

Senate Fiscal Agency
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SFA**BILL ANALYSIS**

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Senate Bills 378 and 597 (as enrolled)
Sponsor: Senator Joel D. Gougeon
Senate Committee: Judiciary
House Committee: Criminal Law and Corrections

PUBLIC ACTS 222 and 223 of 2000

Date Completed: 3-21-01

RATIONALE

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 of 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 caregiver's activities. In addition, there evidently has been little, if any, protection from financial exploitation for the older or disabled adult. While it is possible that a caretaker who helps himself or herself to the financial resources of the person under his or her care could be prosecuted under larceny laws, some people advocated that a new felony offense with harsh penalties be enacted.

CONTENT

Senate Bills 378 and 597 amended the Michigan Penal Code and the Code of Criminal Procedure, respectively, to establish penalties for a "person in a relationship of trust" who embezzles the money or property of a "vulnerable adult", and to classify the offense in the

sentencing guidelines system. Senate Bill 597 was tie-barred to Senate Bill 378. The bills took effect on September 25, 2000.

Senate Bill 378

The bill prescribes penalties for a person in a relationship of trust with a vulnerable adult who, through fraud, deceit, misrepresentation, or unjust enrichment obtains or uses or attempts to obtain or use the vulnerable adult's money or property to benefit that person directly or indirectly. A financial institution or a broker, or a director, officer, employee, or agent of a financial institution or broker, is not in violation of the bill while performing duties in the normal course of business. If the Office of Services to the Aging becomes aware of a violation of the bill, the Office must promptly report the violation to the Family Independence Agency.

The bill includes a graduated sentencing structure that imposes more serious penalties for greater values of money or property or for repeat convictions, as shown in Table 1.

In all cases, the maximum fine is the amount specified or three times the value of the money or property used or obtained, or attempted to be used or obtained, whichever is greater. Also, a court may impose either a fine or imprisonment, or both a fine and imprisonment.

Table 1

Value of Money or Property	Offense	<u>Maximum Sentence</u>	
		Fine	Imprisonment
Under \$200	Misdemeanor	\$500	93 days
\$200 or more but < \$1,000; or < \$200 + 1 or more priors	Misdemeanor	\$2,000	1 year
\$1,000 or more but < \$20,000; or \$200 but < \$1,000 + 1 or more priors*	Felony	\$10,000	5 years
\$20,000 or more; or \$1,000 or more but < \$20,000 + 2 or more priors*	Felony	\$15,000	10 years
* For purposes of this sentence, a prior conviction does not include a conviction for a violation or attempted violation involving money or property valued at less than \$200.			

The values of money or property used or obtained or attempted to be used or obtained in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value of money or personal property used or obtained or attempted to be used or obtained. If the scheme or course of conduct is directed against only one person, however, no time limit applies to aggregation of values.

If the prosecuting attorney intends to seek an enhanced sentence based on the defendant's having one or more prior convictions, he or she must include on the complaint and information a statement listing the prior conviction or convictions. The existence of prior convictions must 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 may be established by any evidence relevant for that purpose including one or more of the following:

- A copy of the judgment of conviction.
- A transcript of a prior trial, plea-taking, or sentencing.
- Information contained in a presentence report.
- The defendant's statement.

If the sentencing is enhanced by one or more prior convictions, those prior convictions may not be used for further enhancement under the Code of Criminal Procedure's habitual offender provisions (MCL 769.10, 769.11, and 769.12).

The bill does not prohibit a person from being charged with, convicted of, or punished for any other violation of law the person commits while violating the bill.

The bill defines "person in a relationship of trust" as a person who is a caregiver; relative by blood,

marriage, or adoption; household member; court-appointed fiduciary; or other person who is entrusted with or has assumed responsibility for the management of the vulnerable adult's money or property. "Vulnerable adult" means an individual, 18 years old or over, who, because of age, developmental disability, mental illness, or disability, whether or not determined by a court to be an incapacitated individual in need of protection, lacks the cognitive skills required to manage his or her property.

Senate Bill 597

The bill includes in the sentencing guidelines the felony violations of embezzlement by a person in a relationship of trust with a vulnerable adult, as enacted by Senate Bill 378. Embezzlement by a person in a relationship of trust with a vulnerable adult of \$1,000 to \$20,000 or with prior convictions is a Class E property felony, with a statutory maximum sentence of five years' imprisonment. Embezzlement by a person in a relationship of trust with a vulnerable adult of \$20,000 or more or \$1,000 to \$20,000 with prior convictions is a Class D property felony, with a statutory maximum sentence of 10 years' imprisonment.

MCL 750.174a (S.B. 378)
777.16i (S.B. 597)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Strong punitive actions should be taken against those in a position of trust who exploit the elderly and infirm, whether acting as a caretaker informally or in an official capacity. According to testimony before the Senate Judiciary Committee by the Director of the Bay County Division on Aging, the elderly sometimes suffer neglect and financial exploitation at the hands of caregivers who are remiss in their duties. Often, the abuser is someone in a position of trust or someone who has established access and opportunity to take advantage of a vulnerable senior citizen.

Several dilemmas have arisen in efforts 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 friend or relative if that arrangement is informal and not court-ordered. In order to deter this kind of exploitation of vulnerable adults either by trusted persons acting as caretakers or by court-appointed fiduciaries, and to punish that activity appropriately, the bills establish a specific criminal prohibition with severe penalties.

Supporting Argument

Senate Bill 378 includes graduated penalties with more severe sanctions applying for greater amounts of money or property inappropriately obtained and for repeat offenders. This tiered penalty structure should serve as a greater deterrent than would a flat penalty that applied regardless of the circumstances of the crime.

Opposing Argument

It may be ill-advised to provide an exception from prosecution for certain people, as Senate Bill 378 does for financial institutions, brokers, and their directors, employees, or agents. If an employee of a financial institution or broker engages in fraud, deceit, misrepresentation, or unjust enrichment, he or she should be subject to the bill's sanctions as would anyone else who violated a vulnerable adult's trust.

Response: The exemption for brokers and financial institutions is limited to actions that are within the normal course of business. Without the exemption, it is possible that the bill could be interpreted to prohibit the collection of legitimate fees or other charges assessed for services rendered, such as overdraft fees charged for bounced checks.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bills will have an indeterminate fiscal impact on State and local government. There are no data available to indicate how many people in a relationship of trust with a vulnerable adult may be convicted of embezzlement. The longest maximum penalty established for this crime of 10 years' imprisonment is similar to the penalty for embezzlement by an agent under MCL 750.174. In 1998, there were 72 people committed to State correctional facilities for violation of MCL 750.174 with an average minimum sentence of 2.1 years.

Based on the number of prior convictions or the dollar value of the embezzlement, Senate Bill 597 classifies this crime as a Class D felony with a minimum sentence range from 0-6 months to 43-79 months, and as a Class E felony with a minimum sentence range from 0-3 months to 24-38 months. Assuming that the number of offenders and the average minimum sentence imposed for this crime is equal to the 1998 data for violation of MCL 750.174, given that the annual cost of incarceration is \$22,000, the cost for offenders convicted of this crime will be \$3.3 million. Assuming that the number of offenders remains equal to the 1998 data, but half of the offenders serve the longest minimum sentence for each of the crime classes, the cost for offenders convicted of this crime will be \$7.7 million.

Fiscal Analyst: K. Firestone

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.