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The Arizona Adult Protective Services Act and House Bill 2344: New Amendments Concerning Financial Exploitation of Vulnerable Adults

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“Elder abuse comes in many different forms – physical abuse, emotional abuse, or financial abuse. Each one is devastating in its own right. Many times, sadly, as with my situation, the elder abuse involves a family member. When that happens, you feel scared, disappointed, angry, and you can’t believe this is happening to you. You feel overwhelmed. The strength you need to fight it is complicated. You’re afraid, but you’re also thinking about your other family members. You’re thinking about the potential criticism of your family and friends. They may not want to accept the dysfunction that you need to share. Because you love your family and for other reasons, you might feel hesitant to come forward. You might not be able to make rational decisions. What other people see as generosity may, in reality, be the exploitation, manipulation, and sadly, emotional blackmail of older, more vulnerable members of the American public.”¹

The Arizona Adult Protective Services Act ("APSA") was originally enacted by the Arizona State Legislature in 1988 in order to protect the State’s substantial elder population and codified elder abuse as a Class 5 Felony. A year later the Act was amended to provide a civil statutory cause of action for elder abuse and financial exploitation, over and above remedies already provided in Title 12 of the Arizona Revised Statutes. Most recently, House Bill 2344 ("HB 2344") was introduced in the Forty-ninth Arizona State Legislature, First Regular Session, 2009. HB 2344, *inter alia*, overhauled statutory definitions and elements, and affords criminal affirmative defenses to alleged APSA financial exploiters. The Bill passed through both houses and Governor Jan Brewer signed the new legislation into law on July 13, 2009. As a result, the new, non-emergency legislative amendments discussed herein took effect on September 30, 2009.
I. INTRODUCTION

A. Vulnerable Adult Financial Exploitation

According to the 1998 National Elder Abuse Incidence Study ("NEAIS"), approximately 449,924 elderly persons aged 60 and over were subject to domestic abuse and or neglect in 1996. Of this estimate, 70,942 (16%) were reported to and substantiated by adult protective services. The remaining 378,982 (84%) went unreported. Financial exploitation accounted for 21,427 (30.2%) of substantiated reports. As a result, the "iceberg" theory of vulnerable adult exploitation underreporting was validated by the study; i.e., "officially reported cases of abuse are only the ‘tip of the iceberg,’ or a partial measure of a much larger, unidentified problem."

Researchers believe the "iceberg" theory is so prevalent because vulnerable elderly adults are disoriented, affected by diseases of old age, or are not able to speak or make decisions without the exploiter being present. Indeed, the NEAIS found that adult family members were the perpetrators in 89.7% of the reported incidents of domestic elder abuse and neglect, including financial exploitation. Arizona boasts a population of approximately 6,353,952, of which, 13% (825,733) are 65 years and over. The astounding population of elderly Arizona citizens makes this State a prime demographic for confidence men, nursing care facilities and family members taking financial advantage of those who were raised in a more trusting time.

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3 \textit{Id.}
4 \textit{Id.}
5 \textit{Id.}
6 \textit{Id.}
7 \textit{Id.}
8 \textit{Id.}
Before its recent amendments, the APSA\textsuperscript{10} created far reaching criminal, civil and probate liability if a "person who is in a position of trust and confidence and who by intimidation or deception knowingly takes control, title, use or management of an incapacitated or vulnerable adult's asset or property with the intent to permanently deprive that person of the asset or property."\textsuperscript{11} This article will examine the legislative history of the new APSA language in addition to pertinent past criminal, probate, estate and civil case law that the new legislation alters. Lastly, the author will hypothesize as to the implications and affects regarding the new APSA and will offer proposed solutions.

II. DEFICIENCIES UNDER THE OLD ACT

A. Scope and Breadth of the Old APSA

Prior to the enactment of HB 2344, the APSA was used as both a sword and a shield by numerous attorneys in a myriad of civil practice areas because of the Act’s scope and breadth. Pre-HB 2344, the APSA provided that any person in a position of power who influences and deprives an incapacitated\textsuperscript{12} or vulnerable adult\textsuperscript{13} of assets or property was guilty of criminal theft, and, could be held civilly liable in treble consequential damages, punitive damages and

\textsuperscript{11} Former Ariz. Rev. Stat. § 46-456(B). The “incapacitated” and “intimidation or deception” language were stricken from the APSA as a result of H.B. 2344, 1\textsuperscript{st} Reg. Sess. (Ariz. 2009). See notes 25, and 26 infra. Interestingly, the criminal, probate and estates and civil aspects of the APSA do not currently provide a definition for “deception” which was formerly codified at Ariz. Rev. Stat. 46-456(G)(1). The burdens of proof in proving incapacity to challenge a power of attorney are maintained and codified at Ariz. Rev. Stat. Ann. 14-5506(B) (2010).
\textsuperscript{13} “Vulnerable adult” means 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. Ariz. Rev. Stat. Ann. § 46-451(A)(9) (2011)(emphasis added).
attorneys’ fees.\textsuperscript{14} Probate penalties under the Act called for total, mandatory estate forfeiture and disclaimer of any intestate share.\textsuperscript{15} Furthermore, a separate civil choose in action was and is still available per the APSA when a vulnerable adult’s life or health has been endangered or injured by neglect, abuse or exploitation by a service provider that assumed a legal duty to provide elder care.\textsuperscript{16}

In order to satisfy the former APSA provisions, an exploiter must have been and still must be deemed to be in a “position of trust and confidence” for the proscribed penalties to apply.\textsuperscript{17} Once placed in such a position, persons must have acted for the benefit of the vulnerable adult to the same extent as a trustee under Arizona law at the time of the act(s), omission(s) or transactions(s).\textsuperscript{18} To be sure, the legislation still includes protection from not only physical abuse,\textsuperscript{19} but also financial exploitation and emotional abuse.\textsuperscript{20} The Act still has resounding teeth in the civil arena, which remains true post-HB 2344, illustrated in its statute of limitations period. While the vulnerable victim has a two-year, limited private right of action against the exploiter


\textsuperscript{15} Former Ariz. Rev. Stat. § 46-456(D)


\textsuperscript{17} “Position of trust and confidence” means that a person is any one 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 has a fiduciary relationship with an incapacitated or vulnerable adult including a de facto guardian or de factor conservator.” Former Ariz. Rev. Stat. § 46-456(G)(3).

\textsuperscript{18} Former Ariz. Rev. Stat. § 46-456(A)

\textsuperscript{19} “Abuse” means:

(a) Intentional infliction of physical harm.

(b) Injury caused by negligent acts or omissions.

(c) Unreasonable confinement.


after actual discovery, an APSA action survives the death of the exploited victim and pain and suffering damages are in play.

**B. Burdens of Proof, Civil Immunities and Mandatory Estate Divesture**

As described above, before the recent amendments, probate, estate and civil APSA penalties were severe. Moreover, defenses provided to probate, estate and civil defendants under the glare of potential and actual APSA litigation was grim. Violators could be convicted theft, lose all testamentary devises and inheritances and be held liable in civil damages. Once a violator was cast into exploiter status defendants faced an uphill battle. This was the case because the former APSA was silent as to the burdens of proof and persuasion that the defendant need carry in order to avoid imposition of sanctions. Prior to HB 2344, APSA language only spoke to burdens of proof regarding legitimizing or debunking powers of attorney in a criminal, civil or probate context, and that of establishing the already well known preponderance burden in civil actions. Conversely, the APSA criminal theft provision was rarely utilized by the State though the Act provided for mandatory reporting.

