

THE THIRTY-FIFTH LEGISLATURE OF AMERICAN SAMOA

Fourth Regular Session

Begun and held at Fagatogo, Tutuila, American Samoa
on Monday, the ninth day of July
two thousand and eighteen

AN ACT CREATING A LAW CRIMINALIZING AND PREVENTING THE
NEGLECT, ABUSE AND EXPLOITATION OF THE ELDERLY AND DISABLED
ADULTS; CREATING A CHAPTER 51 UNDER TITLE 46 A.S.C.A.

Preamble:

WHEREAS, the abuse, neglect, and exploitation of the elderly and disabled adults is a growing problem in the United States and the vast majority of cases go unreported; and

WHEREAS, older and disabled adult abuse, neglect, and exploitation have no boundaries and cross all racial, social, class, gender and geographic lines; and

WHEREAS, not less than \$2.9 billion dollars is taken from older adults each year due to financial abuse and exploitation; and

WHEREAS, older adults who are abused are 3 times more likely to die earlier than older adults of the same age who are not abused; and

WHEREAS, disabled adults are 1.5 times more likely to be a victim of violence than those without a disability, while adults with mental health conditions are at nearly four times the risk of experiencing violence.

BE IT ENACTED BY THE LEGISLATURE OF AMERICAN SAMOA:

Section 1. There is created a Chapter 51 under Title 46 A.S.C.A. which reads:

**“CHAPTER 51
ELDERLY AND DISABLED ADULT NEGLECT, ABUSE, AND
EXPLOITATION OFFENSES**

Sections:

46.5101 Definitions.

46.5102 Abuse, aggravated abuse, and neglect of an elderly person or disabled adult—Penalties.

- 46.5103 Sexual offenses committed upon or in the presence of an elderly person or disabled adult.**
- 46.5104 Exploitation of an elderly person or disabled adult—Penalties.**
- 46.5105 Knowledge of victim’s age.**
- 46.5106 Good faith assistance.**

46.5101 Definitions.

As used in this chapter:

(1) **“Business relationship” means a relationship between two or more individuals or entities where there exists an oral or written contract or agreement for goods or services.**

(2) **“Caregiver” means a person who has been entrusted with or has assumed responsibility for the care or the property of an elderly person or disabled adult. “Caregiver” includes, but is not limited to, relatives, court-appointed or voluntary guardians, adult household members, neighbors, health care providers, and employees and volunteers of facilities as defined in subsection (6).**

(3) **“Disabled adult” means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living.**

(4) **“Elderly person” means a person 60 years of age or older.**

(5) **“Endeavor” means to attempt or try.**

(6) **“Facility” means any location providing day or residential care or treatment for elderly persons or disabled adults. The term “facility” may include, but is not limited to, any hospital, training center, state institution, nursing home, assisted living facility, adult family-care home, adult day care center, group home, mental health treatment center, or continuing care community.**

(7) **“Lacks capacity to consent” means an impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause, that causes an elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning the elderly person’s or disabled adult’s person or property.**

(8) **“Lewd” crude and offensive in a sexual manner.**

(9) **“Obtains or uses” means any manner of:**

(A) **Taking or exercising control over property; or**

(B) **Making any use, disposition, or transfer of property.**

(10) **“Position of trust and confidence” with respect to an elderly person or a disabled adult means the position of a person who:**

(A) **Is a parent, spouse, adult child, or other relative by blood or marriage of the elderly person or disabled adult;**

(B) **Is a joint tenant or tenant in common with the elderly person or disabled adult;**

(C) Has a legal or fiduciary relationship with the elderly person or disabled adult, including, but not limited to, a court-appointed or voluntary guardian, trustee, attorney, or conservator;

(D) Is a caregiver of the elderly person or disabled adult; or

(E) Is any other person who has been entrusted with or has assumed responsibility for the use or management of the elderly person's or disabled adult's funds, assets, or property.

(11) "Property" means anything of value and includes:

(A) Real property, including things growing on, affixed to, and found in land.

(B) Tangible or intangible personal property, including rights, privileges, interests, and claims.

(C) Services.

(12) "Services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

(A) Repairs or improvements to property.

(B) Professional services.

(C) Private, public, or governmental communication, transportation, power, water, or sanitation services.

(D) Lodging accommodations.

(E) Admissions to places of exhibition or entertainment.

