

## ELDER LAW

BY DANIEL G. FISH

### Medicaid Spousal Refusal Lawsuits: 'Commissioner v. Mandel'

ONE OF THE most frequent situations for an elder law attorney is a client whose spouse has just been admitted to a nursing home. The client is facing the demographic reality of longer life spans<sup>1</sup> and the economic reality that a month in a nursing home averages \$7,656 in New York City.<sup>2</sup>

The advice given to such a client has included the option of Medicaid spousal refusal.<sup>3</sup> That advice must now include a discussion of a recent case, *Commissioner of the Department of Social Services of the City of New York v. Mandel*.<sup>4</sup> The decision is important because it is the first New York City case to reach the merits of a spousal refusal lawsuit, it was decided within the context of a summary judgment and it affects large numbers of senior citizens.



court ruled that as a matter of law, Mr. Mandel was of sufficient ability to support his wife. He was also found liable for the full cost of his wife's care, plus interest from June 1999.<sup>10</sup>

No spousal refusal case before *Commissioner v. Mandel* has ever been decided on the merits, outside of an estate claim.<sup>11</sup> There are only two reported cases in New York that involved actions by the local Department of Social Services against the refusing community spouse: *Commissioner of the Department of Social Services of the City of New York v. Spellman*, 672 NYS2d 298 (1st Dept. 1998) and

*Commissioner of the Department of Social Services of the City of New York v. Fishman*, 713 NYS2d 152 (1st Dept. 2000). Neither of these cases reached the merits of the department's claim. These two cases were decided upon motions to dismiss filed by the defendant in each case. In *Spellman*, the defendant challenged the department's ability to proceed under an implied contract theory, arguing that its sole remedy was a support action which had to be brought in Family Court. In *Fishman*, the defendant argued that the department had not pled its implied contract claim properly. Both of these cases were decided at the Appellate Division level in favor of the plaintiff, the Department of Social Services.

A third case, *In the Matter of Shah*, 711 NYS2d 824, 95 NY2d 148 (2000), contains a reference to spousal refusal suits but was not itself a claim by the department against a refusing spouse. In *Shah*, the wife/guardian sought court authorization to transfer all of her husband's assets to herself, so that he would qualify for Medicaid under a spousal refusal application. The local Department of Social Services argued that the amount of any such transfer was as a matter of law limited to an amount between \$74,820 and \$87,000. The New York Court of Appeals rejected that argument finding that the department had an adequate remedy after the Medicaid application was approved in bringing a suit. This is a critical decision because it supports the argument that the "ability to support" is not a rigid figure. If the figure were inflexible, the court would likely have allowed the transfer up to that amount but no more. The Court of Appeals went so far as to quote the language of Justice Lawrence Bracken in the *Shah* Appellate Division opinion.

The complexities [of the law] \*\*\* 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 with his or her assets, a right which includes the right to give those assets away to someone else for any reason or for no reason \*\*\* We would only amplify this by saying that no agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances \*\*\* choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in defraying the cost of ruinously expensive, but absolutely essential, medical treatment.

### Background

Medicare is the primary health insurance program for seniors and it is not means tested. However, it does not cover custodial care, the type of care most frequently given at home or in a nursing home. Medicaid does cover custodial care. However, it requires poverty level income and resources. In the past, married couples had their resources and income counted together for eligibility purposes. This was called "deeming".

The Medicare Catastrophic Act of 1988<sup>5</sup> repealed the "deeming rules" of Medicaid and established a minimum resource level. The minimum resource level in New York State is set at a figure between \$74,820 and \$87,000.<sup>6</sup> It also allowed one spouse (called the community spouse) to hold amounts above the minimum levels without jeopardizing the Medicaid eligibility of the other spouse (called the institutionalized spouse), a concept called "spousal refusal."<sup>7</sup> While the Medicaid eligibility cannot be withheld, the Department of Social Services may bring suit against the refusing community spouse if he or she has sufficient ability to pay.

Mrs. Mandel was admitted to a nursing home in 1995. A Medicaid spousal refusal application was filed on her behalf. Her husband refused to make his assets available, stating that he was not of sufficient ability to support his wife. The amount of Mr. Mandel's assets were in dispute.<sup>8</sup> Her application was approved and Medicaid paid \$319,656 for her care over the next four years. Medicaid then sued her surviving husband for the cost of that care. It brought a summary judgment motion alleging that as a matter of law he had sufficient ability to pay the claim. The defendant resisted the summary judgment motion, asking for a stay while he pursued an administrative fair hearing challenging the computation of his assets.<sup>9</sup> The court granted the department's summary judgment motion and denied the defendant's request for a stay. The court found that the defendant had no likelihood of success in the administrative hearing and that even if he were successful in that proceeding, he would still have undisputed assets of \$700,000. Under these facts, the

