S T A T E O F N E W Y O R K

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2011-2012 Regular Sessions

I N A S S E M B L Y

January 25, 2011

Introduced by M. of A. SCHIMMINGER -- Multi-Sponsored by -- M. of A. GIGLIO, HOOPER, MAGEE, N. RIVERA -- read once and referred to the Committee on Health

AN ACT to amend the social services law, in relation to expanding the asset transfer look-back period, disallowing certain asset shelters, eliminating spousal refusal, capping spousal impoverishment asset allowances, and eliminating the shielding of additional assets

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (a) of subdivision 3 of section 366 of the social services law, as amended by chapter 110 of the laws of 1971, is amended to read as follows:

(a) Medical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available to such applicant because of the absence of such relative [or] AND the refusal or failure of such ABSENT relative to provide the necessary care and assistance. In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three OF THIS CHAPTER and other applicable provisions of law.

S 2. Paragraph (d) of subdivision 5 of section 366 of the social services law, as added by chapter 170 of the laws of 1994, is amended to read as follows:

(d) For transfers made after August tenth, nineteen hundred ninety-three:

(1) (i) "assets" means all income and resources of an individual and of the individual's spouse, including income or resources to which the individual or the individual's spouse is entitled but which are not

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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received because of action by: the individual or the individual's spouse; a person with legal authority to act in place of or on behalf of the individual or the individual's spouse; a person acting at the direction or upon the request of the individual or the individual's spouse; or by a court or administrative body with legal authority to act in place of or on behalf of the individual or the individual's spouse or at the direction or upon the request of the individual or the individual's spouse.

(ii) "blind" has the same meaning given to such term in section 1614(a)(2) of the federal social [social] security act.

(iii) "disabled" has the same meaning given to such term in section 1614(a)(3) of the federal social security act.

(iv) "income" has the same meaning given to such term in section 1612 of the federal social security act.

(v) "resources" has the same meaning given to such term in section 1613 of the federal social security act, without regard, in the case of an institutionalized individual, to the exclusion provided for in subsection (a)(1) of such section.

(vi) "look-back period" means the thirty-six month period, or, in the case of payments from a trust or portions of a trust which are treated as assets disposed of by the individual pursuant to department regulations, the sixty-month period, immediately preceding the date that an institutionalized individual is both institutionalized and has applied for medical assistance, OR IN THE CASE OF A NON-INSTITUTIONALIZED INDIVIDUAL, THE DATE THAT SUCH NON-INSTITUTIONALIZED INDIVIDUAL APPLIES FOR MEDICAL ASSISTANCE COVERAGE OF LONG TERM CARE SERVICES; PROVIDED, HOWEVER, THAT THE LOOK-BACK PERIOD FOR ALL TYPES OF TRANSFERS SHALL BE SIXTY MONTHS IF THE COMMISSIONER OF HEALTH OBTAINS ALL NECESSARY APPROVALS UNDER FEDERAL LAW AND REGULATION TO IMPLEMENT SUCH A LOOK-BACK PERIOD; PROVIDED FURTHER THAT THE USE OF A SIXTY-MONTH LOOK-BACK PERIOD FOR ALL TYPES OF TRANSFERS SHALL CONTINUE ONLY IF AND FOR SO LONG AS THE USE OF SUCH A LOOK-BACK PERIOD DOES NOT PREVENT THE RECEIPT OF FEDERAL FINANCIAL PARTICIPATION UNDER THE MEDICAL ASSISTANCE PROGRAM; PROVIDED FURTHER THAT THE COMMISSIONER OF HEALTH SHALL SUBMIT SUCH WAIVER APPLICATIONS AND/OR STATE PLAN AMENDMENTS AS MAY BE NECESSARY TO OBTAIN APPROVAL TO IMPLEMENT A SIXTY-MONTH LOOK-BACK PERIOD FOR ALL TYPES OF TRANSFERS AND TO ENSURE CONTINUED FEDERAL FINANCIAL PARTICIPATION.

(vii) "institutionalized individual" means any individual who is an in-patient in a nursing facility, including an intermediate care facility for the mentally retarded, or who is an in-patient in a medical facility and is receiving a level of care provided in a nursing facility, or who is receiving care, services or supplies pursuant to a waiver granted pursuant to subsection (c) of section 1915 of the federal social security act.

(viii) "intermediate care facility for the mentally retarded" means a facility certified under article sixteen of the mental hygiene law and which has a valid agreement with the department for providing intermediate care facility services and receiving payment therefor under title XIX of the federal social security act.

(ix) "nursing facility" means a nursing home as defined by section twenty-eight hundred one of the public health law and an intermediate care facility for the mentally retarded.

(x) "nursing facility services" means nursing care and health related services provided in a nursing facility; a level of care provided in a hospital which is equivalent to the care which is provided in a nursing facility; and care, services or supplies provided pursuant to a waiver

granted pursuant to subsection (c) of section 1915 of the federal social security act.

