

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: CS/SB 588

INTRODUCER: Children, Families, and Elder Affairs Committee and Senator Richter

SUBJECT: Offenses Against Vulnerable Persons

DATE: March 28, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Crosier</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
2.	<u>Dugger</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
3.	_____	_____	<u>JU</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 588 provides additional protections for elderly persons and disabled adults that are vulnerable to instances of exploitation and increases the penalties for committing such acts. The bill amends the hearsay exception for statements of an elderly person or disabled adult in s. 90.803, F.S., to allow an out of court statement by an elderly person or disabled adult in certain circumstances to be admissible.

The bill also amends the definition of “exploitation of an elderly person or disabled adult” to delete the requirement that a person use deception or intimidation to obtain or use such vulnerable adult’s funds, assets, or property. The bill specifies that “unauthorized appropriation” occurs when an elderly person or disabled adult does not receive reasonably equivalent financial value in goods or services or when specified fiduciaries violate specified duties. The bill also creates additional instances that constitute “exploitation of an elderly person or disabled adult.”

The bill amends s. 825.103, F.S., to specify when an unlawful appropriation occurs; decreases the property threshold values for criminal exploitation of elderly persons or disabled adults; creates a presumption that certain inter vivos transfers are a result of exploitation; and requires the court in specified cases to return the vulnerable adult’s property before trial if, after conducting an evidentiary hearing, the court makes certain findings.

The bill also amends s. 817.568, F.S., to clarify that any person, including any person in the relationship of parent or legal guardian, that willfully and without authorization uses the personal

identification of an individual 60 years of age or older without first obtaining the consent of the individual commits a second degree felony.

The bill is not expected to have a fiscal impact and is effective October 1, 2014.

II. Present Situation:

Elderly and Disabled Populations

The 2010 Census recorded the greatest number and proportion of people aged 65 and over in the history of the United States – 40,300,000, or 13 percent of the total population.¹ In 2010, Florida had the highest proportion of people over the age of 65, making up 17 percent of the total state population.²

In 2011, there were 11,468,487 people aged 18 to 64 in Florida.³ Of that number of people, 1,131,661, or 9.9 percent, had at least one disability.⁴ The number of individuals aged 65 and older in Florida in 2011 totaled 3,296,861.⁵ Of that number of people, 1,136,372, or 34.5 percent, had at least one disability.⁶

Nationwide, life expectancies of individuals reaching the ages of 65 and 85 are increasing. Individuals who survive to the age of 65 can be expected to live another 19.2 years.⁷ As the population of elderly and disabled persons in Florida increases, so does the pool of potential victims of abuse.

Hearsay Exception for Vulnerable Adults

“Hearsay” is a statement,⁸ other than one made by the declarant⁹ while testifying at trial or a hearing offered in evidence to prove the truth of the matter asserted.¹⁰ Currently, hearsay statements are not admissible at trial unless a statutory exception applies.¹¹

Section 90.803(24), F.S., creates a hearsay exception specifically relating to vulnerable adults. The statute specifies that unless the source of information or the method or circumstances by

¹ Administration on Aging, National Center for Elder Abuse, *America's Growing Elderly Population*, available at <http://www.ncea.aoa.gov/Library/Data/index.aspx> (citing U.S. Department of Commerce, U.S. Census Bureau, *The older population; 2010*, Publication C2010BR-09 (last visited Feb. 11, 2014)).

² *Id.*

³ U.S. Department of Commerce, U.S. Census Bureau, American FactFinder, *Selected Social Characteristics in the U.S.-Florida-2011 American Community Survey 1 year estimates*, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP02&prodType=table (last visited Feb. 11, 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 24.

⁸ A “statement” is either an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion; *See* s. 90.801(1)(a), F.S.

⁹ The “declarant” is the person who made the statement; *See* s. 90.801(1)(b), F.S.

¹⁰ Section 90.801(1)(c), F.S.

