



Greater Upstate Law Project, Inc.

**WHAT ONE HAND GIVETH, THE OTHER HAND
TAKETH AWAY:**

**How New York's Pregnancy-Related Medicaid
Recoupment Policy Hurts Low-Income Families**

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EXECUTIVE SUMMARY

What one hand giveth, the other hand taketh away.

-- Proverb

In 1987, the New York State Legislature authorized the Prenatal Care Assistance Program that funded health care providers to furnish prenatal, delivery, post-partum, and newborn health care services to low-income women throughout New York. Around the same time, Congress enacted the Poverty Level Pregnant Women Medicaid Program to expand Medicaid eligibility so that low-income pregnant women throughout the country could obtain Medicaid funded prenatal, birth related, and post-partum care. Both programs were created to achieve a critically important goal: the birth of healthy children to low-income women. With their simple and liberal Medicaid eligibility requirements, and enhanced funding of prenatal care providers, these programs were intended to make it easy for low-income women to obtain essential prenatal and birth related health care.

In New York State, however, these laudable objectives have been compromised by policies and practices the state has adopted to recoup birth related Medicaid expenditures retroactively from fathers after their children are born. When applying for Medicaid, pregnant women are not advised that their babies' fathers will ultimately be held liable for the Medicaid expenses they incur. Instead, they learn of this policy after their babies are born, when local social service districts sue the fathers, often for thousands of dollars, to recover the costs of care. In cases where the father is living with and supporting the mother and child, the financial hardship caused by court-ordered repayment of Medicaid expenditures can threaten the welfare of the family. New York's recoupment practices, which do not exist in most other states, deplete low-income families' already limited financial resources, decreasing the money that otherwise would be spent on the families' basic necessities, and compounding the stress associated with trying to maintain a family on minimal income. If the state's policy was clearly articulated to women when they applied for Medicaid, many would decline coverage, thereby undermining the goals of state and federal programs aimed at promoting healthy births.

This paper provides an overview of New York's Medicaid recoupment policies, using case studies to illustrate their effects. Within the context of the development of the Prenatal Care Assistance Program and the Poverty Level Pregnant Women Medicaid Program, the paper examines the federal and state laws surrounding the recoupment of Medicaid expenses and offers an overview of other states' practices. The paper concludes with recommendations for legislative amendments that would align New York with the forty states that either do not pursue fathers to recover pregnancy related Medicaid expenses or whose practices reflect a greater sensitivity to the financial fragility of low-income families.

Even as this paper was being prepared, indications of changes in New York's recoupment practices were surfacing. On January 12, 2000, in an Informational Letter titled "Child Support Cooperation: Questions and Answers," the New York State Office of Temporary and Disability Assistance specified three instances in which the recovery of pregnancy-related Medicaid costs should not be pursued:

- a) in the case of an unmarried woman, if the unwed father was on Temporary Assistance or Medicaid, or had income and resources at or below the applicable Medicaid standards at the time of the child's birth;
- b) in the case of an unwed father or husband who is currently on Temporary Assistance or Medicaid, or who has income and resources at or below the applicable Medicaid standards;
or
- c) in the case of an unmarried woman, if the unwed father's income and resources were used in determining the mother's eligibility during pregnancy.

While it has not been promulgated as a formal policy change or officially communicated to local social services districts, this informal policy directive is encouraging. It stands as a good beginning

toward the enactment of policies that will protect the families of the thousands of low-income women who need, and are entitled to, Medicaid coverage for prenatal and birth related care.

NEW YORK'S POLICY FOR RETROACTIVE RECOUPMENT OF PREGNANCY RELATED MEDICAID COSTS

New York's retroactive recoupment policy operates in the following way. Low-income pregnant women without health insurance are encouraged -- for numerous sound fiscal and public health reasons -- to obtain Medicaid coverage to pay for prenatal and birth related health care. Often, and for a variety of reasons, the father-to-be's income is not considered when the pregnant woman applies for and receives Medicaid coverage. Furthermore, the mother-to-be is not advised that if she elects to receive Medicaid coverage, the child's father will be sued to recover the Medicaid costs after the child is born.

Nevertheless, New York directs the local social services districts to sue the new father, after his child is born, to pay for the full cost of the prenatal and birth related care that the mother received while she was a Medicaid recipient. Under New York's retroactive recoupment policy, local districts sue fathers even if they live with and financially support the mother and child, even if the father later married the mother, and even if the father's own income would not have affected the mother's eligibility for Medicaid at the time of the child's birth. ^[1]

Because most low-income fathers who are sued by local social services districts to recoup pregnancy and birth related Medicaid expenditures do not have lawyers to assist them in court, their predicaments remain unnoticed. ^[2] Furthermore, New York State does not collect detailed information from local social services districts about their recoupment efforts. For these reasons, it is difficult to assess the number of low-income families involved and the extent to which they are affected.

However, based on anecdotal evidence throughout New York State -- including the stories of families who were able to secure the help of Legal Services lawyers --, it is indisputable that the harm suffered by low-income families as a result of local districts' recoupment practices is widespread and harsh. Here are some of their stories. ^[3]

CASE EXAMPLES

Tim and Xina ^[4]

Tim and Xina, who are unmarried, live together in Delaware County with three of their own children, and one child from Xina's marriage to another man. Xina's husband disappeared many years ago and his whereabouts are unknown. Xina would like a divorce, but she cannot afford one.

Tim supports Xina, his three children, and Xina's child from her previous marriage. Although Xina and Tim were not living together when their first child was born, they moved in together before the birth of their third child. Tim has been supporting the entire family since then.

The birth related expenses of all three of their children were covered by New York's Medicaid program for pregnant women because Xina did not have any health insurance. After the birth of their third child, the Delaware County Department of Social Services sued Tim for over \$10,000 to recover the cost of the pregnancy and birth related health care that had been provided to Xina.

Xina and Tim were stunned when they learned of the lawsuit. When Xina applied for coverage, she was never told that Tim would be sued. At the time Tim was sued, he was working 30 hours a week, earning \$7.15 an hour to support his household. Tim did not contest the lawsuit because he could not afford to miss time from work, and could not afford an attorney to represent him.

After the judgment was entered, Tim agreed to have regular payments taken out of his wages. However, because the local social services district failed to implement the wage attachment in a timely manner, the district has threatened to take Tim's tax refund to pay for the arrears which accrued between the time he agreed to the wage assignment and the time the county began implement it.

The \$9,500 judgment against Tim has seriously strained his family's already limited financial resources. Tim and Xina's family had been counting on Tim's tax refund to get their car repaired and to pay other bills.

