

# WEST VIRGINIA LEGISLATURE

## 2016 REGULAR SESSION

### ENROLLED

## House Bill 4309

FISCAL  
NOTE

BY DELEGATES ROWAN, BORDER, FAST, STANSBURY,

MOYE, CAMPBELL, OVERINGTON, ROMINE, DUKE,

PETHTEL AND FERRO

[Passed March 12, 2016; in effect ninety days from  
passage.]

1 AN ACT to amend the Code of West Virginia, 1931, by adding thereto a new article, designated  
2 §55-71-1, §55-71-2, §55-71-3, §55-71-4, §55-71-5 and §55-71-6; and to amend and reenact  
3 §61-2-29b of said code, all relating generally to protections against financial exploitation  
4 of elderly persons, protected persons and incapacitated adults; establishing a cause of  
5 action against a person who commits an act of financial exploitation against an elderly  
6 person, protected person or incapacitated adult; defining terms; restricting certain  
7 defenses which, standing alone, are based on legal relationship to an elderly person,  
8 protected person or incapacitated adult; providing for court-authorized remedies;  
9 authorizing the award of increased damages in certain circumstances; providing for award  
10 of costs and attorneys' fees; establishing the standard of proof; establishing the statute of  
11 limitations for actions brought under the article; authorizing the court to freeze assets and  
12 order injunctive relief; providing options the court may exercise upon a formal finding of  
13 exploitation; authorizing the court to require posting security, or additional security, under  
14 certain circumstances; clarifying criminal penalties for conviction of certain offenses of  
15 financial exploitation of an elderly person, protected person or incapacitated adult; and  
16 increasing the criminal penalty for the offense of financial exploitation of \$1,000 or more.

*Be it enacted by the Legislature of West Virginia:*

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a  
2 new article, designated §55-71-1, §55-71-2, §55-71-3, §55-71-4, §55-71-5 and §55-71-6; and to  
3 amend and reenact §61-2-29b of said code, all to read as follows:

**CHAPTER 55. ACTIONS, SUITS AND ARBITRATION;**

**JUDICIAL SALE.**

**ARTICLE 71. FINANCIAL EXPLOITATION OF AN ELDERLY PERSON, PROTECTED  
PERSON OR INCAPACITATED ADULT.**

**§55-71-1. 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 section twenty-nine,  
6 article two, chapter sixty-one of this code;

7 (2) "Elderly person" means a person who is sixty-five years or older;

8 (3) "Financial exploitation" or "financially exploit" means the intentional misappropriation  
9 or misuse of funds or assets of an elderly person, protected person or incapacitated adult, but  
10 shall not apply to a transaction or disposition of funds or assets where the defendant made a  
11 good-faith effort to assist the elderly person, protected person or incapacitated adult with the  
12 management of his or her money or other things of value; and

13 (4) "Protected person" means any person who is defined as a "protected person" in section  
14 four, article one, chapter forty-four-a of this code and who is subject to the protections of chapter  
15 forty-four-a or forty-four-c of this code.

**§55-71-2. Restriction of defenses, standing alone, based on legal relationship.**

1 Notwithstanding any provision of this code to the contrary, acting in a position of trust and  
2 confidence, including, but not limited to, as guardian, conservator, trustee or attorney for or  
3 holding power of attorney for an elderly person, protected person or incapacitated adult shall not,  
4 standing alone, constitute a defense to an action brought under this article.

**§55-71-3. Court authorized remedies.**

1 (a) In an action brought against a person under this article upon a finding that an elderly  
2 person, protected person or incapacitated adult has been financially exploited, the court may  
3 order:

4 (1) The return of property or assets improperly obtained, controlled or used; and

5 (2) An award of actual damages to the person who brought the action for any damages  
6 incurred or for the value of the property or assets lost as a result of the violation or violations of  
7 this article.

8 (b) In addition to the remedies provided in subsection (a) of this section, a court may order  
9 the following:

10 (1) For violations committed by a person who is not in a position of trust and confidence,  
11 payment of two times the amount of damages incurred or value of property or assets lost; and

12 (2) For violations committed by a person in a position of trust and confidence, payment of  
13 treble damages.

**§55-71-4. Attorneys' fees; court costs and burden of proof; statute of limitations.**

1 (a) The court may award reasonable attorneys' fees and costs to a person that brings an  
2 action under this section and prevails.

3 (b) The standard of proof in proving that a person committed financial exploitation in an  
4 action pursuant to this article is a preponderance of the evidence.

