NEW YORK LEGAL ASSISTANCE GROUP

Preserve Protections that Prevent Impoverishment of Married Couples and Ensure Access to Health and Long Term Care for Vulnerable Spouses and Children

(2016-17 Budget - Article VII HMH, Part B, sections 3-4)

NYLAG opposes two changes proposed in the Governor's proposed 2016-2017 that will impoverish married couples where one spouse needs Medicaid, and deny Medicaid for children with severe illness. First, the Governor again proposes to limit "spousal and parental refusal" to situations where the parent lives apart from his sick child, or where a "well" spouse lives apart from or divorces an ill spouse. Second, the Governor proposes to reduce, for the first time ever, the spousal impoverishment "resource allowance" allowed when one spouse needs Medicaid for nursing home care, Managed Long Term Care, or other "waiver" programs. These cuts will cause impoverishment, lead to premature institutionalization and denial of critical Medicaid services for acute and long term care.

1. PRESERVE OR EXPAND – RATHER THAN REDUCE – THE SPOUSAL IMPOVERISHMENT RESOURCE ALLOWANCE

Congress enacted the federal "spousal impoverishment" protections in 1988 to prevent one spouse from becoming impoverished when the other spouse needs Medicaid to pay for nursing home care. The Affordable Care Act [ACA] expanded those protections to protect couples where one spouse is enrolled in a Managed Long Term Care plan.[i] This ACA provision at long last *potentially* removes the institutional bias that has long pervaded Medicaid long term care services – removing the financial incentive to institutionalize a spouse. The spousal protections provide a "well spouse" with some financial security, and can prevent her from needing to rely on Medicaid for her own medical or long term care.

States have an option of setting the resource allowance between a minimum floor of $23,844 and a ceiling of $119,220 of the couple's combined assets. The ceiling was originally $60,000 when the federal law was enacted in 1988, and has gradually increased by a statutory consumer price index adjustment to the current $119,220.[ii] New York elected the highest federally allowed resource allowance twenty years ago in 1995, when it was at $74,820 with the consumer price index adjustment. However, New York n*ever increased* it by the federal cost-of-living index, while in the last 20 years, the federal maximum resource allowance has increased to $119,220.

The formula under federal law provides that a spouse can keep the **greater** of:

1. the resource allowance as set by the state between $23,844 and $119,220 – New York's allowance has been $74,820 since 1995- OR
2. one-half of the couple's combined assets, up to $119,220.

Thirteen states including Massachusetts and California set the resource allowance at the highest level permitted - $119,220 as of 2015.[iii] If New York reduces the allowance as proposed, it will join 32 states with allowances at $25,000 or under, despite its high cost of living. See n 3.

The Governor's proposal will hurt couples with the *least* assets – between $23,500 and $150,000, while not affecting those with combined assets over $150,000. Here are examples of the disparate impact of the Governor's proposal on couples of more modest means:

- George and Martha have $47,000 in life savings. Before, Martha could keep **all** of these savings when George enrolls in an MLTC plan or enters a nursing home. Under the Governor's proposal, Martha could keep only **half** of their savings, or $23,500.
- Brad and Angelina have $238,000 in life savings. Before, Angelina could keep half of their combined savings -- $119,220 – when Brad enrolls in an MLTC plan or enters a nursing home. This will not change under Governor's proposal. She can still keep $119,220.
- Other examples:

Couple's combined assets	Amount of Assets Community Spouse May Keep		
	If allowance raised to federal maximum	Under Current NY Law	Under Gov's PROPOSED CHANGE
$30,000	$30,000	$30,000	$23,500
$47,000	$47,000	$47,000	$23,500
$75,000	$75,000	$75,000	$37,500
$119,220	$119,220	$75,000	$59,610
$150,000	$119,220	$75,000	$75,000
$238,000	$119,220	$119,000	$119,000
$350,000	$119,220	$119,220	$119,220

New York is well known to have one of the highest costs of living in the nation,[iv] which is why the legislature 20 years ago opted for the highest resource allowance permitted by federal law. Unfortunately, unlike states like Massachusetts, the state legislature did not enact a requirement to increase the allowance by the federal consumer price index, even though the costs of living have skyrocketed. If anything, New York should join Massachusetts,[v] California, and, as of 2010, sixteen other states to opt for the *highest* permitted allowance of $119,220, rather than reducing the allowance to only $23, 500. The inevitable result will be spouses unable to meet their high living costs facing potential eviction or homelessness, and spouses forced to resort to Medicaid because of depleted savings.