Harry and Sally

Harry and Sally live in Cortland County. They are the parents of Hannah and Carl. When Sally was pregnant with Carl in 1993, she was living with, but not yet married to Harry. Because she did not have any health insurance, Sally applied for prenatal and birth related health care through New York's Medicaid program.

When Sally applied for Medicaid, Harry was earning \$1,214 per month. Sally later began to receive \$408 a month in public assistance, bringing the family's gross income up to \$1,622 a month. Because Sally was not married to Harry when she applied for Medicaid, the Cortland County social services district did not consider Harry's income in determining Sally's eligibility for Medicaid. In fact, according to a district employee, the district was legally barred from considering Harry's income. Nevertheless, Sally would have been eligible for coverage even if Harry's income had been counted.

Two years after Carl was born, the Cortland County social services district sued Harry for over \$3000 to pay for Sally's birth related health care that had been covered by Medicaid. By then, Sally and Harry were married. Harry was earning less than the federal poverty level, and Sally was no longer receiving public assistance. Harry and Sally were spending every dollar Harry earned on food, clothing, and shelter for their family, and could not afford even a minimal reduction in income.

If Harry had been forced to repay the Cortland County social services district for the cost of Sally's birth related medical care, the family would have suffered significant financial harm. Unlike most fathers sued under these circumstances, Harry found a Legal Services attorney to represent him in court. Sally told Harry's lawyer that if she had known that Harry would be sued for cost of the medical care she would receive, she would never have applied in the first place.

Luckily, the judge agreed that the district's lawsuit would severely harm the welfare of Harry and Sally's family. When he dismissed the district's lawsuit, the judge also correctly observed that if Harry and Sally had been married when Sally applied for Medicaid, Sally would still have been eligible, and the district could not have sued Harry.

George and Susan

George, who has limited intellectual functioning, and Susan live in Clinton County. On June 30, 1995, before they were married, George and Susan had a daughter, Lila. When Lila was born, George and Susan were both 17 years old and living together. At the time of Lila's birth, Susan was receiving public assistance and Medicaid, and George, who was not working, had no income. About a year later, when George and Susan were both 18 years old, they married. After their marriage, the family began receiving public assistance and Medicaid. In November 1996, George was granted Supplemental Security Income benefits because of his impairments.

Shortly after George and Susan married, the Clinton County social services district sued George to recover \$3,485.94 for the health expenses Medicaid had paid in connection with Lila's birth. Luckily for George and Susan, George obtained the help of a Legal Services lawyer. Even with his lawyer's help, the Family Court found George liable to pay the \$2,911.64 that was associated with Susan's (but not Lila's) care, and ruled that the district could enforce the judgment under any legal method. The district then restrained George's bank account, and twice notified him his driver's license would be suspended for failure to pay the judgment.

George's lawyer appealed the decision. The Appeals Court found that because he could not afford to pay the Medicaid costs at the time the Family Court issued its decision, George should not be required to pay the costs -- but only for the time being. The Court left open the possibility that the district could sue George later if his ability to pay improved.

Charles and Eileen

Charles and Eileen, who are not married, live together in Clinton County. They are the parents of Jack, who was born in September 1997. Because of his mental impairment, Charles receives Social Security disability benefits, and works part-time for a work program supported by the Association for Retarded Citizens. Although Charles was not living with Eileen when Jack was born, he began living with them shortly later.

After Jack was born, the Clinton County social services district sued Charles for all the Medicaid expenses associated with Jack's birth. The Family Court ordered Charles to pay \$25 a month toward the judgment. To ensure payment, the district garnished the monthly payment from Charles' disability benefits.

Because Charles was not represented by an attorney, the Family Court judgment was not appealed. His family's situation came to light after Eileen contacted a Legal Services office when her

family's Food Stamps were reduced because the social services district ruled that Charles was no longer entitled to a Food Stamp deduction for the child support he paid to Eileen after Charles, Eileen and Jack started to live together.

Sam and Diane ^[5]

Sam and Diane live together in Oneida County, but are not married. When Diane got pregnant in the early 1990s, she applied for and received Medicaid to cover her prenatal and birth related medical expenses.

In 1995, the Oneida County social services district sued Sam for \$4,123.08 to recover Medicaid costs associated with the prenatal and birth related care provided to Diane in connection with the birth of their daughter, Rachel. At the time of the lawsuit, Sam was unemployed, and Diane was working for minimum wages at a local business.

The Oneida Family Court ruled that Sam, who was not represented by an attorney, was liable for the entire amount. However, because Sam was unemployed at the time, the Family Court ordered Diane to pay the judgment and garnished her wages \$50 a month. Sam and Diane's situation did not come to light until 1999, when Diane went to a Legal Services lawyer for help on an unrelated matter.

Thomas and Jodi ^[6]

Jodi lives with her husband, Thomas Sr., and their son, Thomas Jr., in Allegany County. When Thomas Jr. was born, Jodi and Thomas were living together, but had not yet married.

Jodi and Thomas have worked all their adult lives. Since they began to live together, they always supported their family with their wages, and never received cash assistance or Food Stamps. In 1991, when Jodi became pregnant with Thomas Jr., she and Thomas were both working, but neither had health insurance. As a result, Jodi applied for Medicaid coverage so that she could obtain necessary prenatal and birth related health care.

Thomas Jr. was born in July 1992. In March 1993, the Allegany County social services district sued Thomas Sr. for \$4,565.72 to pay for the prenatal and birth related health coverage Jodi had received in connection with Thomas Jr.'s birth. Jodi and Thomas were shocked when Thomas was sued, because they had thought that Jodi's Medicaid coverage was free. Thomas' income was not taken into consideration when Jodi applied for Medicaid coverage. However, because of Thomas' low wages, consideration of his income would not have affected Jodi's eligibility for coverage. If Jodi and Thomas had known that Thomas would later be sued for over \$4,500 to recover these costs, Jodi would never have applied for coverage.

Jodi and Thomas were able to find a Legal Services lawyer who was willing to try to help them. In a separate lawsuit, their lawyer claimed that New York State's practice of suing fathers for the prenatal and birth related coverage their partners received violated the federal Medicaid Act. Although the federal trial judge agreed with Jodi and Thomas' claims, the appeals court reversed the trial judge's decision, and Jodi and Thomas, who by then had married, were forced to pay Allegany County for the cost of the prenatal and birth related health care Jodi had received.

HISTORICAL BACKGROUND

Federal History

In the mid 1980s, national political leaders became increasingly concerned about the strong correlation between the lack of prenatal and birth related health care for low-income women, the high incidence of low birth weight and other serious disabilities in children born to women who had little or no prenatal care, and the high cost to society of caring for these infants. The data Congress reviewed at the time were stark and alarming.

