

**PRACTICAL ELDER LAW ENTITLEMENTS:  
SSI AND MEDICAID - 2002**

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I. PRESENTATION SCOPE

A. General treatment

1. Aged, Blind or Disabled (ABD) categories
  - a. Excludes F&C category
  - b. Excludes CMSIP
2. “Nuts and bolts” treatment of long term care Medicaid<sup>1</sup>
  - a. Eligibility
  - b. Estate recovery avoidance
  - c. Transfer of assets

B. Detailed resources.

1. Estate Planning in Virginia, 2d. Ed., Chapter 8, *Powers of Attorney and Special Situations*. 2002.<sup>2</sup>

More detailed treatment of the topics covered in this work.

2. 8<sup>th</sup> Annual Elder Law Symposium, *Estate Planning for Spouse of Institutionalized Spouse*. 1999.<sup>3</sup>

More detailed analysis of specific planning opportunities and issues for the community spouse (see below) or the potential community spouse to avoid:

- a. loss of Medicaid benefits to the institutionalized spouse, and
- b. Medicaid estate recovery from inadvertent funding of the estate of the institutionalized spouse.

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<sup>1</sup> See Medicaid Manual §M 14, *Long Term Care*.

<sup>2</sup> Available through the Virginia CLE office, 1-800-079-8253, <http://www.vacle.org>.

<sup>3</sup> *Id.*

3. 29<sup>th</sup> Annual University of Richmond Estate Planning Seminar for Professionals, *Medicaid For Institutionalized Spouse And Parents of Disabled Children*. 2001.<sup>4</sup>

## II. SSI AND MEDICAID GENERALLY

### A. Social Security Supplemental Security Income (SSI).

Federally funded income support program available to aged, blind and disabled persons with low income and modest resources.

1. Statute: 42 U.S.C. 1381 *et seq.*
2. Regulations: 20 CFR 416.101 *et seq.*<sup>5</sup>
3. Social Security Rulings and Acquiescence Rulings
4. Policy: Social Security Manual System (POMS)
  - a. Useful for eligibility guidance, interpretation and application of SSI law, since the eligibility worker will base decisions on this policy in most cases.
  - b. Not binding on the Social Security Administration.<sup>6</sup>
  - c. Available at several sources:
    - (i) at local Social Security Administration office
    - (ii) CD-ROM Doc number is SSA1.8/4:998/9 titled: SSA Publications on CD-ROM
    - (iii) Internet.<sup>7</sup>
    - (iv) Especially useful is the POMS material on the SSI transfer of assets rule<sup>8</sup> and treatment of trusts.<sup>9</sup>

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<sup>4</sup> Contact Diane Lowder, Esq., University of Richmond, (804) 289-8969, dlowder@richmond.edu.

<sup>5</sup> Available at <http://www4.law.cornell.edu/cfr/20p416.htm#start>.

<sup>6</sup> See *Schweiker v. Hansen*, 450 U.S. 785 (1981).

<sup>7</sup> See link at <http://majette.net>. See VII.H of the present work for icon navigation guide.

<sup>8</sup> See 42 USC 1382b as amended effective January 1, 2000 for the transfer of assets rule. See 8/2000 POMS CD-ROM transmittal SI 01150.

<sup>9</sup> See POMS SI 00835.360, *When to Charge ISM [in-kind support and maintenance] from Third Party Vendor Payments*; SI 01120.200, *Trusts Established Prior to 1/1/00, Trusts Established by Third Parties*

- (a) Especially troubling is the unilateral pronouncement by SSI in the POMS that for exempt trusts (under 42 USC 1396p (d)(4)), “[t]he person establishing the trust must have legal authority to act with regard to the assets of the individual [i.e., SSI recipient]. An attempt to establish a trust by an individual without the legal right or authority to act with respect to the assets of the individual may result in an invalid trust.”<sup>10</sup>
- (b) The practical effect of this is to require a court order appointing a guardian or otherwise taking control over the assets of the SSI recipient even though the federal statute only permits *any* person who is a parent or grandparent to establish the trust, regardless of whether he or she has authority to act with respect to the assets of the applicant or recipient.

## 5. Research Aids

### a. Treatises

- (i) Regan, *et als. Tax, Estate and Financial Planning for the Elderly*. Matthew Bender.
- (ii) Margolis, ed. *The Elder Law Report*. Little, Brown and Company.

### b. Web Sites

- (i) Federal statutes, regulations, and policy governing the SSI program, together with other resources and reports applicable to the program, are linked at <http://majette.net>.
- (ii) See also:
  - (a) <http://www.ssa.gov> (Social Security Administration)
  - (b) <http://www.access.gpo.gov/nara/cfr/index.html> (SSI Regulations – go to Title 20, Chapter 416)
  - (c) <http://www.nosscr.org> (National Organization of Social Security Claimant's Representatives)
  - (d) <http://www.nsclc.org> (web site of the National Senior Citizens Law Center)

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*and Trusts Not Subject to Section 1613(e) of the Social Security Act; and SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00.*

<sup>10</sup> See e-mail from Mandy Ballasy, a regional specialist with SSI in Philadelphia, in connection with a trust established pursuant to 42 USC 1396p (d)(4)(A) by a grandparent of the *adult* recipient / applicant, dated April 15, 2002.

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Practical Entitlements: SSI and Medicaid  
 2002 Virginia Elder Law Seminar  
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- (e) <http://www.handsnet.org> (Collaborative network of various health activist groups with many useful links)

## B. Virginia Medicaid<sup>11</sup>

### 1. Federal statutes

- a. Generally, see 42 USC 1396 *et seq.*
- b. 1396p (transfer of assets / estate recovery / trusts);
- c. 42 USC 1396r-5 (special rules applicable to institutionalized spouses with “community [non-institutionalized] spouse”

### 2. Virginia statutes

- a. Va. Code § 20-88.02 (donee liability for transferred assets).
- b. Va. Code § 20-88.02:1 (restrictions and clarifications in certain spousal support orders).
- c. Va. Code §§ 32.1-310 *et seq.* (general Medicaid regulation).
- d. Va. Code § 32.1-325 (enabling Medicaid statute).
- e. Va. Code § 32.1-325.02 (disclaimer as transfer of assets for purposes of Medicaid eligibility).
- f. Va. Code § 32.1-326.1 (mandatory estate recovery).
- g. Va. Code §. 32.1-330 (mandatory pre-screening of certain applicants for nursing facility and other long term care services).
- h. Va. Code §. 55-19 (spendthrift trusts).
- i. Va. Code § 55-19.5 (public policy prohibitions on convertible or "trigger" trusts).<sup>12</sup>
- j. Va. Code § 63.1-133.1 (enabling legislation for liens on property of Medicaid recipients of long term care benefits under Medicaid).

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<sup>11</sup> Each state has its own plan which the federal government approves through CMMS, the federal Centers for Medicare & Medicaid Services, successor to Health Care Financing Administration.

<sup>12</sup> See also 42 USC 1396p (d), (e); 12 VAC 30-40-300 (E).

3. Virginia State Plan of Medical Assistance
  - a. The official body for the regulations governing the Department of Social Services operation of the Medicaid program in Virginia.
  - b. The Virginia Register publishes the official DMAS regulations.<sup>13</sup>
  - c. Legal authority for the policy found in Virginia Medicaid Manual (published and interpreted in the first instance by the Virginia Department of Social Services).
  - d. Helpful citations in the State Plan:<sup>14</sup>
    - (i) Spousal Impoverishment, 12 VAC 30-110-720 *et seq.*
      - (a) Most used are cataloged at the writer's web site, see <http://www.geocities.com/hana+zushi/medspou.htm>.
      - (b) Revised regulations affecting spousal impoverishment were published March 12, 2001,<sup>15</sup> and became effective April 11, 2001.
      - (c) The revisions are available at the writer's web site or directly at the official Virginia site:  
  
<http://legis.state.va.us/codecomm/register/voll17/v17i13.pdf>
    - (ii) Transfer of Assets, 12 VAC 30-40-300.
    - (iii) Client Appeals Regulations, 12 VAC 30-110-10.
    - (iv) Liens and Estate Recoveries, 12 VAC 30-20-140 (estate recoveries); 12 VAC 30-20-130 (liens).<sup>16</sup>

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<sup>13</sup> Where DMAS regulations and Medicaid Manual (see below) provisions conflict, DMAS regulations have the force of law, while the Manual is a "working document" meant to give guidance to the DSS. See, e.g., MAAP #92-083-319-B (7/30/93) ("policy [in the Manual] is merely a guideline and not a regulation or law, the MAAP is bound by the State Plan...").

<sup>14</sup> As stated, the regulations have primacy over Medicaid Manual policy. However, in practice there is virtually no adherence to anything other than the Medicaid Manual in the eligibility determination and review process. See <http://leg1.state.va.us/000/reg/TOC12030.HTM#C0110> for Eligibility and Appeals Table of Contents.

