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COMMENT

MEDICAID ELIGIBILITY PLANNING FOR AGED CLIENTS IN VIRGINIA

I. INTRODUCTION

The Medicaid program is a jointly financed federal and state assistance program established under Title XIX of the Social Security Act of 1965.¹ The purpose of the program is to provide "federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons."² The Medicaid program's federal statutory and regulatory framework was described by Justice Powell of the United States Supreme Court as "among the most intricate ever drafted by Congress."³ Justice Powell added that the Act's "Byzantine construction . . . makes [it] 'almost unintelligible to the uninitiated.'"⁴ To add to these already significant difficulties, each state participating in the program develops its own eligibility requirements and standards for coverage.⁵ The complexity of these federal and state provisions, combined with the rising cost of nursing home care,⁶ has led many elderly Americans to seek the help of attorneys in order to protect their assets and plan for Medicaid-eligibility.⁷

1. 42 U.S.C.S. §§ 1396-1397(e) (Law. Co-op. 1995 & Supp. 1997); 42 C.F.R. §§ 430-498.103 (1996).

2. *Harris v. McRae*, 448 U.S. 297, 301 (1980).

3. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

4. *Id.* (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976)).

5. *See* 42 U.S.C.S. § 1396a(a)(17) (Law. Co-op. 1995).

6. The average annual cost of nursing home care in the United States is \$40,000. *See Harris, Meyer, Egging People On*, HOSP. & HEALTH NETWORKS, Oct. 20, 1996, at 34.

7. "In fact, a growing number of lawyers specialize in this. . . . Nearly 70 per-

This article seeks to explain the Medicaid provisions relevant to aged persons in Virginia and provide some basic Medicaid-eligibility planning strategies. Part II of the article sets forth the specific provisions applicable to aged Virginia residents. Basic planning strategies are discussed in Part III, and changes in these strategies resulting from recent legislative action are discussed in Part IV.

II. MEDICAID PROGRAM PARAMETERS

A. *Medicaid Coverage*

Medicaid benefits cover medical expenses for aged applicants during the month in which the individual applied for benefits if the applicant was "eligible at any time during the month."⁸ Also, "[c]overage is available for three months before the date of application if [the applicant] would have been eligible [during that time] had [he] applied."⁹ Medical expenses covered by Medicaid are listed in the Virginia Administrative Code and include among other things: (1) inpatient hospital services; (2) outpatient hospital services; (3) dental services; (4) physical therapy; (5) prescription drugs; (6) laboratory and x-ray services; and (7) skilled nursing facility services.¹⁰

B. *General Eligibility Requirements*

For aged individuals,¹¹ Medicaid eligibility is determined by reference to certain income and resource levels. These financial restrictions are based primarily on the size of the Medicaid applicant's family.

cent of all nursing home residents wind up having their care at least partly paid for by Medicaid, many after having exhausted their own funds." *Id.*

8. 12 VA. ADMIN. CODE 30-40-200(a)(1) (1996) (formerly VRR 460-02-2.6100).

9. *Id.* 30-40-200(a)(2) (1996) (formerly VRR 460-02-2.6100).

10. *See id.* 30-50-10, -20 (Supp. 1997) (formerly VRR 460-02-3.1100); *see also* 42 C.F.R. §§ 440.1-270 (1996).

11. Federal statute defines an "aged" individual as a person 65 years of age or older. *See* 42 U.S.C.S. § 1396d(a)(iii) (Law Co-op. 1995).

1. Income

To be eligible for Medicaid benefits, the applicant and his family must usually have an annual income less than or equal to the Federal Poverty Income Guidelines' (Poverty Guidelines) income level for a family of the appropriate size.¹² In Virginia, however, an applicant with income greater than the cap value is not necessarily ineligible. The Commonwealth is one of several states that permit applicants to "spend down" excess income and remain Medicaid-eligible. In deciding income-eligibility, the Department of Medical Assistance Services¹³ (DMAS) will deduct from the applicant's income the following amounts: (1) any Supplemental Secured Income (SSI) benefits received by the applicant, (2) any state supplement recognized by the Social Security Act,¹⁴ (3) any increases in Old Age, Survivors' and Disability Insurance (OASDI), and (4) any expenses incurred "for necessary medical and remedial services recognized under State law."¹⁵ These "spend-down" provisions essentially permit an applicant to remain eligible for Medicaid benefits as long as he spends any income he receives in excess of the cap on necessary medical care.

