

Amendment No. 2 to SB1230

Watson
Signature of Sponsor

AMEND Senate Bill No. 1230

House Bill No. 810*

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. This act shall be known and may be cited as the "Elderly and Vulnerable Adult Protection Act."

SECTION 2. Tennessee Code Annotated, Title 39, Chapter 15, is amended by adding the following as a new part:

39-15-501.

As used in this part, unless the context otherwise requires:

(1) "Caregiver":

(A) Means a relative or a person who has a legal duty to provide care, or who has assumed such duty by contract or conduct that a reasonable person would interpret as an assumption of the responsibility for an elderly or vulnerable adult's care; and

(B) Does not include a financial institution as a caregiver of property, funds, or other assets unless the financial institution has entered into an agreement, or has been appointed by a court of competent jurisdiction, to act as a trustee with regard to the property of the adult;

(2) "Elderly adult" means a person seventy (70) years of age or older;

(3) "Financial exploitation" means:

(A) The use of deception, intimidation, undue influence, force, or threat of force to obtain or exert unauthorized control over an elderly or vulnerable adult's property with the intent to deprive the elderly or vulnerable adult of property;

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(B) The breach of a fiduciary duty to an elderly or vulnerable adult by the person's guardian, conservator, or agent under a power of attorney which results in an appropriation, sale, or transfer of the elderly or vulnerable adult's property;
or

(C) The act of obtaining or exercising control over an elderly or vulnerable adult's property by a caregiver committed with intent to benefit the caregiver or other third party;

(4) "Relative" means a spouse; child, including stepchild, adopted child, or foster child; parent, including stepparent, adoptive parent, or foster parent; sibling of the whole or half-blood; step-sibling; grandparent, of any degree; grandchild, of any degree; and aunt, uncle, niece, and nephew, of any degree, who:

(A) Resides with or has frequent or prolonged contact with the elderly or vulnerable adult; and

(B) Knows or reasonably should know that the elderly or vulnerable adult is unable to adequately provide for the adult's own care or financial resources;
and

(5) "Vulnerable adult" means a person eighteen (18) years of age or older who, because of intellectual disability or physical dysfunction, is unable to fully manage the person's own resources, carry out all or a portion of the activities of daily living, or fully protect against neglect, exploitation, or hazardous or abusive situations without assistance from others.

39-15-502.

(a) It is an offense for any person to knowingly financially exploit an elderly or vulnerable adult.

(b) A violation of this section shall be punished as theft pursuant to § 39-14-105; provided, however, that the violation shall be punished one (1) classification higher than is otherwise provided in § 39-14-105.

(c)

(1) If a person is charged with financial exploitation that involves the taking or loss of property valued at more than five thousand dollars (\$5,000), a prosecuting attorney may file a petition with the circuit, general sessions, or chancery court of the county in which the defendant has been charged to freeze the funds, assets, or property of the defendant in an amount up to one hundred percent (100%) of the alleged value of funds, assets, or property in the defendant's pending criminal proceeding for purposes of restitution to the victim. The hearing on the petition may be held ex parte if necessary to prevent additional exploitation of the victim.

(2) Upon a showing of probable cause in the ex parte hearing, the court shall issue an order to freeze or seize the funds, assets, or property of the defendant in the amount calculated pursuant to subdivision (c)(1). A copy of the freeze or seize order shall be served upon the defendant whose funds, assets, or property has been frozen or seized.

(3) The court's order shall prohibit the sale, gifting, transfer, or wasting of the funds, assets, or property of the elderly or vulnerable adult, both real and personal, owned by, or vested in, such person, without the express permission of the court.

(4) At any time within thirty (30) days after service of the order to freeze or seize funds, assets, or property, the defendant or any person claiming an interest in the funds, assets, or property may file a motion to release the funds, assets, or property. The court shall hold a hearing on the motion no later than ten (10) days from the date the motion is filed.

(d) In any proceeding to release funds, assets, or property, the state has the burden of proof, by a preponderance of the evidence, to show that the defendant used, was using, is about to use, or is intending to use any funds, assets, or property in any way that constitutes or would constitute an offense under subsection (a). If the court finds that any funds, assets, or property were being used, are about to be used, or are intended to be used in any way that constitutes or would constitute an offense under subsection (a), the court shall order the funds, assets, or property frozen or held until further order of the court.

(e) If the prosecution of a charge under subsection (a) is dismissed or a nolle prosequi is entered, or if a judgment of acquittal is entered, the court shall vacate the order to freeze or seize the funds, assets, or property.

(f) In addition to other remedies provided by law, an elderly or vulnerable adult in that person's own right, or by conservator or next friend, has a right of recovery in a civil action for financial exploitation or for theft of the person's money or property whether by fraud, deceit, coercion, or otherwise. The right of action against a wrongdoer shall not abate or be extinguished by the death of the elderly or vulnerable adult, but passes as provided in § 20-5-106, unless the alleged wrongdoer is a relative, in which case the cause of action passes to the victim's personal representative.

39-15-503.

