

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: CS/CS/SB 374

SPONSOR: Committees on Judiciary, and Children and Families and Senators Carlton and Peadar

SUBJECT: Elderly Persons and Disabled Adults

DATE: April 24, 2001

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Barnes</u>	<u>Whiddon</u>	<u>CF</u>	<u>Favorable/CS</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

This bill provides for a number of provisions impacting the welfare of elderly persons and disabled persons as follows:

- Creates a new cause of action for an elderly person or disabled adult to recover property damages arising from exploitation as defined in s. 825.103, F.S. when there is clear and convincing evidence that he or she has been injured because of exploitation,
- Provides a procedure for the establishment of a statewide registry of professional guardians through the Statewide Public Guardianship Office (SPGO) and allows the SPGO to privatize that function through the Florida State Guardianship Association,
- Reduces the period from 10 to 5 years in which unclaimed funds held by a guardian escheat to the state and requires that these escheated funds be deposited in the Department of Elderly Affairs Trust Fund for distribution to the SPGO,
- Authorizes the SPGO and the public guardian offices to staff offices with specified professionals, and
- Provides for the creation of a not-for-profit fundraising organization for the SPGO.

This bill substantially amends the following sections of the Florida Statutes: 772.11, 744.534, 744.703 and 825.101. It also creates ss. 744.1083 and s. 744.7082.

II. Present Situation:

Financial Exploitation

According to experts in elder law, the financial exploitation of elderly citizens by persons in whom elders have placed trust and confidence to manage their funds, assets, and property is a serious growing problem, whether the perpetrator is a family member, a long-term business associate or an employed caretaker. In 1996, the National Center on Elder Abuse at the American

Public Human Services Association completed a 4-year study to determine the incidence of elder abuse and neglect in the United States. Of the 115,110 substantiated reports for which information was available, 70,942 cases (61.6%) were reports of incidents in which elders were maltreated by other people (perpetrators). Of the 70,942 cases, 21,427 (30%) cases were for financial or material exploitation. Female elders were more likely to be victims of financial/material exploitation (63%). Eighty-five percent of the perpetrators of financial/material exploitation were under age 60 years, and 41.1 percent were 40 years of age or younger.

▪ *Criminal Prosecution*

There are at least two statutory provisions available for criminal prosecution of exploitation of an elderly adult or disabled adult:

<i>Statute</i>	<i>Offense</i>	<i>3d Felony</i>	<i>2d Felony</i>	<i>1st Felony</i>
s.812.014 (general theft statute)	A person knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently deprive <i>the other person</i> of a right to the property or a benefit from the property or appropriates the property to his or her own use.	Property value -	Property value-	Property value
s.825.103 (financial exploitation as theft) ¹	A person knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, <i>an elderly person</i> or <i>disabled adult</i> funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property. The exploitation has to have been committed by: 1) a person who is in a position of trust and confidence or has a business relationship with the elderly person or disabled adult, <i>or</i> 2) a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent.	(\$300 <> \$20K)	(\$20K <= > \$100K)	≥\$100K

For purposes of s. 825.103, F.S., a person who is in a position of trust and confidence may be a parent or relative by blood or marriage, joint tenant or tenant in common, a person in a legal or fiduciary relationship such as a guardian or trustee, a caregiver, or any other person entrusted with responsibility for financial management of the elderly person’s or disabled adult’s property.

• *Civil Actions*

There are at least two statutory provisions available for civil causes of action and remedies based on exploitation of an elderly person or disabled adult. Section 772.11, F.S., provides a civil cause of action based on a violation of the underlying criminal theft provisions in ss. 812.012-812.037, F.S. The definition for theft is broader than the definition for exploitation and thus exploitation would be encompassed in the theft definition. Such victim would be able to recover treble damages and attorney’s fees and costs. The burden of proof is clear and convincing evidence. A

¹ According to the Florida Department of Law Enforcement, in the FY 1998-99, 511 persons were arrested for violation of s. 825.103, F.S. Of the 511 persons arrested, 95 persons (18.6%) were convicted as follows: 76 persons for 3d degree felony, 15 persons for 2d degree felony, and 4 persons for 1st degree felony.

presuit requisite is the filing of a demand for \$200 or up to treble damages. If the person against whom the demand is made complies within 30 days, a written release from further liability must be executed. No punitive damages are available. The defendant can also recover attorney's fees and costs from the trial and appellate courts if it is found that the claim was without legal support.

