STATE OF OKLAHOMA

1st Session of the 51st Legislature (2007)

SENATE BILL 398 By: Adelson

AS INTRODUCED

An Act relating to mental health; amending 43A O.S. 2001, Sections 10-103, as last amended by Section 2, Chapter 332, O.S.L. 2003, 10-104, as amended by Section 1, Chapter 399, O.S.L. 2003, 10-108, as amended by Section 8, Chapter 332, O.S.L. 2003 (43A O.S. Supp. 2006, Sections 10-103, 10-104 and 10-108), which relate to the Protective Services for Vulnerable Adults Act; adding definition; adding persons required to make certain report; authorizing certain court order; authorizing certain eviction; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 43A O.S. 2001, Section 10-103, as last amended by Section 2, Chapter 332, O.S.L. 2003 (43A O.S. Supp. 2006, Section 10-103), is amended to read as follows:

Section 10-103. A. When used in the Protective Services for Vulnerable Adults Act:

1. "Protective services" means services which are necessary to aid a vulnerable adult in meeting the essential requirements for mental or physical health and safety that the vulnerable adult is unable to provide or obtain without assistance. The term

"protective services" includes but is not limited to services provided to or obtained for such person in order to prevent or remedy the abuse, neglect, or exploitation of such person;

2. "Services which are necessary to aid an individual to meet essential requirements for mental or physical health and safety" include, but shall not be limited to:

a. the identification of vulnerable adults in need of the services,

b. the provision of medical care for physical and mental health needs,

c. the provision of social services assistance in personal hygiene, food, clothing, and adequately heated and ventilated shelter,

d. protection from health and safety hazards,

e. protection from physical mistreatment,

f. guardianship referral,

g. outreach programs, and

h. the transportation necessary to secure any of such services.

The term shall not include taking the person into physical custody without the consent of the person except as provided for in Sections 10-107 and 10-108 of this title, and the evaluation, monitoring, and provision of protective placements;

3. "Meet essential requirements for mental or physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which physical injury or illness to the vulnerable adult is likely to occur;

4. "Incapacitated person" means:

a. any person eighteen (18) years of age or older:

(1) who is impaired by reason of mental or physical illness or disability, dementia or related disease, mental retardation, developmental disability or other cause, and

(2) whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that such person lacks the capacity to manage his or her financial resources or to meet essential requirements for his or her mental or physical health or safety without assistance from others, or

b. a person for whom a guardian, limited guardian, or conservator has been appointed pursuant to the Oklahoma Guardianship and Conservatorship Act;

5. "Vulnerable adult" means an individual who is an incapacitated person or who, because of physical or mental

disability, incapacity, or other disability, is substantially impaired in the ability to provide adequately for the care or custody of himself or herself, or is unable to manage his or her property and financial affairs effectively, or to meet essential requirements for mental or physical health or safety, or to protect himself or herself from abuse, verbal abuse, neglect, or exploitation without assistance from others;

6. "Caretaker" means a person who has:

a. the responsibility for the care of a vulnerable adult or the financial management of the resources of a vulnerable adult as a result of a family relationship,

b. assumed the responsibility for the care of a vulnerable adult voluntarily, by contract, or as a result of the ties of friendship, or

c. been appointed a guardian, limited guardian, or conservator pursuant to the Oklahoma Guardianship and Conservatorship Act;

7. "Department" means the Department of Human Services;

8. "Abuse" means causing or permitting:

a. the infliction of physical pain, injury, sexual abuse, sexual exploitation, unreasonable restraint or confinement, or mental anguish, or

b. the deprivation of nutrition, clothing, shelter, health care, or other care or services without which

serious physical or mental injury is likely to occur to a vulnerable adult by a caretaker or other person providing services to a vulnerable adult;

9. "Exploitation" or "exploit" means an unjust or improper use of the resources of a vulnerable adult for the profit or advantage, pecuniary or otherwise, of a person other than the vulnerable adult through the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense;

