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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

16 **PATRICK KELLEY and MATTHEW**
17 **REED, by and through his guardian ad**
18 **litem, VICKI REED, on behalf of**
19 **themselves and all others similarly situated,**

20 **Petitioners/Plaintiffs,**

21 **v.**

22 **JENNIFER KENT, in her official capacity**
23 **as Director of the California Department of**
24 **Health Care Services and the**
25 **CALIFORNIA DEPARTMENT OF**
26 **HEALTH CARE SERVICES,**

27 **Respondents/Defendants.**

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Superior Court of California
County of Los Angeles

JUL 06 2017

Sherri R. Carter, Executive Officer/Clerk
By M. Soto, Deputy
Moses Soto

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CASE NO.

BS 170173

CLASS ACTION

VERIFIED PETITION FOR WRIT OF
MANDATE (CODE CIV. PROC. § 1085);
CLASS ACTION COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

JUSTICE IN AGING

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1 Petitioners and plaintiffs Patrick Kelley and Matthew Reed (represented by his wife, Vicki
2 Reed, as guardian ad litem) ("Petitioners") hereby submit this verified petition for writ of
3 mandate under Code of Civil Procedure § 1085 and class action complaint for injunctive and
4 declaratory relief on behalf of themselves and all others similarly situated (together with
5 Petitioners, "Plaintiffs") against and directed to respondents and defendants California
6 Department of Health Care Services and its Director Jennifer Kent ("Respondents").

7 INTRODUCTION

8 1. Plaintiffs are married older adults of limited income and resources who have
9 disabilities caused by significant medical conditions. Because California has failed to implement
10 the spousal impoverishment protection mandated by the federal Medicaid Act, Plaintiffs have
11 limited or no access to needed home and community-based care. They now face the difficult
12 choice of: forgoing the home care altogether; being unnecessarily institutionalized, at a high cost
13 to the state; or impoverishing their spouse by forcing them to pay for home care out-of-pocket.

14 2. Respondents California Department of Health Care Services and its Director
15 Jennifer Kent administer the Medicaid program in California ("Medi-Cal"). They have refused to
16 implement the federal Medicaid Act's mandatory spousal impoverishment protection applicable
17 to persons eligible for Medi-Cal-funded home and community-based services ("HCBS")
18 programs. The Department of Health Care Services' failure to follow the law and implement the
19 spousal impoverishment protection places Petitioners and many other married couples at serious
20 risk of costly and unnecessary institutionalization. Ultimately, Respondents are hurting and
21 discriminating against one of California's most vulnerable populations.

22 3. Petitioners bring this petition for writ of mandate and class action complaint for
23 injunctive and declaratory relief to compel Respondents to do what they have been required to do
24 under federal Medicaid law since January 1, 2014, but have still not done: apply the expanded
25 spousal impoverishment protection to persons eligible for home and community-based services
26 programs. Because of Respondents' refusal to enforce this mandate, Plaintiffs are unable to
27 access critical Medi-Cal covered home and community-based services and therefore face an
28 imminent risk of harm, including unnecessary institutionalization, hospitalization, and/or injury.

DM_US 83035310-1.099891.0012

VERIFIED PETITION FOR WRIT OF MANDATE (CODE CIV. PROC. § 1085);
CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

PARTIES

4. Petitioner Patrick Kelley resides in Los Angeles, California. Mr. Kelley is a married 67-year-old man with multiple sclerosis. Because of his disabilities and medical conditions that limit his activities of daily living, Mr. Kelley should be eligible for medical assistance for HCBS. Mr. Kelley is currently on the waitlist for the Nursing Facility/Acute Hospital (“NF/AH”) Waiver services program

5. In September 2016, Mr. Kelley, through his wife, applied for Medi-Cal and requested that Respondents apply the expanded spousal impoverishment protection to his case. Mr. Kelley would qualify for Medi-Cal assistance if Respondents applied the expanded spousal impoverishment protection. However, because Respondents refuse to implement the expanded spousal impoverishment protection in making their Medi-Cal eligibility determinations, Respondents denied Mr. Kelley’s Medi-Cal application. As a result of this denial, Mr. Kelley has had to drain his and his wife’s limited savings to pay for the community-based medical care that he needs, leaving his wife on the verge of impoverishment. Once those resources are depleted, Mr. Kelley and his wife will be forced to choose between Mr. Kelley remaining at home without medically needed care or moving him into an institutional setting. Perversely, should Mr. Kelley go to an institutional setting, Medi-Cal would apply the spousal impoverishment protection.

6. Petitioner Matthew Reed is represented in this action by his wife, Vicki Reed, as his guardian ad litem. Mr. Reed resides in Los Angeles, California. Mr. Reed is a 62-year-old man with multiple sclerosis, Bell’s Palsy, and vascular dementia following a stroke. Because of his disabilities and medical conditions that limit his activities of daily living, Mr. Reed should be eligible for medical assistance for HCBS programs with a reduced or eliminated share of cost. Mr. Reed is currently on the waitlist for the NF/AH Waiver.

