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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** SB 416                      **Hearing Date:** April 25, 2017  
**Author:** Anderson  
**Version:** February 15, 2017  
**Urgency:** No                              **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Elder Abuse: Isolation*

### HISTORY

**Source:** Unknown

**Prior Legislation:** SB 338 (Morrell), failed passage in Senate Public Safety (2015)  
AB 441 (Wilk), failed passage in Assembly Public Safety (2015)

**Support:** California Advocates for Nursing Home Reform; California Association for Health Services at Home; California District Attorneys Association; California Long-Term Care Ombudsman Association; California Police Chiefs; Coalition for Elder and Disability Rights (CEDAR); Congress of California Seniors

**Opposition:** American Civil Liberties Union; California Attorneys for Criminal Justice

### PURPOSE

*The purpose of this bill is to make isolating an elder person or dependent person a misdemeanor and to increase existing felony enhancements that would be imposed if the victim suffered great bodily injury and is between the age of 65 and 70.*

*Existing law* defines an “elder” to mean any person who is 65 years of age or older. (Pen. Code § 368, subd. (g).)

*Existing law* defines “dependent adult” to mean any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. “Dependent adult” also includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility. (Pen. Code § 368, subd. (h).)

*Existing law* provides that any person who knows or reasonably should know that a person is an elder adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a

county jail not exceeding one year, or by a fine not to exceed \$6000, or by both that fine and imprisonment, or by imprisonment in the state prison for two, three or four years. (Pen. Code § 368, subd. (b)(1).)

*Existing law* states that if during the commission of the offense described above, the victim suffers great bodily injury, as defined, the defendant shall receive an additional term in the state prison as follows:

- Three years if the victim is under the age of 70; and,
- Five years if the victim is 70 years of age or older.

*This bill* provides instead that a defendant shall receive an additional term of five years when the victim is 65 years of age or older.

*Existing law* provides that any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits an elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of an elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health may be endangered is guilty of a misdemeanor, punishable by up to 6 months in the county jail, a fine of up to \$1,000 or both jail and fine. A second or subsequent violation is punishable by up to one year in county jail, a fine of up to \$2,000 or both jail and fine. (Pen. Code § 368, subd. (c).)

*Existing law* provides that any caretaker of an elder or a dependent adult who violates any provision of law proscribing theft, embezzlement, forgery, fraud, or identity theft, with respect to the property or personal identifying information of that elder or dependent adult, is punishable as follows:

- By a fine not exceeding \$2,500, or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by a fine not exceeding \$10,000, or by imprisonment in the county jail for two, three, or four years, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding \$950; or
- By a fine not exceeding \$1,000, by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value not exceeding \$950. (Pen. Code § 368, subd. (e).)

*Existing law* provides that false imprisonment is the unlawful violation of the personal liberty of another, and generally punishes false imprisonment as a misdemeanor with a fine of up to \$1000, imprisonment in county jail for up to one year, or both the fine and imprisonment. (Pen. Code §§ 368, 367.)

*Existing law* states that any person who commits the false imprisonment of an elder or a dependent adult by the use of violence, menace, fraud, or deceit is punishable by imprisonment in county jail for 2, 3 or 4 years. (Pen. Code § 368, subd. (f).)

*Existing law* states that upon conviction of any felony it shall be considered a circumstance in aggravation in imposing the upper term if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability. (Pen. Code § 1170.85, subd. (b).)

*This bill* creates a new misdemeanor offense for the willful isolation of an elder or dependent adult by a caretaker.

*This bill* defines “isolate” to mean restricting the personal rights retained by the elder or dependent adult, including, but not limited to, the right to receive visitors, telephone calls, and personal mail unless specifically authorized by a court order.

*Existing law* defines “caretaker” to mean means any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult. (Pen. Code § 368, subd. (i).)

*This bill* adds a conservator or an attorney-in-fact to the definition of caretaker.