(XI) "NON-INSTITUTIONALIZED INDIVIDUAL" MEANS AN INDIVIDUAL WHO IS NOT AN INSTITUTIONALIZED INDIVIDUAL, AS DEFINED IN CLAUSE (VII) OF THIS SUBPARAGRAPH.

(XII) "LONG TERM CARE SERVICES" MEANS HOME HEALTH CARE SERVICES, PERSONAL CARE SERVICES, ASSISTED LIVING PROGRAM SERVICES AND SUCH OTHER SERVICES FOR WHICH MEDICAL ASSISTANCE IS OTHERWISE AVAILABLE UNDER THIS CHAPTER WHICH ARE DESIGNATED AS LONG TERM CARE SERVICES IN THE REGULATIONS OF THE DEPARTMENT.

(2) The uncompensated value of an asset is the fair market value of such asset at the time of transfer, minus the amount of the compensation received in exchange for the asset.

(3) In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual or the individual's spouse for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services for the period of time specified in subparagraph four of this paragraph. IN DETERMINING THE MEDICAL ASSISTANCE ELIGIBILITY OF A NON-INSTITUTIONALIZED INDIVIDUAL, ANY TRANSFER OF AN ASSET BY THE INDIVIDUAL OR THE INDIVIDUAL'S SPOUSE FOR LESS THAN FAIR MARKET VALUE MADE WITHIN OR AFTER THE LOOK-BACK PERIOD SHALL RENDER THE INDIVIDUAL INELIGIBLE FOR LONG TERM CARE SERVICES FOR THE PERIOD OF TIME SPECIFIED IN SUBPARAGRAPH FOUR OF THIS PARAGRAPH. Notwithstanding the provisions of this subparagraph, an individual shall not be ineligible for services solely by reason of any such transfer to the extent that:

(i) [in the case of an institutionalized individual,] the asset transferred was a home and title to the home [as] WAS transferred to: (A) the spouse of the individual; or (B) a child of the individual who is under the age of twenty-one years or blind or disabled; or (C) IN THE CASE OF AN INSTITUTIONALIZED INDIVIDUAL, a sibling of the individual who has an equity interest in such home and who resided in such home for a period of at least one year immediately before the date the individual became an institutionalized individual; or (D) IN THE CASE OF AN INSTITUTIONALIZED INDIVIDUAL, a child of the individual who was residing in such home for a period of at least two years immediately before the date the individual became an institutionalized individual, and who provided care to the individual which permitted the individual to reside at home rather than in an institution or facility; or

(ii) the assets: (A) were transferred to the individual's spouse, or to another for the sole benefit of the individual's spouse; or (B) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse; or (C) were transferred to the individual's child who is blind or disabled, or to a trust established solely for the benefit of such child; or (D) were transferred to a trust established solely for the benefit of an individual under sixty-five years of age who is disabled; or

(iii) a satisfactory showing is made that: (A) the individual or the individual's spouse intended to dispose of the assets either at fair market value, or for other valuable consideration; or (B) the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or (C) all assets transferred for less than fair market value have been returned to the individual; or

(iv) denial of eligibility would cause an undue hardship, as determined pursuant to the regulations of the department in accordance with

criteria established by the secretary of the federal department of health and human services.

(4) (I) Any transfer made by an individual or the individual's spouse under subparagraph three of this paragraph shall cause the person to be ineligible for services for a period equal to the total, cumulative uncompensated value of all assets transferred during or after the look-back period, divided by the average monthly costs of nursing facility services provided to a private patient for a given period of time at the time of application, as determined pursuant to the regulations of the department. The period of ineligibility shall begin with the first day of the first month during or after which assets have been transferred for less than fair market value, and which does not occur in any other periods of ineligibility under this paragraph. For purposes of this subparagraph, the average monthly costs of nursing facility services to a private patient for a given period of time at the time of application shall be presumed to be one hundred twenty percent of the average medical assistance rate of payment as of the first day of January of each year for nursing facilities within the region wherein the applicant resides, as established pursuant to paragraph (b) of subdivision sixteen of section twenty-eight hundred seven-c of the public health law.

(II) NOTWITHSTANDING ANY PROVISION OF CLAUSE (I) OF THIS SUBPARAGRAPH TO THE CONTRARY, THE PERIOD OF INELIGIBILITY DESCRIBED THEREIN SHALL BEGIN ON THE FIRST DAY THE INDIVIDUAL IS RECEIVING SERVICES FOR WHICH MEDICAL ASSISTANCE COVERAGE WOULD BE AVAILABLE BUT FOR THE PROVISIONS OF SUBPARAGRAPH THREE OF THIS PARAGRAPH, AND WHICH DOES NOT OCCUR IN ANY OTHER PERIODS OF INELIGIBILITY UNDER THIS PARAGRAPH, IF THE COMMISSIONER OF HEALTH OBTAINS ALL NECESSARY APPROVALS UNDER FEDERAL LAW AND REGULATION TO IMPLEMENT SUCH A PERIOD OF INELIGIBILITY. THE USE OF SUCH A PERIOD OF INELIGIBILITY SHALL CONTINUE ONLY IF AND FOR SO LONG AS IT DOES NOT PREVENT THE RECEIPT OF FEDERAL FINANCIAL PARTICIPATION UNDER THE MEDICAL ASSISTANCE PROGRAM. THE COMMISSIONER OF HEALTH SHALL SUBMIT SUCH WAIVER APPLICATIONS AND/OR STATE PLAN AMENDMENTS AS MAY BE NECESSARY TO OBTAIN APPROVAL TO IMPLEMENT THE PERIOD OF INELIGIBILITY DESCRIBED IN THIS CLAUSE AND TO ENSURE CONTINUED FEDERAL FINANCIAL PARTICIPATION.

