

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: SB 1344

INTRODUCER: Senator Burgess

SUBJECT: Protection of Elderly Persons and Disabled Adults

DATE: March 21, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Cox</u>	<u>CF</u>	Favorable
2.	<u>Siples</u>	<u>Jones</u>	<u>CJ</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1344 expands the jurisdiction of the Office of Statewide Prosecution (OSP) within the Florida Office of the Attorney General (OAG) to include specified authority over crimes against elderly persons and disabled adults as outlined in ch. 825, F.S.

The bill also provides additional methods of proving abuse and exploitation of an elderly person or disabled adult by criminalizing the intentional isolation of vulnerable adults from family members for a length of time which could reasonably lead to physical or psychological injury to the elderly person, or with the intent to effect, conceal, or disguise criminal activity involving the elderly person or disabled adult or their property.

The bill criminalizes the previously uncharged conduct of an exploiter who changes the terms of the will or trust of a vulnerable adult in order to benefit the exploiter or a co-conspirator. The bill forfeits inheritances under a will, through a trust, through joint tenancy or contractual arrangements for a person convicted of abuse, neglect, exploitation, or aggravated manslaughter. In the absence of a conviction, the bill effects disinheritance if a court finds, by the greater weight of the evidence, that an individual caused or contributed to the death of the decedent. The bill also expands who may file an injunction for protection for exploitation of a vulnerable adult and extends the time of a temporary injunction to up to 45 days.

The OAG anticipates that the bill will have a positive fiscal impact on state government by consolidating the investigation and prosecution of multi-circuit criminal activity related to crimes of elder abuse and exploitation, alleviating some of the burden on local law enforcement and prosecution. The Legislature Office of Economic and Demographic Research preliminarily estimates that the bill will have a “positive indeterminate” prison bed impact (an unquantifiable increase in prison beds). See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

Refer to Section III. Effect of Proposed Changes for discussion of the relevant portions of current law.

III. Effect of Proposed Changes:

Elder Population

As the country's "baby-boomer" 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 2019, individuals age 65 and older represented approximately 20.9 percent of Florida's total 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 it is estimated that individuals age 65 and older will account for approximately 47.9 percent of the state's population growth between 2010 and 2030.⁵

Vulnerable Adults and Elderly Residents

In 2016, 35.2 percent of individuals nationwide 65 years of age or older were reported to have a disability.⁶ Moreover, 19 percent of Florida elders surveyed in a 2016 study conducted by the Department of Elder Affairs (DOEA) indicated that they required assistance with activities of daily living, such as walking, bathing, and dressing.⁷

Elder populations are vulnerable to abuse and exploitation due to risk factors associated with aging, such as physical and mental infirmities and social isolation.⁸ In Florida, almost 1.3 million

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, available at <https://www.census.gov/newsroom/press-releases/2017/cb17-100.html> (last visited March 18, 2021).

² Press Release, U.S. Census Bureau, *Older People Projected to Outnumber Children for First Time in U.S. History* (revised October 8, 2019), available at <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> (last visited March 18, 2021).

³ Pew Research Center, *Where Do the Oldest Americans Live?*, July 9, 2015, available at <https://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/> (last visited March 18, 2021).

⁴ U.S. Census Bureau, *65 and Older Population Grows Rapidly as Baby Boomers Age*, June 25, 2020, available at <https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html> (last visited March 18, 2021).

⁵ The Office of Economic & Demographic Research (EDR), *Population Data: 2016, 2020, 2025, 2030, 2035, 2040, & 2045, County by Age, Race, Sex, and Hispanic Origin*, pp. 89-90 and 269-70, available at http://edr.state.fl.us/Content/population-demographics/data/Medium_Projections_ARSH.pdf; and the EDR, *Econographic News: Economic and Demographic News for Decision Makers, 2019, Vol. 1*, available at <http://edr.state.fl.us/content/population-demographics/reports/econographicnews-2019v1.pdf> (all sites last visited March 18, 2021).

⁶ University of New Hampshire Institute on Disability/UCED, *2017 Disability Statistics Annual Report*, p. 2, available at https://disabilitycompedium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf (last visited March 18, 2021).

⁷ Florida Department of Elder Affairs, *2016 Report Assessing the Needs of Elder Floridians*, p.1, available at http://elderaffairs.state.fl.us/doea/pubs/pubs/2016_Assessing_the_Needs_of_Elder_Floridians.pdf (last visited March 18, 2021).

⁸ National Center on Elder Abuse, *What are the Risk Factors?*, available at <https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx#risk>; and U.S. Department of Justice, *Elder Justice Initiative, Older Adults, Families,*

senior citizens live in medically underserved areas and 1.4 million suffer from one or more disabilities.⁹ According to the U.S. Department of Justice, approximately 1 in 10 seniors is abused each year in the United States, though incidents of elder abuse are reported to local authorities in 1 out of every 24 cases.¹⁰ Elder abuse can have significant physical and emotional effects on an older adult and can lead to premature death.¹¹ Abused seniors are twice as likely to be hospitalized and three times more likely to die than non-abused seniors.¹²

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.¹³ The most common perpetrators of elder abuse are relatives, such as adult children or a spouse, followed by friends and neighbors, and then home care aides.¹⁴ Research shows that elder abuse is underreported, often because the victims fear retribution or care for or trust their perpetrators.¹⁵ 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.¹⁶ Experts believe this may be one of the reasons elder abuse lags behind child abuse and domestic violence in research, awareness, and systemic change.¹⁷

Vulnerable adults residing in nursing homes, assisted living facilities, and adult family care homes are particularly vulnerable to financial exploitation due to the risk of discharge or eviction

and Caregivers, available at <https://www.justice.gov/elderjustice/victims-families-caregivers> (all sites last visited March 18, 2021).

