The Provider's Role in Proving Undue Hardship

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Nursing home and elder law attorneys alike find themselves in a pickle when a Medicaid applicant's spouse refuses to cooperate with documenting his or her partner's application for medical assistance. Such cases present lawyers on both sides of the long-term care system with an opportunity to work together to meet the shared goal of securing a Medicaid budget.

Even if only the institutionalized spouse is applying for Medicaid, the community spouse is required to verify his or her own resources.[1] When the community spouse withholds this information and documentation from the Medicaid caseworker, the applying spouse is at risk of being denied medical assistance.[2]

This article will discuss spousal obligations in the context of nursing home Medicaid applications, and explore how attorneys for long term care providers and consumers can work together to overcome denials based on missing spousal documentation.

Distinguishing Spousal Obligations

As a preliminary matter, it is important to distinguish two distinct obligations that fall to a community spouse with a husband or wife applying for nursing home Medicaid coverage. One obligation requires the well spouse to make a financial contribution from his or her own funds to defray the ill spouse's medical expenses. The second obligation requires the well spouse to produce his or her own financial records to complete the documentation of the ill spouse's Medicaid application.

In the case of a financial contribution, the institutionalized spouse's Medicaid application cannot be denied because the community spouse has refused to make her funds available to pay for the applying spouse's nursing home bill. In such a case, the Department of Social Services can assess the relative net worth of the husband and wife, and pursue the refusing spouse in court for a financial contribution after conferring Medicaid coverage to the applying spouse.[3]

Contrast the obligation of a community spouse to produce her own financial records to complete her institutionalized mate's Medicaid application. Community spouses cannot simply refuse to release their financial records, and opt for a determination of the applying spouse's Medicaid eligibility based exclusively on the applying spouse's financial records.[4] Proceeding in this manner is not an option under the regulations.

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When the non-applying spouse refuses to divulge her income and resources to Medicaid, the institutionalized spouse's eligibility for medical assistance is indeterminable because the income and resources of *both* members of a co-habiting couple are generally considered available and countable for Medicaid budgeting purposes.[5] As stated in the Medicaid Reference Guide: "When a community spouse fails or refuses to provide information concerning his/her resources, the institutionalized spouse's eligibility cannot be determined and the A/R may be denied Medicaid."[6]

In short, a community spouse can refuse to fulfill his/her obligation of financial support without dooming the spouse's Medicaid application, the obligation to produce financial documentation cannot be refused, and almost always results in a denial of the applying spouse's application based on missing documentation.

Assignments of Support

While a spouse's obligation to make a financial contribution *can* be refused, and the spouse's obligation to produce documentation *cannot* be refused, whenever a community spouse fails to make his/her money *or* documentation available for Medicaid purposes the applying spouse is required to sign an assignment of support.[7]

Even though assignments of support are required when a spouse fails to fulfill the financial contribution or documentation production obligation, it is important to note that in neither case is the absence of an assignment fatal. Spousal refusal works even when the resident has not signed an assignment, and in this author's experience assignments are not even requested in cases of missing spousal documentation.

In the case of a community spouse who refuses to contribute financially to her institutionalized spouse's cost of care, New York State has the right to pursue that legally responsible relative for support even without an assignment of support. Accordingly, assignment or no assignment, institutionalized applicants are entitled to have their Medicaid eligibility determined without regard to the finances of their refusing spouse.[8]

When the spouse fails or refuses to provide necessary information about his or her finances, Medicaid does not even reach the issue of an assignment or a support suit. Instead, the Medicaid district almost always summarily denies coverage for "missing documentation." Since no Medicaid is provided, no support suit is needed.

The requirement of an assignment of support is, in other words, pretty much a non-issue in cases involving refusing spouses (who refuse to contribute financially) as well as uncooperative spouses (who are uncooperative in releasing their financial records).

Overcoming Denials for Missing Spousal Documentation

Despite the common understanding of how a withholding husband or wife can sabotage an applying spouse's Medicaid application, a 1993 Administrative Directive (ADM) opens the door to securing Medicaid coverage for an applicant with a non-compliant spouse. The ADM provides as follows:

> An A/R must not be denied solely because a non-applying legally responsible relative refuses to provide required verification.[9]

The Medicaid Reference Guide (MRG) similarly holds out hope that a married applicant can be approved for Medicaid despite a paucity of information about the spouse's income and resources:

> When the LRR [legally responsible relative] refuses to provide financial information, eligibility is generally indeterminable. However, if the A/R provides complete information concerning his/her own income and resources, as appropriate, including any jointly held resources, eligibility is determined based on the available information.[10]

Nevertheless, despite these promising sources of authority, most Medicaid districts will quickly deny Medicaid coverage to a married applicant who submits an application without spousal documentation. To overcome a denial where the community spouse has not been forthcoming in providing necessary information about his/her income and resources, the applying spouse must prove that "to deny assistance would be an undue hardship."[11]

Undue hardship exists when:

(i) a community spouse fails or refuses to cooperate in providing necessary documentation about her resources;

(ii) the institutionalized spouse is otherwise eligible for MA;

(iii) the institutionalized spouse is unable to obtain appropriate medical care without the provision of MA; and

(iv) (a) the community spouse's whereabouts are unknown;

(b) the community spouse is incapable of providing the required information due to illness or mental incapacity;

(c) the community spouse lived apart from the institutionalized spouse immediately prior to institutionalization;

(d) due to the action or inaction of the community spouse, other than the failure or refusal to cooperate in providing necessary information about his/her resources, the institutionalized spouse will be in need of protection from actual or threatened harm, neglect, or hazardous conditions if discharged from an appropriate medical setting.

