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November 17, 2015

Senator Al Franken  
United States Senate  
309 Hart Senate Office Building  
Washington, D.C. 20510

**RE: Request for Assistance with CMS on Issue Affecting Minnesotans with Disabilities  
who are Married and Need Community Support Services**

Dear Senator Franken:

I am contacting you to request your assistance with Minnesota's request to the Center for Medicare and Medicaid Services (CMS) for approval to continue to use a favorable Medicaid financial eligibility policy for married couples, one of whom is disabled and needs Home and Community-Based Services waivers (HCBS) due to a disabling medical condition such as Multiple Sclerosis (MS) or Amyotrophic Lateral Sclerosis (ALS) or a catastrophic injury such as a traumatic brain injury.

### **Background**

This issue is quite complicated because it involves financial eligibility rules developed nearly 30 years ago for senior couples to protect some income and savings for the community spouse when one spouse enters a nursing facility. Since that time, states have had an option to apply those rules, called "spousal anti-improvement rules" to married persons with disabilities who qualify for nursing facility care but instead choose to live at home using home and community-based services (HCBS) waivers. Minnesota did not adopt the option of using spousal anti-improvement rules for married persons with disabilities under age 65. Instead, our state has applied a different financial eligibility policy, more tailored to the working-age family under age 65 years old.<sup>1</sup> Starting in 2014, Section 2404 of the Affordable Care Act (ACA 2404) changed the state option to a *requirement* for all states when determining Medicaid financial eligibility under an HCBS waiver for married persons of any age. While this ACA provision provides financial relief for persons with disabilities or who are elderly in some other states,

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<sup>1</sup> Minnesota does use the spousal anti-improvement rules for those over age 65 participating in the HCBS waiver program called the Elderly Waiver.

imposing these rules in Minnesota on married persons with a disability will have harsh and destabilizing consequences for them and their families. We have been told that Minnesota is the only state with this more favorable policy in the country, further complicating the effort with CMS.

### **Current Status**

Despite the Minnesota Department of Human Services' (DHS) efforts to demonstrate to CMS that Minnesota's policy is a better fit for working-age families affected by disability, CMS is poised to require our state to comply despite the harsh results which include:

- the loss of Medicaid coverage for some spouses with disabilities now relying on HCBS waivers to live at home with their families;
- families losing many thousands of dollars in savings, including the 10% penalty and tax consequences for cashing in retirement accounts early;
- divorce for some and
- putting the family's home and their children's future educations at risk.

We seek your help to protect these families and allow them to continue under Minnesota's current "exemption from or waiver of spousal deeming rules" rather than imposing the spousal anti-impoverishment rules.

Under the "exemption from spousal deeming," Minnesota uses regular institutional rules to disregard a spouse's income and assets in the eligibility determination under 42 C.F.R. § 435.217. We support our state's effort to continue its current "exemption from spousal deeming" policy because it is more advantageous for most people with disabilities under age 65 than the spousal anti-impoverishment protections. It appears that CMS is pressuring Minnesota to implement the anti-spousal impoverishment rules despite the fact that this will hurt the very group the ACA provision was intended to help.

In 2013, the Minnesota Legislature adopted a provision, supported by disability advocacy groups, to require DHS to request a waiver from CMS to continue with current policy. The Minnesota DHS submitted an 1115 Medicaid Demonstration waiver request to CMS June 30, 2014. We have recently learned that CMS has said they will not consider Minnesota's 1115 waiver or other technical grounds provided by DHS as a basis for our state to be allowed to continue with its more favorable policy for working-age married persons with a disability.

We do not yet have an estimate of the number of persons affected, but DHS estimated there are about 1,400 married persons with a disability using HCBS waivers. Further, they estimated that only a small percentage of those married individuals have a spouse who has been able to save for the couple's children or their own retirement and would be hurt by having to divide their assets.