⁹ The Department of Elder Affairs, *2018 Profile of Older Floridians*, p. 6, available at

http://elderaffairs.state.fl.us/does/pubs/stats/County_2018/Counties/Florida.pdf (last visited March 18, 2021).

¹⁰ U.S. Department of Justice, *Elder Justice Initiative*, available at <https://www.justice.gov/elderjustice>; and National Center on Elder Abuse, *What is Known about the Incidence and Prevalence of Elder Abuse in the Community Setting?*, available at <https://ncea.acl.gov/What-We-Do/Research/Statistics-and-Data.aspx#prevalence>; 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 (February 2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2804623/> (all sites last visited March 18, 2021).

¹¹ U.S. Department of Justice, *Elder Justice Initiative: About Elder Abuse*,

available at <https://www.justice.gov/elderjustice/about-elder-abuse>; see also, Mark S. Lachs et al., *The Mortality of Elder Mistreatment*, 280:5 *JAMA* at 428-432 (1998), available at <https://jamanetwork.com/journals/jama/fullarticle/187817> (all sites last visited March 18, 2021).

¹² XinQi Dong, et al., *Elder Abuse as a Risk Factor for Hospitalization in Older Persons*, 173(10), *JAMA Intern Med.* At 911-917 (2013), available at <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/1675876> (last visited March 18, 2021).

¹³ National Center on Elder Abuse, *Challenges in Elder Abuse Research*, available at <https://ncea.acl.gov/About-Us/What-We-Do/Research/Statistics-and-Data.aspx#challenges> (last visited March 18, 2021).

¹⁴ National Center on Elder Abuse, *Who are the Perpetrators?*, available at <https://ncea.acl.gov/About-Us/What-We-Do/Research/Statistics-and-Data.aspx#perpetrators> (last visited March 18, 2021).

¹⁵ Center for Disease Control and Prevention, *Understanding Elder Abuse, Fact Sheet 2016*, available at <https://www.cdc.gov/violenceprevention/pdf/em-factsheet-a.pdf> (last visited March 18, 2021).

¹⁶ See U.S. Department of Justice, National Institute of Justice, *Elder Justice Roundtable Report: Medical Forensic Issues Concerning Abuse and Neglect*, October 18, 2000, pp. 8-9, available at <https://www.ncjrs.gov/pdffiles1/nij/242221.pdf> (last visited March 18, 2021).

¹⁷ *Id.* at pp. 7-10.

because of the inability to pay for necessary care and services.¹⁸ Under state and federal law, a nursing home may discharge or transfer a resident with 30 days written notice if the resident has failed to pay a bill for care, after reasonable and appropriate notice for residence at the facility.¹⁹ Assisted living facilities and adult family care homes can relocate or terminate the residency of a vulnerable adult with 45 days notice or 30 days notice, respectively.²⁰

Adult Protective Services Act

In 1977, the Legislature enacted the “Adult Protective Services Act” (APSA), ch. 415, F.S., authorizing the Department of Children and Families (DCF) to investigate reports of abuse, neglect, or exploitation of a vulnerable adult. An assessment of an individual’s need for protective services is initiated upon a report of alleged abuse, neglect, or exploitation.²¹

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, developmental disability or dysfunction, brain damage, or the infirmities of aging.²² Under the APSA, abuse, neglect, or exploitation constitutes the following conduct:

- **Abuse:** Any willful act or threatened act by a relative, caregiver,²³ or household member which causes or is likely to cause significant impairment to a vulnerable adult’s physical, mental, or emotional health.²⁴
- **Neglect:** 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.²⁵
- **Exploitation:** Knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult’s funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult by a person who stands in a position of trust and confidence with a vulnerable adult or by a person who knows or should know that the vulnerable adult lacks the capacity to consent. Exploitation may include

¹⁸ The Consumer Financial Protection Bureau, *We’re helping long-term care facilities protect older Americans from financial exploitation*, June 19, 2014, available at <http://www.consumerfinance.gov/blog/were-helping-long-term-care-facilities-protect-older-americans-from-financial-exploitation/> (last visited March 18, 2021).

¹⁹ Section 400.022(1)(p), F.S.; 42 U.S.C. s. 1396r.

²⁰ Sections 429.28(1)(k) and 429.85(1)(l), F.S.

²¹ Section 415.104, F.S.

²² Section 415.102(28), F.S.

²³ Section 415.102(5), F.S. defines “caregiver” to mean “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.

²⁴ Section 415.102(1), F.S.

²⁵ Section 415.102(16), F.S.

