



EXPLOITATION OF VULNERABLE ADULTS RIGHTS, OBLIGATIONS AND REMEDIES

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Title 46 of the Arizona Revised Statutes is entitled Adult Protective Services. First enacted in 1988, it criminalized abuse of an incapacitated or vulnerable adult. A statutory civil cause of action for elder abuse was enacted one year later. It was then amended with the intent to punish those who prey on and exploit vulnerable and incapacitated adults. It protects both the health and the assets of the vulnerable person.

Incapacity – An impairment by reason of mental illness, mental deficiency, mental disorder, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication or other cause to the extent that the person lacks sufficient understanding or capacity to make or communicate informed decisions concerning his person.

Vulnerable Adult – An individual who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment.

Exploitation – The illegal or improper use of an incapacitated or vulnerable adult or his resources for another’s profit or advantage.

Position of Trust and Confidence – A person is any of the following: (a) One who has assumed a duty to provide care to the incapacitated or vulnerable adult; (b) A joint tenant or tenant in common with an incapacitated or vulnerable adult; (c) One who is in a fiduciary relationship with an incapacitated or vulnerable adult including de facto guardian or de facto conservator. *Note* – this is a very broad definition and may include people who do not know they are in a “position of trust and confidence”.

Obligations - A person who is in a position of trust and confidence to an incapacitated or vulnerable adult shall act for the benefit of that person to the same extent as a trustee.

Except as otherwise provided by the terms of the trust, the trustee shall observe the standard of care in dealing with the trust assets that would be observed by a prudent man dealing with the property of another. A prudent man is defined as “a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, diligence, discretion and judgment would act in the management of the property of others.”



Theft - A person who is in a position of trust and confidence who, by intimidation or deception knowingly takes control, title, use or management of incapacitated or vulnerable adult's asset or property with intent to permanently deprive that person of the asset or property is guilty of theft as provided by statute.

Penalties - Pursuant to statute, the mandatory penalty is forfeiture and applies to all violations of the statute. The discretionary penalties include compensatory damages, treble damages, forfeiture and punitive damages.

Remedies are available at all stages of the litigation, enabling the court to impose additional penalties and/or restrain current or future actions and set the burden of proof. These remedies can be used to maintain the status quo during the litigation to protect the assets at issue from being depleted or otherwise removed.

Survivability of Claims – Title 46 claims survive the death of the incapacitated or vulnerable adult. Causes of action against any person who has assumed a duty to provide care to an incapacitated or vulnerable adult who causes said adult's life or health to be endangered or injured by neglect, abuse or exploitation are not limited or affected by the death of the incapacitated or vulnerable adult. Causes of action for financial exploitation are not limited or affected by the death of the incapacitated or vulnerable adult.

Application of the survival statute to elder abuse cases would contravene the express provisions of the statute that the specified causes of action not be "limited or affected" by the victim's death. If elder abuse claims were so limited, "the tortfeasor would have great incentive to delay litigation until the victim dies. If we were to subscribe to defendants' theory, the policy of the elder abuse statute would not be furthered."

Two Year Statute of Limitations - The statute of limitations for exploitation actions used to be 7 years. It is now two (2) years. Initiation of a civil proceeding must be commenced within two years after actual discovery of the cause of action.

Standing - The question of who has standing to bring a Title 46 claim has been hotly contested. Title 46 is explicitly and implicitly designed to protect the interests of the incapacitated or vulnerable adults. Actions under the statute are brought by or on behalf of that person. Often, the incapacitated or vulnerable adult himself/herself may not be in a position to initiate an action in his/her own name. Statutory authority exists for suit to be brought by the incapacitated or vulnerable adult or his/her conservator or personal representative.

A person who violates this statute is subject to damages in a civil suit brought by or on behalf of an incapacitated or vulnerable person. This section does not specify who may bring the suit "on behalf of" the vulnerable adult. There are certain statutes that empower a conservator to prosecute claims for protection of estate assets and also gives a personal representative the same standing to sue and be sued as the decedent.



Penalties to Improper Use of Power of Attorney - Application of the severe penalty of mandatory forfeiture and the other discretionary penalties created by statute has been expanded to other situations that may not fall under the umbrella of these statutes. Improper use of a power of attorney (whether intentional or unintentional) may subject the agent to forfeiture and other penalties. If it is anticipated the agent may use the power of attorney in a manner that directly or indirectly benefits the agent, then the power of attorney should include the statutory language affirming the agent's right to use the power of attorney in that manner.

