

Spousal Refusal

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What is Medicaid?

Medicaid pays for necessary medical care for eligible individuals whose income and resources are insufficient to meet the costs of their medical care. *See 42 USC § 1396 et seq; SSL § 363; Comm'r of the Dept. of Social Servs. Of the City of N.Y., v. Spellman, 243 A.D.2d 45, 47-48 (1st Dept 1998).*



What is "Spousal Refusal"?

Spousal refusal occurs when one spouse is being cared for in a facility (“the institutionalized spouse”), while the other spouse continues to live at home in the community (“the community spouse”). Upon application of the institutionalized spouse for Medicaid benefits, the community spouse quite simply refuses to contribute his or her income and/or assets for the care of the institutionalized spouse.

LDSS Recovery of Chronic Care Medicaid

Pursuant to SSL §§ 101 and 102 and FCA §§ 412 and 415, the Community Spouse is legally responsible, if of sufficient ability, to contribute toward the cost of medical care for the Institutionalized Spouse.

New York State has contemplated the duty of a married spouse with sufficient resources to provide for a spouse receiving publicly funded treatment and care. FCA § 412 sets out a married person's duty to support their spouse, and FCA § 415 further states that a spouse of “sufficient ability” is responsible for the support of a spouse-recipient of public assistance or care. *FCA §§ 412 and 415.*

LDSS Recovery of Chronic Care Medicaid

MERP- Medicaid Estate Recovery Program

State Medicaid programs must recover **certain** Medicaid benefits paid on behalf of a Medicaid enrollee.

Spousal Share

The spousal share is an amount equal to one-half of the total value of the countable resources of the community spouse and institutionalized spouse as of the beginning of the most recent continuous period of the institutionalization of the institutionalized spouse.

Continuous period of institutionalization means at least thirty (30) consecutive days of institutional care in a medical institution and/or nursing facility, or receipt of home and community based waived services, or a combination of institutional and home and community based waived services.

How is a spousal obligation calculated?

Community Spouse Gross Income-health insurance premium-burial disregard- Federal Maximum Community Spouse Resource Allowance (FMCSRA)*=Community Spouse Available Resource

*2024 FMCSRA is \$148,620.00

Minimum Monthly Maintenance Needs Allowance

If the Community Spouse wishes to seek an increase of the permitted MMNA (\$3,853.50 for 2024) he or she must either at a **fair hearing** or in a **family court proceeding** establish that there exist “exceptional circumstances which result in significant financial distress”. If the above is established Medicaid must permit an amount adequate to provide additional necessary income to the Community Spouse from the income of the Institutionalized Spouse.

Minimum Monthly Maintenance Needs Allowance Continued

In Gomprecht v. Sabol, 86 N.Y.2d 47, 629 N.Y.S. 2d 190 (1995), the NY Court of Appeals severely limited the 41 42 U.S.C. §1396r-5(d)(1)(b); Soc. Serv. L. §366-c.4 (b) 4218 NYCRR §360-4.10 (b)(6) 510 ability of Community Spouses to increase the MMNA in a state Court proceeding.

The Court determined that the fair hearing “exceptional circumstances” test was to be utilized by the Court in support proceedings. The Court opined that “exceptional circumstances” must be the result of “true financial hardship that is trust upon the Community Spouse by circumstances over which he or she has no control.” See Schachner v. Perales, 85 N.Y. 2d 316, 624 N.Y. 3d 558 (1995)

Spousal Refusal and Undue Hardship Concerning a Community Spouse's Refusal to Provide Necessary Information

For purposes of determining Medicaid eligibility for the institutionalized spouse, a community spouse must cooperate by providing necessary information about their resources. Refusal to provide the necessary information shall be reason for denying Medicaid for the institutionalized spouse as Medicaid eligibility cannot be determined. If the applicant or recipient demonstrates that denial of Medicaid would result in undue hardship for the institutionalized spouse and an assignment of support is executed or the institutionalized spouse is unable to execute such assignment due to physical or mental impairment, Medicaid shall be authorized. However, if the community spouse refuses to make such resource information available, the New York State Department of Health or local department of social services, at its option, may refer the matter to court for recovery from the community spouse of any Medicaid expenditures for the institutionalized spouse's care.