2. Resources

Eligible Medicaid applicants must also meet certain resource requirements. To be eligible for Medicaid benefits, a person or his family may not hold more than a certain amount of countable assets.¹⁶ In calculating these assets, DMAS considers only

12. The Federal Poverty Income Guidelines are increased annually and published in the Federal Register. For 1997, the Poverty Guidelines income level for a single person is \$7,890; for a married couple, the figure is \$10,610. 62 Fed. Reg. 10,856, 10,857 (1997).

13. Federal law and regulations require each state to establish a body to administer the Medicaid program. See 42 U.S.C.S. 1396a(a)(10) (Law. Co-op. 1995 & Supp. 1997). In Virginia, the Department of Medical Assistance Services is entrusted with this task. See VA. CODE ANN. § 32.1-321.1, -323 (Repl. Vol. 1997).

14. See 42 U.S.C.S. §§ 1396-1397(e) (Law. Co-op. 1995 & Cum. Supp. 1997).

15. 12 VA. ADMIN. CODE 30-40-130(b) (1996) (formerly VRR 460-02-2.6100).

16. Virginia Code section 32.1-325.02 describes the determination of an applicant's assets:

When determining eligibility for medical assistance services, "assets" means, in regard to an individual, all income and resources of the indi-

those resources deemed "available"¹⁷ to the applicant and his family and "considers only the resources of spouses living in the same household as available to spouses."¹⁸

The methods used by the DMAS to determine countable resources are detailed in the Virginia Administrative Code. Not all of an applicant's assets will be counted; certain assets are entirely exempt from consideration. In Virginia, exempt property includes: (1) the applicant's home;¹⁹ (2) the applicant's automobile;²⁰ and (3) the applicant's burial plot if the value of that plot is sufficiently low.²¹

C. Spousal Impoverishment Provisions

Different eligibility guidelines apply when the institutionalization of the Medicaid applicant separates a married couple. These "spousal impoverishment" provisions provide for the

vidual and the individual's spouse, including, but not limited to, any income or resources which the individual or such individual's spouse is or becomes entitled to, but does not receive, because of any action by such individual or such individual's spouse, or by a person, including a court or administrative body, with legal authority to act in the place of or on behalf of the individual or such individual's spouse, or by any person, including any court or administrative body acting at the direction of or upon the request of the individual or such individual's spouse.

VA. CODE ANN. § 32.1-325.02(A) (Repl. Vol. 1997).

17. Federal law directs each state to consider "only such income and resources as are . . . available to the applicant." 42 U.S.C.S. § 1396a(a)(17)(B) (Law. Co-op. 1995). Applicants and beneficiaries may, however, be required to use any resources due to them but not yet recovered. See 42 C.F.R. § 435.608 (1996).

18. 12 VA. ADMIN. CODE 30-40-140(b) (Cum. Supp. 1997) (formerly VRR 460-02-2.6100).

19. See *id.* 30-40-240(B)(3) (1996) (formerly VRR 460-03-2.6105). The applicant's home is defined as "the house and lot used as the principal residence." *Id.*; see also VA. CODE ANN. § 32.1-325(A)(3) (Repl. Vol. 1997). Additionally, \$5,000 worth of land contiguous to the home is exempt from resource calculations. See 12 VA. ADMIN. CODE 30-40-240(B)(3) (1996) (formerly VRR 460-03-2.6105); see also VA. CODE ANN. § 32.1-325(A)(3) (Repl. Vol. 1997).

20. See 12 VA. ADMIN. CODE 30-40-290(4) (1996) (formerly VRR 460-03-2.6108.2). The applicant may exclude one automobile from the resource calculation. If the applicant owns more than one vehicle, "the individual's equity in the least valuable vehicle or vehicles must be counted." *Id.*

21. See *id.* 30-40-290(1) (1996) (formerly VRR 460-03-2.6108.2). A burial plot for the applicant worth \$2,500 or less and a similarly valued burial plot for the applicant's spouse are also exempt from resource eligibility consideration. See *id.*; VA. CODE ANN. § 32.1-325(A)(2) (Repl. Vol. 1997).

applicant's spouse during an applicant's lengthy hospitalization. These provisions apply to "[p]ersons whose first continuous period of institutionalization [or a period of re-institutionalization] began on or after September 30, 1989."²² A "continuous period of institutionalization" is defined in the Virginia Administrative Code as "30 consecutive days of institutional care in a medical institution or nursing facility, or 30 consecutive days of receipt of waiver services, or 30 consecutive days of a combination of institutional and waiver services."²³

1. Modified Resource Eligibility Test

Under the spousal impoverishment provisions, an institutionalized applicant is eligible for Medicaid benefits "if the difference between the couple's combined countable resources and the community spouse resource allowance . . . is equal to or less than the appropriate Medicaid resource limit for one person."²⁴ The community spouse resource allowance means the difference between a couple's countable resources and the largest of the following: (1) the spousal share of the resources;²⁵ (2) the spousal resource standard;²⁶ (3) any amount transferred by the applicant to his spouse pursuant to a court order;²⁷ or (4) an amount determined by the DMAS hearing officer.²⁸

Like the general eligibility requirements, the spousal impoverishment provisions provide that certain assets are exempt from resource-eligibility consideration. In calculating countable

22. 12 VA. ADMIN. CODE 30-110-730 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 2.1).

