

REFERENCE TITLE: vulnerable adults; financial exploitation

State of Arizona
House of Representatives
Forty-ninth Legislature
First Regular Session
2009

HB 2344

Introduced by
Representatives Mason, Pancrazi: Jones

AN ACT

AMENDING SECTIONS 13-1802, 14-5506 AND 46-456, ARIZONA REVISED STATUTES;
RELATING TO INCAPACITATED AND VULNERABLE ADULTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 13-1802, Arizona Revised Statutes, is amended to
3 read:
4 13-1802. Theft; classification
5 A. A person commits theft if, without lawful authority, the person
6 knowingly:
7 1. Controls property of another with the intent to deprive the other
8 person of such property; or
9 2. Converts for an unauthorized term or use services or property of
10 another entrusted to the defendant or placed in the defendant's possession
11 for a limited, authorized term or use; or
12 3. Obtains services or property of another by means of any material
13 misrepresentation with intent to deprive the other person of such property or
14 services; or
15 4. Comes into control of lost, mislaid or misdelivered property of
16 another under circumstances providing means of inquiry as to the true owner
17 and appropriates such property to the person's own or another's use without
18 reasonable efforts to notify the true owner; or
19 5. Controls property of another knowing or having reason to know that
20 the property was stolen; or
21 6. Obtains services known to the defendant to be available only for
22 compensation without paying or an agreement to pay the compensation or
23 diverts another's services to the person's own or another's benefit without
24 authority to do so.
25 B. A person commits theft if the person knowingly takes control, title, use
26 or management of an incapacitated or vulnerable adult's assets or property
27 ~~through intimidation or deception, as defined in section 46-456,~~ while acting
28 in a position of trust and confidence, **AS DEFINED IN SECTION 46-456,** and with
29 the intent to deprive the incapacitated or vulnerable adult of the asset or
30 property. **IT IS AN AFFIRMATIVE DEFENSE TO A PROSECUTION FOR A VIOLATION OF**
31 **THIS SUBSECTION THAT THE ASSETS WERE GIVEN AS GIFTS CONSISTENT EITHER WITH A**
32 **PATTERN OF GIFT GIVING TO THE DEFENDANT THAT EXISTED BEFORE THE ADULT BECAME**
33 **INCAPACITATED OR VULNERABLE OR WITH A PATTERN OF GIFT GIVING TO A CLASS OF**
34 **INDIVIDUALS THAT EXISTED BEFORE THE ADULT BECAME INCAPACITATED OR VULNERABLE**
35 **AND THE DEFENDANT LATER BECOMES A MEMBER OF THE CLASS.**
36 C. The inferences set forth in section 13-2305 apply to any
37 prosecution under subsection A, paragraph 5 of this section.
38 D. At the conclusion of any grand jury proceeding, hearing or trial,
39 the court shall preserve any trade secret that is admitted in evidence or any
40 portion of a transcript that contains information relating to the trade
41 secret pursuant to section 44-405.
42 E. Theft of property or services with a value of twenty-five thousand
43 dollars or more is a class 2 felony. Theft of property or services with a
44 value of four thousand dollars or more but less than twenty-five thousand
45 dollars is a class 3 felony. Theft of property or services with a value of

1 three thousand dollars or more but less than four thousand dollars is a class
2 4 felony, except that theft of any vehicle engine or transmission is a class
3 4 felony regardless of value. Theft of property or services with a value of
4 two thousand dollars or more but less than three thousand dollars is a class
5 5 felony. Theft of property or services with a value of one thousand dollars
6 or more but less than two thousand dollars is a class 6 felony. Theft of any
7 property or services valued at less than one thousand dollars is a class 1
8 misdemeanor, unless the property is taken from the person of another, is a
9 firearm or is a dog taken for the purpose of dog fighting in violation of
10 section 13-2910.01, in which case the theft is a class 6 felony.

11 F. A person who is convicted of a violation of subsection A, paragraph
12 1 or 3 of this section that involved property with a value of one hundred
13 thousand dollars or more is not eligible for suspension of sentence,
14 probation, pardon or release from confinement on any basis except pursuant to
15 section 31-233, subsection A or B until the sentence imposed by the court has
16 been served, the person is eligible for release pursuant to section
17 41-1604.07 or the sentence is commuted.