Spousal Refusal and Undue Hardship Concerning a Community Spouse's Refusal to Provide Necessary Information Cont.

Undue hardship occurs when:

A community spouse fails or refuses to cooperate in providing necessary information about their resources;

The institutionalized spouse is otherwise eligible for Medicaid;

The institutionalized spouse is unable to obtain appropriate medical care without the provision of Medicaid; **and**

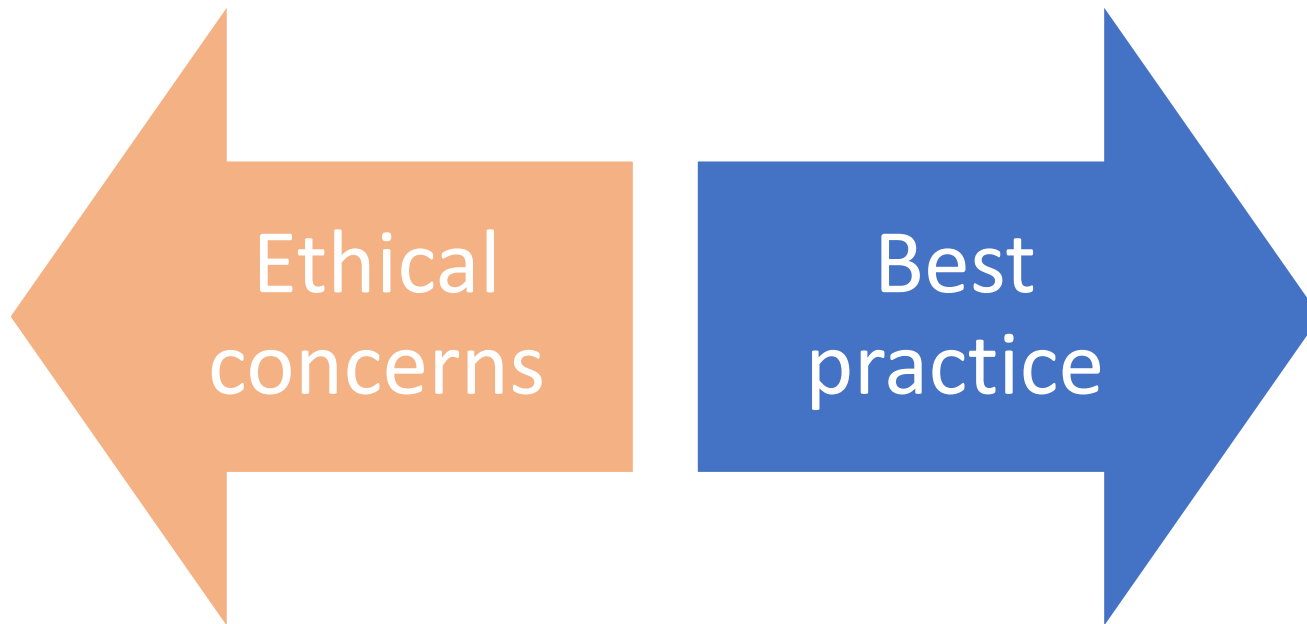
- The community spouse's whereabouts are unknown; **or**
- The community spouse is incapable of providing the required information due to illness or mental incapacity; **or**
- The community spouse lived apart from the institutionalized spouse immediately prior to institutionalization; **or**

Due to the action or inaction of the community spouse, other than the failure or refusal to cooperate in providing necessary information about their resources, the institutionalized spouse will need protection from actual or threatened harm, neglect, or hazardous conditions if discharged from an appropriate medical setting.

An institutionalized spouse will not be determined ineligible for Medicaid because the community spouse refuses to make their resources in excess of the community spouse resource allowance available to the institutionalized spouse if:

- The institutionalized spouse executes an assignment of support from the community spouse in favor of the social services district; **or**
- The institutionalized spouse is unable to execute such assignment due to physical or mental impairment.