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.²⁶

Criminal Penalties Under ch. 825, F.S.

Current law provides criminal penalties for the abuse, neglect, and exploitation of elderly and disabled adults.²⁷ Under s. 825.103, F.S., a person is guilty of the "exploitation of an elderly person or disabled adult" when he or she:

- Stands in a position of trust and confidence, or has a business relationship, with an elderly person or a disabled adult and knowingly obtains or uses, or endeavors to obtain or use, the elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive that person of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult;²⁸
- Obtains or uses, endeavors to obtain or use, or conspires with another to obtain or use an elderly person's or disabled adult's 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, or to benefit someone other than the elderly person or disabled adult, and he or she knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent;²⁹
- Breaches a fiduciary duty to the elderly person or disabled adult while acting as the person's guardian, trustee, or agent under a power of attorney, and such breach results in an unauthorized appropriation, sale, or transfer of property;³⁰
- Misappropriates, misuses, or transfers without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer;³¹ or
- Intentionally or negligently fails 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 while acting as a caregiver or standing in a position of trust and confidence with the elderly person or disabled adult.³²

The term "lacks capacity to consent" means an impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause, causing an elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning their person or property.³³

²⁶ Section 415.102(8), F.S.

²⁷ Sections 825.101-825.106, F.S.

²⁸ Section 825.103(1)(a), F.S.

²⁹ Section 825.103(1)(b), F.S.

³⁰ Section 825.103(1)(c), F.S.

³¹ Section 825.103(1)(d), F.S.

³² Section 825.103(1)(e), F.S.

³³ Section 825.101(8), F.S.

An offender commits a first-degree felony³⁴ if the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$50,000 or more.³⁵ An offender commits a second-degree felony³⁶ if the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued between \$10,000 and \$50,000.³⁷ An offender commits a third-degree felony³⁸ if the funds, assets, or property involved in the exploitation of an elderly person or disabled adult is valued at less than \$10,000.³⁹

The court is required to hold an evidentiary hearing when a person is charged with financial exploitation of an elderly person or disabled adult involving the taking of or loss of property valued at more than \$5,000 and property belonging to a victim is seized from the defendant pursuant to a search warrant. The court then determines, by a preponderance of the evidence, whether the defendant unlawfully obtained the victim's property. The court may order it returned to the victim for restitution purposes before trial if the court finds that the property was unlawfully obtained.⁴⁰

Fiduciary Relationships, and Kickbacks, Improper Benefits

Current law does not address instances where the fiduciary is either employed by, or has some pecuniary relationship with, a third party involved in the care or provision of services to the elderly person or disabled adult.⁴¹ A relationship between the fiduciary and third-party provider may not always lead to an identifiable financial loss by an elderly person or disabled adult; however, this relationship creates a conflict of interest and breach of fiduciary duty.⁴²

Current law also does not specifically address cases where a perpetrator seeks a designation as a specified fiduciary with the intent to benefit someone other than the elderly person or disabled adult.⁴³ The absence of a specific prohibition on such conduct creates a potential gap for prosecution and enforcement when a perpetrator seeks out appointment as a guardian, trustee, or agent under power of attorney with the intention and design of obtaining control over the victim's assets and person for the benefit of the perpetrator or a third party.⁴⁴ Current law also criminalizes conduct which results in a taking or other specified harm while the elderly person or disabled adult victim is alive, but does not specifically prohibit conduct by a perpetrator who intentionally alters a victim's will, trust, or other testamentary devise.⁴⁵

³⁴ A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

³⁵ Section 825.103(3)(a), F.S.

³⁶ A second degree felony is punishable by up to 15 years imprisonment and up to a \$10,000 fine. Sections 775.082 and 775.083, F.S.

³⁷ Section 825.103(3)(b), F.S.

³⁸ A third degree felony is punishable by up to five years imprisonment and up to a \$5,000 fine. Sections 775.082, 775.083, and 775.084, F.S.

³⁹ Section 825.103(3)(c), F.S.

⁴⁰ Section 825.103(4), F.S.

⁴¹ The Florida Office of Attorney General (OAG), *White Paper Related to SB 1344*, at p. 2, March 4, 2021 (on file with the Senate Committee on Criminal Justice) (hereinafter cited as "The OAG White Paper").

⁴² The OAG White Paper at pp. 2-3.

⁴³ The OAG White Paper at p. 3.

⁴⁴ *Id.*

⁴⁵ *Id.*

Isolation

The Florida Office of Attorney General (OAG) states that in many instances of abuse, neglect, and exploitation, the perpetrator will first isolate the elderly person or disabled adult victim from family and friends who might otherwise intervene or object to the perpetrator's involvement on the victim's behalf.⁴⁶ Isolation is particularly problematic with victims who either lack the mental capacity to fully comprehend or react to the isolation, or with victims who depend upon the perpetrator for their physical care and wellbeing.⁴⁷ The perpetrator is often a family member or other individual trusted by the victim in such cases, and will use social isolation to achieve their efforts and exert a level of control and influence over the victim unrelated to, or disproportionately related to, effective caregiving, with the intent of concealing underlying criminal conduct, which may include, but is not limited to; abuse, neglect, or exploitation.⁴⁸

In cases beginning with intentional social isolation, the resulting injury or harm to the victim often could have been avoided with earlier intervention by law enforcement.⁴⁹ If ch. 825, F.S., specifically prohibited acts of unreasonable isolation of an elderly or disabled adult from family, irreversible harm to the victim may be avoided.⁵⁰

Effect of the Bill

Definitions

The bill amends s. 825.101, F.S., adding definitions for the terms, 'improper benefit' and 'kickback.' These terms will apply to ch. 825, F.S.