<sup>15</sup> Virginia Register of Regulations, Volume 17, Issue 13 (March 12, 2001), p. 2087 *et seq.*

<sup>16</sup> Note: Virginia does *not* impose liens on the property of Medicaid recipients for the recovery of Medicaid payments.

4. Virginia Medicaid Manual
  - a. Official policy used by the local offices of the Department of Social Services.
  - b. While available at each local Department of Social Services office,<sup>17</sup> the Virginia Medicaid Manual is not available on the Internet.
  - c. The Manual is constantly updated by “broadcasts” or E-mail transmittals of new policy from the central office of the Department of Social Services.<sup>18</sup>
  - d. References to applicable policy are incorporated into this presentation.
5. Medical Assistance Appeals Panel (MAAP) opinions. These were opinions issued by the former three judge panel of Medicaid administrative law judges until its dissolution. While they can be a helpful source of DMAS analysis of the welfare law generally and the specific policies often found in the Medicaid Manual, the DMAS asserts that they lack authority as precedent.
  - a. An index of approximately 430 of these opinions was published by the author of this chapter in the 1993 and 1994 Annual Elder Law seminars sponsored by the Virginia Law Foundation Continuing Legal Education Committee.

### III. Important Eligibility Concepts.

#### A. “Covered Group” or Eligibility Category for Medicaid

1. “An individual’s need for medical care, the state of his health, or his coverage by private health insurance have no effect on his Medicaid eligibility.”<sup>19</sup>
2. Only persons in a “covered group” who are aged, blind, or disabled<sup>20</sup> are qualified to receive Medicaid.

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<sup>17</sup> See <http://www.dss.state.va.us/localagency/allagency.html> for addresses and phone numbers of all Virginia local Departments of Social Services.

<sup>18</sup> The Virginia Medicaid Manual is available for annual subscription (paper only) for a cost of \$78.75 plus annual updates, which are presently \$70.00, plus shipping. The address is Commonwealth of Virginia Department of Social Services, 730 East Broad Street, Richmond, Virginia 23219-1849. More information is available at 804.692.1110.

<sup>19</sup> Virginia Medicaid Manual § M 0210.001.

<sup>20</sup> Persons who are also under the age of 18 may qualify for benefits when they are impoverished. See Virginia Medicaid Manual § M 0310.002 for List of Medicaid Covered Groups.

- a. Aged
  - (i) Persons 65 years of age or older.<sup>21</sup>
  - (ii) Only the year of birth must be verified. If the day and month can't be established, the Department of Social Services uses July 1.<sup>22</sup>
- b. Blind
  - (i) Same test as used by SSI.<sup>23</sup>
  - (ii) Central visual acuity of 20/200 or less in the better eye with the use of correcting lens.<sup>24</sup>
- c. Disabled<sup>25</sup>
  - (i) Same test as used by SSI, SSDI, Railroad Retirement System Full disability definitions apply.
  - (ii) Adults: persons over the age of 17 are disabled when they are unable to do any substantial gainful activity because of a severe, medically determinable physical or mental impairment which has lasted or is expected to last for a continuous period of not less than 12 months, or which is expected to result in death.
  - (iii) Children: persons *not* over the age of 17 are disabled when they have a severe, medically determinable physical or mental impairment<sup>26</sup> which results in marked and severe functional limitation, which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months, and the child does not engage in any substantial gainful activity.<sup>27</sup>

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<sup>21</sup> Virginia Medicaid Manual § M 0310.105.

<sup>22</sup> *Id.*

<sup>23</sup> Virginia Medicaid Manual § M 0310.106.

<sup>24</sup> Virginia Medicaid Manual § M 0310.106.

<sup>25</sup> Virginia Medicaid Manual § M 0310.112.

<sup>26</sup> The Manual actually uses the word "disability" in defining "disability," see *id.*, A.2.

<sup>27</sup> *Id.*

- (iv) Note that in meeting the exceptions for transfers to disabled persons (including to trusts for them), references to “SSI” disability is equivalent to disability under the non-means tested SSDI program.<sup>28</sup>

B. Eligibility Categories.

1. Virginia offers Medicaid payment for long term care costs to three classes of possible beneficiaries. These are “mandatory categorically needy,” “optional categorically needy,” and “medically needy.”
2. The “mandatory categorically needy class consists of aged (65 or over), blind, or disabled individuals who receive SSI and who meet Virginia’s more restrictive Medicaid eligibility criteria.
  - a. The more restrictive Virginia requirements (1) deny coverage to conditionally eligible SSI recipients, (2) terminate eligibility for persons retaining ownership of a home after six months absence, unless they can establish reasonable efforts to sell it; (3) deny eligibility to persons whose property contiguous to their home exceeds \$5,000.00 in value, and (4) count the value of undivided estates as an available resource to applicants.
  - b. The restrictions may not be more restrictive than those legally in effect in Virginia in January, 1972. This is the so called “209(b)” option.<sup>29</sup>
3. The “optional categorically needy” category includes:
  - a. Individuals who are eligible but have not applied for SSI or an optional state supplement.
  - b. Individuals in an intermediate care facility operated in a DMHMR facility whose incomes are less than 300% of the SSI level (\$1,635 in 2002).<sup>30</sup>
  - c. Individuals who receive Medicaid approved community-based personal care and whose income is less than 300% of the SSI level (\$1,635 in 2002).
  - d. Aged, blind, or disabled individuals receiving a benefit under an optional state supplement. The only supplement in Virginia is the Auxiliary Grant

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<sup>28</sup> *Id.*, A 3 (“The Medicaid disability definitions is the same as that of the Social Security Administration (SSA) and Supplemental Security Income (SSI) disability definition.”).

<sup>29</sup> 42 U.S.C. sec. 1396a(f), 42 C.F.R. sec. 435.121 (1991).

<sup>30</sup> See Virginia Medicaid Manual § M 0810.002 A 3.

paid to persons living in adult care residences licensed pursuant to Va. Code sec. 63.1-175.

- e. The “medically needy” category includes the aged, blind, or disabled person who would receive SSI or AFDC except that his or her income exceeds the SSI level (\$545 in 2002).
  - (i) Medicaid coverage for this group is based on the so called “spend-down.” The spend-down is an ongoing payment of “excess” income (i.e., income over a permissible limit) for incurred medical expenses.
  - (ii) Many nursing facility patients qualify for Medicaid as medically needy only after exhausting their “excess resources” (i.e., resources in excess of the \$2,000.00 limit. **The spend-down of income should not be confused with the exhaustion of assets that is sometimes required before an applicant is impoverished enough to qualify for Medicaid.**
  - (iii) Virginia Medicaid Manual § M1470.600 divides “medically needy” applicants for nursing home and community based care into categories depending upon monthly income.<sup>31</sup>
    - (a) Applicant/recipients in the medically needy group are persons who are 65 or older, blind or disabled, who meet the resource limits described below but whose income is more than \$545.00 per month.
      - (i) A medically needy applicant/recipient whose monthly income is *less than* 300% of the SSI level (presently \$1,635 per month) automatically meets the income test and are enrolled in Medicaid when they are admitted to the nursing home.<sup>32</sup> He is required to re-certify his entitlement on an **annual** basis.<sup>33</sup>
      - (b) A medically needy applicant/recipient whose monthly income is *more than* 300% of the SSI level (presently \$1,635 per month) is placed on a “spenddown” which requires a determination of whether his monthly income is less or more

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<sup>31</sup> The Manual provides a useful, step-by-step plan to determine eligibility for medically needy applicants at Virginia Medicaid Manual § M1460.400.

<sup>32</sup> Virginia Medicaid Manual § M 1460.400 E 4. This assumes that the applicant/recipient requires nursing home care (i.e., passes the pre-screening test for such care).

<sup>33</sup> Virginia Medicaid Manual § M1460.720 C 1.

than the “Medicaid rate” for the facility in which he is admitted. The “Medicaid rate” is the **daily** reimbursement rate Medicaid pays the facility multiplied by 31 days.<sup>34</sup>

- (c) If the applicant/recipient’s monthly income is less than the Medicaid rate, even though more than \$1,635 per month, the applicant/recipient passes the income test and is enrolled for a year without further re-certification.
- (d) If the applicant/recipient’s monthly income is *more* than the Medicaid rate but insufficient to discharge the expense of nursing home care at the private rate, eligibility is **denied** for the month of admission and the Medicaid technician is directed to “determine the spenddown eligibility **AFTER** the month has passed, on a daily basis (do not project expenses) by chronologically deducting old bills and carry-over expenses, then deducting the facility daily cost at the **private** daily rate and other medical expenses as they were incurred.”<sup>35</sup>
- (e) The Manual notes that “[c]overage ends on the last day of the [i.e., **each**] month. Each month must be evaluated separately. ***These patients will always be enrolled after the month being evaluated has passed.***”<sup>36</sup>
  - (i) A hapless applicant/recipient whose income exceeds the Medicaid rate but is insufficient to pay his nursing home expense must maintain a “daily record of all medical expenses” on Form 032/02/023/7 (2/98), which is submitted each month for Medicaid payment of the *preceding* month of nursing home care.<sup>37</sup>

#### 4. Categorical eligibility

##### a. Automatic eligibility

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<sup>34</sup> Regardless of the number of days in the month, the Medicaid rate multiplier is 31, see Virginia Medicaid Manual § M1460.710 C.

