

ADULT PROTECTIVE SERVICES INSTRUCTIONS

Introduction

When APSA was enacted in 1988, it imposed only criminal penalties against certain persons who caused or permitted an incapacitated adult to be endangered, injured or imperiled by neglect. 38th Leg., 2nd Reg. Sess. Laws, ch. 85, § 2 (Ariz. 1988). The Arizona Legislature amended APSA in 1989, creating a civil remedy against “persons” and “enterprises” when statutory elements are met. 39th Leg., 1st Reg. Sess. Laws, ch. 118 (Ariz. 1989).

The complex nature of APSA claims includes uniquely defined terms of art, elements of each claim and legal doctrines that intersect APSA claims. Only the definitions that apply to the case being tried should be used. Practitioners should carefully observe the exemptions to liability and elements of each parallel cause of action that may arise out of conduct regulated by APSA.

There has been considerable discussion regarding whether there is a right to a jury trial under APSA claims due to the Arizona Court of Appeals Division One holding of *In the Matter of the Estate of Newman*, 219 Ariz. 260 (App. 2008). Practitioners should carefully examine whether the claims of a case have a right to a jury trial or not under the framework of *Newman*.

ADULT PROTECTIVE SERVICES 1

Elements of Abuse

A vulnerable adult may recover damages against a caregiver employed to provide care for the vulnerable adult if the caregiver abuses the vulnerable adult.

[Name of plaintiff] claims that [Name of defendant]¹ abused a vulnerable adult. On this claim, [Name of plaintiff] must prove by a preponderance of evidence:

1. [Name of injured person] was a vulnerable adult;
2. [Name of defendant] was a [person or enterprise] [employed to provide care / that has assumed a legal duty to provide care / that has been appointed by a court to provide care]² to [Name of injured person];
3. [Name of defendant] caused or allowed endangerment or injury to [Name of injured person's] life or health by [choose all that apply]
[Intentional infliction of physical harm]
[Negligent acts or omissions]³
[Unreasonable confinement]
[Sexual abuse or sexual assault]
[Emotional abuse]; and
4. [Name of injured person] [during his/ her lifetime] suffered damages.^{4, 5}

SOURCE: A.R.S. §§ 46-451(A)(1), 455; *Delgado v. Manor Care of Tucson AZ LLC*, 242 Ariz. 309 (2017).

USE NOTE: 1. Licensed physicians, podiatrists, registered nurse practitioners, and physician assistants are not subject to civil liability for damages unless at the time of the events giving rise to a cause of action they were either (1) “employed or retained . . . to serve the function of medical director” of a facility or (2) “the primary provider responsible for the medical services to the patient while the patient was at one of the facilities listed in paragraph 1 of this subsection.” A.R.S. § 46-455(B)(1)-(2). Nevertheless, in *Fadeby v. Encompass Health Valley of the Sun Rehabilitation Hosp.*, 253 Ariz. 515, 521-22, ¶¶ 26-28 (App. 2022), the court of appeals held that an entity may be subject to APSA liability as an “enterprise” for the conduct of its associated medical providers, even if those individuals are otherwise individually exempted from liability under APSA. See APSA Enterprise 6 for more details on the definition of an enterprise.

USE NOTE: 2. Use the description(s) appropriate to the circumstances of the case. A.R.S. § 46-455(B).

USE NOTE: 3. For medical providers whose alleged abuse is based upon medical negligence, include RAJI (CIVIL) 8th Medical Negligence 1 in the definition of “abuse” when referring to “injury caused by negligent acts or omissions.” See *Cornerstone Hosp. of Se. Arizona, LLC v. Marner ex rel. Cnty. of Pima*, 231 Ariz. 67, 72, ¶ 12 (App. 2012).

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ADULT PROTECTIVE SERVICES 1

Elements of Abuse

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USE NOTE: 4. The measure of damages for neglect and abuse claims arising under APSA are the same measures used in personal injury cases. However, an estate may claim APSA remedies for pre-death pain and suffering. A.R.S. § 46-455(P). In an effort to clarify this distinction without duplicating the existing damages instructions, Use Note 5 is included.