The bill defines "improper benefit" to mean "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." The bill defines "kickback" to have the same meaning as s. 456.054(1), F.S., which means "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."

Abuse of an Elderly Person or Disabled Adult

The bill amends s. 825.102, F.S., expanding the definition of "abuse of an elderly person or disabled adult" to include "intentionally, and without lawful authority, isolating or restricting access of an elderly person or a disabled adult to family members for any length of time which could reasonably be expected to result in physical or psychological injury to the elderly person or disabled adult, or with the intent to promote, facilitate, conceal, or disguise some form of criminal activity involving the person or property of the elderly person or disabled adult." The effect of this provision is that a person who commits abuse of an elderly person or disabled adult in the newly defined manner will be subject to the criminal penalties mentioned above.

⁴⁶ The OAG White Paper at p. 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

The bill adds that a reasonable cause to believe that a defendant's action was necessary to protect the elderly person or disabled adult from danger constitutes a valid defense to a potential abuse violation under s. 825.102, F.S.

Exploitation of an Elderly Person or Disabled Adult

The bill amends s. 825.103, F.S., adding to the current definition of "exploitation of an elderly person or disabled adult." Specifically, the bill provides that a breach of a fiduciary duty to an elderly person or disabled adult by their guardian, trustee, or agent under power of attorney that results in a "kickback" or "receipt of improper benefits" constitutes the offense of exploitation (in addition to prohibited breaches of fiduciary duty under current law, which include actions resulting in an unauthorized appropriation, sale, or transfer of property). Where the fiduciary owing a duty to an elderly person or disabled adult is also an agent of such a person appointed under ch. 709, F.S.⁵¹ or a guardian or trustee appointed under chs. 736 and 744, F.S., respectively, the bill adds that obtaining appointments with the purpose and design of benefiting someone other than the principal or beneficiary is considered an unauthorized appropriation and therefore constitutes the offense of exploitation.

The bill also adds financial exploitation of an elderly person or disabled adult to the current definition. Any person who knowingly obtains or uses, endeavors to obtain or use, or conspires with another to obtain or use the funds, assets, property, or the estate of an elderly person or disabled adult through the intentional modification or alteration of a planned distribution or disbursement in a will, trust, or other testamentary document commits exploitation under the bill unless they have first obtained any of the following:

- A court order authorizing the modification;
- A written instrument authored by the elderly person or disabled adult, sworn to by the elderly person or disabled adult with two witnesses, authorizing the change; or
- The action of an agent under a valid power of attorney authorized by the elderly person or disabled adult permitting the change.

Florida Office of the Attorney General

The Florida Attorney General (AG) is recognized as the chief legal officer of the state and, absent express legislative restriction, may exercise such power and authority as the public interest may require.⁵² As chief legal officer of the state, the AG must be noticed in certain proceedings under Florida law and may bring actions on behalf of citizens of the state as provided for by law.⁵³

The Office of Statewide Prosecution

The Florida Constitution gives the Office of Statewide Prosecution (OSP) concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws that occur in two or more judicial circuits, or when any such offense is affecting or has affected two or more judicial circuits as

⁵¹ Chapter 709, F.S., relates to power of attorney and similar instruments.

⁵² The Florida Office of the Attorney General (OAG), *The Role and Function of the Attorney General*, available at <https://myfloridalegal.com/pages.nsf/Main/F06F66DA272F37C885256CCB0051916F> (last visited March 18, 2021).

⁵³ See e.g., s. 736.0110, F.S., relating to charitable trusts.

provided by general law.⁵⁴ The Statewide Prosecutor is appointed by the AG and serves a term of four years.⁵⁵ The OSP is authorized to investigate and prosecute a number of statutorily enumerated offenses.⁵⁶

Effect of the Bill

The bill amends s. 16.56, F.S., broadening the investigative and prosecutorial authority of the OSP to cover criminal offenses enumerated in ch. 825, F.S. Specifically, this change would result in the following offenses being under the OSP:

- Abuse, aggravated abuse, and neglect of an elderly person or disabled adult;
- Lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person, including:
 - Lewd or lascivious battery upon an elderly or disabled person;
 - Lewd or lascivious molestation of an elderly or disabled person; and
 - Lewd or lascivious exhibition in the presence of an elderly or disabled person;
- Exploitation of an elderly person or disabled adult; and
- Violation of an injunction for protection against exploitation of a vulnerable adult.

The other jurisdictional requirements must be met for OSP to investigate or prosecute one of these offenses.

