

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1041 Protection of Elderly Persons and Disabled Adults

SPONSOR(S): Judiciary Committee, Burton and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1344

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Pending

SUMMARY ANALYSIS

CS/HB 1041 passed the House on April 15, 2021, and subsequently passed the Senate on April 26, 2021.

Florida has the highest percentage of senior residents in the nation, projected to increase to 25 percent of the state population – 5.9 million seniors – by 2030. Elder populations are vulnerable to abuse and exploitation due to risk factors associated with aging, such as physical and mental infirmities and social isolation. In Florida, almost 1.3 million senior citizens live in medically underserved areas, and 1.4 million suffer from one or more disabilities. At the national level, according to the Department of Justice, approximately 1 in 10 seniors is abused each year, and incidents of elder abuse are reported to local authorities in 1 out of every 23 cases. Elder abuse can have significant physical and emotional effects on an older adult and can lead to premature death. Prevalent forms of abuse are financial exploitation, neglect, emotional or psychological abuse, and physical abuse; however, an elder abuse victim will often experience multiple forms of abuse at the same time.

The bill makes several changes and additions to laws protecting elderly and disabled persons. Specifically, the bill:

- Prohibits a person who commits one of the following offenses on an elderly person or disabled adult from inheriting from the victim's estate, trust, or other beneficiary assets:
 - Abuse;
 - Neglect;
 - Exploitation; or
 - Aggravated manslaughter.
- Authorizes the Office of Statewide Prosecution to investigate and prosecute crimes under chapter 825, F.S.
- Prohibits unreasonable isolation of an elderly person or disabled adult from his or her family members.
- Prohibits seeking out appointment as a guardian, trustee, or agent under power of attorney with the intent to obtain control over the victim or his or her assets for the perpetrator or a third party's benefit.
- Prohibits intentional conduct by a perpetrator to modify an elderly or disabled victim's estate plan to financially benefit either the perpetrator or a third party in a manner inconsistent with the intent of the elderly person or disabled adult.
- Authorizes agents under a durable power of attorney to petition for an injunction for protection against exploitation of a vulnerable adult.

The bill may have an indeterminate fiscal impact on state government and does not appear to have a fiscal impact on local governments.

Subject to the Governor's veto powers, the bill has an effective date of July 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

As the country's "baby-boom" population reaches retirement age and life expectancy increases, the nation's elder population is projected to increase from 49.2 million in 2016¹ to 77 million by 2034.² Florida has long been a destination state for senior citizens and has the highest percentage of senior residents in the entire nation.³ In 2018, Florida had an estimated 4.3 million people age 65 and older, approximately 20 percent of the state's population.⁴ By 2030, this number is projected to increase to 5.9 million, meaning the elderly will make up approximately one quarter of the state's population and will account for most of the state's growth.⁵

Elder populations are vulnerable to abuse and exploitation due to risk factors associated with aging, such as physical and mental infirmities and social isolation.⁶ In Florida, almost 1.3 million senior citizens live in medically underserved areas and 1.4 million suffer from one or more disabilities.⁷

According to the Department of Justice, approximately 1 in 10 seniors is abused each year in the United States, and incidents of elder abuse are reported to local authorities in 1 out of every 23 cases.⁸ Elder abuse can have significant physical and emotional effects on an older adult, and can lead to premature death.⁹ Abused seniors are twice as likely to be hospitalized and three times more likely to die than non-abused seniors.¹⁰

Elder abuse occurs in community settings, such as private homes, as well as in institutional settings like nursing homes and other long-term care facilities. Prevalent forms of abuse are financial exploitation, neglect, emotional or psychological abuse, and physical abuse; however, an elder abuse victim will often experience multiple forms of abuse at the same time.¹¹ The most common perpetrators of elder abuse are relatives, such as adult children or a spouse; friends and neighbors; and home care

¹ Press Release, U.S. Census Bureau, *The Nation's Older Population is Still Growing*, Census Bureau Reports (June 22, 2017), Release Number: CB17-100, <https://www.census.gov/newsroom/press-releases/2017/cb17-100.html> (last visited May 5, 2021).

