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

Section 1. Section 14-5501, Arizona Revised Statutes, is amended to read:

14-5501. **Durable power of attorney; creation; validity; notice; prohibition**

A. A durable power of attorney is a written instrument by which a principal designates another person as the principal's agent. The instrument shall contain words that demonstrate the principal's intent that the authority conferred in the durable power of attorney may be exercised:

1. If the principal is subsequently an incapacitated person with a disability or becomes incapacitated.
2. Regardless of how much time has elapsed, unless the instrument states a definite termination time.

B. The written instrument may demonstrate the principal's intent required by subsection A of this section using either of the following statements or similar language:

1. "This power of attorney is not affected by subsequent disability or incapacity of the principal or lapse of time."
2. "This power of attorney is effective on the disability or incapacity of the principal."

C. A power of attorney executed in another jurisdiction of the United States is valid in this state if the power of attorney was validly executed in the jurisdiction in which it was created.

D. Except as provided in section 28-370, an adult, known as the principal, may designate another adult, known as the agent, to make financial decisions on the principal's behalf by executing a written power of attorney that satisfies all of the following requirements:

1. Contains language that clearly indicates that the principal intends to create a power of attorney and clearly identifies the agent.
2. Is signed or marked by the principal or signed in the principal's name by some other individual in the principal's conscious presence and at the principal's direction.
3. Is witnessed by a person other than the agent, the agent's spouse, the agent's children or the notary public.
4. Is executed and attested by its acknowledgment by the principal and by an affidavit of the witness before a notary public and evidenced by the notary public's certificate, under official seal, in substantially the following form:

   I, __________, the principal, sign my name to this power of attorney this _____ day of __________ and, being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my power of attorney and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in the power of attorney and that I am eighteen years
of age or older, of sound mind and under no constraint or undue influence.

____________________
Principal

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

____________________
Witness

The state of ______________
County of _______________

Subscribed, sworn to and acknowledged before me by __________., the principal, and subscribed and sworn to before me by __________., witness, this __ day of __________.

(seal)

(signed) _____________________

______________________________
(notary public)

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

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

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

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

1. AN AGENT IS SUBJECT TO SPECIFIC DUTIES UNDER ARIZONA STATUTES THAT GOVERN THE EXERCISE OF AUTHORITY UNDER A POWER OF ATTORNEY.
2. A PERSON IN A POSITION OF TRUST AND CONFIDENCE TO A VULNERABLE ADULT, INCLUDING AN AGENT DESIGNATED IN A POWER OF
ATTORNEY, MUST USE THE VULNERABLE ADULT'S ASSETS SOLELY FOR THE
BENEFIT OF THE VULNERABLE ADULT.

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

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

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

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

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

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

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

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

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

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

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

1. Order a person who violates subsection A of this section or section
13-1802, subsection B to forfeit all or a portion of the person's:
(a) Interest in any governing instrument.
(b) Benefits under title 14, chapter 2 with respect to the estate of
the vulnerable adult, including an intestate share, an elective share, an
omitted spouse's share, an omitted child's share, a homestead allowance, any
exempt property and a family allowance. If the vulnerable adult died
intestate, the vulnerable adult's intestate estate passes as if the person who violated subsection A of this section or section 13-1802, subsection B disclaimed that person's intestate share to the extent the court orders that person to forfeit all or a portion of the person's benefits under title 14, chapter 2.

2. Revoke, in whole or in part, any revocable:
   (a) Disposition or appointment of property that is made in a governing instrument by the vulnerable adult to the person who violates subsection A of this section or section 13-1802, subsection B.
   (b) Provision by the vulnerable adult that is contained in a governing instrument that confers a general or nongeneral power of appointment on the person who violates subsection A of this section or section 13-1802, subsection B.
   (c) Nomination or appointment by the vulnerable adult that is contained in a governing instrument that nominates or appoints the person who violates subsection A of this section or section 13-1802, subsection B to serve in any fiduciary or representative capacity, including serving as a personal representative, executor, guardian, conservator, trustee or agent.

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

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

E. If the court imposes a revocation under subsection C, paragraph 2 of this section, provisions of the governing instrument shall be given effect as if the person who violated subsection A of this section or section 13-1802, subsection B disclaimed all provisions revoked by the court or, in the case of a revocation of a nomination in a fiduciary or representative capacity, the person who violated subsection A of this section or section 13-1802, subsection B predeceased the decedent.
F. Section 46-455, subsections F, G, H, I, K, L, M and P also apply to civil violations of this section.

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

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

1. A bank, financial institution or escrow agent licensed or certified pursuant to title 6.
2. A securities dealer or salesman registered pursuant to title 44, chapter 12, article 9.
3. An insurer, including a title insurer, authorized and regulated pursuant to title 20.
4. A health care institution licensed pursuant to title 36, chapter 4 that provides services to the vulnerable adult.

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

J. For the purposes of this section:

1. "Asset" includes all forms of personal and real property.
2. "Disposition or appointment of property" includes a transfer of an item of property or any other benefit of a beneficiary designated in a governing instrument.
3. "For the benefit of the vulnerable adult" includes any act that is consistent with the clearly stated wishes of the vulnerable adult found by the court to be made without coercion and while the vulnerable adult was of sound mind.
4. "Governing instrument" means a deed, a will, a trust, a custodianship, an insurance or annuity policy, an account with pay on death designation, a security registered in beneficiary form, a pension, a profit sharing, retirement or similar benefit plan, a family limited partnership, an instrument creating or exercising a power of appointment, a power of attorney, an estate planning document or a dispositive, appointive or nominative instrument of any similar type.
5. "Position of trust and confidence" means that a person is any of the following:
(a) A person who has assumed a duty to provide care to the vulnerable adult.
(b) A joint tenant or a tenant in common with a vulnerable adult.
(c) A person who is in a fiduciary relationship with a vulnerable adult including a de facto guardian or de facto conservator.
(d) A person who is in a confidential relationship with the vulnerable adult. The issue of whether a confidential relationship exists shall be an issue of fact to be decided by the court based on the totality of the circumstances.
(e) A beneficiary of the vulnerable adult in a governing instrument.
(f) AN AGENT UNDER A POWER OF ATTORNEY OF WHICH A VULNERABLE ADULT IS PRINCIPAL.

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