

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

Elder #7

February 27, 2020

S. 7508-A – Part OO

By: BUDGET

A. 9508-A – Part OO

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Senate Committee: Finance

Assembly Committee: Ways and Means

Effective Date: 120 Days after becoming law

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE PROPOSED AMENDMENT TO THE BANKING LAW ADDING A NEW SECTION 4-d REGARDING TRANSACTION HOLDS

The proposed addition to the banking law gives institutions broad discretion to put transaction holds on accounts even when the account is a guardianship or trust account. While protection against financial exploitation is a valid goal, the concern is that the proposed amendment will enable banks to put a transaction hold on the accounts of seniors without affording them proper due process protections and will protect the bank from liability, regardless of the circumstances, with minimal or no consequences to the banking institution.

In addition, the provision includes trust or guardianship accounts which are already under court supervision and often insured.

1. The definition of “vulnerable adult” is overly broad.

Section 4-d 1(b). of the proposed legislation states the following: (b) “Vulnerable Adult” means “an individual who, because of mental and/or physical impairment is potentially unable to manage his or her own resources or protect him or herself from financial exploitation.”

It is our position that the current legislation be limited to vulnerable elderly persons. Our proposed affirmative legislation incorporates Penal Law Section 260.31, which defines a “vulnerable elderly person” as “a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.”

The Executive's proposal is overly broad, and by defining the target population of persons to be protected under this legislation as those who are "potentially unable to manage" opens the door to broad interpretations and assumptions by bank personnel. Absent specialized training in this area, we do not believe that they would be able to properly make this determination. Moreover, by extending this provision to all vulnerable adults, instead of the elderly, the law could have implications that unduly restrict the lives of the disabled and special needs populations.

2. The language regarding an account hold does not provide guidance with respect to the "delay" in completing a transaction.

The language proposed in Section 1.(d) of the definitions is open-ended with respect to how long a delay should stay in effect because it would depend upon the completion of an investigation. The language we propose would define a "Temporary Account Hold," as a restriction on the ability of an owner or any other person to withdraw some or all of the funds from a deposit account at a banking institution."

3. The amendment to the banking law should not include guardianship and trust accounts as these mechanisms have their own built in protections.

In the Section 1 (c) definition, guardianship and perhaps trust accounts are included as accounts that would fall under the aegis of this legislation. Also, Section (2)(a)(ii) and (b) state that a transaction hold can be put on all accounts including guardianship and trust accounts. This is an unnecessary provision. Guardians have been approved by the Court, have filed a bond when required to do so, and have annual accounting requirements to the Court. There is no need for additional protections on guardianship accounts.

A grantor creates a trust with the understanding that the person named as trustee will be able to act on behalf of the trust estate. Similar to a guardianship, the grantor had the opportunity to impose a bond on the trustee if he or she deemed it necessary and has the ability to build in provisions for the trustee to account.

This proposed law should not apply to guardianship or trust accounts.

4. The amendment to the banking law does not include adequate notice requirements.

The proposed section (2)(c)(i) states that the institution must make "reasonable efforts" to contact persons authorized to transact business on the account. This notice can be made orally or in writing and must be made within two business days. In order to protect the constitutional due process rights of vulnerable seniors, it is necessary to incorporate specific procedures for providing notice, including service of said notice upon the parties affected, and other forms of follow-up communication, such as telephone calls or electronic communications. Additionally, given the gravity of having a temporary account hold placed on an account, as well as the concern of financial exploitation, notice should be made within one business day from when the temporary account hold was placed. Since the institution has broad discretion to place a transaction hold on the account, the account holder has a right to know this is being done, so as to avoid late payments and bounced checks.

5. There must be specific procedures with respect to mandating the reporting of suspected financial abuse to the proper authorities.

Section (2)(c)(ii) requires the institution placing the transaction hold to immediately notify adult protective services or law enforcement, but in no more than one business day. We believe that in order for the reporting aspect of the law to be effective, specific language is necessary. The bank should report the suspected financial exploitation to the government officials administering adult protective services, or a similar agency, if the former does not exist in the county where the purported abuse occurred. The notification should be sent to the appropriate agency in the county of the vulnerable elderly person's residence, as determined by banking institution records. If no such residence in New York is shown, then to the government official administering adult protective services, or similar agency, in the county in which the banking institution has an office where the account was created or is domiciled.

Further, while the purpose of the bill is to ensure expeditious reporting, we believe that the requirement that the financial institution must provide all documentation to the appropriate government agency within three days may be unduly burdensome. Rather, we propose that banking institutions promptly provide documentation to appropriate government agencies in order to afford additional time, if needed, to adequately investigate and gather evidence in support of a case against a potential abuser.