<sup>35</sup> Virginia Medicaid Manual § M1460.410 C 4 (emphasis in original).

<sup>36</sup> *Id.* Emphasis supplied by the writer.

<sup>37</sup> The form is an appendix to Virginia Medicaid Manual § M 1340, mistakenly cited as Virginia Medicaid Manual § M 1330 at Virginia Medicaid Manual § M1460.720 C.

- (i) SSI recipients generally are entitled to automatic Medicaid in Virginia,<sup>38</sup> except when there are interests (generally in land) which SSI excludes from countable resources but which Medicaid in Virginia does not.<sup>39</sup>
- (ii) Certain Families and Children groups.<sup>40</sup>

#### 5. Medically Needy eligibility

- a. Provisional eligibility as a “medically needy” person exists for persons who have qualifying countable resources but more income than the SSI income limit.
- b. Eligibility is obtained under the “spend-down” rules.

#### C. Income v. Resources

1. “It is important to distinguish between resources and income to know which counting rules to use for any given month. *An item is not subject to both income and resources counting rules in the same month.*” (Emphasis supplied).<sup>41</sup>
2. The Counting Rules:
  - a. items received during a month are evaluated under the income-counting rules.
  - b. items retained as of the first moment of the month following receipt are subject to evaluation under resource-counting rules.<sup>42</sup>

#### D. Assets v. Resources

1. “Resources are cash and any other person or real property that an individual (or spouse, if any):
  - owns
  - has the right, authority, or power to convert to cash (if not already cash); and

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<sup>38</sup> Virginia Medicaid Manual § M 0320.200.

<sup>39</sup> Virginia Medicaid Manual § M 0320.201 C 1 b defines countable resources which might cause Virginia to refuse Medicaid eligibility to an otherwise eligible SSI recipient.

<sup>40</sup> Virginia Medicaid Manual § M 0320.300.

<sup>41</sup> Virginia Medicaid Manual § S 1120.005. The policy lists an exception as follows: “ Trusts established on of [*sic*] after August 11, 1993, See [Virginia Medicaid Manual §] M 1120.201.”

<sup>42</sup> *Id.*

- is not legally restricted from using for his/her support and maintenance.”<sup>43</sup>
2. “Not everything an individual owns (assets) are resources for Medicaid purposes. In certain situations, an asset that is not a resource may become one at a later date or *vice versa*. The distinction is important since:
    - an asset that is not a resource does not count against the resource limit and
    - proceeds from the sale or trade of a resource (i.e., the amount representing conversion of principal from one form to another) are also resources but what a person receives from a nonresource is subject to evaluation as income at the time of receipt.”
  3. “Assets of any kind are not resources if the individual does not have:
    - any ownership interest;<sup>44</sup> and
    - the legal right, authority or power to liquidate them (provided they are not already in cash); or
    - the legal right to use the assets for his/her support and maintenance.

EXAMPLE: An individual owns a block of stock jointly with his brother. Although the form of ownership is one which would permit either to sell the property without the other’s consent, the brothers have a legally binding agreement that one will not sell without consent of the other. The individual’s brother refuses his consent, thereby making the stock not a resource for the individual. However, if the brother should give his consent, the stock would be subject to evaluation under the resources-counting rule beginning with the month following the month of consent.

The value of the stock would not be counted as income to the individual in the month consent is given.”<sup>45</sup>

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<sup>43</sup> Virginia Medicaid Manual § S 1110.100.

<sup>44</sup> See Virginia Medicaid Manual § M 1120.010, *Factors That Make Property A Resource*, for detailed policy on ownership interest, legal right to access property, and exclusions or exceptions (such as when access is available only with litigation, in which case the Manual confusingly provides that “[w]hen ... a co-owner legally blocks sale of jointly-owned property), we do not require an individual to undertake litigation in order to accomplish sale or access [; t]he property is not a resource under such circumstances in a month if a legal bar exists anytime during that month,” but then states that a partition suit may be required. See also Virginia Medicaid Manual § M 1130.140 B 1 e (specifying the limited exclusion for jointly owned real estate while a partition action is pending).

<sup>45</sup> Virginia Medicaid Manual § S 1110.115.

## E. Countable Resources v. Exempt Resources

1. A resource is any property which a person owns, has the right, authority or power to convert into cash, and which the person is not legally restricted from using for support and maintenance.<sup>46</sup>
2. An individual may retain \$2,000 in countable resources in 2002.
3. A couple in the community may retain \$3,000 in 2002 if both apply, but if both apply while in a nursing home (i.e., there is no "community spouse"), *each* may retain \$2,000 in countable resources.<sup>47</sup>
4. When one spouse is admitted to a nursing facility and the other remains in the community (defined as anywhere that is not "institutionalized"), the community spouse is entitled to retain a "spousal protected resource amount" which is an calculated and preserved for the well spouse to maintain her in the community,<sup>48</sup> as described below.
  - a. The spouse in the nursing facility is entitled to retain \$2,000 in countable resources.
5. Eligibility based upon resources is determined for each calendar month. Resource eligibility exists for the entire calendar month if countable resources were at or below the resource limit at any time in the month,<sup>49</sup> **except in the case of married institutionalized persons with community spouses.**<sup>50</sup>
  - a. In cases of institutionalized spouses with a community spouse, resource determinations are made as of the first moment of the first day of the calendar month.<sup>51</sup>
6. Unless exempted, all of an applicant's resources are "counted" in determining the \$2,000.00 resource limitation.<sup>52</sup>
  - a. The Omnibus Budget Reconciliation Act of 1993 (herein cited as OBRA) defines "resources" and "income" to be "assets" for purposes of calculating

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<sup>46</sup> Virginia Medicaid Manual, S1110.100 (B).

<sup>47</sup> Virginia Medicaid Manual § M1460.500.

<sup>48</sup> Virginia Medicaid Manual § M1480.010.

<sup>49</sup> Virginia Medicaid Manual, M1100.001 (B)(1); M1460.500 C.

<sup>50</sup> See below.

<sup>51</sup> Medicaid Manual §M 1480.232.

<sup>52</sup> The specific rules for determining countable and excluded resources in nursing home cases are found at Virginia Medicaid Manual § S1100 *et seq.* and at Virginia Medicaid Manual § M1460.500, see Virginia Medicaid Manual § M 1460.510 B.

disqualification periods upon a transfer of "assets" by the applicant or a statutory surrogate for the applicant.

- b. In contrast, this section identifies the types of property which Medicaid policy excludes (does not "count") toward the applicable resource limit.
7. The most important exempt resources<sup>53</sup> in Virginia are:
- a. The home and lot (1 acre or the minimum zoning requirement) and up to \$5,000.00 of adjacent contiguous property are exempt while the applicant/recipient, the spouse, or a disabled child resides in the home.<sup>54</sup>
    - (i) When one spouse of a married couple is in a nursing facility and the other remains in the home, "the home and all contiguous property are exempted resources for all categories."<sup>55</sup>
    - (ii) The home is exempted for the first six months of institutionalization. After six months the exemption ends unless a spouse or minor dependent child lives in the home. If the person's parent or adult child, who is disabled or who is at least age 70, has resided in the home for a continuous period starting at least one year before the owner's institutionalization, it also remains exempt.<sup>56</sup>
      - (a) Section 63.1-133.1 of the Virginia Code prohibits imposition of liens on the property of Medicaid recipients, except recipients of long-term care nursing facility benefits paid by DMAS.
      - (b) Nevertheless, Virginia does not impose liens on any property.<sup>57</sup>

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<sup>53</sup> See Virginia Medicaid Manual § S 1120.100 – 1120.150 for assets which Medicaid policy excludes as resources, and Virginia Medicaid Manual § S 1120.200 – 1220.220 for property that may or may not be a resource (esp. Virginia Medicaid Manual § S 1120.215, *Inheritance and Unprobated Estates* and § S 1120.220, *Loans, Promissory Notes, and Property Agreements*).

<sup>54</sup> Virginia Medicaid Manual, M1130.100; Virginia Medicaid Manual § M1460.530.

<sup>55</sup> Virginia Medicaid Manual § M1480.010; 12 VAC 30-110-720 (" 'Couple's countable resources' means all of the couple's non-excluded resources regardless of state laws relating to community property or division of marital property. For 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.")

