

# Major Changes in Special Needs Law: Legislative and Case Law Update

*By Mira B. Weiss, Esq. and Chelsey B. Gottlieb, Esq.*

## **I. Introduction**

Two significant, and long awaited, changes to special needs trust law occurred in late 2016. Of major importance is the adoption of the *21st Century Cures Act* (H.R. 34 – 114<sup>th</sup> Congress (2015-2016), Pub. Law No. 114-255) (the “Act”), signed in to law by President Obama on December 13, 2016. The Act represents the culmination of a long fought battle against discrimination of persons with disabilities, by establishing the right of disabled individuals to establish, and fund, a first party special needs trust (“SNT”) in accordance with 42 U.S.C. § 1396p[d][4][A] without risking the loss of government benefits such as Medicaid and Social Security.

Concurrently, the application of New York state’s version of U.S.C. § 1396p[d][4][A]—New York Soc. Security Law § 366[2][b][2][iii]—was being tested in Matter of Kroll v. New York State Dept. of Health, 39 N.Y.S.3d 183 (2<sup>nd</sup> Dept., Oct. 5, 2016) (“Matter of Kroll”). Matter of Kroll is significant to the practice of elder law, special needs, and trusts and estate law in New York. As explained below, the court in Matter of Kroll upheld the use of the trustee’s power of appointment to decant an irrevocable third party special needs trust into a successor third party trust, and not to a trust that would require, pursuant to Social Services Law § 366[2][b][2][iii], the inclusion of a “payback provision” allowing the state, at the time of the beneficiary’s death, to recoup from the trust amounts remaining in the trust up to the total value of all medical assistance paid on behalf of such individual.

## **II. The 21st Century Cures Act**

On December 13, 2016, former President Obama signed the *21st Century Cures Act*. Included in the Act is Section 5007: *Fairness in Medicaid Supplemental Needs Trusts* which, by incorporating text from the Special Needs Trust Fairness Act of 2015, enables first party SNTs to be established and funded by individuals with disabilities for his or her own benefit. Notably, Congress inserted the words “the individual” after “for the benefit of such individual by”, thereby empowering disabled individuals to establish a first party SNT for their own benefit. Section 5007 of the *Fairness in Medicaid Supplemental Needs Trusts* reads as follows:

(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.

(21st Century Cures Act, Pub. L. 114-255 § 5007).

Currently, New York legislators are working on conforming New York Soc. Security Law § 366[2][b][2][iii] to the federal Act. The revision to Soc. Security Law § 336 will add the words “by the individual” to the list of parties permitted to create a first party SNT as such: “...a trust containing the assets of such a disabled individual which was established for the benefit of the disabled individual while such individual was under sixty-five years of age *by the individual*, a parent, grandparent, legal guardian, or court of competent jurisdiction...” SSL § 336[2][b][2][iii](emphasis added).

The proposed New York legislation is part of Governor Cuomo’s FY 2018 Executive Budget released on January 17, 2017. When implemented in New York, this change will amend existing law by enabling a disabled individual to create and fund a first party SNT.

### **III. Special Needs Trusts**

Special needs trusts (sometimes referred to as “supplemental needs trusts”) are used to enable beneficiaries to access government benefit programs, such as Medicaid and Social Security, without including the value of trust assets in the government’s determination of the beneficiary’s eligibility for such benefits.

Like first party SNTs—trusts created and funded by the trust beneficiary—third party SNTs are trusts created and funded by a third party for the benefit of a disabled individual. Unlike first party trusts, the “creator” of a third party SNT must be “a person or entity other than the beneficiary or the beneficiary’s spouse” (EPTL 7-1.12[a][5][iv]).

### **IV. Matter of Kroll**

In Matter of Kroll, the court granted co-trustees of an irrevocable trust—which when drafted, did not contemplate the beneficiary having a disability and included a provision giving the beneficiary the right to withdraw trust principal upon reaching twenty one (21) years of age—the right to decant the trust into a supplemental needs trust without requiring the new trust to include a “payback” provision pursuant to EPTL 7-1.12[a][5][iv] and SSL § 336[2][b][2][iii].

Before turning 21 years of age, the beneficiary became disabled and began receiving Medicaid and Social Security benefits. The DOH argued that the beneficiary’s right to withdraw principal at age 21 established him as the “creator” of the successor self-settled trust under EPTL 7-1.12[a][5][v], therefore making trust funds countable in the determination of the beneficiary’s eligibility for benefits and the trust subject to the payback provisions. The court disagreed with the DOH’s position. The court held that because the beneficiary had no vested right in the trust at its creation or at the time of the decanting, the trust assets did not constitute resources or income of the beneficiary, and therefore rejected the DOH’s claim that the payback provisions applied to the successor trust.

Matter of Kroll established that assets in a third party trust can successfully be decanted to a successor third party SNT, thereby preserving a disabled beneficiary's eligibility for government benefits.



Mira B. Weiss is the founder and principal of Weiss Law Group, PLLC and “Of Counsel” to Abrams Garfinkel Margolis, Bergson, LLP based in New York and California. With thirty years experience as an attorney and business professional, she brings unique skills and a fresh, holistic approach to the practice of elder law, special needs, and trusts and estates.

Mira counsels individuals and families in matters of: estate planning and probate; special needs and long-term care; Medicaid planning; guardianship, insurance and health advocacy. She is readily available to attorneys seeking advice on management of the special needs and elderly.

Mira is a frequent CLE lecturer and panel participant for such organizations as: The National Law Institute, Fordham Law School, New York State Society of Certified Public Accountants, New York City Bar Association, the American Association of Daily Money Managers, and Caring Kind (f/k/a the Alzheimer’s Association) and the Orion Resource Group.

She currently serves as the chair of the New York City Bar Association’s Small Law Firm Committee, chair of the Health Committee of the SDNY Chapter of the Federal Bar Association, and is a member of the American Health Lawyer’s Association, NYCBA Surrogate’s Court Committee, New York State Bar Sections on Elder Law and Special Needs, and Trusts and Estates, and the National Academy of Elder Lawyers.

Mira is a graduate of George Washington University School of Law and admitted to practice in New York State, the District of Columbia, and the U.S. Court of Appeals.



Chelsey B. Gottlieb is an associate at the Weiss Law Group, PLLC, where she concentrates her practice on elder law, estate planning, Medicaid planning and asset protection, and guardianships. She has collaborated with legal and healthcare professionals to prepare educational programs for attorneys, various professionals, and consumers.

Chelsey earned her J.D. from Benjamin N. Cardozo School of Law, where she served as a Staff Writer and Articles Editor of the Cardozo Public Law, Policy, and Ethics Journal. She also holds a bachelor’s degree and graduated with Phi Beta Kappa honors from Lehigh University.

Chelsey is admitted to practice in the State of New York. She is an active member of the New York State Bar Association, Elder Law and Special Needs Section; and of the New York City Bar Association, Legal Problems of the Aging Committee.