7. Because Respondents fail to use the expanded spousal impoverishment protection in making Medi-Cal eligibility determinations, Mr. Reed’s Medi-Cal share of cost is a staggering \$1,509. His share of cost is so high that he and his wife cannot pay for the care he needs and also afford their basic living expenses. The Reeds face the very real risk of having to move Mr. Reed into an institutional setting.

1 8. Respondent California Department of Health Care Services is the single state
2 Medicaid agency and administers Medi-Cal. As the single state Medicaid agency, the
3 Department is responsible for the implementation of all federal Medicaid eligibility provisions
4 and the administration of all Medi-Cal home and community-based services programs, in
5 accordance with all applicable laws and regulations.

6 9. Respondent Jennifer Kent is sued in her official capacity as the Director of the
7 California Department of Health Care Services. As such, she is responsible for the Department's
8 compliance with all applicable state and federal laws governing the Medi-Cal program.

9 **CLASS ACTION ALLEGATIONS**

10 10. Pursuant to Code of Civil Procedure § 382, the individual Petitioners bring this
11 action on their own behalf and on behalf of all others similarly situated. The proposed class
12 consists of all married individuals who (a) have applied for Medi-Cal assistance on or after
13 January 1, 2014, (b) qualify for the level of care provided by home and community-based
14 programs authorized under the Medicaid Act, (c) meet the eligibility criteria for receiving Medi-
15 Cal assistance under the federal Medicaid Act's expanded spousal impoverishment protection,
16 and (d) have been determined by Respondents to be either (i) ineligible for Medi-Cal assistance
17 after they failed to apply the spousal impoverishment protection or (ii) eligible subject to payment
18 of a larger share of the cost of care than they would have been had Respondents applied the
19 spousal impoverishment protection.

20 11. On information and belief, more than 1,000 married individuals ("Class
21 Members") qualify for home and community-based services and are entitled to these services
22 under the federal Medicaid Act but have been wrongfully found to be ineligible to receive these
23 services solely because of the Respondents' actions and omissions in implementing the spousal
24 impoverishment protection in California. Class Members are suffering and will continue to suffer
25 harm as a result of Respondents' failure to properly process their Medi-Cal eligibility under the
26 mandatory spousal impoverishment protection. The size of the class is so numerous that joinder
27 of all members is impracticable.

1 12. Common questions of law and fact predominate over questions affecting
2 individual Class Members. Questions of law and fact common to members of the proposed class
3 include: (a) whether Petitioners and the proposed class are entitled to consideration of their
4 eligibility for Medi-Cal under the expanded spousal impoverishment protection; (b) whether
5 Respondents have failed to implement the expanded spousal impoverishment protection of the
6 Medicaid Act; and (c) whether Respondents' failure to implement the expanded spousal
7 impoverishment protection violates state and federal laws. The prosecution of separate actions
8 by individual Class Members would create a risk of inconsistent or varying adjudication,
9 establishing incompatible rules of law for the implementation of the expanded spousal
10 impoverishment protection.

11 13. Petitioners' claims are typical of the claims of the class as a whole in that
12 Petitioners and the class currently meet the level of care requirements for home and community-
13 based services programs and for Medi-Cal based on the expanded spousal impoverishment
14 protection. The claims arise from the failure of Respondents to implement the mandated spousal
15 impoverishment protection.

16 14. Petitioners will fairly represent and adequately protect the interests of members of
17 the class as a whole. Petitioners do not have any interests antagonistic to those of other Class
18 Members. By filing this action, Petitioners have displayed an interest in vindicating their rights,
19 as well as the claims of others who are similarly situated. The relief sought by Petitioners will
20 inure to the benefit of members of the class generally. Petitioners are represented by qualified,
21 experienced, and competent counsel.

22 15. Class Members share a common need for home and community-based services,
23 and Respondents' failure to implement the expanded spousal impoverishment protection is
24 applicable to the entire proposed class. A class action is superior to individual lawsuits for
25 resolving this controversy.

26 16. Respondents' actions, as alleged herein, have resulted in, and will continue to
27 result in irreparable injury to Petitioners and the petitioner class for which they have no plain,
28

1 speedy, or adequate remedy at law. Petitioners and Class Members will suffer irreparable injury
2 in that they will be placed at risk of unnecessary institutionalization.

3 **STATUTORY AND REGULATORY FRAMEWORK**

4 **Medicaid & Medi-Cal Programs**

5 17. Federal Medicaid is a cooperative, jointly-funded program by federal and state
6 governments that provides medical assistance to, *inter alia*, low-income elderly persons and
7 persons with disabilities. *See* 42 U.S.C. §§ 1396 *et seq.* The purpose of federal Medicaid is to
8 furnish, as far as practicable, “medical assistance on behalf of ... aged, blind or disabled
9 individuals, whose income and resources are insufficient to meet the costs of necessary medical
10 services” and “to help such families and individuals to attain or retain capability for independence
11 or self-care....” *Id.* at § 1396-1.

12 18. On the federal level, Medicaid is administered by the Centers for Medicare and
13 Medicaid Services (“CMS”), an agency within the United States Department of Health and
14 Human Services.