**C. Impossibility of Criminal Prosecution**

The opposite was true for prosecuting APSA theft cases because the Act was overly particular and building a criminal case was next to impossible. Pre-amendment, the State needed

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23 Former Ariz. Rev. Stat. § 14-5506(D)(In a criminal proceeding, the agent has the burden of proving by clear and convincing evidence that the principal had capacity. In a civil proceeding, if the party challenging the validity of a power of attorney on the grounds of lack of capacity proves by a preponderance of the evidence that, at the time the power of attorney was executed, the principal was a vulnerable adult, the agent has the burden of proving by clear and convincing evidence that the principal had capacity). Codified at Ariz. Rev. Stat. Ann. § 14-5506(B) (2011).
to prove “deception”\textsuperscript{25} or “intimidation”\textsuperscript{26} perpetrated by the wrongdoer in order to prosecute theft under the Act.\textsuperscript{27} Though these elements were specifically defined they were especially difficult to prove in most potential criminal APSA cases because the wrongdoer befriended and often isolated the vulnerable adult from their family and other witnesses.\textsuperscript{28} As a result, the misdeeds of the potential APSA criminal wrongdoer only came to light after family and friends found their loved one’s assets, property, and or possessions in the hands of the potential APSA violator.\textsuperscript{29} By that time it was too late, the only State witness was incompetent,\textsuperscript{30} or, even worse,

\textsuperscript{25}“Deception” means that a person deceives an incapacitated or vulnerable adult by knowingly doing any of the following:
(a) Creating or confirming a false impression in an incapacitated or vulnerable adult's mind.
(b) Failing to correct a false impression that the person is responsible for creating or confirming in an incapacitated or vulnerable adult's mind.
(c) Making a promise to an incapacitated or vulnerable adult that the person does not intend to perform or that the person knows will not or cannot be performed. A person's failure to perform a promise is not by itself sufficient proof that the person did not intend to perform the promise.
(d) Misrepresenting or concealing a material fact that relates to the terms of a contract or an agreement that the person enters into with the incapacitated or vulnerable adult or that relates to the existing or preexisting condition of any of the property involved in a contract or an agreement.
(e) Using any material misrepresentation, false pretense or false promise to induce, encourage or solicit an incapacitated or vulnerable adult to enter into a contract or an agreement.

\textsuperscript{26}“Intimidation” includes threatening to deprive a vulnerable adult of food, nutrition, shelter or necessary medication or medical treatment. This language was formerly codified at Ariz. Rev. Stat. § 46-456(G)(2) and incorporated into former Ariz. Rev. Stat. Ann. §§ 13-1802(B) and 14-5506(C). While “intimidation” is no longer utilized as an element under the APSA, the Trust code has been amended to include it to challenge powers of attorney. Codified at Ariz. Rev. Stat. Ann. § 14-5506(D)(2) (2011). Furthermore, agents who procure power of attorneys using intimidation are still subject prosecution under Title 13 of the criminal code and the civil penalties proscribed by the APSA. Codified at Ariz. Rev. Stat. Ann. § 14-5506(A) (2011).

\textsuperscript{27}Former Ariz. Rev. Stat. Ann. § 13-1802(B)

\textsuperscript{28}Minutes of Meeting: Hearing on HB 2344 Before the House Comm. on Judiciary, 2009 Leg., 1\textsuperscript{st} Sess. (Ariz. 2009) (statement of Greg Stanton, Deputy Attorney General, Legislative Affairs, Arizona Attorney General’s Office).

\textsuperscript{29}Id.

\textsuperscript{30}See Ariz. R. Evid. 606; accord Ariz. Stat. Ann. § 13-4061 (2010); but cf. State v. Griffin, 117 Ariz. 54, 570 P.2d1067 (1977) (Test to determine whether a witness’ mind is so unsound as to require that he be excluded as incompetent to testify is whether his mental derangement or defect is such that he is deprived of the ability to perceive the event about which he is to testify or is deprived of the ability to recollect and communicate with reference thereto).
not available for conversation.\textsuperscript{31} Thus, the few situations and scenarios reported to police, the county attorney and or the Arizona Attorney General’s Office were not prosecutable in a criminal sense.\textsuperscript{32} Consequently, the legislature looked to broaden the ability of prosecutorial offices and offer greater protection to vulnerable adults by amending the Act.

D. \textbf{Pitfalls of the Pre-Amended Act: Probate and Estate Enforcement}

Yet another pitfall of the pre-amended Act was the stringent language that probate courts had no choice but to enforce. An individual could potentially violate the APSA if he or she was in a position of “trust and confidence”\textsuperscript{33} and took advantage of a vulnerable adult by not “act[ing] for the benefit of that person to the same extent as a trustee pursuant to title 14, chapter 7.”\textsuperscript{34} Further, APSA penalties could also be enforced if an individual “deceived” or “intimidated” as a precursor to theft or procurement of a power of attorney.\textsuperscript{35} Additionally, any authority or document that purported the use of property to be used not in the vulnerable adult’s best interest and which could be perceived to be for the agent’s benefit needed to separately initialed by the vulnerable adult and agent at the time of execution.\textsuperscript{36}

If these statutory requirements were not met, and the vulnerable adult’s property converted, the power of attorney was invalid,\textsuperscript{37} and any probate court in the State of Arizona was mandated to divest all of the wrongdoer’s benefits in the vulnerable adult’s estate including an intestate share, an elective share, an omitted spouse's share, an omitted child's share, a homestead share, an omitted spouse's share, an omitted child's share, a homestead

\begin{thebibliography}{99}
\bibitem{31} Minutes of Meeting: Hearing on HB 2344 Before the House Comm. on Health and Human Services, 2009 Leg., 1st Sess. (Ariz. 2009) (statement of Robert Brown, Special Assistant to County Attorney, Pinal County) (frustrated prosecutors "could not prove “intimidation” or “deception” because the [vulnerable adult’s] who suffer this kind of betrayal and loss only live between six months and one year afterward because they no longer are able to trust). http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/1R/comm_min/House/030409+HHS%2EDOC.htm.


\bibitem{33} See Note 17, supra.

\bibitem{34} Former Ariz. Rev. Stat. § 14-5506(A)


\bibitem{36} Former Ariz. Rev. Stat. § 14-5506(B)

\end{thebibliography}
allowance, an exempt property allowance and family allowance no matter what the circumstance or who the culprit. As a result, the Act was utilized inappropriately to blackmail fellow family members who were taking care of their vulnerable relatives by their own siblings with a stake in the estate.  

E. Civil Liability Immunities

The most interesting and divergent section pre-HB2344, however, rest in former APSA civil liability immunities. Only five classes of parties were completely immune from civil damages: physicians and specialists in the normal course of their licensure, primary providers responsible for medical services within two years prior to admittance to a nursing care institution, banks and financial institutions, security dealers, and insurers.

On the other hand, the aforementioned civil exemptions with respect to healthcare providers were not applicable in two scenarios. Firstly, medical directors of nursing care institutions, assisted living centers, assisted living facilities, residential care institutions, adult care

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44 See e.g. Corbett v. ManorCare of America, Inc., 213 Ariz. 628, 629, 146 P.3d 1027, 1038 (App. Div. 2006)(director of nursing may be liable under ASPA who was responsible for managing the daily operations of the department of nursing services at the facility, which included overseeing patient care and staff education, “helping to direct ... the clinical aspects of resident care,” managing the staff, and ensuring that federal and state regulations were followed); see Ariz. Rev. Stat. Ann. § 36-711(15) (2011)(definition of medical director); Ariz. Rev. Stat. Ann. § 36-446(1)(2011)(definition of nursing care institution administrator).

45 "Nursing care institution" means a health care institution that provides inpatient beds or resident beds and nursing services to persons who need continuous nursing services but who do not require hospital care or direct daily care from a physician. Ariz. Rev. Stat. Ann. § 36-401(31) (2011).


47 "Assisted living facility" means a residential care institution, including an adult foster care home, that provides or contracts to provide supervisory care services, personal care services or directed care services on a continuous basis. Ariz. Rev. Stat. Ann. § 36-401(8) (2011).
homes, and skilled nursing facilities were subject to civil suit under the Act. Lastly, licensed physicians, specialists, nurses, and health care assistants that were primary providers responsible for performing medical services to the vulnerable patient while admitted at any one of the defined facilities was also amenable to civil suit. Accordingly, “enterprises,” like those facilities described above, and directors of nursing of those institutions, were proper parties under the Act and frequently found themselves defending civil suits that prayed for damages.

III. LEGISLATIVE HISTORY BEHIND ENACTMENT OF HB 2344

A. Competing Interests Between the State Bar Probate Section and the Attorney General’s Office

In 2003, the State Bar Subcommittee Probate Section on Non-Uniform Laws was reviewing the APSA for modification. Specifically, the Committee was concerned about three prevailing issues that continued to be raised in the probate and estate community: 1) fairly minor APSA violations produced mandatory estate forfeiture under the Act; 2) only probate transfers were subject to the compulsory estate divestiture; and 3) only the exploited individual, their conservator or a personal representative had standing to bring APSA claims to protect the estate.

