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EMBEZZLEMENT: VULNERABLE ADULTS

Senate Bills 378 (Substitute H-4) and 597 (Substitute H-1) First Analysis (3-22-00)

Sponsor: Sen. Joel D. Gougeon
**House Committee: Criminal Law and
Corrections**
Senate Committee: Judiciary

THE APPARENT PROBLEM:

Elderly and disabled persons sometimes need assistance with their day-to-day care and financial affairs, such as paying bills and buying groceries. In cases in which a court-appointed fiduciary (such as a guardian, conservator, or trustee) provides those services, there may be sufficient court oversight of their activities to protect the person on whose behalf the fiduciary is charged to act. Often, though, the responsibility for caring for these vulnerable adults, including managing their finances, falls informally on a family member or trusted friend. In these cases, there is no mechanism for legal oversight of the activities of the caregiver and little, if any, protection from financial exploitation for the older or disabled adult. While it is possible that a caretaker who helped himself or herself to the financial resources of the person under his or her care could be prosecuted under existing larceny laws, some people believe that this problem is significant enough to warrant a new felony offense with harsh penalties.

THE CONTENT OF THE BILLS:

Senate Bills 378 and 597 would amend the Michigan Penal Code and the Code of Criminal Procedure, respectively, to establish penalties for a "person in a relationship of trust" who embezzled the money or property of a "vulnerable adult", and to classify the offense in the sentencing guidelines system. Senate Bill 597 is tie-barred to Senate Bill 378 and both bills would take effect on July 1, 2000.

Senate Bill 378 would amend the Michigan Penal Code (MCL 750.174a) to prescribe penalties for a person who was in a relationship of trust with a vulnerable adult and, through fraud, deceit, misrepresentation, or unjust enrichment, obtained or used or attempted to

obtain or use the vulnerable adult's money or property for his or her own direct or indirect benefit.

Violations of the bill would be punished under a tiered penalty structure based upon the value of the money or property used or obtained, or attempted to be used or obtained. If the value of the money or property involved was less than \$200, the person would be guilty of a misdemeanor punishable by imprisonment for no more than 93 days and/or a fine. The fine would be no more than \$500 or three times the value of the money or property involved, whichever amount was greater.

If the value of the money or property was at least \$200 but less than \$1,000 or the crime was a second or subsequent violation involving money or property of less than \$200 in value, the person would be guilty of a misdemeanor punishable by not more than one year of imprisonment and/or a fine. The fine would be three times the value of the money or property involved in the crime or not more than \$2,000, whichever was greater.

If the value of the money or property involved was \$1,000 or more but less than \$20,000, or the crime was a second or subsequent violation involving money or property valued at \$200 or more but less than \$1,000, the crime would be a felony. The punishment would be imprisonment for no more than 5 years and/or a fine. The fine would be three times the value of the money or property involved in the crime or not more than \$10,000, whichever was greater.

If the money or property involved had a value of \$20,000 or more, or the crime was a second or subsequent violation involving money or property valued at \$1,000 or more but less than \$20,000, the

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crime would be a felony punishable by imprisonment for not more than 10 years and/or a fine. The fine would be three times the value of the money or property involved in the crime or not more than \$15,000, whichever was greater.

In determining the value of money or property used or obtained or attempted to be used or obtained in separate incidents directed against different victims that were part of a scheme or course of conduct, property or money taken over a 12-month period could be figured in the aggregate so as to increase the level of the offense. However, if the scheme or course of conduct were directed against only one person, there would be no time limit on aggregating the amounts to increase the level of the offense.

If the prosecuting attorney intended to seek an enhanced sentence based on the fact that the crime was a second or subsequent offense, the prosecuting attorney would be required to include a statement listing the defendant's prior convictions on the complaint and information. The existence of such a prior conviction would have to be determined by the court, without a jury, at sentencing or at a separate hearing for that purpose before sentencing. The existence of a prior conviction under these circumstances could be established by any relevant evidence, including: a copy of the judgment of conviction; a transcript of a prior trial, plea-taking, or sentencing; information contained in the pre-sentence report; or, the defendant's statement. However, if a defendant's sentence was enhanced based upon one or more prior convictions, those prior convictions could not also be used to further enhance his or her sentence under the habitual offender provisions of the Code of Criminal Procedure.

