Richmond County Bar Association
Winter 2012 Journal
By: Elder Law Committee
Anthony J. Lamberti, Esq.
The Law Firm of Lance P. Armstrong, P LLC

Spousal Planning Issues

A. Rules Protecting the Community Spouse

1. Rules Regarding Income

Under the Medicare Catastrophic Coverage Act (MCCA), states are given the discretion to establish an income allowance for the community spouse (which, in 1989, was $1,500) to be adjusted every year for inflation. New York has consistently chosen the highest income allowance, which currently is $2,841 per month.

Specifically, the community spouse is allowed to have a Minimum Monthly Maintenance Needs Allowance (MMMNA) (the maximum MMMNA in 2012 is $2,841). If the community spouse's income falls below the MMMNA, the community spouse is entitled to receive total income up to the MMMNA amount by deducting income of the institutionalized spouse, but only to the extent such income is actually made available to (or for the benefit of) the community spouse. The MMMNA is equal to or exceeds the following:

a. A sufficient amount of income to increase the community spouse's income to 1/12 of the income official poverty level (as defined by the Office of Management and Budget and as revised annually) for a family of two; and

b. An excess shelter allowance to cover high housing costs. This allowance is calculated by adding:

   i. The spouse's expenses for rent or mortgage payments (principal and interest), taxes, insurance, and (if applicable) condominium or cooperative maintenance charges; and

   ii. The standard utility allowance used by some states for the Food Stamp Program or the spouse's actual utility expenses; and

If the sum of (a) and (b) exceeds 30 percent of the income allowance, the excess is considered an additional amount that the community spouse may retain from his or her own income or receive from the institutionalized spouse's income.

If the community spouse requires income in excess of the MMMNA, and if a state court orders such support, the MMMNA will be increased up to the amount set by the court. The ability to increase the MMMNA through court-ordered support in Family Court in New York has been severely curtailed due to a 1995 Court of Appeals case, *Gomprecht v. Sabol,* which will be discussed below. The standard in New York for court-ordered support is the same as the standard used at a fair hearing.

At a fair hearing, the community spouse must show that he or she needs income above the MMMNA because of "exceptional circumstances resulting in significant financial distress."

German war reparation payments received by the institutionalized spouse do not count as income.

Besides providing for the community spouse, Congress also has provided for allocations of the institutionalized spouse's income by deducting the following amounts:

a. Personal Needs Allowance for the institutionalized spouse;

b. Community spouse monthly income allowance for the community spouse "but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse;

c. Family allowance for each "family member" (i.e., minor or dependent parents, or dependent siblings of either spouse who reside with the community spouse). This

allowance equals the amount by which one-third of the state minimum allowance exceeds that person's actual monthly income; and

d. Medical expenses for the institutionalized spouse.

Except as provided in the following paragraph, any income received by the community spouse is not considered available to the institutionalized spouse for purposes of Medicaid eligibility. Social Services Law § 366-c(3)(a) provides that this presumption applies unless established by a preponderance of the evidence to the contrary.

After the institutionalized spouse is deemed eligible to receive Medical Assistance, Congress has established certain rules to determine how income is apportioned between the community spouse and the institutionalized spouse.

a. Nontrust Property

i. If income is paid solely in the name of the institutionalized spouse or solely in the name of the community spouse, the income is deemed available only to that particular spouse.

ii. If income is paid in the names of the institutionalized spouse and the community spouse, one-half of the income is deemed available to each of them.

iii. If income is paid or distributed in the names of the institutionalized spouse or the community spouse, or both, and to a third party or parties, the income is deemed available to each spouse in proportion to the spouse's interest (or, if income is paid with respect to both spouses and no such interest is specified, one-half of the joint interest is deemed available to each spouse).

b. Trust Property

Income is deemed available to each spouse as indicated in the trust agreement or if there are no specific provisions in the trust agreement regarding allocation of income, the following rules apply:

i. If income is paid solely to the institutionalized spouse or solely to the community spouse, the income shall be deemed available only to that particular spouse;

ii. If income is paid to both the institutionalized spouse and the community spouse, one-half of the income shall be deemed available to each of them; or

iii. If income is paid to the institutionalized spouse or the community spouse, or both, and to a third party or parties, the income is deemed available to each spouse in proportion to the particular spouse's interest (or, if income is paid with respect to both spouses and no such interest is specified, one-half of the joint interest is deemed available to each spouse).

Under New York State law, income from a trust shall be considered available to each spouse in accordance with the provisions of the trust instrument, or, in the absence of a specific trust provision allocating income, in accordance with the provisions of subparagraphs (ii) through (iv) of 18 N.Y.C.R.R. § 360-4.10(b)(2)(v).

