

REFERENCE TITLE: power of attorney; notice; duties

State of Arizona  
House of Representatives  
Fifty-second Legislature  
Second Regular Session  
2016

## **HB 2576**

Introduced by  
Representative McCune Davis

AN ACT

AMENDING SECTION 14-5501, ARIZONA REVISED STATUTES; AMENDING TITLE 14, CHAPTER 5, ARTICLE 5, ARIZONA REVISED STATUTES, BY ADDING SECTION 14-5508; AMENDING SECTION 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 THAT BY ACCEPTING AUTHORITY UNDER THE POWER OF  
36 ATTORNEY THAT THE AGENT IS SUBJECT TO SPECIFIC DUTIES UNDER STATE LAW THAT  
37 GOVERNS THE EXERCISE OF AUTHORITY UNDER A POWER OF ATTORNEY, WHICH MAY  
38 INCLUDE DUTIES TO A VULNERABLE ADULT UNDER SECTION 46-456. THE POWER OF  
39 ATTORNEY SHALL INCLUDE A SPACE FOR THE AGENT TO INITIAL TO INDICATE THAT THE  
40 AGENT HAS READ THE NOTICE. AN AGENT IS NOT RELIEVED OF CRIMINAL LIABILITY  
41 UNDER SECTION 13-1802 OR 13-1815 SOLELY BECAUSE THE POWER OF ATTORNEY  
42 DOCUMENT DOES NOT CONFORM TO THE REQUIREMENTS OF THIS SUBSECTION.

43 ~~F.~~ G. A person whose license as a fiduciary has been suspended or  
44 revoked pursuant to section 14-5651 may not serve as an agent under a power  
45 of attorney in any capacity unless the person is related to the principal by

1 blood, adoption or marriage. This prohibition does not apply if the person's  
2 license has been reinstated and is in good standing.

3 Sec. 2. Title 14, chapter 5, article 5, Arizona Revised Statutes, is  
4 amended by adding section 14-5508, to read:

5 14-5508. Liability of agent

6 A. AN AGENT IS LIABLE TO THE PRINCIPAL FOR DAMAGES IF THE AGENT,  
7 WITHOUT LAWFUL AUTHORITY, KNOWINGLY TAKES CONTROL, TITLE, USE OR MANAGEMENT  
8 OF THE PRINCIPAL'S PROPERTY WITH THE INTENT TO DEPRIVE THE PRINCIPAL OF THE  
9 PROPERTY. PROOF THAT AN AGENT TOOK CONTROL, TITLE, USE OR MANAGEMENT OF THE  
10 PRINCIPAL'S PROPERTY WITHOUT ADEQUATE CONSIDERATION TO THE PRINCIPAL MAY GIVE  
11 RISE TO AN INFERENCE THAT THE AGENT INTENDED TO DEPRIVE THE PRINCIPAL OF THE  
12 PROPERTY.

13 B. IF IN A CIVIL ACTION BROUGHT BY OR ON BEHALF OF A PRINCIPAL THE  
14 COURT FINDS THAT THE AGENT HAS VIOLATED THIS SECTION, THE COURT SHALL AWARD  
15 THE PRINCIPAL ACTUAL DAMAGES AND REASONABLE COSTS AND ATTORNEY FEES, AND THE  
16 COURT MAY AWARD ADDITIONAL DAMAGES IN AN AMOUNT UP TO TWO TIMES THE AMOUNT OF  
17 THE ACTUAL DAMAGES.

18 Sec. 3. Section 46-456, Arizona Revised Statutes, is amended to read:

19 46-456. Duty to a vulnerable adult; financial exploitation;  
20 civil penalties; exceptions; definitions

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

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

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

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

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

38 B. A person who violates subsection A of this section or section  
39 13-1802, subsection B shall be subject to actual damages and reasonable costs  
40 and attorney fees in a civil action brought by or on behalf of a vulnerable  
41 adult and the court may award additional damages in an amount up to two times  
42 the amount of the actual damages.

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

1           1. Order a person who violates subsection A of this section or section  
2 13-1802, subsection B to forfeit all or a portion of the person's:

3           (a) Interest in any governing instrument.

4           (b) Benefits under title 14, chapter 2 with respect to the estate of  
5 the vulnerable adult, including an intestate share, an elective share, an  
6 omitted spouse's share, an omitted child's share, a homestead allowance, any  
7 exempt property and a family allowance. If the vulnerable adult died  
8 intestate, the vulnerable adult's intestate estate passes as if the person  
9 who violated subsection A of this section or section 13-1802, subsection B  
10 disclaimed that person's intestate share to the extent the court orders that  
11 person to forfeit all or a portion of the person's benefits under title 14,  
12 chapter 2.

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

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

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

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

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

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

1 E. If the court imposes a revocation under subsection C, paragraph 2  
2 of this section, provisions of the governing instrument shall be given effect  
3 as if the person who violated subsection A of this section or section  
4 13-1802, subsection B disclaimed all provisions revoked by the court or, in  
5 the case of a revocation of a nomination in a fiduciary or representative  
6 capacity, the person who violated subsection A of this section or section  
7 13-1802, subsection B predeceased the decedent.

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

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

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

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

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

25 3. An insurer, including a title insurer, authorized and regulated  
26 pursuant to title 20.

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

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

34 J. For the purposes of this section:

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

36 2. "Disposition or appointment of property" includes a transfer of an  
37 item of property or any other benefit of a beneficiary designated in a  
38 governing instrument.

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

43 4. "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, a family limited partnership, an  
2 instrument creating or exercising a power of appointment, a power of  
3 attorney, an estate planning document or a dispositive, appointive or  
4 nominative instrument of any similar type.

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

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

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

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

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

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

17 (f) AN AGENT UNDER A POWER OF ATTORNEY OF WHICH A VULNERABLE ADULT IS  
18 PRINCIPAL.

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