A seminal report, *Preventing Low Birthweight*, published by The National Academy of Science's Institute of Medicine in 1985, identified an extremely high direct correlation between low birth weight and inadequate prenatal care. The report found that significant numbers of pregnant women who were at high risk of giving birth to physically impaired infants were not seeking prenatal care. After reviewing numerous studies, the Academy concluded, "The overwhelming weight of the evidence indicates that prenatal care reduces low birth weight and that the effect is greatest among high-risk women."^[7]

Preventing Low Birthweight calculated that savings of \$3.38 could be realized for every \$1.00 of public funds spent on prenatal health care.^[8] That same year, another respected organization, the Southern Governor's Regional Task Force on Infant Mortality, published a report, *For the Children of Tomorrow*, with similar conclusions, estimating a savings of \$2 to \$10 for each public dollar spent on prenatal health care.^[9]

Pointing to these studies and others, Congress acknowledged the moral and fiscal value to society of ensuring that low-income pregnant women had access to prenatal and birth related medical care.^[10] Consequently, from the mid 1980s through 1990, Congress repeatedly amended the federal Medicaid Act to expand and simplify eligibility for prenatal and birth related health care coverage for low-income pregnant women.^[11] The "Poverty Level Pregnant Women" Program ["PLPW"], as this federal coverage is called, provides low-income women with access to prenatal and birth related health care, with more liberal eligibility requirements than the conventional Medicaid program.^[12]

Besides the prohibitive cost of prenatal medical care, both *Preventing Low Birthweight* and *For the Children of Tomorrow* observed that certain eligibility policies in the conventional Medicaid program acted as barriers to obtaining prenatal health care. In 1990, Congress recognized that one such policy, the "support cooperation requirement," effectively inhibited hundreds of thousands of otherwise eligible and uninsured pregnant women from applying for medical coverage.

Simply put, the conventional Medicaid program requires Medicaid applicants to cooperate with the state to obtain financial support from third parties who may be legally responsible to provide such support to them. Specifically, Medicaid applicants must: (1) assign to the state Medicaid agency any support rights for payment of medical care they may have against a third party; (2) cooperate in paternity and support proceedings against the unwed father; and (3) identify and provide information regarding any third party who may be liable for care and services provided.^[13]

Congress had become increasingly aware that many pregnant women concluded that foregoing "free" prenatal care was far preferable to the consequences of cooperating with the state to sue the father for the child's medical care. If the unborn child's father was abusive, the pregnant woman faced the possibility of physical or emotional assault. And in terms of an economic effect, if the father lived with -- but was not married to -- the woman, a state's lawsuit against the father for the cost of the medical care could significantly deplete the father's financial contribution to the family, converting the mother's receipt of "free" prenatal care into a financial loss to the household.

In 1990, responding to this serious problem, Congress exempted Poverty Level Pregnant Women Program Medicaid recipients from having to cooperate with the state to seek support from the father as a condition of eligibility.^[14] In so doing, Congress expressly observed that the application of these requirements to women seeking prenatal care "discourage[d] many of them from seeking benefits

that would give them access to early prenatal care." The support cooperation requirements, Congress noted, were a "potential barrier to prenatal care for the high-risk, low-income women that would most benefit from it."^[15]

From a fiscal standpoint, Congress was not oblivious to the fact that the PLPW Program's "support cooperation" exemption would necessarily increase the expenditure of public funds for prenatal health care to the extent that unwed fathers of children born to Program recipients would no longer be liable to pay for these expenses. Congress concluded, however, that the financial benefits gained from the decrease in medical expenses associated with caring for low birth weight and physically impaired infants far outweighed the financial benefits that might be achieved from enforcing the "support cooperation" requirements. As the United States Department of Health and Human Services observed when it implemented the "exemption" regulations:

[B]y removing impediments to prenatal and postpartum care, the provisions implemented by this ["support cooperation" exemption] rule are expected to reduce infant mortality and save money which would otherwise be spent on costly services such as neonatal intensive care.^[16]

New York State History

As Congress began to grapple with the serious problem of low-income pregnant women who did not receive prenatal care, so too did New York. In the mid-1980s, New York was ranked in the bottom third of states with regard to low birth weight babies, infant mortality, and percent of late or no prenatal care.^[17] Alarmed by these and similar data, the New York State Legislature adopted the "Prenatal Care Act of 1987" that created the "Prenatal Care Assistance Program" (PCAP).^[18] PCAP was a pilot project that funded prenatal care providers in areas with a high percentage of infant mortality and low birth weight babies. Under PCAP, qualified providers offered various prenatal and post-partum health care services, educational services, and counseling services to uninsured pregnant women with incomes below 185% of the Federal Poverty Level.

Two years later, New York expanded its Medicaid financial eligibility requirements for pregnant women to coincide with both the federal expansions and with the financial eligibility levels for its earlier PCAP program. Thus, as of 1989, PCAP provided free Medicaid funded prenatal and birth related health care to pregnant women in households with incomes up to 185% of the Federal Poverty Level.^[19] In 1991, one year after Congress exempted pregnant women in the PLPW Program from the "support cooperation" requirement, the New York Legislature followed suit in New York's PCAP Program.^[20]

Once New York complied with federal law by exempting PCAP recipients from the "support cooperation" requirements, it would have been expected that New York would refrain from suing fathers to reimburse the state for the pregnancy related medical care provided to low-income pregnant women in the PCAP Program, as Congress had intended. To the financial and emotional detriment of low-income families throughout New York State, experience has demonstrated the opposite.

Simply put, New York policy interprets the exemption to be merely a temporary delay in, rather than a prohibition against, suing fathers to repay the state for the Medicaid expenses connected to the birth of their children. Local social services districts do not sue the father to recoup pregnancy or birth related expenses while the woman is still pregnant, or immediately after the child's birth. However, as early as 60 days after the infant's birth, local districts are directed to sue the fathers to recover, retroactively, the Medicaid funds that paid for the pregnancy and birth related medical expenses. Consequently, although the pregnant woman is often under the impression that she will receive prenatal and birth related medical coverage without cost to her household, the state forces the father -- and

potentially his family -- to repay New York for these expenses within weeks or months after the child's birth.

New York's restrictive interpretation of the "support cooperation" exemption, and its retroactive recoupment practices, operate in precisely the harmful, counterproductive manner that Congress identified, and tried to prevent, when it adopted the exemption. PCAP workers throughout New York have found, predictably, that New York's recoupment policy does, in fact, prevent low-income pregnant women who informally learn of New York's recoupment policy from applying for Medicaid coverage to avoid the policy's harsh consequences to their families.