<sup>56</sup> 12 VAC 30-40-240 B 4 d (does not contain the provision as to age 70, compare with Virginia Medicaid Manual § M1460.530.

<sup>57</sup> 12 VAC 30-20-130 *et seq.* Federal law limits the circumstances under which liens may be imposed upon an institutionalized recipient's home. 42 U.S.C. 1396p (a) prohibits assertion of a lien on home property of a recipient "if (A) the spouse of such individual [the recipient], or (B), such individual's child under age 21, or is blind or permanently and totally disabled, or (C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year

- b. Personal Effects and Household Furnishings; contrast with "Durable Items"
  - (i) Clothing, jewelry, photographs, etc., and furnishings and equipment of the individual's home are excluded.<sup>58</sup>
  - (ii) "Durable items" are not excluded. Durable goods are vaguely defined as household goods and personal effects which "retain a significant resale value over time." The Manual's definition mysteriously excludes "anything treated as an item of unusual value," itself not a defined term except by reference to the transfer of assets rules found at Virginia Medicaid Manual § M1450.500 *et seq.*<sup>59</sup>
- c. One automobile is excluded, regardless of value.<sup>60</sup>
- d. Term life insurance is excluded as a resource.<sup>61</sup>
  - (i) **Caveat:** Va. Code § 32.1-325.01 requires that all premium payments on a term policy made within 30 months before applying for Medicaid be treated as uncompensated transfers (see below) if the death benefit is not at least twice the premiums paid for such policy.
- e. Life insurance with cash value(s) can be exempted when the combined *face value* is \$1,500.00 or less. If the face value exceeds \$1,500.00, the cash value is counted as a resource.<sup>62</sup>
- f. Certain burial arrangements are excluded.
  - (i) "Burial space items" held for an applicant, spouse, or any immediate family member<sup>63</sup> of either spouse, are excluded regardless of value.<sup>64</sup> Burial space items include grave sites, crypts, caskets,

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immediately before the date of the individual's admission to the medical institution is lawfully residing in the home."

<sup>58</sup> Va. Medicaid Manual, M1130.430.

<sup>59</sup> Virginia Medicaid Manual § M1450.501 B states that "[a]n item of unusual value is one that has a fair market value of more than \$1,000 or two or more items, when each has a fair market value of \$500 or more."

<sup>60</sup> Virginia Medicaid Manual, M1130.200.

<sup>61</sup> 12 VAC 30-40-290 (E); Virginia Medicaid Manual § S1130.300 B.

<sup>62</sup> 12 VAC 30-40-290 (E); Virginia Medicaid Manual, § S1130.300(B)(2).

<sup>63</sup> Immediate family members are parents, children, stepchildren, siblings, and step-siblings. Virginia Medicaid Manual § M1130.400.

<sup>64</sup> *Id.*

vaults, headstones, and services incident to opening and closing grave sites, and for the perpetual care of the grave sites. A burial space is considered "held for" a person when he has title and possession of the same, or a contract for the provision of the burial space item or service.

- (ii) Funds set aside for burial services (which are generally defined as burial expenses other than burial space items) are subject to an exclusion from countable resources.
  - (a) The exclusion is \$3,500<sup>65</sup> except for married persons when one is in a nursing home and the other is a community spouse.<sup>66</sup>
  - (b) The exclusion is in addition to the exclusion for burial space items.<sup>67</sup>
  - (c) Burial funds can be in cash, bank account balances, or other financial instruments. The limit is apparently reduced by: (i), the face value of any non-term polic(ies) of life insurance whose cash value is not counted as a resource; (ii), the value of identified "burial insurance;" and (iii), amounts placed into an irrevocable burial trust for burial "*expenses* that are not burial space items. (Amounts designated for burial space items do not reduce the \$3,500.00 maximum exclusion.)"<sup>68</sup>
  - (d) Irrevocable burial trusts which are created with the funds of the applicant/recipient are problematical and should probably be avoided if the client's needs can be accomplished by other means.

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<sup>65</sup> 12 VAC 30-40-290 (A). However, the limit is not accurately reflected in the Virginia Medicaid Manual, although a Department of Social Services "broadcast" dated June 28, 1999 to local Department of Social Services offices from the then Interim Medicaid Manager states that as a result of law enacted in the 1999 Virginia General Assembly, the maximum burial funds exclusion was increased "from \$2500 to \$3500 effective July 1, 1999. The \$3500 maximum burial fund exclusion applies to all covered groups except the categorically needy Family and Children and the (QWDI) Qualified Disabled and Working Individuals. ... [However, a] maximum of \$1500, not \$3500, for burial funds is excluded for each spouse when calculating the resource assessment and the spousal share for married institutionalized individuals." See <http://www.geocities.com/hana+zushi/burial.pdf> for an image of the memorandum which may be helpful in the application process.

<sup>66</sup> Virginia Medicaid Manual § M1130.410 (generally); Virginia Medicaid Manual § M1480.210 B (spousal).

<sup>67</sup> Exempt burial fund exclusions can be established for the applicant and the applicant's spouse, and in certain circumstances other than nursing facility cases, other individuals whose income is deemed available to the applicant. Virginia Medicaid Manual, M1130.410.

<sup>68</sup> Virginia Medicaid Manual, M1130.410 (emphasis in original).

- (e) Trusts created for burial are not treated differently than other trusts for purposes of Medicaid,<sup>69</sup> and as seen below, such trusts generally either result in a countable resource to the applicant/recipient or in the case of an irrevocable trust, an uncompensated transfer of assets.
  - (i) **A safe harbor is the purchase of a term life insurance policy for burial<sup>70</sup> which is then irrevocably assigned to a funeral home to fund a burial contract for the purchaser (applicant/recipient).<sup>71</sup> Note that this transfer will eliminate any further availability (or need for) a burial fund exclusion.<sup>72</sup>**
- g. Real and personal property used in business may be exempted.
  - (i) Three categories of real and personal property can be wholly or partially excluded as "essential property to self support."<sup>73</sup>
  - (ii) Income producing business personal property (if currently used in a trade or business), regardless of type,<sup>74</sup> value or rate of return, is excluded.<sup>75</sup>
  - (iii) Up to \$6,000.00 in "non-business" income producing property, regardless of rate of return, is excluded if it is used to produce goods or services essential for consumption only by the applicant's household.<sup>76</sup>
  - (iv) Up to \$6,000.00 in non-business income producing property which is not used for the production of goods or services solely for consumption by the individual's household can be excluded if it has at least a six percent (6%) rate of return.<sup>77</sup>

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<sup>69</sup> Virginia Medicaid Manual § M1130.420 B requires that the trust be analyzed under the provisions of Virginia Medicaid Manual § M1120.200 through 202 and M1140.400 through 404.

<sup>70</sup> Va. Code § 32.1-325.01 provides that the purchase of such a policy for *any* premium is not an uncompensated transfer for purposes of Medicaid, as reflected in Virginia Medicaid Manual § 1450.601 A.

<sup>71</sup> Virginia Medicaid Manual § M1130.425 C 2 c (example).

<sup>72</sup> Virginia Medicaid Manual § M1130.425 C 2.

<sup>73</sup> Va. Medicaid Manual, S1130.500.

<sup>74</sup> Liquid resources (e.g., cash and bank accounts) can be excluded if used as a part of a trade or business. Virginia Medicaid Manual §§ S1130.500 (B)(3), S1130.501 (C)(5).

<sup>75</sup> Virginia Medicaid Manual § S1130.501.

<sup>76</sup> Virginia Medicaid Manual § S1130.502.

<sup>77</sup> Virginia Medicaid Manual § S1130.503.

- h. Certain lump sum payments are excluded in differing circumstances and for differing exclusion periods.
  - (i) SSI lump sum benefits are not counted as income or resources for six months following receipt, if separately identifiable.<sup>78</sup>
  - (ii) Other lump sum payments are counted as income in the month received.<sup>79</sup>
- i. Life estates in real property are excluded as resources,<sup>80</sup> except for a medically indigent category not pertinent to these issues.<sup>81</sup>
  - (i) However, a person holding a full life interest is entitled to all income produced by the property; a person holding a partial life interest in property is entitled to his fractional share of that income.
  - (ii) A retained life estate serves several important functions in all estate planning, including planning for institutionalization as a Medicaid recipient. It gives the patient of a nursing facility the potential of returning to his home. It ordinarily furnishes a step up in the basis of the property in the hands of the remaindermen at the life tenant's death.
  - (iii) **If a remainder interest is transferred within the "look-back" period discussed below, the value of the life estate is subtracted from the asset value, thus reducing the possible Medicaid disqualification period.**<sup>82</sup>
- j. Irrevocable trusts under which the Medicaid applicant is a beneficiary but lacks authority to use, revoke, or direct the use of trust assets, are excluded as resources.<sup>83</sup> OBRA greatly changed treatment of trusts created by the

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<sup>78</sup> Virginia Medicaid Manual § S1130.600.