10. “Financial neglect” means the repeated instances by a caretaker who has assumed the role of financial management, of failure to use the resources available to restore or maintain the health and physical well-being of a vulnerable adult, including, but not limited to:

a. squandering or negligently mismanaging a vulnerable adult’s money, property, or accounts,

b. refusing to pay for necessities or utilities in a timely manner, or

c. providing substandard care to a vulnerable adult despite the availability of adequate financial resources;

11. "Neglect" means:

a. the failure to provide protection for a vulnerable adult who is unable to protect his or her own interest,

b. the failure to provide a vulnerable adult with adequate shelter, nutrition, health care, or clothing, or

c. negligent acts or omissions that result in harm or the unreasonable risk of harm to a vulnerable adult through the action, inaction, or lack of supervision by a caretaker providing direct services;

~~11.~~ 12. "Sexual abuse" means:

a. oral, anal, or vaginal penetration of a vulnerable adult by or through the union with the sexual organ of a caretaker or other person providing services to the vulnerable adult, or the anal or vaginal penetration of a vulnerable adult by a caretaker or other person providing services to the vulnerable adult with any other object, or

b. for the purpose of sexual gratification, the touching, feeling or observation of the body or private parts of a vulnerable adult by a caretaker or other person providing services to the vulnerable adult, or

c. indecent exposure by a caretaker or other person providing services to the vulnerable adult;

~~12.~~ 13. “Indecent exposure” means forcing or requiring a vulnerable adult to:

a. look upon the body or private parts of another person or upon sexual acts performed in the presence of the vulnerable adult, or

b. touch or feel the body or private parts of another;

~~13.~~ 14. "Self-neglect" means the action or inaction of a vulnerable adult which causes that person to fail to meet the essential requirements for physical or mental health and safety due to the vulnerable adult's lack of awareness, incompetence or incapacity;

~~14.~~ 15. "Sexual exploitation" includes, but is not limited to, a caretaker's causing, allowing, permitting or encouraging a vulnerable adult to engage in prostitution or in the lewd, obscene, or pornographic photographing, filming or depiction of the vulnerable adult as those acts are defined by state law; and

~~15.~~ 16. "Verbal abuse" means the use of words, sounds, or other communication including, but not limited to, gestures, actions or behaviors, by a caretaker or other person providing services to a vulnerable adult that are likely to cause a reasonable person to experience humiliation, intimidation, fear, shame or degradation.

B. Nothing in this section shall be construed to mean a vulnerable adult is abused or neglected for the sole reason the vulnerable adult, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the practices of a recognized religious method of healing, for the treatment or cure of

disease or remedial care, or a caretaker or other person responsible, in good faith, is furnishing such vulnerable adult spiritual means alone through prayer, in accordance with the tenets and practices of a recognized church or religious denomination, for the treatment or cure of disease or remedial care in accordance with the practices of or express consent of the vulnerable adult.

SECTION 2. AMENDATORY 43A O.S. 2001, Section 10-104, as amended by Section 1, Chapter 399, O.S.L. 2003 (43A O.S. Supp. 2006, Section 10-104), is amended to read as follows:

Section 10-104. A. Any person having reasonable cause to believe that a vulnerable adult is suffering from abuse, neglect, or exploitation shall make a report as soon as the person is aware of the situation to:

1. The Department of Human Services; or

2. The municipal police department or sheriff's office in the county in which the suspected abuse, neglect, or exploitation occurred.

B. Persons required to make reports pursuant to this section shall include, but not be limited to:

1. Physicians;

2. Operators of emergency response vehicles and other medical professionals;

3. Social workers and mental health professionals;

4. Law enforcement officials;

5. Staff of domestic violence programs;

6. Long-term care facility personnel~~; and~~, including staff of nursing facilities, intermediate care facilities for persons with mental retardation, assisted living facilities, and residential care facilities;

7. Other health care professionals;

8. Representatives of financial institutions, including banks and credit unions;

9. Staff of residential care facilities, group homes, or employment settings for individuals with developmental disabilities; and

