

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

HOUSE BILL 2696

AN ACT

AMENDING SECTIONS 46-451 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 46-451, Arizona Revised Statutes, is amended to
3 read:
4 46-451. Definitions; program goals
5 A. In this chapter, unless the context otherwise requires:
6 1. "Abuse" means:
7 (a) Intentional infliction of physical harm.
8 (b) Injury caused by negligent acts or omissions.
9 (c) Unreasonable confinement.
10 (d) Sexual abuse or sexual assault.
11 2. "De facto conservator" means any person who takes possession of the
12 estate of a vulnerable adult, without right or lawful authority. A de facto
13 conservator is subject to all of the responsibilities that attach to a
14 legally appointed conservator or trustee.
15 3. "De facto guardian" means any person who takes possession of the
16 person of a vulnerable adult, without right or lawful authority. A de facto
17 guardian is subject to all of the responsibilities that attach to a legally
18 appointed guardian.
19 4. "Exploitation" means the illegal or improper use of a vulnerable
20 adult or his resources for another's profit or advantage.
21 5. "Informed consent" means any of the following:
22 (a) A written expression by the person that the person fully
23 understands the potential risks and benefits of the withdrawal of food,
24 water, medication, medical services, shelter, cooling, heating or other
25 services necessary to maintain minimum physical or mental health and that the
26 person desires that the services be withdrawn. **A WRITTEN EXPRESSION THAT IS**
27 **WITNESSED BY AT LEAST ONE INDIVIDUAL WHO DOES NOT BENEFIT, FINANCIALLY OR**
28 **OTHERWISE, FROM THE WITHDRAWAL OF SERVICES CREATES A REBUTTABLE PRESUMPTION**
29 **THAT THE PERSON WAS COMPETENT TO UNDERSTAND THE MEANING AND EFFECT OF THE**
30 **EXPRESSION.**
31 (b) Consent to withdraw food, water, medication, medical services,
32 shelter, cooling, heating or other services necessary to maintain minimum
33 physical or mental health as permitted by an order of a court of competent
34 jurisdiction.
35 (c) A declaration made pursuant to title 36, chapter 32.
36 (d) Consent by another person under a durable power of attorney
37 relating to health care services to withdraw food, water, medication, medical
38 services, shelter, cooling, heating or other services necessary to maintain
39 minimum physical or mental health.
40 6. "Neglect" means a pattern of conduct without the person's informed
41 consent resulting in deprivation of food, water, medication, medical
42 services, shelter, cooling, heating or other services necessary to maintain
43 minimum physical or mental health.

1 7. "Protective services" means a program of identifiable and
2 specialized social services that may offer social services appropriate to
3 resolve problems of abuse, exploitation or neglect of a vulnerable adult.

4 8. "Protective services worker" means a person who has been selected
5 by and trained under the requirements prescribed by the department to provide
6 protective services.

7 9. "Vulnerable adult" means an individual who is eighteen years of age
8 or older and who is unable to protect himself from abuse, neglect or
9 exploitation by others because of a physical or mental impairment.
10 Vulnerable adult includes an incapacitated person as defined in section
11 14-5101.

12 B. Protective services programs shall seek to maintain the adult in
13 his familiar environment by strengthening his capacity for self-maintenance
14 or by providing supportive services.

15 C. Nothing in this section shall be construed to mean that an adult is
16 abused, neglected or in need of protective services for the sole reason that
17 he relies on treatment from a recognized religious method of healing in lieu
18 of medical treatment.

