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Short Title: Clarify Protections/Exploitation of Elders.

(Public)

Sponsors:

Referred to:

March 31, 2015

A BILL TO BE ENTITLED

AN ACT TO CLARIFY THAT UPON CONVICTION FOR EXPLOITATION OF AN OLDER ADULT OR DISABLED ADULT, ANY SEIZED ASSETS SHALL BE USED TO SATISFY THE DEFENDANT'S RESTITUTION OBLIGATION AS ORDERED BY THE COURT.

The General Assembly of North Carolina enacts:

**SECTION 1.** G.S. 14-112.3 reads as rewritten:

**"§ 14-112.3. Asset freeze or seizure; proceeding.**

(a) For purposes of this section, the term "assets" includes funds and property as well as other assets that may be involved in a violation of G.S. 14-112.2.

(b) Whenever it appears by clear and convincing evidence that any defendant is about to or intends to divest himself or herself of assets in a manner that would render the defendant insolvent for purposes of restitution, the district attorney may make an application to the court ~~with jurisdiction over the pending charges~~ to freeze or seize the assets of the defendant. Upon a showing by clear and convincing evidence in the hearing, the court shall issue an order to freeze or seize the assets of the defendant in the amount calculated pursuant to G.S. 14-112.2(f). The procedure for petitioning the court under this section shall be governed by G.S. 1A-1, Rule 65, except as otherwise provided in this section.

(b1) An order to freeze or seize assets shall direct the appropriate State or local law enforcement agency with territorial jurisdiction over the assets to serve and execute the order as follows:

(1) Personal property or financial assets in the defendant's possession that are not held by a financial institution shall be seized and held until final disposition as directed by the order.

(2) If the asset is an account, intangible, or other financial asset held by a financial institution, the State or local law enforcement agency shall serve the order on the entity or institution in possession of the asset with return of service to the clerk of superior court.

(3) If the asset is real property, then a lis pendens shall be filed as directed by the court with the clerk in the county or counties where the property is located in accordance with Article 11 of Chapter 1 of the General Statutes. If property is located in multiple counties, a lis pendens shall be filed in each county.



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1           (4)   For all orders served and executed in accordance with subsection (b1) of this  
2           section, a return of service shall be filed with the clerk of superior court by  
3           the State or local law enforcement agency with an inventory of items seized.  
4           If assets identified are financial assets as listed in subdivision (2) of this  
5           subsection, then the law enforcement agency shall list the financial  
6           institution wherein such funds are held and the amount of said funds. Said  
7           inventory should also identify any and all available real property and  
8           identify the counties wherein lis pendens were filed in accordance with  
9           subdivision (3) of this subsection.

10        (b2)   A record of any personal property seized by a law enforcement agency pursuant to  
11        this section shall be kept and maintained as provided in Article 2 of Chapter 15 of the General  
12        Statutes, except that the property shall not be disposed of other than pursuant to an order of the  
13        court entered pursuant to this section. Property frozen or seized pursuant to this section shall be  
14        deemed to be in the custody of the law enforcement agency seizing it and shall be removed and  
15        stored in the discretion of that law enforcement agency, which may do any of the following:

16           (1)   Place the property under seal.

17           (2)   Remove the property to a place designated by the law enforcement agency.

18           (3)   Request that the North Carolina Department of Justice take custody of the  
19           property and remove it to an appropriate location pending an order of the  
20           court for disposition.

21        (c)    At any time after service of the order to freeze or seize assets, the defendant or any  
22        person claiming an interest in the assets may file a motion to release the assets.

23        (d)    In any proceeding to release assets, the burden of proof shall be by clear and  
24        convincing evidence and shall be on the State to show that the defendant is about to, intends to,  
25        or did divest himself or herself of assets in a manner that would render the defendant insolvent  
26        for purposes of restitution. If the court finds that the defendant is about to, intends to, or did  
27        divest himself or herself of assets in a manner that would render the defendant insolvent for  
28        purposes of restitution, the court shall ~~order the assets frozen or held until further order of the~~  
29        ~~court. The rules of evidence that apply to this proceeding are the rules that would apply in a~~  
30        ~~proceeding pursuant to G.S. 1A-1, Rule 65.~~ deny the motion.

31        (e)    If the prosecution of the charge under G.S. 14-112.2 is terminated by voluntary  
32        dismissal without leave by the State or the court, or if a judgment of acquittal is entered, the  
33        court shall vacate the order to freeze or seize the assets. If assets are released pursuant to this  
34        subsection, accrued costs incident to the seizure, freeze, or storage of the assets shall not be  
35        charged against the defendant and shall be borne by the agency incurring those costs.

36        (e1)   Upon conviction of the defendant, or entry of a plea of no contest, any frozen or  
37        seized assets shall be used to satisfy the defendant's restitution obligation as ordered by the  
38        court, accounting for costs incident to seizure, including costs of sale. However, if the  
39        defendant can satisfy the restitution order within a period of time designated by the court, the  
40        court may accept an alternate form of restitution satisfaction. Any excess assets shall be  
41        returned to the defendant.