10. Job coaches, community service workers, and personal care assistants.

C. 1. If the report is not made in writing in the first instance, as soon as possible after it is initially made by telephone or otherwise, the report shall be reduced to writing by the Department of Human Services, in accordance with rules promulgated by the Commission for Human Services, or the local municipal police or sheriff's department whichever entity received the initial report. The report shall contain the following information:

a. the name and address of the vulnerable adult,

b. the name and address of the caretaker, guardian, or person having power of attorney over the vulnerable adult's resources if any,

c. a description of the current location of the vulnerable adult,

d. a description of the current condition of the vulnerable adult, and

e. a description of the situation which may constitute abuse, neglect or exploitation of the vulnerable adult.

2. If federal law specifically prohibits the disclosure of any of the information required by this subsection, that information may be excluded from the report.

D. If the initial report is made to the local municipal police department or sheriff's office, such police department or sheriff's office shall notify, as soon as possible, the Department of Human Services of its investigation.

E. Any person who knowingly and willfully fails to promptly report any abuse, neglect, or exploitation as required by the provisions of subsection A of this section, upon conviction, shall be guilty of a misdemeanor punishable by imprisonment in the county jail for a term not exceeding one (1) year or by a fine of not more than One Thousand Dollars ($1,000.00), or by both such fine and imprisonment.

F. 1. Any person participating in good faith and exercising due care in the making of a report pursuant to the provisions of this section shall have immunity from any civil or criminal liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from the report.

2. The same immunity from any civil or criminal liability shall also be extended to previous employers of a person employed to be responsible for the care of a vulnerable adult, who in good faith report to new employers or prospective employers of such caretaker any misconduct of the caretaker including, but not limited to, abuse, neglect or exploitation of a vulnerable adult, whether confirmed or not.

G. Any person who willfully or recklessly makes a false report shall be civilly liable for any actual damages suffered by the person being reported and for any punitive damages set by the court or jury which may be allowed in the discretion of the court or jury.

H. 1. Every physician or other health care professional making a report concerning the abuse, neglect or exploitation of a vulnerable adult, as required by this section, or examining a vulnerable adult to determine the likelihood of abuse, neglect or exploitation, and every hospital in which a vulnerable adult is examined or treated for abuse, neglect or exploitation shall disclose necessary health information related to the case and

provide, upon request by either the Department of Human Services or the local municipal police or sheriff's department receiving the initial report, copies of the results or the records of the examination on which the report was based, and any other clinical notes, x-rays or photographs and other health information which is related to the case if:

a. the vulnerable adult agrees to the disclosure of the health information, or

b. the individual is unable to agree to the disclosure of health information because of incapacity; and

(1) the requesting party represents that the health information for which disclosure is sought is not intended to be used against the vulnerable adult in a criminal prosecution but to provide protective services pursuant to the Protective Services for Vulnerable Adults Act,

(2) the disclosure of the information is necessary to conduct an investigation into the alleged abuse, neglect or exploitation of the vulnerable adult subject to the investigation, and

(3) immediate enforcement activity that depends upon the disclosure:

(a) is necessary to protect the health, safety and welfare of the vulnerable adult because of incapacity, or

(b) would be materially and adversely affected by waiting until the vulnerable adult is able to agree to the disclosure.

2. If federal law specifically prohibits the disclosure of any of the information required by this subsection, that information may be excluded from the disclosed health information.

I. After investigating the report, either the county office of the Department of Human Services or the municipal police department or sheriff's office, as appropriate, shall forward its findings to the office of the district attorney in the county in which the suspected abuse, neglect, or exploitation occurred.

J. Any state or county medical examiner or physician who has reasonable cause to suspect that the death of any vulnerable adult may be the result of abuse or neglect as defined by Section 10-103 of this title shall make a report to the district attorney or other law enforcement official of the county in which the death occurred. The report shall include the name of the person making the report, the name of the deceased person, the facts or other evidence supporting such suspicion, and any other health information that may be of assistance to the district attorney in conducting an investigation into the matter.

