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Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER #16 February 17, 2016

S. 6407 – PART B, Sec. 3 By: BUDGET
A. 9007 – PART B, Sec. 3 By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE ELIMINATION OF MEDICAID "SPOUSAL REFUSAL"

INTRODUCTION: New York State has a constitutional mandate to provide for the care and support of 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 Executive's elimination of the right of "spousal refusal" for persons living in the community would create barriers to the receipt of care, force couples to consider divorce and separation, and force disabled people into 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 pevent financial ruin and maintain some dignity, 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. **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, as many local districts are already doing. This approach protects the truly needy and provides the Medicaid agency with flexibility while requiring contribution from those able to pay; moreover, unlike this proposal, it does not contribute to the destruction of the marriage.

4. **The application of "spousal impoverishment" rules to the spouses of people who receive community Medicaid under the managed long term care waiver does not adequately ameliorate the problem:** 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 addition, there are a number of categories of Medicaid recipients that are not protected by the expanded Spousal Impoverishment coverage. Finally, the spousal impoverishment provisions in the MLTC program do not permit the use of a community pooled trust, which is often needed to maintain a residence in the community – a right that single people have under current law, creating a discriminatory impact on married people.

ANALYSIS:

The 2016-17 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part B § 3 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 BOTH refused to provide care and assistance AND was absent from the home.

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 and will eventually force the well spouse to become a public charge.

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

The Division of Budget's 2016-17 projected total savings for this proposal is $10 million in state savings ($20 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**: 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 the well 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 in dignity.

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, who may soon need care as well. For a state which seeks to encourage marriage, and, by passage of the Marriage Equality Act extended the ability to marry, to make this proposal appears to run contrary to its own public policy objectives.

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 currently 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 trust 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. Moreover, Section 4 of Part B of this Budget Bill, proposes to lower the minimum amount that a non-applying spouse can keep to from $74,820 to $23,844, which will greatly diminish said spouse's ability to remain in the community as well. When combined with the instant proposal, there will be a significant influx of individuals into nursing homes, at greater 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. **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. Many local districts are actively pursuing spousal refusal cases in a cost-effective manner and these districts may be able to provide guidance on how to replicate these efforts throughout the state.

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" protections to married persons receiving MLTC or other "waiver" services. This ACA provision potentially removes the institutional bias that has long 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 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 only available "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. This creates a Catch-22 barring MLTC enrollment to an eligible applicant, 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. 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 without any spend-down and without needing spousal refusal thereafter. As previously stated, the Executive's proposal to reduce the spousal impoverishment levels will further reduce the access to care for a significant population currently enrolled in MLTC services, since instead of $89,670, a couple living together where one needs home care services could be limited to $38,694 ($23,844 for the "well" spouse and $14,850 for the applicant) in combined assets.

New York is implementing this ACA requirement in a way that defeats the intent of the ACA to remove the institutional bias. 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 spousal refusal can prevent that perverse result, and make MLTC a true option 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 violation of the ACA and the Americans with Disabilities Act.

In addition, there are a number of categories of Medicaid recipients that are not protected by the expanded Spousal Impoverishment coverage. These include

(a) **Persons applying for Hospice Care** – Applicants for Hospice Care are exempt from mandatory enrollment in MLTC; however, if they do not enroll in MLTC, or are not qualified for that program, they will not be protected by spousal impoverishment budgeting.

(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 waivered program, there are many with serious illnesses do not qualify or are waiting to the 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 their medical care 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.

Based on the foregoing, the Elder Law and Special Needs Section OPPOSES this legislation.

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