

# **WEST VIRGINIA LEGISLATURE**

## **2016 REGULAR SESSION**

**Introduced**

### **House Bill 4555**

BY DELEGATES ROWAN, BORDER, MOYE, DUKE,  
SHAFFER, HAMILTON, FERRO, PETHTEL, ROMINE,  
CAMPBELL AND OVERINGTON

[Introduced February 16, 2016; Referred  
to the Committee on Senior Citizen Issues then the  
Judiciary.]

1 A BILL 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, all relating to establishing a  
 3 cause of action against a person who commits an act of financial exploitation against an  
 4 elderly person, protected person or incapacitated adult; defining certain terms; restricting  
 5 certain defenses which, standing alone, are based on legal relationship to and elderly  
 6 person, protected person or incapacitated adult; providing for court authorized remedies;  
 7 providing for attorneys' fees; providing that damage awards have priority; prescribing the  
 8 burden of proof; authorizing the court to freeze assets while also providing options the  
 9 court may exercise if a person violates an injunction; and, providing a penalty for violating  
 10 an injunction.

*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 new  
 2 article, designated §55-71-1, §55-71-2, §55-71-3, §55-71-4, §55-71-5 and §55-71-6, all to read as  
 3 follows:

**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.**

4 (a) Any elderly person, protected person or incapacitated adult against whom an act of  
 5 financial exploitation has been committed may bring an action under this section against any  
 6 person who has committed an act of financial exploitation against him or her.

7 (b) For the purposes of this article:

8 (1) "Incapacitated adult" has the same meaning as prescribed under section twenty-nine,  
 9 article two, chapter sixty-one of this code;

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

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

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

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

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

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

1 (a) In an action brought against a person under this article, the court may order the person  
2 to:

3 (1) Return property or assets improperly obtained, controlled, or used; and

4 (2) Reimburse the person who brought the action for any damages incurred or for the  
5 value of the property or assets lost as a result of the violation or violations of this article.

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

8 (1) For knowing violations committed by a person who is not in a position of trust and  
9 confidence:

10 (A) Payment of two times the amount of damages incurred or value of property or assets  
11 lost; and

12 (B) Impose a civil penalty not exceeding \$5,000 for each act of financial exploitation.

13 (2) For knowing violations committed by a person in a position of trust and confidence:

14 (A) Payment of treble damages; and

15 (B) Payment of a civil penalty not exceeding \$10,000.

**§55-71-4. Attorneys' fees; priority of damage awards; burden of proof.**

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

3 (b) Actual damages awarded to a person under this article have priority over any civil  
4 penalty imposed under this article.

5 (c) The burden of proof in proving that a person committed financial exploitation in an  
6 action pursuant to this article is by a preponderance of the evidence.

**§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 an 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 is by a preponderance of the evidence. In addition, the  
7 court may:

8 (1) Issue an injunction;

9 (2) Order the violator to make payment of the money unlawfully received from the elderly  
10 person, protected person or incapacitated adult, to be held in escrow for distribution to the  
11 aggrieved elderly person, protected person or incapacitated adult;

12 (3) For knowing violations, increase the amount of restitution ordered under subdivision  
13 two in any amount up to three times the amount of damages incurred or value of property or  
14 assets lost;

15 (4) Provide for the appointment of a receiver;

16 (5) For knowing violations by a person who is not in a position of trust and confidence,  
17 order the person to pay a civil penalty of up to \$5,000 per violation; and

18 (6) For knowing violations by a person in a position of trust and confidence, order the  
19 person to pay a civil penalty of up to \$10,000 per violation.

20 (b) In an action under section one of this article, the court may void or limit the application  
21 of contracts or clauses resulting from the financial exploitation.

22 (c) In an action brought under this article, upon the filing of the complaint or on the  
23 appearance of any defendant, claimant, or other party, or at any later time, the court, may require  
24 the plaintiff, defendant, claimant, or other party or parties to give security, or additional security,  
25 in a sum the court directs to pay all costs, expenses, and disbursements that are awarded against  
26 that party or that the party may be directed to pay by any interlocutory order, by the final judgment,  
27 or on appeal.

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

1 (i) Any person who violates the terms of an injunction issued under subsection (f) shall  
2 forfeit and pay to the state a civil penalty of not more than \$15,000 per violation. For the purposes  
3 of this section, the court issuing the injunction shall retain jurisdiction, the cause shall be  
4 continued, and the aggrieved party may petition for recovery of civil penalties. Whenever the court  
5 determines that an injunction issued under section five of this article has been violated, the court  
6 shall award reasonable costs to the party asserting that a violation has occurred.

NOTE: The purpose of this bill is to establish a cause of action against a person who commits an act of financial exploitation against an elderly person, protected person or incapacitated adult. In so doing, the bill defines certain terms; restricts certain defenses

which, standing alone, are based on legal relationship to and elderly person, protected person or incapacitated adult; provides for court authorized remedies; provides for attorneys' fees; provides that damage awards have priority; prescribes the burden of proof; authorizes the court to freeze assets while also providing options the court may exercise if a person violates an injunction; and, provides a penalty for violating an injunction.

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