2. REJECT THE PROPOSED ELIMINATION OF THE SPOUSAL AND PARENTAL REFUSAL.

The Governor's proposed 2016-2017 budget will deny Medicaid to children with severe illness, or to low-income married seniors who need Medicaid to help with Medicare out-of-pocket costs or long-term care. Medicaid would be available ONLY if the parent lives apart from his sick child, or the "well" spouse lives apart from or divorces her ill spouse. NYLAG opposes the requirement that families split up in order to obtain Medicaid to these vulnerable groups. We question whether this cut will achieve the savings intended.

Since 2014, fewer married couples need to use spousal refusal where one spouse enrolls in a Managed Long Term Care (MLTC) plan in order to receive home care. This is because in 2014, "spousal impoverishment" protections first became available to married couples when one spouse is receiving MLTC services, as a result of the Affordable Care Act (ACA).[vi] The extension of "spousal impoverishment" protections to married persons receiving MLTC or other "waiver" services is an important tool to prevent unnecessary institutionalization and poverty. It eliminates the longstanding bias that allowed married spouses of nursing home residents to retain enough income and assets to live without impoverishment, but required spouses of home care recipients to live at the sub-poverty regular Medicaid levels.

However, there are critical gaps in these protections that continue to make spousal refusal essential.

First, New York State, in violation of federal guidance,[vii] refuses to authorize the spousal impoverishment protections at the time the Medicaid application is filed and approved. Eligibility is first evaluated under regular income and asset rules *without* the spousal impoverishment allowances, so that the application is REJECTED if a couple had $75,000 in assets (or $23,500 if Governor's proposal is enacted). The spouse MUST use Spousal Refusal in order to get Medicaid approved and enroll in MLTC. Only after the application is accepted and the spouse enrolls in an MLTC plan can they request a "re-budgeting" using the spousal impoverishment protections.[viii] Then, many couples become fully eligible without Spousal refusal. The State's insistence that spousal protections are available only "post-eligibility" is a barrier to MLTC enrollment, unless the spouse can do a "spousal refusal" for the initial application.

Similarly, without spousal impoverishment income protections, the same couple must use spousal refusal in order for the spouse to have Medicaid approved. Otherwise, a couple with combined income of $3,364 would be initially charged with an income "spend-down" of $2,200/month. Spousal refusal is essential to get the application accepted, and to allow the "sick spouse" to enroll in an MLTC plan. Only after MLTC enrollment may the couple request re-budgeting with the spousal impoverishment protections – which will allow them to keep their income and assets without any spend-down and without needing spousal refusal from then on.

Here is who is hurt by the Governor's proposal.

I. COUPLES TRYING TO AVOID NURSING HOME PLACEMENT FOR A SPOUSE WITH LONG-TERM CARE NEEDS.

The Governor proposes to eliminate spousal refusal to qualify for Medicaid in the community – but federal law guarantees the right of spousal refusal for nursing home care. So the Governor's proposal will force spouses to place their beloved spouse in a nursing home. This would defeat the whole purpose of the spousal impoverishment protections that are meant to end, rather than perpetuate, the institutional bias in Medicaid. 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.

- **Marie Z was only age 58 when she started showing signs of early Alzheimer's disease.** Her husband of nearly 40 years works full time. They had good health insurance through his employer – which costs the couple $1800/month, but it does not cover long term care. One of their daughters quit her job to care for her, but with Marie's round-the-clock needs they needed formal 24-hour home care. NYLAG assisted her in filing a Medicaid application in March 2015, with her husband filing a Spousal Refusal. It took over seven months until Medicaid was approved in August 2015, in part because Mrs. Z was so young – under age 65 -- that she could only qualify by being determined officially "disabled," which takes extra time. Finally, in October 2015, Marie enrolled in an MLTC plan. Without spousal refusal, she would have had to be placed in a nursing home – removed from her husband of 40 years and her Bronx home.

