

Nuts & Bolts: The New Florida Statute §825.1035 Injunction for Protection Against Exploitation of Vulnerable Adults

Audio Webcast CLE of the Florida Bar Elder Law Section
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Overview

- Brief history
- Elements of Exploitation
- The Relief
- The Process
- The Petition
- Violations

History

Elements of Exploitation

“Vulnerable Adult” (VA)

- 18 years old and older
- Impaired ability to
 - Perform normal activities of daily living (e.g., meal preparation and eating, bathing, dressing, grooming, toileting (or continence), ambulation (transferring or walking) OR
 - Provide for own care or protection
- Impairment is due to any of the following: disability (mental, emotional, sensory, long-term physical or developmental), brain damage, or infirmities of aging

What is “Exploitation”?

- Defined the same as criminal exploitation in §825.103(1), Fla. Stat.
- Five different types are set out, involving different actions and relationships with the VA

1. Depriving the VA of their funds or property

- Using or trying to use a VA's funds or property with intent to deprive the VA of the use, or to benefit someone else
- By someone who either
 - Is in a position of trust and confidence with the VA OR
 - Has a business relationship with the VA

2. *Depriving the VA with diminished capacity of funds or property*

- Using or trying to use a VA's funds or property with intent to deprive the VA them of the use, or to benefit someone else
- By a person who knew or should know that the VA lacks capacity to consent

3. Breach of fiduciary duty

- Fiduciary includes a trustee, guardian, or agent under a POA
- Unauthorized appropriation, sale or transfer of the VA's property (VA does not receive reasonable value), OR
- Fiduciary violates the following duties:
 - Fraud in appointment;
 - Abuse of powers;
 - Wasting, embezzling or intentionally mismanaging assets;
 - If agent under a POA, acting contrary to the principal's sole benefit or best interest

4. *Bank account misuse*

- Misappropriation, misuse or transfer without authorization of funds belonging to the VA IF the VA was the sole contributor or payee of the funds
- Applies only to
 - Personal accounts
 - Joint accounts created with the intent that the VA has all rights to the money deposited
 - Convenience accounts (see §655.80, F.S.)

5. Failure to provide necessities

- Intentional or negligent failure to effectively use the VA's income and assets for necessities of support and maintenance
- By a
 - Caregiver, OR
 - Person who stands in a position of trust and confidence

Injunctive Relief

Temporary *ex parte* injunction

- For a limit of 15 days without notice to the respondent (*ex parte*).
- The court can:
 - Prohibit contact, including awarding possession of dwelling to VA
 - Freeze assets or credit lines of VA, even if held jointly or in respondent's name only
 - Allow for certain expenses to be paid notwithstanding a freeze, if the need is set out in the Petition
 - Provide directives to law enforcement officers

Injunctive Relief After Hearing

- Continue the temporary injunction, in whole or part
- Restrain the respondent from exploiting
- Award the VA exclusive use and possession of the dwelling (after confirming the availability of alternate caregivers, if needed)
- Ordering the respondent to participate in treatment
- Directing assets to be returned to the VA or remain frozen until ownership can be determined
- If there has been exploitation, order respondent to pay costs
- Order other relief necessary to protect the VA

The Process

Who can bring the action?

- The Vulnerable Adult (“VA”)
- The VA’s guardian
- A person or organization action on behalf of the VA *with consent* of the VA or guardian.
- A person who also files for appointment of emergency temporary guardian of the VA

Fees and Costs

- No attorney is required
- No filing fees can be assessed
- The clerk can arrange for service
- Respondent may have to pay costs if exploitation is found. Petitioner is only responsible for “actual damages” if there was no substantial fact or legal support

Venue

- In circuit where VA resides OR
- If there is a pending guardianship, it is filed in that proceeding

Clerk's Role

- Providing an informational brochure about exploitation and why you should not provide false information to the court
- Providing simplified petition forms and instructions
- Providing forms to report violations of an injunction
- Facilitate (but not provide legal advice) on filling out forms
- Service of pleadings and orders (via sheriff or law enforcement agency)

Other help

- *Advocates from State Attorney's Office, law enforcement, or APS* can be present with petitioner or respondent at any court hearing
- *APS* must provide the court the results of "any relevant investigations" related to the VA within 72 hours of receipt of any petition or order.
- *Law enforcement* may accompany the VA to assure that possession of a dwelling is returned to the VA, pursuant to the court's order.

