

## Memorandum in Opposition

### ELDER LAW AND SPECIAL NEEDS SECTION

March 21, 2017

Elder #6

S.2006-B; Part RR

By: BUDGET  
Senate Committee: Finance

#### **THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE PROPOSED AMENDMENTS TO THE SOCIAL SERVICES LAW AND THE BANKING LAW**

The Section opposes this proposal for reasons similar to those expressed in the Elder Law and Special Needs Section's opposition to the Governor's original proposal in S.2008/A.3008, Part AA. The reasons for our objections to the Senate's proposal are as follows:

- The proposed Part RR does not adequately define a "vulnerable adult." It includes persons with physical impairments without adequately defining why they would not be able to manage their own funds or delegate that authority to another.
- The proposal could result in a hold being placed on accounts where the potentially exploited person is merely a beneficiary of someone else's account. Someone, especially one who is not a vulnerable adult, should not have their funds frozen because they named a disabled person as a beneficiary. Consider the adult child naming mom or dad as a beneficiary on their account. This is a valid estate planning tool that would unnecessarily subject the child's funds to being frozen merely because mom or dad is a beneficiary, even though there is no valid present interest in the funds.
- The legislation could unnecessarily affect guardianship and trust accounts where there already are sufficient safeguards, such as court oversight with annual reporting requirements, bonding, removal proceedings, or sanctions. The owner of a trust account is the trust, not the individual, subject to a written trust agreement which contains the rules and guidelines by which the trustee must act.
- The notice requirement is vague and inadequate as it only provides for an undefined reasonable effort to provide notice. This could include notice to the potential abuser but not to the "vulnerable adult" if, after a reasonable effort, the vulnerable adult cannot be contacted.
- The proposal provides for reporting to adult protective services, but lacks a requirement as to the time for reporting and does not include reporting to other law enforcement agencies.

- The transaction hold in this proposal could be indefinite in duration and puts the burden of bringing a proceeding to release the hold on the account holder. This effectively takes away a person's ability to access their own funds without any due process.
- The proposal provides for financial exploitation training, but makes the participation by a covered banking institution completely voluntary. The bank has no incentive to educate employees on these procedures and the concern is that it would be less work for the bank to default to placing a hold, rather than training its staff on the necessary due diligence to ferret out actual abuse. This coupled with the immunity the bank would maintain, even if the employees involved have not participated in any training, could create a situation in which a hold is automatically placed if an elderly or disabled person is the owner or beneficiary of an account.

For the above reasons the Section believes the proposal fails to provide appropriate due process rights, and should be evaluated more closely before being enacted as drafted. Therefore, it is recommended that this issue be given an opportunity for serious stakeholder engagement and discussion.

The Elder Law and Special Needs Section supports the concept of a task force to study and report on the issue of financial exploitation of vulnerable adults, similar to what is proposed in A.6395 (Lupardo). The task force, however, should have a deadline by which the guidelines relating to reporting suspected financial exploitation must be issued. Moreover, the task force should be charged with addressing the following issues:

- (1) The definition of a vulnerable adult. If the definition includes a person with a physical impairment, what rights would that person would have to control his or her accounts or delegate that authority?
- (2) Whether accounts should be included where the vulnerable adult is merely the beneficiary on someone else's account.
- (3) Whether accounts such as guardianship and trust accounts should be included where there is already adequate court supervision, bonding requirements, and other protections.
- (4) The notice requirements as to who should be provided with notice, and whether such notice should be oral or in writing.
- (5) The reporting requirement to adult protective services and to other law enforcement agencies and whether those agencies should make the determination to apply the transaction hold or apply to a court of competent jurisdiction for such a hold (including the ability to immediately obtain a preliminary hold).
- (6) When a transaction hold should terminate. Should it be at the discretion of the banking institution, at a time certain, or should it require a court order?
- (7) Should participation in financial exploitation training and education be voluntary? Or should training and education be mandatory in order for qualified immunity to apply?