## COMMENTS

### 1. Elder Abuse Laws

Elder abuse can either be a criminal offense or a civil violation. Existing criminal law provides for enhanced penalties for specified crimes such as theft, embezzlement, forgery, fraud, and identity theft committed against elderly or dependent persons. (Pen. Code § 368, subd. (d).) The law also punishes willfully causing or permitting an elder or dependent adult to suffer or inflicting unjustifiable physical pain or mental suffering; or as a caretaker willfully causes or permits injury or the health to be endangered. (Pen. Code § 368, subds. (b)-(c).) If the crime is committed under circumstances or conditions likely to cause great bodily injury or death, the punishment is a felony. If the crime is committed under circumstances or conditions not likely to cause produce great bodily harm or death, the punishment is a misdemeanor. (*Id.*) If great bodily injury is incurred, the defendant must be sentenced to an additional 3 years if the victim is under 70 years of age, or 5 years if the victim is 70 or older. If the offense causes death of the victim, the defendant must be sentenced to an additional 5 years if the victim was under 70 years old and 7 years if the victim was 70 or older. (*Id.*) Existing law also provides that false imprisonment of an elder or dependent adult is punishable as a felony. (Pen. Code § 368, subd. (f).)

Under civil laws, a person or organization may be sued for harming an elder or dependent adult. Civil elder abuse includes financial abuse, physical abuse, neglect, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering. It also includes the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering. (Welf. & Inst. Code § 15610.07.) Civil law provides for civil remedies which may include actual damages, punitive damages and attorney’s fees. (Welf. & Inst. Code § 15657.)

Existing civil laws also provide that certain persons are mandated reporters and required to report suspected elder abuse to local law enforcement or adult protective services. (Welf. & Inst. Code § 15630.) A mandated reporter is any person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not he or she receives

compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, clergy member, or employee of a county adult protective services agency or a local law enforcement agency. (*Id.*) A failure to report elder or dependent abuse by a mandated reporter may be punished as a misdemeanor. (*Id.*)

Local and state law enforcement have concurrent jurisdiction with Adult Protective Services and the local long-term care ombudsman programs to investigate elder and dependent adult abuse and criminal neglect. (Pen. Code § 368.5.)

## 2. New Crime of Isolation

This bill creates a new crime of isolation which punishes as a misdemeanor the restriction of personal rights retained by the elder or dependent adult, including, but not limited to, the right to receive visitors, telephone calls, and personal mail unless specifically authorized by a court.

While existing criminal law does not specify isolation of an elder or dependent adult as a crime, it does specify that the unlawful violation of the personal liberty of another is false imprisonment and punishable as a misdemeanor. (Pen. Code, §§ 368, 367.) Additionally, the law specifies that false imprisonment of an elder or dependent adult by the use of violence, menace, fraud, or deceit is a felony. If the false imprisonment is not achieved through use of violence, menace, fraud or deceit, the general crime of false imprisonment could be prosecuted.

This bill seeks to punish the restriction of personal rights of an elder or dependent adult as a misdemeanor, but it appears that this conduct may already be punished as misdemeanor false imprisonment. And when committed against an elder or dependent adult by the use of violence, menace, fraud, or deceit, the offense could be prosecuted as a felony.

Additionally, this bill creates a new definition of “isolation” that is different from existing law. “Isolation” is defined for purposes of mandated reporters to include the following:

- Acts intentionally committed for the purpose of preventing, and that do serve to prevent, an elder or dependent adult from receiving his or her mail or telephone calls;
- Telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons;
- False imprisonment, as defined in Section 236 of the Penal Code; or
- Physical restraint of an elder or dependent adult, for the purpose of preventing the elder or dependent adult from meeting with visitors. (Welf. & Inst. Code, § 1510.43, subd. (a).)

Existing law also provides a rebuttable presumption that the acts described above do not constitute isolation if they are performed pursuant to the instructions of a doctor who is caring for the elder or dependent adult at the time the instructions are given, and who gives the instructions as part of his or her medical care. (Welf. & Inst. Code, § 1510.43, subd. (b).) These acts also do not constitute isolation if they are performed in response to a reasonably perceived threat of danger to property or physical safety. (Welf. & Inst. Code, § 1510.43, subd. (b).)

