

Real Estate Transactions, Financial Elder Abuse, and Incapacity

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Today's Topics for Real Estate Professionals

Elderly in the U.S. & The Real Estate Practice

Dementia and Alzheimer's Effect On the Daily Practice of Real Estate

The Rise of Financial Elder Abuse

Cognitive Capacity in Real Estate

Red Flags in Real Estate Transactions



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Financial Elder Abuse and Capacity

A Changing Landscape

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The world for real estate agents and title companies is quickly changing...

- Over 54 Million Americans were 65 years of age or older in 2019.
- By 2060, this population is projected to reach almost a quarter of the then U.S. Population . (*Doubling the elderly population since 2013*)
- The eighty-five-years-or-older population is projected to more than double from six million in 2013 to 14.6 million in 2040.
- Life Expectancy:
 - Women 82.65 Years
 - Men 78.18 Years
- Longer Life Expectancy and more expensive care...



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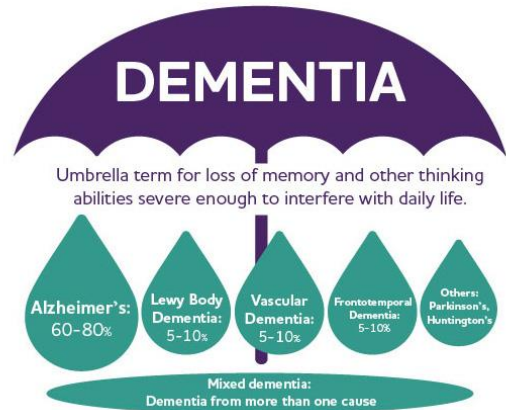
Decline in Mental Awareness/Acuity



Over 6.2 million people, ages sixty-five and older, suffered from some form of Alzheimer's in 2021.



By 2060 this number will increase to over 13.8 million.



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Idaho Alzheimer's Statistics

- **Prevalence**
 - 2018 – 25,000
 - 2020 – 27,000
 - 2025 – 33,000
 - 32% Increase
- **Workforce**
 - 8 Geriatricians...
- \$149M in Medicaid Costs
- \$22,739 per capita Medicare Spending
- \$749,000 in Unpaid Care

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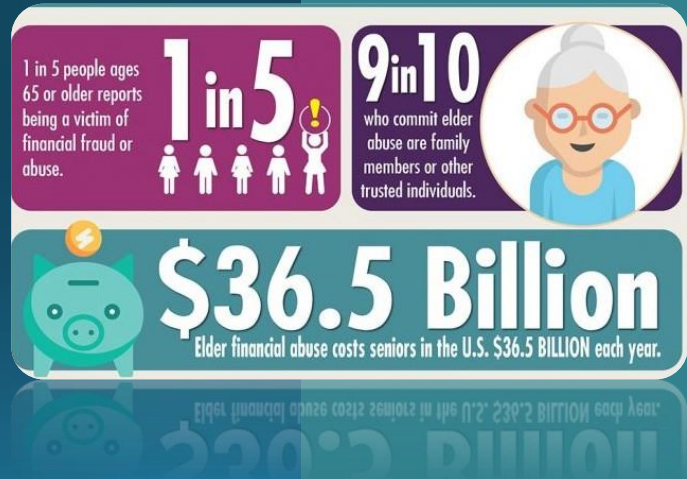
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Financial Elder Abuse Is Happening in Real Estate

Precise statistics on the amount of elder abuse that occurs are unavailable.

For every one (1) case of financial elder exploitation or abuse reported, it is estimated there are twenty-five (25) more cases that go unreported.

Recent estimates show 39.6% of Americans 65 years of age or older are victims of financial abuse.



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Real Estate & the Elderly

Issues to consider as in planning:

- The real property can be a tempting target for financial elder abuse.
- Increase in elderly clients.
- Possible issues with capacity during the transaction.
- Possible financial elder abuse considerations.
- How do real estate agents and title officers handle fiduciaries in these transactions?

Case Examples:

- Women with dementia desires to sell home and move to an assisted living.
- Daughter wants to sell home for mom's care and her "inheritance".
- Financial power of attorney selling home without dad's permission.

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Determining Capacity in Real Estate

What is Capacity?

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Determining Capacity in Real Estate

- What is capacity?
- What is the context?
 - Medical?
 - Legal?
 - Transactional?



- (1) specific legal transactions under statutory and case law;
- (2) standards of diminished capacity in state guardianship and conservatorship law; and
- (3) ethical guidelines for assessing capacity as set forth in the Idaho Rules of Professional Conduct

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Capacity Continued...

- Medical Capacity (IC 39-4503):

“Any person who comprehends the need for, the nature of and the significant risks ordinarily inherent in any contemplated hospital, medical, dental, surgical, or other health care, treatment or procedure is competent to consent thereto on his or her own behalf.”

