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November 17, 2015

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Re: ACA Spousal Deeming – Medical Assistance Waivered Programs, Under Age 65

Dear Anne,

I appreciate your advocacy opposing the ACA requirement of spousal deeming to Minnesota's waived programs for married persons with disabilities under age 65. You provided MDHS Commissioner Lucinda Jesson with a substantive summary of the effects a change to spousal impoverishment rules would have on the disability community. I would like to build on your comments from the vantage point of a special needs and elder law attorney with more than twenty years of experience in this area.

I have worked extensively with the waived programs for married persons with disabilities. Minnesota's long-standing policy of insulating a family from the harsh economic costs of a long-term disability are laudable and essential. In addition to the points you have already made, I have the following concerns regarding implementation of the federal spousal impoverishment rules to married persons under age 65 on waived programs:

Spousal Abandonment: The well spouse generally takes care of the children, maintains the home, and works full time. In addition, the well spouse meets the care needs of the ill spouse in the morning, coming home in many instances over lunch, and resuming responsibilities throughout the evening and overnight. The well spouse has an incentive in the current system to meet these extensive and grueling demands because of hope. Hope that the family can survive despite the devastating illness and long term care expenses incurred by the ill spouse. When a well spouse can work and save or pay on a mortgage or purchase clothing and food for the children because of the no deeming rules, the family stays intact. Take away this incentive, and I see a host of devastating issues arising.

The ill spouse loses all informal care giving as the well spouse divorces the ill spouse and receives custody of the children. All care giving becomes the responsibility of the State. In most instances, the ill spouse needs 24-hour care. The only program that permits this level of care is long term care in a nursing home. This is contrary to the objectives of Olmstead for younger persons with disabilities. The family dynamics are fragile enough and this will be the last straw for some families.

I know this first hand from the reaction of clients to a previous onerous policy change involving married couples. When the state passed a law requiring contribution from the well spouse's income towards the ill spouse's cost of care, well spouses initiated divorces. They had reached their breaking point. Thankfully, that law has been repealed and it immediately reduced the number of persons I saw in my practice who felt they had no choice but to divorce.

Income Taxes and Penalties on Retirement Savings: IRAs and 401(k)s are the main form of savings for working families. With the no spousal deeming rules, a well spouse's retirement assets are not considered in determining the ill spouse's financial eligibility. With spousal impoverishment rules applied, it is my experience that the well spouse in many instances would have to cash out some or all retirement assets as part of an asset reduction. Under age 59 ½, the well spouse will not only have significant income taxes to pay upon cash out, but there will be a 10% penalty applied. Years of hard work and saving for the future will evaporate. The well spouse will be extremely vulnerable in the future due to the inability to save for retirement and losses to income taxes and penalties. At least the ten percent penalty was avoidable when spousal impoverishment only applied to persons over 65. This is not the case when these rules are applied to a much younger population. Minnesota also does not exempt retirement assets in determining financial eligibility which some states do in applying the spousal impoverishment rules. Divorce is the only viable option to keep earning power and retirement assets intact.

I also fear if I counsel a couple on the consequences to the well spouse's retirement that they will leave my office discouraged and decide not to seek help for the ill spouse. This vulnerable population will become even more vulnerable as families make very difficult financial decisions out of desperation. I expect ill spouses will decide to forego services to save money for the preservation of the family unit. Married persons with disabilities should not be put in this position.

No Secondary Source for Payment of Expenses/Reduced Quality of Life: With a well spouse working and assets preserved by the no deeming rules, the well spouse pays for many needs of the ill spouse. Again, with assets mandatorily reduced as part of spousal impoverishment, this is not likely to occur. Unlike an older couple where they are near the end of their lives and a well spouse has a limited time to live, a younger well spouse is faced with using the very limited resources to pay for his or her own future and the children's. There are significantly greater pressures not to support the ill spouse with the remaining limited assets. Either the state will have to pick up those expenses or the ill spouse will be left without.

Loss of Stability and Supports for Children: The consequences for children has also been neglected in most of the analysis on this issue. Children have no protections outside of a very small Social Security benefit (if the ill spouse even had a sufficient work history). When the well spouse loses his or her savings to an asset reduction to qualify the ill spouse for benefits, the well spouse will not have money to pay for necessities for the children. I understand it costs approximately \$250,000 to raise a child to adulthood. Many ill spouses have adult onset illnesses that have robbed the family of earning power and normalcy, and now their stability will be further undermined. Unlike persons over 65 whose houses are paid for, most young families have fully-

encumbered homes. If the well spouse has to reduce assets, the safety net disappears to meet housing needs for the family and other basic necessities.

Spousal impoverishment income spenddown rules only allow an ill spouse to deduct very specific items, such as medical insurance premiums. The deductions from the ill parent's income for child support is limited to \$250 which is wholly insufficient. There is also no sufficient family allowance available to the children. These rules were developed for an elderly population, not for persons with disabilities raising families.

I anticipate health insurance funding will be adversely impacted as well. Health savings accounts are considered available assets. If a well spouse must count an HSA towards a resource allowance and use the HSA to assist with payment of medical expenses for the ill spouse, the family does not have an incentive to save within an HSA and may not be able to pay for health care for a well spouse or children.

There are so many scenarios for disrupting family stability when applying these rules to younger couples. Policies must maintain incentives, such as no spousal deeming, for families to remain intact while coping with tragedy and hardship.

Federal Policy Inconsistencies: The ACA expanded Medicaid to allow a married sole provider who loses his or her income source to retain all assets and receive health insurance through the MA expansion program, but if that same person happens to need long term care services, the family will have to reduce assets to spousal impoverishment limits.

I also note an inconsistency in that there is no collection for Medical Assistance paid on behalf of a person under 55 and yet spousal deeming will force younger couples to reduce their assets to spousal impoverish limits in order to receive assistance.

Rules intended for an elderly population need to be much more carefully evaluated before imposing them on a younger, married and disabled population. Medicaid laws are designed to allow states to be more liberal in their benefits and Minnesota should be supported in its initiative to maintain working programs that support community integration and families. Minnesota's waived programs that do not require spousal deeming keep families together, ill spouses cared for, children supported, and well spouses with incentives to work and save.

CMS just issued its letter requiring all states to come into compliance with the spousal impoverishment rules. There has been at least a two year delay in implementing this provision of the ACA. In another two years, Congress must revisit the federal funding for home- and community-based programs with expiration of the ACA in the following year. Minnesota should not be forced to re-tool existing, successful waiver programs when it is a shining example of what is possible to assist persons with disabilities in community-based settings. The re-tooling alone will take significant funds away from servicing the disability community. Minnesota will have to re-tool yet again two years later? More losses for the disability community. Does CMS really want to hamstring one of the most aggressive state-supporters of the ACA? Given the short time

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before Congress must revisit the funding of community-based programs, CMS should delay compliance with the spousal impoverishment rules for Minnesota. It has the discretion and should do so where human suffering is the cost.

This rule change will have a profound, adverse impact on married persons with disabilities. CMS failure to delay compliance with the ACA or to permit a variance under a Section 1115 waiver would be a travesty. I am available to respond further to questions regarding the impact of spousal deeming on married persons with disabilities.

Very truly yours,



Cathryn D. Reher
Attorney at Law

CDR:kh

cc: Lauren Gilchrist, Special Advisor to Governor Mark Dayton
Senator Amy Klobuchar
Senator Alan Franken
House Representative Betty McCollum
House Representative Keith Ellison
Minnesota Department of Human Services Commissioner Lucinda Jesson
Julian Zweber, Legislative Liaison, Elder Law Section, Minnesota State Bar Association
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