

Memorandum in Opposition ELDER LAW SECTION

Elder #6

February 11, 2014

S. 6358, Part-C
A. 8558, Part-C

By: BUDGET
By: BUDGET

Senate Committee: Finance
Assembly Committee: Ways and Means

THE ELDER LAW SECTION OPPOSES THIS LEGISLATION AND RECOMMENDS CHANGES

Part C Section 18 of the Proposed Health and Mental Hygiene Article VII Legislation

– Preserving Spousal Refusal Protections

For many years, the Executive's budget proposed eliminating spousal refusal for Medicaid recipients living in the community unless the refusing spouse lives separate and apart. The Elder Law Section has opposed these proposals each year primarily because they would force people into institutional (nursing home) care. This year, however, the Executive's proposal recognizes the Elder Law Section's concerns and attempts to minimize the incentive to institutionalize individuals who would be better served receiving home based or community care.

The Executive's proposal continues to allow spousal refusal where the spouse is defined as a "community spouse," a term used to define who may benefit from "spousal impoverishment" protections. Last year, the definition of "community spouse" was extended to include the spouse of someone receiving community-based long-term care through the managed long term care (MLTC) program. Because mandatory enrollment in MLTC is now being extended statewide, this would provide the protection of both spousal impoverishment budgeting rules or the recourse of spousal refusal to persons living in the community throughout the state.

However, the proposal does not go far enough to comply with a little-known provision of the Patient Protection and Affordable Care Act (PPACA),¹ which requires states to include spousal impoverishment protections beginning now – in January 2014 – for all "medically needy" couples including those where one spouse receives home-and-community-based services under a waiver. NYS's preservation of "spousal refusal" for people enrolled in MLTC is an important part of these federally mandated spousal impoverishment protections, but leaves out other fragile populations entitled to these protections under the PPACA.

¹ Section 2404 of the Patient Protection and Affordable Care Act (PPACA) amends 42 USC 1396r-5(h)(1)(A) to define "institutionalized spouse" effective Jan. 1, 2014 (and for five years thereafter) to include all "medically needy" spouses including those in various home care programs. [The "medically needy" program allows older persons, adults with disability, and minor children and their caretaker relatives, who have income higher than the Medicaid limit to qualify for Medicaid by spending down their excess income on medical expenses.]

The Elder Law Section recognizes the Executive's commitment to protecting the rights of those individuals in MLTC programs. That being said, there are some technical changes that should be made to the language in order to protect additional vulnerable populations, including those entitled to these protections under the provisions of the Affordable Care Act. The proposed legislation should be amended to address the following issues:

1. **MLTC is not yet available statewide** - MLTC is not projected to cover many upstate counties until the end of 2014, and those dates may be further extended. This legislation should be amended to continue to allow spousal refusal protections for those individuals in counties where MLTC is not available.
2. **The legislation should be amended to provide for spousal refusal to be restored in the event mandatory MLTC is repealed.**
3. **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. The legislation should be amended to allow spousal refusal for those persons receiving hospice care.
4. **Sufficient Income and Resource Standard** - Current law applies a standard that examines if an "applicant has a responsible relative with sufficient income and resources to provide medical assistance" The proposed legislation, however, compares "the amount of available income and/or resources of the applicant, including the amounts deemed available to the applicant from legally responsible relatives, to an applicable eligibility standard." It is not clear whether a change in the standard is intended, but we believe the standard should continue to read where there is a relative "with sufficient income and resources."

The changes listed above would preserve the intent of the Executive's proposal while providing additional safeguards and an equitable application of the legislation.

While the Executive's proposal addresses many of the Elder Law Section's concerns regarding elimination of spousal refusal, the proposal also would eliminate protections available under current law for some particularly vulnerable populations who would lose access to Medicaid if they lose spousal refusal protections. The populations include:

1. **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 that are not. 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.
2. **Others Who Rely on Medicaid for Acute and Primary Care** - Because of the expanded income limits for adults under 65 under the Affordable Care Act, fewer married persons will need to use spousal refusal. But for seniors and people with disabilities on Medicare, the old income limits still apply, which are well below the federal poverty level. Though most medical care is covered by Medicare, Medicaid can be 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.

If these changes are incorporated, the Elder Law Section of the New York State Bar Association would not oppose the legislation. The Section looks forward to working with the Executive and the legislature to address these issues and develop a solution that will allow New York's most vulnerable populations to continue to be protected by spousal refusal provisions.

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

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