19 ~~D. A written expression pursuant to subsection A, paragraph 5,
20 subdivision (a) of this section is valid only if the person is of sound mind
21 when the consent is made and if the consent is witnessed by at least two
22 individuals who do not benefit by the withdrawal of services.~~

23 D. THIS SECTION DOES NOT MEAN THAT A PERSON IS EXPLOITED BY A TRANSFER
24 OF ASSETS FOR THE PRIMARY PURPOSE OF OBTAINING OR MAINTAINING ELIGIBILITY FOR
25 BENEFITS UNDER TITLE 36, CHAPTER 29, MEDICAID BENEFITS OR BENEFITS FOR
26 SUPPLEMENTAL SECURITY INCOME, MEDICARE OR VETERANS' ADMINISTRATION PROGRAMS
27 IF THE TRANSFERS OF ASSETS ARE BETWEEN THE PERSON AND ANY OF THE FOLLOWING:

- 28 1. THE PERSON'S SPOUSE.
- 29 2. THE PERSON'S DISABLED CHILD.
- 30 3. A TRUST FOR THE BENEFIT OF THE PERSON'S SPOUSE OR DISABLED CHILD.

31 E. A TRANSFER FOR THE PURPOSE OF OBTAINING OR MAINTAINING ELIGIBILITY
32 FOR BENEFITS UNDER TITLE 36, CHAPTER 29 OR MEDICAID BENEFITS SHALL COMPLY
33 WITH 42 UNITED STATES CODE SECTION 1396p AND SECTIONS 36-2904.01 AND 36-2934.

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

35 46-456. Duty to a vulnerable adult; financial exploitation;
36 civil penalties; exceptions; definitions

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

- 42 1. The superior court gives prior approval of the transaction.
- 43 2. The transaction is specifically authorized in a valid durable power
44 of attorney that is executed by the vulnerable adult as the principal or in a
45 valid trust instrument that is executed by the vulnerable adult as a settlor.

1 3. THE TRANSACTION IS REQUIRED IN ORDER TO OBTAIN OR MAINTAIN
2 ELIGIBILITY FOR SERVICES UNDER TITLE 36, CHAPTER 29.

3 4. THE PERSON IN THE POSITION OF TRUST AND CONFIDENCE TO THE
4 VULNERABLE ADULT IS THE VULNERABLE ADULT'S SPOUSE AND THE TRANSACTION
5 FURTHERS THE INTEREST OF THE MARITAL COMMUNITY, INCLUDING APPLYING FOR
6 BENEFITS FOR SUPPLEMENTAL SECURITY INCOME, MEDICAID, MEDICARE OR VETERANS'
7 ADMINISTRATION PROGRAMS.

8 B. A person who violates subsection A of this section or section
9 13-1802, subsection B shall be subject to actual damages in a civil action
10 brought by or on behalf of a vulnerable adult and the court may award
11 additional damages ~~for~~ IN an amount up to two times the amount of the actual
12 damages.

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

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

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

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

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

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

38 3. Sever the interests of the vulnerable adult and the person who
39 violates subsection A of this section or section 13-1802, subsection B in any
40 property that is held by them at the time of the violation as joint tenants
41 with the right of survivorship or as community property with the right of
42 survivorship, and transform the interests of the vulnerable adult and the
43 person who violated subsection A of this section or section 13-1802,
44 subsection B into tenancies in common. To the extent that the person who
45 violated subsection A of this section or section 13-1802, subsection B did

1 not provide adequate consideration for the jointly held interest, the court
2 may cause the person's interest in the subject property to be forfeited in
3 whole or in part.

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

13 E. If the court imposes a revocation under subsection C, paragraph 2
14 of this section, provisions of the governing instrument shall be given effect
15 as if the person who violated subsection A of this section or section
16 13-1802, subsection B disclaimed all provisions revoked by the court or, in
17 the case of a revocation of a nomination in a fiduciary or representative
18 capacity, the person who violated subsection A of this section or section
19 13-1802, subsection B predeceased the decedent.

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

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

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

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

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

37 3. An insurer, including a title insurer, authorized and regulated
38 pursuant to title 20.

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

41 I. For the purposes of this section:

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

43 2. "Disposition or appointment of property" includes a transfer of an
44 item of property or any other benefit of a beneficiary designated in a
45 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 4. "Position of trust and confidence" means that a person is any of
8 the following:

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

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

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

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

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

26 Sec. 3. Legislative intent

27 The legislature intends by this act only to clarify existing law as
28 enacted by the legislature and interpreted by the courts.