

REFERENCE TITLE: power of attorney; notice

State of Arizona
House of Representatives
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HB 2394

Introduced by
Representatives McCune Davis, Andrade, Cardenas, Fernandez, Gabaldón,
Mendez, Rios: Alston, Bolding, Clark, Hale

AN ACT

AMENDING SECTIONS 14-5501 AND 46-456, ARIZONA REVISED STATUTES; RELATING TO
POWERS OF ATTORNEY.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:
2 Section 1. Section 14-5501, Arizona Revised Statutes, is amended to
3 read:
4 14-5501. Durable power of attorney; creation; validity; notice;
5 prohibition
6 A. A durable power of attorney is a written instrument by which a
7 principal designates another person as the principal's agent. The instrument
8 shall contain words that demonstrate the principal's intent that the
9 authority conferred in the durable power of attorney may be exercised:
10 1. If the principal ~~is~~ subsequently ~~a person with~~ DEVELOPS a
11 disability or BECOMES incapacitated.
12 2. Regardless of how much time has elapsed, unless the instrument
13 states a definite termination time.
14 B. The written instrument may demonstrate the principal's intent
15 required by subsection A of this section using either of the following
16 statements or similar language:
17 1. "This power of attorney is not affected by subsequent disability or
18 incapacity of the principal or lapse of time."
19 2. "This power of attorney is effective on the disability or
20 incapacity of the principal."
21 C. A power of attorney executed in another jurisdiction of the United
22 States is valid in this state if the power of attorney was validly executed
23 in the jurisdiction in which it was created.
24 D. Except as provided in section 28-370, an adult, known as the
25 principal, may designate another adult, known as the agent, to make financial
26 decisions on the principal's behalf by executing a written power of attorney
27 that satisfies all of the following requirements:
28 1. Contains language that clearly indicates that the principal intends
29 to create a power of attorney and clearly identifies the agent.
30 2. Is signed or marked by the principal or signed in the principal's
31 name by some other individual in the principal's conscious presence and at
32 the principal's direction.
33 3. Is witnessed by a person other than the agent, the agent's spouse,
34 the agent's children or the notary public.
35 4. Is executed and attested by its acknowledgment by the principal and
36 by an affidavit of the witness before a notary public and evidenced by the
37 notary public's certificate, under official seal, in substantially the
38 following form:
39 I, _____, the principal, sign my name to this power
40 of attorney this ____ day of _____ and, being first duly
41 sworn, do declare to the undersigned authority that I sign and
42 execute this instrument as my power of attorney and that I sign
43 it willingly, or willingly direct another to sign for me, that I
44 execute it as my free and voluntary act for the purposes
45 expressed in the power of attorney and that I am eighteen years

1 of age or older, of sound mind and under no constraint or undue
2 influence.

3 _____
4 Principal

5 I, _____, the witness, sign my name to the foregoing
6 power of attorney being first duly sworn and do declare to the
7 undersigned authority that the principal signs and executes this
8 instrument as the principal's power of attorney and that the
9 principal signs it willingly, or willingly directs another to
10 sign for the principal, and that I, in the presence and hearing
11 of the principal, sign this power of attorney as witness to the
12 principal's signing and that to the best of my knowledge the
13 principal is eighteen years of age or older, of sound mind and
14 under no constraint or undue influence.

15 _____
16 Witness
17 The state of _____
18 County of _____

19 Subscribed, sworn to and acknowledged before me by
20 _____, the principal, and subscribed and sworn to before me
21 by _____, witness, this ____ day of _____.

22 (seal)
23 (signed) _____
24 _____
25 (notary public)

26 E. The execution requirements for the creation of a power of attorney
27 provided in subsection D of this section do not apply if the principal
28 creating the power of attorney is:

- 29 1. A person other than a natural person.
30 2. Any person, if the power of attorney to be created is a power
31 coupled with an interest. For the purposes of this paragraph, "power coupled
32 with an interest" means a power that forms a part of a contract and is
33 security for money or for the performance of a valuable act.

34 F. IN ADDITION TO THE OTHER REQUIREMENTS OF THIS SECTION, A POWER OF
35 ATTORNEY MUST CONTAIN A NOTICE IN SUBSTANTIALLY THE FOLLOWING FORM AND A
36 SPACE FOR THE AGENT TO INITIAL TO INDICATE THAT THE AGENT HAS READ THE
37 FOLLOWING LANGUAGE:

38 BY ACCEPTING THE RESPONSIBILITY AS AGENT UNDER THIS POWER
39 OF ATTORNEY, I UNDERSTAND THAT:

40 1. AN AGENT IS SUBJECT TO SPECIFIC DUTIES UNDER ARIZONA
41 STATUTES THAT GOVERN THE EXERCISE OF AUTHORITY UNDER A POWER OF
42 ATTORNEY.

43 2. A PERSON IN A POSITION OF TRUST AND CONFIDENCE TO A
44 VULNERABLE ADULT, INCLUDING AN AGENT DESIGNATED IN A POWER OF

1 ATTORNEY, MUST USE THE VULNERABLE ADULT'S ASSETS SOLELY FOR THE
2 BENEFIT OF THE VULNERABLE ADULT.

3 3. FAILURE TO CARRY OUT THESE DUTIES MAY SUBJECT AN AGENT
4 TO CIVIL PENALTIES UNDER SECTION 46-456, ARIZONA REVISED
5 STATUTES, OR CRIMINAL PENALTIES UNDER TITLE 13, ARIZONA REVISED
6 STATUTES.