Elder Exploitation Injunctions

In 2018, the Legislature created a cause of action for an injunction prohibiting exploitation of a vulnerable adult.⁵⁷ Section 825.1035, F.S., specifies who may file for an injunction, including:

- 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.⁵⁸

Current law also:

- Identifies proper venue and details procedural framework for the parties and court;
- Requires the clerk of the circuit court to perform specific duties and limits the amount of the fee for filing a petition;
- Provides a sworn petition form for parties filing an injunction;
- Allows the court to grant a temporary injunction under certain circumstances;
- Provides direction for effecting service of process;
- Lists standards for the court to follow when issuing an injunction;

⁵⁴ Fla. Const. art. IV, s. 4(b); The OAG, *The Office of Statewide Prosecution*, available at <https://www.myfloridalegal.com/pages.nsf/Main/D243EF87774E965185256CC600785693> (last visited March 18, 2021).

⁵⁵ Section 16.56(2), F.S.

⁵⁶ See s. 16.56(1)(a), F.S., for a list of criminal offenses investigated and prosecuted by the OSP.

⁵⁷ Chapter 2018-100, L.O.F.; codified in s. 825.1035, F.S.

⁵⁸ Section 825.1035(2)(a)1.-4., F.S.

- Identifies forms of relief the court may grant to a vulnerable adult in issuing an injunction, including temporary and exclusive use of a shared residence and freezing the assets and credit lines of the vulnerable adult and those of an individual accused of exploiting the vulnerable adult;
- Permits the court to order payment of specified living expenses when the vulnerable adult's assets are frozen;
- Requires the sheriff or a law enforcement agency to assist the court and clerks of court with specific tasks in issuing and executing an injunction;
- Provides criminal penalties for violating an injunction and authorizes law enforcement to arrest an individual who has violated the terms of an injunction; and
- Limits the liability of financial institutions for freezing assets or credit lines.⁵⁹

The court may issue a temporary injunction ex parte, prior to the hearing on the petition, which grants relief as the court deems proper if the court finds:

- An immediate and present danger of exploitation of the vulnerable adult exists;
- There is a likelihood of irreparable harm and nonavailability of an adequate remedy at law;
- There is a substantial likelihood of success on the merits;
- The threatened injury to the vulnerable adult outweighs possible harm to the respondent;
- Granting a temporary injunction will not disserve the public interest; and
- Such injunction provides for the vulnerable adult's physical or financial safety.⁶⁰

The relief granted by the court may include, but is not limited to:

- Restraining the respondent from committing any acts of exploitation against the vulnerable adult;
- Awarding to the vulnerable adult the temporary exclusive use and possession of the dwelling shared by the vulnerable adult and the respondent, or barring the respondent from the residence of the vulnerable adult; and
- Freezing any assets of the vulnerable adult in any depository or financial institution whether titled solely in the vulnerable adult's name, solely in the respondent's name, jointly with the respondent, in guardianship, in trust, or in a Totten trust under certain circumstances.⁶¹

An ex parte temporary injunction may not exceed 15 days, and a hearing on the petition for the injunction must be set for a date no later than the last day the temporary injunction is effective.⁶² The court may grant a continuance for the hearing, for good cause shown. However, the ex parte injunction is not be extended beyond the initial 15 days as a result of the continuance.⁶³

Petition for Injunction for the Protection of a Vulnerable Adult

A sworn petition must be filed alleging exploitation, or imminent exploitation, of a vulnerable adult, containing the following information:

- The last known residence of both the vulnerable adult and the respondent;

⁵⁹ See s. 825.1035, F.S.

⁶⁰ Section 825.1035(5)(a), F.S.

⁶¹ *Id.*

⁶² Section 825.1035(5)(d), F.S.

⁶³ *Id.*

- The respondent's last known employer, a physical description of the respondent, and any aliases they are known to have;
- The manner in which the respondent is associated with the vulnerable adult and any previous or pending legal actions between the respondent and the vulnerable adult;
- The petitioner's knowledge of any reports made to a state agency regarding exploitation, abuse, or neglect of the vulnerable adult;
- The reasons the petitioner claims to genuinely fear an imminent danger of exploitation, or any facts the petitioner believes show the respondent has already committed exploitation;
- The petitioner's knowledge of reasons why the adult depends on the respondent for care, any alternative provisions for care not involving the respondent, resources allowing the adult to access such provisions, and the willingness of the adult to access such provisions;
- Financial institutions where the petitioner knows the adult maintains assets, accounts, or lines of credit;
- Whether the estimated value of the adult's assets is below \$1500, between \$1500 and \$5000, or greater than \$5000;
- Attestation that the petitioner genuinely fears imminent exploitation of the vulnerable adult by the respondent; and
- Remedies sought through the injunction, which may include:
 - Prohibiting any direct or indirect contact between the respondent and the vulnerable adult;
 - Immediately restraining the respondent from committing any acts of exploitation;
 - Freezing specified assets of the vulnerable adult, whether solely in the adult's name, jointly named with the respondent, or solely in the respondent's name; and
 - Providing any other conditions the court feels necessary to protect the vulnerable adult or their assets.⁶⁴

Effect of the Bill

The bill amends s. 825.1035, F.S., adding authorized agents acting under a durable power of attorney to the list of individuals authorized to petition for an injunction for protection against exploitation of a vulnerable adult.

