

REFERENCE TITLE: vulnerable adults; asset misuse; damages

State of Arizona
House of Representatives
Fifty-first Legislature
Second Regular Session
2014

HB 2245

Introduced by
Representative Campbell

AN ACT

AMENDING SECTION 46-456, ARIZONA REVISED STATUTES; RELATING TO 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 46-456, Arizona Revised Statutes, is amended to
3 read:

4 46-456. Duty to a vulnerable adult; financial exploitation;
5 civil penalties; exceptions; definitions

6 A. A person who is in a position of trust and confidence to a
7 vulnerable adult shall use the vulnerable adult's assets solely for the
8 benefit of the vulnerable adult and not for the benefit of the person who is
9 in the position of trust and confidence to the vulnerable adult or the
10 person's relatives unless any of the following applies:

11 1. The superior court gives prior approval of the transaction on a
12 finding that the transaction is for the benefit of the vulnerable adult.

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

16 3. The transaction is required in order to obtain or maintain
17 eligibility for services under title 36, chapter 29.

18 4. The person in the position of trust and confidence to the
19 vulnerable adult is the vulnerable adult's spouse and the transaction
20 furthers the interest of the marital community, including applying for
21 benefits pursuant to title 36, chapter 29 or benefits for supplemental
22 security income, medicare or veterans' administration programs.

23 B. A person who violates subsection A of this section or section
24 13-1802, subsection B shall be subject to actual damages and reasonable costs
25 and attorney fees in a civil action brought by or on behalf of a vulnerable
26 adult and the court may award additional damages in an amount up to ~~two~~ THREE
27 times the amount of the actual damages.

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

30 1. Order a person who violates subsection A of this section or section
31 13-1802, subsection B to forfeit all or a portion of the person's:

32 (a) Interest in any governing instrument.

33 (b) Benefits under title 14, chapter 2 with respect to the estate of
34 the vulnerable adult, including an intestate share, an elective share, an
35 omitted spouse's share, an omitted child's share, a homestead allowance, any
36 exempt property and a family allowance. If the vulnerable adult died
37 intestate, the vulnerable adult's intestate estate passes as if the person
38 who violated subsection A of this section or section 13-1802, subsection B
39 disclaimed that person's intestate share to the extent the court orders that
40 person to forfeit all or a portion of the person's benefits under title 14,
41 chapter 2.

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

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

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

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

10 3. Sever the interests of the vulnerable adult and the person who
11 violates subsection A of this section or section 13-1802, subsection B in any
12 property that is held by them at the time of the violation as joint tenants
13 with the right of survivorship or as community property with the right of
14 survivorship, and transform the interests of the vulnerable adult and the
15 person who violated subsection A of this section or section 13-1802,
16 subsection B into tenancies in common. To the extent that the person who
17 violated subsection A of this section or section 13-1802, subsection B did
18 not provide adequate consideration for the jointly held interest, the court
19 may cause the person's interest in the subject property to be forfeited in
20 whole or in part.

21 D. A revocation or a severance under subsection C, paragraph 2 or 3 of
22 this section does not affect any third party interest in property that was
23 acquired for value and in good faith reliance on apparent title by
24 survivorship in the person who violated subsection A of this section or
25 section 13-1802, subsection B unless a writing declaring the severance has
26 been noted, registered, filed or recorded in records that are appropriate to
27 the kind and location of the property and that are relied on as evidence of
28 ownership in the ordinary course of transactions involving that property.

29 E. If the court imposes a revocation under subsection C, paragraph 2
30 of this section, provisions of the governing instrument shall be given effect
31 as if the person who violated subsection A of this section or section
32 13-1802, subsection B disclaimed all provisions revoked by the court or, in
33 the case of a revocation of a nomination in a fiduciary or representative
34 capacity, the person who violated subsection A of this section or section
35 13-1802, subsection B predeceased the decedent.

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

38 G. The vulnerable adult or the duly appointed conservator or personal
39 representative of the vulnerable adult's estate has priority to, and may
40 file, a civil action under this section. If an action is not filed by the
41 vulnerable adult or the duly appointed conservator or personal representative
42 of the vulnerable adult's estate, any other interested person, as defined in
43 section 14-1201, may petition the court for leave to file an action on behalf
44 of the vulnerable adult or the vulnerable adult's estate. Notice of the
45 hearing on the petition shall comply with section 14-1401.

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

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

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

8 3. An insurer, including a title insurer, authorized and regulated
9 pursuant to title 20.

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

12 I. A civil action brought by a person in a position of trust and
13 confidence against a vulnerable adult regarding a governing instrument
14 established by the vulnerable adult is presumed not to be for the benefit of
15 the vulnerable adult unless it is shown otherwise by clear and convincing
16 evidence.

17 J. For the purposes of this section:

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

19 2. "Disposition or appointment of property" includes a transfer of an
20 item of property or any other benefit of a beneficiary designated in a
21 governing instrument.

22 3. "For the benefit of the vulnerable adult" includes any act that is
23 consistent with the clearly stated wishes of the vulnerable adult found by
24 the court to be made without coercion and while the vulnerable adult was of
25 sound mind.

26 4. "Governing instrument" means a deed, a will, a trust, a
27 custodianship, an insurance or annuity policy, an account with pay on death
28 designation, a security registered in beneficiary form, a pension, a profit
29 sharing, retirement or similar benefit plan, a family limited partnership, an
30 instrument creating or exercising a power of appointment, a power of
31 attorney, an estate planning document or a dispositive, appointive or
32 nominative instrument of any similar type.

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

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

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

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

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

44 (e) A beneficiary of the vulnerable adult in a governing instrument.

1 6. "Revocable" means a disposition, appointment, provision or
2 nomination under which the vulnerable adult, at the time of or immediately
3 before death, was alone empowered, by law or under the governing instrument,
4 to cancel the designation in favor of the person who violated subsection A of
5 this section or section 13-1802, subsection B, whether or not the vulnerable
6 adult was then empowered to designate the vulnerable adult in place of the
7 person who violated subsection A of this section or section 13-1802,
8 subsection B or the vulnerable adult then had capacity to exercise the power.