<sup>79</sup> Virginia Medicaid Manual § S810.030.

<sup>80</sup> 12 VAC 30-40-290 (B); Virginia Medicaid Manual §§ M1110.515; M1140.110 B 4 c. A life estate may apparently be considered a resource for a qualified disabled working individual, *id.*

<sup>81</sup> Va. Medicaid Manual, M1110.515.

<sup>82</sup> Estate recovery caveat: 42 U.S.C. 1396p (a) requires estate recoveries. Subsection (b)(4)(B) defines "estate" to include the probate estate and, at the state's option under certain circumstances, "other property in which the individual had any legal ... interest at the time of death (*to the extent of such interest*) ... including such assets conveyed to a survivor, heir, or assign of the deceased individual through ... life estate... or other arrangement." (Emphasis supplied.) Virginia's estate recovery regulation 12 VAC 30-20-140 includes the broader estate definition. The value of the life interest to the holder at death is obviously zero, and the conveyance to the survivor does not occur "through" a life estate, but *after* a life estate. The remainder is vested in the "survivor" through an inter-vivos deed.

<sup>83</sup> Va. Medicaid Manual, M1120.200 (D)(2).

Medicaid recipient (or certain persons acting on his behalf or at his request) when the recipient's income or resources fund such trusts.

8. Enhanced resource exclusions (in addition to the exclusions noted above) apply to family units consisting of a community spouse and institutionalized spouse.
  - a. Home and all contiguous property, regardless of value, are excluded.<sup>84</sup>
  - b. Assets protected as the “community spouse resource allowance” while in the hands of the institutionalized spouse, for ninety days following eligibility, are excluded.<sup>85</sup>

#### F. Valuation of Resources

1. Medicaid uses the fair market value of resources as determined in accordance with its own policy.
2. Real estate is valued at its tax assessed value,<sup>86</sup> minus any encumbrances.<sup>87</sup>
3. Motor vehicles valued by “Blue Book” average trade-in value when available, otherwise, by tax assessment.<sup>88</sup>
4. Remainder and life estates are valued according to the tables set forth in the Virginia Medicaid Manual.<sup>89</sup>

#### G. Resource Eligibility Timing

##### 1. General Rule

If at any moment in the month resources are valued at or less than the limit (\$2,000 for single person), resource eligibility exists for the entire month.<sup>90</sup>

##### 2. Institutionalized Spouse Rule

Resources are determined and valued as of the first moment of the month, and only when countable resources are within the applicable limit (i.e., not in

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<sup>84</sup> Medicaid Manual §M 1480010 B 6.

<sup>85</sup> Medicaid Manual §M 1480. 1480.242.

<sup>86</sup> Virginia Medicaid Manual § M 1110.400 A.

<sup>87</sup> Virginia Medicaid Manual § S 1140.042.

<sup>88</sup> Virginia Medicaid Manual § M 1110.400 A.

<sup>89</sup> Virginia Medicaid Manual § S 1140.120.

<sup>90</sup> Virginia Medicaid Manual, M1100.001 (B)(1); Virginia Medicaid Manual § M 110.600; M1460.500 C.

excess of the combined community spouse resource allowance plus \$2,000) as of this date will resource eligibility exist for that month.<sup>91</sup>

- a. In practice, except when the couple's combined countable resources do not exceed \$19,856 (which is the sum of the minimum community spouse resource allowance, \$17,856 in 2002, plus \$2,000, the limit for the institutionalized spouse) as of the snapshot date, Medicaid eligibility will not be available until at least one month of nursing

## H. Deeming of Resources

### 1. Resources

- a. Parent's resources are deemed to child under eighteen.<sup>92</sup>
- b. Spouse's resources are deemed to spouse when not institutionalized.<sup>93</sup>
- c. When spouse is institutionalized, snapshot rules apply for initial eligibility of institutionalized spouse, until eligibility is established for institutionalized spouse.<sup>94</sup>
  - (i) After eligibility for the institutionalized spouse established, resources in the community spouse resource allowance and after acquired assets of the institutionalized spouse cannot be deemed available to the institutionalized spouse.<sup>95</sup>

### 2. Deemed transfer of assets<sup>96</sup>

- a. Assets transferred by one spouse are deemed transferred by the other spouse when either applies for Medicaid to pay for long term care or community based care under the Virginia waiver.<sup>97</sup>

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<sup>91</sup> Medicaid Manual § M 1480.000 A provides, under the heading, "**Married Institutionalized Individuals' Eligibility & Patient Pay**" that "[f]or resource assessment and eligibility determination, the resource value is its value as of the first moment of the first day of a calendar month." Cf. Virginia Medicaid Manual § M 1480.220 E 5.

<sup>92</sup> Medicaid Manual § M 0520.00 *et seq.*. But see waiver programs, Virginia Medicaid Manual § M 1110.001 3.

<sup>93</sup> *Id.*

<sup>94</sup> Virginia Medicaid Manual § M 1480.000 B 2.

<sup>95</sup> Virginia Medicaid Manual § M 1480.230 ("Once an institutionalized spouse has established Virginia Medicaid eligibility as an institutionalized spouse, count only the institutionalized spouse's resources when determining the institutionalized spouse's Medicaid eligibility. Do not count or deem the community spouse's resources available to the institutionalized spouse."). See also Virginia Medicaid Manual § M 1480.232 A 2.

<sup>96</sup> Note that this outline does not address the impact of the transfer of assets by a parent when a child applies for Medicaid under the F&C category.

## I. Transfer of Assets

1. Section 217 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) amended 42 U.S.C. § 1320a-7b, "Criminal penalties for acts involving Medicare or State health care programs," to make the "knowing and willful dispos[itions] of assets in order for an individual to become eligible for medical assistance" a criminal act "if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c)." Under Section 218 of HIPAA, the criminal provision became effective on January 1, 1997.
  - a. In August, 1997, Section 4734 of the Balanced Budget Act of 1997 amended the statute by repealing the criminal penalty as applied to persons *making* the transfer of assets and *imposing* it upon any person who, "for a fee knowingly and willfully *counsels or assists* an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX [Medicaid], if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917 (C). Section 4734 became effective on August 5, 1997.
  - b. When it initially enacted HIPAA, Congress failed to proscribe criminal conduct in the statute. While the statute described intent and conduct (knowingly and willfully transferring assets), it failed to proscribe the conduct in the part of the statute that penalizes the behavior, subsections (i) and (ii). The 1997 revision to the statute corrected the error in subsection (ii) of the statute by including "provision of counsel or assistance" by any person who "for a fee ... knowingly and willfully counsels or assists" a third person to dispose of assets in order for the individual to become eligible for medical assistance."
  - c. In its present incarnation, statute permits the *act* of transferring assets to obtain eligibility for Medicaid while it criminalizes *communication* of a statement that the law permits such transfers.

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<sup>97</sup> Virginia Medicaid Manual § M 1450.500 A ("An institutionalized individual who disposes of, or whose spouse disposes of, assets for less than fair market value on or after the look-back date ... is ineligible for Medicaid payment of LTC services (nursing facility services, a level of care in any institution equivalent to that of nursing facility services, and home or community based services under a CBC waiver).")

- d. Constitutional concerns were raised early in connection with the criminalization of the transmission of legal advice, and the generally ambiguous language of the statute.<sup>98</sup>
  - e. In March, 1998, Attorney General Reno opined that the statute was unconstitutional and informed Congressional leadership in both chambers that she would not defend the same. On April 7, 1998, in *New York State Bar Association v. Reno*, case number 97-CV-1760, the United States District Court for the Northern District of New York issued a preliminary injunction preventing the United States, its agents, servants, employees, attorneys, and all persons in active concert and participation with Attorney General Reno, from commencing, maintaining, or otherwise taking action to enforce 42 U.S.C. § 1320a-7b(a) (6). The injunction has since been made permanent.
  - f. Apart from the constitutional issues, the statute itself states that that persons who receive a fee for counsel or assistance in effecting a transfer may only be subjected to the penalty when such a transfer will "result in the imposition of a period of ineligibility for such [Medicaid] assistance." Transfers which do not result in the imposition of ineligibility are not sanctioned.<sup>99</sup>
2. The federal statute is the exclusive basis for imposing disqualification for transfers of assets.<sup>100</sup>
  3. Time frames for different Medicaid disqualification rules:
    - a. Transfers before July 1, 1988. All property transfers occurring before July 1, 1988, when the applicant applied before January 1, 1991.<sup>101</sup> These

<sup>98</sup> See *Peebler v Reno*, 965 F. Sup. 28 (Dist. Ore. 1997) (dismissed on standing grounds, but containing position by the United States Attorney General to the effect that transfers made within the "look-back" period but beyond the date of calculated ineligibility do not trigger the statute); *Appointment Of A Guardian Of Betty Gersten*, 661 N.Y.S.2d 943 (Sup.Ct. 1997) (criticizing over reliance on *Peebler* but permitting transfer of assets by guardian regardless of HIPAA).

