

Memorandum in Opposition

ELDER LAW AND SPECIAL NEEDS SECTION

Elder #8

March 9, 2020

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THE RESTRICTIONS ON MEDICAID “SPOUSAL REFUSAL”

The 2019-2020 New York State Executive Budget for Health and Mental Hygiene, Article VII Legislation at Part G §1 would have replaced the current Social Services Law §366 subdivision 3(a). This is almost the identical proposal to eliminate “spousal refusal” for community based Medicaid that was made the year before and in many previous, no matter how dressed in more complex language it is, was made over many years in the past. We anticipate this proposal to be again made by the MRT II.

This proposal would amend Social Services Law §366 subdivision 3(a) to change the current language from “absence of such relative *or* the refusal or failure” to “absent from the applicant’s household, *and* fails or refuses....”.

Social Services Law §366-c, in compliance with federal law, already codifies spousal refusal for a “community spouse” which is defined to include the spouse of a person in a nursing facility or receiving care under a waiver or a managed long-term care (MLTC) plan. Therefore, the result is to exclude the following Medicaid applicants and recipients:

- (a) **Persons applying for Hospice Care who don’t enroll in a MLTC;**
- (b) **Parental refusal for seriously ill children who are not in a waiver program; and**
- (c) **Adults who rely on Medicaid for Acute and Primary Care.**

For these populations, the consequences will be devastating:

1. It will cause long-standing marriages to end in **divorce** or **separation**;
2. It will cause greater **institutionalization** in nursing homes of the ill spouse; 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 for community-based Medicaid.

ANALYSIS

New York State has a constitutional mandate to provide care and support to needy individuals. The Americans with Disabilities Act mandates that disabled individuals have access to services in the least restrictive and most integrated setting. Though Federal and State programs have been expanded to enable the aged and infirm to stay in their homes and receive care, the elimination of the right of “spousal refusal” for persons living in the community would create barriers to the receipt of crucial medical care, force couples to consider divorce and separation, and force disabled people into unnecessary and premature institutionalization.

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 \$23,100 and available income no greater than \$1,284 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 Division of the Budget’s projected savings for this proposal is \$5.9 million in 2020. We believe these savings estimates are incorrect and inflated for the reasons discussed below.

1. ELIMINATION OF SPOUSAL REFUSAL WOULD ENCOURAGE SEPARATION AND DIVORCE, AND FORCE ELDERLY SPOUSES INTO NURSING HOMES, EVEN IF STILL AVAILABLE FOR THOSE ENROLLED IN MLTC PLANS:

Even though members of MLTC plans and nursing homes would still be allowed to exercise “spousal refusal,”¹ the proposed change would still pose a barrier for seniors and

¹ The Affordable Care Act expanded the definition of “community spouse” to include not just spouses of nursing home residents but spouses of people enrolled in “waivers,” such as MLTC plans or the Traumatic Brain Injury waiver program. “Community spouses” are entitled to both “spousal impoverishment” protections and spousal refusal. Their income and resources may not be deemed available to a spouse in a nursing home or MLTC plan. This is the same as spousal refusal. See 42 U.S.C. §1396r-5(h)(1)(A); 42 U.S.C. §1396r-5(b)(1)(income); 42 U.S.C. §1396r-5(c)(4)(resources); Social Services Law §366-c. The

people with disabilities when they apply for Medicaid in order to enroll in MLTC plans. Moreover, many seniors and people with disabilities are excluded from MLTC and must access home care outside of MLTC plans. The wholesale repeal of spousal refusal will encourage divorce and separation, and encourage institutionalization, since federal law still mandates availability of “spousal refusal” in nursing homes. 42 U.S.C. §1396r-5(c)(3).

A. Limiting Spousal Refusal to people enrolled in MLTCs creates a catch-22 –Medicaid applications would be denied because of a spouse’s income or assets, even though such income or assets would be protected once the spouse is enrolled in MLTC.

The proposal would compound the existing gap in NYS policy which harms married people by delaying use of federal “spousal *impoverishment*” protections until after they are already enrolled in an MLTC plan. Now “spousal *refusal*” protections would also be delayed until after enrollment in an MLTC plan. This effectively denies eligibility to married individuals applying for Medicaid in order to enroll in MLTC plans, because of the community spouse’s income or assets, even if the community spouse’s income or assets would be protected once the ill spouse is enrolled in an MLTC plan. This catch-22 will inevitably cause unnecessary institutionalization, separation, and divorce.

Beginning in 2014, federal law required that all states offer “spousal impoverishment” protections to married persons receiving MLTC or other “waiver” services. This provision potentially removes the institutional bias that has long pervaded Medicaid long-term care services. Since the 1980s, 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 \$3,625.50 per month (\$3,216.50 for the “well” spouse and \$409 for the applicant), and combined assets as high as \$90,570 (\$74,820 for the “well” spouse and \$15,750 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

Further Consolidated Appropriations Act of 2020, 116 P.L. 94, 133 Stat. 2534, Division N, Sec. 204 extended these provisions allowing spousal impoverishment budgeting (by extending the definition of an institutional spouse) to May 23, 2020. The Further Consolidated Appropriations Act of 2020 also has a different provision called “Rule of Construction” which makes permanent allowing states to apply certain spousal budgeting rules to these community-based programs. Among these are the spousal income and resource deeming rules in 42 USC 1395r-5 which allows for spousal refusal. Therefore, NYS provisions for spousal refusal in MLTC programs can no longer be claimed to be inconsistent with federal law.