23. *Id.* 30-110-720 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 1.1); *see also* 42 U.S.C.S. § 1396p(e)(3) (Law Co-op. Supp. 1997) (defining "institutionalized individual").

24. 12 VA. ADMIN. CODE 30-110-800 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 2.8).

25. *See id.* 30-110-720 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 1.1). "Spousal share" is defined as one-half of the couple's countable resources at the beginning of the most recent continuous period of care. *See id.* (defining "spousal share"). This figure is "increased [each year] by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved." *Id.* (defining "community spouse resource allowance").

26. *See id.* This figure is also increased annually by reference to the consumer price index. *See id.*

27. *See id.*

28. *See id.*

resources under these provisions, the applicant's home, contiguous property, household goods, and a single automobile are not considered.²⁹ Additionally, if the institutionalized Medicaid applicant has resources that exceed the resource limit for a single person, the DMAS will deduct the following amounts from the applicant's resources for the purpose of establishing eligibility: (1) the value of any resources the institutionalized spouse transferred to the community spouse or to other dependents pursuant to a court support order, (2) the value of any support rights assigned to the Commonwealth, (3) the value of any support rights that may not be assigned to the Commonwealth due to the applicant's incompetency, and (4) any amount necessary to make the individual eligible if the DMAS determines that denial of Medicaid would create an undue hardship.³⁰

2. Income Considerations

Once the initial eligibility of the applicant is established, the spousal impoverishment provisions determine how much the Medicaid beneficiary must contribute to institutional care or waiver services.³¹ The Virginia Administrative Code details the method by which the DMAS calculates the income of the institutionalized spouse. Unless shown otherwise, the DMAS considers income paid to one spouse as belonging only to that spouse.³² Each spouse also owns one-half of all income paid to the couple jointly³³ and one-half of any income "which has no instrument establishing ownership."³⁴ Additionally, "[i]ncome paid in the name of either spouse, or both spouses and at least one other party, shall be considered available to each spouse in a proportionate share."³⁵ If the income is derived from property held in trust, each spouse owns the income according to the

29. *See id.* (defining "countable resources").

30. *See id.* 30-110-830 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 2.11).

31. *See id.* 30-110-920 (1996) (formerly VRR 460-04-8.6 § 3.1). "Waiver services" is defined as Medicaid reimbursed home or community-based services. *See id.* 30-110-720 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 1.1).

32. *See id.* 30-110-930(1)(a) (1996) (formerly VRR 460-04-8.6 § 3.2).

33. *See id.* 30-110-930(1)(b) (1996) (formerly VRR 460-04-8.6 § 3.2).

34. *Id.* 30-110-930(1)(c) (1996) (formerly VRR 460-04-8.6 § 3.2).

35. *Id.* 30-110-930(1)(d) (1996) (formerly VRR 460-04-8.6 § 3.2).

terms of the trust instrument.³⁶ Where the trust instrument is not so specific, the rules detailed above for non-trust income apply.³⁷

In calculating the institutionalized beneficiary's income, DMAS deducts a monthly thirty-dollar personal needs allowance, a community spouse maintenance allowance, and a family maintenance allowance.³⁸ The community spouse maintenance allowance is equal to the greatest of the following: (1) a percentage of the Federal Poverty Guidelines income level for two³⁹ plus the excess shelter allowance,⁴⁰ (2) an amount set in a spousal support court order,⁴¹ or (3) any amount "determined necessary by a [DMAS] hearing officer because of exceptional circumstances resulting in extreme financial duress."⁴² These deductions, however, are not made "when the allowances are not actually made available to the community spouse."⁴³ The family member's maintenance needs allowance is equal to one-third of the amount for the community spouse (without regard to excess shelter allowances), reduced by the monthly income of the family member.⁴⁴

III. PLANNING CONSIDERATIONS BEFORE THE KASSEBAUM-KENNEDY HEALTH REFORM BILL

A. *Pre-application Transfer of Assets*

To ensure Medicaid eligibility, an individual may wish to transfer certain resources to friends or family members. While

36. *See id.* 30-110-930(2)(a) (1996) (formerly VRR 460-04-8.6 § 3.2).