## **Reasons Minnesota Should Be Allowed To Maintain Its Current Policy**

Here are some important reasons that Minnesota should not be required to impose the spousal impoverishment rules on married couples under age 65 with one spouse who needs HCBS:

1. **Loss of Medicaid Coverage**  
Some current participants will lose Medical Assistance (MA) coverage because of the change in the way assets are treated.<sup>2</sup> Loss of health coverage is contrary to other ACA provisions and certainly to the ACA's overall purpose to expand, not contract health coverage.
2. **Families Relied on Current Policy Over Many Years**  
Some married couples will face very difficult financial and personal decisions on how to cope with a new set of rules years after they built their lives on our state's current policy for HCBS waiver eligibility.
3. **Forcing Financial and Personal Changes on Families Already Under Significant Stress Due to Disability is Unreasonably Harsh**  
It is extremely harsh and unreasonable to force families who are already dealing with very difficult circumstances due to a catastrophic accident or very serious deteriorating health conditions such as Amyotrophic Lateral Sclerosis (ALS) or progressive Multiple Sclerosis (MS) to face the loss of family savings for their children's future or for the non-assisted spouse's retirement. To require cashing in one's retirement savings before retirement will be very costly in terms of taxes, the 10% penalty and depletion of the non-disabled spouse's savings for the couples' children's future. Some fear their only option is to divorce to protect their families' future. Having a family and living in one's own home are cherished community values which should not be burdened for persons with disabilities in Minnesota because our state uses different financial rules which are better suited for many working-age families in these circumstances than the spousal anti-impoverishment rules developed for the elderly.
4. **Excess Administrative Processes and Costs Would Be Required to Comply**  
The administrative processes surrounding such a major change for the families affected will be daunting. Since the spousal anti-impoverishment rules are imposed upon initial eligibility, will each family have to reconstruct their finances back to the point of initial HCBS waiver eligibility? For some that will be two decades or more in the past. It would be very unfair not to allow families to use the initial eligibility date if they choose, since some non-assisted spouses

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<sup>2</sup> If the non-assisted spouse has savings, the HCBS spouse will have the assets from their spouse attributed to them under a formula which allows the non-assisted spouse to have no more than \$33,851 or one-half of all assets up to \$119,220. The HCBS spouse will be terminated from Medicaid coverage if the attributed assets are more than \$3,000.

have been working and saving for their children's college or their own retirement over many years and would be required to make disadvantageous financial decisions or lose MA coverage. Also, families will need a long notice period, solid information on the impact of the spousal anti- impoverishment rules on each family's finances and time to seek legal and financial advice about what to do for their family's circumstances.

**5. Minnesota's Current Policy Accomplishes the Purpose of the ACA Provision**

CMS is rigidly interpreting the ACA provision in question rather than examining Minnesota's policy to understand whether the ACA's purpose to improve the financial circumstances for married couples who need HSBS waivers is met. As DHS staff have made clear to CMS, our state's policy is more favorable for working-age families than the ACA provision, and thus, the purpose of the ACA provision is accomplished with Minnesota's unique policy.

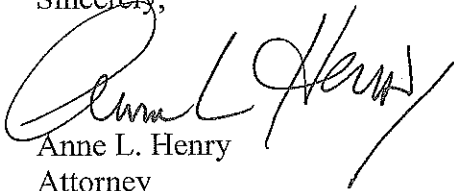
**6. ACA Section 2404 is Temporary**

The ACA provision which imposes spousal impoverishment rules for participants in HCBS waivers expires at the end of 2019. Congress will have to revisit this matter before then and decide to extend it, change it or let it expire. Given the short timeframe until expiration of the provision, families should not be forced to make such significant and difficult changes in their lives. Minnesota should be allowed to continue its current policy and work with CMS and our Congressional delegation on solutions to this problem.

We are working with individuals and disability advocacy groups concerned about this very unfortunate application of an ACA provision meant to help persons with disabilities not to hurt them. We are most willing to meet with you and your staff to further explain this difficult situation.

Thank you.

Sincerely,



Anne L. Henry  
Attorney

ALH:nb

cc: Lauren Gilchrist