¹¹ Section 90.802, F.S.

which the statement is reported indicates a lack of trustworthiness, an out of court statement made by a vulnerable adult describing any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act on the declarant vulnerable adult, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

- The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and
- The vulnerable adult either:
 - Testifies; *or*
 - Is unavailable as a witness, provided that there is corroborative evidence of the abuse or offense. Unavailability must include a finding by the court that the vulnerable adult's participation in the trial or proceeding would result in a substantial likelihood of severe emotional, mental, or physical harm, in addition to findings pursuant to s. 90.804(1), F.S.¹²

The party seeking to introduce a hearsay statement under the exception in s. 90.803, F.S., bears the burden of establishing that the declarant is unavailable as a witness at a pretrial hearing.¹³ In the time since the hearsay exception for vulnerable adults was enacted,¹⁴ the United States Supreme Court (Court) has held the admission of certain out of court statements violates the Confrontation Clause of the Sixth Amendment.^{15,16} In *Crawford*, the Court held that before an out of court statement that is testimonial in nature can be admissible in a criminal proceeding the Confrontation Clause requires the:

- Declarant to be unavailable; and
- Defendant to have had a prior opportunity to cross-examine such declarant.

The Court later held that the distinction of whether evidence is testimonial or nontestimonial in nature rests on the primary purpose of the statement.

Further, in *State v. Hosty*, the Florida Supreme Court has examined s. 90.803(24), F.S., in light of *Crawford* and held that the Confrontation Clause requires the declarant to be unavailable for testimonial hearsay statements to be admissible.¹⁷

The statute does not currently conform with this ruling since it states certain hearsay statements may be admitted even if the declarant testifies.

¹² Section 90.804(1), F.S.

¹³ See *Jones v. State*, 678 So.2d 309, 314 (Fla. 1996).

¹⁴ The hearsay exception in s. 90.803(24), F.S., was enacted by the Legislature in 1996. *Conner v. State*, 748 So.2d 950, 957 (Fla. 1999).

¹⁵ *Crawford v. Washington* 124 S.Ct. 1354 (2004).

¹⁶ The Sixth Amendment of the U.S. Constitution provides, in part: "In all criminal prosecutions...the accused shall enjoy the right to ...be confronted with the witnesses against him."

¹⁷ 944 So.2d 255 (Fla. 2006)

Financial Exploitation of Elderly Persons and Disabled Adults

According to the National Center on Elder Abuse, financial exploitation of the elderly includes “the illegal or improper use of an elder’s funds, property or assets.”¹⁸ For example, forging an older person’s signature, misusing or stealing an older person’s money or possessions, coercing or deceiving an older person into signing a document and improperly using a conservatorship, guardianship, or power of attorney are examples of financial exploitation.¹⁹ Disabled adults, who can be equally vulnerable to financial crimes, are often victims of similar offenses.

Financial exploitation of the elderly and disabled is reported less than other forms of abuse. It is believed that only 1 in 14 cases of financial exploitation against disabled adults are reported and that the yearly number of cases nationwide could exceed 850,000.²⁰ The “typical” victim of financial exploitation is between 70 and 89 years of age, Caucasian, female, frail, and cognitively impaired.²¹ It has been estimated that the financial loss to victims of these types of crimes is at least \$2.9 billion nationwide.²²

Florida Law – “Exploitation of an Elderly Person or Disabled Adult”

Section 825.101, F.S., defines the following terms:

- “Elderly person” means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction to the extent that the ability to provide adequately for his or her own care is impaired; and
- “Disabled adult” means a person 18 years or older who suffers from physical or mental incapacitation due to developmental disability, organic brain damages, or mental illness, or has at least one physical or mental limitation that restricts his or her ability to perform normal activities of daily living.

Section 825.103(1), F.S., defines exploitation of an elderly person or disabled adult as:

- Knowingly, by deception²³ or intimidation,²⁴ obtaining or using, or endeavoring to obtain or use, a 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, or to benefit someone other than the vulnerable adult, by a person who:

¹⁸ The National Center on Elder Abuse, *Types of Abuse-Financial or Material Exploitation*, available at <http://www.ncea.aoa.gov/faq/index.aspx> (last visited Feb. 11, 2014).

¹⁹ *Id.*

²⁰ MetLife Mature Market Institute, the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University, *Broken Trust: Elders, Family, and Finances, A Study on Elder Financial Abuse Prevention*, (March 2009), page 8; see also The National Committee for the Prevention of Elder Abuse and the National Adult Protective Services Association, *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 years of Age and Older*, (February 2006), page 20. (on file with the Senate Committee on Children, Families, and Elder Affairs.)