<sup>99</sup> 42 U.S.C. § 1396p(c)(4) provides that "[a] State (including a State that has elected treatment under section 1902(f) [42 U.S.C. § 1396a(f)]) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection."

Dispositions that cause (and do not cause) imposition of periods of ineligibility are defined in the state plan (see *State Plan for Medical Assistance Relating to Transfer of Assets and Treatment of Certain Assets*, 12 VAC 30-40-300), and generally in 42 U.S.C. § 1396p, "Liens, adjustments and recoveries, and transfers of assets." In addition, Virginia, in accordance with other provisions of the federal law, has a detailed list of assets that may be disposed of for purposes other than to qualify for medical assistance, found in the *Medicaid Manual* M1450.501.

<sup>100</sup> 42 USC 1396p (c).

<sup>101</sup> Medicaid Manual M1450.100.

transfers are rare, but when they occur, there is an open ended ineligibility period which is two years plus a month for each \$1000 (or part thereof) in value in excess of \$12,000 transferred.

- b. Transfers after June 30, 1988 and before August 11, 1993. These transfers were subject to a 30-month maximum period of ineligibility, which has expired as of the publication of this handbook.<sup>102</sup>
  - c. Spouse-to-spouse transfers after December 31, 1988, and before October 1, 1989. These transfers can affect eligibility, but only if a spouse applied before April 1, 1992.<sup>103</sup>
  - d. Spouse-to-spouse transfers after September 30, 1989, but before August 11, 1993. No spouse could be rendered ineligible for Medicaid by reason of such a transfer as of this publication.<sup>104</sup>
  - e. Transfers made after August 10, 1993 are subject to the present rule.<sup>105</sup>
4. Except for those transfers specifically permitted by the law and policy, transfers of property for less than fair market value presumptively cause a period of ineligibility for *long-term care services*, including services under a home and community-based services waiver.<sup>106</sup>
  5. To determine whether there is a disqualification period, the applicant must disclose whether he or she has made a transfer within a "look-back" period. There are two look-back periods, depending upon the nature of the *transferee*.
    - a. The first look-back is for transfers *other* than transfers to trusts (or legal devices similar to trusts) and the second is for transfers to *or from* trusts created after August 10, 1993.
    - b. For transfers except to or from trusts created after August 10, 1993, the look-back is 36 months. For transfers to or from trusts created after August 10, 1993, the look-back is 60 months.<sup>107</sup>

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<sup>102</sup> Medicaid Manual M1450.200.

<sup>103</sup> Medicaid Manual M1450.300.

<sup>104</sup> Medicaid Manual M1450.400.

<sup>105</sup> 12 VAC 30-40-300; Medicaid Manual M1450.702.

<sup>106</sup> 42 U.S.C. § 1396p(c)(4); 12 VAC 30-40-300; Medicaid Manual M1450.003.

<sup>107</sup> 42 U.S.C. 1396p(c)(1)(B); 12 VAC 30-40-300(E)(2)(b); Medicaid Manual M1450.003. The present application for Medicaid benefits requires the applicant to disclose transfers for the past 60 months, presumable to inhibit applications.

6. The ineligibility period is determined by dividing the cumulative value of all transferred assets within the applicable look-back period before the date on which the application is filed by the average monthly costs to a private patient of Virginia nursing facility services.<sup>108</sup> The quotient is rounded down<sup>109</sup> and represents the number of months during which Medicaid will not pay for long-term care services for the transferor.
7. The commencement and termination dates of Medicaid disqualification depend upon when the transfers occurred within the look-back period and whether there are multiple transfers.<sup>110</sup>
  - a. When there is one transfer within the look-back period, the disqualification period runs from the first day of the month in which the transfer occurred.<sup>111</sup>
  - b. When there are multiple transfers within the look-back period and in the same month, all of the values of the transferred assets are added together, and the sum is divided by the average monthly cost of nursing home care in effect on the application date (as determined by Medicaid).<sup>112</sup>
  - c. When there are multiple transfers within the look-back period, but in different months, the penalty period for each transfer is determined separately.<sup>113</sup>
    - (i) If the penalty periods overlap, the value of all of the assets transferred within the look-back period is added, and divided by the average monthly cost of nursing home expense. The quotient (rounded down) is the penalty period. The penalty period commences with the first month in the series and continues until completely exhausted.<sup>114</sup>
8. As stated above, OBRA expanded the definition of transferred assets to include all resources and income of the individual and his spouse to which they are entitled but which they do not receive because of actions by (1) the individual or the spouse, (2) anyone acting in place of the individual or his spouse, or (3) anyone acting at the direction or upon the request of the

<sup>108</sup> 12 VAC 30-40-300(E)(2)(a); Medicaid Manual M1450.702. As of this publication, the average monthly cost is \$2,596 except in northern Virginia localities, where the average is \$3,275.

<sup>109</sup> Medicaid Manual M1450.702.

<sup>110</sup> See 12 VAC 30-40-300(E)(2)(a); Medicaid Manual M1450.702.

<sup>111</sup> Medicaid Manual M1450.702(E).

<sup>112</sup> Medicaid Manual M1450.702.

<sup>113</sup> Virginia Medicaid Manual § M1450.702 G.

<sup>114</sup> Medicaid Manual M1450.702.

individual or his spouse. **Courts and administrative bodies are specifically included.**<sup>115</sup>

9. Disclaimers are transfers of assets for Medicaid and SSI transfer of assets purposes.<sup>116</sup>
10. When an asset is commonly held by the applicant/recipient, it is considered transferred when *any* action is taken by the co-owner to reduce or eliminate the applicant/recipient's ownership or control of the asset.<sup>117</sup>
11. Some resource transfers will not result in disqualification for policy reasons, including administrative convenience.
  - a. Transfer of title to the home is not a disqualifying transfer when title is transferred to certain persons:
    - (i) The individual's spouse;
    - (ii) a child of the individual who is under age 21, blind, or disabled (as determined by SSI or Medicaid standards);
    - (iii) The individual's sibling or half-sibling who has an equity interest in the home and who resided in the individual's home for at least one year immediately before the date of the institutionalization;
    - (iv) or a son or daughter (not within (b) above and not including stepchildren) who resided in the individual's home for at least two years prior to institutionalization and who provided care enabling the individual to reside at home rather than in a nursing facility.<sup>118</sup>
  - b. Transfers of an asset other than the home do not cause disqualification for Medicaid when the asset is transferred to certain persons:
    - (i) to the individual's spouse or to another person for the sole benefit of the spouse;

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<sup>115</sup> 12 VAC 30-40-300 E 1 b; Medicaid Manual § M 1450.002

<sup>116</sup> Va. Code Ann. § 32.1-325.02, regarding disclaimers by Medicaid applicants and their spouses, requires the same result.

<sup>117</sup> 42 U.S.C. 1396p (c)(3); 12 VAC 30-40-300 (E).

<sup>118</sup> 42 U.S.C. 1396p(c)(2)(A)(iv); 12 VAC 30-40-300; Virginia Medicaid Manual §M1450.502 (C). Expect opposition to transfers to adult children who provided assistance for two years, typically on the ground that the transferor did not need nursing home care during the entire two year period preceding the institutionalization. If the client wishes to use this transfer exemption, be aware of the proof requirements at Virginia Medicaid Manual § M1450.502 B 3.

- (ii) *from* the individual's spouse to another for the sole benefit of the individual's spouse;
  - (iii) to the individual's child under age 21, or to a trust established solely for the benefit of the individual's child who is disabled for Social Security purposes; or
  - (iv) to a trust, (including a trust described in 42 U.S.C. 1396p(d)(4), described below), established solely for the benefit of a person under 65 years of age who is disabled as defined by Social Security.<sup>119</sup>
- c. Transfers of certain tangible assets (to anyone) do not disqualify an individual from Medicaid long-term care services.<sup>120</sup>
- (i) Transfers of an engagement ring, a wedding ring, items required by the individual's medical or physical condition, and household goods and personal effects that are not of "unusual value," are not disqualifying transfers.
  - (ii) Items of "unusual value" are defined in the Va. Medicaid Manual as "one [item] that has a fair market value of more than \$1,000.00" or "two or more items when each has a fair market value of \$500.00 or more." It is unclear whether the valuations apply to discrete transfers or to all transfers in the applicable look-back period.
  - (iii) A vehicle may be given away without disqualification if, among other things, "it is necessary because of climate, terrain, distance, or similar factors to provide necessary transportation to perform essential daily activities." Otherwise, up to \$4,500.00 of the trade-in value of a vehicle is excluded from being evaluated as a transfer.<sup>121</sup>
12. Any transfer in which the individual makes a satisfactory showing through objective evidence that he or she intended to receive fair market value or disposed of the resources "for other valuable consideration," or exclusively for a purpose other than Medicaid eligibility, or in which a denial of eligibility "would work an undue hardship."<sup>122</sup> Special rules are given in the Medicaid Manual to determine when hardship exists.<sup>123</sup>

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<sup>119</sup> *Id.* See "Medicaid Treatment of Trusts" discussion, below.