In the situation where income is not paid from a trust and where no instrument exists to establish ownership interest, subject to the following paragraph, one-half of the income is deemed available to the institutionalized spouse and one-half to the community spouse.

The rules regarding non-trust property and the rules regarding property not held pursuant to an instrument are superseded to the extent that the institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided herein.

Note that pursuant to 18 N.Y.C.R.R. § 360-4.10(b)(5):

The community spouse will be requested to contribute 25 percent of his/her income in excess of the minimum monthly maintenance needs allowances toward the cost of necessary care or assistance for the institutionalized spouse. An institutionalized spouse will not be denied Medicaid because the community spouse refuses or fails to make such income available. However, nothing contained in this paragraph prohibits a social services district from enforcing the provisions of the Social Services Law which require financial contributions from legally responsible relatives, or recovering from the community spouse the cost of any Medicaid provided to the institutionalized spouse.

Also note that pursuant to 18 N.Y.C.R.R. § 360-4.10(b)(6):

> If either spouse establishes that the community spouse needs income above the level established by the social services district as the minimum monthly maintenance needs allowance, based upon exceptional circumstances which result in significant financial distress ... the department must substitute an amount adequate to provide necessary income from the income otherwise available to the institutionalized spouse. See *Gomprecht,* infra.

The term "income," as used in the Medicaid context, might not include items that are deemed income for tax purposes or in determining Medicaid eligibility.

2. Rules Regarding Resources

Federal law provides that the community spouse is entitled to a Community Spouse Resource Allowance (CSRA) to be set by the state and adjusted annually pursuant to the Consumer Price Index. The computation of the CSRA commences on the first day the institutionalized spouse begins a period of institutionalization that is likely to last for at least 30 consecutive days. The computation consists of:

a. The total value of the resources to the extent either the institutionalized spouse or the community spouse has an owner ship interest; and

b. A spousal share that is equal to one-half of the total value of the resources.

At the commencement of the period of institutionalization of the institutionalized spouse, either the institutionalized spouse or the community spouse may request that the state conduct an assessment of the total value of the resources based upon any relevant documentation provided to the state. The state is required to indicate on the assessment that the spouse is entitled to have a fair hearing under 42 U.S.C. § 1396r-5(e)(2), SSL § 366-c(7)(a).3i

In attributing resources at the time of the initial Medicaid eligibility determination, the following rules apply:

a. Except as provided in the following paragraph, all the resources held by either the institutionalized spouse, com munity spouse, or both are deemed available to the institutionalized spouse "to the extent that the value of the resources exceeds the maximum commu nity resource allowance"; and

b. Resources are deemed available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the CSRA pursuant to 42 U.S.C. § 1396r-5(f)(2)(A).33

Prior to 1996, New York State always selected the highest amount permitted by federal law. In 1996, New York State amended this law by providing that the spouse is entitled to retain resources in an amount equal to the greater of the following:

a. $74,820; or

b. One-half of the total value of the resources of the couple as of the month of the first continuous period of institutionalization of the institutionalized spouse, up to a maximum of $113,640 (for the year 2012) . Thus, if the couple has assets in excess of $227,280 the CSRA is $113,640.

3. **Enhancing the Resource Allowance**

42 U.S.C. § 1396r-5(e)(2)(C) provides:

> [I]f either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

Depending upon the amount of the income of the community spouse, this provision may translate into significant increases in the CSRA.

If the spousal share is deemed insufficient to raise the community spouse's income to the MMMNA, the community spouse should seek a fair hearing or a court order aimed at obtaining a greater share of the institutionalized person's resources.

4. Income First Issue

The question of whether income or assets should be transferred first to bring the community spouse's MMMNA up to the minimum amount is an important one. Federal law does not expressly address this issue. HCFA (presently known as the Center for Medicare and Medicaid Services or CMS) initially took the position that no substitutions (higher resource allowances) are permitted when institutionalized spouses do not make available monthly income allowances to their community spouses (known as the "income first" rule). Although some states interpreted this statement as *mandating* the "income first" rule, HCFA has denied this interpretation.

The position of the New York State Department of Social Services that income should be transferred first is stated in Administrative Directive 96 ADM-11, which provides in pertinent part: "[t]he community spouse may be able to obtain additional amounts of resources to generate income when the otherwise available income of the community spouse, together with the income allowance from the institutionalized spouse is less than the maximum monthly income allowance.

In most circumstances, the community spouse would prefer to retain resources first rather than receive income from the institutionalized spouse inasmuch as the retention of resources by the community spouse provides greater financial protection for the future.