²¹ *Id.*

²² Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, *Hastings Law Journal*, Vol.65, No. 4 at 125 (2014) this report is further cited as “*Preying on the Graying.*” (on file with the Senate Committee on Children, Families, and Elder Affairs.)

²³ Section 825.101(3), F.S.

²⁴ Section 825.101(8), F.S.

- Stands in a position of trust and confidence with the vulnerable adult; or
- Has a business relationship with the vulnerable adult;
- Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use a 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, or to benefit someone other than the vulnerable adult, by a person who knows or reasonable should know that the vulnerable adult lacks the capacity to consent;²⁵ or
- Breaching a fiduciary duty to a vulnerable adult by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.

If the funds, assets, or property involved in a violation of the offense is:

- Valued at \$100,000 or more, it is a first degree felony;²⁶
- Valued at \$20,000 or more but less than \$100,000, it is a second degree felony;²⁷ and
- Valued at less than \$20,000, it is a third degree felony.^{28,29,30}

On the other hand, s. 812.0145, F.S., provides lower property threshold amounts that trigger enhanced criminal penalties for committing theft against persons 65 years of age or older as follows:

- If the funds, assets, or property involved is valued at \$50,000 or more, it is a first degree felony;
- If the funds, assets, or property involved is valued at \$10,000 or more, but less than \$50,000, it is a second degree felony; and
- If the funds, assets, or property involved is valued at \$300 or more, but less than \$10,000, it is a third degree felony.³¹

Prosecutions of financial exploitation of elderly persons often face significant roadblocks due to the difficulty in proving that what may superficially look like voluntary gifts is in fact exploitation.³² Exploited elders frequently are unable, and sometimes unwilling, to effectively assist prosecutors.³³ Prosecutions are further complicated by the fact that the transactions often occur in secret and often times the elderly person may not be a good witness as a result of cognitive or other impairments.³⁴

²⁵ Section 825.101(9), F.S.

²⁶ Punishable by up to 30 years in prison and up to \$10,000 in fines. Sections 775.082, 775.083, or 775.084, F.S.

²⁷ Punishable by up to 15 years in prison and up to \$10,000 in fines. Sections 775.082, 775.083, or 775.084, F.S.

²⁸ Punishable by up to 5 years in prison and up to \$5,000 in fines. Sections 775.082, 775.083, or 775.084, F.S.

²⁹ Section 812.0145(2)(a), (b), and (c), F.S.

³⁰ These offenses are currently ranked in the Criminal Punishment Code offense severity ranking chart at Level 8, Level 7, and Level 6, respectively. The Code applies to sentencing for felony offenses committed on or after October 1, 1998.

Criminal offenses are ranked in the "offense severity ranking chart" from level one (least severe) to level ten (most severe) and are assigned points based on the severity of the offense as determined by the Legislature. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony. A defendant's sentence is calculated based, in part, on points assigned for the offense severity ranking. The points are added in order to determine the "lowest permissible sentence" for the offense. Section 921.0022, F.S.

³¹ Section 812.0145(2)(a), (b), and (c), F.S.

³² *Preying on the Graying*, at 125.

³³ *Id.*

³⁴ *Id.*

Permissive Presumption

A presumption in a legal proceeding is an assumption of the existence of a fact which is in reality unproved by direct evidence.³⁵ A presumption is derived from another fact or group of facts that has been proven in the action.³⁶ There are two types of presumptions: conclusive presumptions, which *require* the jury to find the presumed fact if the underlying facts are proved; and permissive presumptions, which *allow*, but do not require, the jury to find the presumed fact if it finds the underlying fact to be true.³⁷

Hundreds of presumptions exist in American jurisprudence.³⁸ There are several premises that support the creation of presumptions in the law, including fairness, the desire to advance substantive policies, and the need for some device to resolve certain issues that could not otherwise be resolved due to a lack of proof.³⁹ The strongest justification for most presumptions is the probabilistic determination that the existence of certain facts can be logically inferred from other facts.⁴⁰ Currently, s. 825.103, F.S., does not provide any presumptions.

Personal Identification Information

Section 817.568, F.S., contains a variety of provisions criminalizing the fraudulent use of a person's personal identification information. Personal identification information is defined as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual."⁴¹

Subsections (6) and (7) of the statute makes it a second degree felony for a person:

- To willfully and without authorization fraudulently use personal identification information concerning an individual who is less than 18 years of age without first obtaining the consent of that individual or of his or her legal guardian; or
- Who is in the relationship of parent or legal guardian, or who otherwise exercises custodial authority over an individual who is less than 18 years of age, to willfully and fraudulently use personal identification information of that individual.

