

Highlights of New York State Law Regarding Medicaid for Married Couples

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This outline supplements the Peter J. Strauss outline pp. 29 et seq.

- I. When both spouses apply for Medicaid, the income and resource rules for a couple apply.
- II. When only one spouse applies for Medicaid for non-institutional care, the Department of Social Services will presume that the income and resources of the non-applicant spouse are available to Medicaid applicant. 18 N.Y.C.R.R. § 360-4.3(a)(3). But see “Spousal Refusal” discussed below. Soc.Serv.L. § 366(3)(a).
- III. Spousal Protections For A Community Spouse: If the Medicaid applicant receives institutional care and has a spouse who remains in the community, the “community spouse” may retain a Community Spouse Resource Allowance (CSRA) and a Minimum Monthly Maintenance Needs Allowance (MMMNA). Soc.Serv.L. § 366-c.
 1. The CSRA is the greater of (1) \$74,820 or (2) one half of the combined resources to a maximum of \$87,000 (2001) or (3) an amount established for the support of the community spouse pursuant to a fair hearing or a court order.
 2. If the community spouse’s income is below the MMMNA, the CSRA may be enhanced to an amount sufficient to generate income up to the MMMNA. (Conflicting court cases have addressed the issue as to whether or not the community spouse is entitled to an enhanced CSRA or will receive income from the institutionalized spouse first. See *Golf v. New York State Department of Social Services*, 91 N.Y. 2d 656 (1998), which held that the institutionalized spouse’s income must be allocated to the community spouse before granting

an enhanced CSRA. But see: *Robbins v. DeBuono*, 218 F.3rd 197 (2d Cir. 2000), cert. denied (U.S. Jan. 8, 2001), which viewed Social Security benefits as distinct from other kinds of income, holding that allocation of the institutionalized spouse’s social security income to the community spouse violates federal anti-alienation statutes.

3. The MMMNA in 2001 is \$2,175 per month. It is adjusted annually for inflation. In order to obtain income beyond the MMMNA pursuant to a fair hearing or support order, the community spouse must demonstrate that such enhancement is required “due to exceptional circumstances resulting in significant financial distress.” 18 N.Y.C.R.R. § 360-4-10(6); *Gomprecht v. Sabol*, 86 N.Y. 2d 47 (1995).
4. None of the community spouse’s income may be counted in determining the institutionalized spouse’s Net Available Monthly Income (NAMI) which is payable to the nursing home even to the extent the community spouse retains income in excess of the MMMNA. However, under state regulations the local Social Services District will request a contribution from the community spouse of 25% of the income in excess of the MMMNA. The institutionalized spouse must receive Medicaid even if the community spouse refuses or fails to comply with such a request. Whether or not the community spouse complies with such a request, the Department of Social Services may still seek further support or recovery from the community spouse pursuant to Social Services Law.

PRACTICE TIP:

The purchase of an annuity by a community spouse may convert resources in excess of the CSRA to income and avoid the need for spousal refusal.

IV. SPOUSAL REFUSAL

- A. When one spouse applies for Medicaid, the Medicaid application must be processed without regard to the income and resources of the non-applicant spouse if the non-applicant spouse refuses to contribute towards the cost of the Medicaid spouse’s care. See Soc.Serv.L. § 366(3)(a) that applies to non-institutional as well as institutional care and Soc.Serv.L. § 366-c(5)(b) that applies to institutional Medicaid. Social Services Law Section 366-c requires that the institutionalized spouse assign his or her rights to the Department of Social Services, or that a doctor’s note be submitted stating the institutionalized spouse lacks the capacity to execute such an assignment.
- B. The furnishing of Medicaid creates an “implied contract” between the “refusing spouse” and the local Social Services District allowing for recovery of Medicaid benefits paid. Soc.Serv.L. § 366(3)(a); Soc.Serv.L. § 366-C(5)(b). See *Commissioner of the Department of Social Services v. Spellman*, 672 N.Y.S. 2d 298 (1st Dep’t 1998). Enforcement of this “implied contract” varies tremendously from locality to locality and enforcement is sporadic at best.

PRACTICE TIP:

It is almost always advantageous for a client to execute a spousal refusal for institutional Medicaid. In some cases, the local Social Services District makes no effort to collect or recover anything from the refusing spouse. To the extent Medicaid seeks reimbursement, it is only entitled to be reimbursed at the Medicaid rate which is usually between 50% and 75% of the private pay rate that a community spouse would have had to pay a nursing home.

On the other hand, in a home care case the amount of money that Medicaid pays for home care may actually be greater than the amount of money that would be paid by a spouse privately. The right to transfer assets and of spousal refusal was supported by the New York Court of Appeals in *Matter of Shah*, Aff'd. 95 N.Y. 2d 148 (2000). Writing for the four-judge panel for the Appellate Division in that case, Justice Lawrence J. Bracken permitted the community spouse, who was also the institutionalized spouse's guardian, to transfer resources in excess of the CSRA as set forth in Soc.Serv.L. § 366-c:

“The complexities of the Medicaid eligibility rules...should never be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, a right which includes the right to give those assets away to someone else...” Caveat: Beware of conflicts between spouses and between spouses and other family members.

V. TRANSFERS OF ASSETS

A. Transfer of assets between spouses will not affect Medicaid eligibility. Soc.Serv.L. § 366(5)(d)(3)(ii); 18 N.Y.C.R.R. § 360-4.4(C)(2)(iii)(c). This also applies to a transfer of a homestead. Soc.Serv.L. § 366(5)(c)(3)(i); 18 N.Y.C.R.R. § 360-4.4(C)(2)(iii)(b). This includes transfers of assets to a trust for the sole benefit of a spouse. HCFA Transmittal 64 § 3257.

PRACTICE TIP:

This allows assets to be transferred from the spouse who is applying for Medicaid to the Community or refusing spouse.

B. A Medicaid application must include all financial records of both the applicant and the applicant spouse for the period thirty-six months prior to the date of application. Soc.Serv.L. § 366. Documentation of the refusing spouse's finances can be waived due to hardship. 18 N.Y.C.R.R. § 360-4.10(c)(3)

B. Medicaid laws governing transfer of assets apply to transfers of assets by a Medicaid applicant or by the spouse. Medicaid laws governing treatment of trusts generally apply to living trusts established by the Medicaid applicant or by the Medicaid applicant's spouse.

VI. RIGHTS OF RECOVERY AND LIENS

A. Medicaid has a right of recovery against the estate of a Medicaid recipient. The estate is defined as "all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy." Soc.Serv.L. § 369. However, no lien may be placed on a homestead if the property is occupied by a surviving spouse. Any adjustment or recoveries against a property of a Medicaid recipient for Medicaid benefits correctly paid can be made only after the death of the individual surviving spouse. Soc.Serv.L. § 369 (2)(b)(ii).

B. If a Medicaid Applicant/Recipient survives a spouse, the Medicaid Applicant/Recipient is required to execute his or her right of election because it is an available asset. Soc.Serv.L. § 366(5)(d). If the right of election is waived, the waiver will be treated as a transfer of assets by the Applicant/Recipient to the beneficiaries of the deceased spouse's estate as of the date of death, regardless of when the waiver was executed. *Matter of Estate of Dionisio*, 244 A.D. 2d 483, 665 N.Y.S. 2d 904.

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