15 19. Because California has elected to participate in Medicaid, it must comply with the
16 requirements of the federal Medicaid Act and its implementing regulations. 42 U.S.C. §§ 1396-
17 1396v. California participates in Medicaid by submitting a State Medicaid Plan to CMS for
18 approval. 42 U.S.C. § 1396a; 42 C.F.R. § 430.12; Welf. & Inst. Code § 14100.1.

19 20. Respondents must promptly and humanely “secure for every person the amount of
20 aid to which he is entitled” without discrimination on account of any characteristic listed or
21 defined by law. Welf. & Inst. Code §§ 10000, 10500.

22 21. The Medi-Cal covered services included in California’s state plan, including
23 nursing facility coverage and personal care services, must be offered statewide, without any limits
24 on the number of qualified people receiving those services.

25 22. People may be financially eligible for Medi-Cal through two avenues:
26 “categorically needy” or “medically needy.” People who qualify as “categorically needy” are
27 generally persons who receive cash assistance to meet basic needs or who qualify under other
28 categories set forth in federal and state law.

23. State law limits the amount of premiums and cost-sharing imposed on Medi-Cal enrollees. Welf. & Inst. Code § 14134; 22 C.C.R. § 51002.

24. People who qualify as “categorically needy” receive “free Medi-Cal,” meaning that they do not generally need to financially contribute to the cost of their care for covered services.

25. “Medically needy” recipients are otherwise eligible for Medi-Cal but are required to pay a “share of the cost” of their medical treatment if their income exceeds the allowed amount. Welf. & Inst. Code §§ 14005.7, 14005.9; 22 C.C.R. §§ 50651-50660. This “share of cost” is the amount that they must spend out-of-pocket on medical care before Medi-Cal will pay for any covered service.

26. In California, married beneficiaries with more than \$1,664 of net monthly income are subject to payment of a share of the cost of care. The State’s calculation requires that married couples with net monthly income above \$1,664 pay all income above \$934 each month toward their health care costs before Medi-Cal will pay for any covered services.

Institutional Alternatives: Home & Community-Based Services

27. Medi-Cal is required to cover certain medical services in the state plan, including nursing facility services for qualifying individuals over 21 years of age. 42 U.S.C. § 1396d(a)(4)(A); Welf. & Inst. Code §§ 14132.20, 14133.12, 14132.99, 14132.97, 14132.92, 14132.925, 14132.93.

28. The purpose of these programs is to enable low-income seniors and people with disabilities to receive the medical and personal care they need while living in their homes rather than in more expensive institutional settings.

29. California’s largest home and community-based program is the In-Home Supportive Services (“IHSS”) program. Established in 1973, IHSS ensures that eligible individuals who are elderly, blind, or disabled receive the home care services they need to remain safely in their homes. *See* Welf. & Inst. Code §§ 12300, 14132.95, 14132.951. IHSS provides attendant care services to any qualifying person, without an enrollment cap or a waiting list. It

1 enables over 500,000 people with disabilities to live at home and in their community. It is a
2 critical piece of California's continuum of services for those who need long-term care.

3 30. California covers 41% of people in the IHSS program through the Community
4 First Choice Option (IHSS-CFCO), which is a Medi-Cal program for individuals who meet the
5 criteria for a nursing facility level of care. These people are entitled to receive a wide variety of
6 needed services in their own homes. Such services include meal preparation and cleanup,
7 mealtime assistance, transportation to and from medical appointments, domestic and related
8 services, paramedical services, protective supervision, teaching and other personal care services.

9 31. In addition to IHSS, California offers various other home and community-based
10 programs through federal Medicaid waiver programs, which are limited to a small number of
11 enrollees. These programs, including the NF/AH Waiver, have a cap on enrollment, which has
12 created significant waiting lists for people who need home and community-based services. The
13 people on the waiting lists are entitled to an eligibility determination for Medi-Cal based on the
14 expanded spousal impoverishment protection, and if approved for Medi-Cal, would be entitled to
15 all covered Medi-Cal benefits, including IHSS.

16 **The Spousal Impoverishment Protection**

17 32. The federal Medicaid program requires states to include a protection against
18 spousal impoverishment when one spouse needs a level of care provided in a nursing facility.
19 This requirement allows one spouse to remain financially stable when the other spouse seeks
20 either nursing facility or home and community-based services.

21 33. Prior to 1988, when a state determined the Medicaid eligibility of a married person
22 for purposes of obtaining Medicaid benefits, it generally considered the income and assets of
23 either spouse as being available to the applicant. This is known as "spousal deeming." When one
24 spouse became disabled and required institutional care in a nursing home or other Medicaid-
25 funded facility, assets held jointly by the spouse receiving care in an institution (the
26 "institutionalized spouse") and the spouse living in the community (the "community spouse")
27 were deemed fully available to the applicant in determining Medicaid eligibility. This practice
28 impoverished many community spouses who spent all of the married couple's income and assets

1 paying for the institutionalized spouse's care until their assets were exhausted and the
2 institutionalized spouse qualified for Medicaid, exposing them to poverty and potential
3 homelessness.