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The key issue raised by *Commissioner v. Mandel* is the dollar amount at which the "ability to pay" attaches. Community spouses with assets of \$74,820 or less are clearly of insufficient means as a matter of law.<sup>12</sup> The summary judgment procedural posture of *Mandel* is capable of being read two ways; either the "ability to pay" is rigidly set between \$74,820 and \$87,000 or the "ability to pay" is per se if the community spouse holds \$700,000. Individual factors, such as the age and health of the community spouse, whether the community spouse has a disabled child, the fixed living expenses of the community spouse, would seem to raise questions of fact in most other cases and preclude the use of summary judgment. In *Mandel*, the court appears to base its decision to grant summary judgment in large part upon *Gomprecht v. Gomprecht*, 86 NY2d 47. The court's reliance upon *Gomprecht* seems misplaced. *Gomprecht* is easily distinguishable because it was an affirmative action initiated by the community spouse. In that case, the community spouse brought her own action seeking an increase in the amount of her husband's income to which she claimed she was entitled. *Mandel* is the opposite, it is an action initiated by the department in which the community spouse is in a defensive posture.

### Large Numbers Affected

New York City Medicaid averaged over 35,000 total nursing home cases between fiscal year 1997 and fiscal year 2000.<sup>13</sup> Annual spousal refusal cases during that same time period averaged 2,500. An average of 225 cases per

year were referred to the legal division of Medicaid, its Office of Revenue and Investigation. In October 2000<sup>14</sup> the total number of people subject to recovery of Medicaid benefits was 402.

### Conclusion

While the underlying fact pattern in *Mandel* is common, the amount of assets in question is not. The vast majority of clients seeking assistance from an Elder Law attorney will have much more modest assets. The asset level in *Mandel* likely had an effect upon the court's perception of this issue. Even if the "ability to pay" is ultimately found to be on the more restrictive end, spousal refusal is likely to continue to be a viable option because of the disparity between the private pay rate and the Medicaid rate. An individual who pays privately for care pays at a substantially higher rate than the amount which Medicaid pays for the same day, in the same facility, in the same bed. Therefore, a community spouse may choose to apply for Medicaid under spousal refusal, agreeing when the claim is made by the Department of Social Services to pay the claim at the Medicaid rate. While it may be difficult to definitively tell clients where the "ability to pay" level is today, for most clients, the best advice is likely to continue to be spousal refusal.

(1) The 2000 census reported a 35 percent increase over the last decade in the number of Americans age 100 and above. The census counted 50,454 centenarians. It predicted one million centenarians by the year 2050.

(2) State of New York, Department of Health, Office of Medicaid Management, Administrative Directive, Transmittal 01 OMM/ADM-3 "Changes in

Medicaid Regional Rates for years 2000 and 2001, Aug. 16, 2001.

(3) For a complete review of the legal context of this issue, please see Fish, Daniel G. "Spousal Refusal Lawsuits Increase," *NYLJ*/May 21, 2001, p. 9.

(4) Sup. Ct. NY County, Justice Tolub, *NYLJ*, Sept. 14, 2001, p. 18.

(5) 42 USC 1396r-5, as amended by Pub. L. 100-360, 102 US Stat 753.

(6) The minimum resource amount is called CSRA (Community Spouse Resource Allowance). It is calculated as one-half of the couple's assets, but not less than \$74,820 and not more than \$87,000.

(7) 42 USC §1396r-5 and NY Soc Serv Law §366(3)(a).

(8) At the time of the Medicaid application, Mr. Mandel acknowledged assets of \$1,593,365, but claimed that one asset, a corporation value at \$900,000, was exempt under 18NYCRR §360-4.4(d)(2)(i). That regulation states: "the equity value of income producing property used in a trade or business is not considered an available resource."

(9) CPLR 2201 "... the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."

(10) *Matter of Klink*, 718NYS2d 758 (4th Dep. 2000).

(11) *Matter of Klink*, 718NYS2d 758 (4th Dep. 2000) was a claim against the estate of a community spouse and held that the estate was liable in conclusory language which held simply that the decedent was of sufficient ability to pay. The majority of the opinion is a discussion of the rate of interest. *Matter of Craig* 82 NY2d 388 was a suit against the estate of a community spouse.

(12) State of New York, Department of Health, Office of Medicaid Management, Administrative Directive, Transmittal 01 OMM/ADM-4 Spousal Impoverishment Allowance Increases for 2001, Aug. 21, 2001.

(13) Testimony of First Deputy Commissioner Mark Hoover before the General Welfare Committee of the City Council of N.Y., Oct. 17, 2000.

(14) Letter to Public Advocate Mark Green from Human Resources Administration Commissioner Jason A. Turner dated Oct. 13, 2001.

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