

PROTECTING A SPOUSE MICHELE CASSIDY, J.D., LL.M

Using a Spousal Refusal letter.

Spouses of a person in need of long term care are in a funny position because in many ways they have a great deal of protection and in others they are left hanging out to dry. The best way to discuss the matter is to look into a typical situation. Lets say that a Husband needs care at home, that is he needs the help of a personal care aide or a home health aide. Husband transfers all of his assets to Wife. Husband applies for Medicaid. If Husband's assets are less than \$14,400, husband is eligible for Medicaid. Wife could be sitting on \$1.0 million but her spouse will receive Medicaid if in the Medicaid application process, Wife submits a "spousal refusal letter." This is a letter which states that I as a spouse will not use my assets and income for the support and maintenance of my Husband. Upon doing so, Medicaid can not under the laws of the State of New York count the Wife's assets and income for purposes of determining Husband's eligibility for Medicaid. Thus Husband will obtain Medicaid in the simple example given no matter what the value of Wife's assets.

But doesn't a spouse have a duty of support?

Note however that when the Husband applies for Medicaid he is required to assign Medicaid his right to receive support from his Wife. Armed with that right, the local district of Medicaid can pursue the Wife for support of the Husband. So while the Husband gets the Medicaid, the public agency (now the New York State Department of Health) has the right to try to recover amounts paid from the Wife.

What determines whether Medicaid pursues the wife?

Well that depends in large part on whether the Wife is in a position to provide support for her Husband. This of course will vary with each individual situation.

What is Spousal Impoverishment?

Unfortunately and for reasons which are not all that clear, greater protection is given to the community spouse (the spouse remaining at home and is therefore considered to be living in the community) when the other spouse (the institutionalized spouse is the spouse in the nursing home) is in a nursing home. Here the community spouse is allowed to have approximately \$74,820-\$115,920 in resources (there is a method which we need not go into here) of assets (it will change each year and this is in addition to the home) in 2009 and \$2,898 a month of income in 2014. These protections for the well spouse are not available when the ill spouse is able to remain home. Strange?

What occurs if the community spouse has more resources than what is permitted?

Well under normal circumstances, Medicaid will not be made available to the ill spouse. However, as stated above, New York allows the community spouse to submit a Spousal Refusal Letter so that the income and the resources of the community spouse are not considered in determining the eligibility of the institutionalized spouse and, therefore, Medicaid will be provided. There is, of course, the obligation of the community spouse to support the institutionalized spouse.

What if the assets of the community spouse are less than what is permitted?

All that needs be done is to transfer all of the family's assets to the community spouse, at least what is left of them.

What if the community spouse has more than \$2,898 per month?

In New York, the community spouse will be expected to contribute 25% of the monthly income exceeding \$2,898. That's not a bad deal.

If the community spouse has excess assets, that spouse can use a private annuity to produce a favorable result and probably avoid an action for support. See Using Private Annuities.

What if the community spouse has less than \$2,898 per month in income?

Here is an important right that people should be aware of. If the community spouse has less than the monthly income allowed, the community spouse can request that part of the income of the institutionalized spouse be given to the community spouse to bring the community spouse's income to \$2,898 per month or at least to whatever amount can be reached below \$2,898 per month.