

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2618

BY DELEGATE ROWAN, MARTIN, C., ROHRBACH, SYPOLT,
GRAVES, LOVEJOY, LONGSTRETH, BOGGS, MANDT,
MAYNARD AND KELLY, J.

[Introduced January 23, 2019; Referred
to the Committee on Senior, Children, and Family
Issues then the Judiciary.]

1 A BILL to amend and reenact §55-7J-1 of the Code of West Virginia, 1931, as amended; and to
 2 amend and reenact §61-2-29b of said code, all relating to including the use of undue
 3 influence resulting in financial or asset loss or disadvantage to an elderly person, protected
 4 person or incapacitated adult in the definitions of civil and criminal financial exploitation of
 5 elderly persons, protected persons and incapacitated adults; definitions; and including the
 6 use of undue influence in the definition of the crime of an act of financial exploitation.

Be it enacted by the Legislature of West Virginia:

CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

ARTICLE 7J. FINANCIAL EXPLOITATION OF AN ELDERLY PERSON, PROTECTED PERSON OR INCAPACITATED ADULT.

§55-7J-1. Action for financial exploitation of an elderly person, protected person or incapacitated adult; definitions.

1 (a) Any elderly person, protected person or incapacitated adult against whom an act of
 2 financial exploitation has been committed may bring an action under this article against any
 3 person who has committed an act of financial exploitation against him or her.

4 (b) For the purposes of this article:

5 (1) "Incapacitated adult" has the same meaning as prescribed under §61-2-29 of this code;

6 (2) "Diminished capacity" means the inability to address, avoid, prevent or stop financial
 7 exploitation because of physical, mental or emotional conditions;

8 ~~(2)~~ (3) "Elderly person" means a person who is 65 years or older;

9 ~~(3)~~ (4) "Financial exploitation" or "financially exploit" means the intentional
 10 misappropriation or misuse of funds or assets of an elderly person, protected person or
 11 incapacitated adult, or use of undue influence resulting in financial or asset loss or disadvantage
 12 to an elderly person, protected person or incapacitated adult, but shall ~~shall~~ may not apply to a
 13 transaction or disposition of funds or assets where the defendant made a good-faith effort to assist

14 the elderly person, protected person or incapacitated adult with the management of his or her
15 money or other things of value; and

16 ~~(4)~~ (5) "Protected person" means any person who is defined as a "protected person" in
17 §44A-1-4 of this code and who is subject to the protections of chapter 44A or 44C of this code.

18 (6) "Undue influence" means excessive persuasion that causes another person to act or
19 refrain from acting by overcoming that person's free will and results in inequity.

20 (A) In determining whether the alleged financial exploitation was produced by undue
21 influence, all of the following shall be considered:

22 (i) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited
23 to, incapacity, diminished capacity, illness, disability, injury, age, education, impaired cognitive
24 function, emotional distress, isolation, or dependency, and whether the influencer knew or should
25 have known of the alleged victim's vulnerability.

26 (ii) The influencer's apparent authority. Evidence of apparent authority may include, but
27 is not limited to, status as a fiduciary, family member, care provider, health care professional,
28 legal professional, spiritual adviser, expert, intimate partner or other qualification.

29 (iii) The actions or tactics used by the influencer. Evidence of actions or tactics used may
30 include, but is not limited to, controlling necessities of life, medication, the victim's interactions
31 with others, access to information, or sleep; use of affection, intimidation, or coercion; or initiation
32 of changes in personal or property rights, use of haste or secrecy in effecting those changes,
33 effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

34 (iv) The equity of the result. Evidence of the equity of the result may include, but is not
35 limited to, the economic consequences to the victim, any divergence from the victim's prior intent
36 or course of conduct or dealing, the relationship of the value conveyed to the value of any services
37 or consideration received, or the appropriateness of the change in light of the length and nature
38 of the relationship.

39 (B) Evidence of an inequitable result, without more, is not sufficient to prove undue

40 influence.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 2. CRIMES AGAINST THE PERSON.

§61-2-29b. Financial exploitation of an elderly person, protected person or incapacitated adult; penalties; definitions.

1 (a) Any person who financially exploits an elderly person, protected person or an
2 incapacitated adult in the amount of less than \$1,000 is guilty of a misdemeanor and, upon
3 conviction thereof, shall be fined not more than \$1,000 or confined in jail for not more than one
4 year, or both fined and confined.

5 (b) Any person who financially exploits an elderly person, protected person or an
6 incapacitated adult in the amount of \$1,000 or more is guilty of a felony and, upon conviction
7 thereof, shall be fined not more than \$10,000 and imprisoned in a state correctional facility not
8 less than two nor more than 20 years.