On April 2,1998, the New York Court of Appeals reversed the Appellate Division, Fourth Department, and held in *Golf v. New York State Department of Social Services,*[i] that the language and purpose of the federal and New York State Medicaid statutes permit the application of the income first rule by the department of social services. Accordingly, as a result of the Court of Appeals' decision, income of the institutionalized spouse may be attributed to the community spouse before the institutionalized spouse's resources are utilized to raise the income of the community spouse to the level of the MMMNA.

i. *Golfv. New York State Department of Social Services,* 674 N.Y.S.2d 600 (1998).

The questions presented in *Golf* concerned the construction of state and federal statutory provisions regarding Medicaid and the reasonableness of the method used by the local Medicaid agency in determining the eligibility of the institutionalized spouse. Specifically at issue was the decision to utilize the income first rather than the resources first method to determine the institutionalized spouse's eligibility for Medicaid. The New York State Court of Appeals upheld the "income first" approach, concluding that the statutes are ambiguous and that the income first method is premised upon a reasonable interpretation of the relevant statutory provisions.

In *Golf,* Eileen Golf, the administratrix of her deceased husband Floyd Golf's estate, filed a posthumous Medicaid application on behalf of her husband's estate for institutional Medicaid benefits. DSS determined that although Mrs. Golf had less income than the MMMNA, she had excess resources. Mr. Golf, in addition to his income, also had excess resources.

DSS acknowledged that Mrs. Golf was entitled to a transfer of resources and/or income to raise her income to the MMMNA level. The issue was whether income or resources should be applied first. The local agency allowed for a transfer of *income* from Mr. Golf's estate to Mrs. Golf, but Mr. Golf still did not qualify for Medicaid, as his *resources* exceeded the Medicaid allowable amount.

The case was appealed to the New York Court of Appeals, New York's highest court. The federal and state provisions at issue were, respectively:

> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.
>
> and
>
> If either spouse establishes that income generated by the community spouse resource allowance, established by the social services district, is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, the department shall establish a resource allowance for the spousal

> share of the institutionalized spouse adequate to provide such minimum monthly maintenance needs allowance.

The Court held that these provisions, under both the federal and state statutory frameworks, are "clearly designed to permit the transfer of resources at the pre-eligibility stage. But, demonstrably, neither provision dictates whether income allocation should or should not precede resource allocation."[44] The Court further stated, "[c]ritical... is the fact that neither the Federal nor State statute provides for when such a transfer takes place—pre-eligibility (and pre-resource transfer) or posteligibility—and therein lies the room for agency interpretation." Thus, the New York Court of Appeals held that the language and purpose of the federal and New York State Medicaid statutes permit the application of the income-first rule by DSS.

Although *Golf* does not address the issue of spousal refusal, the Court's discussion of income first versus resources first implies that the spousal impoverishment provisions were not intended to offer a financial boon for applicants or to provide a route upon which one could bypass the obligation to contribute one's fair share of the costs associated with nursing home care. Thus, the Court states that "[a]n agency's transfer of income, rather than resources, to the community spouse effectively serves the dual goals of ensuring that the community spouse would live comfortably and of protecting against the depletion of limited Medicaid resources by individuals capable of helping themselves." The Court further states that the practical difficulties of recoupment from a community spouse of resources transferred to him or her by the institutionalized spouse should not be lightly dismissed, further stating "[t]hat some means of recoupment exist is no reason to create opportunities for sheltering assets."

11. Increasing the MMMNA After *Gomprecht*

On June 29,1995, the New York State Court of Appeals in *Gomprecht v. Sabol ("Gomprecht"),* found that the fair hearing "exceptional circumstances" standard is the standard to be applied by New York State courts in support proceedings brought by a community spouse. Furthermore, citing its holding in *Schachner v. Perales* the court found that the "exceptional circumstances" must be occasioned by "true 'financial hardship that is thrust upon the community spouse by circumstances over which he or she has no control."

In *Jenkins v. Fields* plaintiffs sought to have a federal court rule that the *Gomprecht* decision was inconsistent with federal law. Both Mr. and Mrs. Jenkins were retired transit authority token booth clerks. Mrs. Jenkins had previously received an award under the then-existing lifestyle standard enunciated in *Rose S.* When the original order expired, she refiled for a continuation of her support award, but later withdrew her petition in light of the intervening *Gomprecht* decision.

In essence, the federal court found that the federal statute "appears to be intended to do no more than permit State courts to apply a more lenient standard in support proceedings if they choose to do so... ." Thus, the federal court's statutory interpretation provided the state court with the latitude to arrive at any decision it chose, and *Jenkins* was dismissed as not presenting a federal question.

Therefore, the current standard for court-ordered support to a community spouse seeking more than the MMMNA is that he or she show "significant financial distress," which is defined in 18 N.Y.C.R.R. § 360-4.10(a)(10) as

> exceptional expenses which the community spouse cannot be expected to meet from

the monthly maintenance needs allowance from amounts held in resources. Such expenses may be of a recurring nature or may represent major onetime costs, and may include but are not limited to: recurring or extra-ordinary non covered medical expenses; amounts to preserve, maintain or make major repairs on the homestead; and amounts necessary to preserve an income producing asset.

