

## Memorandum in Support

### ELDER LAW AND SPECIAL NEEDS SECTION

ELDER # 5

March 16, 2017

S. 4779

By: Sen. Hannon

A. 6743

By: M of A Barrett

Senate Committee: Health

Assembly Committee: Health

Effective Date: Immediately

**AN ACT** to amend the social services law, in relation to the eligibility of disabled persons who are applicants for or recipients of medical assistance.

**LAW & SECTION REFERRED TO:** Section 366 of the social services law.

### **THE ELDER LAW AND SPECIAL NEEDS SECTION SUPPORTS THIS LEGISLATION**

On Dec. 13, 2016 then-President Obama signed into law Public Law 114-255, the “21st Century Cures Act.” That law contained the following provision:

*Sec.5007.FAIRNESS IN MEDICAID SUPPLEMENTAL NEEDS TRUSTS  
(a) IN GENERAL-Section 1917(d)(4)(A) of the Social Security Act (42 U.S.C. 1396p(d)(4)(A)) is amended by inserting “**the individual**,” after “for the benefit of such individual by”.*

*(b)EFFECTIVE DATE.-The amendment made by subsection (a) shall apply to trusts established on or after the date of the enactment of this Act.*

This law ends an anomaly in the previous law which allowed a self-settled Supplemental Needs Trust to be established by a parent, grandparent, guardian, or court but not by the individual himself or herself.

New York law contains a parallel provision in its Social Services law.

This bill conforms New York law to the federal legislation by adding to Social Services Law §366(2)(b)(2)(iii) the words “the individual” to the list of persons who can establish a supplemental needs trust containing the assets of such a disabled individual.

The new federal law and the proposed New York amendment correct a problem in current law that is discriminatory and prohibits individuals with disabilities from establishing their own special needs trusts. Prior federal law and current New York law

only allow a grandparent, parent, legal guardian or court of competent jurisdiction to establish a special needs trust. The law incorrectly presumed that disabled individuals were incapable of creating a trust for their own benefit. The presumption was false and prejudicial. This unfair presumption not only prevented disabled individuals from enjoying the same rights and privileges as able bodied New Yorkers, but in addition it imposes unnecessary legal fees and costs, court delays, and uncertainty for people who can least afford it.

For individuals without parents, grandparents or a guardian to set up their trust, the law required that a court must establish the trust. For example, under the law prior to the federal amendment, in order to create a special needs trust, a disabled individual must first retain an attorney to draft a petition to the court setting forth all of the relevant facts regarding the individual's disabling condition (thus laying bare for public consumption facts which an individual would prefer to remain private). The proceeding required court filing fees of upwards of \$200 and could take two to three months as opposed to two weeks where there is a parent, grandparent or guardian willing to establish the trust. Authorizing individuals to establish their own trusts will eliminate all of these unnecessary complications.

There is no valid public policy reason for prohibiting competent individuals with disabilities from establishing their own individual special needs trusts. Additionally, New York Medicaid eligibility can be no more restrictive than federal law, so the conforming New York amendment is required to ensure continuing federal financial participation in the Medicaid program.

For all of the above reasons, we urge swift passage of the conforming amendment to allow disabled individuals to create their own special needs trust.

**Based on the foregoing, the Elder Law and Special Needs Section SUPPORTS this legislation.**