Proving the third element of the undue hardship regulation requires the joint efforts of the attorneys who are representing both consumers and providers of long-term care.

Inability to Obtain Medical Care

For an institutionalized Medicaid applicant, proving undue hardship entails the submission of evidence that the resident is in danger of losing his or her placement at the long-term care center if Medicaid is not approved.[12]

According to one Administrative Law Judge:

> The interpretation of the prevailing law is that there must be a showing that the Appellant is actually pending eviction and that was not demonstrated in this instance. A threat of possible eviction proceedings from the nursing home as evidenced in this case does not suffice to meet the criteria. There has to be an actual order of eviction and a showing that the eviction is pending.[13]

Unfortunately, this restrictive interpretation of the undue hardship regulation, when read in conjunction with the regulation limiting the conditions under which a nursing home may discharge a resident, makes proving undue hardship impossible, literally.

Under 10 N.Y.C.R.R. Sec. 415.3 (h) (1) (i) (b) a nursing home may only permissibly discharge a resident for non-payment if "no appeal of a denial of benefits is pending." The New York State Department of Health has interpreted this regulation to permit discharges for non-payment only when the nursing home resident does not have a Medicaid application or administrative appeal pending.[14]

How can institutionalized Medicaid applicants or appellants establish their entitlement to Medicaid coverage under the undue hardship regulations when they are protected against being involuntarily discharged from the nursing home for non-payment during the pendency of their applications and appeals? In short, they can't.

While an agency's interpretation of a statute that it administers and the implementing regulations are entitled to judicial deference, well-settled law requires the agency's interpretation to have a rational basis and not be arbitrary and capricious.[15]

There is no rational basis for requiring an eviction in order to prove undue hardship and overcome a denial for missing spousal documentation. Indeed, 10 N.Y.C.R.R. Sec. 415.3 (h) (1) (i) (b) prohibits the discharge or eviction of a resident for non-payment until an application has been denied or a Fair Hearing decision has been rendered. Accordingly, under the agency's interpretation, it would be impossible for any nursing home applicant or appellant to ever prove undue hardship.

Commonality of Interests

Attorneys for nursing homes and applicants/appellants alike share an interest in being able to secure Medicaid coverage for residents who are eligible for medical assistance, but for missing information about their spouse's finances. In such cases, nursing home attorneys can be instrumental in securing the documentation needed to support an elder law attorney's claim of undue hardship.

Although eviction proceedings cannot be initiated for non-payment while a resident is Medicaid pending, the facility's intentions regarding a discharge can be memorialized in an affidavit that will support an undue hardship claim. In this author's experience, even when an undue hardship case has been denied at the agency level and at a Fair Hearing, the State will recognize in the context of a judicial appeal that an administrator's affidavit regarding the risk of discharge satisfies the third element of the undue hardship regulation.

Working cooperatively to prove undue hardship so applicants with non-compliant spouses can benefit from the Medicaid program is just another example of the natural affinity that exists between attorneys for health care providers and the elder law bar.

Endnotes

1. For purposes of this article, if not stated otherwise, the husband is the institutionalized spouse.
2. New York State Medicaid Update, December 2011 (Volume 27 - Number 16) ("Refusal to provide the necessary information shall be reason for denying Medicaid for the institutionalized spouse because Medicaid eligibility cannot be determined.").
3. Soc. Serv. Law Sec. 366(3)(a), 18 N.Y.C.R.R. 360-4.3(f)(1)(i).
4. 18 N.Y.C.R.R. 360-4.10(c)(3); New York State Department of Health Medicaid Reference Guide, Page 333.1 (Updated: November 2009).
5. Soc. Serv. Law Sec. 366(3)(a); 18 N.Y.C.R.R. 360-4.3(f)(1).
6. New York State Department of Health Medicaid Reference Guide, Page 501 (Updated: November 2009).
7. 18 N.Y.C.R.R. 360-4.10(c)(3) and (4).
8. Morenz v. Wilson-Coker, 415 F.3d 230 (2d Cir. 2005).
9. 93 AMD-29 at page 4.
10. New York State Department of Health Medicaid Reference Guide, Page 501 (Updated: June 2010).
11. 18 N.Y.C.R.R. 360-4.10 (c)(3).
12. Fair Hearing Decision dated October 23, 2009 (Fair Hearing Number 5325375H).
13. Fair Hearing Decision dated September 9, 2010 (Fair Hearing Number 5458792Q).
14. October 15, 1998 letter of Terry Friedland, Senior Attorney, New York State Department of Health.
15. Matter of Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974).

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