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 \$23,100, even though the applicant spouse is eligible for MLTC services if the couple’s combined assets do not exceed \$90,570. 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 an MLTC plan. Only after MLTC enrollment may the couple request the Medicaid agency to re-budget them with the spousal impoverishment protections – and, under this proposal, spousal refusal – which will allow them to keep their income and assets without any spend-down and without needing spousal refusal thereafter.

New York is implementing this federal law requirement in a way that defeats the legislative intent to remove the institutional bias. An individual who otherwise would be eligible with spousal impoverishment protections would be denied Medicaid and thus prevented from enrolling in MLTC. Only spousal refusal can prevent that perverse result, and make MLTC a true option to institutional care. As proposed, elimination of spousal refusal will again force married persons into nursing homes, in violation of the Americans with Disabilities Act as interpreted by the Supreme Court in *Olmstead* and other federal law.

B. Married individuals excluded from MLTC eligibility who need to access home care outside of MLTC will be forced into nursing homes, or separation, or divorce.

Not everyone who needs home care may access it through MLTC Plans. For married individuals excluded from MLTC, ending spousal refusal would cause Medicaid ineligibility for some married individuals who are unwilling or unable to separate from their spouse, and would cause other couples to separate or divorce to maintain eligibility. If the couple separates, it would result in a significant increase in the amount of home care necessary, because an in-home spouse would no longer be available to provide nighttime and other care. The crippling costs of home care for an elderly or disabled spouse are more than most middle-class families can endure. Removal of spousal refusal would 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 with dignity.

Those excluded from accessing home care through MLTC plans include:

(a) Persons enrolled in Home Hospice care who need additional Medicaid home care services to supplement the hospice nursing care.

(b) Those who, because of their disabilities, require assistance with “housekeeping” tasks such as laundry, shopping, cleaning, and meal preparation, though not assistance with their personal needs, such as bathing. “Housekeeping” assistance,

limited by state law to 8 hours per week, is an important preventive service, preventing falls and other accidents for those who cannot safely perform these tasks themselves.

Home care, for those excluded from MLTC plans, will likely be moved to fee-for-service Medicaid, where neither the protections of spousal impoverishment nor the ability to use spousal refusal are available. Without these protections, thousands of people will be denied Medicaid entirely, and get no care at all, which is likely to lead to falls and other accidents, a worsening health condition, and possible institutionalization – at a high cost. Other couples 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 – to make this proposal appears to run contrary to its own public policy objectives.

2. THE POTENTIAL FOR ABUSE OF SPOUSAL REFUSAL CAN BE MORE THAN ADEQUATELY 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 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.

3. SPOUSAL REFUSAL AND PARENTAL REFUSAL ARE NECESSARY FOR SICK CHILDREN AND SPOUSES WHO NEED MEDICAID OR THE MEDICARE SAVINGS PROGRAM FOR CRUCIAL MEDICAL CARE:

Because of the Affordable Care Act's expanded income limits – and absence of asset limits – for adults under 65 without Medicare, fewer married persons will need to use spousal refusal. But for seniors and people with disabilities on Medicare, the standard income and asset limits still apply, which are well below the federal poverty level. The Community Medicaid eligibility standards limit couples' resources to \$23,100 and income to \$1,284 per month. The reality of the high New York cost of living means that all the spouse's income and assets are necessary to meet the couple's living expenses, and prevent the spouse's own impoverishment and need for Medicaid.

A. Many seniors, including those on Medicare, rely on Medicaid for acute and primary care and to subsidize high Medicare costs through the Medicare Savings Program.

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 or inability to pay for care. Retention of the right of spousal refusal for this population will result in little cost to the state because Medicare remains the primary coverage. The Medicare Savings Program gives automatic eligibility for "Extra Help," the federal subsidy for Medicare Part D prescription drug coverage. That subsidy is fully paid by the federal government, at no cost to the state, and is critical for those facing exorbitant coinsurance and deductibles for specialty drugs for cancer, multiple sclerosis, and other chronic diseases.

B. Seriously ill children still need to access regular Medicaid.

Though many children are covered by government programs, a small number of children with cancer and other chronic diseases still need to access regular Medicaid. Child Health Plus and most employer-based health insurance do not cover nursing home stays, personal care services, hospice, private duty nursing, or non-emergency medical transportation. Current law permits refusal by any "legally responsible relative" including parents of minor children. Although some children with disabilities are covered by a waiver program, which excludes parents' income, many with serious illnesses do not qualify or are waiting to be accepted into a program. The Governor's proposed change will saddle these parents with potentially ruinous health care costs they cannot afford, or their child would be denied the services.

4. Spousal Refusal when one spouse is institutionalized is protected by federal law.

Recent newspaper articles have some members of the health care industry suggesting that MRT II consider eliminating the use of spousal refusal by nursing home recipients. Federal law guarantees the right of spousal refusal for spouses of nursing home residents. *See* 42 USC 1396r-5(c)(3). Elimination of this right for couples seeking to avoid institutionalization will lead to increased institutionalization at higher Medicaid costs. Moreover, the New York State legislature can not entertain a change to the allowance of spousal refusal for spouses of nursing home residents without a change to the federal law.

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