II. **CHILDREN WITH SEVERE ILLNESS**—The refusal law currently applies to any "legally responsible relative" including parents of minor children. There are no "spousal impoverishment- like" protections for children with chronic disabilities. While some are covered by a waivered program, which does not count parents' income, and others benefit from the Medicaid expansion under the ACA, there are still some children with serious illness who will be denied Medicaid without "parental refusal" even if their parents are neglectful or abusive

- **A Brooklyn mother of a severely autistic 2-year-old** was told in February 2015 she had to quit her new job as a teaching paraprofessional in order to qualify her daughter for Medicaid. With parental refusal, she will qualify.

- **A 7 year old child living in Manhattan** has a hearing impairment and requires an assistive device that is not covered by his father's employer insurance. Child Health Plus is not an option because of the father's employer insurance coverage. Mt. Sinai Hospital has assisted the child in obtaining Medicaid with parental refusal since the family cannot afford the cost of the device and their income is over the Medicaid level.

III. **PERSONS RECEIVING HOSPICE CARE AND OTHERS EXCLUDED FROM MLTC** – Terminally ill people enrolled in a home hospice and those who need help with housekeeping chores (personal care Level I) because of their disabilities are excluded from MLTC, and therefore must access Medicaid personal care through their local Medicaid programs. Since they are not in MLTC, they do not get spousal impoverishment protections, making spousal refusal even more critical. Yet the Governor's proposal would deny this protection.

IV. **MARRIED ADULTS WHO RELY ON MEDICAID FOR ACUTE AND PRIMARY CARE RATHER THAN LONG TERM CARE**—Married adults who need Medicaid for primary or acute medical care would be denied "spousal refusal" rights under this proposal, even if their spouses are abusive or neglectful. Because of the expanded income limits for adults under 65 under the Affordable Care Act, fewer married persons under age 65 will need to use spousal refusal. However, seniors on Medicare are still subject to the old income limit, which at $1209/month for a couple is *below* the Federal Poverty Line (FPL)($1311/month for a couple). For these seniors, as well as younger couples, Medicaid can be vital secondary insurance for severe illness. For seniors, there is little cost to the State, since most of their medical care is covered by Medicare.

- **Mrs. H, age 25, was newly diagnosed with cancer in November 2015**. Prior to her diagnosis she worked as a freelancer and was uninsured. Her husband works, with an annual salary of about $50,000,

but his employer does not offer health insurance. In November 2015 she was rushed to the emergency room of a private hospital and spent several days in intensive care. She is now receiving outpatient treatment at a NYC public hospital. Because of her husband's income, she was ineligible for Medicaid despite no longer being able to work. They faced tens or even hundreds of thousands of dollars in bills from her recent hospitalization as well as the cost of ongoing care. Private health insurance is unaffordable – especially now that she cannot work. NYLAG helped her apply for Medicaid using spousal refusal, and Medicaid was approved. Without spousal refusal, Mrs. H and her husband would suffer devastating financial consequences from her cancer.

- **Mrs. S, a Polish immigrant living in Brooklyn, became permanently disabled since having Stage 4 lymphoma**. While now doing well in remission, she cannot return to her low-wage work as an office cleaner. Her husband's earnings, while low, would still result in a high spend-down they could not afford. Thanks to spousal refusal, she was able to get Medicaid and pay for chemotherapy, transportation, and crutches. Spousal refusal not only prevented their impoverishment, but ensured continuity of cancer treatment, which is often disrupted because of complicated spend-down procedures.

V. MARRIED ADULTS WHO RELY ON MEDICAID TO HELP WITH MEDICARE OUT-OF-POCKET COSTS. Medicare recipients with incomes under 135% FPL rely on **Medicare Savings Programs** (**MSP**s) to help with Medicare out-of-pocket costs, saving them $104.90 per month in Part B premiums and qualifying them for "Extra Help" (the Part D Low Income Subsidy), which saves dual eligibles an average of $4,000 in prescription costs each year *at no cost to the State*. In fact, for individuals in "QI-1"-- one of the three MSP programs -- the *entire cost* is paid by the federal government, with *no state share*. Spousal refusal can qualify needy seniors and people with disabilities for MSPs. See Examples **D**.