The bill also specifies new informational fields for the petition for protective injunction against exploitation of a vulnerable adult. Specifically, the bill requires the following to be included in a petition for injunction under s. 825.1035, F.S.:

- The petitioner's name;
- The petitioner's address;
- The petitioner's relationship to the vulnerable adult;
- The length of time the petitioner has known the vulnerable adult;
- The vulnerable adult's name and aliases;
- The vulnerable adult's date of birth; and
- Any known impairments affecting either the vulnerable adult's normal activities of daily living or ability to provide for their own care or protection, specifically any of the following:
 - Long-term physical disabilities;
 - Sensory disabilities, such as hearing or vision impairments;

⁶⁴ Section 825.1035(3)(a)1.-14., F.S.

- Cognitive disabilities;
- Mental or emotional disabilities;
- Developmental disabilities;
- Infirmities of aging; or
- Any other known impairments.

The bill also allows courts to extend an ex parte temporary injunction from a maximum of 15 days to up to 30 days beyond the initial injunction period (for a total of 45 days) if good cause for an extension is shown. Only one such extension is permitted under the bill. The bill also repeals the authority of the court to grant a continuance of the hearing on the petition for injunction against exploitation of a vulnerable adult.

Probate Process in Florida

Probate is a court-supervised process for identifying and gathering the assets of a deceased person (decedent), paying the decedent's debts, and distributing the decedent's assets to his or her beneficiaries.⁶⁵ Probate proceedings are governed by The Florida Probate Code, found in chs. 731–735, F.S., and the Florida Probate Rules of court.⁶⁶ The probate process ensures that the decedent's debts are paid in an orderly fashion and that the rightful beneficiaries, whether determined according to a will or by default rules of succession, receive the property to which they are entitled.⁶⁷

Assets subject to probate are those that were owned in the decedent's sole name at death or that were owned by the decedent and one or more co-owners but lacked a provision for automatic succession of ownership at death.⁶⁸ The following are examples to illustrate common probate and non-probate assets:

- A bank account or investment account in the sole name of a decedent is a probate asset; but a bank account or investment account owned by the decedent and payable on death or transferable on death to another, or held jointly with rights of survivorship with another, is not a probate asset.
- A life insurance policy, annuity contract or individual retirement account that is payable to a specific beneficiary is not a probate asset; but a life insurance policy, annuity contract, or individual retirement account payable to the decedent's estate is a probate asset.
- Real estate titled in the sole name of the decedent, or in the name of the decedent and another person as tenants in common, is a probate asset (unless it is homestead property); but real estate titled in the name of the decedent and one or more other persons as joint tenants with rights of survivorship is not a probate asset.
- Property owned by spouses as tenants by the entirety is not a probate asset on the death of the first spouse to die; it goes automatically to the surviving spouse.⁶⁹

⁶⁵ The Florida Bar, *Consumer Pamphlet: Probate in Florida*, available at <https://www.floridabar.org/public/consumer/pamphlet026/> (last visited March 18, 2021) (hereinafter cited as "Consumer Pamphlet 1").

⁶⁶ The Florida Bar, *The Florida Probate Rules*, available at <https://www-media.floridabar.org/uploads/2020/01/Probate-Rules-01-01-20.pdf> (last visited March 18, 2021).

⁶⁷ Consumer Pamphlet 1.

⁶⁸ Consumer Pamphlet 1.

⁶⁹ *Id.*

Qualified Personal Representatives in Probate Cases

A personal representative is a person or business entity appointed by a circuit court to administer a decedent's estate.⁷⁰ If an individual serves as a personal representative, he or she must be at least 18 years old, have full capacity, and be a resident of Florida⁷¹ at the time of the death of the person whose estate he or she is administering.⁷² A person is not qualified to serve as a personal representative if he or she is under 18 years of age, has been convicted of a felony, or is mentally or physically unable to perform the duties of a personal representative.⁷³

Slayer Statutes

All states have enacted "slayer rules" which effectively bar a person who causes a killing from inheriting property from their victims.⁷⁴ While the specific criteria and applicability of slayer statutes vary by jurisdiction, these laws are uniformly predicated on the idea that those responsible for a killing should not benefit from their wrongful acts.⁷⁵

Eight states have expanded their slayer rules to include disqualification of persons from inheriting if they have engaged in the abuse or financial exploitation of a decedent.⁷⁶ Six of the eight states with such laws require a criminal conviction in order to disinherit an individual responsible for abuse or exploitation.⁷⁷ Moreover, three of the eight states provide for disinheritance only when financial elder abuse occurs.⁷⁸ California's slayer rule does not require a criminal conviction to effect disinheritance, and it covers physical abuse, neglect, false imprisonment, or financial abuse of an elder or a dependent adult.⁷⁹

Florida's Slayer Rule - Probate

Current law provides that a surviving person who unlawfully and intentionally kills or participates in procuring the death of a decedent is not entitled to any benefits under a will or through intestacy under the Florida Probate Code.⁸⁰ In such instances, the estate of the decedent passes as if the killer had predeceased the decedent.⁸¹ A joint tenant who unlawfully and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as the decedent's property and the killer has no rights by

⁷⁰ *Id.*

⁷¹ A non-resident of the state may qualify if he or she is a legally adopted child or adoptive parent of the decedent, related by lineal consanguinity, one of certain enumerated relatives of the decedent, or the spouse of a person otherwise qualified to be the personal representative. Section 733.304, F.S.

