

# FINANCIAL EXPLOITATION CLAIMS FOR THE CIVIL LITIGATOR

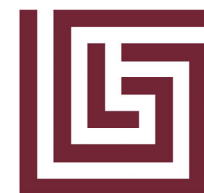
*Chernoff's Lawyers in Limine*

January 27, 2023

KENT S. BERK, ESQ.

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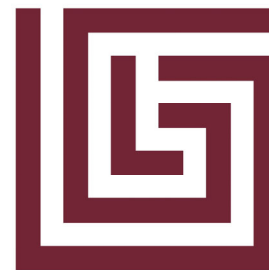
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# OVERVIEW

- Scope of the problem
- Purposes & construction of the Act
- Legislative history
- Who is protected?
- Who is subject to the Act?
- Standard of care
- Exceptions
- Remedies
- Other issues
- Reporting obligations



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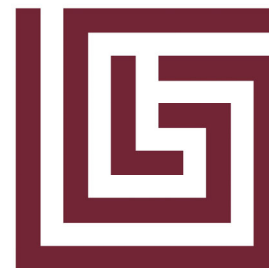
# ARIZONA ALLEGATIONS

- No national reporting system.

| FY   | Total Reports* | Abuse | Neglect | Exploitation |
|------|----------------|-------|---------|--------------|
| 2022 | 34,726         | 5,110 | 9,143   | 9,544        |
| 2020 | 23,054         | 5,593 | 5,616   | 6,343        |
| 2018 | 16,842         | 4,257 | 3,254   | 3,747        |

Source: <https://des.az.gov/APSDData> [APS Data Dashboard]

- Likely underreported
- But reporting increasing
- \* Other sub-categories, such as self-neglect.

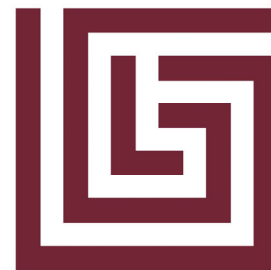


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# PURPOSE & CONSTRUCTION

- Expand rights and claims to remedy abuse, neglect and exploitation of Arizona's large population of vulnerable adults
- Construed broadly

See, e.g., Estate of Winn, 214 Ariz. 149, 150, 150 P.3d 236, 237 (2007); Estate of McGill, 203 Ariz. 525, 528, 57 P.3d 384, 387 (2002); Estate of Wytttenbach, 219 Ariz. 120, 123, 193 P.3d 814, 817 (App. 2008).



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# § 46-456 LEGISLATIVE HISTORY

1996, Ch. 274, H.B. 2457

- person in a position of trust and confidence to an incapacitated or vulnerable adult shall act as a trustee
- treble damages; and disinherited from estate

1998, Ch. 161, S.B. 1050

2003, Ch. 129, S.B. 1010

2008, Ch. 247, H.B. 2806

2009, Ch. 119, H.B. 2344 (current statute w/some modifications)

2012, Ch. 163, H.B. 2560 (added mandatory attorneys' fees to prevailing party)

2013, Ch. 67, 1175 (added exception; revoke governing instrument)

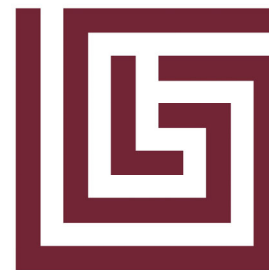
2013, Ch. 185, S.B. 1341 (added exceptions)

2014 Ch. 215 H.B. 2667 (minor non-substantive revisions to definitions)

2019 Ch. 321 S.B. 1538 (defines APS central intake unit; expanded reporting requirements; revised confidentiality provisions and allowed disclosures of reports and other non-substantive revisions)

2021, Ch. 350, § 1, H.B. 2535 (eff. May 10, 2021 (non-substantive revisions)

2022, Ch. 379 H.B. 2397 (adds "emotional abuse" to definition of "abuse")



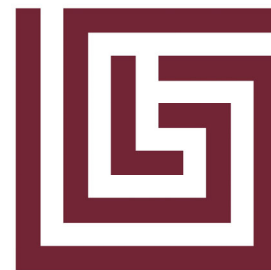
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# WHO IS PROTECTED BY THE ACT?