USE NOTE: 5. Damages in an APSA case may include pre-death pain and suffering “even if the victim dies prior to judgment.” *Matter of Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157 (1997). APSA damages are derivative of the injured-decedent’s rights to pursue APSA claims, and they are an estate asset. *Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab, Inc.*, 234 Ariz. 18, 23-25 (App. 2014). APSA does not permit recovery of the same damages as a wrongful death claim. *See In re Estate of Winn*, 225 Ariz. 275, 278, ¶ 15 (App. 2010), as corrected (Sept. 9, 2010); *Equibua v. Carondelet Health Network*, 235 Ariz. 504, 508, ¶ 16 (App. 2014). To instruct on damages for an APSA claim brought on the victim’s behalf either directly, or as an action brought under A.R.S. § 46-455(P), use RAJI (CIVIL) 8th Personal Injury Damages 1, Measure of Damages. If the case includes both wrongful death and APSA claims, both wrongful death and APSA instructions, as well as separate verdict forms, may be needed. To instruct on punitive damages, use RAJI (CIVIL) 8th Personal Injury Damages 4, Punitive Damages. *See also Newman v. Select Specialty Hosp.-Arizona, Inc.*, 239 Ariz. 558, 561, ¶ 9 (App. 2016) (“APSA authorizes a court or jury to award punitive damages under generally applicable common law principles.”).

ADULT PROTECTIVE SERVICES 2

Elements of Neglect

A vulnerable adult may recover damages against a caregiver employed to provide care for the vulnerable adult if the caregiver neglects the vulnerable adult.

[Name of plaintiff] claims that [Name of defendant]¹ neglected a vulnerable adult. On this claim, [Name of plaintiff] must prove by a preponderance of evidence:

1. [Name of injured person] was a vulnerable adult;
2. [Name of defendant] was a [person or enterprise] [employed to provide care / that has assumed a legal duty to provide care / that has been appointed by a court to provide care]² to [Name of injured person];
3. [Name of defendant] neglected³ [Name of injured person] by depriving [Name of injured person] of food, water, medication, medical services, shelter, supervision, cooling, heating, or other services necessary to maintain [Name of injured person's] minimum physical or mental health;⁴ and,
4. [Name of injured person] [during his/ her lifetime] suffered damages.^{5, 6}

SOURCE: A.R.S. § 46-451(A)(9).

USE NOTE: 1. Licensed physicians, podiatrists, registered nurse practitioners, and physician assistants are not subject to civil liability for damages unless at the time of the events giving rise to a cause of action they were either (1) “employed or retained . . . to serve the function of medical director” of a facility or (2) “the primary provider responsible for the medical services to the patient while the patient was at one of the facilities listed in paragraph 1 of this subsection.” A.R.S. § 46-455(B)(1)-(2). Nevertheless, in *Fadely v. Encompass Health Valley of the Sun Rehabilitation Hosp.*, 253 Ariz. 515, 521-22, ¶¶ 26-28, (App. 2022), the court of appeals held that an entity may be subject to APSA liability as an “enterprise” for the conduct of its associated medical providers, even if those individuals are otherwise individually exempted from liability under APSA. See APSA Enterprise 6 for more details on the definition of an enterprise.

USE NOTE: 2. Use the description(s) appropriate to the circumstances of the case. A.R.S. § 46-455(B).

USE NOTE: 3. For medical providers whose alleged neglect is based upon medical negligence, consider including RAJI (CIVIL) 8th Medical Negligence 1 in the definition of “neglect” when referring to “injury caused by negligent acts or omissions.” See *Cornerstone Hosp. of Se. Arizona, L.L.C. v. Marner ex rel. Cnty. of Pima*, 231 Ariz. 67, 72, ¶ 12 (App. 2012).

USE NOTE: 4. Use only those components of neglect which apply to the case being tried.