18 Sec. 2. Section 14-5506, Arizona Revised Statutes, is amended to read:
19 14-5506. Powers of attorney; best interest; intimidation;
20 deception; definitions

21 A. Except as provided in ~~subsection B of this~~ section 46-456,
22 SUBSECTION A, PARAGRAPHS 1 AND 2, an agent shall use the principal's money,
23 property or other assets only in the principal's best interest and the agent
24 shall not use the principal's money, property or other assets for the agent's
25 benefit. An agent who violates this subsection is subject to prosecution
26 under title 13 and civil penalties pursuant to section 46-456.

27 B. Any authority, the use of which is not in the principal's best
28 interest or is for the agent's benefit including contracted for commissions,
29 fees or other compensation shall be specifically identified in detail within
30 the instrument or a written contract signed by the principal that is
31 specifically identified by the instrument and be separately initialed by the
32 principal and the witness at the time of execution.

33 C. If the agent acted with intimidation or deception ~~as defined in~~
34 ~~section 46-456~~ in procuring the power of attorney or any authority provided
35 in the power of attorney, the agent is subject to prosecution under title 13
36 and civil penalties pursuant to section 46-456.

37 D. A power of attorney executed by an adult who does not have capacity
38 is invalid. In a criminal proceeding, the agent has the burden of proving by
39 clear and convincing evidence that the principal had capacity. In a civil
40 proceeding, if the party challenging the validity of a power of attorney on
41 the grounds of lack of capacity proves by a preponderance of the evidence
42 that, at the time the power of attorney was executed, the principal was a
43 vulnerable adult, the agent has the burden of proving by clear and convincing
44 evidence that the principal had capacity. In a civil proceeding, if the
45 party challenging the validity of a power of attorney on the basis of lack of

1 capacity does not prove by a preponderance of the evidence that, at the time
2 the power of attorney was executed, the principal was a vulnerable adult, the
3 agent has the burden of proving by a preponderance of the evidence that the
4 principal had capacity.

5 E. A person who in good faith either assists or deals with an agent is
6 protected as if the agent properly exercised the agent's power regardless of
7 whether the authority of that person as the agent has been terminated.

8 F. For THE purposes of this section:

9 1. "Best interest" means the agent acts solely for the principal's
10 benefit.

11 2. "Capacity" means that at the time the power of attorney was
12 executed the principal was capable of understanding in a reasonable manner
13 the nature and effect of the act of executing and granting the power of
14 attorney.

15 3. "DECEPTION" MEANS THAT A PERSON DECEIVES AN INCAPACITATED OR
16 VULNERABLE ADULT BY KNOWINGLY DOING ANY OF THE FOLLOWING:

17 (a) CREATING OR CONFIRMING A FALSE IMPRESSION IN AN INCAPACITATED OR
18 VULNERABLE ADULT'S MIND.

19 (b) FAILING TO CORRECT A FALSE IMPRESSION THAT THE PERSON IS
20 RESPONSIBLE FOR CREATING OR CONFIRMING IN AN INCAPACITATED OR VULNERABLE
21 ADULT'S MIND.

22 (c) MAKING A PROMISE TO AN INCAPACITATED OR VULNERABLE ADULT THAT THE
23 PERSON DOES NOT INTEND TO PERFORM OR THAT THE PERSON KNOWS WILL NOT OR CANNOT
24 BE PERFORMED. A PERSON'S FAILURE TO PERFORM A PROMISE IS NOT BY ITSELF
25 SUFFICIENT PROOF THAT THE PERSON DID NOT INTEND TO PERFORM THE PROMISE.

26 (d) MISREPRESENTING OR CONCEALING A MATERIAL FACT THAT RELATES TO THE
27 TERMS OF A CONTRACT OR AN AGREEMENT THAT THE PERSON ENTERS INTO WITH THE
28 INCAPACITATED OR VULNERABLE ADULT OR THAT RELATES TO THE EXISTING OR
29 PREEXISTING CONDITION OF ANY OF THE PROPERTY INVOLVED IN A CONTRACT OR AN
30 AGREEMENT.