42        In order to satisfy an order of restitution, frozen or seized assets shall be handled as follows:

43           (1)   Assets shall be sold, transferred, paid out, or otherwise applied to the  
44           defendant's restitution obligation as follows:

45           a.    If the asset is personal property or liquid assets already seized, the  
46           property shall be disposed of in accordance with the court order.

47           b.    If the asset is held by a financial institution, the court shall enter an  
48           order directing the payment of those funds to the clerk in the amount  
49           specified in the restitution order or, if the amount is less than the full  
50           restitution award, the full amount of liquid assets shall be paid. The  
51           law enforcement agency shall deliver those funds to the clerk.

1           c.     If the asset is real property, the court shall enter an order directing the  
2                 sale of the property. The sale shall be conducted pursuant to Article  
3                 29A of Chapter 1 of the General Statutes. A private sale may be  
4                 conducted pursuant to G.S. 1-339.33 through G.S. 1-339.40, if, upon  
5                 receipt of the petition and satisfactory proof, it appears to the person  
6                 directed to oversee the sale that a private sale is in the best interest of  
7                 the victim.

8           (2)   The proceeds of any sale, transfer, or conversion shall be disbursed as  
9                 follows:

10          a.     The law enforcement agency shall pay all proceeds to the clerk of  
11                 superior court and shall provide an accounting of personal property  
12                 sold or liquid assets seized.

13          b.     All proceeds received by the clerk shall be distributed according to  
14                 the following priority:

15                 1.     Payment to the victim in the full amount of the restitution  
16                         order.

17                 2.     The costs and expenses of the sale.

18                 3.     All other necessary expenses incident to compliance with this  
19                         section.

20                 4.     Any remaining balance to the defendant within 30 days of the  
21                         clerk's receipt of the proceeds of the sale, unless the  
22                         defendant directs the clerk to apply any excess to the  
23                         defendant's other monetary obligations contained in the  
24                         judgment of conviction.

25          (e2)   In the event proceeds from the sale, transfer, or conversion of the seized or frozen  
26                 assets under subsection (e1) of this section are not sufficient to cover the expenses allowed  
27                 under sub-sub-subdivisions 2. and 3. of sub-subdivision b. of subdivision (2) of subsection (e1)  
28                 of this section, after notice and a hearing at which the defendant is present, the court may enter  
29                 a supplemental order of restitution for the unpaid portion of those expenses for the benefit of  
30                 the agency that incurred the expenses, to be paid as part of the criminal judgment and as  
31                 provided under G.S. 7A-304(d)(1)e.

32          (f)     Any person holding any interest in the frozen or seized assets may commence a  
33                 separate civil proceeding in the manner provided by law.

34          (g)     Any filing fees, service fees, or other expenses incurred by any State or county  
35                 agency for the administration or use of this section shall be recoverable only as provided in  
36                 sub-sub-subdivision 2. of sub-subdivision b. of subdivision (2) of subsection (e1) of this  
37                 section."

38          **SECTION 2.** G.S. 1-116(a) is amended by adding a new subdivision to read as  
39                 follows:

40                 "(5) Actions for asset freezing or seizure under G.S. 14-112.3."

41          **SECTION 3.** G.S. 1-119 reads as rewritten:

42          "**§ 1-119. Notice void unless action prosecuted.**

43                 (a)     The notice of lis pendens is of no avail unless it is followed by the first publication  
44                         of notice of the summons or by an affidavit therefor pursuant to Rule 4 (j)(1)c of the Rules of  
45                         Civil Procedure or by personal service on the defendant within 60 days after the cross-indexing.

46                 (b)     When an action is commenced by the issuance of summons and permission is  
47                         granted to file the complaint within 20 days, pursuant to Rule 3 of the Rules of Civil Procedure,  
48                         if the complaint is not filed within the time fixed by the order of the clerk, the notice of lis  
49                         pendens shall become inoperative and of no effect. The clerk may on his own motion and shall  
50                         on the ex parte application of any interested party cancel such notice of lis pendens by  
51                         appropriate entry on the records, which entry shall recite the failure of the plaintiff to file his

1 complaint within the time allowed. Such applications for cancellation, when made in a county  
2 other than that in which the action was instituted, shall include a certificate over the hand and  
3 seal of the clerk of the county in which the action was instituted that the plaintiff did not file his  
4 complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff  
5 and his surety.

6 (c) Notwithstanding subsections (a) and (b) of this section, a notice of lis pendens filed  
7 pursuant to G.S. 1-116(a)(5) shall remain effective until the order to freeze or seize assets under  
8 G.S. 14-112.3(b1)(3) is terminated or an order directing the sale of real property under  
9 G.S. 14-112.3(e1)(1)c. is entered. Notice of lis pendens filed pursuant to G.S. 1-116(5) shall be  
10 exempt from filing fees."

11 **SECTION 3.5.** G.S. 7A-308 is amended by adding a new subsection to read:

12 "(b2) The fees set forth in subdivision (11) of subsection (a) of this section are not  
13 chargeable when service is performed or documents are filed pursuant to the provisions of  
14 G.S. 14-112.3."

15 **SECTION 4.** This act becomes effective October 1, 2015, and applies to offenses  
16 committed on or after that date.