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REPORT ON LEGISLATION BY THE
LEGAL PROBLEMS OF THE AGING COMMITTEE

A.3006-B/S.2606-B, Part A, Section 68

Amends various provisions of law relating to implementing the health and mental hygiene budget for the 2013-2014 state fiscal year. This provision would eliminate spousal refusal in community settings.

THIS PROVISION IS OPPOSED

The New York City Bar Association's Legal Problems of the Aging Committee respectfully submits this report to express its concerns regarding elimination of spousal refusal in community settings. 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 proposal be removed from the Budget.

ELIMINATION OF SPOUSAL REFUSAL IN COMMUNITY SETTINGS

Article VII § 68 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 is 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 2012, 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 $450 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 teenage son while he is still in school. If he had to reduce his family to the Medicaid income guideline of $1175 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 $115,920 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 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 $21,150 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 $2,898 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

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

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 than 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 their 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.

EXPANDING SPOUSAL IMPOVERISHMENT RULES TO THE MANAGED LONG TERM CARE WAIVER WOULD NOT ADEQUATELY ADDRESS THE PROBLEMS THAT WOULD BE CAUSED BY ELIMINATING SPOUSAL REFUSAL

The Governor's budget in Section 68 adds a new option which appears to be an expansion of the benefits of the spousal income and resources enhancements to the recipients of Managed Long Term Care (MLTC) benefits. Although the proposed application of nursing home spousal impoverishment rules in §68 to managed long term care recipients can be viewed as theoretically beneficial, it would not solve the problem caused by the elimination of spousal refusal for the reasons set forth below:

- The protection in §68 would only take effect if and when waiver and approval of MLTC is received from the federal government; however the elimination of spousal refusal in §67 would take effect immediately. (See Part A § 84)

- The protection in §68 only protects a small class of MLTC recipients and does not cover all the persons receiving community based care. It would extend "spousal impoverishment" rules to the managed long term care waiver program. It would not cover couples who are served by mainstream Managed Medicaid (MCO) or who are receiving homecare other than from a MTLTC company. It would not exempt persons receiving other types of community based Medicaid. It would not protect persons in the future if the managed long term care program becomes a non-waivered program; and it would not protect persons receiving home care if New York decides in the future to return home care to a fee for service program. It is important to be noted that the MLTC is only operational in the downstate area (New York City, Nassau, Suffolk and Westchester to date). The expansion to other upstate counties has not been fully planned. Passing section 68 could create a two tiered system in the state with downstate receiving

this enhanced benefit while upstate married recipients experiencing the harsh impact of determining eligibility without spousal budgeting.

- The protection in §68 creates many ambiguities. It redefines an "institutionalized spouse" to include classes of people who are not institutionalized, but who are just members of a MLTC program. Yet many of the provisions in Social Services Law § 366-c anchor the eligibility determination on the date of institutionalization. For example, the resources held on the date of institutionalization are a key element in determining eligibility. This would not apply in the context of community-based care. The resource limit in § 366-c used to establish eligibility for a married applicant is a minimum a $74,820 or a maximum of half the resources held by the couple on the date of institutionalization up to $115,920. There is no way to establish what is half of a couple's resources without a date of institutionalization. This is just one inconsistency in Section 68 which must be addressed before this could be an effective tool in determining Medicaid eligibility.

- The Committee's conclusion is that although this Section could provide benefit to the married MLTC recipient it is (i) unfair and premature until the program is more widely available through the state, and (ii) insufficient in ameliorating the serious negative impact of eliminating the spousal refusal through out the state.

Respectfully Submitted,

Legal Problems of the Aging Committee
Judith D. Grimaldi, Chair

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