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**REPORT ON LEGISLATION BY THE LEGAL PROBLEMS
OF THE AGING COMMITTEE**

**2015-16 ARTICLE VII BUDGET BILL A.3007 / S.2007 (PART B § 33)
WHICH WOULD ELIMINATE THE USE OF “SPOUSAL REFUSAL”
FOR MEDICAID RECIPIENTS**

THIS PROVISION IS OPPOSED

INTRODUCTION

This memorandum is respectfully submitted by the Legal Problems of the Aging Committee of the New York City Bar Association in opposition to the 2015-16 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part B § 33, which would amend Social Services Law § 366 subdivision 3 (a) to provide that for Medicaid eligibility the income and resources of a legally responsible relative (including a spouse) would be deemed as unavailable only if the relative was both absent from the home AND refused to provide care and assistance. Essentially, this would eliminate the use of spousal refusal for Medicaid recipients in the community.

New York State has a constitutional mandate to provide care and support to needy individuals. Federal laws have codified the preference for disabled individuals to have access to services in the least restrictive and most integrated setting. Federal and State programs have been put in place to allow the aged and infirm to stay in their homes and receive care in furtherance of these basic tenets. Yet, the elimination of the right of “spousal refusal” for persons living in the community will force couples to consider divorce and separation, force disabled people into unnecessary and premature institutionalization and create barriers to the receipt of care.

- 1. Elimination of Spousal Refusal Will Encourage Separation and Divorce:** The inability to meet living expenses will have the effect of couples’ terminating marital relationships in order to avoid the loss of their home and impoverishment of the well spouse. It will also remove an important care-giver from the home.
- 2. Elimination of Spousal Refusal Will Force the Elderly to Enter Nursing Homes:** In order to prevent financial ruin and maintain some dignity, the ill spouse may well

end up in a nursing home so that the well spouse can exercise the right of spousal refusal under the federal law.

- 3. The Potential For Abuse Of Spousal Refusal Can Be Remedied Using Existing Laws:** Just as is accomplished in nursing home based Medicaid, the State has the ability to bring support and contribution proceedings against refusing spouses who have sufficient resources and income to pay toward the ill-spouse's care. This approach protects the truly needy and provides flexibility, while requiring contribution from those able to pay without contributing to the destruction of marriage.
- 4. The application of "spousal impoverishment" rules to the spouses of people who receive community Medicaid under the managed long term care waiver would not adequately ameliorate the problems that would arise by eliminating spousal refusal:** Prior to enrolling in a Managed Long Term Care ("MLTC") program, where more generous spousal impoverishment rules are in place, couples will have to establish their initial eligibility for the Medical Assistance program. In order to establish this initial eligibility, couples need to rely on spousal refusal. Eliminating spousal refusal effectively removes this option.

ANALYSIS

The 2015-16 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part B § 33 would amend Social Services Law § 366 subdivision 3 (a) to provide that for Medicaid eligibility, the income and resources of a legally responsible relative (including a spouse) would be deemed as unavailable only if the relative was both absent from the home AND refused to provide care and assistance.

For community-based Medicaid, current law provides that the income and resources of a non-applying spouse are not considered available if the spouse refuses to contribute to the medical expenses of the Medicaid recipient, even if the couple is living together in the community. This allows for the provision of care to a medically needy individual, often in a fragile condition. However, under current law where there is such a refusal, there is an implied contract to pay for care and the Medicaid agency has the ability to commence proceedings against the refusing spouse for income support and a resource contribution. Therefore, current law provides an adequate remedy to the Medicaid agency to sue the refusing spouse to recover public funds. By making agency pursuit of these recoveries discretionary, an allowance is made for case by case analysis and local agency flexibility.

Community Medicaid eligibility standards require that couples can have resources no greater than \$21,750 and available income no greater than \$1,209 per month, which is all that a couple can retain to cover their monthly food, clothing, real estate taxes, utilities, rent, transportation and other living expenses. These limits are completely unrealistic for living expenses throughout most of New York State today.