⁷² Section 733.302, F.S.

⁷³ Section 733.303, F.S.

⁷⁴ Jennifer Piel, Journal of the American Academy of Psychiatry and the Law Online, *Expanding Slayer Statutes to Elder Abuse*, September 2015, available at <http://jaapl.org/content/43/3/369> (last visited March 18, 2021).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Travis Hunt, *Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code s. 259 and Using It as a Model*, 2014 BYU L. Rev. 445 at p. 446 (2014), available at <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2922&context=lawreview> (last visited March 18, 2021).

⁷⁸ *Id.*

⁷⁹ Cal. Prob. Code s. 259.

⁸⁰ See s. 732.802, F.S.; the Florida Probate Code is contained in chs. 731-735, F.S.

⁸¹ Section 732.802(1), F.S.

survivorship.⁸² This also applies to tenancies with right of survivorship and tenancies by the entirety in real and personal property; joint and multiple-party accounts in banks, savings and loan associations, credit unions, and other institutions; and any other form of co-ownership with survivorship incidents.⁸³

A named beneficiary of a bond, life insurance policy, or other contractual arrangements who unlawfully and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and the bond or policy becomes payable as though the killer had predeceased the decedent.⁸⁴ A final judgment of conviction of murder of any degree is conclusive.⁸⁵ In the absence of a conviction of murder, the court may determine by the greater weight of the evidence whether the killing of the decedent was unlawful and intentional.⁸⁶

Effect of the Bill

The bill amends s. 733.303, F.S., prohibiting an individual convicted of abuse, neglect, or exploitation of an elderly person or disabled adult from serving as a personal representative in probate matters.

The bill creates s. 732.8031, F.S., which expands Florida's slayer rule under the Florida Probate Code by prohibiting the following persons convicted of abuse pursuant to s. 825.102(1), F.S., aggravated abuse pursuant to s. 825.102(2), F.S., neglect pursuant to s. 825.102(3), F.S., exploitation pursuant to s. 825.103, F.S., or first degree aggravated manslaughter pursuant to s. 784.07(2), F.S., of an elderly person or disabled adult from inheriting assets from a decedent, or other person whose death was necessary for passage of the perpetrator's interest, who was the victim of the disqualifying offense:

- A surviving person whose beneficiary interest depends on the death of the victim.
- A joint tenant with a right of survivorship and a tenant by the entirety in real and personal property, a joint and multiple-party account holder in a bank, savings and loan association, credit union, and any other financial institution, and any other form of coownership with survivorship interests whose survivorship interest depends on the death of the victim.
- A named beneficiary of a bond, life insurance policy, or other contractual arrangement where the victim is the owner or principal obligee of the bond, life insurance policy, or other contractual arrangement or the person upon whose life such policy was issued.
- Any other acquisition of property or interest by the abuser, neglecter, exploiter, or killer, including a life estate in homestead property, whose beneficiary interest depends on the death of the victim.

Under the bill, assets in the will of the decedent which would otherwise pass to the perpetrator of the crime pass instead as if the perpetrator had predeceased the victim.

⁸² Section 732.802(2), F.S.

⁸³ *Id.*

⁸⁴ Section 732.802(3), F.S.

⁸⁵ Section 732.802(5), F.S.

⁸⁶ *Id.*

The bill creates a rebuttable presumption that disinheritance will apply if an individual is convicted of any of the aforementioned offenses. Absent a conviction, the bill allows a court to determine by the greater weight of the evidence whether the actions of the alleged perpetrator contributed to the death of the elderly person, disabled adult, or other person whose death is necessary for passage of the probate assets to the perpetrator.

The bill provides that the rights of any person who, before rights under this section of the bill are adjudicated, purchases from the abuser, neglecter, exploiter, or killer for value and without notice property that the perpetrator would have acquired except for this section of the bill. The perpetrator is held liable for the amount of the proceeds or the value of the property owed to such a purchaser.

Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable unless, before payment, it receives at its home office or principal address written notice of a claim under this section of the bill.

This section of the bill does not apply if, after the conviction of abuse, neglect, or exploitation, the victim of the offense, if capacitated, executes a written instrument, sworn to and witnessed by two persons who would be competent as witnesses to a will, which expresses a specific intent to allow the person so convicted of abuse, neglect, or exploitation to retain his or her inheritance or survivorship rights.