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48 "Residential care institution" means a health care institution other than a hospital or a nursing care institution that provides resident beds or residential units, supervisory care services, personal care services, directed care services or health-related services for persons who do not need continuous nursing services. Ariz. Rev. Stat. Ann. § 36-401(37) (2011).
50 "Nursing care institution" means a health care institution that provides inpatient beds or resident beds and nursing services to persons who need continuous nursing services but who do not require hospital care or direct daily care from a physician. Ariz. Rev. Stat. Ann. § 36-401(31) (2011).
54 Telephone Interview with Lauren Garner, Deputy Partner, Jaburg & Wilk, PC (Feb. 19, 2010).
55 Id.
As a result of the aforementioned practical problems, the APSA was being misused by disgruntled beneficiaries who wanted more money or wanted to disinherit another beneficiary for innocent APSA technical violations. Further, all of the other remedies provided for by the APSA were discretionary except for the estate forfeiture section. Additionally, the Subcommittee sought to bring the APSA up to speed with Arizona’s slayer statute, which was the origin of the forfeiture and penalties provision in the original APSA, which also includes other “governing instruments”\textsuperscript{56} language. Lastly, the Subcommittee also sought to broaden standing to bring an APSA claim because the original statute gave primary preference to the vulnerable adult if they had the wherewithal to even bring suit, or a conservator if the adult had been adjudicated unable to handle their own finances or a personal representative if the vulnerable adult was deceased.\textsuperscript{57} What often happened, however, was that the conservator or personal representative was the individual exploiting the estate and would not sue themselves.

The Subcommittee drafted amendments that dealt with the aforesaid issues.\textsuperscript{58} Thereafter, it was circulated for comment and was passed by the Executive Council of the State Bar.\textsuperscript{59} Subsequently, the State Attorney General’s Office displayed an interest in amending the APSA and focused on criminal prosecutions under the Act’s interplay with Titles 13 and 14.\textsuperscript{60} Thus, the Subcommittee efforts, coupled with the Attorney General’s Office amendments were introduced as HB 2344 which was then subject to the legislative process. HB 2344 passed through both houses and Governor Jan Brewer signed the new legislation into law on July 13, 2011.

\textsuperscript{57} Telephone Interview with Lauren Garner, Deputy Partner, Jaburg & Wilk, PC (Feb. 19, 2010).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Telephone Interview with Greg Stanton, former Deputy Attorney General, State of Arizona Attorney General’s Office (Nov. 10, 2009).
2009. As a result, the new, non-emergency legislative amendments discussed herein took effect on September 30, 2009.61

IV. ENACTMENT OF HB 2344 AND ITS EFFECT ON ARIZONA LAW

A. Elimination of Superfluous Language Between Code Titles 13, 14 and 46

Former A.R.S. §§ 14-5506(A) was stricken thus eliminating identical language already included in former A.R.S. § 46-456(A). Similarly, former A.R.S. § 46-456(B) which integrated criminal theft under A.R.S. § 13-1802(B) was also red-lined which made way for the new A.R.S. § 46-456(B). These facial changes eliminated superfluous language between respective Code Titles 13, 14, and 46. Undoubtedly, these easy fixes promote statutory simplicity. Further, the principal/agent specific authorization and mandate provided for in A.R.S. §§ 14-5506(B) was also discarded. Thus, generally speaking, the Legislature changed the substance of Code Titles 13, 14 and 46, but maintained the same standard in order to allege APSA financial exploitation. Namely, a person in a position of trust and confidence to a vulnerable adult has the obligation to use assets solely for the benefit of the vulnerable adult and not for the benefit of the person in the position of trust and confidence.

On the other hand, the Legislature, by way of the State Bar Subcommittee Probate Section on Non-Uniform Laws amendments, made dramatic changes to the civil and probate remedies provided for per the Act. Analogously, the Legislature also sought to make the Act more prosecutor friendly. However, the recent changes to A.R.S. § 13-1802(B) do little to help in aiding future criminal theft prosecutions under the APSA and will make State prosecutors’ jobs more difficult.

B. Impossibility of Criminal Prosecution Revisited

61 See Ariz. Const. Art. 4, pt. 1, § 1(3) (non-emergency session laws become effective ninety-one days after the close of the legislative session; in this case, July 1, 2009).
The first hurdle to initiating criminal vulnerable adult theft prosecution under the old Act was obtaining county attorney and or Attorney General Office interest per the mandatory reporting statutes. Attorneys with probate and civil practices are compelled to report APSA financial exploitation cases if the vulnerable adult is already a client. However, reports are rarely made after consultation of prospective clients when the attorney is not retained under A.R.S. § 46-454(B) because of the permissive ethical reporting rule, not to mention the fact that their offices would not be used to perpetuate a fraud if they declined the representation.

Even more problematic, if a probate, estate and or a civil attorney took it upon themselves to report the APSA financial exploitation to authorities, these same practitioners were told to contact their local police departments and swear out a complaint because it was a “civil matter,” even though the APSA specifically provides for criminal penalties for financial exploitation which are codified as felonies. In turn, local police departments informed practitioners that APSA violations were of a civil nature and that inquiries need be forwarded to the county attorney who then referred the case back to the Attorney General’s Office. Thus, the criminal justice system itself was confused with the APSA and private attorneys felt as though mandatory reporting was a waste of time if presented with a possible criminal APSA violation. What made matters worse, if the Attorney General’s Office or County Attorney’s Office did display an

62 Ariz. Rev. Stat. Ann. §§ 46-454(A) (2011)(medical providers, psychologist, social worker, peace officer “reasonable basis” mandatory reporting to law enforcement and or superior court); 46-454(B) (2011)(professional persons responsible with the use or preservation of the vulnerable adult’s proper who has a “reasonable basis” to believe abuse or exploitation is afoot shall make an immediate report to a peace officer, protective services worker, public fiduciary and or protective services worker), 46-455(J) (2011)(mandatory notice to Arizona Attorney General’s Office for civil suit initiation provision).

63 Ariz. Rev. Stat. Ann. 46-454(B) (2011)(professional persons responsible with the use or preservation of the vulnerable adult’s proper who has a “reasonable basis” to believe abuse or exploitation is afoot shall make an immediate report to a peace officer, protective services worker, public fiduciary and or protective services worker).

64 Arizona Rule of Ethics 1.6(d) and 1.18

65 Telephone Interview with Mark E. House, Senior Partner, Becker & House (Feb. 11, 2010).

66 Id.
interest in prosecuting, proving “intimidation” or “deception” or “injury” beyond a reasonable doubt was highly problematic because of vulnerable adult capacity and witness competency.\textsuperscript{67}

Because of the difficulty of prosecuting APSA financial exploitation criminal cases the Act was overhauled, as future cases or the lack thereof will show, to the detriment of the vulnerable adult community. Foremost, drafters removed the “deception” or “intimidation” language throughout the APSA that prevented most cases from ever seeing the light of day. Further, the Legislature blue penciled A.R.S. § 13-1802(B). Now prosecutors need only prove that a person acting in a “position of trust and confidence”\textsuperscript{68} intended to deprive a vulnerable adult of property. Likewise, the class of persons included in those of “positions of trust and confidence” was expanded to include individuals in a “confidential relationship” with the vulnerable adult now a question of fact to be determined based on the totality of the circumstances.\textsuperscript{69}

Furthermore, the new APSA contains an inference that the wrongdoer intended to deprive the vulnerable adult of property if he took control, title, use or management of the vulnerable adult’s property without “adequate consideration”\textsuperscript{70} and without lawful authority.\textsuperscript{71} Not surprisingly, the Arizona Association of Defense Counsel was concerned with this new addition to the Act

\textsuperscript{67} See Note 30, supra.

\textsuperscript{68} “Position of trust and confidence” means that a person is any one of the following:

(a) \textbf{One A PERSON} who has assumed a duty to provide care to the incapacitated or vulnerable adult.

(b) A joint tenant or tenant in common with \textbf{an incapacitated or A vulnerable adult}.

(c) \textbf{One A PERSON} who has a fiduciary relationship with \textbf{an incapacitated or A vulnerable adult including a de facto guardian or de factor conservator}.


\textsuperscript{70} “Adequate Consideration” means the property was given to the person as payment for bona fide goods or services provided by the person and the payment was at a rate that was customary for similar goods or services in the community that the vulnerable adult resided in at the time of the transaction. Ariz. Rev. Stat. Ann. § 13-1802(K)(1) (2011).

during amendment negotiations. Nevertheless, such inferences are found in other criminal offenses in Title 13 and are per se constitutional so long as the trial judge instructs the fact finder that such inferences are not conclusive. Further, the Act also provides a safety valve for people in positions of trust and confidence to request the superior court for prior approval of any vulnerable adult property transfer.

Then again, the Legislature giveth and taketh away. It is now a statutory affirmative defense to any financial exploitation APSA case when a defendant can demonstrate that it was part of a class of individuals who the vulnerable adult gave a pattern of gifts which existed before the adult became vulnerable. In other words, if an APSA financial exploiter criminal defendant can prove a gift by preponderance of the evidence, he or she may now escape liability.

