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REPORT BY THE COMMITTEE ON LEGAL PROBLEMS OF THE AGING REGARDING HOME AND COMMUNITY-BASED MEDICAID WAIVER SERVICES

The New York City Bar Association urges the Centers for Medicare & Medicaid Services (CMS) to promptly reverse a recent policy change that could impoverish thousands of elderly and disabled people who receive Home and Community-Based (HCBS) Medicaid waiver services pursuant to section 1915(c) of the Social Security Act. The issue is urgent because CMS has set a deadline of March 1, 2009, for New York State to comply with the new policy. This provision involves the federal "spousal impoverishment protections," which, since they were enacted in 1988,[1] have protected not only spouses of nursing home residents from impoverishment, but also spouses of participants in HCBS waiver programs in those states that choose to exercise the federal option.[2]

Congress enacted the spousal impoverishment protections in 1988 to protect "community" spouses, usually women, of patients who had been admitted to nursing homes. Under previous law, in order to obtain Medicaid funding for a spouse's nursing home care, the spouse who remained at home was permitted virtually no income and resources to live on. Many were practically starving; others sought divorces in order to escape the crushing financial burden. The new legislation permitted community spouses a reasonable level of income and resources to live on while still permitting Medicaid funding for the nursing home resident.

An important sidelight of this legislation is that it permitted states to budget couples on home-care waiver programs under these same income and asset rules, giving these couples a much-needed financial cushion. For twenty years, New York has applied this option, and this has benefited thousands of couples who have reaped the benefits of home-based care. Now CMS has chosen to eliminate the option, saying that home-based couples can no longer benefit from this more generous budgeting technique. In New York alone, thousands of couples face a terrible choice: impoverishment or placing the ill spouse in a nursing home to retain the budget benefit.

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1 (1) The term "institutionalized spouse" means an individual who (a) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [42 USCS § 1396a(a)(10)(A)(ii)(VI)], and (b) is married to a spouse who is not in a medical institution or nursing facility … 42 USC §1396r-5(h)(1)(A). The reference in subparagraph (1)(A) is to home and community based waiver programs including 1915(c) waivers, which is the type of waiver used in the New York programs at issue here.

2 All community spouses [CS] of institutionalized Medicaid recipients ["institutionalized spouse" or "IS"] are entitled to sufficient income from the IS that would supplement the income of the CS up to the minimum monthly maintenance needs allowance ["MMMNA"]. 42 U.S.C. § 1396r-5, Social Security Act § 1924. The allowance from the IS is called the "community spouse monthly income allowance" (CSMIA). 42 U.S.C. § 1396r-5(d)(2). New York's MMMNA in 2008 is $2610, the maximum allowed under federal law.

Ironically, this change in policy could have the unintended effect of increasing Medicaid costs, as the services for patients who choose to go to nursing homes will cost more than the home-care services. It also flies in the face of the very policies CMS is actively promoting nationwide, to provide services in the community rather than in institutions.

We believe CMS's abrupt reversal in spousal impoverishment policy is misguided and fraught with unintended consequences. Reinstatement of the federal policy *status quo ante* – the policy of allowing the protections in waivers that existed for twenty years– will protect not only these thousands of elderly couples, but hundreds or thousands more younger people with disabilities who have already been deprived of these protections in New York . CMS first applied its reversal of longstanding policy when, in 2005, New York sought approval for its new Nursing Home Transition & Diversion Waiver, which will provide services to enable 5000 residents to leave nursing homes or prevent their institutionalization.[3] Approval of this waiver was refused by CMS until New York State amended its state law in 2007 to eliminate spousal impoverishment protections in the waiver.[4] The same sequence of events occurred when the Traumatic Brain Injury (TBI) waiver was up for renewal on March 31, 2008. Again, the State reluctantly eliminated spousal impoverishment protections in the waiver, a change which just went into effect on September 1, 2008.[5] Already, married people with severe brain injuries who desperately need these services have sought legal assistance when informed that their spouses will not be able to retain all of the couple's income to meet their living expenses – most of this income must be paid toward the cost of the waiver services.

The New York City Bar urges CMS to restore its prior longstanding policy and reverse denial of "spousal impoverishment" protections to people receiving HCBS waiver services.

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3 New York Social Services Law § 366, subd. 6-a.

4 Soc. Serv. L. § 366-c, subd. 4, amended L 2007, ch 58, § 57 (Part C), eff. April 9, 2007, deemed eff. on and after April 1, 2007 and expires and repealed by sunset on March 31, 2010

5 In both the 2007 and 2008 amendments of state law to conform to CMS' demand, the drafters wisely included language that would ensure that the spousal protections were being repealed for the NHTDW and TBI waivers only "to the extent required by federal law." Soc. Serv. L. § 366-c, subd. 4. Thus if the Obama Administration reinstates the federal interpretation *status quo ante* -- before the Bush Administration's unwarranted change – then these protections will automatically be reinstated in all three waiver programs in New York, with no further state legislative action required.