K. No employer shall terminate the employment, prevent or impair the practice or occupation of or impose any other sanction on any employee solely for the reason that the employee made or caused to be made a report or cooperated with an investigation pursuant to the Protective Services for Vulnerable Adults Act. A court, in addition to other damages and remedies, may assess reasonable attorney fees against an employer who has been found to have violated the provisions of this subsection.

SECTION 3. AMENDATORY 43A O.S. 2001, Section 10-108, as amended by Section 8, Chapter 332, O.S.L. 2003 (43A O.S. Supp. 2006, Section 10-108), is amended to read as follows:

Section 10-108. A. 1. If the Department of Human Services determines that a vulnerable adult is suffering from abuse, neglect, or exploitation presenting a substantial risk of death or immediate and serious physical harm to the person or financial exploitation of the estate of the person, and the vulnerable adult lacks mental capacity to consent to receive protective services and no consent can be obtained, the Department may petition the district court in the county specified by paragraph 3 of this subsection for an order:

a. authorizing involuntary protective services and appointing a temporary guardian of the person and/or the estate,

b. freezing the assets of the vulnerable adult, if the vulnerable adult is being exploited, establishing any

new accounts necessary to pay the daily living expenses of the vulnerable adult, and directing a full accounting and investigation of the person alleged to be improperly managing the estate of the vulnerable adult, or

c. suspending or revoking the powers of an attorney-in-fact granted by a durable power of attorney, or revoking an irrevocable trust, or terminating a guardianship or conservatorship established pursuant to the Oklahoma Guardianship and Conservatorship Act.

2. Under no circumstances shall the court authorize the Department, pursuant to this subsection, to consent or deny consent to a Do-Not-Resuscitate order or the withdrawal of hydration or nutrition or other life-sustaining treatment although the court retains jurisdiction to hear such matters under applicable law.

3. The district court which may be petitioned by the Department for an order pursuant to paragraph 1 of this subsection is:

a. the district court in the county in which the vulnerable adult resides,

b. the district court in the county in which the vulnerable adult is receiving inpatient services, or

c. the district court in the county where the vulnerable adult is located when any delay caused by taking the petition to the district court in the county of the

residence of the vulnerable adult would result in greater substantial risk of death or greater serious physical harm to the vulnerable adult. The petition shall include an explanation of why the petition was filed in the district court in the county specified by this subparagraph rather than in the district court as specified in subparagraph a or b of this paragraph.

B. The petition shall be sworn to and include the name, age, and address of the vulnerable adult who the Department has determined is in need of emergency protective services, the nature of the abuse, neglect, or exploitation, the services needed, and information relating to the capacity of the person to consent to services and a description of the attempts of the Department to obtain consent and the name of the person or organization proposed to be appointed as temporary guardian.

C. 1. The vulnerable adult shall receive an opportunity for a hearing upon the petition, and shall be personally served with a copy of the petition and a notice scheduling hearing at least forty-eight (48) hours prior to any such hearing if the petition seeks temporary guardianship of thirty (30) days or more.

2. a. The hearing shall be set by the court on an expedited basis, but no later than five (5) calendar days, not including weekends or holidays when the court is closed, from the date the notice scheduling hearing is

signed by the judge. The vulnerable adult shall have a right to a closed hearing unless such vulnerable adult requests otherwise.

b. Unless the vulnerable adult objects or the person requiring notification pursuant to this subparagraph is alleged to have abused, neglected or exploited the vulnerable adult, the following persons shall be notified of any hearing held pursuant to this subsection:

(1) the legal guardian, guardian ad litem and caretaker of the vulnerable adult,

(2) any person so requested by the vulnerable adult to be present at the hearing, and

(3) persons required to be notified pursuant to Section 3-110 of Title 30 of the Oklahoma Statutes.

D. 1. Upon sworn testimony of a representative of the Department, or statement of a district attorney representing the Department, that immediate and reasonably foreseeable death or serious physical harm to or financial exploitation of the vulnerable adult will result, the court may waive prior notice and issue a seventy-two-hour temporary guardianship and provide involuntary protective services whether or not during regular courthouse business hours. However, within twenty-four (24) hours of issuance

of the seventy-two-hour order, the vulnerable adult and the attorney of the vulnerable adult, if known, shall be personally served with written notice scheduling a hearing within seventy-two (72) hours.