The policy's consequences were described in 1993 by Sarah Waller, who was then the Cortland County Coordinator for the Prenatal Care Assistance Program and Physically Handicapped Children's Program. Ms. Waller told the court in the *Perry v. Dowling* litigation that in her experience, New York's recoupment policy acts as a deterrent to essential health care in two different ways, depending on the pregnant woman's family situation. According to Ms. Waller:

- The first category consists of women in a strained or abusive relationship with the father of the child. Such women fear that a reimbursement proceeding will expose them to further abuse or rupture an already strained relationship. In our county, which is primarily rural, there are also problems of isolation. Any institutional barrier drops their participation rate.
- The second category consists of women living in [stable family situations] with the unwed fathers of their child[ren]. These women fear the financial burden of reimbursement proceedings against the father, which will have the effect of reducing the ability of the father to provide for the family.

Ms. Waller went on to tell the court that in her experience as administrator, she had become aware that some women had actually withdrawn from medical coverage due to the fear of later reimbursement proceedings.^[21]

The experience of Nita Hawkins, the Prenatal Care Assistance Program Coordinator for Wyoming County and several surrounding counties, coincides with that of Ms. Waller. In the *Perry v. Dowling* litigation, Ms. Hawkins told the court that "[m]any of my clients would think twice before continuing on Medicaid if they realized that the [social services district] would then be able to recoup the pregnancy and delivery expenses." In her experience, Ms. Hawkins continued, "I believe that at least 20% of the women . . . would refuse . . . receipt of Medicaid if they had access to proper information telling them the full consequence of receiving [coverage] 60 days after their deliveries."^[22]

NEW YORK'S PARENTAL MEDICAL SUPPORT AND "CONFINEMENT EXPENSES" OBLIGATIONS

Generally, like most other states, New York imposes stringent obligations on fathers and mothers to provide financially for their children's future medical care, based on their financial ability to do so. Family Court Act 416 gives a court specific authority to include the cost of "medical attention" in its support orders. Family Court Act 416(a) - (f) also require the court to order a legally responsible relative to purchase immediately and maintain any group health insurance that may be available, and to ensure that the child is included as a beneficiary. Finally, Family Court Act 416(g) makes a legally responsible relative, who violates a court order by failing to obtain health insurance benefits for his or her dependents, financially liable for all health care expenses incurred by his or her dependents from the

first date his or her dependents were eligible to receive the benefits "after the issuance of the order of support directing the acquisition of such coverage."^[23]

Like many other states, New York imposes an additional financial support obligation on a father to pay for the cost of prenatal and birth related medical care provided to the mother. Under New York Family Court Act 514, known as the "confinement expenses" law, a father is liable to pay:

- the reasonable expenses of: the mother's confinement and recovery and such reasonable expenses in connection with pregnancy as the court in its discretion may deem proper.

A father's obligation to pay the mother's "confinement" expenses has been a component of New York's support statutes for decades. At common law, the father of a child born out of wedlock had no liability to support the child or its mother, absent a state law.^[24] However, years before there was a state welfare system, New York State enacted statutes permitting the recovery of the costs of a woman's pregnancy and confinement. These laws permitted actions by a county's superintendent of the poor to adjudicate the filiation of the child, and if the mother be in indigent circumstances, [he is] also to determine the sum to be paid by such putative father for the sustenance of such mother during her confinement and recovery therefrom."^[25]

In distinct contrast to most other states, however, New York law gives the local social services districts the authority to seek reimbursement from the father to recover "confinement" expenses that were covered by Medicaid. In 1995, Section 514 of the Family Court Act was amended specifically to provide that where the Medicaid program covered these confinement expenses:

the father may be liable to the [Medicaid agency] for the full amount of medical assistance so expended, as the court in its discretion may deem proper.^[26]

Even before the enactment of the 1995 amendment to New York Family Court Act 514, however, New York's laws provided at least theoretical support for the notion that New York State could sue a father to recoup a mother's "confinement" expenses that were covered by the Medicaid program. As noted above, the Medicaid program generally requires Medicaid recipients to assign their support rights to the local social services districts as a condition of eligibility. In New York, these support rights have long included a mother's right to sue for "confinement" expenses from the father of a child born out of wedlock. Nevertheless, local districts rarely exercised their right to sue to recoup these expenses from unwed fathers until the early 1990s.

A major reason local districts rarely sued to recover "confinement" expenses from unwed fathers was because of the federal rule that for Medicaid an adult is not financially responsible for the medical support of another adult to whom he or she is not legally married.^[27] Consequently, prior to 1990, New York State case law held that in Medicaid cases, an unwed father's legal liability was limited to the cost of medical care provided to the child after the child's birth. Stated differently, the prevailing view was that despite New York State's "confinement expenses" laws, federal Medicaid law did not permit the state to recover the costs associated with the mother's prenatal and birth related care when they were paid for by Medicaid.^[28]

In 1990, the New York State Court of Appeals radically changed the prevailing rule. In *Matter of Steuben County v. Deats*, the Court ruled that New York State was entitled to sue the father of a child born out of wedlock to recover the Medicaid expenses that paid for the mother's pregnancy and birth related medical care, as well as for his child's medical care.^[29]

Ironically, the Deats decision was issued the same year that Congress eliminated the "support cooperation" requirement for pregnant women's Medicaid coverage. Thus, at the same time that Congress was removing support related barriers to prenatal medical care for low-income women; New York State was fortifying them.

HOW NEW YORK RECOUPS MEDICAID "CONFINEMENT" EXPENSES FROM FATHERS

During the past decade, local districts' aggressive pursuit of fathers to recover the mothers' "confinement" expenses has proved to be a harsh *quid pro quo* for the provision of Medicaid funded prenatal health care to low-income pregnant women. Particularly where the father's income is used to support the entire household, the retroactive imposition of liability for "confinement" expenses on the father can be extremely harmful to the family.

"Confinement" expenses can be considerable, even if there are no costly pregnancy or birth related complications. The current cost of medical care associated with an uncomplicated pregnancy and birth is typically between \$3,000 and \$5,000. In intact households where the parents' income is low, imposing retroactive liability on the father for these expenses deprives the entire family of income that it desperately needs to stave off impoverishment.^[30]

To understand why the Medicaid agency's pursuit of "confinement expenses" is often so harmful to low-income working families where the mother has received Medicaid benefits, it is helpful to describe how New York's collection process operates.

Initially, an uninsured pregnant woman who learns of New York's Medicaid program would be directed to either the local social services district or a not-for-profit PCAP organization that is authorized to accept Medicaid applications from pregnant women. The application asks for the names of all members of the applicant's household, their incomes, and the household's other income sources. In compliance with federal and state law, the application does not ask the pregnant woman for the name, or any other identifying information, of the father of her as-yet unborn child.