The Florida Trust Code

The revocable, or “living,” trust is often promoted as a means of avoiding probate and saving taxes at death and is governed by ch. 736, F.S.,⁸⁷ referred to as the “Florida Trust Code” (Code). The term “terms of a trust” is defined to mean the manifestation of the settlor’s intent regarding a trust’s provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.⁸⁸ Under the Code, “settlor” is defined as a person who creates or contributes property to a trust.⁸⁹ A “beneficiary” of the trust is a person who has a present or future beneficial interest in the trust.⁹⁰ The person responsible for the management of the trust assets is the “trustee.”⁹¹

Except as otherwise provided in the terms of the trust, the Code governs the duties and powers of a trustee, relations among trustees, and the rights and interests any beneficiaries. The terms of a trust prevail over any provision of the Code, except as provided in s. 736.0105(2), F.S. In all, the Code currently provides 23 terms that are solely governed by the Code and cannot be changed, waived, or otherwise altered by the terms of the trust.⁹²

⁸⁷ The Florida Bar, *Consumer Pamphlet: The Revocable Trust in Florida*, available at <https://www.floridabar.org/public/consumer/pamphlet028/#WHAT%20IS%20A%20REVOCABLE%20TRUST%3F> (last visited March 18, 2021) (hereinafter cited as, “Consumer Pamphlet 2”).

⁸⁸ Section 736.0103(21), F.S.

⁸⁹ Section 736.0103(18), F.S.

⁹⁰ Section 736.0103(4), F.S.

⁹¹ Consumer Pamphlet 2.

⁹² See s. 736.0105(2)(a)-(w), F.S.

Florida's Slayer Rule - Trusts

Under s. 736.1104, F.S., a beneficiary who unlawfully and intentionally kills or participates in procuring the death of the settlor or another person on whose death such beneficiary's interest depends is precluded from taking that interest. Instead, the interest devolves as if the slayer predeceased the victim. This rule is triggered by a civil evidentiary standard (the greater weight of the evidence) although a final judgment of murder in any degree is conclusive.⁹³

Effect of the Bill

The bill amends s. 736.1104, F.S., similarly expanding Florida's slayer rule under the Florida Trust Code by prohibiting a beneficiary of a trust convicted of abuse, neglect, or exploitation, or first degree aggravated manslaughter of an elderly person or disabled adult, from receiving trust benefits when the victim is the settlor of a trust, or another person on whose death such beneficiary's interest depends from inheriting trust interests, including a homestead dependent on the victim's death.

Under the bill, trust interests which would otherwise pass to the perpetrator of the crime pass instead as if the perpetrator had predeceased the victim.

The bill creates a rebuttable presumption that the trust interest is extinguished if an individual is convicted of any of the aforementioned offenses. Absent a conviction, the bill allows a court to determine by the greater weight of the evidence whether the actions of the alleged perpetrator contributed to the death of the elderly person, disabled adult, or other person whose death is necessary for passage of the trust interest to the perpetrator.

Effective Date

The bill is effective July 1, 2021.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, s. 18, of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁹³ Section 736.1104(2), F.S.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The OAG estimates that expanding the OSP's authority in s. 16.56, F.S., to investigate and prosecute qualifying cases under ch. 825, F.S., would alleviate some of the financial burden on local law enforcement and prosecution, while consolidating the prosecution of multi-circuit criminal activity related to such crimes into comprehensive statewide prosecution cases.⁹⁴

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed the bill. The Legislature's Office of Economic and Demographic Research (EDR) preliminarily estimates that the bill will have a "positive indeterminate" prison bed impact (an unquantifiable increase in prison beds).⁹⁵

The EDR provides that the bill's expansion of the definition of "abuse of an elderly person or disabled adult" in s. 825.102, F.S., would impact the multiple felonies listed under the statute. The bill adds the definitions of "improper benefit" and "kickback" in s. 825.101, F.S., and the following (new language in bold): "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, transfer of property, **kickback, or receipt of an improper benefit,**" to s. 825.103, F.S. It also adds "obtaining appointments with the purpose and design of benefiting someone other than the principal or beneficiary" to the list of acts resulting in unauthorized appropriations. It also adds the act of "knowingly obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or a disabled adult's funds, assets, property, or estate through intentional modification or alteration of a plan of distribution or disbursement expressed in a will, trust agreement, or other testamentary devise of the elderly person or disabled adult." This expands the definition

⁹⁴ The OAG White Paper, at p. 5.

⁹⁵ The EDR estimate is on file with the Senate Committee on Criminal Justice.

for exploitation of an elderly person or disabled adult, impacting the multiple felonies listed under this statute. Finally, this bill amends s. 825.1035, F.S., adding “an agent under a valid durable power of attorney with the authority specifically granted in the power of attorney” to those who may file an injunction for protection against exploitation of a vulnerable adult, and extends the time for a temporary injunction from 15 days to up to 45 days. This would impact the Level 1, 3rd degree felony under s. 825.1036, F.S., for “a person who has two or more prior convictions for violation of an injunction or foreign protection order against the same victim, and who subsequently commits a violation of any injunction or foreign protection order against the same victim.”⁹⁶

The EDR advises that per DOC, in FY 18-19, there were 35 new commitments to prison for felonies listed under these statutes (14 for abuse, 21 for exploitation), and 29 new commitments in FY 19-20 (11 for abuse, 18 for exploitation). It is not known how this new language will impact prison beds, but commitments are low under current language.⁹⁷

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 16.56, 733.303, 736.1104, 825.101, 825.102, 825.103, and 825.1035.

This bill creates section 732.8031 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

⁹⁶ *Id.*

⁹⁷ *Id.*