2. If a hearing on the seventy-two-hour order is declined, or upon conclusion of any such hearing, the court may terminate the temporary guardianship and involuntary services or enter a temporary guardianship for up to thirty (30) additional calendar days as provided for in subsection G of this section.

E. 1. The vulnerable adult has a right to be present and represented by counsel at any hearing authorized by this section. If the vulnerable adult is indigent or, in the determination of the court, lacks capacity to waive the right to counsel, the court shall immediately appoint counsel who shall personally meet with the vulnerable adult and attempt to discuss the petition or any pending motion prior to any hearing.

2. If the vulnerable adult is not in attendance at a scheduled hearing, the court shall make a special finding as to why the vulnerable adult is unable to attend, and, upon the request of the vulnerable adult or the attorney of the vulnerable adult, may continue the hearing to allow the vulnerable adult to attend.

3. If the vulnerable adult is indigent, the cost of representation by counsel shall be borne by court funds.

4. If the vulnerable adult is not indigent, the court may order costs of representation paid from the estate in the same manner as

currently paid under the Oklahoma Guardianship and Conservatorship Act.

F. 1. After a hearing on the petition, the court may:

a. appoint a temporary guardian and order involuntary protective services including, but not limited to, authorization for medical and/or psychological treatment and evaluations, and residential placement subject to the provisions of subsection G of this section,

b. issue an order freezing all assets of the vulnerable adult, establish any new accounts necessary to pay the daily living expenses of the vulnerable adult, and order a full accounting and investigation of the person alleged to be improperly managing the vulnerable adult's estate, or

c. suspend or revoke powers of attorney or terminate a guardianship or conservatorship upon a finding that the attorney-in-fact, guardian or conservator failed to act appropriately on behalf of the vulnerable adult.

2. a. Except as otherwise provided by subparagraphs b and c of this paragraph, the court appointing a temporary guardian and ordering involuntary protective services

shall not have authority to order the sale of the real property of the vulnerable adult.

b. If the Department of Human Services has been appointed temporary guardian and the court issues an order for the Department to continue as the temporary guardian of the vulnerable adult beyond the one hundred eighty (180) calendar days authorized by this section because there is no one willing and able to act as guardian for the vulnerable adult, the Department, as temporary guardian may, after one (1) year from its initial appointment, sell the real property of a vulnerable adult pursuant to the provisions of the Oklahoma Guardianship and Conservatorship Act.

c. The Department, as temporary guardian of a vulnerable adult, may also sell the real property of the vulnerable adult pursuant to the provisions of the Oklahoma Guardianship and Conservatorship Act prior to the one-year requirement specified in subparagraph b of this paragraph, if not selling the real property would jeopardize the vulnerable adult's eligibility for Medicaid. The fact that the vulnerable adult would be in jeopardy for receipt of Medicaid if the property was not sold shall be stated upon the court

order directing the sale of the real property of the vulnerable adult.

d. The court may issue an order authorizing the Department to sell personal property of a vulnerable adult when additional resources are required to pay for necessary care for the vulnerable adult pursuant to state law.

G. Whenever the court issues an order for involuntary protective services, the court shall adhere to the following limitations:

1. Only such protective services as are necessary to remove the conditions creating the emergency shall be ordered, and the court shall specifically designate the approved services in the order of the court;

2. Protective services authorized by an involuntary protective services order shall not include a change of residence unless the court specifically finds such action is necessary to remove the conditions creating the emergency and gives specific approval for such action in the order of the court. Emergency placement may be made to such facilities as nursing homes, hospital rehabilitation centers, assisted living centers, foster care and in-home placements, or to other appropriate facilities; provided, however, emergency placement shall not be made to facilities for the acutely mentally ill; and

3. Involuntary protective services may be provided for a period not to exceed thirty (30) calendar days except as provided by subsections L and M of this section.