III. Effect of Proposed Changes:

Section 1 amends s. 90.803(24), F.S., by deleting the language that allows a testimonial hearsay statement to be admissible even if the declarant testifies, thus conforming this exception to the holding in *Crawford* and *Hosty*.

Section 2 amends s. 817.568(6) and (7), F.S., to make it a second degree felony for any person, including a parent or legal guardian, or anyone else who otherwise exercises custodial authority

³⁵ *Ibarrondo v. State*, 1 So.3d 226, 232 (Fla. 5th DCA 2008)

³⁶ *Id.*

³⁷ *Marcolini v. State*, 673 So. 2d 3, 5 (Fla. 1996); *see also State v. Rygwelski*, 899 So.2d 498, 501 (Fla.2d DCA 2005) and *Ibarrondo*, at 232.

³⁸ *Preying on the Graying*, at 125.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Section 817.568, F.S.

over an individual 60 years of age or older, to willfully and without authorization fraudulently use that individual's personal identification information. (Currently this crime only applies when the victim is less than 18 years of age.)

Section 3 deletes the definition of "deception" in s. 825.101(3), F.S. The bill then amends s. 825.103(1)(a), F.S., by removing the requirement that a person use *deception or intimidation* to obtain or use a vulnerable adult's funds, assets, or property.⁴² This will allow prosecution against individuals who exploit elderly persons or disabled adults in a broader range of instances.

Section 4 amends the definition of "exploitation of an elderly person or disabled adult" in s. 825.103(1)(c), F.S., to specify that an "unauthorized appropriation" occurs when:

- An elderly person or disabled adult does not receive reciprocal financial value in goods or services; or
- Persons appointed under chapters 709, 736, and 744, F.S., violate specified duties.

This section creates additional instances that constitute "exploitation of an elderly person or disabled adult" by including the following:

- Misappropriation, misuse or unauthorized transfer of moneys from a personal or joint account in which the elderly person or disabled adult placed, owned and was the sole contributor or payee of the funds prior to the misappropriation, misuse or unauthorized transfer. (The new provision is only applicable to personal accounts, joint accounts created with the intent that only the elderly person or disabled adult enjoys all interests in the moneys deposited into the account, or convenience accounts created under s. 655.80, F.S.)
- Intentionally or negligently failing to effectively use an elderly person's or disabled adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver⁴³ or a person who stands in a position of trust and confidence with the elderly person or disabled adult.

The bill also lowers the property threshold amounts in s. 825.103, F.S., to be consistent with the ones in s. 812.0145, F.S., by providing that if the funds, assets, or property involved in a violation of the offense is:

- Valued at \$50,000 or more, it is a first degree felony;
- Valued at \$10,000 or more but less than \$50,000, it is a second degree felony; and
- Valued at less than \$10,000, it is a third degree felony.

In cases where the taking of or loss of the vulnerable adult's property is valued at more than \$5,000 and the property belonging to the victim is seized from the defendant pursuant to a search warrant, the bill requires the court to:

- Conduct an evidentiary hearing to determine if the defendant unlawfully obtained the victim's property; and
- Order that the property be returned to the victim before trial if the court finds, by a preponderance of the evidence, that the defendant unlawfully obtained the property.

⁴² The bill also deletes the definitions of the terms "misrepresentation" and "intimidation" as they are no longer applicable to chapter 825, F.S.

⁴³ Section 825.101(2), F.S. defines "caregiver."

The evidentiary hearing is for restitution purposes only, and the court's finding that the defendant unlawfully obtained the property is inadmissible at trial and does not give rise to any inference that the defendant has committed an offense under s. 825.103, F.S.

This section also creates a permissive presumption in s. 825.103, F.S., that an inter vivos transfer of money or property valued in excess of \$10,000 at the time of transfer, whether in a single transaction or multiple transactions, was the result of exploitation if it was made by a person 65 years or older to a nonrelative whom the transferor knew for less than 2 years before the first transfer and the transferor did not receive reciprocal value in goods or services.