Two requirements:

1. Age; and
2. “Vulnerable” or  
“Incapacitated”

A.R.S. § 46-451(A)(12) & 14-5101(3)

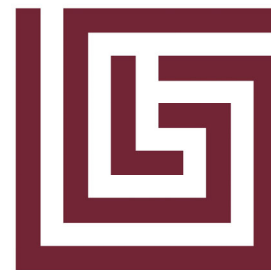


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# “VULNERABLE”

- Unable to protect self from abuse, neglect or exploitation because of a physical **or** mental impairment
- Includes incapacitated person, as defined in § 14-5101

A.R.S. § 46-451(A)(12); Davis v. Zlatos, 211 Ariz. 519, 123 P.3d 1156 (Ct. App. 2005); Cole v. Cole, 2014 WL 1515730 (Ct. App. 2014, Memo); Anguis v. Navarro, 2008 WL 4133388 (Ct. App. 2008, Memo); Yamamoto v. Yamamoto, 2016 WL 1574086 (Ct. App. 2016, Memo)



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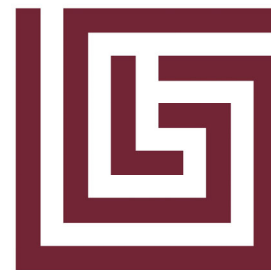
# “INCAPACITATED”

Impaired by reason of:

- mental illness, mental deficiency, mental disorder
- physical illness or disability
- chronic use of drugs, chronic intoxication
- or other cause
- except minority

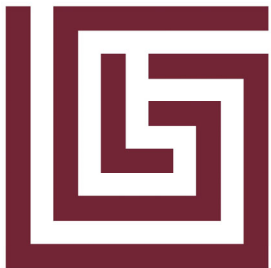
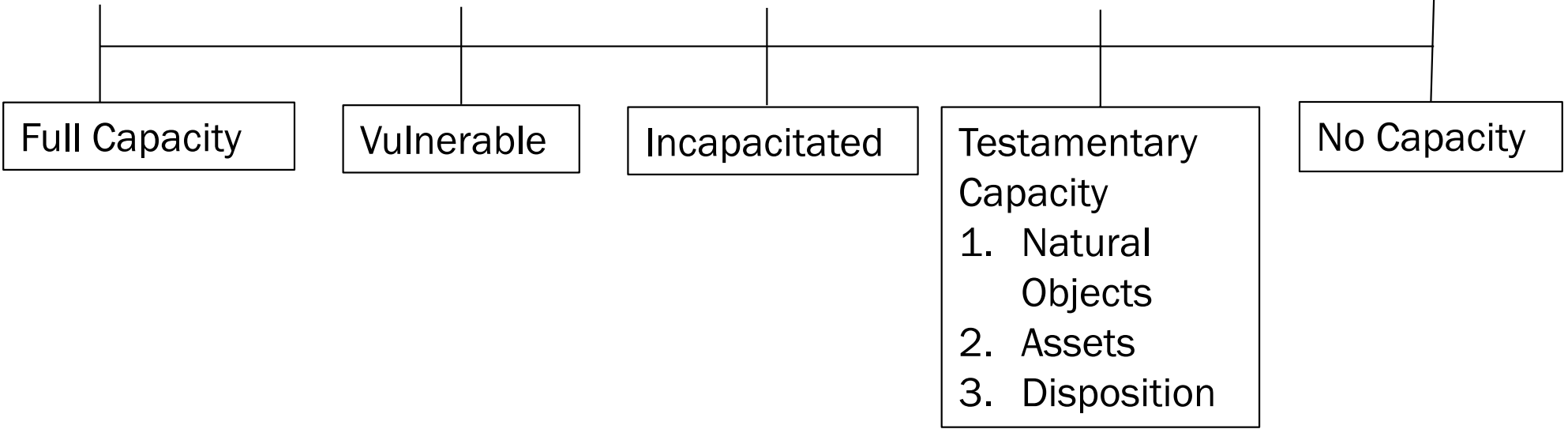
to the extent that lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

A.R.S. § 14-5101(3)



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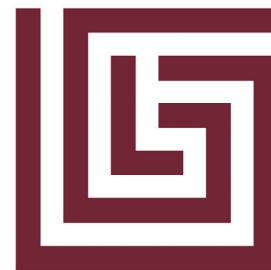
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# WHO IS SUBJECT TO THE ACT?

