

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 557 Vulnerable Adults
SPONSOR(S): Civil Justice Subcommittee; Harrison
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1536

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 4 N, As CS	Robinson	Bond
2) Children, Families & Seniors Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Adult Protective Services Act (APSA) provides for a civil cause of action against a person who neglects, abuses, or exploits a vulnerable adult. The action may be brought against the perpetrator by the vulnerable adult, the vulnerable adult's guardian, an organization acting on behalf of the vulnerable adult or the vulnerable adult's guardian, or the personal representative of the vulnerable adult's estate to recover actual and punitive damages.

This bill amends the APSA to provide that a "facility" which has an obligation to provide for the health, safety, and welfare of a vulnerable adult may also bring the civil action on behalf of the vulnerable adult under certain circumstances. The APSA defines a "facility" as any location providing day or residential care or treatment to the vulnerable adult, including any hospital, state institution, nursing home, assisted living facility, adult family-care home, adult day care center, residential facility licensed under ch. 393, F.S., adult day training center, or mental health treatment center.

The bill does not appear to have a fiscal impact on state or local government.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Florida is home to more than 3.6 million residents age 65 or older.¹ The state is first in the nation in the percentage of elderly residents, measuring 23% of the total population in 2010 and estimated to soar to 35% of the total state population in 2030.² 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.³ However, with increasing age comes the increased likelihood of developing disabilities from chronic conditions. In 2014, 33.7%, or approximately 1.2 million persons, in Florida's elderly population were reported to have a disability.⁴ An additional 1.2 million Floridians age 18-64 also reported a disability in 2014.⁵

Abuse, Neglect, and Exploitation of Vulnerable Adults

A large population of vulnerable adults greatly increases the pool of potential victims of abuse, neglect, or exploitation. The true incidence of abuse, neglect, or exploitation of the elderly or disabled adults is difficult to assess. According to the Centers for Disease Control and Prevention, between 1,000,000 and 2,000,000 persons aged 65 and older have been abused, neglected, or exploited. Over 90% of the time such acts are perpetrated by family members with substance abuse issues, a poor financial situation, extreme levels of stress, or an inadequate understanding of the needs of the vulnerable adult.⁶

Abuse, neglect, and exploitation of a vulnerable adult usually takes one of the following forms:⁷

- **Physical abuse**: The intentional use of physical force that results in acute or chronic illness, bodily injury, physical pain, functional impairment, distress, or death.
- **Sexual Abuse or Abusive Sexual Contact**: Forced and/or unwanted sexual interaction (touching and non-touching acts) of any kind with a vulnerable adult.
- **Emotional or Psychological Abuse**: Verbal or nonverbal behavior that results in the infliction of anguish, mental pain, fear, or distress.
- **Neglect**: Failure by a caregiver or other responsible person to protect a vulnerable adult from harm or the failure to meet needs for essential medical care, nutrition, hydration, hygiene, clothing, basic activities of daily living or shelter, which results in a serious risk of compromised health and/or safety.
- **Financial Abuse or Exploitation**: The illegal, unauthorized, or improper use of a vulnerable adult's resources by a caregiver or other person in a trusting relationship, for the benefit of someone other than the vulnerable adult.

Effect of Financial Exploitation of Vulnerable Adults in Facilities

¹Florida Department of Elder Affairs, *2015 Florida State Profile*, available at http://elderaffairs.state.fl.us/doea/pubs/stats/County_2015/Counties/Florida.pdf (last visited January 20, 2016).

² Florida Department of Elder Affairs, Summary of Programs and Services 2015, p. 9, available at <http://elderaffairs.state.fl.us/doea/sops.php> (last visited January 20, 2016)

³ *Id.* at page 24.

⁴ U.S. Department of Commerce, U.S. Census Bureau, American FactFinder, Selected Social Characteristics in the U.S.-Florida-2014 American Community Survey 1 year estimates, available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_S0201&prodType=table (last visited January 20, 2016).