The presumption applies regardless of whether the transfer or transfers are identified by the parties as a gift or loan. However, the presumption does not apply to a valid loan evidenced in writing that includes definite repayment dates, unless repayment of such loan is in default, in whole or in part, for more than 65 days. The bill provides exemptions from the presumption for:

- Persons who are in the business of making loans; or
- Bona fide charitable donations to nonprofit organizations that qualify for tax exempt status under the Internal Revenue code.

This bill also requires the court to instruct a jury that:

- They may, but are not required to, draw an inference of exploitation upon proof beyond a reasonable doubt of the facts listed in this subsection; and
- The presumption imposes no burden of proof on the defendant.

Section 5 amends s. 775.0844, F.S., to correctly identify the statutory definition of an elderly person to s. 825.101, F.S.

Section 6 amends s. 921.0022(3)(f), (g), and (h), F.S., the offense severity ranking chart of the Criminal Punishment Code, to reflect the new threshold dollar amounts for the exploitation of an elderly person or disabled adult (3rd degree felony – less than \$10,000, 2nd degree felony – greater than \$10,000 but less than \$50,000, and 1st degree felony - \$50,000 or more).

Section 7 reenacts s. 772.11(1), F.S., relating to a civil remedy for theft or exploitation to incorporate the amendment to s. 825.103, F.S.

Section 8 provides an effective date of October 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Due Process Clauses of the United States and Florida Constitutions require the State to prove every element of a criminal offense beyond a reasonable doubt.⁴⁴ Conclusive presumptions that shift the burden of persuasion of a statutorily defined element of the offense to the defendant are impermissible under the Due Process Clause.⁴⁵ Permissive presumptions can be constitutional, but only if they do not shift the burden of persuasion to the defendant.⁴⁶

When reviewing a permissive presumption, the United States Supreme Court requires the challenging party to demonstrate its invalidity as applied.⁴⁷ Since a permissive presumption allows the trier of fact to be free to accept or reject the inference and does not shift the burden of proof, the only instance that affects the application of the “beyond a reasonable doubt” standard is if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference.⁴⁸ This is the only situation where any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination.⁴⁹

For a permissive inference to withstand constitutional challenge, a rational connection must exist between the facts in the record and the ultimate fact to be presumed.⁵⁰ A permissive presumption will be upheld if it can be said with substantial assurance that the presumed fact is more likely to flow from the proved fact on which it is made to depend.⁵¹

The bill creates a permissive presumption of exploitation if the State proves the occurrence of an inter vivos transfer of \$10,000 by an elderly person to someone the elderly person knew less than two years, which did not result in receipt of reciprocal value in goods or services. To the extent that the bill relieves the State of its obligation to prove the elements of a specified instance of exploitation of an elderly person beyond a reasonable doubt, the presumption could be challenged as being unconstitutional.

⁴⁴ *Buttram v. State*, 780 S.2d 224 (Fla. 2d DCA 2001).

⁴⁵ *Francis v. Franklin*, 105 S.Ct. 1965, 1971 (1985); *Sandstrom v. Montana*, 99 S.Ct. 2450, 2459 (1979); *State v. Rolle*, 560 So.2d 1154, 1159 (Fla. 1990); and *Tatum v. State*, 857 So.2d 331 (Fla.2d DCA 2003).

⁴⁶ *County Court of Ulster County, N.Y. v. Allen*, 99 S.Ct. 2213 (1979).

⁴⁷ *U.S. v. Gainey*, 85 S.Ct. 754, 757 (1965)

⁴⁸ *County Court of Ulster County, N.Y. v. Allen*, 99 S.Ct. 2213 at 225 (1979).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *State v. Brake*, 796 So.2d 522 (Fla. 2001).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None

C. Government Sector Impact:

The Criminal Justice Impact Conference reviewed the bill on March 3, 2014 and determined that any impact on the prison population will be insignificant.

According to the Office of the State Court Administrator, any fiscal impact upon the court system is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 90.803, 772.11, 775.0844, 817.568, 825.101, 825.103, and 921.0022.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Children, Families, and Elder Affairs on February 18, 2014:

- The amendment revises s. 817.568, F.S., to clarify that any person, including any person in the relationship of parent or legal guardian, that willfully and without authorization uses the personal identification of an individual younger than 18 years of age or 60 years of age or older without first obtaining the consent of the individual commits a second degree felony.

B. Amendments:

None.