4 34. In 1988, Congress sought to remedy this "pauperization" problem with regard to
5 nursing facility and institutional settings by enacting the Medicaid Catastrophic Coverage Act,
6 102 Stat. 754, 42 U.S.C. § 1396r-5(b)(1). The Medicaid Catastrophic Coverage Act imposed a
7 protection against spousal impoverishment by assuring that the community spouse would be able
8 to keep a sufficient – but not excessive – amount of income and resources without disqualifying
9 the institutionalized spouse from Medicaid. The 1988 iteration of the spousal impoverishment
10 protection primarily protected the spouses of people receiving care in a hospital or nursing facility
11 (*i.e.*, an institutional setting) – but not those who opted for long-term care while living at home.
12 *See id.*

13 35. The 1988 iteration of the spousal impoverishment protection created a strong
14 financial incentive for people to go into a nursing facility even if they preferred to live at home
15 and could remain in their home safely with home and community-based services. In practice, it
16 forced individuals who qualified for an institutional-level of care, but still could receive the
17 equivalent care at home or in the community, to instead submit to institutionalization, thereby
18 separating them from their homes and families.

19 36. In 2010, Congress remedied this problem when it expanded the spousal
20 impoverishment protection to include all people who required a nursing facility level of care, but
21 could receive care in the home. Pub. L. No. 111-148. The Affordable Care Act amended the
22 statutory definition of an "institutionalized spouse." *See* 42 U.S.C. § 1396r-5(h)(1)(A) (referring
23 to services described in 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI)). In doing so, Congress expanded
24 the spousal impoverishment protection to require all states, including California, to apply the
25 spousal eligibility rules to individuals who are eligible for these home and community-based
26 service programs at a nursing home level of care. Under the expanded definition, a spouse with a
27 disability no longer must submit to institutionalization or obtain a scarce waiver slot to get the
28 care he or she needs. Rather, if the spouse with a disability meets the criteria for a broad range of

1 home and community-based service programs the couple may avail themselves of the more
2 lenient income rules, thereby allowing the disabled spouse to remain at home while receiving
3 needed medical care and services.

4 37. The Affordable Care Act's expansion of the spousal impoverishment protection
5 became effective on January 1, 2014. *See* Pub. L. No. 111-148, § 2404.

6 38. On May 7, 2015, CMS issued guidance on the spousal impoverishment protection
7 detailing "how states would apply the statute in making Medicaid eligibility determinations."
8 CMS, SMS #15-001 ACA #32, Affordable Care Act's Amendments to the Spousal
9 Impoverishment Statute (D.H.H.S. 2015) ("CMS Guidance").

10 39. The CMS Guidance explains that states are required to apply the spousal
11 impoverishment rule when determining Medicaid eligibility for married Medicaid applicants who
12 meet the level of care requirement for home and community-based services, including to
13 applicants who are "categorically needy" and must spend down their income in order to receive
14 services. CMS made clear that the spousal impoverishment protection also applies to applicants
15 who are on waiting lists for home and community-based service waivers.

16 40. The CMS Guidance clarifies that states must determine need for home and
17 community-based services when a married applicant requests such services. States are directed to
18 establish a method (or methods) for applicants to request these services that will trigger an
19 eligibility determination based on the spousal impoverishment rule. It is the responsibility of the
20 state, not the applicant, to determine which Medicaid home and community-based service
21 program the applicant is eligible for, based on the eligibility criteria for each program.

22 41. Finally, the CMS Guidance reminds states that the expanded definition of
23 "institutionalized spouse" went into effect on January 1, 2014, and it expressly directs the states
24 to "begin work on conforming their eligibility practices for married individuals potentially in
25 need of HCBS as soon as possible."

26 42. Respondents have still not implemented the CMS Guidance.
27
28

1 **FACTUAL ALLEGATIONS**

2 **Respondents' Failure To Implement**

3 **The Expanded Spousal Impoverishment Protection**

4 43. Despite receiving express guidance from CMS and despite the fact that
5 Respondents have been required to implement the expanded spousal impoverishment protection
6 in California for more than three years now, they have failed to take any definitive steps to do so.

7 44. As a result of Respondents' failure to implement this important provision of
8 federal law, Petitioners and Class Members are either unlawfully denied Medi-Cal altogether or
9 determined eligible for Medi-Cal with an unaffordable share of cost. Respondents thus force
10 Petitioners and Class Members to make the untenable choice of forgoing needed services
11 altogether, submitting to unnecessary institutionalization, or impoverishing their spouses by
12 forcing them to pay for needed home care out-of-pocket.

13 **Respondents' Unlawful Denial Of Petitioners' Access To Medi-Cal Benefits**

14 **Petitioner Patrick Kelley**

15 45. Patrick Kelley is a 67-year-old veteran who lives with his wife, Melody Rogers, in
16 Los Angeles, California.

17 46. Mr. Kelley has primary progressive multiple sclerosis. First diagnosed almost 15
18 years ago, the disease has progressed, and Mr. Kelley now has spastic quadriplegia and can only
19 use his left hand for simple, limited motor tasks.