⁵ *Id.*

⁶ Florida Department of Elder Affairs and the Florida Department of Children & Families, *The Power to Prevent Elder Abuse Is In Your Hands*, available at, <http://uwf.edu/media/university-of-west-florida/colleges/coh/departments/center-on-aging/Bryant---The-Power-to-Prevent-Elder-Abuse--Is-in-Your-Hands.pdf>. (last visited January 22, 2016).

⁷ Centers for Disease Control and Prevention, *Injury Prevention & Control: Division of Violence Prevention*, available at <http://www.cdc.gov/violenceprevention/elderabuse/definitions.html> (last visited January 20, 2016)

Vulnerable adults residing in nursing homes, assisted living facilities, and adult family care homes are particularly affected by financial exploitation due to the risk of discharge or eviction because of the inability to pay for necessary care and services.⁸ Under state and federal law, a nursing home may discharge or transfer a resident with 30 days written notice if the resident has failed, after reasonable and appropriate notice, to pay, or have paid under Medicare or Medicaid, for residence at the facility.⁹ Assisted living facilities and adult family care homes may relocate or terminate the residency of a vulnerable adult with 45 days' notice or 30 days' notice, respectively.¹⁰

Consequently, the responsibility of caring for exploited vulnerable adults at risk of discharge or eviction may fall on various state and federal programs. In 2010, a review of 80 elder financial exploitation cases in Utah found the state's Medicaid program would potentially have to pay about \$900,000 to cover the cost of care for vulnerable adults who had suffered substantial losses due to financial exploitation.¹¹

Adult Protective Services Act

In 1977, the Legislature enacted the "Adult Protective Services Act" (APSA), ch. 415, F.S., which provides statutory authority for the Department of Children and Families (DCF) to investigate reports of abuse, neglect, or exploitation of a vulnerable adult.

The APSA defines a "vulnerable adult" as a person 18 years of age or older whose ability to perform the normal activities of daily living, or whose ability 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.¹²

Under the APSA, abuse, neglect, or exploitation constitutes the following conduct

- **Abuse:**¹³ Any willful act or threatened act by a relative, caregiver,¹⁴ or household member which causes or is likely to cause significant impairment to a vulnerable adult's physical, mental, or emotional health.
- **Neglect:**¹⁵ The failure or omission on the part of the caregiver or vulnerable adult to provide the care, supervision, and services necessary to maintain the physical and mental health of the vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, which a prudent person would consider essential for the well-being of a vulnerable adult. "Neglect" also means the failure of a caregiver or vulnerable adult to make a reasonable effort to protect a vulnerable adult from abuse, neglect, or exploitation by others.
- **Exploitation:**¹⁶ 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 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 by a person who stands in a position of trust and confidence¹⁷ with a

⁸ Consumer Financial Protection Bureau, *We're helping long-term care facilities protect older Americans from financial exploitation*, available at, <http://www.consumerfinance.gov/blog/were-helping-long-term-care-facilities-protect-older-americans-from-financial-exploitation/> (last visited January 21, 2016).

⁹ s. 400.022(1)(p), F.S.; 42 U.S.C. § 1396r.

¹⁰ ss. 429.28(1)(k) and 429.85(1)(l), F.S.

¹¹ *Supra* at FN 8.

¹² s. 415.102(28), F.S.

¹³ s. 415.102(1), F.S.

¹⁴ "Caregiver" means a person who has been entrusted with or has assumed the responsibility for frequent and regular care of or services to a vulnerable adult on a temporary or permanent basis and who has a commitment, agreement, or understanding with that person or that person's guardian that a caregiver role exists. "Caregiver" includes, but is not limited to, relatives, household members, guardians, neighbors, and employees and volunteers of facilities. s. 415.102(5), F.S.

¹⁵ s. 415.102(16), F.S.

¹⁶ s. 415.102(8), F.S.

¹⁷ Must be done knowingly, by deception or intimidation. s. 415.102(8), F.S.

vulnerable adult or by a person who knows or should know that the vulnerable adult lacks the capacity to consent. Exploitation may include breaches of fiduciary relationships, 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.