Cyber Security Concerns



Filing a Petition in Family Court



Spousal Refusal Petitions (Form 4-3a) are filed under Article 3 and 4 of the Family Court Act.



Affidavit of the Social Welfare Examiner



Marriage Certificate



Spousal Refusal Form

The Petition

- Spousal Support-Medicaid Petitions are filed under Article 4 of the Family Court Act and Article 3 of the Social Services Law
- These petitions are brought on behalf of the Institutionalized Spouse by the Commissioner against the Community Spouse

The Affidavit

The Assigned Social Welfare Examiner must complete an Affidavit in support of the Petition and set forth:

- The Institutionalized Spouse is the recipient of Medicaid
- The Social Welfare conducted an appropriate assessment of resources
- The Community Spouse executed a spousal refusal form
- The Community Spouse has sufficient means to contribute to their spouse's care.

The Marriage Certificate and Spousal Refusal Form

In addition to the Affidavit, a copy of the marriage certificate* and the executed spousal refusal form must be submitted with the petition when it is filed with the Family Court.

*Foreign Marriage Certificates are accepted, and a translated copy is not required.

The Order of Support

Order of Support (Form 4-7)

Include:

- ✓ Chargeable arrears (Adjudicated Medicaid payments from onset to date of Order)
- ✓ Amount of CS income due towards monthly care until below the FMCSRA (\$148,620.00 in 2024)
- ✓ Amount towards arrears as negotiated by counsel
- ✓ Terms of missed payments (GCDSS Default is any 3 consecutive missed payments- the total becomes due within 60 days of written notice)
- ✓ A clause that the order shall be enforceable pursuant to CPLR §5241 or 5242, or in any other manner provided for by law.
- ✓ That the order of support runs while the Institutional Spouse remains in a care facility and the CS is above the FMCSRA
- ✓ Optional- A Medicaid Lien placed on the real property

Case Law-First Department

Commr. of the Dept. of Social Servs. v Fishman, 280 AD2d 396 (1st Dept 2001)

Plaintiff **social services** commissioner appealed the judgment of the Supreme Court, New York County (New York), which granted defendant wife's motion to dismiss plaintiff's complaint seeking reimbursement from defendant of medical assistance benefits paid on behalf of her deceased husband while he was a patient in a residential health care facility under [N.Y. Soc. Serv. Law § 366\(3\)\(a\)](#).

The deceased was determined eligible for assistance, and defendant signed a declaration expressly refusing to provide for the deceased's care. Plaintiff's agency advised defendant that it was authorized to seek recovery and that defendant possessed excess assets. Plaintiff's complaint alleged that plaintiff provided medical assistance payments for the deceased, that defendant was legally required to provide support for him, that defendant possessed total resources which exceeded the allowable resource level, and that she refused to perform her obligations when requested to do so. The court held that these allegations, together with plaintiff's documentary evidence, were sufficient to plead a cause of action under [§ 366\(3\)\(a\)](#).

Case Law-First Department Cont.

Commr. of the Dept. of Social Servs. v Spellman, 243 AD2d 45 (1st Dept 1998)

The Supreme Court, New York County, denied defendant community spouse's (CS) motion to dismiss an action brought by plaintiff **social services** department for reimbursement of nursing home care that the state paid on behalf of the CS's wife. The CS sought review.

A CS's wife was institutionalized in a nursing home. The wife received Medicaid benefits and the state filed an action that sought reimbursement from the CS. The court found that the Medicaid program was a payor of last resort and that the CS, if able, was liable to the state for reimbursement. The court held that the [N.Y. Soc. Serv. Law § 366-c](#) and the federal Medicare Catastrophic Coverage Act, [42 U.S.C.S. § 1396r-5](#) spared CSs from liquidating all assets to pay for the institutionalized spouse's upkeep. The court found that the CS had excess funds beyond money to meet his daily needs and the state was entitled to collect the excess money for reimbursement under state and federal Medicaid **laws**. The court held the CS may be compelled to pay for his wife's care.