Anyone in a “position of trust and confidence”

- a) Assumed a duty to provide care to the adult
- b) Joint tenant or a tenant in common with the adult
- c) Fiduciary to the vulnerable adult
- d) *De facto* guardian or *de facto* conservator
- e) In a confidential relationship with the adult (totality of the circumstances)
- f) Beneficiary of the adult in a governing instrument
- g) Agent under POA [subsumed in foregoing]

A.R.S. § 46-456(J)(5)



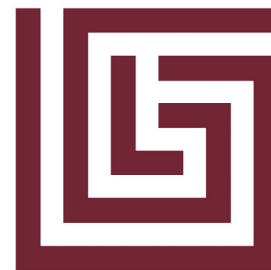
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## CERTAIN PEOPLE ARE NOT SUBJECT TO THE ACT

Does NOT apply to an **agent** who is acting within the scope of the person's duties as, or on behalf of, any of the following:

1. A bank, financial institution or escrow agent licensed or certified pursuant to title 6.
2. A securities dealer or salesman registered pursuant to title 44, chapter 12, article 9.
3. An insurer, including a title insurer, authorized and regulated pursuant to title 20.
4. A health care institution licensed pursuant to title 36, chapter 4 that provides services to the vulnerable adult.

A.R.S. § 46-456(H)

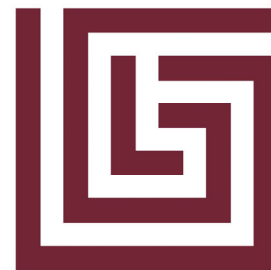


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# STANDARD OF CONDUCT

- “Exploitation” means the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage
- Shall use assets solely for benefit of the vulnerable adult and not for person who is in the position of trust or the person's relatives
- Without lawful authority, knowingly taking control, title, use or management of adult's property while in a position of trust with intent to deprive the adult of the property. (If without adequate consideration, inference may arise that intended to deprive adult.)

A.R.S. §§ 46-456(A) & (B), 46-451(A)(6) and 13-1802(B) (defining “theft” to include financial exploitation of a vulnerable adult); Rodriguez v. Graca, 2015 WL 6698535 (Ct. App. 2015, Memo)

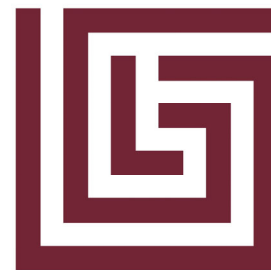


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# EXCEPTIONS

1. Superior Court gives prior approval, finding that the transaction is for the benefit of the vulnerable adult
2. Specifically authorized by the adult in a valid durable POA or a valid trust
3. Transaction is required in order to obtain or maintain eligibility for AHCCCS [A.R.S. § 36-2901 et. seq.]

A.R.S. §§ 46-451(D), 46-456(A)

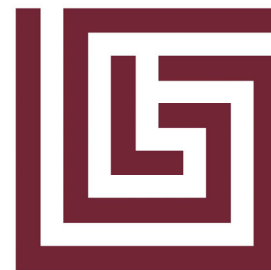


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# EXCEPTIONS CONT'D

4. The person in the position of trust to the vulnerable adult is the adult's spouse and the transaction furthers the interest of the marital community, including applying for benefits pursuant to title 36, chapter 29 or for supplemental security income, Medicare or veterans' administration programs
5. Consistent with the clearly stated wishes of the vulnerable adult found by the court to be made without coercion and while the vulnerable adult was of sound mind
6. Given as a gift, which is consistent with a pattern of gifting before became vulnerable

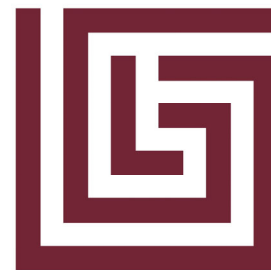
A.R.S. §§ 46-456(A) & (J)(3); re: Exception #6, 13-1802(C) (defense to charge of "theft")



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# EXAMPLES OF EXPLOITATION

- Use of credit cards
- ATM withdrawals
- Forgery
- Deeds
- Theft of personal property
- Inadequate consideration

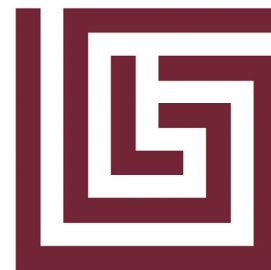


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# WARNING SIGNS

- Abnormal financial activity – credit card activity, bank disbursements
- Disbursements beyond means
- Seclusion from family and friends
- New estate planner and/or changes to estate plan
- Withholding care and treatment
- Recent changes to titles, deeds, or refinanced mortgages,
- Unauthorized POA, wills, trusts or other documents
- Threats of harm, neglect, abandonment or inpatient care