7 ~~F.~~ G. A person whose license as a fiduciary has been suspended or
8 revoked pursuant to section 14-5651 may not serve as an agent under a power
9 of attorney in any capacity unless the person is related to the principal by
10 blood, adoption or marriage. This prohibition does not apply if the person's
11 license has been reinstated and is in good standing.

12 Sec. 2. Section 46-456, Arizona Revised Statutes, is amended to read:
13 46-456. Duty to a vulnerable adult; financial exploitation;
14 civil penalties; exceptions; definitions

15 A. A person who is in a position of trust and confidence to a
16 vulnerable adult shall use the vulnerable adult's assets solely for the
17 benefit of the vulnerable adult and not for the benefit of the person who is
18 in the position of trust and confidence to the vulnerable adult or the
19 person's relatives unless any of the following applies:

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

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

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

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

32 B. A person who violates subsection A of this section or section
33 13-1802, subsection B shall be subject to actual damages and reasonable costs
34 and attorney fees in a civil action brought by or on behalf of a vulnerable
35 adult and the court may award additional damages in an amount up to two times
36 the amount of the actual damages.

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

39 1. Order a person who violates subsection A of this section or section
40 13-1802, subsection B to forfeit all or a portion of the person's:

41 (a) Interest in any governing instrument.

42 (b) Benefits under title 14, chapter 2 with respect to the estate of
43 the vulnerable adult, including an intestate share, an elective share, an
44 omitted spouse's share, an omitted child's share, a homestead allowance, any
45 exempt property and a family allowance. If the vulnerable adult died

1 intestate, the vulnerable adult's intestate estate passes as if the person
2 who violated subsection A of this section or section 13-1802, subsection B
3 disclaimed that person's intestate share to the extent the court orders that
4 person to forfeit all or a portion of the person's benefits under title 14,
5 chapter 2.

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

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

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

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

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

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

38 E. If the court imposes a revocation under subsection C, paragraph 2
39 of this section, provisions of the governing instrument shall be given effect
40 as if the person who violated subsection A of this section or section
41 13-1802, subsection B disclaimed all provisions revoked by the court or, in
42 the case of a revocation of a nomination in a fiduciary or representative
43 capacity, the person who violated subsection A of this section or section
44 13-1802, subsection B predeceased the decedent.

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

3 G. The vulnerable adult or the duly appointed conservator or personal
4 representative of the vulnerable adult's estate has priority to, and may
5 file, a civil action under this section. If an action is not filed by the
6 vulnerable adult or the duly appointed conservator or personal representative
7 of the vulnerable adult's estate, any other interested person, as defined in
8 section 14-1201, may petition the court for leave to file an action on behalf
9 of the vulnerable adult or the vulnerable adult's estate. Notice of the
10 hearing on the petition shall comply with section 14-1401.

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

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

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

18 3. An insurer, including a title insurer, authorized and regulated
19 pursuant to title 20.

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

22 I. A civil action brought by a person in a position of trust and
23 confidence against a vulnerable adult regarding a governing instrument
24 established by the vulnerable adult is presumed not to be for the benefit of
25 the vulnerable adult unless it is shown otherwise by clear and convincing
26 evidence.

27 J. For the purposes of this section:

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

29 2. "Disposition or appointment of property" includes a transfer of an
30 item of property or any other benefit of a beneficiary designated in a
31 governing instrument.

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

36 4. "Governing instrument" means a deed, a will, a trust, a
37 custodianship, an insurance or annuity policy, an account with pay on death
38 designation, a security registered in beneficiary form, a pension, a profit
39 sharing, retirement or similar benefit plan, a family limited partnership, an
40 instrument creating or exercising a power of appointment, a power of
41 attorney, an estate planning document or a dispositive, appointive or
42 nominative instrument of any similar type.

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

- 1 (a) A person who has assumed a duty to provide care to the vulnerable
2 adult.
- 3 (b) A joint tenant or a tenant in common with a vulnerable adult.
- 4 (c) A person who is in a fiduciary relationship with a vulnerable
5 adult including a de facto guardian or de facto conservator.
- 6 (d) A person who is in a confidential relationship with the vulnerable
7 adult. The issue of whether a confidential relationship exists shall be an
8 issue of fact to be decided by the court based on the totality of the
9 circumstances.
- 10 (e) A beneficiary of the vulnerable adult in a governing instrument.
- 11 (f) AN AGENT UNDER A POWER OF ATTORNEY OF WHICH A VULNERABLE ADULT IS
12 PRINCIPAL.
- 13 6. "Revocable" means a disposition, appointment, provision or
14 nomination under which the vulnerable adult, at the time of or immediately
15 before death, was alone empowered, by law or under the governing instrument,
16 to cancel the designation in favor of the person who violated subsection A of
17 this section or section 13-1802, subsection B, whether or not the vulnerable
18 adult was then empowered to designate the vulnerable adult in place of the
19 person who violated subsection A of this section or section 13-1802,
20 subsection B or the vulnerable adult then had capacity to exercise the power.