Case Law-Second Department

Matter of Schneider, 70 AD3d 842 (2d Dept 2010)

A department of social services may recover from the estate of a community spouse, the cost of Medicaid benefits paid for the care of an institutionalized spouse, so long as the community spouse was a "responsible" relative pursuant to Social Services Law § 101, in that he or she possessed sufficient means to pay the institutionalized spouse's medical expenses at the time when the expenses were incurred. 42 U.S.C.S.

§§ 1396k(a)(1)(A), 1396a(a)(25), 1396r-5(c)(2), Social Services Law §§ 101, 366 (3)

Case Law- Second Department Cont.

Sherman v DeRosa, 34 AD3d 782 (2d Dept 2006)

The DSS sought to recover from the wife Medicaid benefits it paid for the nursing home care of the wife's late husband. The complaint alleged that the DSS provided medical assistance payments for the husband, that the wife was legally required to provide support for him, and that she possessed total resources in excess of the allowable resource level but refused to provide for her husband's care. The supreme court dismissed all nine of the affirmative defenses asserted in her amended verified answer. The appeals court found that the seventh and eighth affirmative defenses were properly dismissed since the DSS's claim was not barred by res judicata or collateral estoppel. The claim for reimbursement asserted against the wife was not raised or decided on the merits in a prior guardianship proceeding, nor did the DSS have a full and fair opportunity to contest the issue in that proceeding. The remaining affirmative defenses were also properly dismissed since the DSS was authorized to bring an action to recover the cost of Medicaid benefits paid for the care of the wife's spouse to the extent that the wife had available resources ([Social Services Law §§ 104, 366\(2\)](#)).

Case Law- Third Department

Matter of Lopez v Commr. of N. Y. State Dept. of Health, 42 AD3d 638, 638 (3d Dept 2007)

Medicaid eligibility was denied for excess resources, and it was found that the spouse could meet her minimum monthly maintenance allowance (MMMA) by increasing a monthly withdrawal from her annuity. The appellate court held she had the burden to show entitlement to Medicaid, and a claim that respondent county commissioner of social services improperly included the total she could withdraw from her annuity without penalty in her monthly income, forcing her to deplete the annuity's principal, was speculative as she did not prove the nature of the annuity or what part of an increased monthly withdrawal would be principal rather than income. Requiring her to maximize her income was consistent with the policy to assure a community spouse had enough but not excessive income to live comfortably and not to permit the sheltering of personal wealth at public expense. The conclusion that she could withdraw more from her annuity to meet the MMMA was not arbitrary or capricious. Her spousal refusal should have been considered in deciding her husband's Medicaid eligibility because nothing precluded her from asserting that statutory right, under Social Services Law § 366.

Case Law- Court of Appeals

Matter of Balzarini v Suffolk County Dept. of Social Servs., 16 NY3d 135 (2011)

At issue was whether the wife's expenses for housing, utilities, auto, Medicare, food, clothing, medical care, and home maintenance supported an increased award. The appellate court found that Congress created the MMMNA precisely to cover just such ordinary and thus, by definition, non-exceptional items. All the wife tried to show at the hearing was that she could not maintain her existing lifestyle if all of the husband's income was applied toward his medical care. She thus did not demonstrate that her "significant financial distress" was caused by "exceptional circumstances" within the meaning of the spousal impoverishment provisions. [Social Services Law § 366-c](#) contemplated that an increase in the MMMNA was available only to alleviate true financial hardship that was thrust upon the community spouse by circumstances over which he or she had no control, as exemplified by the circumstances enumerated in [18 NYCRR 360-4.10\(a\)\(10\)](#). The spousal impoverishment provisions were not meant to enable the community spouse to maintain his or her prior lifestyle and have the public subsidize it. Substantial evidence supported the determination denying the wife an increase in the MMMNA.

SHAM DIVORCES

Is there such a thing?

What is it?