B. Exempt Interspousal Transfers

It may be necessary for the institutionalized spouse to transfer resources to the community spouse to become Medicaid eligible if the institutionalized spouse has resources in excess of the allowable amounts. The transfer of assets rules provide that *any* amount of resources may be transferred between spouses without imposition of a penalty period.

Notwithstanding the above paragraph indicating that any amount of resources may be transferred between spouses, once a Medicaid application is submitted on behalf of the institutionalized spouse, federal law provides that an institutionalized spouse may only transfer to a community spouse an amount equal to the CSRA but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.

Practice issue: May a community spouse transfer assets out of his or her name once the institutionalized spouse's nursing home Medicaid application is approved? Both federal and state law expressly exempt transfers made "exclusively for a purpose other than to qualify for Medical Assistance." Thus, where the Medicaid application is already approved and the community spouse thereafter transfers assets for a purpose other than to qualify the applicant spouse for benefits, the transfer does not result in a period of ineligibility with respect to the institutional spouse's Medicaid eligibility. However, such post-eligibility transfers by the community spouse are subject to the transfer penalty rules with respect to the community spouse's *own* Medicaid eligibility.

C. The Right of Spousal Refusal

In addition to the right to retain a fixed income and resource allowance, under federal law, the community spouse may also exercise a right of "spousal refusal" and retain amounts in excess of the CSRA or the MMMNA without jeopardizing the institutionalized spouse's Medicaid eligibility, provided that:

Under federal Medicaid law, where the healthy spouse of a nursing home resident refuses to cooperate with an application for Medicaid and the nursing home resident's spouse signs over his rights to spousal support to the state for if the state already has those rights by statute), the nursing home resident spouse's application for Medicaid coverage must be considered without regard to the resources of the community spouse. 42 U.S.C. §1396r-5(c). Except in some cases of second marriages, this provision has been ignored in most of the country. However, it has become the basis of Medicaid eligibility determinations for married applicants (for both those in the community and those in nursing homes) in New York State.

Under New York Social Services law, when a legally responsible relative refuses to contribute his or her income or resources toward the cost of care of a Medicaid applicant, the Medicaid agency is required to determine the eligibility of the applicant based solely on that person's income and[resources, as if the legally responsible relative did not exist, ("Legally responsible relative" typically refers to a communitv spouse or to a parent of a disabled child under the age of 21.) The community spouse is required, however, to fully disclose her income and resources. This article reviews the legal implications of such a refusal by a community spouse, which is commonly known as a "spousal refusal."

(*The Role of the Spousal Refusal*

Section 366(3)(a) of the New York Social *\ Services Law provides that:

> Medical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, me income and resources of the responsible relative are not available to such applicant because of the absence of such relative or the refusal or failure of such relative to provide the necessary care and assistance. In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of the article three and other applicable provisions of law.

The New York legislature has repeatedly rejected proposals in recent years to either abolish or severely restrict spousal refusals (although a proposal to repeal the provision is once again before the legislature as part of Governor George Pataki's 1995 budget-cutting package).

In New York, the community spouse is entitled to retain the first $113,640 of the couple's combined resources (community spouse resource allowance (CSRA)) - not half of the resources up to this limit as in many states - and $2,841 of the couple's combined income (the minimum monthly maintenance needs allowance (MMMNA)). This income figure is a guaranteed minimum, not a cap based on a formula. In some counties in New York, however, if the healthy spouse herself has more than $2,841 in income. 25 percent of any income she has above the $2,841 must be applied toward the cost of care of the ill spouse.

For resources: (a) the institutionalized spouse assigns to the state any right of support from the community spouse; or (b) the institutionalized spouse lacks the ability to execute an assignment of support due to physical or mental problems in which case the state has the right to bring a support proceeding against the community spouse without such assignment; or (c) the state finds that the denial of eligibility would "work an undue hardship";

For income: The community spouse exercises his or her right of refusal pursuant to 42 U.S.C. § 1396r-5(b)(l), which provides that "[d]uring any month in which an institutionalized spouse is in the institution, except as provided in certain specific circumstances, no income of the community spouse shall be deemed available to the institutionalized spouse."

Social Services Law § 366(3)(a) provides:

> [M]edical assistance shall be furnished to applicants in cases -where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available to such applicant because of the absence of such relative or the refusal or failure of such relative to provide the necessary care and assistance.
>
> In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law.

