, licensures, experience and education, arrests, and previous accusations of abuse, neglect or exploitation. Pay attention to the caregiver's questions, too. For instance: A caregiver asking to be paid "under the table," can indicate future legal trouble for you and/or the caregiver.

6. Hire a caregiver with appropriate experience and knowledge. Make sure that the caregiver you hire understands and has experience with the type of care needed. For example, if a potential caregiver is providing care for an elderly person with Alzheimer's disease, make sure

that the caregiver knows about the disease progression and understands the behaviors associated with it. This helps prevent injury to your loved one and to the caregiver. There are community organizations that can provide training and education for family members and caregivers dealing with a variety of diseases and disabilities.

7. Monitor the caregiver. Once you have hired a caregiver, you must supervise and monitor them. Make unexpected visits when the caregiver is on duty. Talk to the caregiver about your loved one and the care provided. Watch for physical signs that care is not being provided. For example, if the caregiver is to do laundry, check to make sure the laundry is done. Ask your loved one about the care they receive and how they feel about the caregiver, even if your loved one is incompetent. Watch for signs of physical and/or mental deterioration, changes in your loved one's behavior or personality, or isolation by the caregiver. Watch your loved one's finances for sudden changes in spending habits or out of the ordinary gifts. These are all warning signs that the caregiver may not be appropriate or may even be harming your loved one.

8. Always have a backup plan. Never become completely dependent upon the caregiver. Have a written backup plan and provide the caregiver with a copy so he/she can implement it in case of emergency or illness. This helps prevent your loved one being left without care. It also allows the caregiver to address his/her illnesses and emergencies without personal hardship. A backup plan also helps ensure that a caregiver cannot use his/her position to take advantage of you or your loved one by threatening to or withholding care and/or other services.

9. Never Give the Caregiver Financial or Medical Decision-Making Authority. Never allow caregivers to have control of the finances or authority to make medical decisions for your loved one. Such arrangements are impossible to monitor and leave the caregiver vulnerable

to accusations of wrong-doing and your loved one vulnerable to harm. Make sure the decision-making processes and protections are in place before the caregiver assumes his/her duties. Make sure the caregiver knows what those processes are in case decisions must be made. If petty cash is needed for your loved one's care, make arrangements with the caregiver to handle only small amounts of money and account for all expenditures with receipts.

10. Finally, fire bad caregivers and report suspected abuse, neglect and exploitation immediately. Fire caregivers who fail to do their jobs. Your written contract should provide for the process by which this is done. Also, abuse, neglect and exploitation are crimes and should be immediately reported to Adult Protective Services, law enforcement and any agency employing the offending caregiver. Reporting can help protect your vulnerable loved one and future adults who may come in contact with the caregiver. The hotline to report abuse is toll-free. Your name and contact information is protected by law and the hotline is available 24 hours a day: 1-800-96-ABUSE.

¹ National Aging in Place Council citing U.S. Dept. Health and Human Services 2003, Alzheimer's Association 2005

² Family Caregiver Alliance, Fact Sheet: Hiring In-Home Care.

³ <http://elderaffairs.state.fl.us/english/pdfs/CARESdir.pdf>

⁴ <http://www.fdle.state.fl.us/CriminalHistory/>

Twyla Sketchley is the managing attorney for The Sketchley Law Firm, P.A. The Sketchley Law Firm, P.A. focuses its practice on providing support and guidance to individuals with special needs and their families through elder law and guardianship.

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UNDER WHAT AUTHORITY?

When family members are involved in caring for an individual, it can be confusing and difficult to know who has what authority to obtain information from services providers, release information to others, and make personal, medical and/or financial decisions. The following is an outline of commonly used decision-makers and the ways to determine the extent of their authority:

1. **The Individual**

If the individual is competent, she has the right to make all decisions regardless of the surrogate decision-makers that she has appointed, unless she specifically directs otherwise. If the individual is competent, she has the right to make all decisions regarding release of information.

2. **Health Care Surrogate**

A Health Care Surrogate is the person an individual designates in a written document to make health care decisions for her when she is unable to make those decisions for herself. The Health Care Surrogate Designation (the written document) will outline any limitations on the authority granted to the Surrogate. If no limitations, then the Surrogate has the authority powers listed under Fla. Stat. § 765.205.

3. **Health Care Proxy**

A Health Care Proxy is the person designated by law to make health care decisions for an individual who is unable to make decisions for herself. The person must be one of the individuals authorized under Fla. Stat. § 765.401, nearest in relation to the individual. Usually facilities or health care providers use a form noting the appointment of a Proxy in their chart.

4. **Attorney In Fact**

An Attorney In Fact is the person an individual (principal) appoints via a written document called a power of attorney to make financial and property decisions on her behalf. To be valid, it must be signed and witnessed in compliance with Florida Law. In the case of a principal who is incapable of making decisions, the Attorney In Fact must be acting under a Durable Power of Attorney signed when the principal had capacity. The Durable Power of Attorney can include authority to make medical decisions. The authority granted to the Attorney In Fact is specifically listed in the document.

5. **Guardian**

A Guardian is the individual appointed by a court to make decisions for an incapacitated individual. The Guardian's authority to make decisions for and individual can be found in her Letters of Guardianship. To determine the extent of the Guardian's decision-making authority, the Letters of Guardianship must be reviewed by the provider and/or its attorney. Generally, the Guardian can only exercise the authority granted in the Letters of Guardianship.



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