Section 415.1111, F.S., also permits a civil cause of action based on abuse, neglect or exploitation² of a vulnerable adult³ against any perpetrator. This provision was substantially revised in the 2000 Legislative Session. *See* ch. 2000-349, L.O.F.⁴ Although it appears that the revision removed the requirement that the cause of action be based on an underlying confirmed report of abuse, neglect, or exploitation by the Department of Children and Family Services under chapter 415, F.S., this section still refers to an action against a "perpetrator." Section 415.102(2) defines "alleged perpetrator" who has been named in a reported call as the person responsible for abusing, neglecting, or exploiting a vulnerable adult. The vulnerable adult may sue but the suit may also be brought by the vulnerable adult's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of the vulnerable adult or that person's guardian, or by the personal representative of the estate of a deceased vulnerable adult without regard to whether the cause of death resulted from the abuse, neglect, or exploitation.

Actual and punitive damages may be recovered. In addition, the prevailing party may be entitled to recover reasonable attorney's fees and costs of the action. The burden of proof under this section as established by case law is the greater weight of the evidence. The remedies available in s. 415.1111, F.S., are in addition to and cumulative with other legal and administrative remedies available to a disabled adult or an elderly person.

Guardianship

Under Chapter 744, F.S., a person who has been determined to be incapacitated (i.e. lacks capacity to manage property or meet essential health and safety requirements) through a judicial proceeding is appointed a guardian. A guardian is a person or entity who has been appointed by the court to act on behalf of a ward's person or property, or both. A professional guardian is a guardian who receives compensation for services rendered to two or more wards as their guardians, excluding relatives. Section 744.1085, F.S., provides for the regulation of professional guardians. Each professional guardian who files a petition for appointment as a guardian is required to post a blanket fiduciary bond and satisfy minimum training requirements.

Additionally, professional guardians are required to submit to credit and criminal investigation background screening including an investigatory check by the National Crime Information Center

²Exploitation is defined as an act taken by a person in a position of trust and confidence or a person who 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. s. 415.102(7), F.S.

³ The terms "elderly persons and disabled adult" were uniformly replaced in chapter 415, F.S., with the term "vulnerable adult" by the 2000 Legislature. *See* ch. 2000-349, L.O.F.

⁴ Provisions imposing civil monetary penalties for abuse, neglect, and exploitation were also removed.

and the Florida Crime Information Center systems by means of fingerprint checks by the Department of Law Enforcement and the Federal Bureau of Investigation.⁵ *See* s. 744.3135, F.S..

The clerks of the circuit courts are designated as the officials authorized to obtain fingerprint cards from the Federal Bureau of Investigation and to make such cards available to all guardians. Guardians who are either requested or required to undergo a criminal background check must have their fingerprints taken and submit the appropriate processing fee to the Florida Department of Law Enforcement. However, only professional guardians are required to pay a \$5 fee to the clerk of the circuit court, in the judicial circuit in which they are applying to serve as a guardian, for the handling and processing of their files. The respective clerks of the circuit courts are designated as the recipients of fingerprint check results and are required to make the results available to their respective courts.

According to the Department of Elderly Affairs, elders, family members, and the general public, consistently inquire and complain about abuse, neglect and exploitation by professional guardians. Those complaints are referred to the respective judicial circuits in which the inquirer resides or the professional guardian is serving a ward. Currently, it is unknown how many professional guardians are operating in the state, there is no mechanism for addressing problems that may span a professional guardian's entire caseload, and there is no statewide oversight of professional guardians.

Statewide Public Guardianship Office (SPGO)

In 1999, the Legislature created the Statewide Public Guardianship Office (SPGO) within the executive branch to replace the various public guardianship programs in operation within the judicial branch. *See* Chapter 99-277, *Laws of Florida*. The SPGO's primary purpose is to assume the oversight of the delivery system of guardianship services to indigent persons adjudicated incapacitated but to expand that system to the entire state. The SPGO is placed within the Department of Elderly Affairs, for administrative support purposes only; it is not subject to the control, supervision, or direction of the department. An executive director serves as the administrator of the SPGO. The SPGO operates through branch offices with the state circuit court structure, and is authorized to perform a number of duties including regulatory oversight of the public guardianship programs in Florida.