Source: "Protect Your Pocketbook," ElderCare.gov



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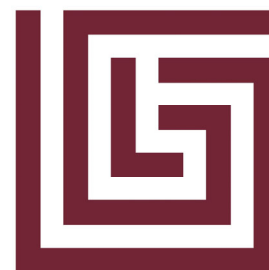


# STANDING: WHO CAN SUE?

1. Vulnerable adult
2. Conservator
3. Personal Representative
4. Interested Person

Priority

A.R.S. §§ 46-456(G) (2009) & 14-1201(33) (defining “interested person”)

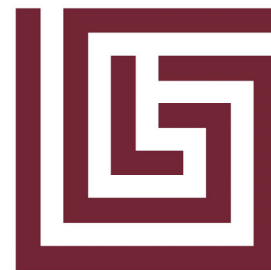


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# INTERESTED PERSON REQUEST FOR LEAVE

- Need only establish is an “interested person” under ARS § 14-1201(33).
- If not, may summarily deny the petition for leave.
- If so, is there anyone with priority that has or will file?
- The Court may not address the merits of claims or defenses. Accept allegations as true.

*In re Stephens Revocable Tr.*, 249 Ariz. 523, 527, 472 P.3d 539, 543 (Ct. App. 2020)



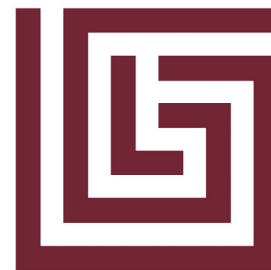
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# MANDATORY CIVIL REMEDIES

A person who violates A.R.S. §§ 46-456(A) or 13-1802(B), shall be subject to:

1. Actual damages; and
2. Reasonable costs and attorneys' fees

A.R.S. § 46-456(B)

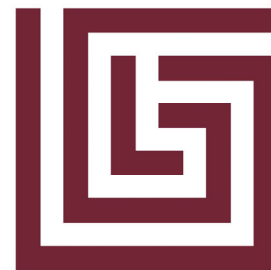


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# OPTIONAL CIVIL REMEDIES

1. Additional damages of up to 2x actual
2. Actual (pain and suffering) and consequential damages
3. Punitive damages
4. Forfeit or revoke all or a portion of
  - a. Interest in any governing instrument
  - b. Intestate share and elections
  - c. Interest in any enterprise
4. Sever joint tenancy property
5. Various others, including provisional remedies

A.R.S. §§ 46-455(G) & (H), and 46-456(B)-(E)

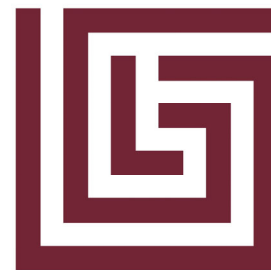


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# PAIN AND SUFFERING

- Action and damages survive death of vulnerable adult
- “The cause of action or the right to bring a cause of action pursuant to subsection B or E of this section shall not be limited or affected by the death of the vulnerable adult.”

A.R.S. § 46-455(P). Compare A.R.S. § 14-3110. See Matter of Guardianship/Conservatorship of Denton, 190 Ariz. 152, 945 P.2d 1283 (1997)

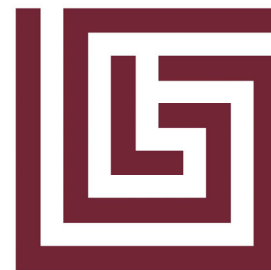


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# STATUTE OF LIMITATION

- 2 years from “actual discovery of the cause of action”
- “regardless of when the wrongdoing was discovered”
- Compare: “discovery rule”
- Tolling

A.R.S. §§ 46-455(K), 12-502; Estate of Wyttenbach, 219 Ariz. 120, 123, 193 P.3d 814, 817 (App. 2008) (dicta); Estate of Norvelle, 2021 WL 3508243 (App. Aug. 10, 2021)

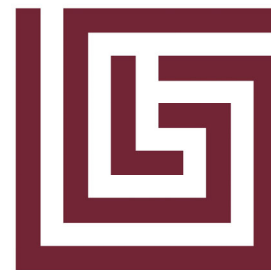


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# HOW TO AVOID LIABILITY

- Have vulnerable adult consult with independent counsel (See Davis, applying “trustee,” not “sole use” standard of conduct)
- Comply with statute – sole benefit of adult
- Use statutory exceptions
- Accounting
- Transparent
- Fair/Reasonable
- Release/Disclaimer