The elimination of spousal refusal will make it difficult or impossible for couples to continue to live together in the community where one spouse needs medical services. Since the proposed change in the law would require that a spouse be absent before he or she could utilize a spousal refusal, it will cause long standing marriages to end in divorce or separation; it will cause greater institutionalization in nursing homes of the ill spouse because the couple cannot afford to cover their living expenses on \$1,209 per month; and it will cause the impoverishment of the well spouse leaving him or her without sufficient income and assets to meet living expenses, in which case the well spouse may be forced to become a public charge.

The Legal Problems of the Aging Committee opposes the elimination of spousal refusal.

The Budget Office's 2015-16 projected total savings for this proposal is \$10.7 million in state savings (\$21.4 million in gross savings including federal money). We believe these savings estimates are incorrect and inflated for the reasons discussed below.

1. Elimination of Spousal Refusal Will Encourage Separation and Divorce:

In many cases, ending spousal refusal will not cause Medicaid ineligibility, but instead will cause couples to separate or divorce to maintain eligibility. It will result in a significant increase in the amount of home care necessary in most cases, because an in home spouse will no longer be available to provide nighttime and other care. Spouses who survive the trials and tribulations of raising children and supporting each other through "sickness and health" will be forced to consider divorce or separation in their later years as a means of survival. The crippling costs of homecare and nursing home care for an elderly or disabled spouse are more than most middle class families can endure. Removal of spousal refusal will place families in the untenable position of requiring divorce or separation to a spouse of thirty or more years to assure that the ill spouse receives the medical care required in the most integrated setting, while enabling the well spouse to retain sufficient assets to live in dignity.

Consequently, we do not believe that the elimination of spousal refusal will result in the projected budget savings because spouses will separate or divorce in order to qualify for Medicaid benefits. This will not affect the assets of the community spouse, who may soon need care as well.

2. Elimination of Spousal Refusal Will Force the Elderly to Enter Nursing Homes:

Ending community spousal refusal will shift infirm and elderly Medicaid recipients to more expensive nursing home care where spousal refusal is federally mandated. Since federal law guarantees the right of spousal refusal for spouses of nursing home residents [42 U.S.C. §1396r-5(c)(3)], elimination of this right for couples seeking to avoid institutionalization will lead to increased institutionalization (at higher Medicaid costs).

Institutional Medicaid eligibility standards permit couples to retain sufficient assets and income to remain in their current homes and avoid spousal impoverishment. The community spouse can retain between \$74,820 and \$119,220 in resources and monthly income of \$2,980.50. Further, the institutional spouse can retain \$14,850 in resources. Although these spousal

impoverishment provisions have been expanded to the MLTC program for certain community cases, this precludes the use of a pooled community trust¹ if spousal impoverishment budgeting is elected. Therefore many couples rely on spousal refusal so that the pooled community trust can be used to preserve income that enables the couple to remain in their home, especially in regions where housing costs are high. Since a single individual would be able to use the community pooled trust, the elimination of spousal refusal unfairly discriminates against married persons.

For those couples who require home care which does not fall under the MLTC program, the ill spouse will be forced to seek more costly nursing home care to prevent the married couple from becoming impoverished. In addition, the protections created by the “spousal impoverishment” guidelines to managed long term care are inadequate for reasons discussed below. Frail and elderly New Yorkers will be forced into nursing homes at an additional cost to the Medicaid system.

The State has long recognized the value, both in economic and human terms, of retaining elderly and disabled persons in their homes and as active, involved members of their families. The proposal to eliminate spousal refusal in community Medicaid cases would result in an increase in nursing home admissions and would run afoul of the United States Supreme Court *Olmstead* case which requires that care be provided in the "most integrated setting" possible.

3. Existing Law Allows for Recoupment of Costs:

New York State law currently permits spousal refusal for both institutional care and care provided in the home. However, it also permits the commencement of both support and contribution proceedings against all refusing spouses. The State's ability to recover from the refusing spouse provides adequate safeguards against potential abuses while providing for case-by-case analysis and local agency flexibility. Rather than repealing spousal refusal, the State should use the laws already enacted 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 while at the same time contributing towards the support of his or her spouse.

4. Spousal Impoverishment Rules in the Managed Long Term Care Waiver Do Not Adequately Address the Problems:

Beginning in 2014, the Federal Affordable Care Act (“ACA”) has required that all states offer “spousal impoverishment” protections² to married persons receiving MLTC or other “waiver” services. This ACA provision potentially removes the institutional bias that has long

¹ In sum, a pooled community trust is a supplemental needs trust run by a not-for-profit and into which a disabled individual on Medicaid can deposit funds that are in excess of the amount allowed by the Medicaid program.

