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REPORT OF THE LEGAL PROBLEMS OF THE AGING COMMITTEE ON PROPOSED NEW YORK STATE 2011 EXECUTIVE BUDGET

The New York City Bar Association's Legal Problems of the Aging Committee respectfully submits this report to express its concerns regarding two proposed changes in the 2011 Executive Budget: elimination of spousal refusal in community settings and expansion of Medicaid estate recovery. As discussed below, the Committee believes that these changes would adversely impact some of New York's most vulnerable citizens and, in some cases, conflict with existing law. Accordingly, we urge that the proposals be removed from the Budget.

ELIMINATION OF SPOUSAL REFUSAL IN COMMUNITY SETTING

Article VII § 24 of the Governor's Executive Budget proposes to eliminate the "spousal refusal" option in New York State's Medicaid program for couples living at home. We respectfully believe this proposal would conflict with existing law and the public policy benefits therein. Indeed, this change would negatively impact the lives of many New Yorkers who are attempting to care for their spouses at home in spite of the emotional and financial burdens.

It has been New York's practice to afford couples applying for Medicaid, whether for services in the community or in an institutional setting, the same spousal impoverishment protections found in the federal law at 42 USC 1396r-5 (c) (3). The Governor proposes to eliminate this protection and require that applicants for Medicaid home care services who are married be determined eligible based on a review of the household financials including *both spouses'* income and resources. This will require the non applying spouse to reduce his/her income and assets to federal poverty level in order for the applicant spouse to receive benefits. This will have several negative results.

Case example:

Mr. B a 51 year old working husband whose wife age 49 had a sudden paralyzing stroke. She spent one year in a rehabilitation center on Medicaid benefits. Mr. B signed a spousal refusal and contributed 25% of his excess income above the federal income guideline of $2739 per month towards her care in the institution. In the fall of 2009, Mr. B took his wife home and had accepted 12 hours of daily home care services. Mr. B covers the night services and paid for additional night services at a rate of $400 a week.

To accommodate his wife's transition home he renovated the house to make it barrier free, and used his entire savings. His remaining resources are his retirement savings and his life

insurance. He also owns his home where he and his wife reside and, in addition has a share in a two family house which he inherited from his father. This property is family occupied and operates at a loss.

Mr. B works full time and also supports his 19 year old son while he is still in school. If he had to reduce his family to the Medicaid income guideline of $1167 per month, he would not be able to support his family. He would face either the choice of readmitting his wife to the nursing home or seeking a divorce. Neither option is preferred as they run counter to the State's policy efforts to support family caregivers, keep people at home and reduce the cost of care. Mr. B is not a millionaire on Medicaid, although his fixed assets are slightly above the federal Medicaid community spouse resource eligibility guideline of $109,560 because of his retirement savings. These guidelines when applied in a cookie cutter fashion lose their ability to provide a fair outcome for many families with special circumstances.

The negative impact of eliminating New York State's implementation of spousal refusal includes the following:

1. *Elimination Of Spousal Refusal Would Violate Federal Law*

The Medicare Catastrophic Coverage Act of 1988 (MCCA) provides that Medicaid eligibility cannot be denied where the community spouse refuses to make his or her resources available for the cost of care of the institutionalized spouse. 42 U.S.C. §1396r-5(c)(3). This provision has been upheld by the New York Court of Appeals [Matter of Shah (Helen Hayes Hosp.), 95 N.Y.2d 148, 711 N.Y.S.2d 824, 733 N.E.2d 109 (2000)] and the Second Circuit Court of Appeals [Morenz v. Wilson-Coker, 415 F.3d 230, 234 (2d Cir. 2005) holding that Connecticut must allow "spousal refusal" for institutional Medicaid under federal law.]

Elimination of spousal refusal would also be prohibited due to the federal "maintenance of effort" provisions which prohibit a change to state Medicaid eligibility determination standards. Under federal law, enacted to expand and enhance Medicaid eligibility for persons subsisting at or near the federal poverty level, states must ensure that the "eligibility standards, methodologies, or procedures" under its Medicaid State Plan, or under its Medicaid waiver or demonstration programs, are not more restrictive than the rules in effect prior to the enactment of the law. [American Recovery and Reinvestment Act of 2009 (ARRA) Sec 5001(f)] More restrictive eligibility rules will preclude the State from accessing the increased Federal Medical Assistance Percentage until the State restores eligibility standards, methodologies and procedures. These provisions are designed to prevent a state from reducing its commitment to Medicaid funding and from altering the eligibility rules in such a manner as to deprive the poor, elderly and disabled from benefits for which they would have been eligible prior to the enactment of the legislation. Therefore, elimination of spousal refusal may threaten this Federal funding.