6. The standard for payment of expenses during the transaction hold is vague.

Section (2)(c)(iv) make funds available to pay expenses. However, the provision does not state to whom the funds will be made available or who will be responsible for making the timely payments. If the principal account holder lacks the capacity to handle their own finances and the agent under the power of attorney is the alleged exploiter, there is no person to make these payments. For this reason, we propose that specific types of prearranged charges be paid from the account in question. Such payments include, but are not limited to mortgage and rent payments, utilities, automatic clearing house debit (ACH) withdrawals. We also believe that the vulnerable elderly person needs to have access to a certain amount of cash to pay for items such as food and incidental medical expenses.

Further, the decision as to what funds will be released is to be made by adult protective services, law enforcement or a non-profit that often deals in this area. The concern is that there is no real decision maker identified and no standard for what is to be treated as an emergency expense. It would be very easy for each agency to pass on the responsibility of this determination to the next, all the while neglecting the expenses.

7. A court's decision to prolong the transaction hold should be determined after a hearing on notice to the principal account holder, alleged exploiter, and the proposed recipient of funds.

A court order pursuant to Section (3)(c) extending the transaction hold should only be made after a hearing is held on notice to the principal account holder, the alleged exploiter, and the proposed recipient of the funds. The parties should be afforded the opportunity to appear in court prior to a determination of a further transaction hold. If an institution, adult protective services, or law enforcement believe that the transaction hold should be imposed longer than the amount of time contemplated by the bill, then they should be required to bring a proceeding requesting a court determination on the matter. It is our position that if adult protective services or a law enforcement agency believes that the temporary account hold should remain in effect for longer than ten business days, then such official may seek a court order, upon notice to all parties authorized to transact business on the account for which the temporary account hold was placed, and pursuant to the same notice requirements for initially placing the temporary account hold.

8. Reasonable basis standard for bank immunity is not sufficient.

The reasonable basis standard for liability to the banking institution contained in section (4) is too vague. The intention of this legislation is to provide an effective procedure to identify and report alleged financial exploitation of vulnerable elderly persons. This can only be achieved with the support of the banking institutions. It is reasonable that immunity from criminal, civil or administrative liability would be of great concern to them. However, the proposed language merely states that they would be immune from liability for “all good faith actions.” There is no definition to the standard, and without specific language, we are concerned that a banking institution may place transaction holds in any situation with an elderly client of the bank. This coupled with the lack of training as discussed below will not serve the client’s best interests.

In conjunction with members of the Business Law Section’s banking committee of the NYSBA, we have formulated language regarding immunity protections which we believe satisfy the concerns of the banking industry and protects elderly clients from being unreasonably restricted from accessing their accounts without proper procedures having been followed.

Based on the foregoing, the NYSBA’s Elder Law and Special Needs Section OPPOSES this legislation and proposes affirmative legislation.

Historically, the need to address financial exploitation of the elderly gained momentum when a proposal pertaining to the financial exploitation of the elderly appeared in Governor Cuomo’s 2017 Budget Bill. Specifically, the language was found in the Article VII Bill for “Transportation Economic Development and Environmental Conservation.”

In 2017, our Elder Abuse Committee was asked to review S.6736 (Valesky) and A.6099A (Lupardo), which were bills that dealt with banks and financial exploitation of elders. By way of legislative history, the Senate bill passed the Senate on June 15, 2017. The Assembly bill was amended on June 16, 2017, to conform to the Senate bill and recommitted to the Aging Committee that same day. The Assembly bill, unlike the Senate bill, is accompanied by a Memorandum in Support of Legislation (“Memo”) which was reviewed by the Elder Abuse Committee. The Elder Abuse Committee presented its analysis of the Valesky bill to the Elder Law and Special Needs Section (“Section”).

In order to facilitate the process in presenting affirmative legislation, members of our section spoke with legislators and reviewed the bills that had been introduced by various state senators over the years. In November of 2018, the Elder Law and Special Needs Section approved proposed affirmative legislation. This proposal was presented to the NYSBA Executive Committee in January, 2019. In order to ensure that the affirmative legislation had the full support of the bar association, we worked with members of the Trusts and Estates Law Section and the Business Law Section. In particular, we collaborated with the banking committee of the Business Law Section to ensure that the language proposed would be supported by banking institutions.

In June of 2019, the NYSBA Executive Committee voted in support of the affirmative legislation to amend the Social Services and Banking Laws. A copy of the proposed affirmative legislation is attached. It is our position that the proposed affirmative legislation offers a practical method of combating financial abuse as it would afford meaningful protection to vulnerable elderly persons.