² Press Release, U.S. Census Bureau, *Older People Projected to Outnumber Children for First Time in U.S. History* (revised Oct. 8, 2019), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> (last visited May 5, 2021).

³ *Where Do the Oldest Americans Live?*, Pew Research Center, July 9, 2015, <https://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/> (last visited May 5, 2021).

⁴ U.S. Census Bureau, *Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States*, <https://www.census.gov/newsroom/press-kits/2018/estimates-characteristics.html> (last visited May 5, 2021).

⁵ Florida Office of Economic & Demographic Research, *Population Data: 2016, 2020, 2025, 2030, 2035, 2040, & 2045, County by Age, Race, Sex, and Hispanic Origin*, pp. 89-90 and 269-70, http://edr.state.fl.us/Content/population-demographics/data/Medium_Projections_ARSH.pdf (last visited May 5, 2021); Florida Office of Economic & Demographic Research, *Econographic News: Economic and Demographic News for Decision Makers*, 2019, Vol. 1, <http://edr.state.fl.us/content/population-demographics/reports/econographicnews-2019v1.pdf> (last visited May 5, 2021).

⁶ National Center on Elder Abuse, *What are the Risk Factors?*, <https://ncea.acl.gov/About-Us/What-We-Do/Research/Statistics-and-Data.aspx#risk> (last visited May 5, 2021); U.S. Department of Justice, *Elder Justice Initiative, Older Adults, Families, and Caregivers*, <https://www.justice.gov/elderjustice/victims-families-caregivers> (last visited May 5, 2021). See also Xing Qi Dong et al., *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, JAMA Intern Med. 173:10 at 911-917 (2013).

⁷ Department of Elder Affairs, *2018 Profile of Older Floridians*, http://elderaffairs.state.fl.us/doea/pubs/stats/County_2018/Counties/Florida.pdf (last visited May 5, 2021).

⁸ U.S. Department of Justice, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited May 5, 2021). See also Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100:2 Am. J. Pub. Health, at 292-297 (Feb. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804623/> (last visited May 5, 2021).

⁹ U.S. Department of Justice, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited May 5, 2021). See also Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280:5 JAMA at 428-432 (1998), <https://jamanetwork.com/journals/jama/fullarticle/187817> (last visited May 5, 2021).

¹⁰ U.S. Department of Justice, *Elder Justice Initiative*, <https://www.justice.gov/elderjustice> (last visited May 5, 2021). See also Xing Qi Dong et al., *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, JAMA Intern Med. 173:10 at 911-917 (2013).

¹¹ National Center on Elder Abuse, *Challenges in Elder Abuse Research*, <https://ncea.acl.gov/About-Us/What-We-Do/Research/Statistics-and-Data.aspx#challenges> (last visited May 5, 2021).

aides.¹² Research indicates that elder abuse is underreported, often because the victims fear retribution or care for or trust their perpetrators.¹³ Elder abuse deaths are more likely to go undetected because an elder death is expected to occur, given age or infirmity, more so than other deaths due to abuse such as a child death or a death involving domestic violence.¹⁴ Some experts believe this may be one of the reasons elder abuse lags behind child abuse and domestic violence in research, awareness, and systemic change.¹⁵

Disinheritance Laws

Current law prevents a person who intentionally kills or participates in procuring the death of another person from receiving any assets from the victim's estate.¹⁶ Therefore, if a person murders another person, the murderer is not entitled to receive any property under the victim's will or through intestacy.¹⁷

As cases of elder abuse and exploitation have increased, states have enacted laws to protect the elderly population. There are currently eight states that have expanded their disinheritance laws to include perpetrators of elder abuse and exploitation to prevent them from profiting from their wrongdoing.¹⁸ The expansion of disinheritance law is effective because family members, who most commonly commit elder abuse and exploitation, are the ones to inherit under a state's intestacy laws and are often beneficiaries under the decedent's last will and testament. Some perpetrators are motivated to commit financial abuse to purposefully modify the victim's estate plan.¹⁹ Others purposefully engage in abuse to speed up the victim's death so they can inherit. When a disinheritance law is applied to a case of elder abuse, the perpetrator is penalized and a would-be abuser may be deterred from committing elder abuse.²⁰

Chapter 825, F.S.