(5) In the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset, or the affected portion of the asset, shall be considered to be transferred by such individual when any action is taken, either by such individual or by any other person, that reduces or eliminates such individual's ownership or control of such asset.

(6) In the case of a trust established by the individual, as determined pursuant to the regulations of the department, any payment, other than a payment to or for the benefit of the individual, from a revocable trust is considered to be a transfer of assets by the individual and any payment, other than to or for the benefit of the individual, from the portion of an irrevocable trust which, under any circumstance, could be made available to the individual is considered to be a transfer of assets by the individual and, further, the value of any portion of an irrevocable trust from which no payment could be made to the individual under any circumstances is considered to be a transfer of assets by the individual for purposes of this section as of the date of establishment of the trust, or, if later, the date on which payment to the individual is foreclosed.

(7) IN THE CASE OF A TRANSFER BY AN INDIVIDUAL WHICH RESULTS IN A PERIOD OF INELIGIBILITY FOR SUCH INDIVIDUAL OR HIS OR HER SPOUSE, SUCH

PERIOD OF INELIGIBILITY WILL CONTINUE WITHOUT REGARD TO THE INDIVIDUAL'S BECOMING AN INSTITUTIONALIZED INDIVIDUAL IF THE TRANSFER WAS MADE WHILE THE INDIVIDUAL WAS A NON-INSTITUTIONALIZED INDIVIDUAL AND WITHOUT REGARD TO THE INDIVIDUAL'S BECOMING A NON-INSTITUTIONALIZED INDIVIDUAL IF THE TRANSFER WAS MADE WHILE THE INDIVIDUAL WAS AN INSTITUTIONALIZED INDIVIDUAL. IN NO EVENT SHALL THE TOTAL PERIOD OF INELIGIBILITY FOR LONG TERM CARE SERVICES AND NURSING FACILITY SERVICES RESULTING FROM THE SAME TRANSFER OF ASSETS EXCEED THE PERIOD CALCULATED PURSUANT TO SUBPARAGRAPH FOUR OF THIS PARAGRAPH.

S 3. Clause (B) of subparagraph (i) of paragraph (d) of subdivision 2 of section 366-c of the social services law, as amended by chapter 433 of the laws of 1997, is amended to read as follows:

(B) on and after January first, nineteen hundred ninety-five through June thirtieth, nineteen hundred ninety-nine, seventy-four thousand eight hundred twenty dollars or such greater amount as may be required under federal law; PROVIDED, HOWEVER, THAT SUCH AMOUNT SHALL NOT BE INCREASED OR ADJUSTED TO AN AMOUNT IN EXCESS OF THE ALLOWANCE PERMITTED UNDER THIS PARAGRAPH ON THE EFFECTIVE DATE OF THE CHAPTER OF THE LAWS OF TWO THOUSAND ELEVEN THAT AMENDED THIS CLAUSE;

S 4. Paragraph (b) of subdivision 5 of section 366-c of the social services law, as added by chapter 558 of the laws of 1989, is amended to read as follows:

(b) An institutionalized spouse shall not be ineligible for medical assistance by reason of excess resources determined under paragraph (a) of this subdivision, if (I) the institutionalized spouse executes an assignment of support from the community spouse in favor of the social services district and the department, or the institutionalized spouse is unable to execute such assignment due to physical or mental impairment, [or] AND (II) to deny assistance would create an undue hardship, as defined by the commissioner.

S 5. Section four of this act shall not take effect unless and until the commissioner of health receives all necessary approvals under federal law and regulation to implement its provisions, and provided that such provisions do not prevent the receipt of federal financial participation under the medical assistance program. The commissioner of health shall submit such waiver applications and/or state plan amendments as may be necessary to obtain such approvals and to ensure continued federal financial participation.

S 6. The commissioner of health is authorized to promulgate or adopt any rules or regulations necessary to implement the provisions of this act and any procedures, forms, or instructions necessary for such implementation may be adopted and issued on or after the effective date of this act. Notwithstanding any inconsistent provision of the state administrative procedure act or any other provision of law, rule or regulation, the commissioner of health is authorized to adopt or amend or promulgate on an emergency basis any regulation he or she determines necessary to implement any provision of this act on its effective date.

S 7. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

S 8. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2011; provided that sections one through five of this act shall take effect July 1,

2011; and provided further that the commissioner of health shall notify the legislative bill drafting commission upon the occurrence of the approvals required under section five of this act in order that the commission may maintain an accurate and timely effective data base for the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law.