Moreover, eliminating spousal refusal in the community would run afoul of the Supreme Court's decision in Olmstead v. LC.[1] Olmstead introduced the "integration mandate" which

[1] Olmstead v. LC. ex rel Zimring, 527 U.S. 581,119 S.Ct. 2176 (1999).

requires states to provide services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Olmstead specifically required Georgia to place persons with disabilities in community settings rather than be institutionalized. The Governor's proposal to allow spousal refusal only in an institutional setting and not in the community would, naturally, have the opposite effect. Individuals would be compelled to leave the community and transfer to a nursing home so that their spouses would be able to survive financially.

2. *Elimination Of Spousal Refusal Will Encourage Separation And Divorce*

The proposal to eliminate spousal refusal will encourage separation and divorce. Spouses who otherwise supported each other through "sickness and health" will be forced to consider divorce as a means of economic survival. The catastrophic costs of homecare for an elderly or disabled spouse are more than most middle class families can afford. Eliminating spousal refusal will place families in the untenable position of needing to divorce a spouse in order to secure medical care required by the spouse in need, while enabling the well spouse to retain sufficient assets to live in the community.

3. *Elimination Of Spousal Refusal Could Subject The Well Spouse To Extreme Financial Hardship*

Spousal impoverishment laws enable a community spouse, with a spouse in an institution, to retain enhanced income and resources. The proposed law would not extend this consideration to couples seeking care at home. Individuals who apply for Medicaid homecare would be forced to spend down their assets below the spousal impoverishment limits. Under this proposal of eliminating the spousal refusal for couples seeking care at home, the couple would need to spend down their assets to the $20,100 asset limit. Further, frequently upon a spouse's death, the income payable to the surviving spouse is significantly reduced due to a reduction in retirement benefits. Elimination of spousal refusal prevents the surviving spouse from protecting assets to produce a sufficient stream of income upon the death of his or her spouse. In contrast, spousal refusal has allowed a healthy elderly spouse to maintain assets that generate income for his or her own living expenses and future long term care needs. Its elimination would mean that the surviving spouse's income would likely fall below even the Medicaid minimum monthly maintenance needs allowance required by Federal and New York law (currently $ 2739 monthly).

4. *The Potential For Abuse Of Spousal Refusal May Be Remedied Under Existing Federal And State Laws Because Medicaid Agencies Can Recover Spousal Support Where Appropriate*

When Federal law introduced "spousal refusal" and permitted a community spouse to refuse to have his or her assets used in the computation of the Medicaid eligibility of the institutionalized spouse, the *quid pro quo* was that the institutionalized spouse assigns to the State the right of support from his or her spouse or, if the institutionalized spouse is unable to execute the assignment, the law automatically assigns this right to the State. Currently, New York State law permits spousal refusal for both institutional care and care provided in the home. It also permits, however, the commencement of support proceedings against all refusing spouses. While it is acknowledged that the exercise of spousal refusal may be abused in certain instances by wealthy spouses, the State can recover from the refusing spouse as a safeguard against such

potential abuses. Rather that repealing spousal refusal, the State should create clear guidelines for spousal impoverishment. In applying these guidelines to both community and institutional cases, the local Medicaid agencies could target its efforts to recover spousal support through negotiation and/or Court proceedings in circumstances where the spouse refuses to support despite the fact that he or she has more than sufficient resources and income to meet his or her own needs and contribute towards the support of his or her spouse.

For the above reasons, we support the maintenance of the spousal refusal rules for both institutional and home based Medicaid cases. Maintaining the existing rules would comply with Federal law, eliminate the need for divorce and/or unnecessary institutionalization, as well as prevent significant financial hardship. The rules should be maintained particularly because the state already has the right to pursue any spouse who abuses the system.

EXPANSION OF MEDICAID ESTATE RECOVERY

The Governor's Article VII Budget Bill contains provisions at Part H, Section 53 to expand Medicaid estate recovery in Section 369 of the Social Services Law.

The provisions would expand Medicaid estate recovery to include recovery from the recipient of a decedent's property by distribution or survival and to expand the definition of "estate" for the purposes of recovery to include "any other property in which the individual has any legal title or interest at the time of death, including jointly held property, retained life estates, and interests in trusts, to the extent of such interests."