How does it impact a Medicaid Application

SHAM DIVORCES FACTORS

In Re Joseph KLAYNBERG, Debtor, 43 B.R. 309, United States Bankruptcy Court, S.D. New York (September 19, 2022)

Courts recognize that there are certain relevant factors when determining if a divorce is a “sham” for the purposes of disputed transfers, including:

- **Timing of the divorce;**
- **Short interval between the entry of the divorce decree and the bankruptcy filing;**
- **Despite being married for 37 years, Debtor and spouse entered into the Separation Agreement just 46 days after creditor demand letter;**
- **Parties continue to hold themselves out as married;**
- **Parties continue to live together after the divorce in the very house that was transferred to one of the spouses;**
- **The transferor spouse continues to pay the mortgage, taxes, and other costs on the transferred house;**
- **Parties quickly agreed upon a division of their property;**
- **One Spouse not represented by counsel;**
- **Divorce was completed on a “fast track,” with no real negotiation;**
- **The distribution of assets in the Separation Agreement appears to be extremely lopsided in favor of the non-debtor party.**

SHAM DIVORCES FACTORS

Milin v. Pak, et al., 189 A.D.3d 1211, NYS APP. DIV. 2nd Dept. (December 16, 2020)

“In determining whether a conveyance was fraudulent, the ‘courts will consider badges of fraud[,] which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent”

“Badges of fraud include (1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance”

Plaintiff alleged in the proposed second amended complaint that defendant knew of the plaintiff's claim regarding the unpaid loan before the divorce action was commenced, instituted a sham divorce to transfer the property to his wife to shield it from the plaintiff's lawsuit, and continued to reside in and retain control over the property after the divorce and transfer.

SHAM DIVORCES – MEDICAID CONSIDERATIONS

- When was the application filed?
- Did divorce take place in the look back?
- What is the Length of the Marriage?
- Is there a Divorce Decree or is the action still pending?
- Is there a Separation or Opting out agreement? Does it seem fair?
- Was there financial disclosure?
- Was the Applicant/Recipient represented by an attorney in the divorce?
- What was the Applicant/Recipient Health at the time of Divorce?
- What was the timing of Placement
- Do the parties continue to reside together?
- Do the parties still have joint accounts?

DIVORCE – FAILURE TO PROVIDE DOCUMENTATION

FAIR HEARING NO. 8179954J Suffolk County (09/17/2021)

Resource and income information of the Appellant's spouse is necessary to determine the Appellant's Medicaid chronic care eligibility, per the applicable State Regulations and policy. Per State policy, a "spouse" is defined as a person married to the applicant and includes married persons who are separated, but not divorced.

State's policy set forth in the Administrative Directive 93 ADM-29 is that a Medicaid applicant must not be denied solely because a non-applying legally responsible relative refuses to provide the requested verification

Divorce commenced in 2019 prior to Change in Status application submitted May 6, 2020. Appellant was discharged home May 25, 2020. The Agency requested a copy of the divorce decree and all stipulation agreements. Appellant failed to provide income and resource documentation for his spouse and the Agency denied the application.

DIVORCE – FAILURE TO PROVIDE DOCUMENTATION

FAIR HEARING NO. 8179954J Suffolk County (09/17/2021)

The divorce was not finalized at the time of the Fair Hearing, but the Appellant provided a Stipulation of Settlement that indicated both parties were represented by attorneys and stated in part: “Each party has made independent inquiry into the financial circumstances of the other and is fully informed of the income, assets, and financial condition of the other ... Each party acknowledges that this agreement has been achieved after full disclosure and good-faith negotiations.”

Appellant’s divorce attorney was in possession of the Appellant’s spouse’s financial information as of at least October 9, 2020. Appellant’s representative unequivocally testified that she did not even attempt to inquire at the time as to whether Appellant’s divorce attorney had the relevant financial information for the spouse, even though the record shows the representative was in contact with Appellant’s divorce attorney at the time.

No good cause was shown for the failure to provide the requested documentation.

Conclusion

The LDSS is not required to succeed in recovery, only make a reasonable effort to do so.

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