31 (e) USING ANY MATERIAL MISREPRESENTATION, FALSE PRETENSE OR FALSE
32 PROMISE TO INDUCE, ENCOURAGE OR SOLICIT AN INCAPACITATED OR VULNERABLE ADULT
33 TO ENTER INTO A CONTRACT OR AN AGREEMENT.

34 4. "INTIMIDATION" INCLUDES THREATENING TO DEPRIVE AN INCAPACITATED OR
35 VULNERABLE ADULT OF FOOD, NUTRITION, SHELTER OR NECESSARY MEDICATION OR
36 MEDICAL TREATMENT.

37 ~~3.~~ 5. "Vulnerable adult" has the same meaning prescribed in section
38 46-451.

39 Sec. 3. Section 46-456, Arizona Revised Statutes, is amended to read:

40 ~~46-456.~~ Duty to an incapacitated or vulnerable adult; financial
41 exploitation; civil and criminal penalties;
42 exceptions; definitions

43 A. A person who is in a position of trust and confidence to an
44 incapacitated or vulnerable adult shall ~~act for the benefit of that person to~~
45 ~~the same extent as a trustee pursuant to title 14, chapter 7.~~ USE THE

1 INCAPACITATED OR VULNERABLE ADULT'S ASSETS ONLY IN THE INCAPACITATED OR
2 VULNERABLE ADULT'S BEST INTEREST AND NOT FOR THE BENEFIT OF THE PERSON WHO IS
3 IN THE POSITION OF TRUST AND CONFIDENCE TO THE INCAPACITATED OR VULNERABLE
4 ADULT OR THE PERSON'S RELATIVES UNLESS EITHER OF THE FOLLOWING APPLIES:

- 5 1. THE SUPERIOR COURT GIVES PRIOR APPROVAL OF THE TRANSACTION.
- 6 2. THE TRANSACTION IS SPECIFICALLY AUTHORIZED IN A VALID GENERAL OR
7 NONGENERAL POWER OF ATTORNEY THAT IS EXECUTED BY THE INCAPACITATED OR
8 VULNERABLE ADULT AS THE PRINCIPAL OR IN A VALID TRUST INSTRUMENT THAT IS
9 EXECUTED BY THE INCAPACITATED OR VULNERABLE ADULT AS A SETTLOR. IN ORDER FOR
10 AN AUTHORIZATION TO BE VALID UNDER THIS PARAGRAPH, THE AUTHORITY, INCLUDING
11 ANY CONTRACTED COMMISSIONS, FEES OR OTHER COMPENSATION, MUST BE SPECIFICALLY
12 IDENTIFIED IN DETAIL AND SEPARATELY INITIALED BY THE INCAPACITATED OR
13 VULNERABLE ADULT AND INCLUDE AT LEAST ONE WITNESS TO THE GENERAL OR
14 NONGENERAL POWER OF ATTORNEY OR TRUST INSTRUMENT AT THE TIME THE DOCUMENT IS
15 EXECUTED BY THE INCAPACITATED OR VULNERABLE ADULT.

16 B. A person who is in a position of trust and confidence and who ~~by~~
17 ~~intimidation or deception~~ knowingly takes control, title, use or management
18 of an incapacitated or vulnerable adult's asset or property with the intent
19 to permanently deprive that person of the asset or property is guilty of
20 theft as provided in section 13-1802. FOR THE PURPOSES OF A CRIMINAL
21 PROSECUTION UNDER SECTION 13-1802, PROOF THAT A PERSON TOOK CONTROL, TITLE,
22 USE OR MANAGEMENT OF AN INCAPACITATED OR VULNERABLE ADULT'S ASSET WITHOUT ANY
23 SIGNIFICANT BENEFIT TO THE INCAPACITATED OR VULNERABLE ADULT SHALL GIVE RISE
24 TO AN INFERENCE THAT THE PERSON INTENDED TO PERMANENTLY DEPRIVE THE
25 INCAPACITATED OR VULNERABLE ADULT OF THE ASSET. IT IS AN AFFIRMATIVE DEFENSE
26 TO A PROSECUTION FOR A VIOLATION OF THIS SUBSECTION THAT THE ASSETS WERE
27 GIVEN AS GIFTS CONSISTENT EITHER WITH A PATTERN OF GIFT GIVING TO THE
28 DEFENDANT THAT EXISTED BEFORE THE ADULT BECAME INCAPACITATED OR VULNERABLE OR
29 WITH A PATTERN OF GIFT GIVING TO A CLASS OF INDIVIDUALS THAT EXISTED BEFORE
30 THE ADULT BECAME INCAPACITATED OR VULNERABLE AND THE DEFENDANT LATER BECOMES
31 A MEMBER OF THE CLASS.