<sup>120</sup> Virginia Medicaid Manual § M1450.501.

<sup>121</sup> Virginia Medicaid Manual § M1450.501.

<sup>122</sup> 42 U.S.C. 1396p (c)(2)(D)

<sup>123</sup> Virginia Medicaid Manual § M1450.502 G.

## J. Estate Recovery<sup>124</sup>

1. Medicaid recovers from estates of deceased recipients when:
  - a. Legal estate administrator or executor has been verified.<sup>125</sup>
  - b. Dollar amount of applicable medical assistance payments (claim amount) and estate meets agency cost effective threshold. Recovery is not theoretically initiated unless both the amount of the claim and the value of the estate at least exceed the administrative cost of recovery.
  - c. Deceased was single or surviving spouse is deceased.
  - d. Deceased has no surviving children under 21 or children who are blind or disabled.
  - e. Deceased eligible was 55 years of age or older when the individual received such medical assistance.
  - f. Deceased eligible had no surviving sibling who had an equity interest in the deceased's home and such sibling resided in the property for at least one year prior to the deceased's entering a nursing facility.
2. Virginia is a priority creditor in such recoveries.<sup>126</sup>
3. Avoidance or minimization through effective transfers of assets *prior* to death
  - a. Transfer assets to community spouse and other exempt transferees.
  - b. Use joint account or p.o.d. accounts to distribute final checking account balances.

## IV. TABLES

### A. SSI (and Categorically Needy Medicaid) Resource and Income Limitations

	Married	Single
Resources <sup>127</sup>	\$3,000	\$2,000

<sup>124</sup> See <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-20-140>.

<sup>125</sup> This is not a federal requirement. Apparently DMAS uses estate qualification to determine whether there are sufficient assets to justify collection.

<sup>126</sup> Va. Code Ann. § 64.1-157.

Income (Monthly) <sup>128</sup>	\$817	\$545
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B. Medicaid Resource and Income Limitations - Both Spouses in Community<sup>129</sup>

	Married	Single
Resources	\$3,000	\$2,000
Income (Monthly) Group I	\$293.00	\$230.08
Income (Monthly) Group II	\$326.95	\$265.47
Income (Monthly) Group III	\$416.12	\$345.12

C. Community Spouse Resource Allowance And Income Protections

Community Spouse Resource Allowance <sup>130</sup>	Minimum \$17,856	Capped Amount \$89,280
MMNA <sup>131</sup>	\$1,492.50 <sup>132</sup>	\$2,232.00 <sup>133</sup>
Dependent Allowance <sup>134</sup>		\$497.50

<sup>127</sup> There are different resource limits for “partial” Medicaid programs that pay for limited benefits. See Virginia Medicaid Manual § M 1110.003.

<sup>128</sup> Virginia Medicaid Manual § M 0810.002. See also <http://www.ssa.gov/notices/supplemental-security-income/text-understanding-ssi.htm> for dynamic publication of income limits by the Social Security Administration itself.

<sup>129</sup> Virginia Medicaid Manual § M 0810.002.

<sup>130</sup> Virginia Medicaid Manual § M1480.210. Note that these numbers are determined as of January 1 annually.

<sup>131</sup> Virginia Medicaid Manual § M 1480.410.

<sup>132</sup> The Monthly Maintenance Needs Standard (minimum income) allowance is determined on July 1 annually.

<sup>133</sup> Includes maximum amount of Excess Shelter Allowance, Virginia Medicaid Manual § M 1480.410 (amount); .430 D 6 (example). The capped amount is the “Monthly Maintenance Needs Allowance Maximum” and determined on January 1 annually.

<sup>134</sup> Virginia Medicaid Manual § M 1480.420 C (policy); .430 E (example). The dependent allowance is one third of the monthly maintenance needs allowance minus the income of the dependent. **Dependents are defined at Virginia Medicaid Manual § M 1480.010 B 6 and include a parent, child under 21, sibling or half sibling of either spouse who may be claimed as a dependent under the IRC.**

Utility Allowance <sup>135</sup>	\$202 (1-3 person household)	\$252 (4 + person household)
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D. Exempt Transfers Of Assets For Less Than Value

<u>Asset Description</u>	Medicaid Ineligibility Not Imposed When <u>Transferred To:</u>
Transfer of any asset (including the home of the applicant or recipient) to any of the following persons will not cause period of ineligibility at any time; there is no “waiting” or “look-back” period for these transfers <sup>136</sup>	<ul style="list-style-type: none"> <li>• Spouse;</li> <li>• Child under age of 21,</li> <li>• Trust for sole benefit of spouse,</li> <li>• Trust for sole benefit of disabled child,</li> <li>• Trust for sole benefit of any person under age of 65 and disabled</li> </ul>
Home of Transferor	Child residing with Transferor and providing care which maintained the transferor in the home for the 2 years immediately preceding the date of institutionalization. <sup>137</sup>
Home of Transferor	Sibling of transferor (a) having equity interest in home and (b) who resided in the home for the one year period before the applicant became an institutionalized individual.
Various Special Assets (household furnishings, business equipment, special use motor vehicles, any motor vehicle, up to \$4,500, etc.) <sup>138</sup>	Any person. Note that certain restrictions may apply (e.g., handicapped use motor vehicle).

<sup>135</sup> Virginia Medicaid Manual § M 1480.410 E.

<sup>136</sup> 42 U.S.C. § 1396p; 12 VAC 30-40-300 (E); Virginia Medicaid Manual § M 1450.502.

<sup>137</sup> Virginia Medicaid Manual § M 1450.502

<sup>138</sup> For complete listing of property interests which for administrative convenience Virginia does not consider assets for purposes of the transfer of assets rule, see Virginia Medicaid Manual § M 1450.501 (included as Practice Aid at VI, *infra.*).

E. Transfer Penalty Period Monthly Calculator<sup>139</sup>

Disclosure Period	Sixty months preceding date of application
Lookback – Transferee other than trust	36 months preceding date of application
Lookback – Transferee to trust (or similar legal instrument)	60 months preceding date of application
<p>Transfers Within Lookback</p> <p><b>Equation: Value / Average Monthly Cost of Nursing Facility Cost = Number Months Ineligibility, Rounded Down</b></p>	
<u>Transfer Value</u>	<u>Disqualification Period</u> <sup>140</sup>
Less than \$3,517	No period of ineligibility
More than \$3,517 but less than \$7,034	One month ineligibility
<p>More than \$7,034, <b>single</b> transfer within applicable look-back period, use equation:</p> <ul style="list-style-type: none"> <li>• Value of gift(s) made in month divided by average monthly cost of nursing home care</li> <li>• Round down quotient</li> <li>• Commence ineligibility from month in which transfer is made for applicant, or month following transfer for recipient<sup>141</sup></li> </ul>	<p>Example: Gift of \$10,000 in August, 2002 in Richmond.</p> <p><math>10,000/3,517 = 2.84</math></p> <p>2 months ineligibility</p> <p>Applicant: ineligible from August through September, 2002.</p> <p>Recipient: ineligible from September through October, 2002.</p>

<sup>139</sup> 42 U.S.C. § 1396p; 12 VAC 30-40-300 (E); Virginia Medicaid Manual § M 1450.700 *et seq.*

<sup>140</sup> The disqualification period commences from the date of *transfer month* for a Medicaid **applicant**, and from the month *following the month of transfer* for a Medicaid **recipient**. Virginia Medicaid Manual § M 1450.702 B.

<sup>141</sup> *Id.*

<p>More than \$7,034, multiple transfers within applicable look-back period, when subsequent transfer is made during extant period of ineligibility:</p> <ul style="list-style-type: none"> <li>• Add the value of all transferred assets</li> <li>• Divide as above</li> <li>• A single period of ineligibility is established, commencing with month in which transfer is made for applicant, or month following transfer for recipient<sup>142</sup></li> </ul>	<p>Example: Applicant makes gift of \$10,000 in December, 2001, and gift of \$10,000 in January, 2002. Because the penalties would overlap, <i>add</i> the gift values together (\$20,000) then divide by \$3,517, and impose disqualification (5 months) from date of transfer (December), to end in June, 2002.<sup>143</sup></p>
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## V. SPECIAL SITUATIONS

### A. Married persons when one spouse is institutionalized.

1. See Notes, VII. B., *infra*.

## VI. PLANNING TECHNIQUES

### A. General Considerations

1. Conversion
  - a. Purchase exempt assets
  - b. Purchase income (community spouse only)
  - c. Purchase exempt services
    - (i) Cash transactions
    - (ii) Deferred transactions
    - (iii) Income tax *caveat* for the employee
2. Transfers of assets

<sup>142</sup> *Id.*

<sup>143</sup> Medicaid Manual §M 1450.702 G 2 (example).

