

SENATE TAX, BUSINESS AND TRANSPORTATION
COMMITTEE SUBSTITUTE FOR
SENATE BILL 189

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

AN ACT

RELATING TO FINANCIAL EXPLOITATION; ENACTING THE FINANCIAL
EXPLOITATION ACT; CREATING A CIVIL CAUSE OF ACTION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
cited as the "Financial Exploitation Act".

SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
Financial Exploitation Act:

A. "caregiver" means a person who has been
entrusted with or who has assumed responsibility for the care
of an eligible adult or the eligible adult's property and may
include a family member that is related to the eligible adult
by blood or marriage; a court-appointed guardian or
conservator; an adult living in the same household as the
eligible adult; a health care provider; or an employee or

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underscoring material = new
[bracketed material] = delete

1 volunteer of an adult daycare, assisted living or residential
2 care facility, group home, nursing home, hospital, mental
3 health treatment center or continuing care community or a
4 service provider of such entity;

5 B. "confidential relationship" means a relationship
6 of confidence and trust between an eligible adult and another
7 person, including but not limited to a family member; business
8 associate or partner; financial advisor; caregiver; health care
9 or mental health care provider; legal professional; or clergy
10 member, imam, minister, priest, rabbi or similar religious or
11 spiritual advisor;

12 C. "eligible adult" means a person eighteen years
13 of age or older with cognitive impairment or a mental, physical
14 or developmental condition or a person who is experiencing
15 other circumstances that cause the person to be susceptible to
16 undue influence or substantially impaired in the ability to
17 provide adequately for the person's personal or financial
18 affairs or protection, regardless of whether the person has
19 been adjudicated pursuant to Section 45-5-303 NMSA 1978;

20 D. "fiduciary relationship" means an agreement or
21 arrangement that creates fiduciary duties owed from one person
22 to another and includes the relationship between a principal
23 and an attorney-in-fact pursuant to a power of attorney; a
24 conservator and a protected person; a trustee and a
25 beneficiary; a financial advisor or broker and an account

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1 owner; or a representative payee and a beneficiary;

2 E. "financial exploitation" means:

3 (1) the wrongful or unauthorized taking,
4 conversion, withholding, appropriation or use of an eligible
5 adult's assets, including money or other property; or

6 (2) an act or omission taken by a trusted
7 person to obtain the benefit, control or use of an eligible
8 adult's assets, including money or other property, through the
9 use of deception, intimidation or undue influence;

10 F. "transaction" means an agreement; contract;
11 conveyance; deed; encumbrance; gift; guarantee; loan; mortgage;
12 pledge; purchase; sale; title transfer; transfer of money,
13 security or other financial asset or real or personal property;
14 or withdrawal from a financial, investment or securities
15 account or changes to ownership on such account, but excludes
16 wills, trusts or transfer on death designations or instruments
17 of a similar type;

18 G. "trusted person" means:

19 (1) a caregiver, health care or mental health
20 care provider;

21 (2) a person upon whom an eligible adult is
22 dependent and with whom the eligible adult has a confidential
23 or fiduciary relationship; or

24 (3) a person in a position of authority,
25 including an eligible adult's family member, financial advisor,

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1 legal professional, clergy member, imam, minister, priest,
2 rabbi or similar religious or spiritual advisor; and

3 H. "undue influence" means excessive persuasion or
4 domination of the decision-making process of an eligible adult
5 by a trusted person that causes an eligible adult to consent to
6 a transaction or refrain from consenting to a transaction that
7 would reasonably be expected to result in financial harm to the
8 eligible adult, including controlling the eligible adult's
9 interaction with others, access to information or necessities
10 of life; using affection, intimidation or coercion; or
11 initiating changes in the eligible adult's personal or property
12 rights in haste, secrecy or at inappropriate times and places.
13 The fact that an eligible adult had independent legal counsel
14 with respect to the transaction is evidence that the
15 transaction was not the product of financial exploitation, but
16 shall not be dispositive on whether the issue of financial
17 exploitation occurred.

18 SECTION 3. [NEW MATERIAL] CIVIL REMEDIES.--

19 A. An eligible adult or an attorney-in-fact,
20 conservator, guardian who has been granted financial powers by
21 the court, temporary conservator or trustee acting for or on
22 behalf of an eligible adult may commence a civil action in a
23 court of competent jurisdiction against a person suspected of
24 financially exploiting an eligible adult in order to:

- 25 (1) return property;

- 1 (2) stop or enjoin a transaction;
- 2 (3) return any profit received from a
- 3 transaction;
- 4 (4) seek compensatory damages for a
- 5 transaction; or
- 6 (5) void or rescind a transaction.

7 B. To prevail on a claim made pursuant to this
8 section, the plaintiff shall prove by a preponderance of the
9 evidence that financial exploitation occurred.

10 C. Punitive damages shall be awarded when a
11 plaintiff proves that the defendant committed financial
12 exploitation and:

13 (1) acted with knowledge that the transaction
14 was wrongful;

15 (2) made a transaction in indifference or
16 reckless disregard for the financial interests of the eligible
17 adult that resulted in financial harm to the eligible adult;
18 and

19 (3) failed to cure the alleged financial
20 exploitation within fifteen days of receiving notice of intent
21 to seek relief from the plaintiff.

22 D. If a plaintiff prevails against a defendant on a
23 financial exploitation claim, the plaintiff may recover
24 reasonable attorney fees and any costs incurred while pursuing
25 such relief.

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1 E. A remedy obtained pursuant to this section shall
2 not limit in any way the right, title and interest of a good
3 faith purchaser, mortgagee, holder of a security interest or
4 other third party who obtains an interest in property
5 transferred from an eligible adult.

6 F. Relief obtained pursuant to this section shall
7 not affect the value of a mortgage.

8 G. Nothing in this section shall limit any other
9 cause of action under the laws of this state.

10 H. When a plaintiff dies during the course of a
11 civil proceeding initiated pursuant to this section, the
12 personal representative of the plaintiff's estate may continue
13 with the proceeding; provided that no proceeding made pursuant
14 to this section shall be initiated after the plaintiff's death.

15 I. A person who is found to have committed
16 financial exploitation is liable for payment of the following
17 to the eligible adult:

18 (1) the amount of restitution required to
19 restore the value of the property that the eligible adult would
20 have had if the financial exploitation had not occurred; and

21 (2) any profit the defendant received through
22 the financial exploitation.