32 C. A person who violates subsection A or B of this section ~~is~~ SHALL BE
33 subject to ACTUAL damages in a civil action brought by or on behalf of an
34 incapacitated or vulnerable adult ~~that equal up to three times the amount of~~
35 ~~the monetary damages~~ AND THE COURT MAY AWARD ADDITIONAL DAMAGES FOR AN AMOUNT
36 UP TO TWO TIMES THE AMOUNT OF THE ACTUAL DAMAGES.

37 D. IN ADDITION TO THE DAMAGES PRESCRIBED IN SUBSECTION C OF THIS
38 SECTION, THE COURT MAY:

- 39 1. ORDER A person who violates subsection A or B of this section
40 ~~forfeits~~ TO FORFEIT all OR A PORTION OF THE PERSON'S benefits UNDER TITLE 14,
41 CHAPTER 2 with respect to the estate of the ~~deceased~~, incapacitated or
42 vulnerable adult, including an intestate share, an elective share, an omitted
43 spouse's share, an omitted child's share, a homestead allowance, ~~an~~ ANY
44 exempt property ~~allowance~~ and a family allowance. If the incapacitated or
45 vulnerable adult died intestate, the ~~decedent's~~ INCAPACITATED OR VULNERABLE

1 ADULT'S intestate estate passes as if the person who ~~committed the violation~~
2 VIOLATED SUBSECTION A OR B OF THIS SECTION disclaimed that person's intestate
3 share TO THE EXTENT THE COURT ORDERS THAT PERSON TO FORFEIT ALL OR A PORTION
4 OF THE PERSON'S BENEFITS UNDER TITLE 14, CHAPTER 2.

5 2. REVOKE, IN WHOLE OR IN PART, ANY REVOCABLE:

6 (a) DISPOSITION OR APPOINTMENT OF PROPERTY THAT IS MADE IN A GOVERNING
7 INSTRUMENT BY THE INCAPACITATED OR VULNERABLE ADULT TO THE PERSON WHO
8 VIOLATES SUBSECTION A OR B OF THIS SECTION.

9 (b) PROVISION BY THE INCAPACITATED OR VULNERABLE ADULT THAT IS
10 CONTAINED IN A GOVERNING INSTRUMENT THAT CONFERS A GENERAL OR NONGENERAL
11 POWER OF APPOINTMENT ON THE PERSON WHO VIOLATES SUBSECTION A OR B OF THIS
12 SECTION.

13 (c) NOMINATION OR APPOINTMENT BY THE INCAPACITATED OR VULNERABLE ADULT
14 THAT IS CONTAINED IN A GOVERNING INSTRUMENT THAT NOMINATES OR APPOINTS THE
15 PERSON WHO VIOLATES SUBSECTION A OR B OF THIS SECTION TO SERVE IN ANY
16 FIDUCIARY OR REPRESENTATIVE CAPACITY, INCLUDING SERVING AS A PERSONAL
17 REPRESENTATIVE, EXECUTOR, GUARDIAN, CONSERVATOR, TRUSTEE OR AGENT.

18 3. SEVER THE INTERESTS OF THE INCAPACITATED OR VULNERABLE ADULT AND
19 THE PERSON WHO VIOLATES SUBSECTION A OR B OF THIS SECTION IN ANY PROPERTY
20 THAT IS HELD BY THEM AT THE TIME OF THE VIOLATION AS JOINT TENANTS WITH THE
21 RIGHT OF SURVIVORSHIP OR AS COMMUNITY PROPERTY WITH THE RIGHT OF
22 SURVIVORSHIP, AND TRANSFORM THE INTERESTS OF THE INCAPACITATED OR VULNERABLE
23 ADULT AND THE PERSON WHO VIOLATED SUBSECTION A OR B OF THIS SECTION INTO
24 TENANCIES IN COMMON. TO THE EXTENT THAT THE PERSON WHO VIOLATED SUBSECTION A
25 OR B OF THIS SECTION DID NOT PROVIDE ADEQUATE CONSIDERATION FOR THE JOINTLY
26 HELD INTEREST, THE COURT MAY CAUSE THE PERSON'S INTEREST IN THE SUBJECT
27 PROPERTY TO BE FORFEITED IN WHOLE OR IN PART.