H. The court shall appoint the Department or an interested person or organization as temporary guardian of the person with responsibility for the welfare of such person and authority to give consent on behalf of the person for the approved involuntary protective services until the expiration of the order.

I. The issuance of an order for involuntary protective services and the appointment of a temporary guardian shall not deprive the vulnerable adult of any rights except to the extent validly provided for in the order or appointment.

J. 1. To enforce an order for involuntary protective services, the court may authorize:

a. forcible entry of the premises of the vulnerable adult to be protected for the purpose of rendering protective services but only after a reasonable showing to the court that good faith attempts to gain voluntary access to the premises have failed and forcible entry is necessary, ~~and~~

b. the transporting of the vulnerable adult to another location for the provision of involuntary services, and

c. the eviction of persons who are in a position to exploit the vulnerable adult from any property owned, leased, or rented by the vulnerable adult and restriction of those persons' further access to any property of the vulnerable adult.

2. If forcible entry is authorized by the court, the order shall include a directive that the Department's representative be accompanied by a police officer or deputy sheriff in the county where the vulnerable adult or property of the vulnerable adult is located, and the police officer or deputy sheriff shall make the forcible entry.

K. The vulnerable adult, the temporary guardian, or any interested person may petition the court to have the order to provide involuntary protective services set aside or modified at any time.

L. If the vulnerable adult continues to need involuntary protective services after expiration of the thirty-day temporary guardianship provided in subsection G of this section, the temporary guardian shall immediately file a verified motion requesting the court to, except as otherwise provided by subsection F of this section, continue the temporary guardianship and involuntary protective services under this section for a period not to exceed one hundred eighty (180) calendar days.

M. 1. Service of the verified motion shall be made in conformity with subsection C of this section.

2. Upon filing such motion, the court shall order that a physical, mental, and social evaluation of the vulnerable adult be conducted by the Department and that a proposed plan of care be submitted to the court within thirty (30) calendar days thereafter reflecting the evaluation findings and recommended services.

3. Upon filing such motion, the prior temporary guardianship shall remain in full force and effect pending a review hearing after the thirty-day evaluation period. The caretaker, guardian or next-of-kin of the vulnerable adult may request that the evaluation period be shortened for good cause.

4. The evaluation shall include at least the following information:

a. the address of the place where the person is residing and the person or agency which is providing care, treatment, or services at present,

b. a summary of the professional treatment and services provided to the person by the Department or agency, if any, in connection with the problem creating the need for emergency protective services, and

c. a medical and social evaluation, including, but not limited to, the Department's assessment of the person's capacity to consent to services, a

psychological or psychiatric evaluation and review if the mental state of the person is in question, and any recommendations for or against maintenance of partial legal rights. The evaluation and review shall include recommendations for placement based upon the best interests of the vulnerable adult taking into consideration the following:

(1) the least restrictive environment,

(2) the desires of the vulnerable adult and legal guardian,

(3) the desires of the caretaker of the vulnerable adult and of any of the persons specified in Section 3-110 of Title 30 of the Oklahoma Statutes,

(4) the physical and mental health needs of the vulnerable adult,

(5) the available programs and services, and

(6) the health, well-being and welfare of the vulnerable adult and the public.

During the hearing to consider the motion to continue the temporary guardianship of the vulnerable adult for up to one hundred eighty (180) calendar days, the court shall consider the Department's findings and proposed plan of care and any other evidence presented by the caretaker, guardian or other interested

persons. The court shall either terminate the temporary guardianship and all involuntary services or continue the temporary guardianship and specify any necessary services to be provided by the Department for a period not to exceed one hundred eighty (180) calendar days. Provided, the court may continue the guardianship of the Department, if there is no one willing and able to act as guardian for the vulnerable adult.

N. Neither the Department nor any of its employees or any other petitioner shall be liable for filing a petition pursuant to the Vulnerable Adults Act if the petition was filed in good faith.

SECTION 4. This act shall become effective November 1, 2007.

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