- a. Exempt Donee Transfers
  - b. Exempt Asset Transfers
  - c. Non Exempt Transfers
    - (i) Granny Liability *Caveat*
    - (ii) Lookback period
    - (iii) Penalty Calculation
    - (iv) Transfer of Less than 100% of average monthly nursing home expense
    - (v) Transfer of Less than 200% of average monthly nursing home expense
    - (vi) Transfer of more than 200% of average monthly nursing home expense
    - (vii) Multiple transfer during extant period of ineligibility
3. Deferral or Avoidance
- a. Probable benefactors' estate plans should be established to bypass Medicaid recipient / applicant or to create special needs trust for any provisions made for recipient / applicant
  - b. **Disclaimer is considered transfer of assets**
  - c. Community Spouse Estate Planning – See Below
    - (i) **Do not use revocable living trust / pour over will**

B. Specific Fact Patterns Involving Institutionalized Spouses

- 1. Planning for eligibility of institutionalized spouse
  - a. **Before** "snapshot" (i.e., in month before month in which institutionalization of spouse occurs).
    - (i) Transfer countable resources (including exempt resources such as home, car, etc.) to community spouse but not to exempt third parties

- (ii) Borrow assets to 200% of “maximum” community spouse resource allowance for division on snapshot date, then repay them *after* snapshot date / community spouse resource allowance has been established
- b. **After** "snapshot" (i.e., in month in which or after institutionalization of spouse occurs).<sup>144</sup>
- (i) Payment for long term care of H and living expenses of W.
  - (ii) Enhanced home, car, or purchase of contiguous property to home.
  - (iii) Long term care insurance for community spouse.
  - (iv) Support order or Medicaid appeal to increase community spouse resource allowance
    - (a) See Estate Planning in Virginia, Chapter 8, for detailed theory and analysis.
    - (b) Limited to not more than “maximum” community spouse resource allowance in **court** support cases, Va. Code Ann. § 20-88.02:1
    - (c) **No** limit on agency modification of community spouse resource allowance
    - (d) **While CSRA “resource first” revisions are still permissible under DMAS regulations and DSS policy, the United States Supreme Court has held that states may employ “income first” procedures,<sup>145</sup> and proposed federal regulations have been published by CMS specifically authorizing state election.<sup>146</sup>**

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<sup>144</sup> Assets in excess of 200% of the "maximum" community spouse resource allowance (in 2001, \$164,000, which is 200% of the "maximum" community spouse resource allowance, \$87,000) may be transferred / converted prior to the snapshot date without loss of community spouse resource allowance value for the community spouse.

<sup>145</sup> See *Wisconsin Department of Health and Family Services v. Blumer*, 534 U. S. \_\_\_\_ (2002) R023; No. 00-952; 2/20/02 available online at <http://majette.net>.

<sup>146</sup> See 42 CFR 431 .260, available online at <http://majette.net>.

- (v) Irrevocable immediate pay annuity for community spouse, provided actuarially sound in accordance with Medicaid policy<sup>147</sup>
- (vi) Burial planning for both spouses
- (vii) Transfers of countable resources to exempt transferees
- (viii) Trust for disabled child or other person under the age of 65 pursuant to § M 1450.502 C<sup>148</sup>
- (ix) Pooled income non-profit trust for disabled person of any age
  - (a) No specific exclusion in Medicaid Manual for transfer of assets penalty
  - (b) See Department of Social Services Memorandum Letter
- (x) Purchase of life estate in portion of home of child
  - (a) Consider the tax ramifications from the perspective of the parties and the apparent non-application of IRC 121 to the transaction.
  - (b) Note that the general rule is that when less than an entire interest in property is sold, the seller's total basis in the property is allocated among the various interest on the basis of the respective fair market values of the various interests.
- (xi) Sell remainder interest in home of applicant / recipient to child
  - (a) See tax considerations applicable to item (x) above.
- (xii) Contract for services rendered by family member for community spouse

2. Planning for post eligibility of institutionalized spouse.<sup>149</sup>

- a. Increase community spouse income

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<sup>147</sup> See Medicaid actuarial life tables at Virginia Medicaid Manual § M 1450.1000.

<sup>148</sup> See <http://majette.net> for writer's outline, "Virginia Medicaid Implications of Trusts for Disabled Persons," or link directly at <http://www.geocities.com/hana+zushi/medtrust.pdf>.

<sup>149</sup> See Majette, *Decedent's Estate Planning For The Spouse Of An Institutionalized Spouse*. (1999 Virginia Law Foundation, Eighth Annual Elder Law Seminar. 1-800-979-3147.

- (i) annuity, see above; note that “excess income” is subject to a “suggested contribution” (Appendix to present work, Item D).
  - (ii) court order for support *after* eligibility for institutionalized spouse supplants MMNA calculations.<sup>150</sup>
- b. Protect resources from vesting in institutionalized spouse at death of community spouse
- (i) Postnuptial agreement mutually waiving elective share rights of each spouse
  - (ii) Estate plan for community spouse should use testamentary provisions
    - (a) two thirds to children, one third to purely discretionary special needs trust for institutionalized spouse, trustee may use income and principal for institutionalized spouse
      - (i) *Caveat*: elective share considerations when the institutionalized spouse does not claim his elective share.<sup>151</sup>
    - (b) all to special needs trust for institutionalized spouse, mandatory income distribution to institutionalized spouse<sup>152</sup>
      - (i) *Caveat*: elective share considerations when the institutionalized spouse is above the age of 85 years<sup>153</sup>

## VII. PRACTICE AIDS

### 1. Writer’s Entitlement Questionnaire<sup>154</sup>

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<sup>150</sup> When the institutionalized spouse’s income is less than 300% of the SSI level, Virginia Medicaid Manual § M 1480.430 D 3 the eligibility worker is directed not to follow otherwise applicable policy because “[t]he community spouse monthly income allowance is the amount designated by the court order or the DMAS Hearing Officer.”




<sup>151</sup> See Virginia Medicaid Manual § M 1450.003 B.

<sup>152</sup> The writer gratefully acknowledges that his friend, Andrew H. Hook, Esq., of Portsmouth, Virginia, is the originator of this concept.

<sup>153</sup> Once the institutionalized spouse is above the age of 85, the life estate value of the income interest will be worth less than the typical one third elective share value. See Virginia Medicaid Manual § S 1140.120, *Life Estate and Remainder Interest Tables*.






<sup>154</sup> See <http://majette.net> for link, or see linked document at <http://www.geocities.com/hana+zushi/hw-pdf2.pdf>.

2. Institutionalized Spousal Planning Notes<sup>155</sup>
3. Clarified Policy Regarding Non-Relevance of Community Spouse's Resources After Eligibility Established for Institutionalized Spouse, Virginia Medicaid Manual § M0260.401 C (Appendix to present work)
  - a. See letter, April 5, 2000, from Ronald Preston, Associate Regional Administrator, HCFA, to Brian E. Barreira, Esq.,<sup>156</sup> opining that transfer by the community spouse of assets in the community spouse's name *following* establishment of eligibility has no impact on the eligibility of the institutionalized spouse.
4. Expected Community Spouse Contributions, Virginia Medicaid Manual § M0260, Appendix 2 (Appendix to present work)
5. Virginia Medicaid Manual Life Estate Tables, Virginia Medicaid Manual § M 1140.120 (Appendix to present work)
6. Virginia Medicaid Manual Annuity Table, Virginia Medicaid Manual § 1450.1000 (Appendix to present work)
7. E-Mail Correspondence, April 15, 2002, regarding SSI interpretation of 42 USC 1396p(d)(4)(A) trust exception (Appendix to present work)
8. Guide to Icons on Majette Web Page:

<b>Icon</b>	<b>Content:</b>
	State and federal Codes and regulations
	SSI, Medicare and Medicaid
	Writer's Legal Outlines

<sup>155</sup> See <http://majette.net> for link, or see linked document at <http://www.geocities.com/hana+zushi/hw-pdf2.pdf>.

<sup>156</sup> A facsimile of the letter is posted at <http://www.geocities.com/hana+zushi/ISCSTOA.jpg>, accessible through <http://majette.net>.

	Utilities (including all Virginia court and DSS addresses)
	Virginia General Assembly recent and pending bills
	Civil commitment and related mental health
	Legal Office Forms
	Guardianship and Conservatorship

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