Currently Medicaid estate recovery (to recover the cost of Medicaid services provided to such individual during his or her lifetime) under state law is limited to an individual's property included within the individual's estate passing under the terms of a valid will or by intestacy, and would not include property passing to a beneficiary outside of estate administration such as through a beneficiary designation or by operation of law. The proposed expansion will likely instill a fear with seniors that they will ultimately lose their home to the government, if they get sick. We believe that a consequence of this fear will be to drive many seniors to lose control of their homes prematurely by transferring the home to a third party, such as a child, where it would be subject to the child's control as well as creditors. In addition, as explained below, the expansion of estate recovery would mean that less income will be available to help pay for health services during the individual's lifetime. Moreover, as demonstrated in other states that have experimented with estate recovery, the potential recovery will likely not be successful in any event as such property legally passes to another recipient.

1. *Impact on a Senior's Home*

A Medicaid recipient may only have assets valued at $13,800 plus limited exempt resources. Therefore the only property in a recipient's estate that could be recovered is likely to be a personal needs account with a maximum of $13,800, a homestead valued under $750,000 or a retirement plan.

Since the state's interest in the only likely large asset – the homestead – can be protected by a lien for most institutional care, this new provision will most likely be used for estate

recovery against a homestead of a recipient receiving community based services, such as home care. This provision will encourage the outright transfer of the homestead. Outright transfers tend to deprive the elderly and disabled of dignity and put them at the mercy of the transferee, usually a child or other relative.

Additionally, encouraging outright transfers rather than retained life interests will reduce income that would be part of a Medicaid spend down. During the lifetime of the life tenant, the benefits of the life estate are enjoyed by the life tenant. These benefits include income from property rented by the life tenant. If the life tenant is receiving Medicaid benefits, this income is included as part of such person's net available monthly income and, to the extent that such person's net available monthly income exceeds the Medicaid allowable amount, it is used to pay towards the cost of such person's medical care. Accordingly, encouraging Medicaid applicants to transfer property without reserving a life estate will reduce the applicant's net available monthly income and increase the cost to Medicaid.

2. *Impact on a Senior's Retirement Account*

Similarly, expanding estate recovery will encourage persons to cash in and transfer the proceeds from their exempt retirement accounts. The required distributions of a retirement plan are income which becomes part of a recipient's Medicaid spend down and which inures to the benefit of Medicaid. Therefore encouraging Medicaid applicants to cash in and transfer retirement plans will reduce the applicant's net available monthly income and increase the cost to Medicaid.

3. *Potential Conflict of Laws*

Most importantly, the proposed expansion to the definition of estate conflicts with existing New York statutory law and will result in competing claims to property of a deceased Medicaid recipient. By way of example, life estates terminate upon the death of the life tenant and, upon the life tenant's death, the remainder interest passes to the remainderman. If the remainder beneficiaries are ascertainable at the time the life estate is created, the remainderman has a future estate which is indefeasibly vested. EPTL § 6-4.7 defines a future estate indefeasibly vested as "…an estate created in favor of one or more ascertained persons in being which is certain when created to become an estate in possession whenever and however the preceding estates end and which can in no way be defeated or abridged." This is the case with most transfers of real property with a retained life estate. The same legal principles that apply to a life estate are also applicable to interests in trusts. Similarly, claims against retirement plans would conflict with Employee Retirement Income Security Act of 1974 (ERISA) or CPLR 5205.

Other states have encountered problems with attempts to expand Medicaid estate recovery. In fact, Massachusetts back-tracked from an expanded definition and restored estate recovery to cover only the probate estate. We are concerned that the expansion of Medicaid estate recovery would encourage a public policy that would deprive the elderly and disabled of home ownership and control over their own lives. It would reduce the available income that a Medicaid recipient has to offset the cost of Medicaid services. It would conflict with other Federal and New York statutes dealing with the legal interests of beneficiaries of such assets, including life interests, trust interests, and retirement assets, leading to costly litigation, meaning that the expansion of estate recovery will likely not be successful in any event.

For these reasons, we urge the elimination of the budget proposal to expand Medicaid estate recovery beyond the current estate definition.

We would welcome the opportunity to meet to discuss our concerns in greater detail.

Respectfully Submitted,

Legal Problems of the Aging Committee
Russell N. Adler, Chair

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