The applicant must fill out and sign the application. Presumably, before she signs, the applicant has read the fine print on the reverse side of the application that states:

I understand that by applying for Medicaid, I agree to cooperate with the Medicaid agency in identifying and providing information to help find any insurance or person who may be responsible for paying for care and services for me or for a person(s) on whose behalf I am applying. I also agree to establish paternity for any children for whom I am applying for Medicaid benefits.
If I am applying for Medicaid as a pregnant woman, or if I have good reason not to cooperate, I may not have to meet these cooperation requirements. . .^[31]

It would be reasonable to expect that a pregnant woman who, by law, cannot be compelled to cooperate with the state to sue the unwed father to pay for her pregnancy related health care, likewise could not be obligated to cooperate with the state by affirmatively assigning to New York State any rights she might have to sue the unwed father for these benefits. New York, however, has chosen to define the word "cooperate" in a far more restrictive way.

New York regulations interpreting the "support cooperation" exemption list several specific activities that "[t]he term cooperate includes."^[32] As defined by New York, the term "cooperate" includes activities such as "completing the child support enforcement referral form," providing the "full name and social security number of the absent parent or putative father," and "appearing as a witness at court or other hearings or proceedings necessary to [obtain support]."^[33] Conspicuously absent from the list of "cooperation" activities, though, is the pregnant woman's assignment of her right to sue the father for repayment of pregnancy and birth related Medicaid coverage. New York takes the position that for Medicaid purposes, the term "cooperate" does not exclude the assignment of support rights with respect to the unwed father.^[34] As a result, the fine print on the reverse side of the application also states:

ASSIGNMENT OF RIGHTS FOR MEDICAL SUPPORT AND THIRD PARTY PAYMENT

I understand that Medicaid does not pay medical expenses that insurance or another person is supposed to pay. All persons applying for Medicaid benefits are required to give to the Medicaid agency any rights they may have to medical support or other insurance payments for medical care. When I sign this application for myself, or for another person for whom I can legally give away rights, I am giving to the Medicaid agency all of my rights to receive medical support from a spouse or parents of persons under 21 years old and my right to third party payments for the entire time I am on Medicaid.^[35]

Assuming she has read it, whether an applicant understands the serious legal implications of this paragraph is questionable. As a general rule, a woman has no right to support from a man to whom she is not married. The statement, which requires the assignor to "give away" rights to support from a "spouse," suggests to an unmarried applicant, who seeks only prenatal health care for herself, that the provision does not apply to her. Although the phrase, "third party payments" is mentioned, most applicants are unlikely to understand that this phrase, as construed by the Deats case, makes unmarried men liable for the birth related expenses of the mothers of their children. This paragraph fails to convey what in plain English means, "If I receive Medicaid coverage to pay for my prenatal and birth related health care, the social services district will sue the father of my child to recover the entire amount of my Medicaid coverage." Clearly, the failure to advise potential applicants of the state's Medicaid confinement expenses recoupment policy deprives them of their right to choose not to apply for Medicaid coverage because they do not want their households to suffer the adverse financial consequences that receiving Medicaid coverage will guarantee.

After the applicant signs the application, thereby assigning to the Medicaid agency her "right" to medical support, she receives prenatal and birth related medical care. Sixty days after her child is born, however, the Medicaid agency must report her case to the "local child support enforcement unit" to pursue child support.^[36] At this point, or sometimes months later, the local social services district initiates legal proceedings to recoup from the father the cost of the prenatal and birth related health care that the mother already received.

From New York's vantage point, it makes no difference whether the father married the mother after the child was born but before a recoupment lawsuit is commenced, whether he lives with and supports the family even though he and the mother remain unmarried, or whether the mother would have been eligible for Medicaid coverage when she applied for Medicaid, or when the child was born, even if the father's income had been considered. Rather, the local district is directed to sue any father, who was not

married to the woman when she applied for Medicaid coverage, to pay for the cost of prenatal and birth related health care the mother received.

The local district files the lawsuit on the mother's behalf, and in her name.^[37] The district's legal authority to do so derives from the "Assignment of Legal Rights" that the mother signed months earlier (or on a new "Assignment" that the mother might have signed if she reapplied for Medicaid after her pregnancy related coverage expired). As a result, a mother first learns of the lawsuit when the father is served with the district's legal complaint.

Regardless of whether the mother must participate in the legal proceedings against the father, the father cannot avoid them without severe adverse consequences. If he does not appear in court, a default judgment can be entered against him for the entire cost of the care the mother received. To defend himself, he or his lawyer must appear in court. New York State law, however, does not provide assigned counsel to represent low-income fathers in support proceedings. Low-income fathers whom the district sues under these circumstances, therefore, usually appear in court without legal representation.

LITIGATION EFFORTS TO ADDRESS THE PROBLEM

Throughout the last decade, as local districts increased their efforts to recover Medicaid costs from fathers, legal advocates brought a number of lawsuits seeking to mitigate New York's recoupment policy. These litigation efforts have been largely unsuccessful.

As discussed above, the 1990 Deats decision reversed the widely held view that federal Medicaid law barred New York from suing fathers to recover the cost of Medicaid funded prenatal medical care provided to the mother. In 1991, New York State adopted the 1990 congressional mandate to exempt women who received Medicaid funded prenatal and birth related medical care from the "support cooperation" obligation. Although consumer advocates had hoped that New York would cease its recoupment practices in light of the exemption, that did not occur.

In 1993, advocates sued to bar New York and Allegany County Department of Social Services from suing the father of Jodi Perry's newborn son for \$4,656.72 to repay the costs of the PCAP medical care provided to Jodi Perry. The federal trial judge ruled that when Congress adopted the "support cooperation" exemption in 1990, Congress intended that states could not seek retroactive reimbursement of the cost of prenatal medical care that the state had provided to the mother.^[38] In 1996, however, the Second Circuit Court of Appeals held that the federal "support cooperation" exemption did not act as a total ban on New York's recoupment proceedings; rather, it merely delayed New York from seeking reimbursement from the father until 60 days after the infant's birth.^[39]

Advocates then asked the trial court to direct New York to inform PCAP applicants that if they received coverage for their prenatal and birth related medical care, the fathers could be sued to recover the cost of their care after their children were born. The trial court held that PCAP applicants do not have a legal right to such information.^[40]

At the same time Perry was being litigated in federal court, advocates brought several actions in state court. One action contended that it was a violation of constitutional equal protection to require an unwed father -- who was himself a Medicaid recipient -- to reimburse the state for the PCAP medical care provided to the mother since a similarly situated father who was married to the mother when she applied for benefits could not be required to do so. This effort was unsuccessful.^[41]

Other lawsuits that have attempted to mitigate the harsh implications of the Deats decision have been somewhat more successful. The Deats Court confirmed that the father's liability for the "confinement" costs attributable to the newborn could be imposed only if the father had sufficient means to pay for the child's medical care when [the costs] were incurred.^[42] However, Deats left unanswered whether the father's liability for the "confinement" expenses that were attributable to the mother's medical care was absolute, based on an ability to pay when the costs were incurred, or based on an ability to pay at the time of the support hearing.