\* Not tested; no guarantees

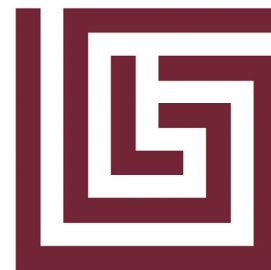


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# REPORTING OBLIGATIONS

“An attorney, accountant, trustee, guardian, conservator or other person who has responsibility for preparing the tax records of a vulnerable adult or a person who has responsibility for any other action concerning the use or preservation of the vulnerable adult's property and who, in the course of fulfilling that responsibility, discovers a reasonable basis to believe that abuse, neglect or exploitation of the adult has occurred shall immediately report or cause reports to be made of such reasonable basis to a peace officer or to the adult protective services central intake unit. All of the above reports shall be made immediately by telephone or online.”

A.R.S. § 46-454(C). See also ER 1.14 (client with diminished capacity) § 46-454(A) (health professional et al reporting obligations)



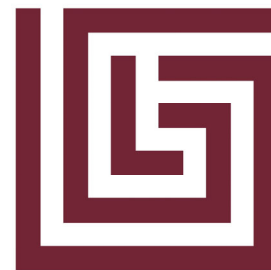
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# REPORT ABUSE, NEGLECT OR EXPLOITATION

Call 1-877-SOS-ADULT (1-877-767-2385)

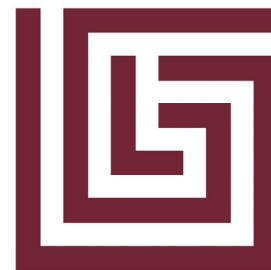
On-line at [www.azdes.gov/reportadultabuse](http://www.azdes.gov/reportadultabuse)



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# RESOURCES

- AZ Adult Protective Services:
  - ✓ [www.azdes.gov/daas/aps/](http://www.azdes.gov/daas/aps/)
- National Center on Elder Abuse:
  - ✓ <https://ncea.acl.gov/Suspect-Abuse.aspx>



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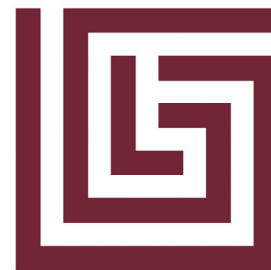
# CONFIDENTIALITY OF APSA RECORDS

Confidential information – unless otherwise provided by law:

- all personally identifying information concerning any person who is involved in an APSA program, including the reporting source's identity, other than a perpetrator against whom an allegation of abuse, neglect or exploitation has been substantiated; and
- all information that is gathered or created by APS

Unless exceptions provided for in B, C and D of this section apply.

A.R.S. § 46-460(A)



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# EXCEPTIONS TO CONFIDENTIALITY

May release information, including the identity of the person who makes a report, pursuant to a superior court order, among other situations.

May release information, except the reporting source's identity, to/where:

1. The client, when a request is made in writing specifically requesting information that directly relates to the person requesting the information.

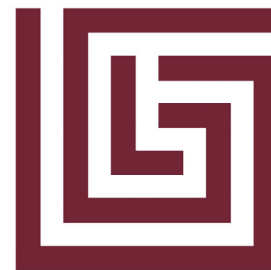
2. When necessary for purposes that are directly connected with the administration of adult protective services, including:

(d) To a person that has the legal responsibility or authorization to care for, evaluate, treat or supervise a vulnerable adult.

(e) To the extent necessary to make claims on behalf of a client for public or private assistance.

3. Pursuant to the consent of the client who is receiving adult protective services.

A.R.S. § 46-460(C) and (D).

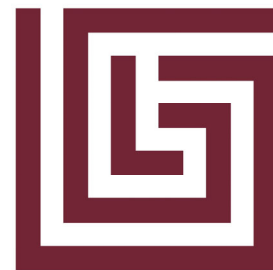


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# NOTICES

This presentation is an overview of Arizona's Adult Protective Services Act. This information is not legal advice and is for general information only.

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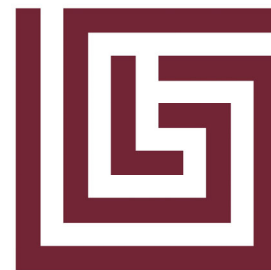
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