- Legal Capacity:

- (1) Testamentary Capacity
- (2) Contractual Capacity and
- (3) Capacity to Convey Real Property

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Testamentary

- The nature and extent of his or her property;
- The natural objects of his or her bounty;
- The duties he or she would ordinarily owe to the natural objects of his or her bounty;
- The nature of his disposition that he or she wishes to make; and
- The purpose of creating a will.
 - *In re Heazle's Est.*, 74 Idaho 72, 257 P.2d 556 (1953).
- Testator had testamentary capacity to execute valid will at time of execution of will, where testator was described as “alert,” “perky,” not distracted, testator correctly answered questions about her family members, the value of her estate, and the current date, and testator was able to live independently at the time of execution of the will.
 - *In re Estate of Conway*, 2012, 277 P.3d 380, 152 Idaho 933.

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Contractual

- In contrast, contractual capacity requires a higher threshold than that of testamentary capacity.
- State law starts with the presumption of competency. However, the test of mental capacity to contract is whether a party possesses sufficient mind to understand in reasonable manner the nature, extent, character, and effect of the act or transaction in which he or she is engaged.
 - *Olsen v. Hawkins*, 90 Idaho 28, 408 P.2d 462 (1965)
- To invalidate a contract on ground of lack of mental capacity, it is not necessary to show that party was incompetent to transact any kind of business, but it is sufficient to show that he or she was mentally incompetent to deal with the particular contract in issue.
- His or her mental condition must be shown to have been diminished at time of making contract or deed that he or she lacked power of reason and was unable to comprehend nature and consequences of his or her act

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Real Property

- A grantor who has mental capacity sufficient to understand ordinary business transactions at the time of execution of the deed, and understands the motive and effect of his deed, knows what property he is conveying and to whom it is being conveyed, is competent to make such deed.
- *Dickey v. Clarke*, 65 Idaho 247, 142 P.2d 597 (1943)
- *Curtis v. Kirkpatrick*, 9 Idaho 629, 75 P. 760 (1904)

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Rule 1.14 of the Model Rules of Professional Conduct

- Ability to articulate reasoning behind the decision (the client should be able to state the basis for their decision and the stated reason should be consistent with the overall stated goals and objectives);
- Variability of state of mind (the extent to which the individual's cognitive function fluctuates)
- Appreciation of consequences (for example, does the client understand that giving away her property may cause tax consequences for her daughter and cause a Medicaid penalty period for her long-term care coverage)
- Substantive fairness of decision (while professionals normally defer to client decisions, before taking action a professional should consider if the action may or will injure others, and if so, further review the action before deciding to move forward);
- Consistency with lifetime values (decision normally should reflect the client's lifelong or long-term perspective); and
- Irreversibility of decision (important to protect individual from irreversible events and calls for caution on the part of the professional)

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Cognitive Capacity Indicators in Real Estate Transactions and Case Studies

Consistency

- Ability to Articulate Reasoning Behind the Decision
- Variability of State of Mind

Outcomes

- Appreciation of Consequences
- Substantive Fairness of Decision

Long-term Effects

Consistency with Lifetime Values
Irreversibility of Decision

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Red Flags for Real Estate Professionals

• *Observational*

1. Short-term memory problems
2. Language/Communication problems
3. Comprehension problems
4. Lack of mental flexibility
5. Calculation/Financial management problems
6. Disorientation/Delusions/Hallucinations
7. Emotional distress or susceptibility
8. Poor grooming/hygiene

• *Qualifying Factors*

1. Client's emotional state
2. Recent events affecting stability of client
3. Medical factors
4. Time of day variability
5. Hearing or vision loss
6. Educational/Cultural/Ethnic Barriers

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Red Flags for Real Estate Professionals

1. Client is uncommunicative and unresponsive
2. Client is unreasonably fearful or suspicious
3. Lack of interest in social contacts
4. Evasive or isolated
5. Unexplained or uncharacteristic changes in behavior
6. Life circumstances don't match what is known about the individual's financial assets
7. Large withdrawals from client's accounts

8. Accounts have been switched, changed or transferred without the direction of legal counsel or a financial advisor
9. Unusual ATM activity
10. Signatures on legal documents or checks don't match client's signature
11. Aggressive family members or caretaker
12. Sudden changes in client's estate planning documents
13. Financial transaction immediately benefits someone other than the client

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Real Estate Case Examples

- Jane recently lost her husband and is now considering selling her home. It has been an emotional time and she is starting to have health concerns due to a recent diagnosis of dementia. Her daughter thinks she should consider her health and look at other options, but her son who recently moved back in with her is telling her to stay and put his name on the property to avoid probate. She reaches out to their family friend who is a relator and seeks advice.

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