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ADULT PROTECTIVE SERVICES 2

Elements of Neglect

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USE NOTE: 5. The measure of damages for neglect and abuse claims arising under APSA are the same measures used in personal injury cases. However, an estate may claim APSA remedies for pre-death pain and suffering. A.R.S. § 46-455(P). In an effort to clarify this distinction without duplicating the existing damages instructions, Use Note 6 is included.

USE NOTE: 6. Damages in an APSA case may include pre-death pain and suffering “even if the victim dies prior to judgment.” *Matter of Guardianship/Conservatorship of Denton*, 190 Ariz. 152, 157 (1997). APSA damages are derivative of the victim-decedent’s rights to pursue APSA claims, and they are an estate asset. *Estate of Decamacho ex rel. Guthrie v. La Solana Care and Rehab, Inc.*, 234 Ariz. 18, 23-25 (App. 2014). APSA does not permit recovery of the same damages as a wrongful death claim. *See In re Estate of Winn*, 225 Ariz. 275, 278, ¶ 15 (App. 2010), as corrected (Sept. 9, 2010); *Equibua v. Carondelet Health Network*, 235 Ariz. 504, 508, ¶ 16 (App. 2014). To instruct on damages for an APSA claim brought on the victim’s behalf either directly, or as an action brought under A.R.S. § 46-455(P), use RAJI (CIVIL) 8th Personal Injury Damages 1, Measure of Damages. If the case includes both wrongful death and APSA claims, both wrongful death and APSA instructions, as well as separate verdict forms, may be needed. To instruct on punitive damages, use RAJI (CIVIL) 8th Personal Injury Damages 4, Punitive Damages. *See also Newman v. Select Specialty Hosp.-Arizona, Inc.*, 239 Ariz. 558, 561, ¶ 9 (App. 2016) (“APSA authorizes a court or jury to award punitive damages under generally applicable common law principles.”).

ADULT PROTECTIVE SERVICES 3

Elements of Financial Exploitation

A vulnerable adult may recover damages against a person who is in a position of trust and confidence with the vulnerable adult if the person exploits the vulnerable adult.

[*Name of plaintiff*] claims that [*Name of defendant*] exploited a vulnerable adult. On this claim, [*Name of plaintiff*] must prove by a preponderance of evidence:

1. [*Name of injured person*] was a vulnerable adult;
2. [*Name of defendant*] was a [*person or enterprise*] in a position of trust and confidence with [*Name of injured person*];
3. [*Name of defendant*] illegally or improperly used the [*Name of injured person's*] resources for another's profit or advantage; and,
4. [*Name of injured person*] [*during his/ her lifetime*] suffered damages.¹

SOURCE: A.R.S. § 46-456; *Davis v. Zlatos*, 211 Ariz. 519 (App. 2005).

USE NOTE: 1. To instruct on damages, use RAJI (CIVIL) 8th Commercial Torts 3, Fiduciary Duty (Measure of Damages). To instruct on punitive damages in cases that meet the standards and where punitive damages are at issue, use RAJI (CIVIL) 8th Personal Injury Damages 4, Punitive Damages. *See also Newman v. Select Specialty Hosp.-Arizona, Inc.*, 239 Ariz. 558, 561, ¶ 9 (App. 2016) (“APSA authorizes a court or jury to award punitive damages under generally applicable common law principles.”).

ADULT PROTECTIVE SERVICES 4

Vulnerable Adult

“Vulnerable adult” means an individual who is eighteen years of age or older and who is unable to protect [*himself / herself*] from abuse, neglect, or exploitation by others because of a physical or mental impairment.

SOURCE: A.R.S. § 46-451(A)(12); *Davis v. Zlatos*, 211 Ariz. 519, 527 ¶ 31 (App. 2005) (holding that a vulnerable adult finding is based on a showing that the individual’s impairment is “to such an extent that [the individual] was unable to protect herself if targeted for abuse, neglect or exploitation.”).

ADULT PROTECTIVE SERVICES 5

Emotional Abuse

“Emotional abuse” means a pattern of ridiculing or demeaning a vulnerable adult, making derogatory remarks to a vulnerable adult, verbally harassing a vulnerable adult, or threatening to inflict physical or emotional harm on a vulnerable adult.