As a condition of eligibility for Medicaid, an individual who has the ability legally to execute an assignment for him or herself, also must

> cooperate with the state in identifying, and providing information to assist the state in pursuing any third party who may be liable to pay for care and services under the plan, unless such individual has good cause for refusing to cooperate as determined by the state agency in accordance with the standards prescribed by the Secretary [of Health and Human Services], which standards shall take into consideration the best interests of the individuals involved."

i. Nursing facility services, home and community based services, and related hospital and prescription drug services; and

ii. At the option of the state, any items or services described in the state Medicaid plan and

c. With respect to individuals who received or were entitled to receive benefits under a long-term care insurance policy issued in connection with a program whereby assets or resources were disregarded, to the extent that a nursing facility and other long-term care services were paid for by Medicaid, the state is required to seek adjustment or recovery from the individual's estate on account of Medicaid paid on behalf of the individual for nursing facility and other long-term care services.

2. The term "estate," not defined under federal law for persons who died before October 1, 1993, includes all real and personal property and other assets included within an individual's estate under state probate law. In addition, the states have the option of including "any ... other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest)." This option includes "such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement."

3. A state must postpone recovery until after the death of the individual's surviving spouse and inasmuch as the recipient is not survived by a minor (i.e., under the age of 21), blind or disabled child. No lien may be imposed on the real property of an individual who is receiving Medicaid if the following individuals lawfully reside therein:

a. A sibling of the individual who was residing in his or her home for at least one year immediately preceding the date the individual was admitted to the med ical institution, or

b. A child of the institutionalized spouse who lived in his or her home for at least two years before the parent/recipient was admitted to the medical institution and who proves to the state's satisfaction that he or she provided care to the parent/recipient which permitted the parent to reside at home rather than in an institution.
In both instances, the resident relative must have continuously lived in the recipient's home since the date of the recipient's admission to the institution.

4. States must establish guidelines in accordance with standards prescribed by the Secretary of Health and Human Services, whereby the state waives the application of the estate recovery rules when application would work an undue hardship, as determined on the basis of criteria established by the Secretary.
5. Federal law provides that the "state or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans, service benefit plans, and health maintenance organizations) to pay for care and services available under the plan." In any case where a third party has a legal liability to make payment for services provided to a Medicaid beneficiary, a state is subrogated to the right of any other party to payment for such services to the extent that payment has been made by the Medicaid program. Medicaid is intended to be the payor of last resort so that other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program.

6. Spousal Liability. Suits for "recovery" brought by the Commissioner of the Department of Social Services (DSS) against the community spouse: In numerous suits filed in the Metropolitan New York area, DSS has asserted a right to recover the cost of Medical Assistance provided to the institutionalized spouse from the community spouse to the extent that spouse has assets in excess of the CSRA. The department of social services has a right to obtain support, on behalf of the institutionalized spouse, from a community spouse who has asserted his/her right of refusal. The institutionalized spouse is not ineligible for Medicaid benefits if the community spouse has excess resources and refuses to make those assets available provided that the institutionalized spouse assigns his/her right of support against the community spouse to the department of social services.

DSS relies on a statutory provision which creates an implicit "contractual" and a "cost recovery" liability upon the spouse or other legally responsible relative "with sufficient income and resources to provide Medical Assistance." DSS applies this statute as a basis of recovery. Query: Is this provision the applicable state statute with which to proceed against a community spouse? Does federal law preempt and supersede New York State law? A case involving these issues was litigated in the New York County Supreme Court.

a. *Commissioner of the Department of Social Services of the City of New York v. Benjamin Spellman,* 243 A.D.2d 45 (1st Dep't 1998)

Defendant's wife, the institutionalized spouse, was admitted on January 1,1994, to a nursing home in New York City. The institutionalized spouse applied for Medicaid in June 1995 and began receiving Medicaid institutional benefits as of April 1,1995. A lawsuit was filed by the Commissioner of the Department of Social Services in December 1995 to recover Medicaid benefits expended on behalf of the institutionalized spouse.

SSL § 366(3)(a) provides that

> medical assistance shall be furnished to applicants in cases where, although such applicant has a responsible relative with sufficient income and resources to provide medical assistance as determined by the regulations of the department, the income and resources of the responsible relative are not available to such applicant because of the absence of such relative to provide the necessary care and assistance. In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law.

DSS argued that there is a retroactive right of recovery against the community spouse under SSL §§ 366(3)(a) and 104 for Medicaid benefits correctly paid. New York case law seems to indicate SSL § 104 is inapplicable. Section 104 authorizes DSS or a local district to bring an action to recover the property of a "legally responsible relative" of a public assistance recipient. A New York Court of Appeals case, *In re Craig,* in which DSS sought recovery from the estate of the surviving spouse of a Medicaid recipient, held "[s]ection 104 is not applicable to recovery of medical assistance governed by section 369k which specifically precludes and preempts the overarching reach of general provisions of Social Services Law by the explicit rules applicable to Medicaid recipients. 82 N.Y.2d at 392, 604 N.Y.S.2d at 910."