(13) "Value" means value determined according to any of the following:

(A)(i) The market value of the property at the time and place of the offense or, if the market value cannot be satisfactorily ascertained, the cost of replacing the property within a reasonable time after the offense.

(ii) In the case of a written instrument such as a check, draft, or promissory note, which does not have a readily ascertainable market value, the value is the amount due or collectible. The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation is the greatest amount of economic loss that the owner of the instrument might reasonably suffer by the loss of the instrument.

(iii) The value of a trade secret that does not have a readily ascertainable market value is any reasonable value representing the damage to the owner suffered by reason of losing advantage over those who do not know of or use the trade secret.

(B) If the value of the property cannot be ascertained, the trier of fact may find the value to be not less than a certain amount; if no such minimum value can be ascertained, the value is an amount less than \$100.

(C) Amounts of value of separate properties involved in exploitation committed pursuant to one scheme or course of conduct, whether the exploitation involves the same person or several persons, may be aggregated in determining the degree of the offense.

46.5102 Abuse, aggravated abuse, and neglect of an elderly person or disabled adult—Penalties.

(a) "Abuse of an elderly person or disabled adult" means:

(1) Intentional infliction of physical or psychological injury upon an elderly person or disabled adult;

(2) An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult; or

(3) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult.

A person who knowingly or willfully abuses an elderly person or disabled adult without causing serious bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a Class C felony.

(b) "Aggravated abuse of an elderly person or disabled adult" occurs when a person:

(1) Commits A.S.C.A. 46.3521 on an elderly person or disabled adult;

(2) Willfully tortures, maliciously punishes, or willfully and unlawfully cages an elderly person or disabled adult; or

(3) Knowingly or willfully abuses an elderly person or disabled adult and in so doing causes serious bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult.

A person who commits aggravated abuse of an elderly person or disabled adult commits a class A felony.

(c)(1) "Neglect of an elderly person or disabled adult" means:

(A) A caregiver's failure or omission to provide an elderly person or disabled adult with the care, supervision, and services necessary to maintain the elderly person's or disabled adult's physical and mental health, including, but not limited to, food, nutrition, clothing, shelter, supervision, medicine, and medical services that a prudent person would consider essential for the well-being of the elderly person or disabled adult; or

(B) A caregiver's failure to make a reasonable effort to protect an elderly person or disabled adult from abuse, neglect, or exploitation by another person.

Neglect of an elderly person or disabled adult may be based on repeated conduct or on a single incident or omission that results in, or could reasonably be expected to result in, serious physical or psychological injury, or a substantial risk of death, to an elderly person or disabled adult.

(2) A person who willfully or by culpable negligence neglects an elderly person or disabled adult and in so doing causes serious bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a class B felony.

(3) A person who willfully or by culpable negligence neglects an elderly person or disabled adult without causing serious bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult commits a class C felony.

46.5103 Sexual offenses committed upon or in the presence of an elderly person or disabled adult.

(a) As used in this section, "sexual activity" means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal

penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.

(b)(1) "Lewd assault upon an elderly person or disabled person" occurs when a person encourages, forces, or entices an elderly person or disabled person to engage in any act involving sexual activity, when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent.

(2) A person who commits lewd assault upon an elderly person or disabled person commits a class B felony.

(c)(1) "Lewd molestation of an elderly person or disabled person" occurs when a person intentionally touches in a lewd manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of an elderly person or disabled person when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent.

(2) A person who commits the lewd molestation of an elderly person or disabled person commits a class C felony.

(d)(1) "Lewd exhibition in the presence of an elderly person or disabled person" occurs when a person, in the presence of an elderly person or disabled person:

(A) Intentionally masturbates;

(B) Intentionally exposes his or her genitals in a lewd manner; or

(C) Intentionally commits any other lewd act that does not involve actual physical or sexual contact with the elderly person or disabled person, including but not limited to, the simulation of any act involving sexual activity, when the person knows or reasonably should know that the elderly person or disabled person either lacks the capacity to consent or fails to give consent to having such act committed in his or her presence.

(2) A person who commits lewd exhibition in the presence of an elderly person or disabled person commits a class C felony.

