SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2090

SPONSOR: Senators Villalobos and Smith

SUBJECT: Trust Funds

DATE: March 25, 2004 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Lang	JU	Fav/1 amendment
2.	Parham	Wilson	HC	Fav/1 amendment
3.			BI	
4.			ACJ	
5.			AP	
6.				

I. Summary:

This bill creates the Elder Victims Trust Fund within the Department of Elderly Affairs (DOEA). Funds will be used to investigate and prosecute financial exploitation against elderly persons. Funds will also be used to finance education initiatives directed toward elderly persons, law enforcement, the judicial system, social service professionals, and the public, on the financial exploitation of elderly persons. The trust fund will be terminated on July 1, 2008, and must be reviewed before that date.

The bill creates s. 410.706, Florida Statutes.

II. Present Situation:

Creation and Operation of Trust Funds

A trust fund consists of moneys received by the state which, under law or under trust agreement, are segregated for a purpose authorized by law.[1] Section 19(f), Article III of the State Constitution governs the creation of trust funds. This constitutional provision prohibits the creation by law of a trust fund of the state or other public body without a three-fifths vote of the membership of each house of the Legislature.[2] This provision further specifies that a trust fund must be created in a separate bill for that purpose only. The Florida Supreme Court has interpreted this provision to encompass the inclusion of issues relating to the trust fund's purpose, administration and funding, as well as language addressing its regulation and solvency [*Americans Bankers Insurance Company v. Chiles,* 675 So.2d 922 (Fla. 1996)]. The First District Court of Appeal construed the three-fifths vote as requiring heightened scrutiny of the bill by the

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[1] s. 215.32(2)(b)1., F.S.
[2] s. 19(f)(1), Art. III of the State Constitution.

Legislature [*Service Insurance Company v. Chiles,* 660 So.2d 734 (Fla. 1st DCA 1995)]. In addition, the Legislature has established criteria governing the establishment of trust funds. Under these criteria, a law creating a trust fund must, at a minimum, specify:

- The name of the trust fund;
- The agency or branch of state government responsible for administering the trust fund;
- The requirements or purposes that the trust fund is established to meet; and
- The sources of moneys to be credited to the trust fund or specific sources of receipts to be deposited in the trust fund.[3]

The Chief Financial Officer is directed to invest all of the trust funds and all of the agency funds of each state agency.[4] Under current law, any balance of an appropriation for any given fiscal year that remains after lawful expenditures have been charged against it reverts to the fund from which the Legislature appropriated it and shall be available for re-appropriation.[5] Any reversion of appropriations provided from the General Revenue Fund must be transferred to the General Revenue Fund within 15 days after the reversion, unless otherwise provided by federal or state law, including the General Appropriations Act.[6]

Termination of Trust Funds

Section 19(f)(2), Article III of the State Constitution, specifies that trust funds created after November 4, 1992, with certain exceptions, shall terminate not more than 4 years after the effective date of the act authorizing the creation of the trust fund, unless the Legislature by law sets a shorter time period. Accordingly, a bill that creates a trust fund should specify the trust fund's date of termination, or, if the trust fund is exempt from the automatic 4-year termination requirement, the bill should declare that the trust fund is exempt from this requirement.[7]

The Legislature established a schedule and process for reviewing trust funds.[8] Before the regular session of the Legislature and immediately prior to the scheduled termination date of an executive branch trust fund (or an earlier date if specified by the Legislature), the agency responsible for administration of the trust fund and the Governor must recommend to the Legislature whether the trust fund should terminate or be re-created.[9] Each recommendation is based on a review of the trust fund's purpose, use, and necessity. A recommendation to re-create the trust fund may include suggested modifications to the purpose, sources of receipts, and allowable expenditures for the trust fund.

If the trust fund is terminated and not immediately re-created, all cash balances and income of the trust fund are deposited into the General Revenue Fund.[10] The agency must pay any outstanding debts of the trust fund as soon as practicable, and the Chief Financial Officer closes

[3] s. 215.3207, F.S.
[4] s. 17.61, F.S.
[5] s. 216.301(1)(b), F.S.
[6] s. 216.301(1)(c), F.S.
[7] See Florida Senate, *Manual for Drafting General Bills* 82 (Sept. 1999).
[8] s. 215.3206 and s. 15.3208, F.S.
[9] s. 215.3206(1), F.S.
[10] s. 215.3206(2), F.S.

out and removes the trust fund from the various state accounting systems, using generally accepted accounting practices concerning warrants outstanding, assets, and liabilities.