Social Isolation

Under current law, a person is guilty of abuse of an elderly person or disabled adult if he or she commits:

- Intentional infliction of physical or psychological injury;
- An intentional act that could reasonably be expected to result in physical or psychological injury; or
- Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury.²¹

A caregiver is guilty of neglect of an elderly person or disabled adult if he or she:

- Fails to provide an elderly person or disabled adult with the care, supervision, and services necessary to maintain the elderly person's or disabled adult's physical and mental health, including:
 - Food,

¹² National Center on Elder Abuse, *Who are the Perpetrators?*, <https://ncea.acl.gov/About-Us/What-We-Do/Research/Statistics-and-Data.aspx#perpetrators> (last visited May 5, 2021).

¹³ Center for Disease Control and Prevention, *Understanding Elder Abuse, Fact Sheet 2016*, <https://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf> (last visited May 5, 2020).

¹⁴ U.S. Department of Justice, National Institute of Justice, *Elder Justice Roundtable Report: Medical Forensic Issues Concerning Abuse and Neglect*, October 18, 2000, p. 8, <https://www.ncjrs.gov/pdffiles1/nij/242221.pdf> (last visited May 5, 2021).

¹⁵ *Id.* at 7-10.

¹⁶ S. 732.802, F.S.

¹⁷ With a will, a testator may devise the estate to whomever he or she prefers. Without a will, however, a deceased person's estate is distributed pursuant to the intestacy statutes according to default rules.

¹⁸ Arizona, California, Illinois, Kentucky, Maryland, Michigan, Oregon, and Washington. Natasa Glisic, *Expanding the Slayer Rule in Florida: Why Elder Abuse Should Trigger Disinheritance*, 22 Barry L. Rev. 111 (2016), <https://lawpublications.barry.edu/cgi/viewcontent.cgi?article=1119&context=barrylrev> (last visited May 5, 2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ S. 825.102, F.S.

- Nutrition,
- Clothing,
- Shelter,
- Supervision,
- Medicine, and
- Medical services; or
- Fails to make a reasonable effort to protect an elderly person or disabled adult from abuse, neglect, or exploitation by another person.²²

Current law does not expressly prohibit intentional isolation of an elderly person. Elder isolation occurs most frequently with victims who either lack the mental capacity to fully appreciate or react to the isolation or with victims who are dependent on a perpetrator for their physical care and wellbeing.²³ The perpetrator, who is typically a family member or other person the victim trusts, utilizes social isolation to exert control and influence over the victim with the intent to conceal abuse, neglect, or exploitation.

Exploitation by a Fiduciary

A person who is in a position of trust and confidence with an elderly person, who has a business relationship with the elderly person, or who knows or reasonably should know that an elderly person lacks the capacity to consent, is guilty of exploitation of the elderly person or disabled adult if he or she obtains, uses, or conspires with another to obtain or use an elderly person's property with the intent to:

- Deprive the elderly person of the use, or
- Benefit someone other than the elderly person.²⁴

Moreover, current law prohibits:

- Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian, trustee who is an individual, or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.
- Misappropriating, misusing, or transferring without authorization money belonging to an elderly person from an elderly person's account.
- Intentionally or negligently failing to effectively use an elderly person's income and assets for the necessities required for that person's support and maintenance, by a caregiver or a person who stands in a position of trust and confidence.²⁵

Current elder law does not expressly prohibit exploitation by a fiduciary for the benefit of a third party or exploitation by intentionally modifying or altering an estate plan or trust.