Additionally, immunity was given to health care institutions agents who accept incidental gifts while in the course and scope of their employment. On the other hand, most health care institutions and nursing facility employees cannot accept gifts of substantial value from residents per their employment contract. In which case, if a care giver was to end up having power of attorney of a vulnerable adult resident, accepted a substantial gift, or ended up being a joint tenant with right of survivorship to the adult’s property, the care giver would be terminated, and

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72 Telephone Interview with Greg Stanton, former Deputy Attorney General, State of Arizona Attorney General’s Office (Nov. 10, 2009).
74 See e.g. State v. Dixon, 127 Ariz. 554, 560, 622 P.2d 501, 507, (Ariz. Ct. App. 1980)( The court may submit permissible inferences to the jury and due process not violated as long as the jury is informed that the inference is not conclusive).
79 Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.
the health care institution would be immune from suit. However, the individual care provider would still be exposed to a criminal, probate, estate and civil APSA actions under its interplay with Titles 13 and 14.

C. **Deficiencies Corrected: Probate and Estate Enforcement**

But for the aesthetic changes outlined in Section IIC above, A.R.S. § 14-5506 dealing with obtainment of powers of attorney from vulnerable adults generally remains unchanged. That is, the agent is subject to prosecution under Title 13 and may be held civilly liable under A.R.S. § 46-456 if the agent acts with intimidation or deception in procuring the power of attorney or any authority provided in the power of attorney. However, after HB 2344, the person in a position of trust and confidence must use the vulnerable adult’s assets solely for the benefit of the vulnerable adult and not for the benefit of the person in a position of trust and confidence or the person’s relatives unless either of the following apply:

1) The superior court gives prior approval for the transaction; or

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.  

While the criminal and power of attorney “deception” standard and its definition had been part of the Act prior to HB 2344, the deception definition was hotly debated in the House Committee of the Whole in the amendment process. As notes 25 and 26 point out, the APSA definition of “deception” was scrapped in a criminal context for political reasons but remains an}

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80 Id.
ingredient to disputing an ill-begotten power of attorney.\textsuperscript{83} As a result, probate and estate practitioners attempting to challenge or defend a power of attorney attained form a vulnerable adult are left with an undefined “deception” statutory standard.

In spite of this, HB 2344 expanded standing rights concerning who may bring an APSA action in probate court. Formerly, the Act only allowed the vulnerable adult, conservator or a personal representative of a vulnerable adult’s estate to bring suit. This was problematic seeing that, in a majority of cases, the vulnerable adult could not protect his or her interests to begin with and the conservator or personal representatives were the individuals responsible for taking financial advantage of the vulnerable adult or his or her estate. In which case, practitioners were stymied and petitioned the superior court to have a disinterested, special administrator appointed which was not always successful.\textsuperscript{84} To remedy this crux, the new APSA permits “any other interested person”\textsuperscript{85} to sue on behalf of the vulnerable adult in order to protect the estate. Further, the scope of perspective defendants in an APSA probate action also widened. Before the amendments, a person in a position of trust and confidence included every individual in a vulnerable adult’s life but those who were in a confidential relationship with the adult, now a

\textsuperscript{83} Former Ariz. Rev. Stat. § 46-456(G)(1)

\textsuperscript{84} Telephone Interview with Mark E. House, Senior Partner, Becker & House (Feb. 11, 2010); Telephone Interview with Lauren Garner, Deputy Partner, Jaburg & Wilk, PC (Feb. 19, 2010); see also In re Estate of Friedman, 217 Ariz. 548, 553, 177 P.3d 290, 295 (Ariz. Ct. App. 2008)(Generally, court appointed special administrator fees are deducted from the estate before distribution. Only when an heir who raises a claim under the APSA in a probate proceeding acts with malice, \textit{i.e.}, that his primary purpose was other than to protect the adult or the estate, can the heir be required to pay the costs of the special administrator's investigation into a claim of elder abuse)(relying on Ariz. Rev. Stat. Ann §§ 14-3720 (entitles the personal representative to obtain compensation from the estate, but does not preclude payment from other sources) and 46-453(A) (immunity and malice standard)).

\textsuperscript{85} "Interested person" includes any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment 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 person, as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. Ariz. Rev. Stat. Ann. § 14-1201(26) (2011).
question of fact. These party enlargements on both sides of the style may make it easier to bring APSA claims if the estate has the money to pay for the litigation costs.

Moreover, the Legislature expanded the probate remedies available under the Act. Now a court may revoke in whole or in part any disposition or appointment of property that is made in a governing instrument by the vulnerable adult to the person who does not use the assets in the vulnerable adult’s best interests or who deprives the vulnerable adult of property without adequate consideration. What is more, the superior court may now revoke powers of appointment and nominations of individuals in governing instruments and sever joint tenant interests to tenancies in common. Should a court impose any new revocation power under the Act, the governing instrument shall be given affect as if the person in a position of trust and confidence disclaimed all revoked provisions, or, in the case of a nomination or appointment, those individuals will be treated as predeceasing the decedent. Accordingly, the APSA is now congruent with the Arizona slayer statute which was the model for the original APSA forfeiture remedies.

D. Civil Liability and Damages

Prior to HB 2344, civil damages for violating the APSA was an all or nothing game. In addition to obligatorily stripping of the APSA violator's estate benefits, the old Act provided that the violator could be subject to damages in a civil action brought by or on behalf of a vulnerable

87 "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, an instrument creating or exercising a power of appointment, a power of attorney or a dispositive, appointive or nominative instrument of any similar type. Ariz. Rev. Stat. Ann. § 46-456(I)(3) (2011).
adult that equaled up to three times the amount of monetary damages.93 Alternatively, the Act’s new civil damages amendment operates to ensure, at the very least, the recoupment of actual damages suffered by the vulnerable adult as a result of the financial exploitation.94 However, HB 2344 further amplified judicial discretion in a permissive award for additional damages for an amount up to two times the amount of actual damages.95

V. CASE STUDIES AND APPLICATION OF THE NEW APSA

A. Impossibility of Criminal Prosecution in Practice: State v. Giles

A majority of the reported APSA cases only address civil, probate, and trust and estates aspects of the Act. While the APSA does encompass criminal charges for theft, only one (1) reported case exists. This case is the only successful, reported criminal conviction by jury under the APSA in the State of Arizona.96

The defendant in that case, Linda Giles, met Demetrius Carafas, in New York in 1972.97 At that time Mr. Carafas was separated from his wife and the two began dating.98 Eventually the romance ceased and Mr. Carafas and his wife reconciled.99 Thereafter, the Carafas’ and Giles moved to Tucson where she lived in an apartment complex owned by Mr. Carafas.100 Around November 2005, Ms. Giles permanently moved into Mr. Carafas’ home after his wife died to

93 Former Ariz. Rev. Stat. § 46-456(C)
95 Id.
96 See State v. Giles, CR-20070126 (Pima County Super. Ct. 2007), aff’d, 2010 WL 520531 (Ariz. Ct. App. 2010). The criminal defendant did not appeal her convictions for vulnerable adult abuse or APSA theft violations. Most criminal APSA cases in Pima County plea out with a suspended sentence contingent upon restitution and probation. Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona. Giles was the first Arizona APSA criminal case to be successfully prosecuted after presented to a jury.
98 Id.
99 Id.
100 Id.
care for him. At that point, Mr. Carafas was 84 years old, suffered from cancer, emphysema and glaucoma. Moreover, Mr. Carafas had attained substantial assets and a great deal of Tucson real estate.

On Thanksgiving Day, November 2006, an argument ensued about a handyman leaving the Carafas house with Giles’ puppy. When the handyman returned and was confronted by Giles, he began beating her. Before this, Giles had been drinking wine while preparing Thanksgiving dinner. After the assault, Carafas pushed Giles to the ground and forced her to take medication with beer. After these altercations, Giles attempted to leave in Carafas’ truck located in the driveway whereupon Giles backed over Carafas killing him instantly.