Except as otherwise specifically detailed in the power of attorney, "an agent shall use the principal's money, property or other assets only in the principal's best interest and the agent shall not use principal's money, property or other assets for the agent's benefit. An agent who violates this subsection is subject to prosecution and civil penalties.

If an agent acts with intimidation or deception in procuring the power of attorney or any authority provided in the power of attorney, the agent is subject to prosecution and civil penalties.

Duty to Report - Attorneys, accountants, and others have a statutory duty to report suspected exploitation.

An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of an incapacitated or vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the incapacitated or vulnerable adult's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that exploitation of the adult's property has occurred or that abuse or neglect of the adult has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer, to a protective services worker or to the public fiduciary of the county in which the incapacitated or vulnerable adult resides.

Appropriate and Abusive Uses of Statute - As with any statute or cause of action, there are appropriate uses and abusive uses and everything in between. In Arizona and other states with a large elderly population, it is vital to protect incapacitated or vulnerable adults from exploitation. The potential penalties available under Title 46 are a detriment to such actions. On the other hand, with the lure or specter (depending on your viewpoint) of mandatory forfeiture, it is not surprising that the statute is sometimes abused and used as a club to gain a greater share of an estate. This may have the effect of disregarding the testator's intent by altering the disposition of his/her assets.

With the possibility of mandatory forfeiture, an innocent party may settle for fear that a technical violation of the statute might be found. In the situations where there was no "exploitation" or the exploitation is merely technical in nature and caused no harm, the statute may be wielded as a club by disgruntled relatives. Even in situations where the questioned actions did not rise to the level of exploitation and the suit is motivated by greed or jealousy, the cost of defending such a suit may force a legitimate beneficiary to settle in order to avoid the uncertainty of litigation. Here are some examples.

1. **Obvious Exploitation**



There are many situations where exploitation is obvious: a) substance abusing grandson takes grandma's pain pills and spends all her money; b) lazy adult children who don't know how or don't want to support themselves try to ensure continued income from mom and dad; c) unscrupulous "church" person who wants to start a new congregation/ build a new facility asks for "donations"; d) "helpful" caregiver knows how to print a Will form off the internet; e) helpful neighbor thinks it would make things so much easier if he was added to the bank account to help pay bills. The list is as long as your imagination. In such situations, any penalties imposed against these people are not harsh enough. Unfortunately, by the time the exploitation is discovered, the money is often gone and the exploiter is judgment proof.

2. Shades of Gray

Sometimes exploitation is unintentional or not really exploitation: a) adult child continues to take "allowance" mom and dad have always given to him; b) well-intentioned caregiver bonds with the incapacitated or vulnerable adult. They care about each other and are together all the time. Vulnerable adult gladly pays for caregiver's meals and begins to give caregiver nice gifts; c) Vulnerable adult's relatives are not around much and vulnerable adult changes her Will to leave part or all of estate to caregiver.

3. No harm, no foul

While of sound mind and not vulnerable, Adult prepares an estate plan that leaves everything to only child, Son. Adult later becomes vulnerable or incapacitated. Son cares for vulnerable adult. They go out to meals together, they travel together, they go shopping together. Vulnerable adult pays for most everything. In the end, there is only a small estate left and it goes to Son.

Current Efforts to Clarify A.R.S. §46-456 - The Non-Uniform Laws Committee of the State Bar Probate and Trust Committee has been discussing how to improve the statute so that it can be better used for its intended purpose and so that the improper use of the statute is limited. To that end, certain amendment language is being considered. The proposed changes ignite lively and passionate debate.

Penalties - The proposed amendments expand the scope of penalties to encompass trusts and non-probate transfers. Actual damages would be mandatory, but forfeiture discretionary.

Standing - The proposed amendments expand standing to all "interested persons" as defined by statute, but limit such expanded standing to instances where the adult, conservator or personal representative has not brought suit. "Interested Persons includes any trustee, heir, devisee, child spouse, creditor, beneficiary and other person who has a property right in or claim against a trust estate or the estate of a decedent ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons." Interested persons other than the personal representative or conservator would have to seek leave of court to file suit.