Office of Statewide Prosecution

The Attorney General's Office of Statewide Prosecution (OSP) is authorized to prosecute certain criminal activities which occur in, or affect, two or more judicial circuits, such as:

- Bribery;
- Burglary;
- Criminal usury;
- Extortion;
- Gambling;
- Kidnapping;
- Larceny;

²² *Id.*

²³ Sandy Baksys, *Elder Isolation is Elder Abuse*, Illinois Task Force on Elder Abuse (Aug. 29, 2019), <https://lithspringfield.com/elder-isolation-is-elder-abuse/> (last visited May 5, 2021).

²⁴ For the purposes of this section, a fiduciary is a person in a position of trust and confidence, has a business relationship with the elderly person or disabled adult, or a person who knows or reasonably should know that the elderly person lacks the capacity to consent.

²⁵ S. 825.103, F.S.

- Murder;
- Prostitution;
- Perjury;
- Robbery and home-invasion robbery;
- Carjacking;
- Narcotics violations;
- Violations of the provisions of the Florida Racketeering Influenced and Corrupt Organization (RICO) Act, Florida Anti-Fencing Act, or the Florida Anti-Trust Act;
- Computer pornography; and
- Any crime involving, or resulting in, fraud or deceit upon any person.²⁶

The Office of Statewide Prosecution is authorized to act throughout Florida and works closely with law enforcement and state attorneys to coordinate the prosecutions of multi-circuit violations of State law.²⁷ In March 2019, the Attorney General's Office created the Senior Protection Team to protect vulnerable seniors from fraud, exploitation, and other crime and abuse.²⁸ Section 16.56, F.S., enumerates the specific criminal violations the OSP has authority to investigate and prosecute; however, chapter 825, F.S., offenses of abuse, neglect, and exploitation of elderly persons or disabled adults are not included within the list of criminal violations over which OSP has authority to investigate and prosecute.²⁹

Civil Injunctions against Exploitation of Vulnerable Adults

A durable power of attorney (DPOA) is an advanced directive document in which a person confers authority on an agent so that if the person later becomes incapacitated, the agent can exercise authority on the person's behalf.³⁰ An agent under a vulnerable adult's³¹ DPOA is selected by the vulnerable adult to act on the vulnerable adult's behalf and to avoid the need for guardianship. DPOAs are less restrictive and a less expensive alternative to guardianships.³²

In 2018, the Florida Legislature created a statutory cause of action for an injunction for protection against exploitation of a vulnerable adult.³³ The court may enter a temporary injunction based upon verified pleadings or affidavits pending a full hearing and may enter a permanent injunction after a hearing against a person who has exploited a vulnerable adult.³⁴

The following entities may file a petition for injunction on behalf of a vulnerable adult:

- A vulnerable adult in imminent danger of being exploited;
- The guardian of a vulnerable adult in imminent danger of being exploited;
- A person or organization acting on behalf of the vulnerable adult with the consent of the vulnerable adult or his or her guardian; or
- A person who simultaneously files a petition for determination of incapacity and appointment of an emergency temporary guardian with respect to the vulnerable adult.³⁵

²⁶ S. 16.56, F.S.

²⁷ *Id.*

²⁸ Office of the Attorney General, *Senior Protection Team*, <http://myfloridalegal.com/seniorprotection> (last visited May 5, 2021).

²⁹ S.16.56, F.S.

³⁰ The Florida Bar, *Florida Power of Attorney* (Aug. 2018), <https://www.floridabar.org/public/consumer/pamphlet13/> (last visited May 5, 2021).

³¹ A vulnerable adult is means 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. S. 825.101, F.S.