The Pima County Attorney’s immediately opened an investigation. The investigation revealed that Mr. Carafas’ will existing at the time of his death bequeathed everything to Ms. Giles, including property conveyances totaling 3 million dollars. Consequently, The Pima County Attorney’s Office enlisted the aid of Assistant Attorney General John Evans who

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101 Id. at ¶ 2.
102 Id.
103 Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.
104 See State v. Giles, Appellant’s Opening Br. at ¶3.
105 Id.
106 Id.
107 Id.
108 Id. at ¶4. As the reader will glean from the citations in notes 97-102 and 104-108, these facts are according to Defendant Appellant Giles. According to the State, the facts at trial showed a hole in Carafas’ door, a broken glass on the kitchen floor, wine stains on the wall, and phone messages captured by a real estate agent which strongly dispute Defendant Appellant Giles’ version of events. Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.
109 Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.
specializes in prosecuting cases under A.R.S. § 46-455 (vulnerable adult neglect)\textsuperscript{110} and A.R.S. 46-456 (theft from a vulnerable adult) to handle these aspects of the case.\textsuperscript{111}

Ms. Giles was charged with second degree murder by the county attorney.\textsuperscript{112} In a separate indictment, the Attorney General charged Ms. Giles with vulnerable adult emotional abuse and theft from a vulnerable adult under the APSA.\textsuperscript{113} Ms. Giles refused to plea to any of the charges and was convicted of the lesser included offense of manslaughter in a separate cause.\textsuperscript{114} After her manslaughter conviction, Ms. Giles’ APSA case was tried before a jury.\textsuperscript{115} Ultimately, the jury was charged and returned guilty verdicts.\textsuperscript{116} On February 8, 2010, Ms. Giles was sentenced.\textsuperscript{117} The court imposed an 18.5 year sentence for financially exploiting Mr. Carafas in an amount of $25,000.00 or more and levied a 1.75 year sentence for vulnerable adult abuse.\textsuperscript{118} Ms. Giles was also ordered to pay restitution in the amount of $540,000.00.\textsuperscript{119} The Arizona Appellate Court, Division 2, affirmed the Ms. Giles’ manslaughter conviction four (4) days later on February 12, 2010.\textsuperscript{120}

Before HB 2344, prosecutors needed to prove that the accused person was in a position of trust and confidence and knowingly took control, title, use or management of an incapacitated or vulnerable adult’s asset or property by intimidation or deception with the intent to permanently


\textsuperscript{111}Id.

\textsuperscript{112}Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.

\textsuperscript{113}Id.

\textsuperscript{114}Id.; see also State v. Giles, CR20064485 (Pima County Super. Ct. 2006).

\textsuperscript{115}Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.


\textsuperscript{117}Id.

\textsuperscript{118}Id.

\textsuperscript{119}Id.

deprive that person of the asset or property to prove their *prima facie* APSA theft case.\(^{121}\) Further, the State also had to prove that the individual did not act for the benefit of the vulnerable adult to the extent as a trustee.\(^{122}\)

Presently, the standard is substantially similar but a permissible inference of APSA theft exists if the property is taken without adequate consideration.\(^{123}\) Criminal defendants charged with APSA theft may also plead a pattern of gift giving as an affirmative defense,\(^{124}\) which is exactly how Ms. Giles defended to no avail under the former APSA.

These recent changes will undeniably require the State to put on additional evidence that illustrates the parties’ past dealings in gifts. Furthermore, the new Act will also require the State to pay for, retain and parade expert financial examiners to evaluate whether the person in the position of trust and confidence actually gave adequate consideration for the assets and property conveyed.\(^{125}\) In *Giles*, the defendant had a 35-year sexual relationship with the decedent and moved into his home approximately a year before he was killed.\(^{126}\) These facts now call for a “battle of the experts” and tough questions for a fact finder decide, over and above the problematic hurdles that were present in the APSA before the HB 2344 amendments.

Consequently, the previous version of the Act was border line useless to prosecutors because of the difficulty of proving the elements what with witness capacity and competency issues. Similarly, the application of the new Act will prove to be more difficult for prosecutors to utilize and will only be used in very unique situations and circumstances. In the end, though its

\(^{121}\) Former Ariz. Rev. Stat. §§ 46-456(B), 13-1802(B)

\(^{122}\) Former Ariz. Rev. Stat. § 46-456(A)


\(^{126}\) Telephone Interview with John Evans, former Assistant Attorney General, Pima County Attorney General’s Office (Feb. 24, 2010). Mr. Evans is now an Assistant Attorney General in the United States Attorney’s Office for the District of Arizona.
intentions were to the contrary, the Legislature essentially made it more difficult for the State to prosecute theft from a vulnerable adult under the new APSA.

B. Probate and Estate Enforcement Deficiencies Corrected: *In re Estate of Newman*

Generally speaking, civil APSA investigations and prosecutions are deducted from the estate before distribution if initiated by a personal representative, conservator or special administrator.\(^{127}\) Only if an heir acts with malice when raising a claim under the APSA can the heir be required to pay APSA investigation costs.\(^{128}\) However, it is well known that some heirs consistently misused the former APSA to squander other’s rights to receive equitable estate distribution. As such, the threat of mandatory forfeiture and investigative fees taken from the estate led to little APSA probate and estate litigation.

The new APSA corrects these deficiencies expanding the scope of standing rights to “interested person[s]”\(^{129}\) and broadening the definition of individuals in a “position of trust and confidence.”\(^{130}\) Moreover, the new Act eliminates mandatory estate forfeiture for technical violations. Thus, a malicious heir is now foreclosed from using the APSA *in terrorem* and numerous parties with an interest in the estate may assert an APSA violation against an extensive backdrop of new potential APSA violators.


\(^{128}\) *In re Estate of Friedman*, 217 Ariz. 548, 553, 177 P.3d 290, 295 (Ariz. Ct. App. 2008)(Generally, court appointed special administrator fees are deducted from the estate before distribution. Only when an heir who raises a claim under the APSA in a probate proceeding acts with malice, *i.e.*, that his primary purpose was other than to protect the adult or the estate, can the heir be required to pay the costs of the special administrator's investigation into a claim of elder abuse)(relying on *Ariz. Rev. Stat. Ann.* §§ 14-3720 (entitles the personal representative to obtain compensation from the estate, but does not preclude payment from other sources) and 46-453(A) (immunity and malice standard)).

\(^{129}\) “Interested person” includes any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment or 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 person, as the term relates to particular persons, may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. *Ariz. Rev. Stat. Ann.* § 14-1201(26) (2011).

Furthermore, the current Act corrects a colossal gap present in the old which is best illustrated by *In re Estate of Newman*. On August 30, 2004, Celia Newman died after suffering years of severe mental and physical impairment. Celia was survived by three children, Ilana, Adina, and Mordecai (“Max”). Celia had a will that appointed Adina as personal representative of her estate. Prior to her death, Celia had a trust put in place with Adina and Ilana appointed as co-trustees and Max as a beneficiary. Before Celia’s death, Max engaged in several questionable transactions; namely, Max used Celia’s money for down payment on an Arizona home and withdrew six-figures from her retirement account. Later, Max acquired power of attorney to act on Celia’s behalf. A few days before Celia’s death, Max drafted and executed “documents purporting to disinherit Adina from the trust and revoke the designation of Adina as personal representative of the trust.”

Once Adina caught wind of the suspect transactions, she used her co-trustee and personal representative power to compel Max to return Celia’s retirement money and provide documents that explained his financial role in their mother’s affairs. Max refused to comply and filed a Petition to Remove Adina as personal representative and trustee of Celia’s estate. Adina countered and brought suit in civil court alleging that Max breached his fiduciary duty to their

132 Id. Ariz. at 263, 196 P.3d at 866
133 Id.
134 Id.
135 Id. Ariz. at 264, 196 P.3d at 867
136 Id. Ariz. at 263, 196 P.3d at 866
137 Id.
138 Id. Ariz. at 264, 196 P.3d at 867
139 Id.
140 Id.
mother under the former APSA, requested return of the property, and requested documents that would aid in the administration of Celia’s estate pursuant to A.R.S. § 14-3709.\textsuperscript{141}

After a seven day trial, the court found that Max had breached his fiduciary duty to Celia and was found civilly liable to her estate for sanctions for the benefits he received prior to her death.\textsuperscript{142} The court also found that Max was required to forfeit the benefits he would have received in Celia’s will, but left his benefits intact under the trust in place prior to Celia’s death independent of the will:

“Although the Court does not interpret A.R.S. § 46-456(D) to require forfeiture of all benefits with respect to a trust estate, it would be anomalous for Max to forfeit all benefits with respect to Celia's probate Estate, and then receive the same benefits through Celia's Trust. This is especially true because the primary assets of the probate Estate will be the funds recovered from Max under the vulnerable adult statute.