### 3. Sentencing Enhancements and Ongoing Concerns over Prison Overcrowding

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

The court also ordered California to implement the following population reduction measures in its prisons:

- Increase prospective credit earnings for non-violent second-strike inmates as well as minimum custody inmates.
- Allow non-violent second-strike inmates who have reached 50 percent of their total sentence to be referred to the Board of Parole Hearings (BPH) for parole consideration.
- Release inmates who have been granted parole by BPH but have future parole dates.
- Expand the CDCR's medical parole program.
- Allow inmates age 60 and over who have served at least 25 years of incarceration to be considered for parole.
- Increase its use of reentry services and alternative custody programs.

(Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14).) Following the implementation of these measures along with the passage of Proposition 47, approved by California voters in November 2014, California met the federal court's population cap in December 2015. (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown*.) The administration's most recent status report states that as "of December 14, 2016, 114,031 inmates were housed in the State's 34 adult institutions" which amounts to approximately 135.3% of design capacity, and 4,704 inmates were housed in out-of-state facilities. (Defendants' December 2016 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14).

This bill increases existing sentencing enhancements for crimes against elder and dependent adults. Existing law contains a variety of enhancements that can be used to increase the amount of time a defendant will serve. Enhancements can range from adding a specified number of years to a person's sentence, or doubling a person's sentence or even converting a determinate sentence into a life sentence. Multiple enhancements can be imposed in a single case to significantly increase the person's sentence. Currently, when elder abuse causes great bodily injury, the court must impose an additional 3 or 5 years depending on whether the victim is under

70 years old or 70 and over. This bill would require a 5 year sentencing enhancement if the defendant causes great bodily injury of anyone 65 years of age or older. Existing law also provides for a sentencing enhancement when elder abuse causes death – 5 years or 7 years depending on whether the victim is under 70 years old or 70 and over. This bill would require a 7 year sentencing enhancement if the defendant causes the death of anyone 65 years of age or older.

Although the state is currently in compliance with the court-ordered population cap, creating new enhancements, or expanding upon existing ones, will increase the length of time that an inmate must serve in prison and reverse the progress made in reducing the state prison population. This is contrary to the court's order for a durable solution to prison overcrowding.

#### **4. Argument in Support**

According to the Congress of California Seniors:

Elder abuse – both physical and financial – is already a crime in California. Seniors and dependent adults often survive only because of the attention and efforts of their caretakers. SB 416 will add years of prison time to the existing sentences if the victim suffers great bodily injury or death as a result of abuse by their caretaker.

Your bill will also make it a misdemeanor for a caretaker to purposefully isolate an elder or dependent adult. Isolation is defined as the general restriction of personal rights, including the right to receive visitors, make and receive telephone calls, and freely use mail and email. Isolation has been shown to be a first step toward domination by a caretaker, often followed by financial abuse.

#### **5. Argument in Opposition**

According to the California Attorneys for Criminal Justice (CACJ):

CACJ opposes SB 416's effort to expand the five (5) year enhancement for inflicting great bodily injury under PC 12022.7 to victims under the age of 70. We also oppose the bill's effort to expand the seven (7) year enhancement for inflicting death on a victim who is under 70.

SB 416 seeks to establish a new misdemeanor offense of "isolating" an elder. However, the definition of the term "isolate" in (h)(4) is unconstitutionally over broad for criminal law purposes. The term "isolate" is defined as "restricting the personal rights..." of the elder. That phrase is so broad as to be meaningless and thus fails to put a potential defendant on notice as to what conduct constitutes committing this crime. That is the sine qua non of over breadth for criminal law purposes. It also fails to give adequate notice to the individual of what behavior on his/her part would constitute criminal acts and thus violates his/her constitutional rights to due process of law. This language also impairs the ability of the caretaker to make decisions in what she/he determines to be the best interests of the elder who is entrusted to their care.

It is clear to CACJ that this language would also cause many people to refuse to take on the role of caretaker for fear that they could be charged with a crime for simply doing what they thought was in the elder's best interests. Finally, this language and the

misdemeanor of “isolating” the elder is ripe for abuse by those who may have ulterior motives for wanting the current caretaker to be removed so as to advance their own nefarious interests.

**-- END --**