The New York Court of Appeals partially answered this question in 1995. In *Commissioner of Franklin County v. Bernard B.*, the court stated that New York's "confinement costs" statute "unambiguously" requires a court to focus on the "unwed father's present ability to pay," or "ability to pay at the time of the support hearing" in determining the father's liability for "confinement" costs attributable to the mother's medical care.^[43] This standard is a far different standard than that applied to determine the father's liability for the cost of his child's medical care, which is based on "his ability to pay at the time the expenses were incurred."

Some courts have construed *Bernard B.* to mean that the father's liability for the mother's birth expenses is absolute, although collection can be deferred until a later date if the father is unable to pay at the time of the hearing. One appeals court, however, rejected this strict liability standard. In *Matter of Le Page v. Christine L.*, the court found that where the father was disabled at the time of the support hearing received Supplemental Security Income benefits, and had no meaningful earning capacity, he was not liable for the confinement expenses associated with the mother's care.^[44]

Finally, the New York Court of Appeals has restricted the financial liability imposed upon the father to the Medicaid expenditures that are related directly to the actual medical services provided. In *Matter of Costello on Behalf of Stark v. Geiser*, Washington County Department of Social Services had sued the father for \$5,281.08 in confinement costs.^[45] Because the father did not have the ability to pay at the time of his daughter's birth, the Family Court found that he was not liable for the \$1,062.78 associated with his daughter's medical care. On the other hand, the Court held him strictly liable for the \$4,218.30 associated with the mother's medical care. In the meantime, the father's attorney discovered that of the \$4,218.30, more than \$3,400 was attributable to the proportionate public statutory surcharges that are built into the Medicaid program's general hospital reimbursement formula, not to the actual cost of the medical services provided. The Court of Appeals held that the father can be held liable only for costs attributable directly to the services actually provided, not to peripheral charges such as any public statutory surcharges.

While litigation has whittled away at some of the more onerous aspects of New York's retroactive reimbursement practices, litigation is not an adequate solution. First, as described above, litigation efforts to stop New York's reimbursement practices have been largely unsuccessful. Second, and more importantly, the vast majority of fathers who are sued to recoup Medicaid birth related costs cannot afford lawyers to represent them at the support hearings. Without representation, even if the fathers had legitimate defenses, the chances that the defenses would be raised in court are slim.^[46] As a result, most fathers who are sued under these circumstances end up with a multi-thousand dollar debt to pay for health care that the family believed the mother was receiving without cost.

OTHER STATES' POLICIES WITH RESPECT TO RECOUPMENT OF PREGNANCY RELATED MEDICAL COVERAGE

Every state seeks to recover the cost of cash public assistance provided to low-income children from absent parents through the collection of child support. However, most states do not seek retroactive recoupment of pregnancy and birth related Medicaid expenditures from the fathers of the newborn children. According to the Center on Law and Social Policy in Washington, D.C., only ten states, including New York, routinely pursue from the father the cost of pregnancy related Medicaid coverage that was provided to a mother who was not married to the father at the time she applied for coverage.^[47]

Even within the state, New York's Medicaid "confinement expenses" recoupment policy seems to be utilized on a selective basis. New York City and Onondaga County rarely, if ever, sue fathers to

recover Medicaid covered "confinement" expenses. And in August 1999, Commissioner Charles Root of the Chenango County Department of Social Services expressed his view that the approach of retroactively seeking recovery for maternity expenses is a disincentive to find work.^[48]

Among the forty states that do not sue fathers to recover pregnancy related Medicaid expenses, a handful have laws that consciously recognize that requiring a parent in an intact family to repay the state for any assistance (not just pregnancy related medical coverage) is detrimental to the children and to the family's ability to survive. Two states suspend liability of assistance arrears for reunited low-income families, a third state authorizes forgiveness of these arrears, and a fourth requires only a minimal payment.

In Minnesota, for example, the child support collection agency can suspend arrears of assistance repayments owed to the state so long as the obligor continues to live in the same household as the child on whose behalf assistance was furnished, if the household's total gross income is under 185% of the federal poverty level.^[49] Obligor must reapply for suspension annually, and must notify the agency when they no longer reside in the same household as the child.^[50]

Vermont's cash assistance support collection laws are even more protective of low-income intact families. In Vermont, the child support collection agency may not take any action to collect support arrears from a reunited family so long as the reunited family has a gross income equal to or less than 225% of the federal poverty level.^[51]

Washington State, on the other hand, has adopted a family-by-family approach. Washington establishes conference boards, chaired by an attorney who can determine when hardship justifies the release of a collection action, and permits the board to write off support debts owed to the state. Washington explicitly includes pregnancy and birth related Medicaid coverage in its definition of "support debt."^[52]

Finally, Connecticut has a specific administrative rule that provides that when a child lives with the obligor, the payment on arrears are \$1 per week when the obligor's gross income is less than or equal to 250% of the federal poverty level, but slightly more when the obligor's income is higher.^[53]

It is clear that the federal government not only approves but encourages policies such as these. On March 22, 1999, the Office of Child Support Enforcement of Administration for Children and Families, of the United States Department of Health and Human Services, promulgated a Policy Interpretation Question ("PIQ") 99-03 that sets forth federal policy regarding compromise of child support arrears, particularly in the case of reunited families. PIQ 99-03 states that policies that encourage the formation of two parent households are important because such children are less likely to be poor, less likely to become teen parents, less likely to have contact with the criminal justice system, and more likely to graduate from high school. The PIQ expressly cites the practices of Washington and Vermont as models for other states.^[54]

LEGISLATIVE RECOMMENDATIONS FOR NEW YORK STATE

New York's PCAP program proves that, like Congress, the New York State legislature recognizes the value of providing prenatal and birth related medical care to low-income women. When low-income pregnant women do not receive adequate prenatal health care, the public pays dearly by providing expensive medical care to premature and low birth weight infants, and by caring for severely disabled children and adults. Yet, as Congress accurately understood, the prospect that the state will sue the

father to recoup the cost of Medicaid funded prenatal care strongly deters women from obtaining the health care they urgently need. Conversely, as experience demonstrates, New York's retroactive recoupment practices deprive intact families of the income they need to provide for their children.

In addition, particularly in light of relatively recent paternity acknowledgment procedures, the policy goal of establishing paternity and encouraging two parent households would be far better served by prohibiting the recoupment of Medicaid coverage for prenatal and birth related care from a father. "Bedside paternity" procedures, or the process of obtaining an acknowledgment of paternity in the hospital, shortly after the mother gives birth, are now in place throughout New York.^[55] As it becomes more widely known that a father who agrees to support his child by participating in "bedside paternity," can also be strapped with a debt of thousands of dollars for the mother's pregnancy and birth related expenses, low-income fathers will be far less likely to acknowledge paternity.