Accordingly, the Court holds that Max remains a beneficiary of Celia's Trust with respect to the Trust as it was constituted prior to Celia’s death, but that Max in his capacity as a beneficiary of Celia's Trust shall forfeit his interest in benefits accruing to the Trust from Celia's probate Estate.”\textsuperscript{143}

The appellate court affirmed.\textsuperscript{144}

\textsuperscript{141} Id.; In addition to the APSA, Ariz. Rev. Stat. Ann. § 14-3709 (2011) is another weapon in a personal representative’s arsenal. Subsection (A) provides for a personal representative to “take possession or control of[] the decedent's property.” Id. It further provides that “[t]he request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession of the property, that the possession of the property by the personal representative is necessary for purposes of administration.” Id. Subsection (A) further provides that “[t]he personal representative may maintain an action to recover possession of property or to determine its title.” Id. Subsections (B), (C), and (D) of 14-3709 pertain to circumstances when a personal representative, or other interested person, believes that a person has, among other things, concealed, embezzled, conveyed or disposed of property of the decedent. Id. Subsection (B) provides that “the court may cite that person” to appear before it. Id. Subsection (C) provides for a sanction of jail if the cited person refuses to appear or answer relevant questions. Id. Subsection (D) sets forth the protocol for the hearing on whether an order of disclosure will issue. Id. Such an order is to be granted “[i]f on examination or from other evidence adduced at the hearing it appears that a person has concealed, embezzled, conveyed or disposed of any property of a decedent.” Id. Subsection (D) also specifies the effect given to an order of disclosure. Id. It states that “[t]he order for the disclosure made on this examination is prima facie evidence of the right of the personal representative to the property in an action brought for recovery of that property, and a judgment shall be for double the value of the property or for return of the property” plus damages of the same amount. Id. (emphasis added).

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 270, 196 P.3d at 873 (quoting Maricopa Sup. Ct. February 5, 2007 Minute Entry, p. 32, ¶ 194).

\textsuperscript{144} Id.
In doing so, Newman stood for the proposition that the old APSA divestiture provision was only subject to assets that flowed through the vulnerable adult’s probate estate. Thus, sophisticated financial exploiters could take a vulnerable adult’s assets prior to their death and set up a trust, joint tenancy bank account and or secure a payable on death designation that passed outside of the probate estate and render the old Act inapplicable. While the appellate Opinion does not elaborate on who set up Celia’s trust prior to her death, Max was a trained financial advisor.\textsuperscript{145} That said, Newman left open the possibility of other clever family members and friends usurping the old Act, if only for about two (2) years.

The “flow-through” Newman glitch has been fixed under the new Act. Presently, the APSA provides that a court may revoke, in whole or in part, a disposition or appointment of property that is made in a governing instrument by a vulnerable adult if a person in a position of trust and confidence does not use the vulnerable adult’s assets solely for their benefit, or if the person in a position of trust and confidence is found guilty of theft under A.R.S. 13-1802(B).\textsuperscript{146} A “governing instrument” includes deeds, wills, trusts, a custodianship, an insurance or annuity policy, a payable on death designation, securities, pensions, profit sharing, retirement plans, an instrument exercising a power of appointment and a power of attorney or a dispositive appointive or nominative instrument of any similar type.\textsuperscript{147}

The new Act also allows a court to sever joint tenancies with rights of survivorship if a person in a position of trust and confidence did not provide adequate consideration for the property at issue.\textsuperscript{148} Lastly, the new Act also provides for third-party bona fide purchaser for

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\item \textsuperscript{145} Id. at 264, 196 P.3d at 867
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value protection. Thus, if Newman was decided under the new APSA, the court could have revoked the documents Max forced Celia to sign in the days preceding her death, not to mention his beneficiary rights in Celia’s trust passing outside of the estate. As a result, the Legislature did a terrific job amending the APSA probate and estate subsections by bringing the Act current with Arizona’s slayer statute concerning the types of powers and instruments that could be invalidated.

The new APSA is not without its detractors, however. A.R.S. § 46-456(C)(1) now provides for permissive estate forfeiture leading some plaintiff probate and estate practitioners to believe that they now must put on more evidence which is contrary to judicial economy. Alternatively, members of the defense probate and estate bar whole-heartedly believe that more evidence and judicial discretion is required because of the severity of complete or partial estate forfeiture.

C. Civil Liability: Actual Damages Guaranteed

Similarly, the Act’s civil damages subsection has been amended. Formerly, the old APSA provided for damages up to three times the amount of monetary damages caused by a person in a position of trust and confidence. Presently, a successful APSA challenge ensures actual damages and an award of additional damages up to two times the amount of actual damages. Resting on similar notions described above, plaintiff probate attorneys believe that the Legislature eviscerated the old Act had by not including a de minimis clause in the new subsection that would shed light on the burden that must be carried in order to be awarded the additional, discretionary damages. Then again, probate and estate defense counselors believe court discretion to be a necessary evil when attempting to evaluate and assign damages, especially damages two times the amount of the actual damages sought.

VI. PROPOSED SOLUTIONS

A. Mandatory Reporting by Financial Institutions and Actively Prosecuting Financial Exploitation Under the New APSA in Maricopa County

The 1998 NEAIS found that perpetrators of vulnerable adult financial exploitation were likely to be the adult children (60.4 %) of the victim.\textsuperscript{152} The victim's other relatives, including grandchildren, friends and neighbors, were equally as likely to be perpetrators of vulnerable adult financial exploitation (9.7 %, 9.2 %, and 8.7%, respectively).\textsuperscript{153} Friends and neighbors (15 \%), hospitals (14.2 \%), and family members (14\%) other than the perpetrator were the three most frequent reporters of substantiated vulnerable adult financial exploitation.\textsuperscript{154} However, the NEAIS estimates that for every abused and or neglected elder report made to adult protective services agencies, over five (5) cases go unreported.\textsuperscript{155} Thus, the “iceberg” theory of underreporting greatly contributes to a void of civil, probate and estate and State theft prosecutions under the Act.

Even though the APSA requires mandatory reporting, an additional measure should be taken by the Legislature requiring stricter reporting of suspicious activity by financial institutions that house the vulnerable adult’s assets under Arizona Revised Statutes Annotated, Section 6 (State Banking Department) and 46-454.\textsuperscript{156} California already has promulgated as much in its Financial Elder Abuse Reporting Act of 2005.\textsuperscript{157} The following list of non-exhaustive factors


\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id.


\textsuperscript{157} See Cal. Welf. and Inst. Code §15630.1 (West 2011); see also Das v. Bank of America, N.A., 112 Cal.Rptr.3d 439, 446-447 (Cal. App. 2nd Dist. 2010)(banks and other financial institutions mandated to report suspected financial abuse of an elder. As mandated reporters, banks are obliged to report suspected financial abuse they encounter in connection with providing financial services to an elder to local law enforcement or adult protective services agencies. Failure to comply with this obligation may subject a bank to civil penalties that may only be brought by Attorney General, district attorney, or county counsel). Subdivision (d)(1) of §15630.1 states: “Any mandated
should be included in a statutory amendment which would trigger a mandatory report from a bank to police, the county attorney and or Attorney General’s Office:

1) Sudden changes in a bank account or banking practice, including an unexplained withdrawal of large sums of money by a person accompanying the vulnerable adult; 2) the inclusion of additional names on a vulnerable adult’s bank signature card; 3) unauthorized withdrawal of funds using a vulnerable adult’s ATM card; 4) abrupt changes in financial documents; 5) discovery of an vulnerable adult’s signature forged for financial transactions; 6) sudden appearance of previously uninvolved relatives claiming rights to a vulnerable adult’s banking affairs; and 7) sudden transfer(s) of assets to a family member or someone outside the family.\(^\text{158}\)

The Arizona Legislature can also hold banks and its employees accountable for mandatory reporting by abolishing immunity under the APSA. In order to accomplish this, the Legislature must amend the APSA and Arizona Revised Statutes Annotated, Section 6, by allowing civil suits instituted only by the Attorney General, district attorney, or county attorney when banks make an untimely report or fail to report financial abuse at all.\(^\text{159}\)

Additionally, Maricopa County must follow the lead of Pima County and actively prosecute under the new APSA. In the past, the Phoenix Police Department operated a division four (4) detectives who investigated vulnerable adult financial exploitation.\(^\text{160}\) In 2010, due to budget cuts, only one (1) Phoenix Police detective maintained these duties with twenty-five (25)

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159 *See* Note 157, *supra*.

160 Telephone Interview with Toni Brown, Detective, Phoenix Police Department (Mar. 26, 2010).
active cases. Furthermore, Phoenix Police did not utilize the APSA’s interplay with Title 13’s corresponding theft provision per A.R.S. § 13-1802(B). As a result, individuals who have financially exploited vulnerable adults in Maricopa County were only charged with common theft under A.R.S. § 13-1802(A). Consequently, civil practitioners were foreclosed from using the APSA’s res judicata effect under A.R.S. §§ 46-455(I) and 46-456(F).