Elder Abuse, Neglect, and Exploitation

Federal definitions of elder abuse, neglect, and exploitation appeared for the first time in the 1987 Amendments to the Older Americans Act. These definitions were provided in the law only as guidelines for identifying problems and not for enforcement purposes. Currently, elder abuse is defined by state laws, and state definitions vary considerably from one jurisdiction to another in terms of what constitutes abuse, neglect, or exploitation of the elderly. Broadly defined, however, there are three basic categories of elder abuse: (1) domestic elder abuse; (2) institutional elder abuse; and (3) self-neglect or self-abuse.[11] In most cases, state statutes addressing elder abuse provide the definitions of these different categories of elder abuse, with varying degrees of specificity. Domestic and institutional elder abuse may be further categorized as follows:

- *Physical abuse* is defined as the use of physical force that may result in bodily injury, physical pain, or impairment.
- *Sexual abuse* is defined as non-consensual sexual contact of any kind with an elderly or disabled person or with any person incapable of giving consent.
- *Emotional or psychological abuse* is defined as the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes but is not limited to verbal assaults, insults, threats, intimidation, humiliation, and harassment.
- *Neglect* is defined as the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Neglect may also include failure of a person who has fiduciary responsibilities to provide care for an elder (e.g., pay for necessary home care services) or the failure on the part of an in-home service provider to provide necessary care.
- *Exploitation* is defined as misusing the resources of an elderly or disabled person for personal or monetary benefit. This includes taking Social Security or SSI (Supplemental Security Income) checks, abusing a joint checking account, and taking property and other resources.

The National Center on Elder Abuse (NCEA) is the major source of available statistics on elder abuse, neglect, and exploitation in the U.S. NCEA collects and analyzes national data on cases referred to and investigated by adult protective services, and serves as a resource to investigators worldwide. The 1998 National Elder Abuse Incidence Study[12] ranked, in order of frequency, the types of elder mistreatment:

- Neglect;
- Emotional/Psychological Abuse;
- Physical Abuse;
- Financial/Material Exploitation; and
- Abandonment.

[11] National Center on Elder Abuse. 2004. http://www.elderabusecenter.org/.
[12] National Center on Elder Abuse. September 1998. *National Elder Abuse Incidence Study: Final Report*. Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families and Administration on Aging.

Florida's Adult Protective Services Program

The Department of Children and Family Services (DCF), Adult Protective Services (APS) program, mandated by chapter 415, F.S., is a system of specialized social services directed toward protecting vulnerable adults who are unable to manage their own affairs, from further occurrences of abuse, neglect, or exploitation. Assessment of an individual's need for protective services is initiated in response to a reported allegation of abuse, neglect, or exploitation. The four components of APS are:

- The on-site investigation of all reports of alleged abuse, neglect, or exploitation;
- Determination of immediate risk to the vulnerable adult and the provision of necessary emergency services;
- Evaluation of the need for and provision of on-going protective supervision; and,
- Provision or arrangement of on-going protective services.

The central APS program office in Tallahassee is responsible for administrative and policy development functions such as planning, budgeting, quality assurance, and ensuring the integrity of program data. DCF also administers the Florida Abuse Hotline in Tallahassee to receive reports alleging abuse, neglect, or exploitation of any vulnerable adult. Program services are provided locally through the department's 15 service district offices. District staff conduct adult protective investigations and provide case management and referral services for adult abuse victims. Adult protective services include the functions listed below.

Adult protective investigations are conducted for all abuse reports. These investigations determine whether there is evidence that abuse, neglect, or exploitation occurred; whether there is an immediate and long-term risk to the victim; and whether the victim needs additional services to safeguard his or her well-being.

Case management is provided to clients who need additional services in order to be protected from further harm. Case management may be intensive, involving frequent contact with the victim and typically lasts for three to six months. Case management may involve removing victims from an unsafe environment and relocating them to a setting where their needs can be safely and suitably met, such as a nursing home or an assisted living facility.

Referral services are provided to some clients to help ensure that they are not victimized again in the future.

Section 415.102(7), F.S., defines "exploitation" to mean a person who:

- Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or
- Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or

possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

"Exploitation" may include, but is not limited to:

- Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;
- Unauthorized taking of personal assets;
- Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or
- Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

DCF collects statistical data on complaints of exploitation which are reported annually. The DCF database tracks complaints for "maltreatments of exploitation." However, the database does not currently collect information specific to financial exploitation. The total number of complaints received by DCF related to "maltreatments of exploitation" requiring investigation in fiscal year 2002-2003 was 9,230. The chart below reports the numbers by each exploitation category.