37. *See id.* 30-110-930(2)(b) (1996) (formerly VRR 460-04-8.6 § 3.2).

38. *See id.* 30-110-950 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 3.4).

39. This value is calculated as the applicable percentage of 1/12 of the income level for a family of two. *See id.* 30-110-720 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 1.1) (defining "community spouse maintenance needs allowance").

40. *See id.* 30-110-960(A)(1) (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 3.5). The excess shelter allowance is "the actual monthly expense of maintaining the community spouse's residence that exceeds 30% of the community spouse maintenance needs allowance," with some additional limitations. *Id.* 30-110-720 (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 1.1) (defining "excess shelter allowance").

41. *See id.* 30-110-960(A)(2) (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 3.5).

42. *Id.* 30-110-960(A)(3) (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 3.5).

43. *Id.* 30-110-960(B) (Cum. Supp. 1997) (formerly VRR 460-04-8.6 § 3.5).

44. *See id.* 30-110-970(A) (1996) (formerly VRR 460-04-8.6 § 3.6).

this course of action may permit the applicant to meet Medicaid's resource eligibility requirements, it may also result in denial of eligibility for a period of time.⁴⁵

1. Look-Back Date

The look-back date is the date thirty-six months before "the first date as of which the individual both is an institutionalized individual and has applied for medical assistance"⁴⁶ and marks the beginning of the look-back period. Any transfer of assets for less than fair market value, made by the applicant or his spouse, during this period may result in a period of ineligibility for Medicaid benefits.⁴⁷ Transfers before the look-back date are ignored.

2. Length of Ineligibility

The ineligibility period resulting from a transfer of resources for less than fair market value begins on the first day of the first month during or after the transfer.⁴⁸ The length of time the Medicaid applicant remains ineligible

shall be equal to but shall not exceed the number of months derived by dividing . . . [t]he total, cumulative uncompensated value of all assets transferred [during the look-back period] by . . . [t]he average monthly cost to a private patient of nursing facility services in the Commonwealth at the time of application for medical assistance.⁴⁹

45. *See id.* 30-40-300(E)(2) (1996) (formerly VRR 460-03-2.6109). This course of action may also subject the applicant's attorney to criminal penalties. *See* discussion *infra* Part IV.

46. 12 VA. ADMIN. CODE 30-40-300(E)(2)(b) (1996) (formerly VRR 460-03-2.6109). The look-back period is sixty months in the case of "payments from a trust or portions of a trust that are treated as assets disposed of by the individual." *Id.*

47. *See id.* 30-40-300(E)(2) (1996) (formerly VRR-460-03-2.6109).

48. *See id.* 30-40-300(E)(2)(a) (1996) (formerly VRR 460-03-2.6109).

49. *Id.*

3. Exempted Transfers

Certain enumerated transfers will not result in an applicant's ineligibility for Medicaid benefits.⁵⁰ Specifically, the applicant may, without penalty, transfer his home to either: (1) his spouse; (2) any of his children who are under the age of twenty-one, blind, or disabled; (3) a sibling "who has an equity interest in the home and who was residing in the individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual;" or (4) any of his children who were residing in the applicant's home for at least two years immediately before the date of the applicant's institutionalization and "who provided care to the individual which permitted the individual to reside at home."⁵¹ Also, transfers to or from the Medicaid applicant's spouse for the sole benefit of that spouse will not result in a period of ineligibility.⁵² An individual may transfer resources to his child who is under the age of twenty-one or disabled, for the sole benefit of that child, without suffering a loss of eligibility.⁵³ Further, transfers to a trust established solely for the benefit of a disabled person under the age of sixty-five are exempt.⁵⁴

B. *Liens and Estate Recoveries*

Although federal law permits states to do so, Virginia does not impose liens against a Medicaid beneficiary's property to ensure recovery of correctly paid Medicaid claims.⁵⁵ The Commonwealth does, however, seek recovery from the estate of the applicant under the federal guidelines.⁵⁶

Federal regulations permit the DMAS to "make an adjustment or recover funds for Medicaid claims correctly paid for an

50. See *id.* 30-40-300(E)(2)(c) (1996) (formerly VRR 460-03-2.6109).

51. *Id.* 30-40-300(E)(2)(c)(1) (1996) (formerly VRR 460-03-2.6109).

