

## **Elder Law and Special Needs Section Memorandum Concerning Social Services Law Section 366-c Being Violative of the Affordable Care Act**

Elder # 9

October 2, 2015

We have become aware that at least one county's Department of Social Services is denying spousal impoverishment budgeting in cases where one spouse is receiving services in an institution and the other spouse is receiving managed long term care ("MLTC") services. Although Section 366-c of the Social Services Law appears to support the position taken by such county Department of Social Services, such position violates federal law and is contrary to the intent of the Affordable Care Act, which is to extend spousal impoverishment protection to MLTC recipients. Accordingly, an amendment to Section 366-c is needed.

Section 2404 of the Affordable Care Act extended the protection against spousal impoverishment to MLTC recipients. This was done by amending the portion of the definition of an "institutionalized spouse" in 42 U.S.C. §1396r-5(h)(1)(A) to include a person receiving MLTC services. The Affordable Care Act did not amend the portion of the definition of an "institutionalized spouse" in Section (h)(1)(B).

Before the amendment, 42 U.S.C. §1396r-5(h) read as follows:

"h) Definitions. In this section:

- (1) The term "institutionalized spouse" means an individual who--
  - (A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [42 USCS § 1396a(a)(10)(A)(ii)(VI)], and
  - (B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.
- (2) The term "community spouse" means the spouse of an institutionalized spouse."

After the amendment, during the five year period that begins on January 1, 2014, Section (h) of 42 U.S.C. §1396r-5 is to be read as follows:

"h) Definitions. In this section:

- (1) The term "institutionalized spouse" means an individual who--
  - (A) is in a medical institution or nursing facility or who is eligible for medical assistance for home and community-based services provided under subsection

- (c), (d), or (i) of section 1915 [42 USCS § 1396n], under a waiver approved under section 1115 [42 USCS § 1315], or who is eligible for such medical assistance by reason of being determined eligible under section 1902(a)(10)(C) [42 USCS § 1396a(a)(10)(C)] or by reason of section 1902(f) [42 USCS § 1396a(f)] or otherwise on the basis of a reduction of income based on costs incurred for medical or other remedial care, or who is eligible for medical assistance for home and community-based attendant services and supports under section 1915(k) [42 USCS § 1396n(k)], and
- (B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.
- (2) The term "community spouse" means the spouse of an institutionalized spouse."

It is important to note that Section 2404 of the Affordable Care Act did not amend that portion of the definition of an "institutionalized spouse" found in (h)(1)(B). Thus, under the federal statute, a Medicaid recipient in an institution or nursing facility whose spouse is residing in the community and receiving MLTC services is an "institutionalized spouse" because under (h)(1)(B) the Medicaid recipient in the institution is not married to a person in a medical institution or a nursing home. Pursuant to (h)(2), the spouse of an institutionalized spouse is a "community spouse". Under spousal budgeting, if the community spouse's income is less than the minimum monthly maintenance needs allowance (presently \$2,980.50) a portion of the institutionalized spouse's income is budgeted to the community spouse in order to bring the community spouse's income up to an amount not to exceed the minimum monthly maintenance needs allowance.

In 2013, New York State implemented Section 2404 of the Affordable Care Act by amending Section 366-c(2)(a) of the Social Services Law which defines the term "institutionalized spouse". New York State's definition of "institutionalized spouse", however, is now inconsistent with 42 U.S.C. 1396r-5(h).

The definition of "institutionalized spouse" in Section 366-c(2)(a) reads as follows:

"(a) For purposes of this section an "institutionalized spouse" is a person (i) who is in a medical institution or nursing facility and expected to remain in such facility or institution for at least thirty consecutive days; or (ii) who is receiving care, services and supplies pursuant to a waiver pursuant to subsection (c) of section nineteen hundred fifteen of the federal social security act or is receiving care, services and supplies in a managed long-term care plan pursuant to section eleven hundred fifteen of the social security act; and (iii) who is married to a person who is not in a medical institution or nursing facility *or is not receiving waiver services described in subparagraph (ii) of this paragraph; (emphasis added)...*"

By including the emphasized words, New York State excludes from its definition of an “institutionalized spouse” a married person residing in a facility or an institution who has a spouse in the community receiving MLTC services. Since under this definition the Medicaid recipient residing in a facility or institution is not an “institutionalized spouse”, the spouse residing in the community receiving MLTC services is not a “community spouse”. Therefore, no portion of the institutionalized spouse’s income is budgeted to the spouse residing in the community receiving MLTC services.

For example under New York’s definition, if a married person residing in a nursing home has monthly income of \$595 and his or her spouse residing in the community receiving MLTC services has monthly income of \$300 per month, the spouse in the institution retains \$50 per month and the balance is paid to the nursing home. None of the nursing home spouse’s income is allocated to the spouse residing in the community receiving MLTC services even though such spouse has only \$300 of income. Under the federal statute, the spouse in the institution retains \$50 per month and the remaining \$545 is allocated to the spouse residing in the community receiving MLTC services, bringing such spouse’s income to \$845 per month.

Thus, Section 366c-2(a) of the Social Services Law violates federal law and is inconsistent with the intent of the Affordable Care Act.

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