Craig seems to indicate, however, that "recovery" in the nature of an implied contract for support is possible against the estate of a refusing spouse who was possessed of sufficient ability to provide support. "The plain import of the Social Services Law § 366(3)(a),... allows the *belated recovery* [emphasis added] from the responsible relative only if that party had sufficient means during the period the medical assistance was rendered."

Any right of "recovery" that extends beyond the fulfillment of a support obligation would violate the Medicaid recovery provisions of federal law, which specifically limit the state's right of "recovery" of correctly paid Medicaid to certain enumerated circumstances. Essentially, recovery is limited to the recipient's estate or upon the sale of the

recipient's homestead property, with any such recovery deferred until the surviving spouse has died.

Note that New York creates an obligation of a responsible relative if the community spouse "is of sufficient ability" and provides that the liability for support may be enforced by the Department of Social Services. Section 101(2) provides, in part, that: "the liability imposed by this section shall be for the benefit of the public welfare district concerned ..., and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction."

In addition to the Social Services Law, the three federal statutory provisions central to the arguments in this case were 42 U.S.C. § 1396k, 42 U.S.C. § 1396p, and 42 U.S.C. § 1396r-5. The question was which statute controls. The Department relied primarily on 42 U.S.C. § 1396k, claiming that this statute provides a right of recovery against a community spouse who is liable as a third party to reimburse the state for the cost of long-term care of the institutionalized spouse. In its Motion to Dismiss this claim, the defendant argued that the federal statute (i.e., 42 U.S.C. § 1396k) is merely an eligibility provision permitting reimbursement of Medicaid correctly paid from insurance providers and that 42 U.S.C. § 1396r-5 is the relevant statute to rely on in this matter. Neither legislative history nor recent case law for both of these statutes provides any dispositive evidence supporting DSS's position that a community spouse is liable as a third party. None of the legislative history contains a discussion of what or who constitutes third parties. The defendant argued that it could be inferred from case law and legislative history that Congress did not want to include community spouses as third parties, for it could have made that clear in the statute.

The Defendant further argued that 42 U.S.C. § 1396r-5 superseded 42 U.S.C. § 1396k as it provides for the special treatment for institutionalized spouses who receive Medicaid as compared to non-institutionalized spouses. The Defendant also argued that 42 U.S.C. § 1396r-5 does not grant or provide any right of recovery for past Medicaid benefits which were correctly paid for, as it merely delineates eligibility requirements and provides a remedy for support. The legislative history behind the drafting of this statute does not discuss whether the statute creates a right of recovery.

Finally, based on Defendant's interpretation of the federal and state statutes and based on the preemption doctrine, it was argued that the Medicaid Act does not provide for recovery from the community spouse for Medicaid which was correctly paid to the institutionalized spouse. The only provision regarding recovery of Medical Assistance correctly paid in the Medicaid Act is found in 42 U.S.C. § 1396p(b), which states that no recovery of Medicaid benefits correctly paid on behalf of any individual under the state plan may be made, except under the following situations:

1. Congress requires a state to seek recovery from an institutionalized spouse who receives Medicaid, while an inpatient in a nursing home, by imposing a lien on the real property of the institutionalized spouse.

2. Congress requires that a state seek recovery from the estate of an individual who was over the age of 55 years when he or she received Medicaid.

3. Congress requires that a state seek recovery from an individual who disregarded payments under a long-term care insurance policy."

Any right of "recovery," it was argued by the Defendant, that extends beyond the fulfillment of a support obligation would violate the Medicaid recovery provisions of federal law which specifically limit the state's right of "recovery" of correctly paid Medicaid to certain enumerated instances described above. In effect, recovery is limited to the recipient's estate or upon the sale of the recipient's homestead property, with any such recovery deferred until the surviving spouse has died.

Based on the foregoing statute, it was argued that this case presented the classic preemption question wherein a federal law precludes state regulation of the same subject.

The court denied Defendant's Motion to Dismiss. It was not persuaded by Defendant's argument that the community spouse was not a "third party" as defined under the statute. The court relied on the definition of "third party" as described in 42 C.F.R. § 433.136(3): "any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan." Additionally, it held that 42 U.S.C. § 1396k was more than an eligibility provision; the court found that this statute provided a mechanism for recovery of benefits. Furthermore, the court concluded that there was no federal preemption of the Medicaid rules in this area.

b. *Commissioner ofDept. of Social Services of City of New York v. Fishman,* 713 N.Y.S.2d 152 (1st Dep't 2000)

DSS's right to recover accrues and the implied contract with a community spouse is created when the community spouse refuses to make income and/or resources available for the institutionalized spouse's support.