20 47. Because of his condition, Mr. Kelley must be monitored 24 hours a day to prevent
21 injury and ensure his safety, *i.e.*, he requires a nursing facility level of care. Mr. Kelley is
22 essentially bed-bound and cannot ambulate unassisted. He is unable to attend medical
23 appointments by himself because he is unable to drive or use public transportation due to his
24 physical impairments. Mr. Kelley also requires assistance with cooking, feeding, shopping,
25 laundry, and other household chores, as well as bathing, dressing, and grooming. Due to
26 incontinence, Mr. Kelley needs assistance with toileting. Because of his disabilities, Mr. Kelley
27 is unable to take his medications unless they are set out for him.

1 48. Mr. Kelley needs, but does not receive, IHSS-CFCO funded services. He cannot
2 be determined eligible for IHSS-CFCO services until he is found eligible for Medi-Cal. Once he
3 is determined eligible for Medi-Cal and IHSS-CFCO, Mr. Kelley would receive needed
4 assistance from an IHSS-funded caregiver. Mr. Kelley also requires Medi-Cal to help pay for
5 needed medical supplies.

6 49. Mr. Kelley separately applied for NF/AH Waiver services to obtain Medi-Cal
7 long-term services under the spousal impoverishment rule. Respondents placed him on a waiting
8 list for these services in 2014. More than three years later, Mr. Kelley is still on the NF/AH
9 Waiver waiting list. Despite his placement on the waiting list, Respondents have not evaluated
10 his eligibility for Medi-Cal under the spousal impoverishment rule.

11 50. In September 2016, Mr. Kelley applied for Medi-Cal, but Respondents denied his
12 application, stating that Mr. Kelley does not qualify for benefits because he and his wife have
13 savings that exceed the Medi-Cal property limit of \$3,000. Mr. Kelley and his wife, Ms. Rogers,
14 live primarily on a fixed income of pensions and Social Security retirement income. Ms. Rogers
15 works as a licensed real estate agent, which provides her with an irregular source of income. Ms.
16 Rogers's ability to work is severely limited by her caregiving responsibilities to Mr. Kelley.

17 51. Mr. Kelley does not want to be institutionalized. However, if Mr. Kelley were
18 willing to be placed in a nursing home or other institutional setting, he would be eligible for
19 Medi-Cal under the 1988 spousal impoverishment rule, and Medi-Cal would cover the full cost of
20 Mr. Kelley's institutional care. The expanded spousal impoverishment protection would allow
21 Mr. Kelley to avoid unnecessary institutionalization because he would be eligible for Medi-Cal
22 and IHSS-CFCO. This would enable Mr. Kelley to receive the services he needs while remaining
23 in the community with his wife.

24 52. Mr. Kelley and Ms. Rogers have exhausted their life savings paying for home care
25 for Mr. Kelley. To date, they have spent over \$225,000 for home care for Mr. Kelley. Mr.
26 Kelley and Ms. Rogers are currently paying approximately \$4,000 per month for caregivers to
27 stay with Mr. Kelley Monday through Sunday from 9 am to 2 pm so that he may live safely in his
28

1 home in the community, and at other times, as needed. Ms. Rogers provides home care for Mr.
2 Kelley at all other times.

3 53. Continued out-of-pocket payments for home and community-based care are
4 unaffordable for Mr. Kelley and Ms. Rogers. As a result, Mr. Kelley faces a very serious risk of
5 institutionalization.

6 54. On March 16, 2017, an advocate from Bet Tzedek Legal Services, contacted
7 Respondents regarding Mr. Kelley. Bet Tzedek requested that Respondents expeditiously process
8 Mr. Kelley's Medi-Cal application using the updated federal spousal impoverishment protection
9 because Mr. Kelley was depleting his resources by paying for private in-home care. Respondents
10 failed to respond.

11 55. On May 23, 2017, Mr. Kelley appealed Respondents' February 27, 2017 Medi-Cal
12 denial.

13 56. Mr. Kelley has a hearing scheduled on July 11, 2017, but an administrative hearing
14 decision will not give him the relief he needs if Respondents have not implemented the new
15 spousal impoverishment rule as required by federal law.

16 57. Respondents know that Mr. Kelley needs HCBS, but they have failed to apply the
17 expanded spousal impoverishment protection when determining his eligibility for Medi-Cal.

18 58. If Respondents had applied the expanded spousal impoverishment rule,
19 Respondents would have determined Mr. Kelley to be Medi-Cal eligible, and Mr. Kelley could
20 receive critically needed IHSS-CFCO services.

21 **Petitioner Matthew Reed**

22 59. Matthew Reed is 62-years-old and lives with his 60-year-old wife, Vicki Reed, and
23 22-year-old son in Los Angeles, California.

24 60. Mr. Reed has been diagnosed with multiple sclerosis. Approximately 17 years
25 ago, Mr. Reed was diagnosed with Bell's Palsy and also had a stroke. Following his stroke, Mr.
26 Reed experienced paralysis in his left hand as well as vascular dementia, which has resulted in
27 impaired memory, confusion, and trouble with judgment, concentrating, reasoning, and planning.