For purposes of determining whether an offense was committed under § 39-15-502:

(1) Any transfer of property valued in excess of one thousand dollars (\$1,000) in a twelve-month period, whether in a single transaction or multiple transactions, by an elderly or vulnerable adult to a non-relative whom the transferor has known for fewer than two (2) years before the first transfer and for which the transferor did not receive reciprocal value in goods or services creates a permissive inference that the transfer was effectuated without the effective consent of the owner.

(2) Subdivision (1) applies regardless of whether the transfer or transfers are denoted by the parties as a gift or loan except that it shall not apply to a valid loan evidenced in writing and which includes definite repayment dates. In the event repayment of any such loan is in default, in whole or in part, for more than sixty (60) days, the inference described in subdivision (1) applies. Subdivision (1) does not apply to persons or entities that operate a legitimate financial institution.

(3) This section does not apply to valid charitable donations to nonprofit organizations qualifying for tax exempt status under the internal revenue code.

(4) A court shall instruct jurors that they may, but are not required to, infer that the transfer of money or property was effectuated without the effective consent of the owner, with the intent to deprive the owner of the money or property, upon proof beyond a reasonable doubt of the facts listed in subdivision (1). The court shall also instruct jurors that they may find a defendant guilty only if persuaded that each element of the offense has been proved beyond a reasonable doubt.

39-15-504.

In cases where an alleged offense under this part or under title 71, chapter 6, part 1 has been committed against an elderly or vulnerable adult, upon the state's

motion, the court shall conduct a hearing to preserve the testimony of the victim within sixty (60) days of the defendant's initial court appearance whether the case originates in general sessions court or criminal court.

39-15-505.

(a) An elderly or vulnerable adult victim's inability to attend judicial proceedings due to illness, or other mental or physical disability, shall be considered exceptional circumstances upon the state's motion to preserve testimony pursuant to Rule 15 of the Tennessee Rules of Criminal Procedure.

(b) The court shall consider an affidavit executed by the elderly or vulnerable adult's treating physician stating that the elderly or vulnerable adult is unable to attend court due to illness or other mental or physical disability as prima facie evidence of the need to preserve witness testimony by the taking of the adult's out-of-court deposition.

(c) The court shall order the defendant's attendance to the out-of-court deposition. The defendant may waive the defendant's attendance in writing.

39-15-506.

(a)

(1) Following a conviction for a violation of § 39-15-502, the clerk of the court shall notify the department of health of the conviction by sending a copy of the judgment in the manner set forth in § 68-11-1003 for inclusion on the registry pursuant to title 68, chapter 11, part 10.

(2) Upon receipt of a judgment of conviction for a violation of an offense set out in subdivision (a)(1), the department shall place the person or persons convicted on the registry of persons who have abused, neglected, or financially exploited an elderly or vulnerable adult as provided in § 68-11-1003(c).

(3) Upon entry of the information in the registry, the department shall notify the person convicted, at the person's last known mailing address, of the

person's inclusion on the registry. The person convicted shall not be entitled or given the opportunity to contest or dispute either the prior hearing conclusions or the content or terms of any criminal disposition, or attempt to refute the factual findings upon which the conclusions and determinations are based. The person convicted may challenge the accuracy of the report that the criminal disposition has occurred, such hearing conclusions were made, or any factual issue related to the correct identity of the person. If the person convicted makes such a challenge within sixty (60) days of notification of inclusion on the registry, the commissioner, or the commissioner's designee, shall afford the person an opportunity for a hearing on the matter that complies with the requirements of due process and the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(b)

(1) In addition to any other punishment that may be imposed for a violation of § 39-15-502, the court shall impose a fine of not less than one thousand dollars (\$1,000). The fine shall not exceed the maximum fine established for the appropriate offense classification.

(2) The person convicted shall pay the fine to the clerk of the court imposing the sentence, who shall transfer it to the district attorney of the judicial district in which the case was prosecuted. The district attorney shall credit the fine to a fund established for the purpose of educating, enforcing, and providing victim services for elderly and vulnerable adult prosecutions.

SECTION 3. Tennessee Code Annotated, Section 39-14-111, is deleted in its entirety.

SECTION 4. Tennessee Code Annotated, Section 40-35-313(a)(1)(B)(i)(c), is amended by deleting the language "a violation of § 71-6-117 or § 71-6-119" and substituting instead the language "a violation of § 71-6-117, § 71-6-119, or § 39-15-502".

SECTION 5. Tennessee Code Annotated, Section 71-6-117(a), is amended by deleting the language "abuse, neglect or exploit" and substituting instead the language "abuse or neglect".

SECTION 6. Tennessee Code Annotated, Section 71-6-120(h), is amended by deleting the language "71-6-117" and substituting instead the language "39-15-502".

SECTION 7. Tennessee Code Annotated, Section 71-6-124(a)(1), is amended by deleting the language "§ 71-6-117" wherever it appears and substituting instead the language "§ 71-6-117 or § 39-15-502".

SECTION 8. For the purposes of promulgating rules required by this act, this act shall take effect upon becoming law, the public welfare requiring it. For all other purposes, this act shall take effect July 1, 2017, the public welfare requiring it.