

# ***The Estate Planning Advisor***

## **Protecting the “Well” Spouse**

**By: Richard J. Shapiro, J.D.**

In my practice, I often deal with married couples where one spouse is in poor physical and/or mental condition while the other spouse is reasonable healthy. The “well,” or “community” spouse is often concerned about maintaining his or her quality of life and financial well being if the “ill” spouse needs long-term care.

Under current New York law, if one spouse needs long-term care and is seeking Medicaid, the community spouse is, at a minimum, permitted to retain the marital home, \$95,100 of liquid assets (“Community Spouse Resource Allowance,” or “CSRA”), an automobile, household furnishings and their other personal property. The community spouse is also permitted to retain monthly income of \$2,378.00 (the “Minimum Monthly Maintenance Needs Allowance,” or “MMMNA”) before being expected to make any contribution towards the ill spouse’s care.

In order for the ill spouse to qualify for Medicaid, he or she cannot retain assets in his/her name exceeding \$3,950. Typically, the ill spouse will transfer all his/her assets to the community spouse, except for the \$3,950 allowance. What if as a result of the transfers the community spouse now has assets (not including the marital home, which is an “exempt” asset) exceeding the CSRA? Ordinarily, the ill spouse would not qualify for Medicaid coverage until the community spouse were to “spend down” the resources in excess of the CSRA. New York, however, presently retains the right of “spousal refusal.” Under this rule, the community spouse can submit to the Department of Social Services a written refusal to contribute towards the ill spouse’s care, and the ill spouse (if otherwise eligible) cannot be denied Medicaid even though the community spouse may retain assets in excess of the CSRA. While a spousal refusal will permit an ill spouse to be placed on Medicaid immediately, the applicable Department of Social Service will retain the right to bring an action for support against the community spouse in Supreme or Family Court.

If the community spouse wants to avoid the possibility of a support action, an alternative to a spousal refusal is for the community spouse to purchase an “immediate pay” annuity. This type of annuity will pay the community spouse a guaranteed payment (typically monthly) for life, based upon their life expectancy under tables promulgated by the Department of Health and Human Services. The money used to purchase the annuity is then effectively converted to a stream of income, with the community spouse typically being asked to pay only twenty-five percent (25%) of their income *in excess of* the MMMNA amount.

This article provides just a brief glimpse of some planning strategies. An elder law attorney should be consulted before considering any of these or other planning strategies.

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