1 Mr. Reed also has mood swings, as well as physical impairments, including trouble with walking
2 and balance.

3 61. Because of his medical conditions and severe cognitive impairments, Mr. Reed
4 needs assistance with most activities of daily living at a nursing facility level of care.

5 62. Mr. Reed is unable to attend medical appointments by himself because he is
6 unable to drive or use public transportation due to his cognitive impairments. Mrs. Reed or her
7 son takes Mr. Reed to medical appointments.

8 63. Mr. Reed has impaired memory and judgment and is a danger to himself if left
9 home alone. For example, Mr. Reed has wandered outside of the house and has been unable to
10 find his way back home. Because of his condition, he should be monitored 24 hours a day to
11 prevent injury and ensure his safety, *i.e.*, he requires a nursing facility level of care.

12 64. Mr. Reed generally uses a cane to ambulate. Mr. Reed is incontinent and wears
13 adult incontinence undergarments. Because of his cognitive and physical impairments, Mr. Reed
14 needs assistance with toileting, preparing all meals, shopping, laundry, and with all household
15 chores, as well as with dressing, bathing, and with grooming. Mr. Reed generally needs
16 assistance feeding himself. He is also unable to remember to take his medications and needs his
17 medication set out for him. Mr. Reed has difficulty communicating and suffers from impaired
18 short-term memory.

19 65. Mr. Reed needs, but does not currently receive, IHSS-CFCO services. Unless and
20 until Respondents implement the spousal impoverishment protection, Mr. Reed's \$1,509 monthly
21 share of cost makes utilizing IHSS-CFCO services prohibitively expensive. Once Respondents
22 apply the spousal impoverishment rule to Mr. Reed's case, his share of cost will be greatly
23 reduced or eliminated, thereby enabling him to receive needed assistance from an IHSS-funded
24 caregiver. With a substantially reduced or eliminated share of cost, Mr. Reed could also receive
25 other beneficial Medi-Cal-covered services.

26 66. Mr. Reed meets the level of care requirements of multiple community care
27 programs offered by Medi-Cal.

1 67. Mr. Reed, through his wife, applied for the NF/AH Waiver program on July 22,
2 2016. He was placed on the waiting list. Almost a year later, Mr. Reed is still on the NF/AH
3 Waiver waiting list. Despite his placement on the waiting list, Respondents have not evaluated
4 his eligibility for Medi-Cal under the spousal impoverishment rule.

5 68. On her husband's behalf, Mrs. Reed applied for Medi-Cal. On his application, Mr.
6 Reed indicated that he needed home care services and requested that Respondents determine his
7 Medi-Cal eligibility according to the spousal impoverishment rule.

8 69. According to a notice of action dated April 6, 2017, Respondents determined that
9 Mr. Reed was eligible for Medi-Cal, effective January 1, 2017, with an unaffordable share of cost
10 of \$1,509 per month. The expanded spousal impoverishment protection would allow Mr. Reed to
11 be eligible for Medi-Cal with a significantly reduced or eliminated share of cost and so would
12 enable him to receive the Medi-Cal services he critically needs while remaining in his community
13 with his wife.

14 70. Currently, Mr. Reed's primary source of health coverage is Medicare. Medicare
15 does not pay for personal care services or certain needed medical supplies, like diapers.

16 71. Mr. Reed receives \$1,047.90 per month in Social Security benefits. Mrs. Reed is
17 employed as a security guard. She works Tuesday through Saturday from 11 pm-7 am, as well as
18 overtime approximately 4-5 times per month. Mrs. Reed's monthly salary ranges from \$2,120 to
19 approximately \$2,500 per month, depending on the number of hours she works. Thus, Mr.
20 Reed's monthly share of cost is nearly 30% of the Reeds' monthly income.

21 72. The Reeds' only savings is approximately \$12,000 in Mrs. Reed's retirement
22 account.

23 73. If Mrs. Reed were willing to place her husband in a nursing home or other
24 institutional setting, Mr. Reed would be eligible for Medi-Cal under the 1988 spousal
25 impoverishment rule, and Medi-Cal would cover the full cost of Mr. Reed's institutional care.
26 Mrs. Reed, however, seeks to prevent the unwanted and unnecessary institutionalization of her
27 husband.

1 74. Paying out-of-pocket for home and community based care is unaffordable for the
2 Reeds. As a result, Mr. Reed faces a very serious risk of institutionalization.

3 75. On May 5, 2017, an advocate from Bet Tzedek Legal Services requested that
4 Respondents expeditiously apply the spousal impoverishment rule to Mr. Reed's Medi-Cal case
5 to eliminate or reduce his share of cost. Respondents have also failed to apply the spousal
6 impoverishment protection to Mr. Reed's case.

7 76. On June 15, 2017, Mr. Reed appealed Respondents' April 6, 2017 Medi-Cal share
8 of cost determination. Mr. Reed does not yet have a hearing scheduled, but an administrative
9 hearing decision will not give him the relief he needs if Respondents have not implemented the
10 new spousal impoverishment rule as required by federal law.

11 77. Respondents know that Mr. Reed needs HCBS, but they have failed to apply the
12 expanded spousal impoverishment protection when determining his eligibility for Medi-Cal.