5 (c) An action under this article shall be brought within two years from the date of the  
6 violation or from the date of discovery, whichever is later in time.

**§55-71-5. Action to freeze assets; burden of proof; options the court may exercise.**

1 (a) An elderly person, protected person or incapacitated adult may bring an action to enjoin  
2 the alleged commission of financial exploitation and may petition the court to freeze the assets of  
3 the person allegedly committing the financial exploitation in an amount equal to, but not greater  
4 than, the alleged value of lost property or assets for purposes of restoring to the victim the value  
5 of the lost property or assets. The burden of proof required to freeze the assets of a person  
6 allegedly committing financial exploitation shall be a preponderance of the evidence. Upon a  
7 finding that the elderly person, protected person or incapacitated adult has been formally  
8 exploited, the court may:

- 9 (1) Grant injunctive relief;
- 10 (2) Order the violator to, in escrow an amount of money equivalent to the value of the  
11 misappropriated assets for distribution to the aggrieved elderly person, protected person or  
12 incapacitated adult;
- 13 (3) Order the violator to return to the elderly person, protected person or incapacitated  
14 person any real or personal property which was misappropriated; or
- 15 (4) Provide for the appointment of a receiver;
- 16 (b) In an action under section one of this article, the court may void or limit the application  
17 of contracts or clauses resulting from the financial exploitation.
- 18 (c) In an action brought under this article, upon the filing of the complaint or on the  
19 appearance of any defendant, claimant or other party, or at any later time, the court may require  
20 the plaintiff, defendant, claimant or other party or parties to post security, or additional security, in  
21 a sum the court directs to pay all costs, expenses and disbursements that are awarded against  
22 that party or that the party may be directed to pay by any interlocutory order, by the final judgment  
23 or after appeal.

**§55-71-6. Penalty for violation of injunction; retention of jurisdiction.**

1 Any person who violates the terms of an order issued under section five of this article shall  
2 be subject to proceeding for contempt of court. The court issuing the injunction may retain  
3 jurisdiction if, in its discretion, it determines that to do so is in the best interest of the elderly  
4 person, protected person or incapacitated adult. Whenever the court determines that an injunction  
5 issued under section five of this article has been violated, the court may award reasonable costs  
6 to the party asserting that a violation has occurred.

**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 twenty 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 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 section one, article two-a,  
16 chapter thirty-one-a of this code and as permitted by subsection thirteen, section four of said  
17 article, others engaged in financially related activities, as defined by section one, article eight-c,  
18 chapter thirty-one-a of this code, caregivers, relatives and other concerned persons are permitted  
19 to report suspected cases of financial exploitation to state or federal law-enforcement authorities,  
20 the county prosecuting attorney and to the Department of Health and Human Resources, Adult  
21 Protective Services Division or Medicaid Fraud Division, as appropriate. Public officers and  
22 employees are required to report suspected cases of financial exploitation to the appropriate  
23 entities as stated above. The requisite agencies shall investigate or cause the investigation of the  
24 allegations.

25 (f) When financial exploitation is suspected and to the extent permitted by federal law,

26 financial institutions and their employees or other business entities required by federal law or  
27 regulation to file suspicious activity reports and currency transaction reports shall also be  
28 permitted to disclose suspicious activity reports or currency transaction reports to the prosecuting  
29 attorney of any county in which the transactions underlying the suspicious activity reports or  
30 currency transaction reports occurred.

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

33 (h) For the purposes of this section:

34 (1) "Incapacitated adult" means a person as defined by section twenty-nine of this article;

35 (2) "Elderly person" means a person who is sixty-five years or older;

36 (3) "Financial exploitation" or "financially exploit" means the intentional misappropriation  
37 or misuse of funds or assets of an elderly person, protected person or incapacitated adult, but  
38 shall not apply to a transaction or disposition of funds or assets where the accused made a good-  
39 faith effort to assist the elderly person, protected person or incapacitated adult with the  
40 management of his or her money or other things of value; and

41 (4) "Protected person" means any person who is defined as a "protected person" in section  
42 four, article one, chapter forty-four-a of this code and who is subject to the protections of chapter  
43 forty-four-a or forty-four-c of this code.

44 (i) Notwithstanding any provision of this code to the contrary, acting as guardian,  
45 conservator, trustee or attorney for or holding power of attorney for an elderly person, protected  
46 person or incapacitated adult shall not, standing alone, constitute a defense to a violation of  
47 subsection (a) of this section.