- **Ms. K, a Korean immigrant living in Flushing**, is 76 years old has become permanently disabled since his advanced prostate cancer metastasized. One of his cancer medications costs $8,000 per month, even with Medicare Part D. He is eligible for the Medicare Savings Program if only his own Social Security income of $1369/month is counted, but his wife's Social Security of only $600/month puts him over the income limit. They have no savings. With spousal refusal, he qualifies for the Medicare Savings Program, which automatically qualifies him for Extra Help with Part D. In 2015, his Medicare Savings Program enrollment was mistakenly discontinued by NYC HRA. NYLAG was able to get it reinstated with advocacy. Without using spousal refusal, he could not afford the costly medications. New York pays NONE of the cost of the "Extra Help" subsidy for his prescriptions – it is fully paid by the federal government. New York only pays for a portion of the monthly Part B premium - a minimal cost to the state, but of immense value to Ms. K, since eligibility for the Medicare Savings Program automatically qualifies her for "Extra Help" with Part D.

ENDNOTES

[i] 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 to include all "medically needy" spouses including those in various home care programs.

[ii] 42 U.S.C. § 1396r-5(f)(2)and 1396r-5(g).

[iii] As of 2015, 13 States used the federal maximum, and 29 use the federal minimum. Krause Financial Services, State-Specific Resources, available at https://www.medicaidannuity.com/resources/state-resource/ (last visited 1/23/16). In 2010, 18 states used the maximum allowance and 25 used the minimum. "Access to Long-Term Services and Supports: A 50-State Survey of Medicaid Financial Eligibility Standards," AARP, Public Policy Institute (2010), pp. 22-23. Available at http://assets.aarp.org/rgcenter/ppi/ltc/i44-access-ltss_revised.pdf (last visited 1/23/16).

[iv] Mercer LLC rated New York City as having the highest cost of living of all U.S. cities in 2015, followed by Los Angeles and San Francisco. Mercer LLC, 2015 Cost of Living Rankings (June 2015), available at https://info.mercer.com/Cost-of-Living-Ranking-2015.html (last accessed Jan. 27, 2016 with free registration)

[v] Massachusetts Medicaid law, Chapter 118E, Section 21A (a)(1)(v), requires that MassHealth "establish the maximum community spouse resource allowance permissible under 42 U.S.C. Sec. 1396r5(f)(2)." In 2016 that amount set by CMS is $119,220.

[vi] See n. 1. The State DOH has implemented this through a series of directives – most recently GIS 14 MA/025 - Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act (PDF), dated Nov. 3, 2014, rescinds an earlier NYS DOH GIS 14 MA/015, issued August 5, 2014, and reinstates two even earlier directives, Pending further clarification from the federal CMS, "districts are to resume applying the policy provided in GIS 12 MA/013**,** "Spousal Impoverishment Budgeting with Post-Eligibility Rules for Individuals Participating in a Home and Community-Based Waiver Program" and NYS DOH GIS 13 MA/018, "Spousal Impoverishment and Transfer of Assets Rules for Certain Individuals Enrolled in Managed Long Term Care." These are all posted at http://www.health.ny.gov/health_care/medicaid/publications/index.htm.

[vii] CMS State Medicaid Director Letter No. 15-001, May 7, 2015, available at http://www.medicaid.gov/federal-policy-guidance/downloads/SMD050715.pdf (last accessed Jan. 28, 2016).

[viii] NYS DOH GIS 12 MA/013**,** "Spousal Impoverishment Budgeting with Post-Eligibility Rules for Individuals Participating in a Home and Community-Based Waiver Program," April 6, 2012, available at http://www.health.ny.gov/health_care/medicaid/publications/docs/gis/12ma013.pdf (last accessed Jan. 28, 2016)(was rescinded but then reinstated by NYS DOH GIS 14 MA/025, dated Nov. 3, 2014), available at http://www.health.ny.gov/health_care/medicaid/publications/pub2014gis.htm (last accessed Jan. 28, 2016).

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