Then again, investigative and prosecutorial policies change as county attorneys come and go. In 2011, and as of the date of publishing, Maricopa County has undergone some promising APSA policy changes with Bill Montgomery seated as County Attorney. While the Phoenix Police Department still only employs one (1) detective in its elder abuse and exploitation division, its case load has increased from twenty-five (25) to eighty-two (82). Correspondingly, Phoenix Police Department and the County Attorney’s Office are now using A.R.S. § 13-1802(B) (theft from a vulnerable adult) which may increase the use of the civil, estate and probate sections of the APSA in the future.

Even so, policy changes may have little effect considering the new APSA affirmative defenses and expert testimony requirement in vulnerable adult theft prosecutions. However, should prosecutor offices in Maricopa County begin using the Act as it was intended, civil judgments would be more easily attained which could, in turn, be filed with respective county recorder offices against the APSA violator’s real property under A.R.S. § 33-961. This practice of filing and renewing adverse real property judgment liens against APSA financial exploiters is

161 Id.
162 Id.
163 See also Ariz. Rev. Stat. Ann. § 13-807 (2011): “A defendant convicted in a criminal proceeding is precluded from subsequently denying in any civil proceeding brought by the victim or this state against the criminal defendant the essential allegations of the criminal offense of which he was adjudged guilty, including judgments of guilt resulting from no contest pleas. An order of restitution in favor of a person does not preclude that person from bringing a separate civil action and proving in that action damages in excess of the amount of the restitution order.”
an important process because most violators have already spent the pilfered money, plead to probation and suspended sentence and cannot pay restitution.

VII. CONCLUSION

This Article began with a quote from Mickey Rooney, a 90-year-old show business legend and World War II Veteran. Mr. Rooney delivered this quote as part of an eloquent Statement to the Senate Special Committee on Aging on March 2, 2011. Mr. Rooney appeared as part of the Senate Panel after a California court granted a temporary restraining order against his stepson from a previous marriage, Christopher Aber, and his wife, Christina Aber, on February 14, 2011. The Court also granted Mr. Rooney’s a request for temporary or permanent conservator to oversee his estate. Court documents allege that the Abers physically and emotionally abused Mr. Rooney for years and took control of his finances.

At an evidentiary hearing on February 24, 2011, Michael Augustine, Mr. Rooney’s temporary estate conservator, stated that Mr. Rooney had been coerced into signing documents to his financial detriment. Further, Mr. Augustine submitted that he had met with Mr. Rooney on two (2) occasions since February 14, 2011, and observed that “the actor was wearing the same clothes both times and had no money or identification cards in his wallet.” Mr. Augustine also managed to locate three of Mr. Rooney’s accounts that had once held a balance in excess of $400,000, but presently only had a combined value of $1,200 after the Abers alleged drained all three. Here, like Giles and Newman above, the people and close confidants the elderly are supposed to trust and love most exact the most damage. Not just financially, but also emotionally.

165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
Sadly, the circular plot does not end with Mr. Rooney in this Article as vulnerable adult financial exploitation will unfortunately continue in Maricopa County. Though its intentions were likely to the contrary, the application of the new APSA will prove to be as difficult (if not more) for prosecutors to utilize and will only be used in very unique situations and circumstances. Only time will tell if the new APSA results in more civil and probate litigation, but all indicia points to that conclusion.

It is this Writer’s hope that the new APSA proves to be more useful than its predecessor in the criminal arena, if only after amendments are made that require State banks to mandatorily report suspicious activity of its vulnerable adults’ accounts. Notwithstanding, please find criminal Jury Instructions that comport with the current APSA with the expectation that they will aid Arizona prosecutors in their endeavors of successfully prosecuting APSA financial exploiters attached in this Article’s Appendix.\(^{170}\)

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\(^{170}\) Special thanks are in order to Assistant Attorney General John Evans who provided me with his Jury Instructions used in *State v. Giles* that were modeled after *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (Ariz. Ct. App. 2005) (Elderly couple and their daughter brought action against caretaker for breach of fiduciary duties, alleging he knowingly depriving an incapacitated or vulnerable adult of his or her assets or property in violation of the APSA and requested that title to land which elderly woman conveyed to caretaker be quieted to elderly couple. The trial court entered judgment for caretaker, and the appellate court reversed quieting title in favor of the vulnerable adult). As an aside, *Davis* is a seminal case and a great starting point for any practitioner researching APSA claims.
APPENDIX

COURT'S INSTRUCTION NO. ___

THE STATE HAS CHARGED THE DEFENDANT, ________________.

WITH ONE COUNT OF THE CRIME OF THEFT FROM A VULNERABLE ADULT. YOU MUST NOT THINK THAT THE DEFENDANT IS GUILTY JUST BECAUSE OF THESE CHARGES. THE DEFENDANT HAS PLED "NOT GUILTY". THIS PLEA OF "NOT GUILTY" MEANS THAT THE STATE MUST PROVE EVERY PART OF THESE CHARGES BEYOND A REASONABLE DOUBT.
COURT'S INSTRUCTION NO. ___

THE CRIME OF THEFT FROM A VULNERABLE ADULT REQUIRES PROOF OF THE FOLLOWING:

1. THE DEFENDANT KNOWINGLY TAKES CONTROL, TITLE, USE OF MANAGEMENT OF A VULNERABLE ADULT'S ASSETS OR PROPERTY WITHOUT LAWFUL AUTHORITY, AND,

2. THE DEFENDANT WAS IN A POSITION OF TRUST AND CONFIDENCE WITH THE VULNERABLE ADULT; AND

3. THE DEFENDANT TAKES CONTROL, TITLE, USE OR MANAGEMENT OF SUCH PROPERTY WITH THE INTENT TO DEPRIVE THE VULNERABLE ADULT OF THEIR PROPERTY.
COURT’S INSTRUCTION NO. ___

“VULNERABLE ADULT” MEANS 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.

“IMPAIRMENT” MEANS DETERIORATION, INJURIOUS LESSENING, OR WEAKENING, ADVANCED AGE MAY ITSELF CAUSE IMPAIRMENT.

“DEPRIVE” MEANS TO WITHHOLD THE PROPERTY INTEREST OF ANOTHER EITHER PERMANENTLY OR FOR SO LONG A TIME PERIOD THAT A SUBSTANTIAL PORTION OF ITS ECONOMIC VALUE OR USEFULNESS OR ENJOYMENT IS LOST. TO WITHHOLD WITH THE INTENT TO RESTORE IT ONLY UPON PAYMENT OF ANY REWARD OR OTHER COMPENSATION OR TO TRANSFER OR DISPOSE OF IT SO THAT IT IS UNLIKELY TO BE RECOVERED.
COURT’S INSTRUCTION NO. ___

“KNOWINGLY” MEANS THAT THE DEFENDANT ACTED WITH AN AWARENESS OF THE EXISTENCE OF CONDUCT OR CIRCUMSTANCES CONSTITUTING AN OFFENSE. IT DOES NOT REQUIRE ANY KNOWLEDGE OF THE UNLAWFULNESS OF THE ACT OR OMISSION.

“INTENTIONALLY” OR “WITH THE INTENT OF” MEANS THAT A PERSON’S OBJECTIVE IS TO CAUSE THAT RESULT OR TO ENGAGE IN THAT CONDUCT.
COURT’S INSTRUCTION NO. ___

PROOF THAT THE DEFENDANT TOOK CONTROL, TITLE, USE OR MANAGEMENT OF A VULNERABLE ADULT’S PROPERTY WITHOUT ADEQUATE CONSIDERATION MAY GIVE RISE TO AN INERENCE THAT THE DEFENDANT INTENDED TO DEPRIVE THE VULNERABLE ADULT OF THE PROPERTY.

INFERENCES ARE DEDUCTIONS OR CONCLUSIONS WHICH REASON AND COMMON SENSE LEAD THE JURY TO DRAW FROM FACTS WHICH HAVE BEEN ESTABLISHED BY THE EVIDENCE IN THE CASE. YOU ARE PERMITTED, BUT NOT REQUIRED TO DRAW, FROM FACTS WHICH YOU FIND HAVE BEEN PROVED, SUCH REASONABLE INFERENCES AS SEEM JUSTIFIED IN THE LIGHT OF YOUR EXPERIENCE.