28 E. A REVOCATION OR A SEVERANCE UNDER SUBSECTION D, PARAGRAPH 2 OR 3 OF
29 THIS SECTION DOES NOT AFFECT ANY THIRD PARTY INTEREST IN PROPERTY THAT WAS
30 ACQUIRED FOR VALUE AND IN GOOD FAITH RELIANCE ON APPARENT TITLE BY
31 SURVIVORSHIP IN THE PERSON WHO VIOLATED SUBSECTION A OR B OF THIS SECTION
32 UNLESS A WRITING DECLARING THE SEVERANCE HAS BEEN NOTED, REGISTERED, FILED OR
33 RECORDED IN RECORDS THAT ARE APPROPRIATE TO THE KIND AND LOCATION OF THE
34 PROPERTY AND THAT ARE RELIED ON AS EVIDENCE OF OWNERSHIP IN THE ORDINARY
35 COURSE OF TRANSITIONS INVOLVING THAT PROPERTY.

36 F. IF THE COURT IMPOSES A REVOCATION UNDER SUBSECTION D, PARAGRAPH 2
37 OF THIS SECTION, PROVISIONS OF THE GOVERNING INSTRUMENT SHALL BE GIVEN EFFECT
38 AS IF THE PERSON WHO VIOLATED SUBSECTION A OR B OF THIS SECTION DISCLAIMED
39 ALL PROVISIONS REVOKED BY THE COURT OR, IN THE CASE OF A REVOCATION OF A
40 NOMINATION IN A FIDUCIARY OR REPRESENTATIVE CAPACITY, THE PERSON WHO VIOLATED
41 SUBSECTION A OR B OF THIS SECTION PREDECEASED THE DECEDENT.

42 ~~E-~~ G. Section 46-455, subsections F, G, H, I, K, L, M and P also
43 apply to civil violations of this section.

44 H. THE INCAPACITATED OR VULNERABLE ADULT OR THE DULY APPOINTED
45 CONSERVATOR OR PERSONAL REPRESENTATIVE OF THE INCAPACITATED OR VULNERABLE

1 ADULT'S ESTATE HAS PRIORITY TO, AND MAY FILE, A CIVIL ACTION UNDER THIS
2 SECTION. IF AN ACTION IS NOT FILED BY THE INCAPACITATED OR VULNERABLE ADULT
3 OR THE DULY APPOINTED CONSERVATOR OR PERSONAL REPRESENTATIVE OF THE
4 INCAPACITATED OR VULNERABLE ADULT'S ESTATE, ANY OTHER INTERESTED PERSON, AS
5 DEFINED IN SECTION 14-1201, MAY PETITION THE COURT FOR LEAVE TO FILE AN
6 ACTION ON BEHALF OF THE INCAPACITATED OR VULNERABLE ADULT OR THE
7 INCAPACITATED OR VULNERABLE ADULT'S ESTATE. NOTICE OF THE HEARING ON THE
8 PETITION SHALL COMPLY WITH SECTION 14-1401.

9 ~~F.~~ I. Subsections A, C, D, ~~and~~ E AND F of this section do not apply
10 to an agent ~~that is~~ WHO IS ACTING WITHIN THE SCOPE OF THE PERSON'S DUTIES AS,
11 OR ON BEHALF OF, any of the following:

12 1. A bank, financial institution or escrow agent licensed or certified
13 pursuant to title 6.

14 2. A securities dealer or salesman registered pursuant to title 44,
15 chapter 12, article 9.

16 3. An insurer, including a title insurer, authorized and regulated
17 pursuant to title 20.

