

SNOWBIRD NEWS

Spousal Refusal in Florida

By Howard S. Krooks

Although the right of a spouse to refuse the availability of his or her assets to the other spouse has been recognized by federal law since 1988, Florida only began to observe the rule in 1999. New York, on the other hand, has been utilizing the “Spousal Refusal” option for 18 years. When Florida adopted the rule in its State Medicaid Manual, Florida attorneys looked to the New York experience for guidance. In this article, we will share with you the status of spousal refusal in Florida so that you may advise your snowbird clients accordingly.



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Before detailing the nuances, you should know that the spousal refusal option is working well in Florida, although change may be coming. Many Florida spouses today are able to protect themselves from impoverishment by exercising their right of spousal refusal. Prior to 1999, Florida attorneys were still able to assist their clients in protecting a spouse’s assets; however, the “Just Say No” option allows for greater flexibility and ascertainable risks. Now for some details:

The Florida spousal refusal rule follows the language of the Medicare Catastrophic Coverage Act of 1988 (42 U.S.C. § 1396r-5)(g)) by providing as follows:

The institutionalized spouse may not be determined ineligible based on a community spouse’s resources if all of the following conditions are found to exist:

1. The institutionalized individual is not eligible for Medicaid institutional services because of the community spouse’s resources and the community spouse refuses to use the resources for the institutionalized spouse; and
2. The institutionalized spouse assigns to the State any rights to support from the community spouse by submitting the Assignment of Support Rights form referenced in Rule 65A-1.400, F.A.C., signed by the institutionalized spouse or their representative; and
3. The institutionalized spouse would be eligible if only those resources to which they have access were counted; and

4. The institutionalized spouse has no other means to pay for the nursing home care.

Fla. Admin. Code R.
65A-1.712(4)(g).

Just as in New York, the Florida rule allows an otherwise qualified Medicaid applicant to be eligible for benefits if the community spouse refuses to make available his or her assets and the Medicaid applicant assigns his or her support rights. The State of Florida has promulgated a form for the assignment of support rights. Most Florida practitioners submit that form with the application. Although not required by the rule, it is also advisable and common practice to include a “Statement of Refusal” from the community spouse.

With a properly completed spousal refusal form, the government is prohibited from counting the community spouse’s assets. The reality is that in most Florida districts, the case workers require verification of the spouse’s assets and are sometimes swayed by the amount of assets disclosed. In some Florida districts, the case workers and their counsel are philosophically opposed to the rule and have not been educated in its application. Because of this lack of understanding on behalf of the case workers and the relative newness of the rule, the elder law bar in Florida has been confronted with difficulties in some districts within the State. In one recent case, a case worker in Palm Beach County refused to accept the spousal refusal and assignment of right of support forms claiming that they lacked the Florida Department of Children and Families’ logo in the upper left hand corner. One of the co-authors of this article is handling this case and it remains to be seen whether this will cause a denial or delayed Medicaid eligibility date.

If all steps in the Florida rule (recited above) are met, the government must approve the applicant’s eligibility. As in New York, the law allows the government to take an assignment of the institutionalized spouse’s support right and to therefore stand in the shoes of the Medicaid recipient and sue the community spouse.

In Florida, to the authors’ knowledge, no person has been sued by the State under this rule. If the State

does try to sue a community spouse, the community spouse will have at least one defense not available in New York, that being Florida's abrogation of the common-law doctrine of necessities.

The common-law "doctrine of necessities" has been completely abrogated in Florida. The Florida Supreme Court abolished the ancient doctrine because it made husbands responsible for their wives' "necessaries" but did not make wives bear a reciprocal responsibility. *Connor v. Southwest Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 175 (Fla. 1995). The Court could have held that husbands and wives are now equally responsible but opted instead to abrogate the doctrine altogether.

It should be noted that Florida case workers are admonished not to let people know about "spousal refusal" rights. The case workers are administratively barred from bringing up the solution and can only address it if the applicant raises the issue. The Florida Medicaid Manual states: "This . . . is not an option that a [worker] suggests to an ineligible couple, but rather a solution to an existing situation which is brought to the [worker's] attention."

In New York, there are several cases which have held in the State's favor when it came to recovery against the community spouse. See, e.g., *Spellman*, 243 A.D.2d 45, 672 N.Y.S.2d 298 (N.Y.A.D. 1st Dep't 1998). In *Spellman*, the Department of Social Services' claim that Social Services Law § 366-(3)(a) expressly creates an implied contract between the Department and the community spouse for the recovery of benefits paid was upheld. This right of recovery, however, is limited by the community spouse being of sufficient ability to pay at the time expenses are incurred. Therefore, one possible defense to a recovery action in New York is that the community spouse lacked either or both sufficient income or sufficient resources at the time Medicaid paid for services provided to the institutionalized spouse. See *In re Craig*, 82 N.Y.2d 388, 604 N.Y.S.2d 908 (1993).

There is no such case law in Florida. While "Spousal Refusal" remains a viable option in New York (notwithstanding recent attempts by the current governor's administration to remove it), it is perhaps an even more attractive option for the Florida client. To the best of the authors' knowledge, there has been no recovery on a spousal refusal case in Florida. There is probably good reason for this. The *Spellman* case relied greatly upon specific New York statutory authority. Moreover, the doctrine of necessities remains intact in New York, unlike in Florida.

In one recent Florida case, Florida's 1st District Court of Appeals questioned the ability of an ill spouse to transfer all assets to the community spouse and for the community spouse to then exercise the

right of spousal refusal. In *Feldman v. Department of Children and Families* (Case No. 1D04-4914), the Court determined that Medicaid eligibility was properly denied where the community spouse refused to make assets available for the institutionalized spouse's care and then, after this refusal, the community spouse became the recipient of additional assets of the institutionalized spouse. This case is very likely limited to its facts (think bad facts = bad law): On February 4, 2004, Mrs. Feldman signed an assignment of support rights and her husband signed a spousal refusal. On March 11, 2004, Mrs. Feldman transferred \$227,000 (most likely after discovered assets) to her husband and applied for Medicaid on that date seeking retroactive benefits. On March 19, 2004, Mrs. Feldman signed a second assignment of support rights and Mr. Feldman signed another spousal refusal form. These new forms were submitted to the Department of Children and Families with a notice that the new forms were being submitted and the old forms were being withdrawn. On these facts, the 1st District Court of Appeals upheld the determination at Fair Hearing of the Department of Children and Families that retroactive benefits could not be obtained due to excess resources of the institutionalized spouse. Unfortunately, the Department of Children and Families in some counties, based upon dicta in the case, and demonstrating a lack of understanding as to why the rule exists in the first place, began rejecting numerous applications where pre-refusal transfers were also deemed improper.

Spousal refusal is still a viable option in Florida and one that is being watched closely by the elder law bar.

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