Unclaimed Funds by Guardians

Under current law, unclaimed funds held by a guardian (for which no ward's estate can be found after diligent search) must be deposited in a court registry after the guardian deducts his or her final costs of administration. *See* s. 744.534, F.S. The clerk then either posts or publishes notice of the unclaimed funds. After 6 months, any remaining unclaimed funds are transferred to the State Treasurer who deposits them to the credit of public guardianship. All interests and income accrue to the unclaimed funds. At any time during the subsequent 10 years, the State Treasurer is required to pay claims from those unclaimed funds upon court order to those persons entitled to such funds. After 10 years, the unclaimed funds revert or escheat to the state for the benefit of public guardianship. However, the statute is silent at that point as to the formal

⁵ In 1999, this authority was expanded to include credit and criminal investigations of public guardians. The exemption from credit and criminal investigatory checks previously granted to spouses and children petitioning for guardianship of a relative was eliminated.

mechanism for requesting and distributing those funds for the benefit of the public guardianship. In practice, according to the Department of Banking and Finance, the State Treasurer has defaulted to provisions in s. 717.123, F.S., relating to the disposition of unclaimed funds. That provision allows the State Treasurer to retain \$3 million of all unclaimed funds and property from all sources to pay out claims, and to transfer and deposit all excess into the State School Fund.

III. Effect of Proposed Changes:

Section 1 amends s. 825.101, F.S., relating to definitions for purposes of criminal offenses for exploitation of elderly persons and disabled adults, to make grammatical changes to the definition for “position of trust and confidence.”

Section 2 amends s. 772.11, F.S., to create a civil cause of action expressly and solely on the basis of exploitation of a disabled adult or elderly person as defined in the criminal statute s. 825.103(1), F.S. Therefore, a disabled person or an elderly person who proves by clear and convincing evidence that he or she has been injured in any way because of exploitation as defined therein, is entitled to minimum damages of \$200 or up to a maximum of treble damages. The person may also recover reasonable attorney’s fees and court costs in the trial and appellate courts. As with other underlying theft violations under this section, a presuit demand for satisfaction of the claim must be made first.

Subsections (2) and (3) deal with the limitation of the term “property” as the underlying basis for a civil cause of action based on violation of the theft or exploitation statutes. It specifically excludes a patient’s or resident’s right or claim for violation of such right. In addition, subsection (3) expressly states that section 772.11, F.S., does not give rise to civil liability as may relate to the provision of health care, residential care, long-term care, or custodial care at licensed facilities or care provided by appropriately licensed personnel in any setting in which the personnel are authorized to practice.

Subsection (4) is created to provide that a civil cause of action under s. 772.11, F.S., survives the death of an elderly person or disabled adult whether the claim arises out of the theft provisions in chapter 812, F.S., or a case of exploitation under s. 825.103, F.S. These provisions are somewhat duplicative in that current law already provides that a cause of action survives the death of a party. *See* s. 46.021, F.S.

Under subsection (6), an elderly person or disabled adult may petition the court to expedite the matter on the docket which the court may do after it considers the person’s age and health. This provision is similar to an existing provision under s. 415.1115, F.S., which allows an elderly person over the age of 65 to petition for speedy trial in a civil cause of action under s. 415.1111, F.S., and an existing provision under s. 825.106, F.S., which allows the state to petition for speedy trial in a criminal prosecution involving any elderly person or disabled adult.

Section 3 creates s. 744.1083, F.S. to provide for the establishment of a statewide registry of professional guardians with the Statewide Public Guardianship Office (SPGO). The SPGO may contract with the Florida State Guardianship Association, Inc. to administer the registry. A

certificate of registration is issued as evidence of registration. It provides a phase-in registration period until January 1, 2002. The SPGO is authorized to establish by rule the applicable registration fee which may not exceed \$25. The SPGO is also given broad authority to adopt other rules to implement this new section. A professional guardian who is:

- A natural person is required to provide his or her name, address, date of birth and employer identification;
- A partnership or association is required to provide the name, address, date of birth of every member, and the employer identification number of the partnership or association;
- A corporation is required to provide the name, address and employer identification number of the corporation, the name, address and date of birth of each of its directors and officers; the name of its resident agent; and the name, address, and date of birth of each person having at least a 10-percent interest in the corporation.

Each registration of a professional guardian must also include: 1) the name, address, date of birth, and employer identification number, if applicable of each person employed or under contract with the professional guardian who is involved in providing financial or personal guardianship services for wards, and 2) documentation that the statutory bonding, educational and background screening requirements have been satisfied.

Section 4 amends s. 744.534, F.S., to shorten the holding period of unclaimed funds held by a guardian and deposited with the State Treasurer from 10 years to 5 years. It specifies that after five years, these unclaimed funds escheat to the state and is to be deposited into the Department of Elderly Affairs Trust Fund. It also designates the SPGO as the recipient of such escheated funds for the benefit of public guardianship.

Section 5 amends s. 744.703, F.S., to allow more than one office of the public guardian to be established in a county or judicial circuit. It also clarifies existing law that the public guardian of an office of public guardian must maintain or contract for professional staff. A nonprofit corporate guardian must receive tax-exempt status from the Internal Revenue Service to be a public guardian.