18 ~~G.~~ J. For the purposes of this section:

19 ~~1. "Deception" means that a person deceives an incapacitated or~~
20 ~~vulnerable adult by knowingly doing any of the following:~~

21 ~~(a) Creating or confirming a false impression in an incapacitated or~~
22 ~~vulnerable adult's mind.~~

23 ~~(b) Failing to correct a false impression that the person is~~
24 ~~responsible for creating or confirming in an incapacitated or vulnerable~~
25 ~~adult's mind.~~

26 ~~(c) Making a promise to an incapacitated or vulnerable adult that the~~
27 ~~person does not intend to perform or that the person knows will not or cannot~~
28 ~~be performed. A person's failure to perform a promise is not by itself~~
29 ~~sufficient proof that the person did not intend to perform the promise.~~

30 ~~(d) Misrepresenting or concealing a material fact that relates to the~~
31 ~~terms of a contract or an agreement that the person enters into with the~~
32 ~~incapacitated or vulnerable adult or that relates to the existing or~~
33 ~~preexisting condition of any of the property involved in a contract or an~~
34 ~~agreement.~~

35 ~~(e) Using any material misrepresentation, false pretense or false~~
36 ~~promise to induce, encourage or solicit an incapacitated or vulnerable adult~~
37 ~~to enter into a contract or an agreement.~~

38 ~~2. "Intimidation" includes threatening to deprive an incapacitated or~~
39 ~~vulnerable adult of food, nutrition, shelter or necessary medication or~~
40 ~~medical treatment.~~

41 1. "ASSET" INCLUDES ALL FORMS OF PERSONAL AND REAL PROPERTY.

42 2. "DISPOSITION OR APPOINTMENT OF PROPERTY" INCLUDES A TRANSFER OF AN
43 ITEM OF PROPERTY OR ANY OTHER BENEFIT OF A BENEFICIARY DESIGNATED IN A
44 GOVERNING INSTRUMENT.

1 3. "GOVERNING INSTRUMENT" MEANS A DEED, A WILL, A TRUST, A
2 CUSTODIANSHIP, AN INSURANCE OR ANNUITY POLICY, AN ACCOUNT WITH PAY ON DEATH
3 DESIGNATION, A SECURITY REGISTERED IN BENEFICIARY FORM, A PENSION, A PROFIT
4 SHARING, RETIREMENT OR SIMILAR BENEFIT PLAN, AN INSTRUMENT CREATING OR
5 EXERCISING A POWER OF APPOINTMENT, A POWER OF ATTORNEY OR A DISPOSITIVE,
6 APPOINTIVE OR NOMINATIVE INSTRUMENT OF ANY SIMILAR TYPE.

7 ~~3.~~ 4. "Position of trust and confidence" means that a person is any
8 of the following:

9 (a) ~~One~~ A PERSON who has assumed a duty to provide care to the
10 incapacitated or vulnerable adult.

11 (b) A joint tenant or a tenant in common with an incapacitated or
12 vulnerable adult.

13 (c) ~~One~~ A PERSON who is in a fiduciary relationship with an
14 incapacitated or vulnerable adult including a de facto guardian or de facto
15 conservator.

16 (d) A PERSON WHO IS IN A CONFIDENTIAL RELATIONSHIP WITH THE
17 INCAPACITATED OR VULNERABLE ADULT. THE ISSUE OF WHETHER A CONFIDENTIAL
18 RELATIONSHIP EXISTS SHALL BE AN ISSUE OF FACT TO BE DECIDED BY THE SUPERIOR
19 COURT BASED ON THE TOTALITY OF THE CIRCUMSTANCES.

20 5. "REVOCABLE" MEANS A DISPOSITION, APPOINTMENT, PROVISION OR
21 NOMINATION UNDER WHICH THE INCAPACITATED OR VULNERABLE ADULT, AT THE TIME OF
22 OR IMMEDIATELY BEFORE DEATH, WAS ALONE EMPOWERED, BY LAW OR UNDER THE
23 GOVERNING INSTRUMENT, TO CANCEL THE DESIGNATION IN FAVOR OF THE PERSON WHO
24 VIOLATED SUBSECTION A OR B OF THIS SECTION, WHETHER OR NOT THE INCAPACITATED
25 OR VULNERABLE ADULT WAS THEN EMPOWERED TO DESIGNATE THE INCAPACITATED OR
26 VULNERABLE ADULT IN PLACE OF THE PERSON WHO VIOLATED SUBSECTION A OR B OF
27 THIS SECTION OR THE INCAPACITATED OR VULNERABLE ADULT THEN HAD CAPACITY TO
28 EXERCISE THE POWER.