52. See *id.* 30-40-300(E)(2)(c)(2)(a), (b) (1996) (formerly VRR 460-03-2.6109).

53. See *id.* 30-40-300(E)(2)(c)(2)(c) (1996) (formerly VRR 460-03-2.6109).

54. See *id.* 30-40-300(E)(2)(c)(2)(d) (1996) (formerly VRR 460-03-2.6109).

55. See *id.* 30-10-560 (Cum. Supp. 1997) (formerly VRR 460-01-53, VRR 460-01-53.1).

56. See VA. CODE ANN. § 32.1-327 (Repl. Vol. 1997); 12 VA. ADMIN. CODE 30-10-560(A) (Cum. Supp. 1997) (formerly VRR 460-01-53, VRR 460-01-53.1).

individual" from the estate of a Medicaid beneficiary, with certain restrictions.⁵⁷ The DMAS may recover from the estate of any Medicaid beneficiary who received benefits when he was sixty-five years or older after the death of the beneficiary's spouse, and only when the beneficiary has no surviving children who are under the age of twenty-one, blind, or disabled.⁵⁸

C. *Planning Strategies*

Planning strategies to ensure Medicaid eligibility for an aged client can be divided into three distinct categories. The first category of strategies encompasses all actions designed to maintain exempt assets, such as the applicant's home. The second category is conversion, including all strategies by which the Medicaid applicant converts non-exempt assets to exempt assets for the purpose of ensuring eligibility. The third category includes all transfers of assets, including those transfers which may result in a period of ineligibility for benefits.

1. Maintenance of Exempt Assets

The maintenance of exempt assets is particularly important in cases where the Medicaid applicant is institutionalized. In those situations, the "[c]ontinued exemption of a residence owned by an institutionalized person depends on evidence of 'an intention to return' to the residence once institutionalized care has begun."⁵⁹ The homeowner may satisfy this requirement by signing a written statement of his intent to return to the residence.⁶⁰

57. 42 C.F.R. § 433.36(h) (1996).

58. *See id.*

59. James D. Palmer, Jr., *New Planning Approaches to Cope With Stricter Medicaid Rules*, 23 EST. PLAN. 76, 76 (1996) (citations omitted).

60. *See id.*

2. Conversion

By converting non-exempt assets to exempt assets,⁶¹ the Medicaid applicant may reduce his family's countable resources and ensure his eligibility for Medicaid benefits. The conversion may be performed by using non-exempt resources to either: (1) pay off a mortgage or loan on another exempt resource or (2) to purchase a new exempt asset.

a. Loan Pay-Offs

Paying off an existing mortgage is perhaps the simplest and most common conversion method. Consider the following scenario: an applicant and his spouse own a \$250,000 home with \$150,000 in equity. They have \$100,000 in cash assets. The applicant would be ineligible for Medicaid benefits because the couple's countable resources⁶² exceed the appropriate resource level. However, if the couple spends \$80,000 to pay off part of the remaining mortgage on their home, their countable resources are reduced to \$20,000 and the applicant is Medicaid-eligible. This planning strategy, while set here in the context of a home mortgage, can be used equally well with any other exempt assets.

b. Purchases

A Medicaid applicant may also reduce his resources to ensure Medicaid eligibility by using non-exempt assets to purchase exempt assets. For example, an applicant with \$100,000 in cash assets and no home may wish to spend the money on a house, thereby reducing his countable resources and gaining a valuable, exempt asset.

61. See *supra* notes 19-21 and accompanying text.

62. The couple's countable resources consist only of the \$100,000 in cash assets, as the home is exempt from consideration. See *supra* notes 16-19 and accompanying text.

An applicant may also convert cash assets by purchasing an annuity. This purchase may invoke the Medicaid provisions regarding trusts, but "[a]n annuity is considered a trust only to the extent that the Secretary of Health and Human Services specifies. To date, the Secretary has not indicated that the trust rules apply to annuities."⁶³ The Health Care Financing Agency (HCFA), however, has published guidelines for the use of annuities.⁶⁴ These guidelines require that annuities not be guaranteed for a period longer than the actuarial life expectancy of the recipient.⁶⁵ If the annuity is guaranteed for a longer period, the total value of the payments made past the actuarial life expectancy of the recipient represents a transfer for less than fair market value, and may result in a period of ineligibility.⁶⁶ Although the use of an annuity may reduce the applicant's resources to ensure Medicaid-eligibility, the income stream provided by the annuity will be considered under Medicaid's income provisions.

3. Transfers

An applicant may also reduce his countable resources by transferring assets. However, few transfers are free of restrictions and most result in a period of ineligibility.⁶⁷

a. Exempted Transfers

The Medicaid provisions permit an applicant to transfer certain assets without penalty. An applicant may transfer his home to certain enumerated individuals without suffering a period of ineligibility for benefits.⁶⁸ Usually, the applicant's home is an exempt asset for the purposes of determining eligibility for Medicaid.⁶⁹ Where the applicant is institutionalized,

63. Joan Lensky Robert & Charles Robert, *Planning for Disability Helps Preserve a Client's Assets*, 23 EST. PLAN. 311, 318 (1996) (citations omitted).