Section 6 creates s. 744.7082, F.S., to provide that the Statewide Public Guardianship Office may affiliate with a non-profit direct-support organization for the direct or indirect benefit of the Statewide Public Guardianship Office or individual offices of public guardians. It also defines a “direct-support organization” and provides the authorization and the procedure for the direct-support organization to be audited by an independent certified public accountant.

Section 7 provides an effective date of the bill upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

The bill requires professional guardians to pay a registration fee to be set by the Statewide Public Guardianship Office that is sufficient to cover the administrative costs of registration.

B. Private Sector Impact:

To the extent this bill provides another cause of action, victims of exploitation or surviving family members of victims have another avenue to pursue to recover for damages arising from exploitation and for recovery of attorney's fees.

Persons or entities who wish to qualify as professional guardians will incur the attendant costs associated with the new registration and annual registration requirements. This bill will have a fiscal impact resulting from the registration process. Since it is not known at this time how many professional guardians there are and how many will apply for registration, it is not possible to calculate the cost of such regulation at this time.

C. Government Sector Impact:

The Office of the State Courts Administrator reported that the provisions relating to the civil cause of action for civil theft and exploitation will increase the workload in the judicial system. According to the office, the average proceeding for a tort case (for automobile or for other negligence cases) requires 101 minutes of judicial time and the new cause of action may require a comparable amount of judicial time. The actual impact to the judicial system cannot be determined because the number of cases filed is not known. The fiscal impact of the provision relating to the expediting these types of cases is expected to be minimal.

VI. Technical Deficiencies:

None.

VII. Related Issues:

- This bill creates a cause of action for exploitation potentially already available under s. 415.1111, F.S., although there are a number of differences:

<i>Civil cause of action</i>	<i>s. 772.11, F.S., as amended by this bill</i>	<i>s. 415.1111, F.S.</i>
<i>Basis of action</i>	Violations of theft provisions in ss. 812.012-812.37, F.S. Violation of exploitation as defined in s. 825.103(1), F.S.	Abuse, neglect and exploitation as defined in chapter 415, F.S.
<i>Who may sue while victim is alive</i>	Elderly person or disabled adult or guardian (as may be authorized under chapter 744, F.S.)	Vulnerable adult; guardian; or person or organization acting on behalf of the vulnerable adult with the vulnerable adult's consent or consent of that adult's guardian
<i>Who may sue on behalf of the victim after the victim's death</i>	Personal representative or person entitled to succeed to the decedent's estate	Personal representative of the estate of the deceased victim regardless of whether or not the death is attributable to the abuse, neglect or exploitation
<i>Presuit requisites</i>	Demand for settlement of claim and if satisfied, written release of liability	None
<i>Damages</i>	\$200 < x > treble actual damages	Actual and punitive damages
<i>Attorney's Fees and Costs</i>	Recoverable	Recoverable
<i>Burden of proof</i>	Clear and convincing evidence	Greater weight of evidence
<i>Speedy Trial</i>	Elderly persons and disabled adults	Elderly persons over 65 years of age.

- Subsection (2) of s. 772.11, F.S., is added to define “property” as excluding “the rights of a patient or a resident or a claim for a violation of such rights. There is no further explanation as to what rights or type of facilities are being inferred by this statement. “Property” for purposes of criminal prosecutions for theft under chapter 812, F.S., and chapter 825, F.S., refer to real estate, and intangible and tangible property.
- Subsection (3) of s. 772.11, F.S., is added to state that no civil liability arises under this section relating to the provision of health care or other care provided by licensed personnel. Clarification is needed as to whether this is intended to prohibit any cause of action arising from staff thefts as may occur at these facilities, including theft of a patient’s or resident’s benefits as may arise from improper billing of Medicaid or other benefits.
- The bill refers to elderly persons and disabled adults which are defined under ch. 25, F.S., as follows:
 - ✓ “Elderly person”: 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 dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired,
 - ✓ “Disabled adult”: a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

Such terms were replaced uniformly throughout chapter 415, F.S., with the term “vulnerable adult” by the 2000 Legislature. *See* ch. 2000-349, L.O.F. Vulnerable adult is now defined 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, physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging. *See* s. 415.102(26), F.S.

- Under the bill, the SPGO may contract with the Florida State Guardianship Association, Inc. to administer the registration process of professional guardians. The Association is not defined in statute. According to the Association's website (www.floridaguardians.com), the Association is a non-profit organization founded in 1983, governed by a Board of Directors representing five geographical regions of the state. Its membership consists of 10 major areas of practitioners including professional guardians, geriatric and care-managers, court personnel, and family guardians. The Association has been registered with the Department of State since 1991.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
