

State of Arizona
House of Representatives
Fiftieth Legislature
Second Regular Session
2012

HOUSE BILL 2560

AN ACT

AMENDING SECTIONS 46-455 AND 46-456, ARIZONA REVISED STATUTES; RELATING TO
ADULT PROTECTIVE SERVICES.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 46-455, Arizona Revised Statutes, is amended to
3 read:

4 46-455. Permitting life or health of a vulnerable adult to be
5 endangered by neglect; violation; classification;
6 civil remedy; definition

7 A. A person who has been employed to provide care, who is a de facto
8 guardian or de facto conservator or who has been appointed by a court to
9 provide care to a vulnerable adult and who causes or permits the life of the
10 adult to be endangered or that person's health to be injured or endangered by
11 neglect is guilty of a class 5 felony.

12 B. A vulnerable adult whose life or health is being or has been
13 endangered or injured by neglect, abuse or exploitation may file an action in
14 superior court against any person or enterprise that has been employed to
15 provide care, that has assumed a legal duty to provide care or that has been
16 appointed by a court to provide care to such vulnerable adult for having
17 caused or permitted such conduct. A physician licensed pursuant to title 32,
18 chapter 13 or 17, a podiatrist licensed pursuant to title 32, chapter 7, a
19 registered nurse practitioner licensed pursuant to title 32, chapter 15 or a
20 physician assistant licensed pursuant to title 32, chapter 25, while
21 providing services within the scope of that person's licensure, is not
22 subject to civil liability for damages under this section unless either:

23 1. At the time of the events giving rise to a cause of action under
24 this section, the person was employed or retained by the facility or
25 designated by the facility, with the consent of the person, to serve the
26 function of medical director as that term is defined or used by federal or
27 state law governing a nursing care institution, an assisted living center, an
28 assisted living facility, an assisted living home, an adult day health care
29 facility, a residential care institution, an adult care home, a skilled
30 nursing facility or a nursing facility.

31 2. At the time of the events giving rise to a cause of action under
32 this section, all of the following applied:

33 (a) The person was a physician licensed pursuant to title 32, chapter
34 13 or 17, a podiatrist licensed pursuant to title 32, chapter 7, a registered
35 nurse practitioner licensed pursuant to title 32, chapter 15 or a physician
36 assistant licensed pursuant to title 32, chapter 25.

37 (b) The person was the primary provider responsible for the medical
38 services to the patient while the patient was at one of the facilities listed
39 in paragraph 1 of this subsection.

40 C. Any person who was the primary provider of medical services to the
41 patient in the last two years before it was recommended that the patient be
42 admitted to one of the facilities listed in subsection B, paragraph 1 of this
43 section is exempt from civil liability for damages under this section.

44 D. For the purposes of this section, primary provider does not include
45 a consultant or specialist as listed in subsection B, paragraph 2,

1 subdivision (a) of this section who is requested by the primary provider to
2 provide care to the patient for whom the primary provider is responsible,
3 unless that consultant or specialist assumes the primary care of the patient.

4 E. The state may file an action pursuant to this section on behalf of
5 those persons endangered or injured to prevent, restrain or remedy the
6 conduct described in this section.

7 F. The superior court has jurisdiction to prevent, restrain and remedy
8 the conduct described in this section, after making provision for the rights
9 of all innocent persons affected by such conduct and after a hearing or
10 trial, as appropriate, by issuing appropriate orders.

11 G. Before a determination of liability, the orders may include, but
12 are not limited to, entering restraining orders or temporary injunctions or
13 taking such other actions, including the acceptance of satisfactory
14 performance bonds, the creation of receiverships and the appointment of
15 qualified receivers and the enforcement of constructive trusts, as the court
16 deems proper.

17 H. After a determination of liability such orders may include, but are
18 not limited to:

19 1. Ordering any person to divest himself of any direct or indirect
20 interest in any enterprise.

21 2. Imposing reasonable restrictions, including permanent injunctions,
22 on the future activities or investments of any person including prohibiting
23 any person from engaging in the same type of endeavor or conduct to the
24 extent permitted by the constitutions of the United States and this state.

25 3. Ordering dissolution or reorganization of any enterprise.

26 4. Ordering the payment of actual and consequential damages, as well
27 as costs of suit ~~and reasonable attorney fees~~, to those persons injured by
28 the conduct described in this section. The court or jury may order the
29 payment of punitive damages under common law principles that are generally
30 applicable to the award of punitive damages in other civil actions. ~~The
31 court may order the payment of reasonable attorney fees that do not exceed
32 the total amount of compensatory damages that are awarded in the action,
33 except that the court may award additional attorney fees in connection with
34 the action after the court has reviewed and approved a request for additional
35 attorney fees to the plaintiff.~~

36 5. Ordering the payment of all costs and expenses of the prosecution
37 and investigation of the conduct described in this section, civil and
38 criminal, incurred by the state or county as appropriate to be paid to the
39 general fund of this state or the county that incurred such costs and
40 expenses.