64. See Palmer, *supra* note 59, at 77.

65. See *id.* (citing HCFA State Medicaid Manual Transmittal No. 64, § 3258.9 (Dec. 13, 1994)).

66. See *id.*

67. See *supra* notes 45-54 and accompanying text.

68. See *supra* note 51 and accompanying text.

69. See *supra* note 19 and accompanying text.

however, his home is exempt only if the noninstitutionalized spouse still resides there.⁷⁰ Consider this scenario: a Medicaid beneficiary is institutionalized while his spouse lives in their jointly owned home. The home is therefore exempt from eligibility consideration. If, however, the noninstitutionalized spouse predeceases the applicant and the applicant is the decedent-spouse's sole beneficiary, the beneficiary-spouse has gained a valuable resource that may make him ineligible for Medicaid benefits.⁷¹ The solution is to transfer the beneficiary's share of the home to the noninstitutionalized spouse and to ensure that the noninstitutionalized spouse's will leaves nothing to the institutionalized spouse. Then, if the noninstitutionalized spouse predeceases the Medicaid beneficiary, the beneficiary will gain no assets that will make him ineligible for coverage.⁷²

b. The Rule of Halves

The "rule of halves," or the Half-a-Loaf Theory, has been used by attorneys to determine how much a Medicaid applicant may transfer and still minimize the applicant's period of ineligibility for benefits.⁷³ Under this theory, the applicant may transfer half or more of his assets to "accelerate Medicaid [eligibility] and preserve assets for loved ones."⁷⁴ As an example of this strategy, consider the following:

Mr. Jones has \$100,000 in assets and is about to enter a nursing home that costs \$6,000 per month. If the average cost of a nursing home in the community is \$5,000 monthly, a gift of \$100,000 to Mr. Jones's daughter would render him ineligible for Medicaid for 20 months (this is computed by dividing the amount of assets transferred by the average cost of a nursing home). If, however, Mr. Jones were to give half of the \$100,000, or \$50,000, to his daughter, the resulting ineligibility period would be only ten months To cover the cost of ten months of nursing home care that Mr. Jones will pay privately, he would use the remaining

70. See 42 U.S.C.S. § 1396p(a)(2) (Law. Co-op. 1995).

71. See Robert & Robert, *supra* note 64, at 316.

72. This technique of transferring the beneficiary's assets to the spouse works with any valuable asset.

73. See Robert & Robert, *supra* note 63, at 316.

74. *Id.*

\$50,000 that he did not transfer to his daughter, as well as his Social Security income of \$1,000 per month. At the end of the ten-month ineligibility period, Mr. Jones would properly be accepted for Medicaid.⁷⁵

c. The Salzman Formula

More efficient transfer strategies may be developed by using a formula developed by Ira Salzman, an elder law practitioner in New York City.⁷⁶ While the Rule of Halves crudely approximates the amount an applicant may safely transfer to minimize Medicaid ineligibility, it fails to take into account the client's income, the actual cost of institutional care, or the actual living expenses of the noninstitutionalized spouse.⁷⁷ These factors are accounted for in the Salzman Formula: $AX + BX = C$, where:

A is the average private pay monthly cost of nursing home care in the client's state or community;

B is the cost of the client's nursing home *plus* other living expenses (including those of a spouse living at home, if any) *less* the client's income (including the income of a spouse living at home, if any);

C is the client's excess resources over and above the Medicaid resource limit (and the spouse's community spouse resource allowance if there is a community spouse); and

X is the number of months that the client must pay for nursing home care privately before becoming eligible for Medicaid.

Thus, AX is the maximum amount that could be safely transferred, and BX is the amount of savings the client would have to pay for his care during the period of ineligibility resulting from that transfer.⁷⁸

75. *Id.*

76. See *Formula to Calculate Medicaid Asset Transfers Still Works*, THE ELDER L. REP., Sept. 1994, at 10.

77. See *id.*

78. *Id.*

Where A is equal to B, the formula gives the same result as the Rule of Halves. Considering again the example above, Mr. Jones has \$100,000 in excess resources ($C = \$100,000$). The average monthly cost of institutional care in his community is \$5,000 ($A = \$5,000$) and his nursing home care costs \$6,000 per month ($B = \$6,000 - \$1,000 \text{ income} = \$5,000$). Solving the equation for X, we see that X is equal to 10 months. The maximum amount Mr. Jones can safely transfer, therefore, is \$50,000. Let's suppose, however, that the monthly cost of Mr. Jones' institutional care is \$7,000 (B now equals \$6,000). The Rule of Halves would still indicate that Mr. Jones may safely transfer \$50,000. Using the Salzman Formula, however, we see that the amount that Mr. Jones can safely transfer, "AX" is actually \$45,450.