Type of Exploitation	Verified	Some Indication	No Indication
Obtains or uses by Deception/Intimidation	618	1142	4532
Endeavors to obtain or use by Deception/Intimidation	79	177	910
When Victim Lacks Capacity	218	284	1194

Source: DCF, March 26, 2004.

Department of Elderly Affairs

The Department of Elderly Affairs is Florida's state unit on aging, operating a number of state and federally funded programs for the elderly. DOEA has rule-making authority for adult day care, Alzheimer's disease training for nursing homes, assisted living facilities, adult family care homes, and hospice programs; and operates the Medicaid Aged/Disabled waiver, the Medicaid Assisted Living for the Elderly waiver and the Comprehensive Assessment and Review for Long-Term Care Services (CARES) nursing home preadmission screening program, under an inter-agency agreement with AHCA. DOEA operates the state-funded Home Care for the Elderly, Community Care for the Elderly, and Alzheimer's Disease Initiative programs. DOEA also administers on behalf of AHCA the Program of All Inclusive Care for the Elderly and the Nursing Home Diversion Program waiver. DOEA runs the Long-Term Care Ombudsman Program for nursing homes, assisted living facilities, and adult family care homes. DOEA also has oversight of the Statewide Public Guardianship Office and runs volunteer and caregiver support programs.

III. Effect of Proposed Changes:

Section 1. Creates the Elder Victims Trust Fund in DOEA. Funds credited to the trust fund will be used to investigate and prosecute financial exploitation against elderly persons, and for education initiatives targeting elderly persons, law enforcement, the judiciary, social service professionals and the general public.

The bill also requires that balances in the trust fund at the end of each fiscal year shall remain in the fund and be available for carrying out the purposes of the fund, precluding appropriations from the General Revenue Fund or other sources from reverting if the appropriations are not used during the fiscal year for which they were provided.

The bill provides that, pursuant to s. 19(f)(2) of Article III of the State Constitution, the Elder Victims Trust Fund will be terminated on July 1, 2008. Before it is terminated, it must be reviewed in accordance with s. 215.3206(1) and (2), F.S.

Section 2. Provides that it shall take effect July 1, 2004, if a companion substantive bill is adopted in the same session or subsequent special session and becomes law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

This bill creates the Elder Victims Trust Fund to be administered by DOEA. This bill appears to comply with s. 19(f), Article III of the State Constitution, relating to the creation and termination of trust funds. The bill will require a three-fifths vote of the membership of each house of the Legislature in order for the Trust Fund to be created.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill creates an Elder Victims Trust Fund within DOEA, but does not provide appropriations for the trust fund. However, SB 2092, the companion bill, specifies how the Trust Fund is to be funded. In a successful action brought by the Attorney General, the costs of the action, together with reasonable attorney's fees, are to be awarded to the Attorney General and deposited in the Elder Victims Trust Fund. Any punitive damages awarded under SB 2092 are to be divided equally between the claimant and the Elder Victims Trust Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill specifies that the trust fund will be created within the Department of Elderly Affairs. Funds will be used to investigate and prosecute financial exploitation against elderly persons. The Department of Legal Affairs under the Office of the Attorney General will be responsible for investigation and prosecution efforts. Also, in SB 2092, the companion bill, the Attorney General is required to investigate and file civil actions in cases of financial exploitation against an elderly person. Funding for the Elder Victims Trust Fund includes one-half of all punitive damages awarded and moneys received by the Attorney General for attorney's fees and costs of investigation or litigation under this authority. The Attorney General's Office may be the more appropriate placement for the Elder Victims Trust Fund.

The bill authorizes any balance in the Elder Victims Trust Fund at the end of the fiscal year to remain within the fund, rather than revert back to the General Revenue Fund. The bill cites s. 216.351, F.S., which provides that subsequent inconsistent laws shall supersede this chapter "only to the extent that they do so by express reference to this section" in support of this provision. This appears to be an exception to s. 216.301, F.S., which requires that all unexpended funds revert back at the end of the fiscal year to the fund from which they were appropriated, so that the Legislature retains control over the unspent balances and decides whether the need exists to re-appropriate the funds.

VIII. Amendments:

#1 by Judiciary:
Technical; inserts the bill number (SB 2092) of the linked bill.

#2 by Health, Aging, and Long-Term Care:
Places the Elder Victims Trust Fund in the Office of the Attorney General rather than in the Department of Elder Affairs and clarifies that funds from the Trust Fund may be used for the education initiatives that the Department of Elder Affairs must implement under the companion bill, SB 2092.