

*Written Testimony before the Judiciary Committee
Roderick L. Bremby, Commissioner
March 9, 2018*

The Department of Social Services appreciates the opportunity to provide written testimony regarding two bills on the Judiciary agenda today.

S.B. No. 249 (RAISED) AN ACT CONCERNING ADMINISTRATION OF THE HOME-CARE PROGRAM FOR THE ELDERLY BY THE DEPARTMENT OF SOCIAL SERVICES.

This legislation requires the Department of Social Services (DSS) to post notice, criteria and the intent to implement proposed regulations regarding the Connecticut Home Care Program for Elders on the eRegulations System at least 180 days prior to implementation of such regulation.

In some instances, the Department has the statutory authority to implement and operate under a new policy outlined in a proposed regulation, prior to formal adoption. Under current law, section 17b-342 allows DSS to implement and operate under a new policy concerning the CHCPE twenty days after a notice of intent (NOI) to amend or adopt a regulation is published in the Connecticut Law Journal. However, the proposed regulation must still go through the notice and comment rulemaking process.

The Department believes that the current statute already provides adequate time for providers to become aware of and prepare for any such change to a regulation. Specifically, the eRegulations system includes a subscription mechanism. This means any member of the public who has requested notification of DSS' NOIs will automatically receive an immediate email alert directly from the eRegulations system when an NOI is posted.

It is not feasible for the Department to wait 180 days before implementing a proposed regulation. In some cases, regulation changes must be made to address and assist with budgetary needs. A 180-day lag between the posting and implementation of such regulations would negatively affect such budgetary targets and would result in a negative fiscal impact on the state.

The Department is also unclear of the intent of lines 15-21 in this legislation, which could be read to allow a person "aggrieved by the Department of Social Services application of criteria or otherwise affected by the criteria" to appeal directly to the Superior Court. If this provision is correctly read to allow individuals the right to directly appeal to the Superior Court without first exhausting administrative remedies through the fair hearing process before the Department, this would seem to violate the Administrative Procedures Act and Connecticut General Statutes 17b-60, et seq., as there would be no final agency decision prior to appeal. It is also unclear what the Superior Court would review in any such legal proceeding because the record on appeal is created during the fair hearing process at the Department. If there is no fair hearing that precedes

the filing of an action with the Superior Court, there would be no record for the court to review on appeal.

For these reasons, the Department must oppose this bill.

S.B. No. 397 (RAISED) AN ACT CONCERNING ADOPTION OF THE UNIFORM TRUST CODE, THE CONNECTICUT UNIFORM DIRECTED TRUST ACT AND THE CONNECTICUT QUALIFIED DISPOSITIONS IN TRUST ACT.

This legislation makes numerous proposed changes to Connecticut's trust laws.

After a preliminary review of this expansive bill, the Department has identified numerous concerns with the proposed changes.

Generally, it is not clear why the Uniform Trust Code (the "Code"), the Connecticut Uniform Directed Trust Act and the Connecticut Qualified Dispositions in Trust Act (the "Acts") are being offered for adoption. The stated purpose of the Code and the Acts does not identify critical issues the Code and Acts seek to address. It is not clear how the Code and the Acts will accomplish the stated purpose. The proposed changes to the Code and Acts may endanger estate plans, may affect eligibility for public assistance, and may interfere with special needs and pooled trusts established for disabled persons to qualify for public assistance. Connecticut has a long history of trust law, both common and statutory, governing the validity and enforcement of trusts. Additionally, the Probate Court has promulgated Rules of Procedure which govern the manner in which cases, including trust cases, are handled in the Probate Courts with the intent of promoting uniformity in the procedures used by all Probate Courts throughout the state. It is not clear how the Code and the Acts will modernize trust law. The Code and Acts may be an attempt to fix something that is not broken.

Examples of areas of concern include:

Sec. 3 (26)(A) provides that a settlor's intent is manifested as "(i) Express in the trust instrument; or (ii) Established by other evidence that would be admissible in a judicial proceeding[.]" In Connecticut, it is well-established that "[t]he issue of intent as it relates to the interpretation of a trust instrument . . . is to be determined by examination of the trust itself and not by extrinsic evidence of actual intent." See Marzahl v. Colonial Bank & Trust Co., 170 Conn. 62, 64 (1976). The Code would overrule long-standing judicial precedent without any basis for doing so.

The Code interferes with special needs trusts and pooled trusts established to enable disabled individuals to qualify for public assistance such as Medicaid. For example, Sec. 3 (23) defines "settlor" and provides: "If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to such person's contribution." Medicaid law provides that only the beneficiary, the beneficiary's parent, the beneficiary's grandparent, or a court may establish a special needs trust or pooled trust pursuant to 42 USC 1396p(d). Applying the Code's definition of a settlor to a special needs trust, an individual who is not statutorily authorized to create a special needs trust would become a settlor of the trust by contributing assets to the trust, potentially invalidating the trust.

The Department is concerned that this legislation may also include additional changes that will adversely affect numerous aspects of the Department and the state budget. Without sufficient time to review and research each provision in this 78 page bill, the Department must oppose SB 397.