IV. RECENT LEGISLATIVE CHANGES TO THE FEDERAL STATUTORY FRAMEWORK

The Kennedy-Kassebaum health reform bill was signed into law by President Clinton on August 20, 1996,⁷⁹ and became effective on January 1, 1997.⁸⁰ The bill created "a new crime for people who knowingly dispose of their assets to qualify for Medicaid benefits."⁸¹ The provision attached criminal liability not only to those seeking Medicaid but to their lawyers as well.

Congress amended this section again when it passed the Balanced Budget Act of 1997.⁸² It now focuses on attorneys and financial planners and does not impose criminal penalties on the client whose funds or assets are being transferred.⁸³

79. See Harry S. Margolis, *Congress Criminalizes Asset Transfers*, THE ELDER L. REP., Sept. 1996, at 1.

80. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 218, 110 Stat. 2008, 2009 (1996).

81. 142 CONG. REC. H9776-01 (daily ed. Aug. 1, 1996) (statement of Rep. Ganske). "Part of the impetus for the fresh crackdown comes from the states which are unhappy that one-third of spending on Medicaid, a program intended for the poor, goes for nursing home care—much of it for middle-class Americans." Meyer, *supra* note 6, at 34.

82. See Pub. L. No. 105-33, § 4734, 111 Stat. 251, 522-23 (1997).

83. It has been noted that the statute and its August 5, 1997 amendment, may violate the Fourteenth Amendment to the United States Constitution. See Kenneth J. Rampino, *Transfer of Assets to Qualify for Medicaid May Result in Criminal Liability Under "Kassebaum-Kennedy" Bill*, EST. PLANNER'S ALERT, Oct. 1996, at 1, 2. Addition-

The relevant provision of this enactment became effective on August 5, 1997,⁸⁴ and imposes criminal penalties upon whoever:

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, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c).⁸⁵

The new law amends the subsection by striking "failure, or conversion by any other person" and inserting: "failure, conversion, or provision of counsel or assistance by any other person."⁸⁶

The original provision and its most recent amendment clearly seek to limit the transfer of assets to obtain Medicaid eligibility. The August 1997 amendment clearly demonstrates congressional intent to target attorneys, financial planners, and others who counsel an elderly applicant to make prohibited transfers.⁸⁷

ally, two elements of the criminalization of ineligibility-producing transfers may be inherently vague and therefore void. *See id.* The first of these elements deals with "the scienter which must be established by the government." *Id.* The second, and most troubling, element is that criminal liability is based upon an actual disqualification for Medicaid benefits. Thus, "[t]he crime cannot be established without a determination of an administrative body applying the complex rules codified in the Social Security Act . . . as interpreted by HCFA and the particular state administrative body having jurisdiction over the matter," all of which may occur months or years after the transfer occurred. *Id.* at 3. A more detailed discussion of constitutional issues implicated by the statute is beyond the scope of this article. Thus, we assume the statute effectively criminalizes those transfers which will result in Medicaid ineligibility.

84. *See* Pub. L. No. 105-33, 111 Stat. 251 (1997).

85. *Id.* § 4734, 111 Stat. at 522-23.

86. *Id.*

87. This amendment confirms the vision of those who asserted that the Kennedy-Kassebaum bill was intended to target attorneys and financial planners because of the difficulties associated with prosecuting an elderly applicant. *See* Marian Raab, *Medicaid Planners May Encounter Jail Time*, FIN. PLAN., Nov. 1, 1996, at 18.

A. *Strategies Unaffected by the Changes*

Some planning strategies remain unaffected by these recent congressional enactments. Under the new law, planning strategies that do not require the transfer of assets impose no criminal liability. Thus, an attorney is free to counsel an applicant to convert non-exempt assets to exempt assets by spending cash to pay off an existing loan or to purchase an immediate annuity.⁸⁸ Additionally, since the new law does not criminalize transfers which will not result in a period of ineligibility, an attorney is free to counsel an applicant on any planning strategies that rely on exempt transfers. Thus, the applicant may transfer his property to his spouse, his home to certain enumerated individuals,⁸⁹ or any of his property for fair market value without worrying about criminal penalties for his counsel.⁹⁰ Additionally, an applicant is probably safe in transferring assets and then "waiting out" the look-back period before applying for Medicaid benefits.⁹¹

B. *Planning Strategies Criminalized by the Bill*

The new statute seems to criminalize any transfers that (1) are made, in whole or in part, for the purposes of ensuring Medicaid-eligibility and (2) that *actually* result in a period of ineligibility.⁹² Thus, use of the Rule of Halves and Salzman's Formula are ill-advised under the new statute;⁹³ in fact, any

88. This applies only so long as that annuity makes no payments beyond the actuarial life expectancy of the applicant. *See supra* notes 65-67 and accompanying text.