Civil Remedies

In addition to DCF intervention and services, the APSA authorizes a vulnerable adult that has been abused, neglected, or exploited, to bring a civil action to recover actual and punitive damages against the perpetrator.¹⁸ An action under s. 415.1111, F.S. may be brought within 4 years¹⁹ of the injury in any court of competent jurisdiction by:

- The vulnerable adult,
- The vulnerable adult's guardian;
- A person or organization acting on behalf of the vulnerable adult or the vulnerable adult's guardian; or
- The personal representative of the estate of a deceased vulnerable adult.²⁰

The prevailing party in an action under s. 415.1111, F.S., may be entitled to recover attorney fees and costs.²¹ The action is considered an addition to and cumulative with other legal and administrative remedies available to the vulnerable adult.

EFFECT OF THE BILL

The bill amends s. 415.1111, F.S., to provide that a "facility" which has an obligation to provide for the health, safety, and welfare of the vulnerable adult may bring the civil action on the vulnerable adult's behalf if the facility:

- Reports the alleged exploitation to law enforcement; and
- Obtains the consent of the vulnerable adult, or if the vulnerable adult cannot give consent, provides notice to vulnerable adult's next of kin or legal representative and shows that the action is necessary for the immediate health, safety, or welfare of the vulnerable adult.

Ch. 415, F.S. defines a "facility" as any location providing day or residential care or treatment to the vulnerable adult, including any hospital, state institution, nursing home, assisted living facility, adult family-care home, adult day care center, residential facility licensed under ch. 393, F.S., adult day training center, or mental health treatment center.²²

The bill provides that recovery of damages for the facility may not exceed the value of the debt owed for services provided to the vulnerable adult plus any reasonable attorney fees or costs incurred in bringing the cause of action. Recovery in excess of such amount belongs to the vulnerable adult or the vulnerable adult's estate.

B. SECTION DIRECTORY:

Section 1 amends s. 415.1111, F.S., relating to civil actions.

Section 2 provides an effective date of July 1, 2016.

¹⁸ s. 415.1111, F.S.

¹⁹ s. 95.11(3)(f), F.S.

²⁰ s. 415.1111, F.S.

²¹ *Id.*

²² s. 415.02(9), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive impact on certain facilities that provide services to vulnerable adults by providing an additional collection method for outstanding debt.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not define the term "services." It is therefore unclear what constitutes "services" and if such items must have been contracted for by, or on behalf of, the vulnerable adult.

The bill requires the facility to report exploitation to law enforcement but does not limit the ability to bring the action only in cases of exploitation. It is unclear if the facility may also bring an action for abuse or neglect.

Under current law, creditor claims against deceased individuals are subject to payment through the administration of the decedent's estate under the Florida Probate Code. This bill appears to prioritize creditor claims of facilities by creating a collection method outside of the probate process. Accordingly, the facility does not have to "get in line" with other creditors to have its claim paid from estate assets.

As a result, civil litigation may be a more attractive option for facility creditors than the probate process to ensure payment of claims. Further, most creditor claims are barred if not presented within two years under the probate code. This bill would allow the facility to pursue collection of a debt for up to four years²³ by filing an action under s. 415.1111, F.S.

Section 415.1111, F.S., is cumulative to other remedies under law. However, *collateral estoppel*²⁴ may prevent a vulnerable adult from re-litigating issues of abuse, neglect, or exploitation under a different cause of action against the same defendant. This may have detrimental effects in cases where the facility did not prevail on a claim under s. 415.1111, F.S., or if the facility does not prosecute all causes of action available to the vulnerable adult in concert with a claim under s. 415.1111, F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 26, 2016, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Limits the class of facilities that may bring the action to facilities which have an obligation to provide for the health, safety, and welfare of the vulnerable adult.
- Establishes condition precedents to bringing the action including reporting the exploitation to law enforcement, obtaining the consent of the vulnerable adult, or, if consent cannot be given, notifying the vulnerable adult's next of kin or legal representative and showing the action is necessary for the immediate health, safety, or welfare of the vulnerable adult.
- Provides that amounts recovered in excess of the debt owed to the facility belong to the vulnerable adult or his or her estate.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

²³ s. 95.11, F.S.

²⁴ Collateral estoppel generally precludes relitigation of an issue in a subsequent but separate cause of action. *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003).