

Memorandum in Opposition

ELDER LAW SECTION

Elder #2

February 8, 2013

S. 2606, Part-A

By: BUDGET

A. 3006, Part-A

By: BUDGET

Senate Committee: Finance

Assembly Committee: Ways and Means

THE ELDER LAW SECTION OPPOSES THE ELIMINATION OF MEDICAID “SPOUSAL REFUSAL”

INTRODUCTION: Government, at both the Federal and State level, is telling its constituents that they are instituting programs to allow the aged and infirm to stay in their homes and receive care. Yet, the elimination of the right of “spousal refusal” for persons living in the community would force couples to consider divorce, separation or unnecessary and premature institutionalization.

1. Elimination of Spousal Refusal Will Encourage Separation and Divorce: The inability to meet living expenses will have the effect of terminating married relationships in order to avoid the loss of their home and total 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 maintain some dignity, and ability to cope financially, the ill spouse will end up in a nursing home so that the well spouse can exercise the right of spousal refusal under the federal law.

3. Elimination of Spousal Refusal Would Violate Federal Law: Implementation of this legislation now would violate the “Maintenance of Effort” requirements of the Affordable Care Act.

4. 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; however, it does not contribute to the destruction of the marriage.

5. The proposed application in § 68 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 problem: This proposal would be subject to federal approval, but even if approved would leave a large number of spouses

of Medicaid recipients without adequate protection, i.e. those receiving mainstream Medicaid Managed Care and those in upstate counties not yet subject to Managed Long Term Care. This results in the creation of a very unfair, de-facto two-tiered Medicaid system.

ANALYSIS:

The 2013-14 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part A § 67 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 only be deemed as unavailable 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 living in the household. 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 right to commence proceedings against the refusing spouse for income support and a resource contribution from the refusing spouse. Therefore current law provides an adequate remedy to the Medicaid agency to sue the refusing spouse and provides for case by case analysis and local agency flexibility.

While the Article VII Legislation at Part A § 68 also proposes amending Social Services Law § 366-c, subdivision 2 (a) to allow nursing home spousal impoverishment rules to apply to persons receiving home care services under the managed long term care waiver program, this would not adequately redress the problems caused by eliminating community based spousal refusal.

The Elder Law Section of the New York State Bar Association opposes the elimination of spousal refusal.

Community Medicaid eligibility standards require that couples can have resources no greater than \$21,150 and available income no greater than \$1,175 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 totally unrealistic for living expenses in 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. 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 \$1,175 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 and will eventually force the well spouse to become a public charge.

Desperate spouses, even those in loving marriages of long duration, may be forced to seek divorce to avoid impoverishing their community spouses. This was the situation that

prompted the initial enactment of the spousal refusal provision. The 2010 enactment of “no-fault” divorce will make it more likely that spouses may seek divorce if spousal refusal is eliminated. Consequently, no budget savings will be realized because spouses will separate or divorce in order to qualify for Medicaid benefits without detrimentally impacting the assets of the community spouse.

The Budget Office’s 2013-14 projected total savings for this proposal is \$34.3M in state savings (\$68.60M in gross savings including federal money). For 2014-15, the projected total savings is \$137M (\$68.5M in state savings). We believe these savings estimates are incorrect and inflated for the reasons discussed below.

1. ELIMINATION OF SPOUSAL REFUSAL WILL ENCOURAGE SEPARATION AND DIVORCE: Ending spousal refusal will not cause Medicaid ineligibility, but instead 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 golden 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 indignity.

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 \$115,920 in resources and monthly income of \$2,898. Further, the institutional spouse can retain \$14,400 in resources. There is currently no similar enhanced spousal allowances for Medicaid homecare (the couple can have resources no greater than \$21,150), the ill spouse will be forced to seek more costly nursing home care to prevent the married couple from becoming impoverished. The proposal in §68 to extend “spousal impoverishment” guidelines to managed long term care is inadequate for reasons discussed below in this memorandum. 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. ELIMINATION OF SPOUSAL REFUSAL WOULD VIOLATE FEDERAL LAW: These changes cannot be implemented now without violating one of the "Maintenance of Effort" requirements of the federal Affordable Care Act. The federal law [42 USC §1396a(gg)] requires states to maintain Medicaid eligibility standards, methods and procedures in effect on March 23, 2010, until the federal Centers for Medicare & Medicaid Services (CMS) finds the State's insurance exchange is fully operational, estimated to be January 1, 2014. An exception is made if the State certifies that it has a budget deficit. But even then, changes may be made only for those not eligible on the basis of disability (or pregnancy) and for those whose income is above 133% of the Federal Poverty Level. NYS could not eliminate spousal refusal until approximately January 2014, for individuals with disabilities under age 65. For persons over age 65 applying for or receiving Medicaid, local districts would have to determine who had income above 133% of the Federal Poverty Level. Identifying those seniors and applying a different set of rules to this group, would impose a huge bureaucratic burden on local districts.

4. THE POTENTIAL FOR ABUSE OF SPOUSAL REFUSAL CAN BE REMEDIED USING EXISTING LAWS: New York State law currently permits spousal refusal for both institutional care and care provided in the home. It also permits, however, 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.

5. EXPANDING SPOUSAL IMPOVERISHMENT RULES TO THE MANAGED LONG TERM CARE WAIVER WOULD NOT ADEQUATELY ADDRESS THE PROBLEMS: The proposed application of nursing home spousal impoverishment rules in §68 to managed long term care, while theoretically beneficial would not solve the problem caused by the elimination of spousal refusal for the reasons set forth below:

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

2. The protection in §68 only protects a small class of 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 receiving care through mainstream Medicaid Managed Care. It would not exempt person 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. In addition it would create a two tiered system since mandatory Managed Long Term Care has not been extended yet to most upstate counties and therefore couples in these counties would not be protected.

Based on the foregoing, the Elder Law Section **OPPOSES** this legislation.

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