89. *See supra* notes 50-54 and accompanying text.

90. *See supra* note 47 and accompanying text.

91. *See* Margolis, *supra* note 79, at 2.

92. *But see id.* at 1 (arguing that, under some interpretations of the provision, the imposition of a period of ineligibility occurs upon transfer and, therefore, "any transfer that may have as a purpose eventual eligibility for Medicaid may be criminal" regardless of whether the transfer *actually* results in ineligibility); Donald S. Hecht, Letter to the Editor, *Law's Full Quotation Changes Meaning*, N.Y. L.J., Oct. 16, 1996, at 2 (arguing that no transfer imposes criminal liability unless accompanied by "a statement, representation, concealment, failure or conversion" under 42 U.S.C. § 1320a-7b(a)).

93. The criminal provisions discussed herein seem to have been designed to eliminate the use of these techniques. *See* Rampino, *supra* note 83, at 2-3.

non-exempt transfer for less than market value, within the look-back period, may result in a criminal penalty.⁹⁴

Under the present state of the law, an attorney who counsels a client to transfer assets causing a period of ineligibility, and whose client, or his spouse, applies for Medicaid during that period of ineligibility, has committed a misdemeanor punishable by a fine of up to \$10,000 and up to twelve months in prison.⁹⁵

C. *Curing Criminal Conduct*

Section 1396p(c)(2)(C)(iii) of U.S. Code Title 42 states that an individual shall not be ineligible for medical assistance to the extent that "all assets transferred for less than fair market value have been returned to the individual."⁹⁶ Thus, it appears that the criminal action defined by the amendment may be "cured" if transferred assets are returned to the transferor.⁹⁷ The section does not state when this cure must occur so perhaps a client may recover the transferred assets even after a period of ineligibility has been imposed and criminal liability against the attorney has attached.⁹⁸

V. CONCLUSION

The Medicaid program's statutory and regulatory framework represents one of the most complex in American law. This legal labyrinth may be navigated by skilled attorneys and planners to provide clients with strategies to ensure eligibility while protecting assets.

94. See Margolis, *supra* note 79, at 2. Certainly the new criminal provision must be considered during any estate planning. "There are several sound reasons for asset re-distribution, including taxation, probate avoidance and asset management [Now] the implications of 'Kennedy-Kassebaum' [and its amendment] must be factored into the equation." Rampino, *supra* note 83, at 3.

95. See 42 U.S.C.S. § 1320a-7b(a)(6)(ii) (Law. Co-op. Supp. 1997); Margolis, *supra* note 81, at 2.

96. 42 U.S.C.S. § 1396p(c)(2)(C)(iii) (Law. Co-op. Supp. 1997).

97. See Margolis, *supra* note 79, at 2.

98. See *id.*

The effects of legislative changes are difficult to describe conclusively. The statute itself faces significant constitutional challenges and the poor drafting makes definite interpretation impossible. No one can definitely outline which actions attorneys may safely undertake under the new law, but, under the law's most reasonable interpretation, attorneys may safely:

- (1) counsel clients to transfer assets for fair market value;
- (2) counsel clients to transfer assets to a spouse, child under the age of twenty-one, or, in trust, to a disabled person under the age of sixty-five for the sole benefit of the recipient;
- (3) counsel clients to transfer their homes to certain enumerated individuals (i.e., their spouses); and
- (4) counsel clients to transfer *any* assets, provided that the client is willing to "wait out" the thirty-six or sixty month look-back period before applying for Medicaid benefits.⁹⁹

An attorney who suggests that a client transfer assets in ways other than these may find that he faces criminal liability for his conduct. Thus, attorneys practicing in this area are advised to be wary; ideally, an attorney should "[a]dvice all clients in all cases of all transfers . . . [and e]ncourage long-term care planning and consider Medicaid only as a last resort."¹⁰⁰

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99. *See id.*

100. Lynn Campisi, *Criminalization of Asset Transfers in Medicaid Planning*, 58 ALA. LAW. 164, 166 (1997).

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