HOUSE DOCKET, NO. 4128 FILED ON: 2/28/2014

HOUSE . . . . . No. 4077

The Commonwealth of Massachusetts

PRESENTED BY:

Paul R. Heroux

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to the prevention of financial exploitation of the elderly.

PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
Paul R. Heroux	*2nd Bristol*	*2/28/2014*

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HOUSE . . . . . No. 4077

By Mr. Heroux of Attleboro, a petition (subject to Joint Rule 12) of Paul R. Heroux relative to the prevention of financial exploitation of the elderly. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Fourteen

An Act relative to the prevention of financial exploitation of the elderly.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 266 of the General Laws is hereby amended by inserting after section 25 the following section:

Section 25A.

(a) For purposes of this section, the following terms shall have the following meanings:-

"Deception", a misrepresentation or concealment of material fact relating to the terms of a contract or agreement entered into with the elderly person or to the existing or preexisting condition of any of the property involved in such contract or agreement, or the use or employment of any misrepresentation, false pretense or false promise in order to induce, encourage or solicit the elderly person to enter into a contract or agreement. Deception includes:

(i) Creating or confirming another person's impression which is false and which the offender does not believe to be true;

(ii) Failure to correct a false impression which the offender previously has created or confirmed;

(iii) Preventing another person from acquiring information pertinent to the disposition of the property involved;

(iv) Selling or otherwise transferring or encumbering property, failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; and

(v) Promising performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not sufficient evidence to prove that the offender did not intend to perform;

"Elderly person", a person 60 years of age or older.

"Intimidation", a threat of physical or emotional harm to an elderly person, or the communication to an elderly person that he or she will be deprived of food and nutrition, shelter, prescribed medication, or medical care and treatment.

"Undue influence", use of influence by 1 person or entity over an elderly person in order to take unfair advantage of that person's vulnerable state of mind, neediness, pain, or agony. Undue influence includes, but is not limited to, the improper or fraudulent use of a power of attorney, guardianship, conservatorship, or other fiduciary authority.

(b) Whoever, after having been convicted of said crime commits a first such crime, shall be punished by a punishment commensurate with the level of severity of the crime as determined by the court.

(c) Whoever, after having been convicted of said crime commits a second or subsequent such crime, shall be punished by imprisonment. The provisions of section 87 of chapter 276 relating to the power of the court to place certain offenders on probation may apply to any person 18 years of age or over charged with a violation of this subsection.

(d) If a person is charged with financial exploitation of an elderly person that involves the taking or loss of property valued at more than $2,500, a prosecuting attorney may file a petition with the court of the county in which the defendant has been charged to freeze the assets of the defendant in an amount equal to but not greater than the alleged value of lost or stolen property in the defendant's pending criminal proceeding for purposes of restitution to the victim. The burden of proof required to freeze the defendant's assets shall be by a preponderance of the evidence.

A person commits the crime of financial exploitation of an elderly person if:

(i) such person knowingly by deception, intimidation, undue influence, or force obtains control over the elderly person's property with the intent to permanently deprive the elderly person of the use, benefit or possession of his or her property thereby benefitting such person or detrimentally affecting the elderly person;

(ii) such a person obtains or uses, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person’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, by a person who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent; or

(iii) such a person breaches a fiduciary duty to an elderly person by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.

(c) Nothing in this section shall be construed to limit the remedies available to the victim pursuant to any state law relating to domestic violence.

(d) Nothing in this section shall be construed to impose criminal liability on a person who has made a good faith effort to assist the elderly person in the management of his or her property, but through no fault of his or her own has been unable to provide such assistance.

(e) Nothing in this section shall limit the ability to engage in bona fide estate planning, to transfer property and to otherwise seek to reduce estate and inheritance taxes; provided that such actions do not adversely impact the standard of living to which the elderly person has become accustomed at the time of such actions.

(f) It shall not be a defense to financial exploitation of an elderly person that the accused reasonably believed that the victim was not an elderly person.

(g) (1) It shall be unlawful in violation of this section for any person receiving or in the possession of funds of a Medicaid-eligible elderly person residing in a Commonwealth licensed facility who intentionally fail to remit to the facility in which the Medicaid-eligible person resides all money owing the facility resident from any source, including, but not limited to, Social Security, railroad retirement, or payments from any other source disclosed as resident income contained in the records of the department of social services, family support division or its successor. The appropriate state agency, family support division or its successor is authorized to release information from its records containing the resident's income or assets to any prosecuting or circuit attorney in the commonwealth for purposes of investigating or prosecuting any suspected violation of this section.

(2) The prosecuting attorney of any county containing a commonwealth licensed facility, who successfully prosecutes a violation of the provisions of this subsection, may request the court of the county in which the offender admits to or is found guilty of a violation, as a condition of sentence or probation, to order restitution of all amounts unlawfully withheld from a facility in his or her county. Any order of restitution entered by the court or by agreement shall provide that 10 per cent of any restitution installment or payment paid by or on behalf of the defendant or defendants shall be paid to the prosecuting or circuit attorney of the county successfully prosecuting the violation to compensate for the cost of prosecution with the remaining amount to be paid to the facility. If the defendant committed financial exploitation as a

result of supporting a substance abuse addiction, when appropriate the preferred sentence shall include treatment for the substance abuse addiction and restitution for the first offense.

(h) Civil Liability. A person who is charged by information or indictment with the offense of financial exploitation of an elderly person or person with a disability and who fails or refuses to return the victim's property within 60 days following a written demand from the victim or the victim's legal representative shall be liable to the victim or to the estate of the victim in damages of treble the amount of the value of the property obtained, plus reasonable attorney fees and court costs. The burden of proof that the defendant unlawfully obtained the victim's property shall be by a preponderance of the evidence. This subsection shall be operative whether or not the defendant has been convicted of the offense.