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Spousal Refusal: Preserving Family Savings by "Just Saying No" to Long-Term Care Impoverishment

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Spousal Refusal: Preserving Family Savings by "Just Saying No" to Long-Term Care Impoverishment

"Just Say No" just may save the family savings. The little-used "Just Say No" rule has been in effect since 1988 and, though founded in federal law, is not honored in most jurisdictions. This review of New York and Florida approaches to "Just Say No" issues sheds light on future applications as more cases present similar dilemmas.

By Scott M. Solkoff

The Need for Protection: Meet Daniel and Dottie

Meet Daniel and Dottie, husband and wife, who have been married twenty-seven years next month. They lived in Chicago until moving to South Florida in 1990. Daniel's first marriage ended in divorce, and Dottie's first husband died of a heart attack at fifty. Daniel and Dottie each have two children from their previous marriages. When they got married, Daniel and Dottie signed a prenuptial agreement stating that each waives any claim or right to the assets of the other. They have, to this day, kept their assets separate and apart. Their wills bypass each other, leaving all to their respective children.

Dottie and Daniel are typical of couples heading into later marriages. They want to live with and love each other in marriage until death do they part, but they do not want the laws of their state to dictate mutual support obligations. They want the ability to provide for each other if they choose to do so. They do not want to be obligated to provide for each other by a default set of laws.

So, they did all of their planning just right. They went to a good attorney. They got a sound prenuptial agreement. They kept their assets separate and apart. Everything was going as planned.

Then along came the nursing home.

Daniel got sick and could no longer stay at home. The nursing home bills began to mount. At $60,000 per year for room and board alone, it took only two years for Daniel to be impoverished. When his assets dropped below the applicable asset cap,[1] Dottie applied for Medicaid benefits to pay for the cost of his nursing home care. Though Daniel had nothing, the application was denied because of Dottie's $280,000 in assets.

According to Medicaid rules in all of the fifty states, in determining eligibility for Medicaid, the state must consider "all the resources held by either the institutionalized spouse, community spouse,[2] or both.[3]" The state, therefore, adds up all of the married couple's assets, no matter how those assets are titled. All of Daniel and Dottie's assets together total $280,000. The law then allows Dottie, as the

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community spouse, to deduct a resource allowance that varies from state to state from the total assets.[4] The difference between total assets and the "community spouse resource allowance" (CSRA) is deemed to be available to the institutionalized spouse, Daniel, and will cause ineligibility for Medicaid benefits.[5]

For example, in Florida, where Dottie and Daniel live, the CSRA is $84,120.[6] Dottie's $280,000 less the $84,120 CSRA means that $195,880 of Dottie's (and her deceased husband's) assets are deemed available by the government for Daniel's nursing home care. Daniel is denied Medicaid coverage because the government wants Dottie to pay.

Despite Dottie and Daniel's best efforts, their assets are almost completely unprotected. Their savings may not pass to their respective children upon death. In fact, it is more likely than not that all of Dottie's assets will go first to Daniel's care and then to her own care. Neither Dottie nor Daniel benefit from their savings or from their careful legal planning.

Dottie and Daniel illustrate an inequity that has caused many elderly couples to divorce each other in order to protect their life savings.[7] To be sure, if Daniel and Dottie get divorced, Dottie's assets cannot be counted as available to Daniel. But there are many problems with divorce as an option for Medicaid asset protection planning.

One problem with divorce is that, in most states, both parties need to be competent in order to obtain one. In some states, there must be a waiting period of two or more years after an adjudication of incapacity. By the time the couple needs the process, the spouses may not be mentally capable of divorce. Another problem with divorce is that the judge may require support or a reallocation of resources that may not be helpful for Medicaid purposes. Another problem, perhaps overarching all, is that people who love each other and wish to remain married may understandably not be able to stomach a divorce for purely economic reasons.

It would make sense then, for the state to allow spouses to maintain their own assets and to refuse to make those assets available to the institutionalized spouse. With this allowance, the community spouse would be able to keep an unlimited amount of assets. Those assets could be used to supplement the care of the institutionalized spouse, and to ensure that the community spouse is not left destitute at the expense of the institutionalized spouse.[8]

This is the "Just Say No" rule.

Authority for the "Just Say No" Rule

The "Just Say No" law exists but has been observed more in the breach than in the observance.[9] It has been the law of all fifty states since 1988 with passage of the Medicare Catastrophic Care Act (MCCA).[10] That law provides, in pertinent part, as follows:

> The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse; (B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring an action against a community spouse without such agreement; or (C) the State determines that denial of eligibility would work an undue hardship.[11]

The law, therefore, allows an institutionalized spouse to qualify for Medicaid benefits even though he or she may have a spouse that chooses to keep assets over the CSRA. The spouse retains the assets, in any amount, and then refuses to make them available for the institutionalized spouse's costs of long-term care. In turn, the state seeks an assignment of the institutionalized spouse's support rights.

The "Just Say No" rule, though founded in federal law (the MCCA), is not honored in most jurisdictions. The State of New York has been the exception to this trend. New York codified the theory in its own rules and state laws back in 1988 (following the MCCA) and further in 1993.[12] Other states have enacted rule changes that mirror the MCCA. The MCCA has become something of a "Model Act" (though required in its application) for many states. For example, the State of Florida enacted its rule changes in 1997.[13]

How the "Just Say No" rule will be applied and litigated in each jurisdiction depends on federal law, state law, and local custom. These materials will discuss how New York and Florida have dealt with the "Just Say No" rule. Although these two states have almost identical rules, their laws differ in application. For this reason, the New York and Florida experiences, taken together, serve as a

touchstone for other states. Because New York has had more experience than any other state with the "Just Say No" provisions, these materials will point, as appropriate, to the New York experience for guidance. These materials will use the Florida rules as a guide on state practice because the Florida rules mirror the federal MCCA.

Effective October 8, 1997, Florida's Department of Children and Families adopted the "Just Say No" rule. It reads:

> (g) 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 institutional 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.[14]

In addition to the Florida Administrative Code, Florida's Department of Children and Families publishes its rules in an administrative manual—the *Integrated Public Assistance Policy Manual.* Therein appear the following:

> If after declaring and verifying his/her assets, the community spouse refuses to make them available to the client, the institutionalized spouse may assign his rights of support to the state and obtain institutional care benefits (refer to 1615.10.30.10 and 1615.10.30.15 for policy).[15]

Note, also, that the State of Florida, like most other state Medicaid systems, does not honor prenuptial agreements for the purposes of counting assets. In order to ensure that an applicant cannot rely upon a prenuptial agreement to safeguard his or her spouse's assets, the government merely disregards the agreements for purposes of counting assets. The Florida rule states, "Assets that are included in a prenuptial agreement are considered part of the couple's total assets when determining eligibility for institutional care services. This policy applies regardless of when the prenuptial agreement was drawn up."[16]

The main policy statement regarding the right to "Just Say No," appears as follows:

> 1615.10.30.10 Assignment of Support Rights (MA-SSI)
>
> If the community spouse refuses to make available assets attributed to the institutionalized spouse, the institutionalized spouse may assign his rights of support to the state and obtain institutional care benefits. This situation may arise when assets allocated to the client actually solely belong to the community spouse who, in turn, refuses to make them available to the client. The institutionalized spouse may complete HRS-AA[17] Form 2504, Assignment of Support Rights, which allows the state to pursue recovery from the community spouse. Refer to HRS Manual 165-24, Integrated Public Assistance Forms Manual, for proper completion (including who can sign the form). The original copy of this form is to be sent to Economic Self-Sufficiency Services, Policy Bureau, in Tallahassee, Attention: SSI Related Program Staff. This form 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.[18]
>
> When all conditions in section 1615.10.30.15 [Undue Hardship] are met, the allocated resources being withheld by the community spouse will no longer be considered available to the institutionalized spouse.
>
> If the institutionalized spouse does not assign the rights of support to the state, continue to consider the assets available to the institutionalized individual.[19]
>
> 1615.10.30.15 Undue Hardship.
>
> - The institutionalized spouse will not be determined ineligible based on a community spouse's resources if *all* of the following conditions are found to exist:
> - The institutionalized individual is not eligible due to the community spouse's assets and the community spouse *refuses* to use the assets for the institutionalized spouse; *and*

- The Assignment of Support Rights form (HRS Form 2504) is signed; *and*
- The institutionalized spouse would be eligible if only those assets to which he/she has access were counted; *and*
- The institutionalized spouse has no other means to pay for the nursing home care.[20]

Rule 1615.10.30.15 tracks the language of the federal MCCA.[21] When read in their totality, the rules and statutes allow an applicant to qualify for Medicaid despite his or her community spouse being over the CSRA. But there is a price to pay. The institutionalized spouse must assign to the state his right to be supported by the community spouse.

The Right to Recover

Medicaid, in all fifty states, is designed to be the payor of last resort.[22] As such, the government may properly look to all other sources prior to making payments for long-term care. That is why, throughout the state Medicaid rules, there is reference to ineligibility based on monies available from any other source.[23]

It is, therefore, proper for the government to deny Medicaid eligibility to one who has other means of support. It is also proper, by separate rule, for the government to pursue reimbursement from third parties. Federal law[24] gives the government the right to pursue third parties that should have paid for care paid for by Medicaid. Many states have enacted similar code provisions.[25]

An example of common language in state recovery statutes is Florida's "Medicaid Third-Party Liability Act."[26] That Act provides that the state is ". . . automatically subrogated to any rights that an applicant . . . has to any third-party benefit to the full amount of medical assistance provided by Medicaid."[27] The law further provides that "[by] applying for or accepting medical assistance, an applicant . . . automatically assigns to the [state] any right, title and interest such person has to any third-party benefit, . . ."[28] Thus, the state can seek reimbursement of amounts paid for support from a third party even when the Medicaid beneficiary makes no written assignment of support rights. Further empowering the state is the language that "[b]y accepting medical assistance, the recipient grants to the [State] the limited power of attorney to act in his or her name, place and stead to perform specific acts with regard to third-party benefits . . . ."[29] Pursuant to the Third-Party Liability Act, Florida may stand in the place of the institutionalized spouse with regard to monies available for care. "The [State] may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.'[30]

Pursuant to state and federal law then, the government has a right to pursue third parties who should be paying for the costs of care otherwise being borne by the government. To be sure, the form assigning the institutionalized spouse's right of support to the state seems superfluous in light of the broad mandate the states give themselves through their third party liability acts. It seems, then, that there is sound legislative support for the government to recover against third parties that should be paying costs of care.

The question that remains unanswered is whether a community spouse is a third party that should be responsible for costs of care. In other words, the government has given itself a broad power to go and recover monies from responsible persons. Throughout the Medicaid rules, there is an assumption that a community spouse has a support obligation to the institutionalized spouse. If this is true, then a community spouse would be subject to the federal and state third-party liability (or recovery) acts. If, however, a community spouse has no support obligation to the institutionalized spouse, then there can be no recovery.

The Support Obligation

A brief recap: The institutionalized spouse applies for ICP Medicaid. The community spouse reveals his or her assets to the government and then states his or her refusal to make those assets available to the government. The institutionalized spouse then assigns his or her right of support to the state.

But what if there is no right of support. The "Just Say No" rules assume that the community spouse has a legal obligation to pay for the institutionalized spouse's long-term care. However, under state law there may be no obligation of support.

Many states have a provision for an action of support against a spouse even when unconnected

with an action for dissolution of marriage. According to the "Just Say No" rule, the government could stand in the shoes of the institutionalized spouse and sue the community spouse for support. The government's forum for getting into court is, therefore, this support action.[31] However, though there may be a forum to sue a spouse for support, the courts cannot create an obligation where none exists. A spouse can sue a spouse for costs of nursing home care, but if no such obligation exists, it would be improper for a court to create such an obligation.

Therefore, while the institutionalized spouse may assign his or her rights of support to the state, the right to nothing means an assignment of nothing. In most states, there is no implied contract of support obligations among husband and wife. Moreover, many states have abrogated the common-law doctrine of necessaries—the responsibility to pay a spouse's debts.

In *Connor v. Southwest Florida Regional Medical Center, Inc.*,[32] the Florida Supreme Court abrogated the state's common-law doctrine of necessaries.[33] The doctrine provided that one who sells goods or services to one spouse may charge the other spouse if the goods or services are required for their sustenance or support. Some states have adjusted the rule to allow for equal responsibilities among the sexes. Those states require husband and wife to be responsible for each other's necessaries.[34] Other states predated Florida in abrogating the doctrine altogether.[35] In many states, however, there is no common-law support obligation. In those states that still have the common-law doctrine of necessaries intact, the "Just Say No" action may be just the case to garner its abrogation.

If there is no support obligation cognizable at common law, the only other way a person could be responsible is if a statute or rule explicitly makes them responsible. In no state does a statute or rule explicitly make a community spouse responsible for the prospective long-term care costs of an institutionalized spouse. The state may argue, if in a position to do so, that the Medicaid program in the totality of its rules, evidences an intent to hold a spouse liable for the care costs of the other spouse. The argument's credence is that, throughout state and federal law, there is constant reference to the "countability" of a community spouse's assets.

But "countability" toward eligibility criteria does not mean that spouses now have the legal responsibility to support one another for long-term care costs. That is a big leap that the courts (and the voting public) should not be able to stomach. Only New York State courts have examined the "Just Say No" rules.

Two points need first to be made about New York law. First, New York has a statute that provides that if a "responsible relative" with sufficient income and resources to provide medical assistance refuses to provide necessary assistance, the furnishing of such assistance by the state "shall create an implied contract with such relative and the cost thereof may be recovered from such relative."[36] Second, the doctrine of necessities is still intact in New York.[37] These are significant differences that distinguish New York law from the law of most states. Still, the following case is instructive.

In *Commissioner v. Spellman*,[38] Mrs. Spellman was a nursing home resident. Mr. Spellman was a community spouse with resources of $233,160. Mrs. Spellman qualified for Medicaid after Mr. Spellman refused, in writing, to make his assets available for his wife's nursing home care. Mrs. Spellman executed an assignment of support from Mr. Spellman. Mr. Spellman was subsequently sued by the State of New York for $32,975, which the state had paid to the nursing home. The state continued to pay for Mrs. Spellman's care at the rate of $141.95 per day. Mr. Spellman brought a motion to dismiss stating that there was no cognizable cause of action against him. The state asserted its right under third-party liability theory. Mr. Spellman's motion to dismiss was denied.

On appeal to New York's intermediate appellate court, Mr. Spellman conceded that the state may sue him for prospective support[39] but claimed that there can be no recovery for past Medicaid payments because there is no implied contract obligating Mr. Spellman to pay. Mr. Spellman also argued that before the state can proceed against him for reimbursement, the state must first sue him for support in family court.

The court held first that there is no requirement that the state bring a separate support action against the community spouse in family court.[40] The court recognized that the MCCA was intended to soften the blow of an unforgiving Medicaid system but also noted that,

> [T]he MCCA . . . was 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.[41]

The court ruled that since Mr. Spellman had resources above his CSRA, he may properly be compelled to pay for his wife's care.[42] The appellate court thereby affirmed the lower court's denial of Mr. Spellman's motion to dismiss.[43]

Spellman's impact may be limited to New York as it relied on a New York statute that implies a contract between community spouse and state. Moreover, the doctrine of necessaries is intact in New York.

In all, there is no right of support that can be found to owe from a community spouse to an institutionalized spouse. There is no statute creating that right, no case law creating the right, the doctrine of necessaries has been abrogated or weakened in many states, and the nationwide trend is to abolish such spousal obligations.[44] Though the state may arguably take assignment of support rights, the right to nothing means an assignment of nothing.

Estate Recovery Against the "Refusing" Spouse

It does not appear that the state has the right to sue community spouses, but if any such right exists, then it might also allow the state to recover from the assets of the community spouse, even after death. This has not been seen in any reported or known cases.

The only reported case bearing on the government's right to recover against the estate of a refusing spouse is *In re Craig*.[45] In *Craig,* the issue was whether the government could recover amounts paid by Medicaid for care of a man, who had since died, from the estate of the man's wife when the wife refused to pay for her husband's care during her lifetime. The Craigs lived very modestly and, at Mrs. Craig's death, her estate had a total of $27,348.50, most of which came from her home. Her personal representative paid over $10,000 to the state to repay Medicaid for payment it had made for Mrs. Craig's care, but the personal representative declined to pay the state for Mr. Craig's care. The court found that the assertion of a *nunc pro tunc* claim against a refusing spouse's estate is not supportable where she lacked sufficient means to pay during her lifetime.[46]

Just Saying No

The process for application under "Just Say No" is as follows:

1. After the couple enters into a relevant postnuptial agreement (if allowed under state law), they must file an application for assistance showing all assets titled in the institutionalized spouse's name alone, the community spouse's name alone, and all joint assets.
2. The application should be accompanied by a statement of refusal signed by the community spouse.
3. The institutionalized spouse (or agent) signs an Assignment of Rights to Support. Most states have promulgated such a form by administrative rule. If the state has not created such a form, counsel should prepare the minimum assignment necessary to placate the state.
4. The application is processed with the government retaining the right to review all assets including those of the refusing spouse, but the determination of eligibility is processed as though a single person were applying. So long as the applicant is under his or her asset cap of $2,000,[47] and meets the income test,[48] the applicant is financially eligible.
5. Once eligibility is determined, the state makes payments to the nursing home or assisted-living facility.

But let us imagine the following:

6. The community spouse receives a letter from the state making a claim for past, and possibly future repayments, and demanding immediate payment.
7. The amount sought by the state cannot exceed what it has paid. This is an interesting issue because it means that even if the state does sue and is successful, it can only receive the Medicaid reimbursement rate, which is significantly lower than the private pay rate. Because the community spouse would only have to pay what the state pays, the community spouse is still better off than if she or he privately paid for the other spouse's care.
8. If the community spouse refuses to pay the amount demanded, the state might then sue the community spouse. Imagine, though, the public perception of the state suing grandmothers and

grandfathers for the costs of nursing home care. Imagine also the resources it would take for the state to pursue such claims.[49]

9. The case may settle or go to trial. If the case settles, the community spouse will likely pay only a percentage of the demand. If the case goes to trial, attorneys for the community spouse will have a very good case against spousal liability.

As a practice note, counsel should be aware that even if a community spouse exercises his or her right to "just say no," transfer rules still apply. In all states, an applicant is deemed to be ineligible for Medicaid (for a period of time that varies by formula from state to state) as a result of gifts made by the applicant or the applicant's spouse. Gifts made by a "refusing" spouse are treated no differently. Therefore, though the assets of the community spouse may not be calculated toward the institutionalized spouse's eligibility, gifts made by the community spouse may cause a period of ineligibility for the institutionalized spouse.

The fact is that in New York, where the "Just Say No" option was a predominant form of Medicaid estate planning, the state has only recently—in the past four years—been aggressively pursuing recovery. Even then, the state is not going after all cases. All reported cases are from the New York City area and are usually involving high dollar amounts. In other counties in New York, it is rare to see a claim made against a community spouse.[50] In Florida, the state has not once pursued recovery against a community spouse.

Conclusion

"Just Say No" is not without risk, but it is a sound option for the married, elder client.

The government clearly intends to assume a spouse's responsibility for the catastrophic health care costs of the other spouse. But nowhere in the law is there support for such a position. In fact, it would go against public policy to require a spouse to pay for the care costs of another spouse. Were it otherwise, the law would encourage divorce and/or quick spend-downs or other sheltering techniques that would divest both spouses of control.

Spouses have the right to refuse to become impoverished at the expense of the other spouse, and this is just what "Just Say No" allows. The ability to control one's finances from the obligations of one's spouse is a fundamental right of all married persons. People in later marriages do not have more rights, but it surely makes the case.

Harken back to Daniel and Dottie. Without "Just Say No," Dottie's assets (which were accumulated through the sweat of her and her first husband) would go toward Daniel's nursing home care and could not be preserved for Dottie or her children. This is manifestly unfair when one considers that she and Daniel exercised their right to enter into a prenuptial agreement that sought to limit or eliminate their liability to each other. By "just saying no," Dottie and Daniel only give effect to an understanding that was manifest between them.

But "Just Say No" is not just for second marriages and not just for those who entered into nuptial agreements (though it makes for a better case). The "Just Say No" rules allow: (1) the community spouse to avoid becoming impoverished; (2) the community spouse to supplement the institutionalized spouse's care; (3) the couple to realize a benefit from saving for their future; (4) the couple to remain married; and (5) the community spouse to retain control and independence.

Justice Bracken of the New York Appellate Division penned the most cogent conclusion on the right to "Just Say No" when he wrote, "[N]o agency of the government has any right to complain about the fact that middle class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment." In re Shah, 694 N.Y.S.2d 82, 87 (App. Div. 1999).

Endnotes

1. The states are required to maintain an "asset cap" in the state Medicaid program. The "asset cap" varies from state to state. In Florida, the asset cap is $2,000 for a single person. In New York, it is $3,500. *See* 42 U.S.C. § 1396r-5.

2. The term "community spouse" means a spouse of an institutionalized applicant for Medicaid, who is not himself or herself applying for Medicaid institutional care program benefits. *See* 42 U.S.C. § 1396r-5(h).

3. *See* 42 U.S.C. § 1396r-5(c)(2)(A).

4. *See* 42 U.S.C. § 1396r-5(f)(2).

5. The CSRA and the concomitant right of a spouse to refuse availability of his or her assets that transforms Medicaid from a purely welfare program to a program intended to extend protections to a vulnerable middle class, at least as it applies to married couples where only one spouse is institutionalized.

6. Year 2000 figure.

7. Divorce is rarely necessary when a couple receives sound legal advice from an experienced elder law attorney. Still, many seniors who do not know of elder law protections, or who come from a state where divorce is widely practiced as an asset preservation method, are forced into an act they would never have voluntarily chosen. The Supreme Court of New Jersey has recognized divorce as a legitimate response to the inequities in the Medicaid system. *See* L.M. v. State, 659 A.2d 450 (N.J. 1995).

8. For some couples, this may mean transferring all of the assets from the ill spouse to the community spouse in advance of a Medicaid application. The community spouse may then exercise his or her right of spousal refusal. Indeed, the New York Court of Appeals has held that a community "spouse, qualified as guardian, is permitted to transfer to herself, for purposes of Medicaid planning, the entire assets of her incapacitated spouse." In re Shah, 733 N.E.2d 1093, 1094 (N.Y. 2000).

9. *See* Daniel Fish, *The New York "Just Say No" Experience,* in Florida Bar Elder Law Annual Public Benefits Seminar at 3.1 (1998).

10. *See* 42 U.S.C. § 1396r-5.

11. *Id.* at § 1396r-5(c)(3).

12. *See* N.Y. Soc. Serv. Law § 366(a) (2000); 18 N.Y. COMP. CODES R. & REGS. tit. 18, § 360-4.10(c)(4) (2000).

13. *See* Section II Proposed Rules, 23 Fla. Admin. Weekly 25 (June 20, 1997).