41 I. A defendant convicted in any criminal proceeding is precluded from
42 subsequently denying the essential allegations of the criminal offense of
43 which he was convicted in any civil proceeding. For the purposes of this
44 subsection, a conviction may result from a verdict or plea, including a plea
45 of no contest.

1 J. A person who files an action under this section shall serve notice
2 and one copy of the pleading on the attorney general within thirty days after
3 the action is filed with the superior court. The notice shall identify the
4 action, the person and the person's attorney. Service of the notice does not
5 limit or otherwise affect the right of this state to maintain an action under
6 this section or intervene in a pending action nor does it authorize the
7 person to name this state or the attorney general as a party to the action.
8 Upon receipt of a complaint the attorney general shall notify the appropriate
9 licensing agency.

10 K. The initiation of civil proceedings pursuant to this section shall
11 be commenced within two years after actual discovery of the cause of action.

12 L. Except for the standard of proof provided in subsection H,
13 paragraph 4 of this section, the standard of proof in civil actions brought
14 pursuant to this section is the preponderance of the evidence.

15 M. Except in cases filed by a county attorney, the attorney general,
16 upon timely application, may intervene in any civil action or proceeding
17 brought under this section if the attorney general certifies that in his
18 opinion the action is of special public importance. Upon intervention, the
19 attorney general may assert any available claim and is entitled to the same
20 relief as if the attorney general had instituted a separate action.

21 N. In addition to the state's right to intervene as a party in any
22 action under this section, the attorney general may appear as a friend of the
23 court in any proceeding in which a claim under this section has been asserted
24 or in which a court is interpreting section 46-453 or this section.

25 O. A civil action authorized by this section is remedial and not
26 punitive and does not limit and is not limited by any other civil remedy or
27 criminal action or any other provision of law. Civil remedies provided under
28 this title are supplemental and not mutually exclusive.

29 P. The cause of action or the right to bring a cause of action
30 pursuant to subsection B or E of this section shall not be limited or
31 affected by the death of the vulnerable adult.

32 Q. For the purposes of this section, "enterprise" means any
33 corporation, partnership, association, labor union or other legal entity, or
34 any group of persons associated in fact although not a legal entity, that is
35 involved with providing care to a vulnerable adult.

36 Sec. 2. Section 46-456, Arizona Revised Statutes, is amended to read:

37 46-456. Duty to a vulnerable adult; financial exploitation;
38 civil penalties; exceptions; definitions

39 A. A person who is in a position of trust and confidence to a
40 vulnerable adult shall use the vulnerable adult's assets solely for the
41 benefit of the vulnerable adult and not for the benefit of the person who is
42 in the position of trust and confidence to the vulnerable adult or the
43 person's relatives unless either of the following applies:

44 1. The superior court gives prior approval of the transaction.

1 2. The transaction is specifically authorized in a valid durable power
2 of attorney that is executed by the vulnerable adult as the principal or in a
3 valid trust instrument that is executed by the vulnerable adult as a
4 settlor.

5 B. A person who violates subsection A of this section or section
6 13-1802, subsection B shall be subject to actual damages AND REASONABLE COSTS
7 AND ATTORNEY FEES in a civil action brought by or on behalf of a vulnerable
8 adult and the court may award additional damages for an amount up to two
9 times the amount of the actual damages.

10 C. In addition to the damages prescribed in subsection B of this
11 section, the court may:

12 1. Order a person who violates subsection A of this section or section
13 13-1802, subsection B to forfeit all or a portion of the person's benefits
14 under title 14, chapter 2 with respect to the estate of the vulnerable adult,
15 including an intestate share, an elective share, an omitted spouse's share,
16 an omitted child's share, a homestead allowance, any exempt property and a
17 family allowance. If the vulnerable adult died intestate, the vulnerable
18 adult's intestate estate passes as if the person who violated subsection A of
19 this section or section 13-1802, subsection B disclaimed that person's
20 intestate share to the extent the court orders that person to forfeit all or
21 a portion of the person's benefits under title 14, chapter 2.

22 2. Revoke, in whole or in part, any revocable:

23 (a) Disposition or appointment of property that is made in a governing
24 instrument by the vulnerable adult to the person who violates subsection A of
25 this section or section 13-1802, subsection B.