13 78. If Respondents had applied the expanded spousal impoverishment rule,
14 Respondents would have determined Mr. Reed to be Medi-Cal eligible with a reduced or
15 eliminated share of cost, and Mr. Reed would be able to access critically needed IHSS-CFCO
16 services.

17 **DECLARATORY AND INJUNCTIVE RELIEF AND RIGHT OF ACTION**

18 79. Absent intervention by this Court, Petitioners and Class Members have suffered
19 and will continue to suffer irreparable harm in that they will not have access to the Medi-Cal
20 services that they are eligible for, causing these individuals either to submit to institutionalization
21 or become impoverished. Money damages cannot compensate for this harm. Petitioners request
22 a judicial determination that Respondents must immediately implement the expanded spousal
23 impoverishment protection pursuant to their responsibilities to administer the federal Medicaid
24 program in California.

25 80. Petitioners contend that Respondents' abovementioned actions violate federal law
26 requiring implementation of the spousal impoverishment protection, state and federal anti-
27 discrimination statutes, and Welfare and Institutions Code §§ 10000 and 10500. Respondents
28 contend otherwise. Declaratory relief is therefore necessary and appropriate to resolve this

1 controversy. Accordingly, Petitioners seek a judicial declaration of the rights and duties of the
2 respective parties.

3 81. Code of Civil Procedure § 1085 confers a right of action to enforce the state and
4 federal statutes cited in this petition. 42 U.S.C. § 1983 confers a right of action to enforce the
5 federal statutes cited.

6 **FIRST CAUSE OF ACTION**

7 **(Against Respondent Kent)**

8 **(Code of Civil Procedure § 1085, 42 U.S.C. § 1983 –**

9 **Violation of Federal Spousal Protection Laws)**

10 82. Petitioners re-allege and incorporate herein by reference each and every allegation
11 and paragraph set forth previously.

12 83. Effective January 1, 2014, federal law requires states participating in Medicaid to
13 implement the spousal impoverishment protection to include all people who required a nursing
14 facility level of care, but could receive care in the home.

15 84. Respondent Kent has refused to implement the spousal impoverishment protection
16 despite demands that she do so. As a result, Petitioners and others similarly situated have paid
17 out-of-pocket for care and services that should have been free, thereby impoverishing their
18 families and risking unnecessary institutionalization.

19 85. Respondent Kent has the clear, present, and ministerial duty to administer the
20 Medi-Cal program in conformity with federal and state law and regulations to ensure all
21 individuals who apply are properly determined eligible or ineligible. Eligible individuals are
22 entitled to home and community-based services as a covered Medi-Cal service.

23 86. Petitioners have a beneficial interest in the issuance of a writ of mandate because
24 without financial assistance under Medi-Cal, they will be forced to choose between leaving their
25 homes and families and unnecessary institutionalization or leaving their spouses destitute and
26 impoverished. Petitioners are also interested as citizens in the enforcement of the public duty at
27 issue in this case.

1 93. Section 504 of the Rehabilitation Act of 1973, on which the ADA is modeled, sets
2 forth similar protections against discrimination by recipients of federal funds. 29 U.S.C. §§ 794
3 *et seq.* These protections include the prohibition against unnecessary segregation.

4 94. Under the ADA and Section 504, Respondents have a duty to provide services to
5 people with disabilities in the “most integrated setting appropriate to their needs” and to prevent
6 unnecessary institutionalization. 28 C.F.R. §§ 35.130(d), § 41.51(d). The most integrated setting
7 for Petitioners and Class Members is continued living in their homes and communities with
8 appropriate home and community-based services, not placement in a nursing facility. Denying
9 integrated services to individuals with disabilities, such as Petitioners and Class Members, places
10 them at risk of unnecessary institutionalization in order to receive the care they need and violates
11 the ADA and Section 504.

12 95. Under the ADA, Respondents also have an obligation to use methods of
13 administration that do not discriminate against individuals with disabilities such as Petitioners and
14 Class Members. Respondents’ administration of the Medi-Cal program fails to implement the
15 spousal impoverishment protection required by the federal Medicaid Act and thereby wrongfully
16 bars qualified individuals with disabilities from accessing the home and community-based
17 services they need to continue living in their homes.

18 96. Regulations implementing the ADA and Section 504 also provide that a “public
19 entity may not, directly or through contractual or other arrangements, utilize criteria or other
20 methods of administration: (i) [t]hat have the effect of subjecting qualified individuals with
21 disabilities to discrimination on the basis of disability; [or] (ii) [t]hat have the purpose or effect of
22 defeating or substantially impairing accomplishment of the objectives of the public entity’s
23 program with respect to individuals with disabilities” 28 C.F.R. §§ 35.130(b)(3), §
24 41.51(b)(3)(I); 45 C.F.R. § 84.4(b)(4).

25 97. In *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), the United States Supreme
26 Court held that the unnecessary institutionalization of individuals with disabilities is a form of
27 discrimination under the ADA. In doing so, the Court interpreted the ADA’s “integration
28 mandate” as requiring persons with disabilities to be served in the community when: (1) the state

1 determines that community-based treatment is appropriate; (2) the individual does not oppose
2 community placement; and (3) community placement can be reasonably accommodated.
3 527 U.S. at 607.

