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February 29, 2015

The Honorable Marilyn Moore
The Honorable Catherine F. Abercrombie
Human Services Committee Co-Chairs
Legislative Office Building Room 2000
Hartford, CT 06106-1519

Re: Raised Bill 5250 and Its Violation of Federal Law.

Dear Senator Moore and Representative Abercrombie:

I submit this written testimony in opposition of Raised Bill 5250 (herein also “the Bill”) on behalf of the Elder Law Section of the Connecticut Bar Association. My Opposition focuses on the following aspects of the Bill:

1. The proposed revision to Connecticut General Statute (herein “C.G.S.”) §17b-81 is in violation of Federal Medicaid Law; and
2. The proposed revision to C.G.S. §17b-81 will cause spousal impoverishment.

I. THE PROPOSED REVISION TO C.G.S. §17b-81 VIOLATES FEDERAL LAW.

The Bill would amend C.G.S. §17b-81 to require that non-taxable annuity income received by the spouse (“Community Spouse”) of a Medicaid Recipient (“Institutionalized Spouse”) be added to the Community Spouse’s taxable income to determine the amount the spouse is required to contribute toward the Institutionalized Spouse’s cost of care. The result would be a violation of federal law and an unfortunate trend toward spousal poverty and possible divorce.

1. Raised Bill 5250 Violates Federal Statutory and Case Law.

The Medicare Catastrophic Coverage Act of 1988 (“MCCA”) sets forth a framework to prevent spousal impoverishment under the Medicaid rules. Specifically, MCCA exempts certain assets and prohibits the deeming of spousal income in determining financial eligibility for Medicaid. Bill 5250 conflicts with the MCCA rule that prohibits the deeming of the Community Spouse’s income. (*See* 42 U.S.C. § 1396r-5(b)(1)). In other words, once the Institutionalized Spouse is eligible for Medicaid, a state may not count the Community Spouse’s income in determining Medicaid eligibility. Bill 5250 would do just this in requiring a contribution of non-taxable annuity payments.

The intent of Bill 5250 is to circumvent the Second Circuit Court of Appeals ruling in *Lopes v. Department of Social Services*, 696 F3d 180 (2012). In *Lopes*, the Department of Social Services (“DSS”) counted a Community Spouse’s monthly non-assignable annuity payment as an asset and denied the Medicaid application. The Federal District Court held that DSS was prohibited from treating annuity income as an available asset in determining Medicaid eligibility. The DSS appealed this decision and the Second Circuit Court of Appeals affirmed, holding that the DSS regulation was more restrictive than federal law. Since DSS may no longer treat spousal annuity income as available for Medicaid, it has proposed Bill 5250 in an attempt to do an end-run around the *Lopes* decision. The DSS must continue to abide by the *Lopes* holding; passage of Bill 5250 would provide DSS with an unlawful means to dismiss it.

2. Raised Bill 5250 Will Cause Spousal Impoverishment.

In Commissioner Bremby’s testimony supporting Bill 5250, he characterizes the use of annuity income as an “inequitable cost shift to the Medicaid program.” The inequity is not a “cost shift,” it is the financial sacrifice spouses make in reducing their assets to a maximum of \$119,220. Additionally, spouses often lose most or all of the Institutionalized Spouse’s income to the nursing home, where it becomes a co-pay known as applied income. The use of immediate annuities provides spouses with income replacement.

In my practice, the typical clients who purchase immediate annuities in conjunction with a spousal Medicaid application have modest assets. They struggle with the emotional trauma of losing a spouse to a long-term or permanent convalescence and are terrified at the prospect of financial ruin. The ability to retain annuity income provides them with security and the hope that they may continue to pay for the upkeep of their home—where they have usually lived their entire adult lives. If their annuity payments become a contribution toward their spouses’ care, there is a genuine threat of spousal impoverishment; this is exactly what MCCA was promulgated to prevent.

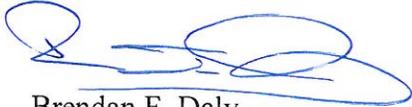
3. From a Policy Perspective, Bill 5250 Promotes An Absurd Result.

Our society provides various incentives, from taxes to other aspects of daily life that promote and cultivate marriage. The Bill could produce the absurd result of promoting married couples, some of whom have been married for decades, to divorce so they can avoid becoming financially destitute as a result of Bill 5250.

II. CONCLUSION:

Raised Bill 5250 contravenes Federal statutory and case law and would cast aside one of the most vulnerable sector of our population—spouses of elderly nursing facility residents—in a disheartening effort by DSS to disregard the Court’s directive in *Lopes*. I request that you oppose the Bill.

Respectfully Submitted,



Brendan F. Daly