In *Fishman,* the Commissioner of the Department of Social Services of the City of New York (DSS) sued Mrs. Fishman, seeking reimbursement of Medical Assistance benefits paid on behalf of her husband, Samuel Fishman, deceased. The Supreme Court, Appellate Division (First Department), found that at the time Mr. Fishman was determined eligible for benefits, Mrs. Fishman possessed sufficient resources to pay for his care. The court further found that under SSL § 366(3)(a), a statutorily implied contract is created at the time the community spouse refuses to make her income available to provide care for the institutionalized spouse.

At the time Mr. Fishman was deemed eligible for Medical Assistance, DSS determined that Mrs. Fishman had a monthly income exceeding the MMMNA by $537.48. She also had excess resources in the amount of $421,807.59. Mrs. Fishman expressly refused to provide for her husband's care by signing a "Declaration of the Legally Responsible Relative," stating that she "refuse[d] to make [her] income and/or resources available" for her husband's medical care. The form that Mrs. Fishman signed stated that legally responsible relatives, despite having signed the form, could be sued for failure to support their spouses or minor children.

DSS sent Mrs. Fishman three demand letters, advising her to contact her attorney if she disputed the accuracy of the letters. The demand letters further stated that if Mrs. Fishman failed to respond within 15 days, DSS would take legal action to obtain reimbursement of Medicaid payments. Mrs. Fishman did not respond to the letters, and less than two months after Mr. Fishman's death, DSS commenced an action seeking recoupment of its payments under the implied contract theory found in SSL § 366(3)(a). The law states in pertinent part that "the furnishing of [medical assistance to applicants] shall create an implied contract with [a responsible relative with

sufficient income and resources to provide medical assistance] and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of law."

Discussion **of the** Case

The lower court concluded that establishing ability to pay only at the initial Medicaid eligibility determination did not satisfy the requirement of establishing sufficient ability to pay at all times benefits were rendered. The Appellate Division First Department reversed and held that an initial determination of the community spouse's resources, without further determinations during the time the institutionalized spouse is receiving benefits, *is* sufficient to satisfy the provisions ofSSL§366(3)(a).i02

The Appellate Division held that DSS's right to recover accrued and the implied contract with Mrs. Fishman was created when she refused to make her income and resources available for Mr. Fishman's support. This event took place at the approximate time that DSS examined her income and resources and determined that she had sufficient ability to pay for her husband's care. The Court went on to state that any contrary interpretation would require DSS to continually reassess the responsible spouse's ability to pay.

Commissioner of the Department of Social Services of the City of New York v. Mandel (New York County Supreme Court, N.Y.L.J., September 14,2001, p. 18, col. 1)

Community spouse was determined to possess "sufficient ability" to provide for his wife thereby permitting the New York City Human Resources Administration to recoup Medicaid benefits in the amount of $319,656.50 paid on behalf of the community spouse's wife.

The Plaintiff, the Commissioner of the Department of Social Services of the City of New York (HRA), moved for summary judgment against the community spouse, Samuel Mandel, to recover $319,656.50 in Medicaid benefits paid on behalf of Mrs. Mandel, the institutionalized spouse, from May 1, 1995 through March 16,1999.

Although Mr. Mandel signed a spousal refusal whereby he "refuse[d] to make [his] income and/or resources available for the cost of necessary medical care and services for [his wife]," HRA sought to enforce its right to recover from a legally responsible relative (i.e., Mr. Mandel, the community spouse) due to his failure to support his spouse in accordance with Social Services Law §§ 101 and 366. HRA alleged that Mr. Mandel possessed "sufficient ability" to provide for his wife notwithstanding his refusal to do so.

Discussion of the Case

Mr. Mandel denied that he was/is of sufficient ability to pay for his wife's care contending that a commercial business interest that he owns should not be included in the determination of his ability to pay for his wife's care. The Court noted that executing a spousal refusal does not deprive HRA from seeking recoupment from a financially qualified spouse. The Court further found that Mr.

Mandel's resources totaled approximately $1,593,635.80. Thus, even if his commercial business interest (which Mr. Mandel claimed should be exempt in evaluating his resources) was not considered when determining his ability to pay for his wife's care, Mr. Mandel's remaining resources still exceeded the community spouse Resource Allowance (CSRA) by more than $700,000.

The Court granted HRA's motion for summary judgment in the amount of $319,656.50 plus interest since June 10, 1999 and denied Mr. Mandel's cross-motion (for an order to stay the proceedings pursuant to CPLR section 2201 pending the exhaustion of his available administrative remedies), holding that there was no reason to preclude HRA's right to collect the money it is owed.