46.5104 Exploitation of an elderly person or disabled adult—Penalties.

(a) "Exploitation of an elderly person or disabled adult" means:

(1) Knowingly obtaining or using, or endeavoring to obtain or use, an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult by a person who:

(A) Stands in a position of trust and confidence with the elderly person or disabled adult; or

(B) Has a business relationship with the elderly person or disabled adult;

(2) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, by a person

who knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent;

(3) Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian, trustee who is an individual, or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property. An unauthorized appropriation under this paragraph occurs when the elderly person or disabled adult does not receive the reasonably equivalent financial value in goods or services, or when the fiduciary violates any of these duties:

(A) For agents:

(i) Committing fraud in obtaining their appointments;

(ii) Abusing their powers;

(iii) Embezzling, or intentionally mismanaging the assets of the principal or beneficiary; or

(iv) Acting contrary to the principal's sole benefit or best interest; or

(B) For guardians and trustees:

(i) Committing fraud in obtaining their appointments;

(ii) Abusing their powers; or

(iii) Embezzling, or intentionally mismanaging the assets of the ward or beneficiary of the trust;

(4) Misappropriating, misusing, or transferring without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor of payee of the funds before the misappropriation, misuse, or unauthorized transfer. This paragraph only applies to the following types of accounts:

(A) Personal accounts;

(B) Joint accounts created with the intent that only the elderly person or disabled adult enjoys all rights, interests, and claims to moneys deposited into such account; or

(5) Intentionally or negligently failing to effectively use an elderly person's or disabled adult's income and assets for the necessities required for that person's support and maintenance, by a caregiver or a person who stands in a position of trust and confidence with the elderly person or disabled adult.

(b) Any inter vivos transfer of money or property valued in excess of \$10,000 at the time of the transfer, whether in a single transaction or multiple transactions, by a person age 65 or older to a nonrelative who the transferor knew for fewer than 2 years before the first transfer and for which the transferor did not receive the reasonably equivalent financial value in goods or services creates a permissive presumption that the transfer was the result of exploitation.

(1) This subsection applies regardless of whether the transfer or transfers are denoted by the parties as a gift or loan, except that it does not apply to a valid loan evidenced in writing that includes definite repayment dates. However, if repayment of any such loan is in default, in whole or in part, for more than 65 days, the presumption of this subsection applies.

(2) This subsection does not apply to:

(A) Persons who are in the business of making loans.

(B) Bona fide charitable donations to nonprofit organizations that qualify for tax exempt status under the Internal Revenue Code.

(3) In a criminal case to which this subsection applies, if the trial is by jury, jurors shall be instructed that they may, but are not required to, draw an inference of exploitation upon proof beyond a reasonable doubt of the facts listed in this subsection. The presumption of this subsection imposes no burden of proof on the defendant.

(c)(1) If the funds, assets or property involved in the exploitation of the elderly person or disabled adult is valued at \$50,000 or more, that offender commits a class A felony.

(2) If the funds, assets, or property involved in the exploitation of the elderly person or disabled adult is valued at \$10,000 or more, but less than \$50,000, the offender commits a class B felony.

(3) If the funds, assets, or property involved in the exploitation of an elderly person or disabled adult is valued at less than \$10,000, the offender commits a class C felony.

(d) If a person is charged with financial exploitation of an elderly person or disabled adult that involves the taking of or loss of property valued at more than \$5,000 and property belonging to a victim is seized from the defendant pursuant to a search warrant, the court shall hold an evidentiary hearing and determine, by a preponderance of the evidence, whether the defendant unlawfully obtained the victim's property. If the court finds that the property was unlawfully obtained, the court may order it returned to the victim for restitution purposes before trial on the charge. This determination is inadmissible in evidence at trial on the charge and does not give rise to any inference that the defendant has committed an offense under this section.

46.5105 Knowledge of victim's age.


It does not constitute a defense to a prosecution for any violation of this chapter that the accused did not know the age of the victim.

46.5106 Good faith assistance.

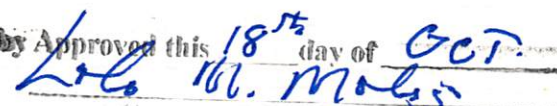
This chapter is not intended to impose criminal liability on a person who makes a good faith effort to assist an elderly person or disabled adult in the management of the funds, assets or property of the elderly person or disabled adult, which effort fails through no fault of the person."

Sec 2. Effective date.

In accordance with Article II Section 19 of the Revised Constitution of American Samoa, this bill shall become effective 60 days after the end of the session at which it has been passed.


GAOTEOTE PALAIE TOFAU
President of the Senate


SAVALI TALAVOU ALE
Speaker, House of Representatives

Merely Approved this 18th day of OCT. 2018

Governor Of American Samoa