“ADEQUATE CONSIDERATION” MEANS THE PROPERTY WAS GIVEN TO THE PERSON AS PAYMENT FOR BONA FIDE GOODS OR SERVICES PROVIDED BY THE DEFENDANT AND THE PAYMENT WAS AT A RATE THAT WAS CUSTOMARY FOR SIMILAR GOODS OR SERVICES IN THE COMMUNITY THAT THE VULNERABLE ADULT RESIDED IN AT THE TIME OF THE TRANSACTION.
“POSITION OF TRUST AND CONFIDENCE” MEANS THAT A PERSON IS ANY OF THE FOLLOWING:

1. A PERSON WHO HAS ASSUMED A DUTY TO PROVIDE CARE TO THE VULNERABLE ADULT; OR

2. A JOINT TENANT OR A TENANT IN COMMON WITH A VULNERABLE ADULT; OR

3. A PERSON WHO IS IN A FIDUCIARY RELATIONSHIP WITH THE VULNERABLE ADULT INCLUDING A DE FACTO GUARDIAN OR DE FACTO CONSERVATOR; OR

4. A PERSON WHO IS IN A CONFIDENTIAL RELATIONSHIP WITH THE VULNERABLE ADULT.
“DE FACTO CONSERVATOR” MEANS ANY PERSON WHO TAKES POSSESSION OF THE ESTATE OF A VULNERABLE ADULT, WITHOUT RIGHT OR LAWFUL AUTHORITY. A DE FACTO CONSERVATOR IS SUBJECT TO ALL OF THE RESPONSIBILITIES THAT ATTACH TO A LEGALLY APPOINTED CONSERVATOR OR TRUSTEE.

“DE FACTO GUARDIAN” MEANS ANY PERSON WHO TAKES POSSESSION OF THE PERSON OF A VULNERABLE ADULT WITHOUT RIGHT OR LAWFUL AUTHORITY. A DE FACTO GUARDIAN IS SUBJECT TO ALL OF THE RESPONSIBILITIES THAT ATTACH TO A LEGALLY APPOINTED GUARDIAN.

A DE FACTO GUARDIAN OR CONSERVATOR’S FIRST DUTY IS TO ACT WITH UNDIVIDED LOYALTY TO THE BENEFICIARY.

A DE FACTO GUARDIAN OR CONSERVATOR SHALL OBSERVE THE STANDARD OF CARE THAT WOULD BE OBSERVED BY A PRUDENT PERSON DEALING WITH THE PROPERTY OF ANOTHER.

“FIDUCIARY RELATIONSHIP” ATTRIBUTES INCLUDE GREAT INTIMACY, DISCLOSURE OF SECRETS, OR INTRUSTING OF POWER WHICH LARGELY RESULTS IN THE SUBSTITUTION OF THAT OTHER’S WILL FOR HIS/HER IN THE MATERIAL MATTERS INVOLVED IN THE TRANSACTION.

A “CONFIDENTIAL RELATIONSHIP” IS ONE WHICH ARISES BY REASON OF KINSHIP BETWEEN THE PARTIES, OR PROFESSIONAL, BUSINESS, OR SOCIAL RELATIONS THAT WOULD REASONABLY LEAD AN ORDINARILY PRUDENT PERSON IN THE MANAGEMENT OF HIS/HER BUSINESS AFFAIRS TO REST A DEGREE OF CONFIDENCE IN ANOTHER WHICH LARGELY RESULTS IN THE SUBSTITUTION OF THAT OTHER’S WILL FOR HIS/HER IN THE MATERIAL MATTERS INVOLVED IN THE TRANSACTION.
COURT’S INSTRUCTION NO. ___

THE ISSUE OF WHETHER A CONFIDENTIAL RELATIONSHIP EXISTS BETWEEN THE DEFENDANT AND THE VULNERABLE ADULT IS AN ISSUE OF FACT TO BE DETERMINED BY YOU BASED ON A “TOTALITY OF THE CIRCUMSTANCES.” “TOTALITY OF THE CIRCUMSTANCES” MEANS TAKING THE WHOLE PICTURE INTO ACCOUNT AND MAKING A DETERMINATION BASED UPON YOUR KNOWLEDGE AND EXPERIENCE FROM THE EVIDENCE PRESENTED.

THE FOLLOWING FACTORS MAY BE CONSIDERED IN DETERMINING IF AND WHEN A CONFIDENTIAL RELATIONSHIP WAS ESTABLISHED BY THE DEFENDANT:

• MR./MRS. ____________ HAD TO BE TAKEN CARE OF BY DEFENDANT
• MR./MRS. ____________ MAINTAINED A CLOSE RELATIONSHIP WITH DEFENDANT
• DEFENDANT PROVIDED TRANSPORTATION TO MR./MRS. ____________ WHO HAS/HAD THEIR MEDICAL CARE PROVIDED FOR
• MR./MRS. ____________ IS/WAS PHYSICALLY OR MENTALLY WEAK
• MR./MRS. ____________ IS/WAS OF ADVANCED AGE OR POOR HEALTH
COURT’S INSTRUCTION NO. ___

IT IS AN AFFIRMATIVE DEFENSE TO THIS PROSECUTION IF THE DEFENDANT CAN PROVE BY PREPONDERANCE OF THE EVIDENCE THAT:

1. THE PROPERTY WAS GIVEN TO HIM/HER AS A GIFT CONSISTENT WITH A PATTERN OF GIFT GIVING THAT EXISTED BEFORE THE ADULT BECAME VULNERABLE; OR

2. THE PROPERTY WAS GIVEN AS A GIFT CONSISTENT WITH A PATTERN OF GIFT GIVING TO A CLASS OF INDIVIDUALS THAT EXISTED BEFORE THE ADULT BECAME VULNERABLE.

“PATTERN OF GIFT GIVING” MEANS TWO OR MORE GIFTS THAT ARE THE SAME OR SIMILAR IN TYPE AND MONETARY VALUE.

DEFENDANT MUST PERSUADE YOU BY “PREPONDERANCE OF THE EVIDENCE,” THAT IS, THAT THESE CLAIMS ARE MORE PROBABLY TRUE THAN NOT TRUE. THIS MEANS THE EVIDENCE THAT FAVORS ONE PARTY SLIGHTLY OUTWEIGHS THE OPPOSING EVIDENCE. THIS IS A LESS EXACTING STANDARD THAN PROOF BEYOND A REASONABLE DOUBT. IN DETERMINING WHETHER THE DEFENDANT HAS MET THIS BURDEN YOU WILL CONSIDER ALL THE EVIDENCE, WHETHER PRESENTED BY THE DEFENDANT OR THE STATE.
COURT’S INSTRUCTION NO. ___

FAILURE TO COMPLAIN DOES NOT NECESSARILY MEAN THAT A PERSON IS NOT VULNERABLE. AN INDIVIDUAL IS NOT REQUIRED TO ACT TO PROTECT HIMSELF BY COMPLAINING ABOUT ABUSE, NEGLECT, OR EXPLOITATION. FAILURE TO COMPLAIN DOES NOT MEAN THAT PERSON IS ABLE TO PROTECT HIMSELF/HERSELF.
COURT’S INSTRUCTION NO. ___

EXPLOITATION MAY OCCUR WITH THE FULL PARTICIPATION OF THE VICTIM.
COURT’S INSTRUCTION NO. ___

IN SUMMARY, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT:

1. KNOWINGLY TOOK CONTROL, TITLE, USE OF MANAGEMENT OF A VULNERABLE ADULT’S ASSETS OR PROPERTY WITHOUT LAWFUL AUTHORITY, AND,

2. THE DEFENDANT WAS IN A POSITION OF TRUST AND CONFIDENCE WITH THE VULNERABLE ADULT; AND

3. THE DEFENDANT TOOK CONTROL, TITLE, USE OR MANAGEMENT OF SUCH PROPERTY WITH THE INTENT TO DEPRIVE THE VULNERABLE ADULT OF THEIR PROPERTY.

IF YOU UNANIMOUSLY FIND THAT THE STATE HAS FAILED TO PROVE BEYOND A REASONABLE DOUBT ANY OF THE ELEMENTS OF THE CRIME OF THEFT FROM A VULNERABLE ADULT, YOU SHALL THEN FIND THE DEFENDANT NOT GUILTY AND NOT CONSIDER HIS/HER AFFIRMATIVE DEFENSE.

COURT’S INSTRUCTION NO. ___

ALL EIGHT OF YOU MUST AGREE ON A VERDICT. ALL EIGHT OF YOU MUST AGREE WHETHER THE VERDICT IS “GUILTY” OR “NOT GUILTY.” WHEN YOU GO TO THE JURY ROOM YOU WILL CHOOSE A FOREPERSON WHO WILL PRESIDE OVER YOUR DELIBERATIONS AND WHO WILL SIGN ANY VERDICT.

YOU WILL BE GIVEN ONE FORMS OF VERDICT ON WHICH TO INDICATE YOUR DECISION. IT READS AS FOLLOWS: