



Medicaid Planning for Married Couples After The Deficit Reduction Act Of 2005¹

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I. Effective Dates of Limits and Standards in this Outline.

- A. Incorporates limits / standards published in the Virginia Department of Social Services Transmittal # 86 amending the Virginia Medicaid Manual, effective generally for 2007:

The SSI amounts, ABD deeming standard amount, ABD student child earned income exclusion, CBC personal maintenance allowance, spousal resource standard, spousal resource maximum, maximum monthly maintenance needs allowance, Medicare premiums, and COLA amounts for 2007 are included in this transmittal and are effective January 1, 2007. The updated LTC utility standard deduction, effective October 1, 2006, is also included in this transmittal. The updated amount was announced in Broadcast 3902. The utility standard deduction is used to determine if the community spouse's shelter expenses exceed the excess shelter standard.³

- B. Social Security Administration Supplemental Security Income (SSI) for 2007.⁴

II. The Six Medicaid Tests For An Institutionalized Spouse Of A Non Institutionalized Spouse.

- A. Your Papers, Please: Citizenship and Identity Credentials for Non-Medicare / SSI enrollees.

¹ This is the third revised edition of the writer's paper presented for the Virginia Law Foundation at the 15th Annual Law Symposium in Richmond, Virginia, and Fairfax, Virginia, in September, 2006. *Image*: John Leech (1817-1864), *Ghost of Christmas Present*, original illustration for first edition of *A Christmas Carol*, by Charles Dickens (1843), presented here in the hope that the present work will contain thoughts and citations to make the reader's way, if not clarity itself, at least "dim with their delicious steam." Leech illustrated for *Punch*, the leading satirical magazine of the day, and performed in Dickens' amateur theatrical productions. Source: David Perdue's Dickens Page, <http://www.fidnet.com/~dap1955/dickens/carol.html>.

² Dates and date sensitive limits (usually financial) are highlighted as a caution to the reader.

³ See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/Transmittal86.pdf, Adobe p. 3.

⁴ See <http://www.ssa.gov/OACT/COLA/SSI.html>.

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- A Medicaid applicant or recipient who declares American citizenship and who has already been approved as a Medicare or Social Security Supplemental Security Income (SSI) recipient does not have to provide further proof of citizenship or identity.⁵
- DRA 2005, § 6036, “Improved Enforcement of Documentation Requirements,” requires submission of documentary proof of citizenship and identity with Medicaid application.⁶
- Virginia Medicaid policy requires proof of identity and citizenship for new applications and Medicaid status recertification (except for SSI and Medicare beneficiaries).⁷

1. Primary sources of proof of citizenship and identity.⁸

Any of these documents suffice to prove citizenship **and** identity:

- a. A United States passport.
- b. Form N-550 or N-570 (Certificate of Naturalization).
- c. Form N-560 or N-561 (Certificate of United States Citizenship).

2. Secondary documents to prove citizenship (**not identity; identity document must accompany any of these citizenship documents**).⁹

- a. A certificate of birth in the United States or its territories, etc.
- b. Form FS-545, FS-240, or Form DS-1350 (Certifications of Birth Abroad).
- c. Form I-197 or I-179 (United States Citizen Identification Card).¹⁰
- d. American Indian Card (I-872)
- e. Northern Mariana Card (I-873)
- f. Final adoption decree

⁵ Virginia Department of Social Services Broadcast 3822 (July 12, 2006, incorporated in Transmittal 85, http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal85.pdf) (“Medicaid applicants and recipients who declare they are United States citizens and who are enrolled in Medicare or receive Supplemental Security Income (SSI) have already met the citizenship and identity requirements mandated by the Deficit Reduction Act of 2005. This includes individuals whose SSI has been terminated. The Department of Medical Assistance Services (DMAS) has advised that local social service agencies are to request State Verification Exchange System (SVES) verification on Medicaid applicants or recipients who are Medicare beneficiaries or SSI recipients and place a copy of the SVES response in the individual’s case file.”)

⁶ See <http://thomas.loc.gov/cgi-bin/query/F?c109:5:./temp/~c109YDtxKk:e239331>. The provision amends 42 U.S.C. 1396b.

⁷ Va. Medicaid Manual § M 0220.100 (B)(3). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 22.

⁸ Va. Medicaid Manual § M 0220.100 (C). See chart at http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 24)

⁹ These documents are insufficient to prove the applicant’s identity and must be accompanied by an identity document. Va. Medicaid Manual § M 0220.100 (C) (g) (2) (Chart 2). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 24.

¹⁰ According to the Virginia Medicaid there was a misprint in the federal statute relating to a particular form of identity card, which is corrected in the Virginia Medicaid policy. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 26.

- g. Evidence of civil service employment by the U.S. government showing employment before June 1, 1976.
 - h. Official Military record of Service if it reflects a U.S. place of birth.
3. Third level documents to prove citizenship (**not identity; identity document must accompany any of these citizenship documents**).¹¹
- a. Extract of hospital record on hospital letterhead established at the time of the person's birth and was created at least 5 years before the initial Medicaid application date and indicates a U.S. place of birth.
 - b. Life or health or other insurance record showing a U.S. place of birth and was created at least 5 years before the initial Medicaid application date.
4. Fourth level documents to prove citizenship (**not identity; identity document must accompany any of these citizenship documents**).¹²
- a. Federal or State census record showing U.S. citizenship or a U.S. place of birth (Generally for persons born 1900 through 1950).
 - b. If created five years before the Medicaid application date, any of these documents which shows a U.S. place of birth:
 - i. Seneca Indian tribal census record,
 - ii. Bureau of Indian Affairs tribal census records of the Navaho Indians
 - iii. U.S. State Vital Statistics official notification of birth registration
 - iv. An amended U.S. public birth record that is amended more than 5 years after the person's birth
 - v. Statement signed by the physician or midwife who was in attendance at the time of birth.
 - c. Institutional admission papers from a nursing home, skilled nursing care facility or other institution and was created at least 5 years before the initial application date and indicates a U.S. place of birth.
 - d. Medical (clinic, doctor, or hospital) record and was created at least 5 years before the initial application date and indicates a U.S. place of birth.

¹¹ "Third level evidence may be used ONLY when the following conditions exist: primary evidence cannot be obtained within the State's reasonable opportunity period, secondary evidence does not exist or cannot be obtained, **and** the applicant or recipient alleges being born in the U.S." Each of these sources is considered a "[t]hird level [source of] evidence [and] is generally a non-government document established or a reason other than to establish U.S. citizenship and showing a U.S. place of birth. The place of birth on the non-government document and the application must agree." Va. Medicaid Manual § M 0220.100 (C) (g) (3). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 26.

¹² This is evidence which is to be used only in the "rarest of circumstances," which the Manual specifies is when no other documentary evidence in any prior category exists. Va. Medicaid Manual § M 0220.100 (C) (g) (4). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 26.

- e. Written affidavits of citizenship, subject to these requirements:¹³
 - i. An affidavit must be by at least two individuals, of whom one is not related to the applicant/recipient, who have personal knowledge of the event(s) establishing the applicant's or recipient's claim of citizenship.
 - ii. The person(s) making the affidavit must be able to provide proof of his/her own citizenship and identity for the affidavit to be accepted.
 - iii. If the affiant has information which explains why documentary evidence establishing the applicant's claim of citizenship does not exist or cannot be readily obtained, the affidavit **must** contain this information as well.
 - iv. The affidavit must be signed under penalty of perjury by the person making the affidavit.
 - v. **A second affidavit** from the applicant/recipient or other knowledgeable individual must also be provided explaining why documentary evidence does not exist or cannot be readily obtained.
 - vi. The Virginia Medicaid Manual publishes affidavit forms.¹⁴
 - 1. Va. Medicaid Manual § M0220, Appendix 7 contains the Affidavit of Citizenship On Behalf Of Medicaid Applicants and Recipients.
 - 2. Va. Medicaid Manual § M0220, Appendix 8 contains the Affidavit of Citizenship By Medicaid Applicants and Recipients.
5. Identity Documents.¹⁵
- a. Not required for persons having been certified for Medicare and / or SSI benefits.
 - b. Separate identity document is not required when “primary” proof of citizenship is presented.
 - c. Acceptable documents:
 - i. Certificate of Degree of Indian Blood, or other U.S. American Indian/Alaska Native tribal document if the document has a photograph of the presenter or other identifying data regarding the presenter.
 - ii. Any identity document described in section 274A(b)(1)(D) of the Immigration and Nationality Act, which include:
 - 1. driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information as name, age, sex, race, height, weight or eye color;

¹³ Va. Medicaid Manual § M 0220.100 (c)(g)(4). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 27, 28.

¹⁴ Va. Medicaid Manual § M 0220. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 34, 35.

¹⁵ Va. Medicaid Manual § M 0220.100 (c)(g)(5). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 29.

2. School identification card with a photograph of the individual;
 3. U.S. military card or draft record
 4. Identification card issued by the Federal, State, or local government with the same information included on driver's licenses;
 5. Military dependent's identification card;
 6. Native American Tribal document; or
 7. U.S. Coast Guard Merchant Mariner card.
- d. Not acceptable.
- i. Voter's registration card.
 - ii. Canadian driver's license.

B. Age or Disability.

1. The spouse must be 65 or, if younger, disabled for purposes of the Social Security Administration.¹⁶

C. Prescreening: Activities of Daily Living / U.A.I., §M1420.¹⁷

1. Prescreening is required for persons entering long term care or community based care, except, *inter alia*, for persons in long term care for at least 30 days before the application date, §M 1420.400 (B).¹⁸
2. The prescreening assesses the institutionalized spouse's ability to perform activities of daily living by reference to a standardized testing survey, the Uniform Assessment Instrument.
3. The screening criteria are ongoing, and DMAS can rescind certification while the recipient remains in the nursing home, §M 1420.400 B 6.

D. Income.¹⁹

1. When an institutionalized person is married to a spouse who is not institutionalized, the institutionalized spouse is an "institutionalized spouse" (the "IS") under special rules.
2. The non-institutionalized spouse, is referred to as the community spouse (the "CS").
3. **ONLY** the income of the institutionalized adult is counted.
4. **The income of the CS is *not considered* in determining Medicaid eligibility for the IS.**

¹⁶ Va. Medicaid Manual § M 0310.002. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m03.pdf, Adobe p. 5.

¹⁷ All cites to "§M" or "§S" are current citations to the Virginia Medicaid Manual, which may be accessed via <http://majette.net>.

¹⁸ See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 44.

¹⁹ Va. Medicaid Manual § M 1480.410.

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5. After eligibility of an institutionalized person is established, income of the person is applied for the person's care in the institution.
 - a. Deductions for personal needs allowance (\$30 per month), guardian fee (when applicable), home maintenance deduction (when applicable), health insurance premiums if any, and unpaid medical expenses (when applicable) are available.²⁰
 - b. If the institutionalized person is married, an additional deduction for maintenance of the CS *may* be available depending upon the income of the CS under the rules below.
6. If the community spouse has monthly income of more than \$1,900, a claim may be made for "expected" support.²¹
 - a. The claim has no effect on the institutionalized spouse's eligibility.
 - b. The claim can only be enforced through a court proceeding.
7. If the income of institutionalized person is less than \$1,869 (in 2007),²² the person is automatically income eligible. If the income exceeds this level, daily, retroactive counting required.²³
8. Supplementing CS Income: The "Minimum Monthly Maintenance Needs Allowance."²⁴
 - a. Minimum: July 1, 2006 until July 1, 2007: \$1,650.00.
 - b. Maximum Monthly Excess Shelter Allowance (January 1, 2007 until January 1, 2008): \$891.00 (The maximum monthly income the CS can receive is limited to \$2,541.00, calculated thus: \$1,650 + [(monthly mortgage (PITI), homeowner association dues, and utility allowance (\$281 or \$352²⁵)) - \$495.00 (which is 30% of the MMNA)]. §M 1480.410²⁶
 - c. Family Dependent Amount, July 1, 2006 until July 1, 2007: \$550.00 (maximum). §M1480.430 E.2.²⁷
9. Post-eligibility court support orders are recognized to allocate additional income to CS. §M1480.^{22.a}

²⁰ See Va. Medicaid Manual § M 1480.430,

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 353.

²¹ See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 394, and further discussion, *infra*.

²² \$1,809.00 for 2006.

²³ Va. Medicaid Manual § M 0810.002. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s08.pdf Adobe p. 5. Va. Medicaid Manual § M 1480.310 (B) 2. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 181.

²⁴ Va. Medicaid Manual § M 1480.410.

²⁵ The higher utility allowance applies to households in which more than three persons reside.

²⁶ See: <http://www.dss.state.va.us/policymanual/medicaid/m14.pdf> Adobe p.343.

²⁷ The dependent amount is one third of the MMNA, reduced by any income of the dependent family member. See:

<http://www.dss.state.va.us/policymanual/medicaid/m14.pdf> Adobe p. 351.

^{22.a} Va. Code § 16.1-241 (L). See Va. CLE publication, Virginia Family Law - A Systematic Approach,

Balnavé, §6.2 (footnote.2). Venue in the Juvenile and Domestic Relations District Court is where either party resides or the defendant is present. Va. Code § 16.1-243 (A)(2) and Rule 8.3(C), Rules of the Virginia Supreme Court. Form DC-610 is available at <http://www.co.henrico.va.us/jdrcourt/DC610p1.pdf> (page 1) and

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10. Medicaid expects a contribution from the CS when income exceeds \$1,900 per month, but does not impute it to the IS unless paid.²⁸

E. Resources: Exempt and Countable.

1. Exempt and countable resources.

- a. A resource is any property which a person owns; has the right, authority, or power to convert to cash (if not already cash); and is not legally restricted from using for his/her support and maintenance.²⁹
- b. All resources are countable unless specifically exempted.

2. Exempt Resources: §S 1130³⁰ and §M 1480.210.³¹

- a. Home of the institutionalized spouse / community spouse.³²
 - i. Home is defined as the property which serves as the principal residence,³³ and for married persons when one is institutionalized, all the property contiguous to the residence.³⁴
 - ii. The home (including contiguous property) is exempt for six months after institutionalization, or longer when certain persons³⁵ reside there.
 - iii. **Caveat:** \$500,000 Home Equity Limitation.³⁶

<http://www.co.henrico.va.us/jdrcourt/DC610p2.pdf> (page 2). Local rules of court should be consulted (see, e.g., Henrico County, <http://www.co.henrico.va.us/jdrcourt/jdrforms.html#origsupport>).

²⁸ §M1480.310 B.3., §M1480 Appendix 6. See Section 4 of Notice of Obligation for Long Term Care Services Form Number 032-03-062.

²⁹ Va. Medicaid Manual § S 1110.100 (B). See: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf Adobe p. 6.

³⁰ See: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf Adobe p. 55.

³¹ “[C]ountable and excluded resources are determined for all covered groups using the ABD resource policy in Chapter S11, regardless of the individual’s covered group and regardless of community property laws or division of marital property laws, except for the following resources which are excluded as indicated below when completing the resource assessment and

spousal share: • the home and all contiguous property; • one automobile, regardless of value; • Disaster Relief funds for 9 months; retroactive SS & SSI payments received on or after 11/01/05 for nine (9) calendar months following the month in which the individual receives the benefits. For retroactive SSI and SS benefits received before 11/01/05, exclude from resources for six (6) calendar months;

and • up to \$1,500 of burial funds for each spouse (NOT \$3,500).” Va. Medicaid Manual § M 1480.220 (B)(2). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf Adobe p. 295.

³² Va. Medicaid Manual § M 1460.530 applies to the home exclusion generally regarding Medicaid applications for long term care benefits. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 530 *et seq.* Va. Medicaid Manual § M 1480.010 B (6) states that “[f]or purposes of determining the combined and separate resources of the institutionalized and community spouses when determining the institutionalized spouse’s eligibility, the couple’s home, contiguous property, household goods, and one automobile are excluded.”

³³ Va. Medicaid Manual § M 1460.530 (B)(3).

³⁴ Va. Medicaid Manual § M 1480.010 B (6); Va. Medicaid Manual § M 1480.210, 220 (B)(2).

³⁵ Spouse, minor or disabled children, etc. See Medicaid Manual § M 1130.100.

³⁶ Va. Medicaid Manual § M 1460.150. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 128.

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1. DRA 2005 imposed rule.
2. Applicable to persons whose long term care Medicaid is effective after January 1, 2006.
3. Virginia's rule is that "home property that exceeds \$500,000 [] will make the home owner ineligible for Medicaid payment of LTC services, unless the home is occupied by a spouse, dependent child under age 21, or a blind or disabled child of any age."³⁷
 - A. During the life of the community spouse, the limitation can be avoided:
 - a. While the community spouse resides in the home.
 - b. If the institutionalized spouse transfers the home (or any portion of the same, sufficient to reduce the institutionalized spouse's share) to the community spouse.³⁸
 - iv. Home and all real estate contiguous to it, married persons, when community spouse residing in the home.
 - b. Motor vehicle of any value.³⁹
 - c. Burial arrangements.
 - i. Cemetery plots are exempt regardless of number owned (except QDWI).⁴⁰
 1. The burial space exclusion is in addition to, and has no effect on, the burial funds exclusion below.⁴¹
 - ii. Burial funds set aside for expenses.⁴²
 1. Single person: \$3,500 burial account
 2. Married person: \$1,500 burial account
 - iii. Burial life insurance policies, not limited.
 - iv. Tangible personal property for the grave is considered a burial space, and is exempt regardless of value.⁴³
3. Personal resource allowance of the institutionalized person (the IS) always limited to \$2,000.

³⁷ See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 2 (instructions from Virginia DSS Director of benefit programs).

³⁸ In practice, it would be rare for the institutionalized spouse not to transfer his entire interest in the home to the community spouse to avoid loss of benefits should the spouse precede him in death and Medicaid estate recovery.

³⁹ Va. Medicaid Manual § M 1480.010 B (6); Va. Medicaid Manual § M 1480.210, 220 (B)(2).

⁴⁰ Va. Medicaid Manual § M 1130.400. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 66.

⁴¹ Va. Medicaid Manual § M 1130.400 A (2). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 83.

⁴² Va. Medicaid Manual § M 1130.410. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 86.

⁴³ Va. Medicaid Manual § M 1130.400 (A).

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4. Lump sum for protection of the community spouse.
 - a. The Community Spouse Resource Allowance ("CSRA") or the Community Spouse Protected Resource Amount ("CSPRA") is the value of countable resources which can be excluded from the couple's countable resources, and thus protected for the community spouse while the institutionalized spouse receives Medicaid.
 - b. 50% of resources in names of both spouses existing on the institutionalization snapshot date, subject to:
 - i. Minimum (as of 1/1/2007): \$20,328. § M 1480.231.
 - ii. Maximum⁴⁴ (as of 1/1/2007): \$101,640.⁴⁵ § M 1480.231.
 - c. Resource valuation and eligibility dates.
 - i. For *unmarried* institutionalized applicant, valued at any time in the month (the "any day in month" rule).⁴⁶
 - ii. For *married* institutionalized spouse, resource eligibility exists when the total of all countable resources of *both* the IS and CS does not exceed the CSRA / CSPRA + \$2,000 on the first day of the calendar month for which eligibility is being determined.⁴⁷
 - d. For IS with CS.
 - i. Assets (of both spouses) initially valued on "snapshot date."
 1. Snapshot date is 1st day of month IS in which IS becomes "institutionalized."⁴⁸
 2. Snapshot date is generally first day of month IS admitted to nursing home and expected to be there for at least 30 consecutive days.⁴⁹
 3. Snapshot can be based on any institutionalization, in a nursing home or otherwise.⁵⁰

⁴⁴ See III B below regarding limited revisions (institutionalization before DRA 2005).

⁴⁵ See: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf Adobe p. 294.

⁴⁶ Medicaid Manual § M 1110.600 (A) (1) ("We make all resource determinations per calendar month. Resource eligibility exists for the full month if countable resources were at or below the resource standard for any part of the month..")

⁴⁷ Valuation: see Va. Medicaid Manual § M 1480.000 A. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 281. Eligibility: see Va. Medicaid Manual § M 1480.230 (B). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 300.

⁴⁸ Medicaid Manual § M 1480.200 (A) ("A resource assessment is strictly a: compilation of a couple's reported resources that exist(ed) at the first moment of the first day of the month in which the first continuous period of institutionalization began on or after September 30, 1989")

⁴⁹ Medicaid Manual § M 1480.010 B (15) ("Institutionalized Spouse means an individual who: is in a medical institution, or who is receiving Medicaid waiver services, or who has elected hospice services; is likely to remain in the facility, or to receive waiver or hospice services for at least 30 consecutive days; and who is married to a spouse who is NOT in a medical institution or nursing facility.")

⁵⁰ "Institutionalization means receipt of 30 consecutive days of care in a medical institution (such as a nursing facility), or waiver services (such as community-based care); or a combination of the two." Medicaid Manual § M 1410.010 B 1; § M 1480 B 5

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- e. A couple with “excess resources” cannot become resource eligible in the month of institutionalization.⁵¹
- f. Post-eligibility increases in resources of CS immaterial to eligibility of IS.⁵²

F. Transfer of Resources: 12 VAC 30-40-300; §M 1450 *et seq.*

1. Criminal liability.

- a. So called “Granny I” and “Granny II” statutes enacted and amended in 1997 and 1998, respectively, created criminal exposure in relation to asset transfers.
 - i. Granny I initially targeted transferors – “Grannies” - who made transfers of assets to qualify for Medicaid benefits.
 - ii. Granny II amended the law to exempt seniors but substituted their paid advisors, under language in 42 U.S.C. 1320a-7b, which made it a crime to “knowingly and willfully counsel[] or assist[] an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under [Medicaid] if disposing of the assets results in the imposition of a period of ineligibility for such assistance.”
- b. The legislation was held unconstitutional in *New York State Bar Assoc. v. Reno*, 999 F. Supp. 710, 715 (E.D.N.Y. 1998).
- c. In fact, the statute has been held so obviously unconstitutional that cautious attorneys seeking additional relief from its reach have been denied relief on the basis of a lack of a justicable controversy. See, *e.g.*, *Magee v. Reno*, C.A. NO. 98-073-T (D.C.R.I. 2000).⁵³

2. Transfers by either spouse affects both spouses when made before initial eligibility established for the IS.

(married persons). When a person qualifies for the Elderly and Disabled Consumer Directed (EDCD) waiver, the personal needs allowance is much higher than for a nursing home resident. The nursing home resident is permitted to retain only \$30 per month (see *supra*) while the EDCD monthly allowance is \$1,028 until January 1, 2008. Va. Medicaid Manual § M 1480.430 (C) (2).

⁵¹ Medicaid Manual § M 1480.250 (D) (“An institutionalized spouse **cannot** establish resource eligibility by reducing resources within the month. The institutionalized spouse may become eligible for Medicaid payment of LTC services when the institutionalized spouse’s resources are equal to or below the \$2,000 CNNMP/MN resource limit as of the first moment of the first day of a calendar month.”)

⁵² Va. Medicaid Manual § M 1480.240 C (2). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 314. See also Va. Medicaid Manual § M 1480.255 A. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 328.

⁵³ “However, like self-censorship that is prompted by a fear of prosecution, self-censorship that stems from a desire to comply with the law must be subjectively felt and objectively reasonable. Here, there is no claim that the plaintiffs feel ethically constrained to obey Section 4734. On the contrary, they have made it clear that they believe Section 4734 to be unconstitutional. Moreover, the Attorney General, as the chief law enforcement officer responsible for upholding the laws, shares that belief and has disavowed any intention to prosecute alleged violations. Because a lawyer’s obligation to uphold the Constitution takes precedence over the obligation to uphold a statute; and, because all concerned agree that Section 4734 is unconstitutional, the plaintiffs have failed to establish an objectively reasonable subjective belief that Section 4734 prevents them from properly counseling their clients.” *Magee*, http://www.rid.U.S.C.courts.gov/opinions/torres/05022000_1-98CV0073T_MAGEE_V_USA_P.pdf.

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- a. Transfers by a community spouse which cause ineligibility of the institutionalized spouse will be apportioned between the two spouses should the community spouse become institutionalized.⁵⁴
 - b. Post eligibility transfers of assets by the community spouse have no effect upon eligibility of the institutionalized spouse, *except* as respects a non-conforming annuity purchased by the community spouse after eligibility.⁵⁵
3. Exempt transfers.⁵⁶
- a. Transfers exempt regardless of value or timing by reason of the character of the transferee, Va. Medicaid Manual § M 1450.400.
 - i. Any property from spouse to spouse.
 - ii. Any property from spouse to Trustee of trust for sole benefit of spouse.
 - iii. Any property to applicant's child under age 21.
 - iv. Any property to applicant's blind or disabled child (of any age).
 - v. Any property to Trustee of a special needs trust per 42 USC 1396p(d)(4)(A) for disabled person under 65.
 - vi. Any property to Trustee of "pooled" special needs trust for disabled persons of any age per 42 USC 1396p(d)(4)(C), with limitations.⁵⁷
 - vii. An applicant's *home* may be transferred:
 - 1. to a sibling or half sibling who has an equity interest in the home and who resided in the home for at least one year before the applicant / transferor became an institutionalized person.
 - 2. to an adult child who resided in the home for at least two years immediately before the date the individual became institutionalized and provided care at home which would otherwise have been provided in a nursing home.^{53a}

⁵⁴ Va. Medicaid Manual § M 1450.630 F.

⁵⁵ Va. Medicaid Manual § M1450.100 A (pre DRA 2005); Va. Medicaid Manual § M 1450.400 (F) (post DRA 2005). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf.

⁵⁶ Va. Medicaid Manual § M 1450.300, 400. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 90-97.

⁵⁷ There is no express federal or state regulatory exemption for transfers into these trusts. However, Virginia has exempted certain transfers to such trusts in an administrative letter, buttressed by ambiguous language in Va. Medicaid Manual § M 1450.400 (C) (3). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 95.

^{53a} Va. Medicaid Manual § M 1450.400 (B) (3). See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 110 for Virginia rule. SI 01150.122 Exceptions—Transfer of a Home (A)(3), see <https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0501150122!opendocument>.

Compare the Virginia Medicaid policy with the SSI POMS statement of policy that the "care [required to meet this
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- b. Transfers in which the applicant's intention at the time of the transfer, or circumstances extant at the time of the application, cause the transfer to be disregarded.
- i. Transfers in which the applicant intended to receive adequate compensation for the asset or that he/she actually received adequate compensation for the asset.⁵⁸
 - ii. Transfers to a Burial Trust of Over \$2,500 after 1988 when the applicant provides objective evidence that all the funds in the trust will be used to pay for identifiable funeral services.⁵⁹
 - iii. Transfers for reasons **exclusive** of becoming or remaining eligible for Medicaid long term care services' payment.⁶⁰
 - iv. *De minimis* transfers after February 7, 2006.⁶¹
 1. Transfers after February 7, 2006 with a total cumulative value not exceeding \$1,000 per calendar year will not be considered a transfer for less than fair market value and no penalty period will be calculated.
 2. Transfers after February 7, 2006, between \$1,000 and \$4,000 per calendar year will not be considered a transfer for less than fair market value if documentation is provided that such transfers follow a pattern that existed for at least three years prior to applying for Medicaid payment. Christmas gifts, birthday gifts, graduation gifts, wedding gifts, etc. meet the criteria for following a pattern that existed prior to applying for Medicaid payment of LTC services.
 3. Although not factored into the examples provided by the Virginia Medicaid Manual, the exemptions effectively provide a reduction in penalties that can be

exception] is substantial but *not necessarily full-time care*. A son or daughter is providing care for purposes of this exception if he/she does most of the following for the transferor on regular basis:

- prepares meals;
- shops for food and clothing;
- helps maintain the home;
- assists with financial affairs (banking, paying bills, taxes);
- runs errands;
- provides transportation;
- provides personal services;
- arranges for medical appointments;
- assists with medication"

Id., ¶ C. POLICY—PROVIDING CARE FOR THE TRANSFEROR. (Emphasis supplied by writer.)

⁵⁸ Va. Medicaid Manual § M 1450.400 D.

⁵⁹ Va. Medicaid Manual § M 1450.400 D 4.

⁶⁰ Va. Medicaid Manual § M 1450.400 E.

⁶¹ Va. Medicaid Manual § M 1450.400 H.

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imposed by reason of a transfer for a minimum of 7 days and a maximum of 30 days per year.⁶²

v. Undue Hardship: Does Virginia Mean What Congress Said?⁶³

1. The Deficit Reduction Act of 2005 (eff. 2-8-06) requires that each State shall provide for a hardship waiver process in accordance with section 1917(c)(2)(D) of the Social Security Act (42 U.S.C. 1396p(c)(2)(D))--

(1) under which an undue hardship exists when application of the transfer of assets provision would deprive the individual--

- (A) of medical care such that the individual's health or life would be endangered; or
- (B) of food, clothing, shelter, or other necessities of life; and

(2) which provides for--

- (A) notice to recipients that an undue hardship exception exists;
- (B) a timely process for determining whether an undue hardship waiver will be granted; and
- (C) a process under which an adverse determination can be appealed.

A. The exclusive focus of the federal statute is upon the impact of the denial upon the Medicaid applicant / recipient.^{59a} This follows because the penalty only applies to persons certified (by the prescreening report) to be in need of long term care in a nursing home. They must have that level of care to have their minimal activities of daily living met. Thus, every denial of Medicaid funding for long term care services that results in denial of admission or expulsion from a nursing home will meet the standard for endangerment and privation.

B. However, Virginia requires “written information clearly documenting and substantiating that that the resources transferred without adequate compensation cannot be recovered,” and by apparently requiring that legal

⁶² \$1,000 / 130.97 [4,060/31] = 7.64 days; \$4,000 / 130.97 = 30.54 days. See example, Va. Medicaid Manual § M 1450.630 E. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 118.

⁶³ Va. Medicaid Manual § M 1450.570. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 106.

^{59a} See Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations July 27, 2006, Letter to State Medicaid Directors Number SMDL #06-018 Enclosure captioned, “Sections 6011 and 6016 New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005,” (herein, CMS SMDL #06-018 Enclosure), §6011 (v). See <http://www.cms.hhs.gov/smdl/downloads/SMD072706b.pdf> (letter); <http://www.cms.hhs.gov/smdl/downloads/TOAEnclosure.pdf#search=%22Sections%206011%20and%206016%20New%20Medicaid%20Transfer%20of%20Asset%20Rules%20Under%20the%20Deficit%20Reduction%20Act%20of%202005%20CMS%22> (Enclosure).

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action be undertaken to recover the assets transferred. The claimant must also document that the immediate adverse impact of the denial of Medicaid coverage of LTC services due to the uncompensated transfer would result in the individual being removed from the institution or becoming unable to receive life-sustaining medical care, food, clothing, shelter, or other necessities of life.⁶⁴

2. All requests for waivers under the undue hardship standard must be considered by the central DMAS office, and an official form for claiming hardship is published in the policy manual.⁶⁵
- c. Transfers exempt by reason of the character or value of the transferred asset, Va. Medicaid Manual § M 1450.300.
- i. Personal Effects and Household Items.
 - ii. Automobiles.
 1. If used for employment or treatment transportation, or which are specifically equipped for disabled persons, no limitation on value.
 2. Otherwise, automobile of up to \$4,500 in trade-in value is excluded.
 - iii. Life insurance.
 1. Term life policies, no limitation on transfer amount.
 2. Other policies, up to \$1,500 in face value.
 - iv. Property essential to self support (business use property).
4. Disqualifying Transfers: The look-back and the penalty.
- a. Ineligibility is imposed, if at all, only for long term care services, including nursing facility services and home or community based care services under the Virginia waiver.⁶⁶
 - b. Transfers made after February 7, 2006, the effective date of DRA 2005, are treated more harshly.
 - c. The look-back, 42 USC 1396p.

⁶⁴ *Id.*

⁶⁵ Va. Medicaid Manual § M 1450, Appendix 1.

⁶⁶ Va. Medicaid Manual § M 1450.004.

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- i. The look-back is the period of time in which Medicaid may consider gifts and under-valued sales ("uncompensated transfers") to disqualify an applicant / spouse from certain Medicaid services.
 - ii. The look-back for uncompensated transfers made before February 7, 2006.⁶⁷
 - 1. To a trust or similar legal instrument, sixty months.
 - 2. To all others, thirty six months.
 - iii. The look-back for uncompensated transfers made after February 7, 2006, is sixty months, regardless of the transferee.⁶⁸
- d. Penalty calculation for long term care services by reason of uncompensated transfers effected within the look-back.
- i. Uncompensated transfers made within the look-back and before February 8, 2006.⁶⁹
 - 1. Calculate period of ineligibility thus for gifts in each separate month during look-back: $(\text{Gift } \$) / \$4,060$ (\$5,403 in Northern Virginia) = months ineligible (rounded down).
 - 2. Example of single gift: Applicant's \$4,000 gift on December 22, 2005 / \$4,060 = 0.97, rounded to 0 months of ineligibility.
 - 3. Example of multiple gifts: Applicant's \$10,000 gift on October 1, 2005 / \$4,060 = 2.46, 2 months of ineligibility. Applicant's second gift of \$10,000 on December 22, 2005 / \$4,060 = 2 months of ineligibility.
 - 4. Commence ineligibility period from the date of the transfer.
 - A. In the first example, there is no ineligibility period. In the second example the first month of ineligibility is October, 2005, and the last day is the last day of January, 2006.⁷⁰
 - B. For transfers made before February 7, 2006, institutionalization of the transferor is immaterial to the commencement of the penalty period.
 - ii. Uncompensated transfers made after February 7, 2006, and within the look-back.

⁶⁷ Va. Medicaid Manual § M 1450.100 B. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 89.

⁶⁸ Va. Medicaid Manual § M 1450.200. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 90.

⁶⁹ Va. Medicaid Manual § M 1450.620.

⁷⁰ For transfers of assets made before February 7, 2006, when there are overlapping penalty periods, add all of the assets together, divide by the private pay cost of nursing home care, and the quotient, rounded down, is the penalty for the series of gifts, and commences to run on the first day of the month of the first transfer. Va. Medicaid Manual § M 1450.620 G 2. See

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 115.

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1. Calculate period of ineligibility for uncompensated transfers in the 60 month period preceding application date.⁷¹
 - A. Single gift within look-back.⁷²
 - a. Divide value of gift by average monthly cost of private nursing home payment \$4,060 (\$5,403 in Northern Virginia).⁷³
 - b. Quotient is the ineligibility period, which is the number of months and partial months (days) of ineligibility for long term care services.⁷⁴
 - i. Example: Applicant's \$10,000 gift on February 9, 2006.
 - ii. $\$10,000 / \$4,060 = 2.46$
 - iii. $10,000 - 8,120 [2 \times 4,060] = 1,880$ [partial month]
 - iv. Daily rate is $4,060 / 31 = \$130.97$
 - v. $\$1,880 / \$130.97 = 14.35$, or 14 days.
 - vi. Ineligibility period = 2 months, 14 days.
 - B. Multiple gifts in look-back.⁷⁵
 - a. Add the total, cumulative value of all assets transferred.
 - b. Divide total by average monthly cost of private nursing home payment \$4,060 (\$5,403 in Northern Virginia).
 - c. Quotient is the ineligibility period, which is the number of months (& partial months) of ineligibility for long term care services.
 - d. Example: Applicant's \$10,000 gift on February 9, 2006, and of \$10,000 on March 5, 2006.
 - i. $\$20,000 / \$4,060 = 4.93$
 - ii. Ineligibility period = 4 months, 28 days.
2. Commence calculated ineligibility period from the later of:

⁷¹ DRA 2005 provides explicit state authority to accumulate multiple transfers into one penalty period. DRA 2005 § 6016 (b). The provision appears unnecessary because the statute, with DRA 2005 amendments to the commencement date of the penalty, will cause the same result. 42 U.S.C. 1396p (c) (1) (E) (i) (I) [requiring consideration of "the total, cumulative uncompensated value of all assets ... on or after the look-back date", for institutionalized persons], and 42 U.S.C. 1396p (c) (1) (E) (ii) (I) [same, for non-institutionalized persons].

⁷² **Caveat:** Va. Medicaid Manual § M 1450.400 G, discussed above, provides a *de minimis* exemption between \$1,000 and \$4,000, from the transfers of assets penalty. The exemption has not been factored into this equation. The exemption is valued at a minimum of 7.64 days per year, and a maximum of 30.54 days per year.

⁷³ Va. Medicaid Manual § M 1450.620 D.

⁷⁴ Va. Medicaid Manual § M 1450.630 E provides details on the calculation of partial months of ineligibility for transfers occurring after February 7, 2006.

⁷⁵ **Caveat:** Va. Medicaid Manual § M 1450.400 G, discussed above, provides a *de minimis* exemption between \$1,000 and \$4,000, from the transfers of assets penalty. The exemption has not been factored into this equation. The exemption is valued at a minimum of 7.64 days per year, and a maximum of 30.54 days per year.

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- A. First day of month during or after which assets have been transferred for less than fair market value, or
- B. the date on which the individual is eligible for Medicaid and would otherwise be receiving institutional level care but for the application of the penalty period, and which does not occur in any other period ineligibility imposed for any other reason.⁷⁶
- C. Example:
 - a. \$5,000 tuition paid for 19 year old grandchild, May 6, 2006, and \$10,000 for medical bills of daughter.
 - b. Donor (or spouse) enters nursing home in April, 2008.
 - c. Assets spent on nursing home care and exhausted to \$2,000, and application for benefits otherwise granted, in Richmond, Virginia, in September, 2009.
 - d. If the gifts are \$15,000, the donor is ineligible for Medicaid for 3 months, 21 days, commencing September 1, 2009, and concluding on December 21, 2009.⁷⁷

III. Planning Considerations: Initial Eligibility.

Example: H and W own a home and have non-working farm land which is contiguous to the home; combined real estate value is \$200,000 with no mortgage. They have \$200,000 in cash or stocks. She has Social Security Administration benefits of \$500 per month. He has Social Security Administration benefits of \$1,100 and a private pension of \$350. H goes into the nursing home on January 3, 2006. No gifts of any kind (including Christmas, birthdays, etc.) made in preceding five years. Powers of attorney with gifting authority in place.⁷⁸

1. Initial eligibility.

- a. Home is exempt as well as all contiguous real estate.⁷⁹
- b. CSRA for W: \$99,540 (1/2 of \$200,000, not exceeding \$99,540).
- c. MMNA for W: \$1,650 - \$500 (Soc. Sec. For Wife) = \$1,150.00.
- d. Excess resources, \$98,460 (\$200,000 - [\$99,540 + \$2,000]).
- e. First possible eligibility date is February 1, 2006.

⁷⁶ Va. Medicaid Manual § M 1450.630 B.

⁷⁷ Va. Medicaid Manual § M 1450.630. The penalty does not commence until September because that is the first day of the month in which the applicant is institutionalized and otherwise eligible for nursing home care based upon an approved application. A complete analysis of the policy is found at "Virginia Medicaid and Public Entitlement Tables (3/6/06)," <http://mysite.verizon.net/vze3mmd7/documents/Medtab06.pdf>.

⁷⁸ A power of attorney without gifting authority can be construed to permit it, see Va. Code Ann. § 11-9.5. In the absence of any power of attorney a conservatorship can accomplish the same result, Va. Code Ann. § 37.2-1024.

⁷⁹ Only \$5,000 in surrounding property would be exempt were H single.

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B. A Dozen Excess Resource Dispositions.

1. Payment for long term care of IS and living expenses of CS.
2. Enhanced home, car, contiguous property to home.
3. Purchase of home for CS⁸⁰ and creation of HECM reverse mortgage for CS.
 - a. Purchase of home is exempt.
 - b. Loan proceeds are excluded from income calculations.⁸¹
4. Long term care insurance for CS.
5. Enhanced (increased) CSRA when sum of CS and IS income less than MMNA via fair hearing for institutionalizations occurring after February 7, 2006,⁸² limited court order.⁸³
6. Conversions of CS resources to income.
 - a. Loan to child for non-negotiable, actuarially sound promissory note.
 - i. Transfer of assets analysis.⁸⁴
 1. The note will not be considered an uncompensated transfer of assets if it:
 - A. has a repayment term that is actuarially sound (see [M1450.100](#)),
 - B. provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments, and
 - C. prohibits the cancellation of the balance upon the death of the lender.
 2. If the promissory note, loan, or mortgage does not meet the above criteria, the uncompensated amount is the outstanding balance as of the date of the individual's application for Medicaid.
 3. The countable value as a resource is the outstanding principal balance for the month in which a determination is being made.
 - ii. Resource analysis.⁸⁵
 1. Rebuttable presumption is that a promissory note is a countable resource.
 - A. "A promissory note is a written, unconditional agreement whereby one party promises to pay a specified sum of money at a specified time (or on demand)

⁸⁰ Note the \$500,000 home limitation will not apply since the community spouse will own (and live) in the home.

⁸¹ Va. Medicaid Manual § M 1120.225 B.

⁸² 12VAC 30-110-856; §M 1480.232 F (1,3); and federal rule 42 CFR 431.260 (conferring authority to make "resources first" a state option) and *Wis. Dep't of Health and Family Servs. v. Blumer*, 543 U.S. 473 (2002). DRA 2005 also mandated this rule as applicable.

⁸³ Va. Code Ann. § 20-88.02:1. See CMS SMDL #06-018 Enclosure, §6013, § 6011 (v).

⁸⁴ Va. Medicaid Manual § M 1450.540. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 119. See also 42 USC 1396p (c) (1) (I) as amended by DRA 2005.

⁸⁵ Va. Medicaid Manual § S 1140.300. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 177.

to another party. It may be given in return for goods, *money loaned*, or services rendered.”

- B. The Medicaid worker is instructed to “[a]ssume that the value of a promissory note, loan, or property agreement as a resource is its outstanding principal balance unless the individual furnishes reliable evidence that it has a CMV of less than *the outstanding principal balance* (or no CMV at all).”
 - C. The Medicaid worker is further instructed that “[i]f including the outstanding principal balance in countable resources causes ineligibility, **inform the individual** that we will use the outstanding principal balance in determining resources unless he or she submits: **evidence of a legal bar to the sale of the agreement** ; or an estimate from a knowledgeable source, showing that the CMV of the agreement is less than its outstanding principal balance.”⁸⁶
 - D. “Knowledgeable sources include anyone regularly engaged in the business of making such evaluations: e.g., banks or other financial institutions, private investors or real estate brokers. The estimate must show the name, title, and address of the source.”
2. Thus, a parent who lends funds to a child, in exchange for a non-negotiable, non-assignable, and non-transferable promissory note which meets the foregoing transfer of assets criteria will result in a resource which has a zero value, because the non-negotiability of the note is a “legal bar” to its transfer. Payments which the lender parent receives on a monthly basis will be attributable to her only as income.
- b. Annuity for CS or single person (purchased after February 7, 2006).⁸⁷
 - i. Transfer of assets analysis.⁸⁸
 - 1. Virginia remainder-person.^{83a}
 - A. According to Va. Medicaid Manual § M 1450.530 B 1, if the community spouse purchases an annuity and is the annuitant, it will not be treated as an uncompensated transfer of assets if Virginia as is named as the remainder beneficiary as to the community spouse’s (annuitant’s) Medicaid payments.⁸⁹

⁸⁶ Emphasis added by writer.

⁸⁷ DRA 2005, § 6012. As of the edit date of this article, the U.S. Government Printing Office has not issued a version of 42 U.S.C. 1396p with the provisions of DRA 2005 *in situ*. However, the writer believes that the section dealing with this topic is 42 U.S.C. 1396p (e)(1). See <http://mysite.verizon.net/vze3mmd7/documents/DRA05-42p.pdf> for the writer’s version of 42 U.S.C. 1396p. See CMS SMDL #06-018 Enclosure generally.

⁸⁸ Va. Medicaid Manual § M 1450.530. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/transmittals/transmittal84.pdf, Adobe p. 101. See also 42 USC 1396p (c) (1) (F) as amended by DRA 2005.

^{83a} See CMS SMDL #06-018 Enclosure, § 6012 I. B. *But compare*, Va. Medicaid Manual § M 1140.260 B 5.

⁸⁹ Va. Medicaid Manual § M 1450.530 B 1. *Accord*: CMS SMDL #06-018 Enclosure, § 6012 (II)(C).

- B. According to Va. Medicaid Manual § M 1450.530 B 1, there is no requirement for actuarial reasonableness if the community spouse – *not the institutionalized spouse (or any institutionalized person)* is the annuitant.
- C. According to Va. Medicaid Manual § M 1450.530 B 2, purchase of an annuity by the institutionalized spouse – which is not recommended – will be treated as an uncompensated transfer of assets unless it is a tax annuity, and even then, unless it is irrevocable, non-assignable, actuarially sound, and provides for equal payments.
 - a. This is an erroneous reading of DRA 2005.
 - b. When an institutionalized person acquires an annuity, it is expressly excluded as an uncompensated transfer of assets if the state is named as a remainder-person, and if the annuity is *either*
 - i. *a tax related annuity, or purchased with tax deferred funds specified in DRA 2005⁹⁰ or*
 - ii. *irrevocable, non-assignable, actuarially sound, and with equal payments throughout the life of the annuitant.⁹¹*
- ii. Resource analysis.⁹²
 - 1. The annuity must be issued by an entity licensed to do business in the state in which the annuity is established.⁹³
 - 2. “Annuities purchased with the assets of a third party such as those *received* through a legal settlement are not considered to be countable resources.”⁹⁴
 - 3. The annuity:⁹⁵
 - A. Must be irrevocable.
 - B. Must be non-assignable.
 - C. Must be actuarially sound.^{90a}
 - a. Use the tables at Va. Medicaid Manual § M 1450, Appendix 2.⁹⁶

⁹⁰ 42 USC 1396p (c) (1) (G) (i), as amended by DRA 2005.

⁹¹ 42 USC 1396p (c) (1) (G) (ii), as amended by DRA 2005..

⁹² Va. Medicaid Manual § M 1140.260. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 176.

⁹³ *Id.* A.

⁹⁴ *Id.* B 2. This has been interpreted to include structured settlements in which the defendant’s insurer buys the annuity in at least one case in Virginia. Query: would traceable third party funds from inheritances, etc., also permit exclusion?

⁹⁵ *Id.* B 4.

^{90a} It is unclear whether an annuity for a community spouse must be actuarially sound, see transfer of assets policy at M 1450.530 B 1.

⁹⁶ Va. Medicaid Manual § M 1450.520 C. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 141.

- b. The annuity should be for no more than the life of the annuitant, and as long as the same does not exceed the life expectancy, will not be considered actuarially unsound so as to cause inclusion as a resource.⁹⁷
 - D. Must provide for payments in equal amounts during the term of the annuity with no deferral and no balloon payments made.
 - E. Reimbursement to Virginia for long term care costs.
 - a. According to Va. Medicaid Manual § M 1140.260 (B)(5), “[p]rior to receiving long-term care services paid by Medicaid, all annuities purchased by the institutionalized individual *or the community spouse* on or after February 8, 2006, must name the Commonwealth of Virginia as the primary [remainder?] beneficiary for at least the total amount of medical assistance *paid on behalf of the institutionalized individual*. If there is a community spouse or minor or disabled child, the Commonwealth must be named as the remainder beneficiary behind the spouse or minor or disabled child.”^{92a}
 - i. Requiring the remainder interest of a non-institutionalized annuitant (e.g., the community spouse) to pay for another person’s Medicaid expense (e.g., the institutionalized spouse) is not authorized by any reasonable reading of DRA 2005.
 - ii. Until this is corrected administratively or judicially, reducing the payback period in the community spouse’s annuity is permissible and perhaps advisable.
- 7. Burial Planning for H & W?⁹⁸
- 8. Trust for disabled child of any age, or disabled person under age 65?⁹⁹
- 9. “Pooled” Disability Trust for disabled person of any age?
 - a. Trust is recognized as an exempt trust in Virginia Medicaid policy.¹⁰⁰
 - b. No specific federal or Virginia Medicaid exemption from transfer of assets penalties for such trust.¹⁰¹

⁹⁷ “When the average number of years of expected life remaining for the individual (the “life expectancy” number in the table) is less than the life of the annuity, the annuity is NOT actuarially sound. The annuity purchase is a transfer for less than fair market value.” Va. Medicaid Manual § M 1450.610 D. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 126.

^{92a} Query: Does this provision conflict with Va. Medicaid Manual § M 1450.530 (B)(1)?

⁹⁸ Va. Medicaid Manual § M 1130.300, -410 *et seq.*; §M1450.510 B.1. (Burial insurance).

⁹⁹ Va. Medicaid Manual Va. Medicaid Manual § S 1120.202 B (resources); http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 46. Va. Medicaid Manual § M 1450.400 C (uncompensated transfer of assets exemption); See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 111.

¹⁰⁰ Va. Medicaid Manual § S 1120.202 B 2.

¹⁰¹ Va. Medicaid Manual § M 1450.400 C provides that transfer of any asset “to a trust established solely for the benefit of an individual under 65 who is disabled as defined by SSI or Medicaid, when the trust meets the conditions in M1120.202” is exempt. Revised January 15, 2007 1:45 PM

10. Split interest (life/remainder estate planning)?
 - a. Life estates are not countable resources.¹⁰²
 - b. No limitations in acquisition of life estate through February 7, 2006.
 - c. Limitations after February 7, 2006.¹⁰³
 - i. Acquisition life estate in another individual's home will be treated as uncompensated transfer of assets unless the purchaser resides in the home for at least twelve consecutive months.
 - ii. According to Transmittal 3822, the limitation applies only to acquisition of a life estate in the home of another individual; thus it has no impact on life estates in commercial property.
 - iii. Apparently the 12 month rule will not apply when the individual purchases a home and then conveys a remainder interest (for value) to a third party, as the individual will have purchased fee simple interest in a home for the CS, and then conveyed a remainder interest to the third party.¹⁰⁴
11. Contract for services rendered by family member for CS?¹⁰⁵
 - a. Services provided by the child to either the IS or CS may be compensated.
 - b. *Caveat* income tax consequences.
12. Divorce following transfer of assets to CS?
 - a. Transfers between spouses are exempt.
 - b. Divorce following transfer of assets from institutionalized spouse to community spouse severs the conduit (marriage) which imputes resources of the (former) community spouse to the institutionalized spouse.
 - i. *Caveat*: MMNA income support rules no longer applicable to the former community spouse.
 - ii. Consider QDROS by which ownership of the income producing asset (pension) is itself transferred to the community spouse in the divorce decree.

While it mentions the pooled trust, it does not provide an exception to the Medicaid transfer of assets penalty for such trusts. See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 111.

¹⁰² Va. Medicaid Manual § S 1110.515 (B) (1),

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 17.

¹⁰³ See Va. Medicaid Manual § M 1450.545,

http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf, Adobe p. 119.

¹⁰⁴ “The DRA provision pertaining to life estates does not apply to the retention or reservation of life estates by individuals transferring real property. In such cases, the value of the remainder interest, not the life estate, would be used in determining whether a transfer of assets has occurred and in calculating the period of ineligibility.” CMS SMDL #06-018 Enclosure, § IV.

¹⁰⁵ Va. Medicaid Manual § M 1450.003 D, G.

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- iii. Purchase of United States EE or I Bonds post-institutionalization (\$30k / \$15k limit per spouse, 6-12 month holding period)?¹⁰⁶

IV. Planning Considerations: Survivor Eligibility

- A. When a benefactor (such as a spouse, parent, or other significant other in the life of a Medicaid or potential Medicaid recipient) dies and leaves to the Medicaid recipient, the assets will trigger disqualification and fund a source of Medicaid estate recovery.
- B. Advise likely benefactors (e.g., parents, unmarried siblings, adult children) to bypass spouse(s) or create special needs trust for spouse(s) in benefactor's estate plan.
- C. In addition to the loss of eligibility, Virginia will recoup its Medicaid expenditures for benefits paid after the recipient's 55th birthday from whatever remains in the estate of the Medicaid beneficiary after death.¹⁰⁷ Example: Great uncle leaves niece, 65, \$50,000 in his will. She has been on Medicaid for 9 years. She loses eligibility, but dies 5 days after Uncle. Medicaid is entitled to recover its claim for 9 years of payments from the gift Uncle made.
- D. Benefactors other than spouses.
1. Any trust (either one created by will or during lifetime of the benefactor) in which the benefactor retains the use during life but creates a spendthrift, purely discretionary trust effective to supplement assets of the Medicaid beneficiary during life.
 2. At death of Medicaid beneficiary, residue in trust will avoid estate recovery and pay to third parties (grandchildren, charities, etc.).
- E. Spouse benefactors.
1. Because of the elective share rules applicable to spouses,¹⁰⁸ beware of both resource and transfer of assets issues.
 2. DO NOT USE living trusts when one spouse is Medicaid eligible, or expected to be.¹⁰⁹
 3. Marital agreements waiving elective share, Va. Code Ann. § 64.1-13 *et seq.*¹¹⁰

¹⁰⁶ Va. Medicaid Manual §M 1140.240 A; See http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf, Adobe p. 174; §1110.305 C 1 (example), Adobe p. 12.

Va. Medicaid Manual § S 1140.240 (A). See <ftp://ftp.publicdebt.treas.gov/sbibond.pdf> and <ftp://ftp.publicdebt.treas.gov/sbeebond.pdf>

¹⁰⁷ Estate recovery for Medicaid recipient, 12 VAC 30-20-140 for *past* benefits paid (after age 55). See <http://majette.net> or <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-20-140>.

¹⁰⁸ Va. Code § 64.1-13 *et seq.*. See <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+64.1-13>. The share is 1/3 if there are surviving descendants of the decedent, 1/2 if not. Va. Code § 64.1-16 (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+64.1-16>).

¹⁰⁹ Each spouse is considered a creator of the trust (Va. Medicaid Manual § M 1140.404 B 1a). Unless the trust provides that the entire fund is to be used for the surviving spouse, that portion of the corpus which is not to be paid to the surviving spouse will be treated as a transfer of assets, *Id.* b. See *Bezzini*, at 715 A.2d 791 (Conn.App., Jul 21, 1998). The analog – that a testamentary trust is not a transfer of assets by a spouse, and thus preferable in the planning process for the community spouse's estate – is discussed (and approved) in *Skindizer*, *infra*.

¹¹⁰ See 9/25/02 Roanoke Department of Social Services disqualification based upon failure to claim elective share at <http://www.geocities.com/hana+zushi/roanoke.pdf>, linked at <http://majette.net>.

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4. Suggested testamentary dispositions:

- a. Testamentary¹¹¹ special needs trust with mandatory income interest for survivor spouse in entire estate.
- b. Testamentary special needs trust with 34% in trust for survivor spouse.

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¹¹¹ *Skindzier*, at 784 A.2d 323 (Conn. 2001) (testamentary trust not disqualifying asset transfer).
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