SOURCE: A.R.S. § 46-451(A)(5).

ADULT PROTECTIVE SERVICES 6

Enterprise

“Enterprise” means any [corporation], [partnership], [association], [labor union], or [other legal entity], or any group of persons associated in fact although not a legal entity, that is involved with providing care to a vulnerable adult.^{1,2}

The term “enterprise,” as used in these instructions, may include a group of people and a business who are associated to provide care to a vulnerable adult, even though the association between them is not recognized as a legal entity.³ Such an association may be established by evidence showing an ongoing organization, formal or informal, and by evidence that the associated people and business[es] functioned as a continuing unit working toward the common purpose of providing care to a vulnerable adult.

SOURCE: A.R.S. § 46-455(Q); *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323 (Ariz. 2011); *Fadely v. Encompass Health Valley of the Sun Rehabilitation Hosp.*, 253 Ariz. 515 (App. 2022).

USE NOTE: 1. Practitioners and courts should consult *Fadely v. Encompass Health Valley of the Sun Rehabilitation Hospital*, 253 Ariz. 515 (App. 2022) for guidance on providing proper instructions for the definition of an “enterprise.” It may be appropriate for practitioners and courts to select which of these categories of “enterprise” is appropriate for the factual universe of the dispute.

USE NOTE: 2. Depending on the circumstances, whether a defendant is an “enterprise” may be a question of law or a question of fact. This element of an Adult Protective Services case may be the subject of motion practice which may determine proper instructions for the definition of “enterprise.”

USE NOTE: 3. Most physicians, podiatrists, nurse practitioners, and physician assistants are exempt from APSA liability unless they fall within certain limited exceptions to the exemption. A.R.S. § 46-455(B). Nevertheless, in *Fadely*, 253 Ariz. at 521-22, ¶¶ 26-28 (App. 2022), the court of appeals held that an entity may be subject to APSA liability as an “enterprise” for the conduct of medical providers, even if those individuals are otherwise individually exempted from liability under APSA and were not employees of the defendant enterprise.

COMMENT: The Arizona Supreme Court held that the State of Arizona is not subject to liability under APSA. *Estate of Braden ex rel. Gabaldon v. State*, 228 Ariz. 323 (2011) (declined to extend in *City of Tempe v. State*, 237 Ariz. 360, 364 ¶¶ 11-13 (App. 2015)). The State of Arizona is not a person, and although it is a legal entity, the court in *Braden* concluded that the legislature did not intend for the State to be a liable party under APSA. 228 Ariz. at 325-26, ¶¶ 10-13. However, the Arizona Court of Appeals held that a municipal corporation may be an “enterprise” under APSA. *City of Tempe v. State*, 237 Ariz. at 364, ¶¶ 11-13 (App. 2015).

ADULT PROTECTIVE SERVICES 7

Exploitation

“Exploitation” means the illegal or improper use of a vulnerable adult or the vulnerable adult’s resources for another’s profit or advantage.

SOURCE: A.R.S. § 46-451(A)(6).

ADULT PROTECTIVE SERVICES 8

Position of Trust and Confidence

“Position of trust and confidence”¹ means that a person is any of the following:

- (a) A person who has assumed a duty to provide care to the vulnerable adult; and/or
- (b) A joint tenant or a tenant in common with a vulnerable adult; and/or
- (c) A person who is in a fiduciary relationship with a vulnerable adult [*including a de facto guardian or de facto conservator*];² and/or
- (d) A person who is in a confidential relationship with the vulnerable adult; and/or
- (e) A beneficiary of the vulnerable adult in a governing instrument.

SOURCE: A.R.S. § 46-456(J)(5).

USE NOTE: 1. Depending on the circumstances, whether a defendant is in a “position of trust and confidence” may be a question of law or a question of fact. This element of an Adult Protective Services case may be the subject of motion practice which may determine proper instructions for the definition of “position of trust and confidence.”

USE NOTE: 2. Use bracketed language if appropriate to the facts of the case. “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. A.R.S. § 46-451(A)(3). “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.R.S. § 46-451(A)(4).