³² A guardianship is a legal process utilized when a person can no longer make or communicate safe or sound decisions about his/her person and/or property or has become susceptible to fraud or undue influence. National Guardianship Association, *What is Guardianship*, <https://www.guardianship.org/what-is-guardianship/> (last visited May 5, 2021).

³³ S. 825.1035, F.S.

³⁴ *Id.*

³⁵ *Id.*

Currently, an agent under a DPOA is not one of the enumerated persons who may file a petition for injunction. Therefore, an agent needs the consent of the vulnerable adult or must simultaneously bring an Incapacity and Emergency Temporary Guardianship action.

Effect of the Bill

The bill creates s. 732.8031, F.S., and amends s. 736.1104, F.S., to prohibit a person who commits any of the following offenses on an elderly or disabled person in any state or jurisdiction from serving as a personal representative or inheriting from the victim's estate, trust, or other beneficiary assets:

- Abuse;
- Neglect;
- Exploitation; or
- Aggravated manslaughter.

A final judgment of conviction for abuse, neglect, exploitation, or aggravated manslaughter of the decedent creates a rebuttable presumption that a convicted person may not inherit a beneficiary asset. In the absence of a qualifying conviction, the court may determine by the greater weight of the evidence whether the abuser's, neglector's, exploiter's, or killer's conduct as defined in ss. 825.102, 825.103, or 782.07(2), F.S., caused the victim's death, in which the person may not inherit. However, a convicted person may inherit from an estate, trust, or other beneficiary asset if it can be shown by clear and convincing evidence that the capacitated victim reinstated the person as a beneficiary.

The bill also:

- Clarifies who may be liable in the event a person is unable to inherit because of abuse, neglect, exploitation, or aggravated manslaughter.
- Requires property acquired as a result of abuse, neglect, exploitation, or manslaughter of an elderly person or disabled adult to be returned.
- Provides that an obligor making payment according to the terms of its policy or obligation is not liable for said payment unless more than 2 business days before payment, it receives written notice of a claim under the bill.
- Amends s. 16.56, F.S., to authorize the Office of Statewide Prosecution to investigate and prosecute crimes under chapter 825, F.S.
- Amends s. 825.101, F.S., to define the terms:
 - "Improper benefit" as any remuneration or payment, by or on behalf of any service provider or merchant of goods, to any person as an incentive or inducement to refer customers or patrons for past or future services or goods; and
 - "Kickback" as having the same meaning as in provided in s. 456.054(1), F.S.³⁶
- Amends s. 825.102, F.S., to prohibit unreasonable isolation of an elderly person or disabled adult from his or her family members.
- Amends s. 825.103, F.S., to:
 - Prohibit seeking out appointment as a guardian, trustee, or agent under power of attorney with the intent to obtain control over the victim's assets and person for the benefit of a perpetrator or a third party.
 - Prohibit intentional conduct by a perpetrator who modifies or alters the victim's originally intended estate plan to financially benefit either the perpetrator or a third party in a manner inconsistent with the intent of the elderly person or disabled adult.
 - Expand the meaning of exploitation of an elderly or disabled person to include breach of fiduciary duty resulting in a kickback or receipt of an improper benefit.

³⁶ A kickback is a remuneration or payment, by or on behalf of a provider of health care services or items, to any person as an incentive or inducement to refer patients for past or future services or items, when the payment is not tax deductible as an ordinary and necessary expense. S. 456.054(1), F.S.

The bill also amends s. 825.1035, F.S., to authorize an agent under a DPOA to petition for an injunction for protection against exploitation of a vulnerable adult, and to allow a court to make a one-time extension of the injunction. The bill amends the statutory form for a petition for an injunction for protection against exploitation of a vulnerable adult in s. 825.1035, F.S., to include sufficient identifying information about the petitioner or the vulnerable adult.

The bill has an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate fiscal impact on state government by expanding OSP's authority to investigate and prosecute qualifying cases under Chapter 825, and by potentially increasing judicial workloads resulting from additional civil actions and hearings for injunction.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.