

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

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HOUSE BILL 397
Committee Substitute Favorable 4/21/15

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 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 where the property is located in accordance with Article 11 of Chapter 1 of the General Statutes.

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



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- 1 (1) Place the property under seal.
- 2 (2) Remove the property to a place designated by the law enforcement agency.
- 3 (3) Request that the North Carolina Department of Justice take custody of the
4 property and remove it to an appropriate location for disposition in
5 accordance with the court order.

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

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

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

21 (e1) Upon conviction of the defendant, or entry of a plea of no contest, any frozen or
22 seized assets shall be used to satisfy the defendant's restitution obligation as ordered by the
23 court, accounting for costs incident to seizure, including costs of sale. However, if the
24 defendant can satisfy the restitution order at the time of entry of the order, the court may accept
25 an alternate form of restitution satisfaction. Any excess assets shall be returned to the
26 defendant.

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

- 28 (1) Assets shall be sold, transferred, paid out, or otherwise applied to the
29 defendant's restitution obligation as follows:
 - 30 a. If the asset is personal property, the property shall be recorded
31 pursuant to G.S. 15-11 and the seizing agency shall store the personal
32 property in accordance with the court order.
 - 33 b. If the asset is a liquid asset, the court shall enter an order directing
34 the payment of those funds to the victim in an amount equal to the
35 restitution order or, if the amount is less than the full restitution
36 award, the court shall order the full amount paid to the victim.
 - 37 c. If the asset is real property, the court shall enter an order directing the
38 sale of the property. The sale shall be conducted pursuant to Article
39 29A of Chapter 1 of the General Statutes. A private sale may be
40 conducted pursuant to G.S. 1-339.33 through G.S. 1-339.40, if, upon
41 receipt of petition and satisfactory proof, it appears to the person
42 directed to oversee the sale that a private sale is in the best interest of
43 the victim.
- 44 (2) The proceeds of any sale, transfer, or conversion shall be disbursed as
45 follows:
 - 46 a. The law enforcement agency shall pay all proceeds to the clerk of
47 superior court.
 - 48 b. All proceeds received by the clerk shall be distributed according to
49 the following priority:
 - 50 1. Payment to the victim in the full amount of the restitution
51 order.

- 1 2. The costs and expenses of the sale.
- 2 3. All other necessary expenses incident to compliance with this
- 3 section.
- 4 4. Any remaining balance to the defendant within 30 days of the
- 5 sale, unless the defendant directs the clerk to apply any
- 6 excess to the defendant's other monetary obligations
- 7 contained in the judgment of conviction.

8 In the event proceeds from the sale of assets are not sufficient to cover the restitution order
9 and the costs and expenses of the sale, any unpaid amounts shall be charged against the
10 defendant and a criminal judgment shall be placed against the defendant for those amounts.
11 Any amount included in a criminal judgment for costs and expenses of the sale shall be owed to
12 the agency or entity which incurred the expense.

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

15 (g) Any filing fees, service fees, or other monies due to any State or county agency for
16 the administration or use of this Chapter shall not be waived and shall only be recoverable if
17 charged against the defendant in the final disposition of the criminal action."

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

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

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

22 "**§ 1-119. Notice void unless action prosecuted.**

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

26 (b) When an action is commenced by the issuance of summons and permission is
27 granted to file the complaint within 20 days, pursuant to Rule 3 of the Rules of Civil Procedure,
28 if the complaint is not filed within the time fixed by the order of the clerk, the notice of lis
29 pendens shall become inoperative and of no effect. The clerk may on his own motion and shall
30 on the ex parte application of any interested party cancel such notice of lis pendens by
31 appropriate entry on the records, which entry shall recite the failure of the plaintiff to file his
32 complaint within the time allowed. Such applications for cancellation, when made in a county
33 other than that in which the action was instituted, shall include a certificate over the hand and
34 seal of the clerk of the county in which the action was instituted that the plaintiff did not file his
35 complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff
36 and his surety.

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

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

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

46 **SECTION 4.** This act becomes effective October 1, 2015, and applies to orders to
47 freeze or seize assets issued on or after that date.