The bill would not prohibit a person from being charged with, convicted of, or punished for any other violation of law that the person committed while violating the bill. In addition, the bill's provisions would not apply to the financial institutions or brokers, or their officers, employees, or agents, provided that they were performing duties in the normal course of their business.

"Person in a relationship of trust" would mean a person who was a caregiver; relative by blood, marriage, or adoption; household member; court-appointed fiduciary; or other person who was entrusted with or had assumed responsibility for the use or management of a vulnerable adult's money or property.

"Vulnerable adult" would mean a person 18 years of age or older who, because of age, developmental disability, mental illness, or disability, whether or not he or she has been determined by the court to be an incapacitated individual in need of protection, lacks the cognitive skills required to manage his or her property.

Finally, the bill would require the Office of Services to the Aging to promptly report violations of the bill's provisions to the Family Independence Agency.

Senate Bill 597 would amend the Code of Criminal Procedure (MCL 777.16i) to include the crimes proposed by Senate Bill 378 in the sentencing guidelines.

The felony of embezzlement by a person in a relationship of trust with a vulnerable adult of \$1,000 to \$20,000 or with prior convictions would be a Class E property felony, with a statutory maximum of 5 years imprisonment. The felony of embezzlement by a person in a relationship of trust with a vulnerable adult of more than \$20,000 or with \$1,000 to \$20,000 prior convictions would be a Class D property felony, with a statutory maximum of 10 years imprisonment.

HOUSE COMMITTEE ACTION:

The House Committee on Criminal Law and Corrections adopted Substitute H-4 for Senate Bill 378. The substitute provides for a tiered system of punishment for the crime, eliminated provisions requiring that the prosecution prove a level of trust and confidence in the relationship between the victim and the defendant, provided a limited exemption for financial institutions and brokers, and limited the definitions of vulnerable adult and person in a relationship of trust. The committee also adopted a substitute (H-1) for Senate Bill 597, which would reflect the tiered system of punishment for the crime.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Strong punitive actions should be taken against those who exploit the elderly and infirm. Unfortunately, several dilemmas arise in trying to combat this problem. It can be difficult to recognize warning signs of financial abuse, and it may not be clear to a victim

that a trusted friend or relative has taken funds or assets. When a caregiver inveigles money or other valuables from an unsuspecting senior, the victim is often too embarrassed or ashamed to pursue legal action against the perpetrator. There is no legal oversight of the activities of a caregiver who is a trusted friend or relative if that arrangement is informal and not court-ordered. In order to deter this kind of exploitation of vulnerable adults by trusted persons and to punish that activity appropriately, the law should include a specific criminal prohibition with severe penalties.

Exploitation in such cases can carry particularly serious consequences. The elderly and other vulnerable adults who suffer financial exploitation at the hands of caregivers are often less able than others to bounce back from financial losses, because they are unable to find employment or other means of recovering or replacing lost assets.

Against:

It is of questionable prudence to include a provision excepting certain groups from prosecution under a criminal law. If financial institutions or brokers engage in fraud, deceit, misrepresentation, or unjust enrichment, then they should be just as vulnerable to prosecution for such a crime as anyone else in a relationship of trust.

Response:

The exemption for brokers and financial institutions is limited to cases where the actions are within the normal course of business. It has been suggested that without this exemption, the bill could lead to prosecutions for normal fees or other charges assessed in the normal course of business based upon the status of the person against whom the fees are assessed. For example, if a vulnerable adult bounced several checks and was charged overdraft fees, the financial institution charging those fees could be prosecuted under the bill's provisions. Furthermore, even if it didn't lead to increased prosecution, without the exemption, the statute could be used as a basis for civil law suits.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bills. (3-21-00)

The Department of State Police supports the bills. (3-21-00)

The Michigan Credit Union League supports the bills. (3-21-00)

The Michigan Bankers Association supports the bills. (3-21-00)

Analyst: W. Flory

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.