Orders on Temporary Injunction

1. **Denied** - Court must enter order noting legal grounds
 - Petitioner can file an amended petition to correct, if possible
2. **Denied, but solely on the failure to show immediate danger**
 - Court still must set hearing "at earliest possible date"
3. **Granted**
 - Order sets hearing within 15 days

Evidentiary Hearing

- All hearings are recorded.
- Both petitioner and respondent will have the right to call witnesses at a hearing.
- The normal rules of evidence apply, including exclusion of hearsay and authentication of documents.
- Judicial notice can be taken of any court records.

Legal Requirements for Injunction

- Being exploited or in imminent danger of being exploited
- Likelihood of irreparable harm
- Substantial likelihood of success on merits
- Threatened injury to the VA outweighs possible harm to the respondent

The Petition

The Petition

- Must be **verified**
- Petitioner swears to have called APS report on allegations of exploitation
- Form is set out in statute, but a simplified or clarified version will likely be available from clerk
- Allege sufficient facts to establish the likelihood that exploitation is, or is in imminent danger of occurring.

Contents of Petition

- **About the Respondent**

- Identification and contact information
- How associated with VA (caregiver, fiduciary, position of trust or confidence?)
- Any pending actions between VA and respondent

- **About the VA**

- Why is petitioner a vulnerable adult?
- Who is responsible for care, and are alternate arrangements available or needed?

Contents of Petition, continued

- **About the exploitation**

- Describe in detail (including dates) all incidents of actual or threatened exploitation
- List “exploited” assets, accounts, lines of credit, approximate worth and related financial institutions
- Provide any critical expenses of VA that must be paid, notwithstanding a freeze

Signs of likely exploitation

- Previous history of exploitation by respondent
- VA's capacity to make financial decisions is impaired
- Evidence of undue influence
- Any criminal history of respondent or probable cause findings by APS

Supporting Documents

- **Affidavits:** If any witnesses other than the Petitioner can testify about the exploitation, a written affidavit (sworn and notarized) of their statement can be attached to the petition. This person should be available to testify at an evidentiary hearing, as well.
- **Other Evidence:** This could include law enforcement reports, APS reports, any bank statements, letters or emails from the respondent, etc. *Any documents that are attached should be referenced in the verified Petition or a supporting Affidavit to identify the document and its contents.*

Motions and such

- *Notice of Confidential Information*: See FL Rule of Judicial Administration 2.425 The Notice will direct the clerk to redact before making public.
- *Request for accommodations for disabilities (ADA)*
- *Motion to Testify by Telephone or Video*: The ADA request for accommodations does NOT include cases where the victim or any witness may be too ill to travel to the court, but could testify at the hearing by phone. It is recommended that you file this motion along with the petition. Any testimony by phone or video requires the presence of a notary to verify identification and swear in the witness.

Violations of Injunction

§825.1036 Criminal Options

- Petitioner files affidavit with Clerk explaining violation
- Clerk forward to State Attorney, Judge, and LEA
- LEA has 20 days to investigate and send findings to SA
- SA has 30 business days to determine action (file criminal charges, motion for order to show cause, notice of continued investigation)
- If IMMEDIATE danger, judge may appoint a SA to act sooner
- LEO may make a warrantless arrest if probable cause

By Financial Institution

- A financial institution directed to freeze assets is not a party and can't be held in contempt.
- It can only be held responsible for a "knowing and intentional violation of the injunction."

Missing Bolts

- Which judge or division will hear these injunctions
- Whether the temporary injunction and final hearing will be before the same judge/division
- Whether a Request to Dismiss can be filed along with the Petition in the event the temporary injunction is denied, but set for hearing
- How APS investigations will interplay with injunction action

Questions and Comments

Stories, Questions and Concerns

- We would like to collect information on how this is working, questions that arise, and procedures adopted by courts across the state. Please email:
- Lreithmiller@floridabar.org
- Put “**Exploitation Injunction**” in the subject line