For all these reasons, sound public policy strongly suggests that where a father has acknowledged paternity of a child born out of wedlock, he should not be found liable for confinement costs if he himself is -- or would be -- eligible for Medicaid, if he has made his income available for the mother's Medicaid, if the consideration of his income would not have made the mother ineligible for Medicaid, or if his own income is below a low-income threshold.

Previous Legislative Initiatives in New York State

In 1993, Assemblywoman Helen Weinstein introduced A. 8544, which proposed a number of amendments to the Social Services Law, the Family Court Act, and the Civil Practice Law and Rules to ameliorate some of the support collection rules that adversely affect intact or reunited families. One provision of the proposed law specifically dealt with confinement costs by amending the Family Court Act to provide that where the father is a Medicaid recipient at the time of the child's birth or if the father's income was below the Medicaid standards at the time of the child's birth, or if his income and resources were made available to the mother in determining her eligibility for public assistance, then the Family Court could not require repayment of confinement costs from the father. In addition, the bill would have prohibited the collection of support from an intact or reunited family where the household income was under 200% of the federal poverty level. The bill failed to get Senate support in 1993, and again when it was reintroduced in the 1994 session.

In 1994, Assemblywoman Weinstein introduced A. 6440, a bill that prohibited the collection of support from intact or reunited families where the household income was under 200% of poverty, but which omitted the confinement cost protections. This bill also failed to get Senate support.

RECOMMENDED LEGISLATIVE PROPOSALS

Plainly, the simplest policy New York could adopt would be the one adopted by the vast majority of states in the country; namely, a policy that prohibits the retroactive recoupment of prenatal and birth related Medicaid from the fathers of the newborns. This policy could be implemented with a bill that amends New York Family Court Act Section 514 as follows:

The father is liable to pay the reasonable expenses of the mother's confinement and recovery and such reasonable expenses in connection with her pregnancy

as the court in its discretion may deem proper; provided, however, where the mother's confinement, recovery and expenses in connection with her pregnancy were paid under the medical assistance program on the mother's behalf, the father may will not be liable to the social services district furnishing such medical assistance and to the state department of social services for the full amount of medical assistance so expended., as the court in its discretion may deem proper.

Short of a complete prohibition of retroactive recoupment, New York could amend Family Court Act Section 514 so that the prohibition applies under certain equitable circumstances, such as the following:

The father is liable to pay the reasonable expenses of the mother's confinement . . . provided, however, where the mother's confinement, recovery and expenses in connection with her pregnancy were paid under the medical assistance program on the mother's behalf, the father may be liable to the social services district furnishing such medical assistance and to the state department of social services for the full amount of medical assistance so expended, as the court in its discretion may deem proper; provided, however, that the father shall not be liable for such expenses if he has signed an acknowledgment of paternity pursuant to section one hundred eleven-k of the Social Services Law or section four thousand one hundred thirty five-b of the public health law, and the father:

- a. has income under 250% of the federal poverty level, as annually adjusted, at the time the child is born;^[56] or
- b. is living with the mother and child as an intact household, and contributing his income and resources to the support of his dependents, at the time the child is born.^[57]

Less desirable would be a suspension policy, similar to that used by Minnesota, Vermont, Washington, or Connecticut. The shortcoming of such a policy is that when the child reaches the age of majority, the parents may be still be low-income and may have a huge debt that was never commensurate with their means.

CONCLUSION

New York's Medicaid program is structured to provide free pregnancy and birth related health care to uninsured, low-income pregnant women. However, New York's retroactive Medicaid recoupment policy harms families who are struggling to survive on limited incomes and thwarts countless other uninsured pregnant women from receiving the essential health care they need.

To reduce the public cost of caring for low birth weight babies, to enhance the health and well-being of New York's newborns, and to preserve two-parent households by safeguarding the financial stability of low-income families, New York's laws should be amended to halt the state's prenatal and birth related Medicaid recoupment policy. To do less merely perpetuates the harm to low-income pregnant women, to their children, and ultimately to society, that the pregnancy related Medicaid programs created in the last two decades were intended to erase.

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¹ A man who is married to and living with his wife when she applies for Medicaid coverage will not be sued because his income and resources are automatically taken into consideration in determining her financial eligibility for Medicaid. See 42 U.S.C. §1396a(a)(17)(D).

² New York's Family Court Act does not provide for the assignment of free legal counsel for low-income respondents in these lawsuits.

³ Except where noted, the persons' names are pseudonyms.

⁴ Tim and Xina, whose story appeared in the Binghamton Press & Sun Bulletin, p. A-1, on August 28, 1999, are their real names. See Appendix A.

⁵ See Appendix B

⁶ Jodi and Thomas, whose names are real, were the litigants in *Perry v. Dowling*, 888 Fed .Supp. 485 (W.D.N.Y. 1995), reversed, 95 F.3d 231 (2d Cir. 1996). See Appendix C.

⁷ Preventing Low Birthweight, p.8, cited in *Lewis v. Grinker*, 965 F.2d 1206, 1219 (2d Cir. 1992).

⁸ See *Lewis v. Grinker*, 965 F.2d 1206 at 1219, 1223.

⁹ Shuptrine, S., *For the Children of Tomorrow*, (1985)

¹⁰ See H. Rep. No. 99-727, 99th Cong. 2d Sess. at 98, reprinted in 1986 U.S. Code Cong. & Admin. News 3607, at 3688-89, 3720; H. Rep. No. 100-391, 100th Cong. 1st Sess., reprinted in 1987 U.S. Code Cong. & Admin. News 2313-1, 2313-257.

¹¹ The New York State Court of Appeals for the Second Circuit has described the chronology of Congress' expansion of prenatal health care coverage in detail in *Lewis v. Grinker*, 965 F.2d 1206, 1209-11, 1219 (2d Cir. 1992).

¹² See 58 Fed. Reg. 4904, 4905 (column 1)(January 19, 1993).

¹³ See 42 U.S.C. §1396k(a)(1)(A)-(C); 42 C.F.R. §§433.145-147; 435.604.

¹⁴ See 42 U.S.C. §1396k(a)(1)(B); 42 C.F.R. §433.145(a)(2), 433.147(a)(1); 58 Fed. Reg. 4904, 4907 (January 19, 1993).

¹⁵ See H. Rep. No. 101-881, 101st Cong., 2d Sess. 106-07 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News 2017, 2118-19.

¹⁶ 58 Fed. Reg. 4904, 4907 (January 19, 1993).