4 98. Respondents have a clear, present and ministerial duty to implement Med-Cal in a
5 manner that complies with state and federal anti-discrimination laws, and Petitioners have a
6 beneficial interest in the performance of that duty. Petitioners are entitled to a writ of mandate to
7 enforce that duty.

8 **THIRD CAUSE OF ACTION**

9 **(Against All Respondents)**

10 **(Code of Civil Procedure § 1085 –**

11 **Violation of Welfare & Institutions Code §§ 10000 & 10050)**

12 99. Petitioners re-allege and incorporate herein by reference each and every allegation
13 and paragraph set forth previously.

14 100. Welfare & Institutions Code § 10000 requires California public assistance,
15 including Medi-Cal, to be administered “promptly and humanely.” Section 10500 requires
16 Respondents to administer the Medi-Cal program in a way that secures for every person “the
17 amount of aid to which he is entitled.”

18 101. By failing to implement the spousal impoverishment protection, Respondents have
19 impermissibly deprive Petitioners and similarly situated beneficiaries of the aid to which they are
20 entitled and have thus violated Sections 10000 and 10050 of the Welfare & Institutions Code.
21 Petitioners are entitled to a writ of mandate to compel enforcement of the ministerial duty to
22 comply with these statutes.

23 **FOURTH CAUSE OF ACTION**

24 **(Against All Respondents)**

25 **(Code of Civil Procedure § 526A –**

26 **Taxpayer Action to Prevent Illegal Expenditure of Funds)**

27 102. Petitioners re-allege and incorporate herein by reference each and every allegation
28 and paragraph set forth previously.

104. Petitioners, who, within one year before the commencement of this suit, have been assessed and paid a tax within and to the State of California, have been substantially affected by these illegal expenditures.

105. Respondents' unlawful conduct, unless and until enjoined by order of this Court, will cause great and irreparable injury to Petitioners in that Respondents will continue to make illegal expenditures.

PRAYER FOR RELIEF

10 WHEREFORE, Petitioners and the proposed class pray that the Court order the following
11 relief and remedies:

12 A. Certify this action as a class action.

13 B. Issue a writ of mandate and preliminary and permanent injunctive relief
14 prohibiting Respondents from continuing to violate Section 1396r-5(h)(1)(A) of the federal
15 Medicaid Act, state and federal anti-discrimination laws, and Sections 10000 and 10500 of the
16 Welfare & Institutions Code.

C. Declare that Respondents are required to implement the expanded spousal impoverishment protection pursuant the federal Medicaid Act as amended by the Affordable Care Act and should have done so since January 1, 2014.

20 D. Issue a writ of mandate pursuant to Code of Civil Procedure § 1085 commanding
21 Respondents to take all steps necessary to immediately implement the expanded spousal
22 impoverishment protection including:

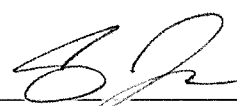
23 i. Issuing statewide guidance to the counties detailing the availability,
24 applicability, and requirement that the spousal impoverishment protection be
25 applied to individuals seeking all coverable home and community-based
26 services;

- ii. Monitoring the implementation of the spousal impoverishment protection and report data on Medi-Cal and home and community-based services program enrollment each quarter;
- iii. Notifying home and community-based service providers of the expanded spousal impoverishment protection; and
- iv. Notifying affected Medi-Cal beneficiaries and people on home and community-based services waitlists dating back to January 1, 2014 of the violations of their rights, a procedure for seeking reimbursement of out-of-pocket payments for medical care that should have been free, and an administrative hearing process to resolve disputes.

- E. Award Petitioners the costs of this action and reasonable attorneys' fees; and
- F. Such other and further relief as the Court deems just and proper.

Dated: July 6, 2017

McDERMOTT WILL & EMERY LLP

By: 

GREGORY R. JONES
Attorneys for Petitioners/Plaintiffs

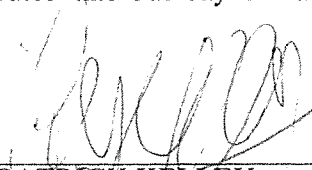
VERIFICATION

I, Patrick Kelley, hereby state as follows:

1. I have read the foregoing Petition for Writ of Mandate and know its contents.

2. I certify that the factual allegations contained in the Petition related to Petitioner Patrick Kelley are true of my own personal knowledge.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct and that this Verification was executed this 5th day of July 2017 in Los Angeles, California.

By: 

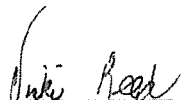
PATRICK KELLEY

VERIFICATION

I, Vicki Reed, the proposed Guardian Ad Litem for Petitioner Matthew Reed, hereby state as follows:

1. I have read the foregoing Petition for Writ of Mandate and know its contents.
2. I certify that the factual allegations contained in the Petition related to Petitioner Matthew Reed are true of my own personal knowledge.

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct and that this Verification was executed this 5th day of July 2017 in Los Angeles, California.

By: 
VICKI REED (FOR MATTHEW REED)