14. FLA. ADMIN. CODE ANN. r. 65A-1.712(3)(g) (2000).

15. Florida Integrated Public Assistance Policy Manual Rule 1615.10.30 (hereinafter referred to as IPAP).

16. IPAP Rule 1615.10.30.05. It occurs to the author that a "postnuptial" agreement is not a "prenuptial" agreement no matter when it is drawn up. Postnuptial or antenuptial agreements are valid under Florida law. *See* FLA. STAT. §§ 61.052, 732.301, 732.702 (1999).

17. The Florida Department of Children and Families (DCF) is the former Department of Health and Rehabilitative Services. The DCF handles all applications for Medicaid assistance in the State of Florida.

18. Note that a state caseworker is admonished not to disclose the right of spousal refusal unless the applicant brings the issue to the application process.

19. IPAP Rule 1615.10.30.10.

20. IPAP Rule 1615.10.30.15 (emphasis in original).

21. *See* 42 U.S.C. § 1396r-5(c)(3).

22. *See e.g.,* FLA. STAT. § 409.910(1) (1999); *In re* Costello v. Geiser, 647 N.E.2d 1261 (N.Y. 1995).

23. *See e.g.,* IPAP Rule 1615.10.30.15 (institutionalized spouse must have no other means to pay for the nursing home care).

24. *See* 42 U.S.C. § 1396a(a)(25)(l).

25. *See e.g.,* FLA. STAT. § 409.910 (1999).

26. *See id.*

27. *Id.* § 409.910(6)(a).

28. *Id.* § 409.910(6)(b).

29. *Id.* § 409.910(6)(b)(3).

30. *Id.* § 409.910(11).

31. Though, as will be seen in the discussion on the *Spellman* case, *infra* pp. 7–8, at least one state has successfully by-passed the family law support action.

32. 668 So. 2d 175 (Fla. 1996).

33. *See id.* at 177.

34. *See, e.g.,* Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1 (Ind. 1993); St. Francis Reg'l Med. Ctr., Inc. v. Bowles, 836 P.2d 1123 (Kan. 1992); Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003 (N.J. 1980); North Carolina Baptist Hosps., Inc. v. Harris, 354 S.E.2d 471 (N.C. 1987); Landmark Med. Ctr. v. Gauthier, 635 A.2d 1145 (R.I.1994); Richland Mem'l Hosp. v. Burton, 318 S.E.2d 12 (S.C. 1984).

35. *See, e.g.,* Emanuel v. McGriff, 596 So. 2d 578 (Ala.1992); Condore v. Prince George's County, 425 A.2d 1011 (Md. 1981); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905 (Va. 1983).

36. N.Y. SOC. SERV. LAW § 366(3)(a) (2000).

37. *See* County of Westchester v. Anderson, 655 N.Y.S.2d 100 (App. Div. 1997).

38. 672 N.Y.S.2d 298 (App. Div. 1998).

39. The reason for this concession is not clear from the case.

40. *See* Spellman at 300.

41. *Id.* (quoting *In re Golf v. State Department of Social Services,* 697 N.E.2d 555, 559–60 (N.Y. 1998)).

42. *See* Spellman at 300.

43. *See id.*

44. *See, e.g.,* Emanuel v. McGriff, 596 So. 2d 578 (Ala.1992); Condore v. Prince George's County, 425 A.2d 1011 (Md. 1981); Schilling v. Bedford County Mem'l Hosp., Inc., 303 S.E.2d 905 (Va. 1983); Connor v. Southwest Fla. Reg'l Med. Ctr., Inc., 668 So. 2d 175 (Fla. 1996).

45. 624 N.E.2d 1003 (N.Y. 1993).

46. *See id.* at 1004.

47. Year 2000 figure.

48. Only applicable in those states that require an applicant have under a certain amount of monthly income. Most states have no income cap but a handful of states have retained it. In Florida, for example, the applicant may earn no more than $1,536 per month (year 2000 figure).

49. These two reasons—lack of resources and political considerations—have been cited by states as the reasons they have chosen not to pursue recovery against the community spouse.

50. *See* Fish, *supra* note 8, at 3.7.