¹⁷ See Governor's Memorandum in Support of S.2782-B, A.3751-B (1987), p.4.

¹⁸ New York Laws of 1987, c. 822.

¹⁹ See NY Public Health Law §§2520, 2521, 2522, 2529; NY Social Services Law §366(4)(o).

²⁰ See NY Laws of 1991, c. 472 §1 (1991); NY Social Services Law §366(4)(h)(2).

²¹ See Appendix D. That low-income, uninsured pregnant women are inhibited from obtaining Medicaid coverage when they hear, through the grapevine, that the fathers of their children might be sued later to recover the cost of their medical care is documented in Improving Access to Medicaid for Pregnant Women and Children (1993), by Sarah Shuptrine.

²² See Appendix E.

²³ See also Family Court Act §545(1)(iii)(court shall make provision for health insurance benefits in accordance with Family Court Act §416).

²⁴ See Prager v. Manowitz, 243 A.D. 284, 276 N.Y.S. 875 (1st Dept 1935).

²⁵ Rheel v. Hicks, 25 N.Y. 289 (1862), citing 1 R.S. sec. 13. In addition, former N.Y. Domestic Relations Law §127 provided that orders of filiation should include "the payment of the necessary expenses incurred by or for the mother in connection with her confinement and recovery ... and such expenses in connection with the pregnancy of the mother as the court may deem proper." A subsequent enactment at N.Y. Domestic Relations Law §120 provided that "The father is liable to pay the expenses of the mother's confinement and recovery and is also liable to pay such expenses ... in connection with her pregnancy as the court in its discretion may deem proper.)

²⁶ See also Family Court Act §545(1)(iii) (in context of child support proceedings, court can order the payment of pregnancy related expenses).

²⁷ See 42 U.S.C. §1396a(a)(17)(D); 42 C.F.R. §435.602.

²⁸ See Matter of Steuben County v. Deats, 147 A. D.2d 943, 537 N.Y.S. 2d 385 (4th Dep't 1989).

²⁹ 76 N.Y.2d 451, 560 N.Y. 2d 404 (1990).

³⁰ In fact, on its face, Family Court Act §514 gives the Medicaid agency the right to sue a married father in an intact household where, taking the father's income into consideration, his pregnant wife was determined to be financially eligible for PCAP coverage. However, advocates and PCAP providers have not heard of any instance in which the Medicaid agency has sued a married father under such circumstances.

³¹ See Appendix F. Medicaid/WIC Application for Pregnant Women/Young Children, DSS-2921 (7/94) (emphasis added). While the statement, "I may not have to meet these cooperation requirements," is less absolute than the law requires, it generally complies with the "support cooperation" exemption requirement.

³² 18 N.Y.C.R.R. §360-3.2(c).

³³ See 18 N.Y.C.R.R. §360-3.2(c)(1) - (6).

³⁴ New York's restrictive interpretation of the term "cooperate" is arguably illegal. According to the United States Department of Health and Human Services, Congress' insertion of the exemption clause in the "support cooperation" subsection of the federal provision, but not into the "assignment" subsection, was designed to maintain a Medicaid agency's right to seek reimbursement from third party sources other than the unwed father, such as health insurers, to which the "support cooperation" exemption does not apply. See 58 Fed. Reg.4904, 4905-06 (January 19, 1993).

³⁵ See Appendix F.

³⁶ See 18 N.Y.C.R.R. §360-3.2(c)(1) - (6).

³⁷ It is possible that since 1995, when Family Court Act §514 was amended, the county has the authority to sue on its own behalf, rather than on behalf of the PCAP recipient. In advocates' experience, however, the county's practice is to sue in the mother's name and on her behalf.

³⁸ See *Perry v. Dowling*, 888 F.Supp.485 (W.D.N.Y. 1995).

³⁹ See *Perry v. Dowling*, 95 F.3d 231 (2d Cir. 1996). The Second Circuit observed that New York's recoupment proceedings were authorized because Ms. Perry had agreed to cooperate with the state in support proceedings when she reapplied for Medicaid coverage for herself two months after her son's birth. The Court did not address whether New York could legally sue a father retroactively when a former PCAP recipient does not reapply for Medicaid coverage, and therefore does not subsequently agree to cooperate with the state in support proceedings. See *Perry v. Dowling*, 95 F.3d at 235-36.

⁴⁰ See *Perry v. Dowling*, 963 F.Supp. 231 (W.D.N.Y. 1997).

⁴¹ See *Commissioner of Social Services of Franklin County on Behalf of Lisa U. v. Steven V.*, 87 N.Y.2d 61, 637 N.Y.S.2d 659 (1995).

⁴² *Deats*, 76 N.Y.2d at 458.

⁴³ 87 N.Y. 2d 61, 68-69, 71, 637 N.Y.S. 2d 659 (1995)

⁴⁴ 242 A.D. 2d 105 (3rd Dep't 1998). See also *Commissioner of Social Services, County of Franklin, on Behalf of Theresa PP v. Ronald QQ*, 86 N.Y.2d 751, 631 N.Y.S.2d 597 (1995), affirming 209 A.D.2d 905, 619 N.Y.S.2d 364 (3rd Dep't 1994).

⁴⁵ 85 N.Y. 2d 103; 647 N.Y.S. 2d 1261 (1995).

⁴⁶ Sam and Diane's situation, in which Diane, who had received the pregnancy and birth related coverage, was forced to repay the judgment entered against Sam, exemplifies the sort of injustices that can occur when the father is not represented by an attorney.

⁴⁷ According to Paula Roberts, Esq., policy analyst at CLASP, these states are Alabama, Arkansas, Kentucky, Maine, Michigan, Nevada, New York, Oklahoma, Wisconsin, and Wyoming.

⁴⁸ See Appendix A.

⁴⁹ See Minnesota Statutes §256.87(9)(c).

⁵⁰ Minnesota Statutes §§256.87(9)(d), (e).

⁵¹ Vermont Statutes T. 33 §4106(e)

⁵² Washington Administrative Code §§388-11-011 (27)(b), 388-11-011(6).

⁵³ Connecticut Administrative Code §46b-215e-4(d).

⁵⁴ See Appendix G.

⁵⁵ See Social Services Law §111-k.

⁵⁶ 250% of the federal poverty level is the income eligibility level for children under the very successful Child Health Plus program.

⁵⁷ Other tests could also be used, such as whether the father was a Medicaid recipient, or would have qualified for Medicaid, when the mother applied for medical care or when their child was born; whether the father made his income and resources available to the mother when she applied for medical care or when their child was born; or whether the father had a sufficiently low income that it would not have affected the mother's eligibility for Medicaid when she applied or when their child was born. However, none of these tests will be as easy to establish as a straight income or "intact family" test.