² Spousal impoverishment protections allow couples in the community with one spouse on Medicaid receiving home care to budget their assets and income as a married couple. The applicant spouse can retain income of \$384 per month and the “well” spouse can retain their own income plus enough of the spouse’s income to bring them to \$2,980.50. Therefore, for couples with a combined income of less than \$3,364.50, this is more advantageous than traditional budgeting with the use of a pooled income trust.

pervaded Medicaid long term care services. Since the 1980's, married spouses of nursing home residents could retain enough income and assets to live without impoverishment, but spouses of home care recipients had to live at the sub-poverty Medicaid levels. Now, for a couple with combined income as high as \$3,364 per month, and combined assets as high as \$89,670 (\$74,820 for the "well" spouse and \$14,850 for the applicant), one spouse can receive MLTC services, including home care, without being required to "spend down" most of that income and assets on the cost of medical care, and without needing a spousal refusal.

However there is a critical gap in these protections that continues to make spousal refusal essential. Under New York's policy, the spousal impoverishment protections are available only "post-eligibility." This means that the Medicaid application is first evaluated under regular income and asset rules without the more generous spousal impoverishment allowances. Under the regular income and asset rules, the application is denied if a couple has combined assets of more than \$21,750, even though the applicant spouse is eligible for MLTC services if the couple's combined assets do not exceed \$89,670. Thus, the applicant cannot enroll in MLTC *unless* the spouse can do a spousal refusal for the initial application.

Spousal refusal is essential to get the application accepted, and to allow the applicant to enroll in a MLTC plan. Then, only after MLTC enrollment may the couple request the Medicaid agency to re-budget them with the spousal impoverishment protections – which will allow them to keep their income and assets up to a certain amount without any spend-down and without needing spousal refusal thereafter. Eliminating spousal refusal, as the proposed budget provision would do, effectively eliminates this option for MLTC. This restriction would seem to defeat the intent of the ACA to remove the bias in favor of institutionalization. An individual who would otherwise be eligible with spousal impoverishment protections will be denied Medicaid and prevented from enrolling in MLTC without an appeal. Only by maintaining spousal refusal can that perverse result be prevented, so that MLTC would be a true alternative to institutional care. Though administrative remedies may be sought to cure this anomalous situation, the provision effectively becomes a barrier to much-needed care. As proposed, elimination of spousal refusal will again force married persons into nursing homes.

In addition, there are a number of categories of Medicaid recipients who are not protected by the expanded Spousal Impoverishment coverage and who would need to utilize spousal refusal to avoid the consequences described above. These include:

- (a) *Persons receiving Hospice Care* - Hospice recipients are excluded from MLTC, even though they need long-term care and the proposed legislation would deny them the protection of spousal refusal.
- (b) *Seriously Ill Children* – Current law permits refusal by any "legally responsible relative" including parents of minor children. Although some children with chronic disabilities are covered by a waived program, there are many with serious illnesses who do not qualify or are waiting to be accepted into the program. The right of a minor child to receive Medicaid when a parent's income is unavailable to pay for costly care such as cancer treatment should be maintained. If these parents, as legally

responsible relatives, could not refuse to pay for the children's care, they would then be saddled with potentially ruinous health care costs.

- (c) *Others Who Rely on Medicaid for Acute and Primary Care* - Because of the expanded income limits for adults under 65 under the ACA, fewer married persons will need to use spousal refusal. But for seniors and people with disabilities on Medicare, the standard income limits still apply, which are well below the federal poverty level. Though much of the medical care of such individuals is covered by Medicare, Medicaid can be a vital secondary insurance for severe illness. Low income individuals should have the continued right to receive Medicaid, and the related Medicare Savings Program that subsidizes Medicare out of pocket costs, notwithstanding a spouse's refusal to pay for care. Retention of the right of spousal refusal for this population will result in little cost to the state because Medicare will remain the primary coverage.

CONCLUSION

Based on the foregoing, the Legal Problems of the Aging Committee of the New York City Bar Association OPPOSES this legislation.

Legal Problems of the Aging Committee
David I. Kronenberg, Chair

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