7. Recovery Against the Spouse's Estate. Since a community spouse only has an obligation to provide support during his or her lifetime, an assignment of the institutionalized spouse's support rights to DSS would terminate upon death. However, a support petition filed prior to the death of the community spouse would probably preserve DSS's right to support up to the time of death.

Craig specifically holds that no right of recovery exists against the estate of the surviving spouse of a Medicaid recipient where that spouse at the time the Medicaid benefits were provided possessed insufficient income and resources to provide support.

As discussed previously, *Craig* indicates that there is a right of "belated recovery" against the estate of a surviving spouse who was possessed of sufficient ability to provide support. However, such a holding may be inconsistent with 42 U.S.C. § 1396p(b), which prohibits recovery for Medicaid benefits correctly paid, except under certain circumstances.

The Omnibus Budget Reconciliation Act of 1993 (OBRA '93) (Public Law 143-66') amended the estate recovery provisions of federal law to permit the state to recover against the surviving spouse's estate to the extent that the surviving spouse had received the predeceased spouse's assets via joint tenancy and similar forms of survivorship.

8. Annuities and Estate Recovery. The Medicaid estate recovery statute is found at § 1917(b)(1) and *(2)*™ of the Social Security Act. Each state has the option of using either the state's own definition of probate estate or using the expanded definition of estate, which is found at § 1917(b)(4)(B) of the Social Security Act. Under the federal Medicaid statute, states *must* attempt recovery from estates for permanently institutionalized individuals and have the *option* to recover for any other Medicaid services for individuals age 55 and over. For Medicaid recovery purposes, the term "estate" includes any property within an individual's estate as defined for purposes of state probate law. However, at the option of the state, an individual's estate may include "any other real property and other assets in which the individual had any legal title or interest at the time of death ... including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or *other arrangement*.

On January 24,2000, HCFA Region IX issued a letter to the California Department of Health Services asserting that a state has the option to recover Medicaid benefits paid on behalf of an annuity policyholder from the surviving beneficiary of the annuity. According to HCFA, and specifically mentioned in the letter, annuities are private contracts that pass outside of probate in those states that use a narrow definition of estate for estate recovery purposes. A state may choose, however, to use a broader definition of estate than the probate estate definition. In such a case, HCFA states that "[ajnnuities can be viewed as an 'other arrangement' under Medicaid law, and can be treated like trusts, life estates, or joint tenancies, without regard to how much of the remainder interest has been 'transferred' by ownership to an heir." As such, annuities may be subject to estate recovery, provided that the state's Medicaid plan is amended to include annuities in its definition of estate. "Additionally, no recovery may be made so long as a surviving spouse or minor or blind or disabled adult child is alive." Consequently, the state may not interfere with the income stream of an annuity so long as there is a surviving spouse, dependent child under the age of 21, or a blind or disabled child of any age. Alternatively, if there is no surviving spouse or child who meets the above criteria and the state employs the expanded definition of estate, recovery from an annuity would be appropriate.

HCFA further clarified the treatment of annuities in a subsequent letter to Herbert Semmel of the National Senior Citizen's Law Center from Linda Minamoto, Associate Regional Administrator of HCFA's Region IX. The letter clarified that the January 24,2000, letter does not apply to life insurance and specifically stated that if there is a surviving spouse or a dependent child, there can be no estate recovery, even if the remainderman of the annuity is not a surviving spouse or dependent child. Furthermore, the letter stated that the remainder balance owned by the beneficiary at the time of death is considered the value of the interest in the annuity. Additionally, "the remainder balance can diminish over time with annuity payments being made to statutorily protected survivors, until such time as an 'estate recovery' can actually be made."

On September 1,2000, the New York State Department of Health, Office of Medicaid Management, issued a letter indicating, among other things, that (a) New York State does not have any form of estate recovery against annuities provided the beneficiary is not the estate of the deceased Medicaid recipient, and (b) there is no requirement that the state be named as primary beneficiary of an annuity to the extent that it has advanced monies on behalf of the Medicaid recipient.

New development Enhanced recovery statute will be discussed by Anthony J. Lamberti, Esq. and Toni Anne Barone, Esq.

The Medicaid Spousal Impoverishment Figures for 2012 have been released.

After remaining flat for two years, the community spouse resource allowance (CSRA) and the maximum monthly maintenance needs allowance will rise in 2012, the Centers for Medicare and Medicaid services has announced. The Medicaid home equity limits will go up as well.
The minimum state CSRA remains at $74,820 and the new maximum is $113,640. The new maximum monthly maintenance needs allowance is $2,841.

In addition, the minimum and maximum home equity limits used by Medicaid will increase to $525,000 and $786,000, respectively.

The new figures are effective January 1, 2012, and reflect an increase in the Consumer Price Index (CPI) of 3.6 percent.