9 (c) Any person convicted of a violation of this section shall, in addition to any other
10 penalties at law, be subject to an order of restitution.

11 (d) In determining the value of the money, goods, property or services referred to in
12 subsection (a) of this section, it ~~shall be~~ is permissible to cumulate amounts or values where such
13 money, goods, property or services were fraudulently obtained as part of a common scheme or
14 plan.

15 (e) Financial institutions and their employees as defined by §31A-2A-1 of this code and
16 as permitted by §31A-2-4(c)(13) of this code, others engaged in financially related activities as
17 defined by §31A-8C-1 of this code, caregivers, relatives and other concerned persons are
18 permitted to report suspected cases of financial exploitation to state or federal law-enforcement
19 authorities, the county prosecuting attorney and to the Department of Health and Human
20 Resources, Adult Protective Services Division or Medicaid Fraud Division, as appropriate. Public

21 officers and employees are required to report suspected cases of financial exploitation to the
22 appropriate entities as stated above. The requisite agencies shall investigate or cause the
23 investigation of the allegations.

24 (f) When financial exploitation is suspected and, to the extent permitted by federal law,
25 financial institutions and their employees or other business entities required by federal law or
26 regulation to file suspicious activity reports and currency transaction reports shall also be
27 permitted to disclose suspicious activity reports or currency transaction reports to the prosecuting
28 attorney of any county in which the transactions underlying the suspicious activity reports or
29 currency transaction reports occurred.

30 (g) Any person or entity that in good faith reports a suspected case of financial exploitation
31 pursuant to this section is immune from civil liability founded upon making that report.

32 (h) For the purposes of this section:

33 (1) "Incapacitated adult" means a person as defined by §61-2-29 of this code;

34 (2) "Diminished capacity" means the inability to address, avoid, prevent or stop financial
35 exploitation because of physical, mental or emotional conditions;

36 ~~(2)~~ (3) "Elderly person" means a person who is 65 years or older;

37 ~~(3)~~ (4) "Financial exploitation" or "financially exploit" means the intentional
38 misappropriation or misuse of funds or assets of an elderly person, protected person or
39 incapacitated adult or use of undue influence resulting in financial or asset loss or disadvantage
40 to an elderly person, protected person or incapacitated adult, but shall not apply to a transaction
41 or disposition of funds or assets where the accused made a good-faith effort to assist the elderly
42 person, protected person or incapacitated adult with the management of his or her money or other
43 things of value; and

44 ~~(4)~~ (5) "Protected person" means any person who is defined as a "protected person" in
45 §44A-1-4 of this code and who is subject to the protections of chapter 44A or chapter 44C of this
46 code.

47 (6) “Undue influence” means excessive persuasion that causes another person to act or
48 refrain from acting by overcoming that person’s free will and results in inequity.

49 (A) In determining whether the alleged financial exploitation was produced by undue
50 influence, all of the following shall be considered:

51 (i) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited
52 to, incapacity, diminished capacity, illness, disability, injury, age, education, impaired cognitive
53 function, emotional distress, isolation, or dependency, and whether the influencer knew or
54 should have known of the alleged victim’s vulnerability.

55 (ii) The influencer’s apparent authority. Evidence of apparent authority may include, but
56 is not limited to, status as a fiduciary, family member, care provider, health care professional,
57 legal professional, spiritual adviser, expert, intimate partner or other qualification.

58 (iii) The actions or tactics used by the influencer. Evidence of actions or tactics used may
59 include, but is not limited to, controlling necessities of life, medication, the victim’s interactions
60 with others, access to information, or sleep; use of affection, intimidation, or coercion; or
61 initiation of changes in personal or property rights, use of haste or secrecy in effecting those
62 changes, effecting changes at inappropriate times and places, and claims of expertise in
63 effecting changes.

64 (iv) The equity of the result. Evidence of the equity of the result may include, but is not
65 limited to, the economic consequences to the victim, any divergence from the victim’s prior
66 intent or course of conduct or dealing, the relationship of the value conveyed to the value of any
67 services or consideration received, or the appropriateness of the change in light of the length
68 and nature of the relationship.

69 (B) Evidence of an inequitable result, without more, is not sufficient to prove undue
70 influence.

71 (†) (j) Notwithstanding any provision of this code to the contrary, acting as guardian,
72 conservator, trustee or attorney for or holding power of attorney for an elderly person, protected

- 73 person or incapacitated adult ~~shall~~ may not, standing alone, constitute a defense to a violation of
- 74 ~~subsection (a)~~ of this section.

NOTE: The purpose of this bill is to include undue influence as a factor in the definition of financial exploitation of an incapacitated person, elderly person or protected person and to correct technical errors. The amendment is made in the civil cause of action as well as the criminal action.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.