

WHITE PAPER

PROPOSED BILL TO ADD CIVIL INJUNCTIONS AGAINST EXPLOITATION OF VULNERABLE ADULTS UNDER CHAPTER 825

This White Paper relates to the proposed amendments to Chapter 825, Florida Statutes, which deals with crimes of abuse, neglect, and exploitation of elderly persons and disabled adults. The proposed Bill seeks to add a new category of injunctive relief: protection against financial exploitation of a vulnerable adult by amending Section 825.101 and creating a new Section 825.1035 that sets out in detail the requirements for a civil injunction to protect vulnerable adults who have been exploited or are in imminent danger of being exploited. The injunction provisions are modeled closely on those already in place for domestic violence injunctions in Sections 741.28 and 741.30, Florida Statutes.

I. SUMMARY

The purpose of the proposed amendments to Chapter 825 is to provide a process through which vulnerable adults – or persons on their behalf -- can get a temporary court order without the need for legal representation to place a freeze on assets, preventing an exploiter from draining accounts and disappearing.. In addition, these changes allow a Vulnerable Adult to proceed without going through an incapacity guardianship process. “Vulnerable adults,” already defined in Section 415.102, Florida Statutes, include persons with disabilities or cognitive deficits due to advanced age. These individuals are especially susceptible to being victimized through financial exploitation. Although there are statutory provisions that provide for civil and criminal remedies for exploitation, there is no process to quickly “stop the bleed” of assets being dissipated. In addition, most of the available remedies, like the use of emergency guardianship, require a determination of incapacity, and representation by an attorney. This Bill closely follows the framework already in place for injunctions to protect victims of domestic violence, which lends itself well to allow for temporary court intervention to “freeze” assets before a perpetrator can drain accounts and disappear.

II. CURRENT SITUATION

A 2015 report by True Link Financial estimated that older Americans lose \$36.5 billion each year due to financial exploitation and scams. Currently, Florida has strong legislation for the *pursuit* of civil and criminal action against persons who financially exploit the elderly and the disabled, once the victimization has occurred. None of these actions, however, is effective in *preventing* the rapid draining of assets of a vulnerable elderly or disabled individual by a person in a position of trust.

Criminal: Exploitation of an elderly person or disabled adult is a crime under Section 825.103. Law enforcement and prosecutors must investigate and file charges against an alleged perpetrator in order to obtain a warrant to seize the assets as evidence in a criminal matter. The delays incurred and due process requirements often tip the predator of the impending prosecution and lead to defendants often relocating assets or leaving town.

APS: Chapter 415 of the Florida Statutes sets out the legislative scheme for Adult Protective Services (“APS”). While APS investigators can uncover potential financial exploitation, their authority revolves primary around protection of the health and well-being of the victim. Generally, APS’s goal is safety, rather than financial security. APS has no subpoena powers and therefore lacks the ability to obtain evidence of alleged financial exploitation. When investigators encounter such a situation, they will typically make the referral to law enforcement or the State Attorney’s office for further investigation (and further delays.)

Civil Actions: Section 415.1111 provides for a civil action for exploitation of a “vulnerable adult,” defined Section 415.102(27) as:

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

This cause of action allows for actual and punitive damages and recovery of attorney’s fees to the prevailing party.

A second civil action is available under Section 772.11, as a civil remedy for theft or exploitation, as that term is defined in the criminal exploitation statute (Section 825.103(1)). This provision allows for treble damages and attorneys fees after making a demand letter to the person liable for damages. While this cause of action relies on a more expanded definition of exploitation than the one in Chapter 415, neither civil action offers an expedited procedure, without notice to the perpetrator, to protect assets. In addition, the filing of a civil action for damages can be daunting to anyone, let alone an elderly person suffering from diminished capacity or a friend who is concerned on their behalf.

Emergency guardianship: A procedure that is frequently used to try to stop the financial bleeding is an emergency temporary guardianship under Section 744.3031. There are several drawbacks to this process. First, the victim in need of protection must be shown to be incapacitated, a higher standard that just being “vulnerable,” and an invasive process in its own right. Second, the Florida Probate Code requires that the petitioner and the “alleged incapacitated person” must be represented by an attorney.

And finally, the statute provides for up to five days for an *ex parte* hearing to be held; even this short notice is often plenty of time to allow an exploiter to drain a joint account and disappear.

III. EFFECT OF PROPOSED CHANGES

All of the current statutes are evidence of Florida's strong public policy against the victimization of vulnerable adults by persons in positions of trust. The proposed changes to the existing framework for domestic violence injunctions add a piece of the puzzle that has been missing: a quick and inexpensive mechanism for the temporary *ex parte* freezing of assets to prevent exploiters from continuing to prey upon our most vulnerable citizens.

Proposed amendments to Section 825.101 (which sets out the definitions for Chapter 825) add definitions for "exploitation," which is defined the same as the current criminal exploitation statute in Section 825.103. "Vulnerable adult" is defined as in Section 415.102 (see above.)

Proposed new Section 825.1035 creates a cause of action for "an injunction for protection against exploitation of a vulnerable adult." Just as a victim of domestic violence must have reasonable cause to believe he or she has been victimized or is in imminent danger of being victimized, there must also be sufficient cause to believe that a vulnerable adult is in imminent danger of being exploited. (Proposed subsection (1)(h) clarifies that there is no requirement for actual conversion to have occurred for issuance of an injunction.)

The cause of action would be initiated by a sworn petition filed in circuit court by the vulnerable adult, that person's guardian, or by a person or organization acting on behalf of the person or guardian with appropriate consent. (1)(a) and (d). This Bill recognizes that many "vulnerable adults" may have guardians or need guardians, or even that a guardian may be the respondent. If the petitioner needs a guardian, petitions for both protection against exploitation and for temporary emergency guardianship may be filed simultaneously. (1)(d). If the petitioner already has a guardian, assets held by the guardian may only be frozen by the court overseeing the guardianship proceeding. (5)(v)3.a.

Representation by an attorney is not required. (1)(e). To prevent the potential for abuse, subsection (f) provides that "actual damages" may be assessed where a petition was "without substantial fact or legal support." (1)(f). In those limited circumstances, attorneys' fees and costs could be part of the damage award if the respondent was represented.

No filing fee is required, as many victims are left without any access to funds by their exploiters. (2)(a). One of the key benefits of the domestic violence injunction procedures is the system already in place for *pro se* victims and their protectors to receive assistance in filing from court clerks. This provision is also included for exploitation injunctions. Subsection (2)(c).

Proposed subsection (3)(b) sets out a form for a Petition for Injunction for Protection Against Exploitation of a Vulnerable Adult. This form includes information that would be relevant to this type of action, including description of the alleged undue influence, and/or exploitation. Previous reports to relevant government agencies should be included, if known, along with results. (3)(h). In addition, the clerk must send a copy of the filed Petition to Adult Protective Services, which is instructed to treat as a report of elder abuse, neglect or exploitation (triggering its own investigation), and to send the court copies of any APS investigations involving the Petitioner within 24 hours. (8)(c).

Proposed subsection (6)(b) adds a non-exclusive list of relevant factors for consideration of exploitation, including history of undue influence and previous exploitation, capacity of the vulnerable adult to make financial decisions, susceptibility to undue influence, and criminal history or probable cause findings by Adult Protective Services against the respondent.

The most salient protection from asset depletion is the ability to seek temporary, emergency *ex parte* relief for immediate and present danger of exploitation, pending a full hearing. Proposed section (5)(a) would expand the court's authority on temporary injunctions to allow for the orders specific to exploitation:

- Freezing any assets of the vulnerable adult in any depository or financial institution, whether titled individually, jointly, in guardianship, in a Totten trust, in trust governed by Chapter 736, Florida Statutes, in a trust of any kind, or in respondent's name only. Special provisions take into account the unique nature of assets held by a guardian, which may only be frozen by the guardianship court, and assets held in trust, which may only be frozen with proper notice to the trustee. (5)(v)3.a. and b.
- Restraining the respondent from committing any acts of exploitation or undue influence against the vulnerable adult.
- Prohibiting the respondent from having any direct or indirect contact with the vulnerable adult.
- Providing any other relief the court determines to be necessary for the vulnerable adult's protection, and any injunctions or directives to law enforcement agencies.

Note that at this point, assets that are under dispute would be “frozen,” so that access to a joint account, for instance, would be prohibited. If there are bills to be paid or other access for the vulnerable adult’s protection, the court would have the discretion to so order under the temporary injunction.

Under proposed amendments to subsection (8)(a)3., law enforcement would serve any injunction freezing assets on the financial institution where the assets were held, or the Court has discretion to waive that service if, for instance, the financial institution was otherwise notified, participating or present during any proceeding.

A temporary injunction remains in effect for 15 days. Subsection (5)(c). During this time, the petitioner could seek help to address the problem, including less restrictive alternatives to guardianship such as an appropriate durable power of attorney. A temporary injunction would also allow for filing for emergency guardianship if needed, civil action, or criminal complaint without fear that remaining assets will be accessed.

At the end of the temporary injunction, if granted, a hearing would be required, with service of notice on the respondent, to allow for a permanent injunction. Subsection (5)(c). Proposed subsection (6)(a) would give the court authority for continued restraint of respondent from exploitation of the vulnerable adult and/or to direct the assets under temporary freeze to be returned to the vulnerable adult or remain frozen until ownership can be determined.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

As a result of the proposal, vulnerable adults and their protectors could effectively stop the depletion of assets by exploiters. In addition, it is anticipated that the availability of such a remedy could also act as a deterrent of potential exploitation. Either way, there would be fewer vulnerable adults ending up as wards of the state thereby potentially decreasing the state’s obligations. It is, however, anticipated that Florida courts will see a rise in litigation due to the creation of this new cause of action. Even so, the more informal, *pro se* friendly, nature of these actions make them less costly and time consuming than the alternatives of criminal prosecution, guardianship, or even APS involvement, which could decrease with effective use of injunctive relief.

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

VII. OTHER INTERESTED PARTIES

Banking institutions, money service businesses, trust departments, fiduciaries, and attorneys could be interested in this matter as it will affect their contractual arrangements. However, the “freeze” of assets under this cause of action would be of limited duration.