26 (b) Provision by the vulnerable adult that is contained in a governing
27 instrument that confers a general or nongeneral power of appointment on the
28 person who violates subsection A of this section or section 13-1802,
29 subsection B.

30 (c) Nomination or appointment by the vulnerable adult that is
31 contained in a governing instrument that nominates or appoints the person who
32 violates subsection A of this section or section 13-1802, subsection B to
33 serve in any fiduciary or representative capacity, including serving as a
34 personal representative, executor, guardian, conservator, trustee or agent.

35 3. Sever the interests of the vulnerable adult and the person who
36 violates subsection A of this section or section 13-1802, subsection B in any
37 property that is held by them at the time of the violation as joint tenants
38 with the right of survivorship or as community property with the right of
39 survivorship, and transform the interests of the vulnerable adult and the
40 person who violated subsection A of this section or section 13-1802,
41 subsection B into tenancies in common. To the extent that the person who
42 violated subsection A of this section or section 13-1802, subsection B did
43 not provide adequate consideration for the jointly held interest, the court
44 may cause the person's interest in the subject property to be forfeited in
45 whole or in part.

1 D. A revocation or a severance under subsection C, paragraph 2 or 3 of
2 this section does not affect any third party interest in property that was
3 acquired for value and in good faith reliance on apparent title by
4 survivorship in the person who violated subsection A of this section or
5 section 13-1802, subsection B unless a writing declaring the severance has
6 been noted, registered, filed or recorded in records that are appropriate to
7 the kind and location of the property and that are relied on as evidence of
8 ownership in the ordinary course of ~~transitions~~ TRANSACTIONS involving that
9 property.

10 E. If the court imposes a revocation under subsection C, paragraph 2
11 of this section, provisions of the governing instrument shall be given effect
12 as if the person who violated subsection A of this section or section
13 13-1802, subsection B disclaimed all provisions revoked by the court or, in
14 the case of a revocation of a nomination in a fiduciary or representative
15 capacity, the person who violated subsection A of this section or section
16 13-1802, subsection B predeceased the decedent.

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

19 G. The vulnerable adult or the duly appointed conservator or personal
20 representative of the vulnerable adult's estate has priority to, and may
21 file, a civil action under this section. If an action is not filed by the
22 vulnerable adult or the duly appointed conservator or personal representative
23 of the vulnerable adult's estate, any other interested person, as defined in
24 section 14-1201, may petition the court for leave to file an action on behalf
25 of the vulnerable adult or the vulnerable adult's estate. Notice of the
26 hearing on the petition shall comply with section 14-1401.

27 H. Subsections A, B, C, D, E and F of this section do not apply to an
28 agent who is acting within the scope of the person's duties as, or on behalf
29 of, any of the following:

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

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

34 3. An insurer, including a title insurer, authorized and regulated
35 pursuant to title 20.

36 4. A health care institution licensed pursuant to title 36, chapter 4
37 that provides services to the vulnerable adult.

38 I. For the purposes of this section:

39 1. "Asset" includes all forms of personal and real property.

40 2. "Disposition or appointment of property" includes a transfer of an
41 item of property or any other benefit of a beneficiary designated in a
42 governing instrument.

43 3. "Governing instrument" means a deed, a will, a trust, a
44 custodianship, an insurance or annuity policy, an account with pay on death
45 designation, a security registered in beneficiary form, a pension, a profit

1 sharing, retirement or similar benefit plan, an instrument creating or
2 exercising a power of appointment, a power of attorney or a dispositive,
3 appointive or nominative instrument of any similar type.

4 4. "Position of trust and confidence" means that a person is any of
5 the following:

6 (a) A person who has assumed a duty to provide care to the vulnerable
7 adult.

8 (b) A joint tenant or a tenant in common with a vulnerable adult.

9 (c) A person who is in a fiduciary relationship with a vulnerable
10 adult including a de facto guardian or de facto conservator.

11 (d) A person who is in a confidential relationship with the vulnerable
12 adult. The issue of whether a confidential relationship exists shall be an
13 issue of fact to be decided by the court based on the totality of the
14 circumstances.

15 5. "Revocable" means a disposition, appointment, provision or
16 nomination under which the vulnerable adult, at the time of or immediately
17 before death, was alone empowered, by law or under the governing instrument,
18 to cancel the designation in favor of the person who violated subsection A of
19 this section or section 13-1802, subsection B, whether or not the vulnerable
20 adult was then empowered to designate the vulnerable adult in place of the
21 person who violated subsection A of this section or section 13-1802,
22 subsection B or the vulnerable adult then had capacity to exercise the power.