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HONOR THY FATHER AND MOTHER: PAYING THE MEDICAL BILLS OF ELDERLY PARENTS

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I. INTRODUCTION

As the elderly population increases and medical costs skyrocket, federal and state governments feel increasing pressures to diminish drains on government treasuries caused by the provision of medical care to the elderly. One possible solution would be to require children to shoulder more of the costs of caring for their parents than they already bear as federal and state taxpayers. This article examines this approach and suggests that such a policy is contrary to both federal and state laws.

The United States government has developed two programs to help elderly Americans pay their medical bills: Medicaid[1] and Medicare.[2] Medicare is a nationwide federal program that provides health insurance to most individuals aged sixty-five and over,[3] without regard to income or assets.[4] In fiscal year 1982, approximately 26.1 million aged persons were covered by Medicare.[5] Medi-

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1. 42 U.S.C. §§ 1396-1396p (1982). Medicaid also provides medical assistance to the under-age-65 low-income blind or disabled and to families with dependent children.

2. 42 U.S.C. §§ 1395-1395xx (1982). Medicare also provides for certain disabled persons under 65 and certain workers and their dependents who need kidney transplantation or dialysis.

3. The program is divided into two parts: (1) Hospital Insurance for short-stay hospital in-patient care which is supported almost entirely by part of the Social Security payroll tax, *id.* §§ 1395c-1395i-2, and (2) Supplementary Medical Insurance, an optional insurance which covers physician visits and other ambulatory care financed through monthly premiums paid by enrollees and the government, *id.* §§ 1395j-1395w.

4. CONGRESSIONAL RESEARCH SERVICE, ACTION ON AGING LEGISLATION IN THE 97TH CONGRESS 3 (March 1983) (information paper prepared for the Special Committee on Aging, U.S. Senate) [hereinafter cited as ACTION ON AGING].

5. CONGRESSIONAL BUDGET OFFICE, CHANGING THE STRUCTURE OF MEDICARE BENEFITS: ISSUES AND OPTIONS (March 1983) [hereinafter cited as CHANGING STRUCTURE].

caid is a Federal-State matching program which provides free medical assistance to low-income, aged persons.[6] In fiscal year 1982, approximately 3.5 million aged persons received assistance through Medicaid.[7]

Federal outlays for Medicare and Medicaid have increased nearly 600 percent since 1970.[8] It is predicted that the Medicare fund's reserves will disappear in 1987 or 1988,[9] whereupon rapidly growing deficits will be generated annually. If the funding program for Medicare is not revised, the deficit may exceed $300 billion by 1995.[10] Medicaid payments have increased from $1.9 million in 1972 to $9.8 million in 1981.[11]

Increasing costs in the two programs are cause for concern in the government and among program recipients and their relatives. Presently, there are no particularly palatable solutions to the financial problems of the programs. The most commonly proposed solution to Medicare's financial woes has been to require patients to share more of the cost of their hospitalization.[12]

Some states have attempted to cope with soaring Medicaid costs by enacting[13] or proposing[14] new family responsibility laws. Other states have attempted to modify existing laws to require reimbursement to the state by the adult children for Medicaid benefits received by their parents.[15] Because the federal government has traditionally insisted that such state laws violate the intent of the federal Medicaid law,[16] there has been infrequent state enforce-

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6. ACTION ON AGING, *supra* note 4, at 6.

7. *Id.*

8. President's Message to Congress concerning Health Incentives Reform Program, 129 CONG. REC. S1717 (daily ed. Feb. 28, 1983).

9. CHANGING STRUCTURE, *supra* note 5, at 2.

10. *Id.* at 66, Table A-1. These projections asume that reimbursement limits under the Tax Equity and Fiscal Responsibility Act (TEFRA) are extended.

11. *See* 4 HEALTH CARE FIN. REV. 130 (1983) (Table 6: "Medicaid Vendor Payments").

12. CHANGING STRUCTURE, *supra* note 5, at xi.

13. *See* DEL. CODE ANN. tit. 31, § 511 (1974); GA. CODE ANN. § 49-4-149.1 (Cum. Supp. 1984); IDAHO CODE § 56-210 (Cum. Supp. 1984); WIS. STAT. ANN. § 49.47(4)(c)(1) (West Supp. 1984).

14. According to the Chairman of the U.S. Senate Special Committee on Aging, there were eleven states considering family responsibility law as of September 12, 1983. Letter from John Heinz, Chairman, U.S. Senate Special Comm. on Aging, to Renae R. Patrick, (Sept. 12, 1983). Since that date ten of the eleven states decided not to modify their laws. The eleventh state, Indiana, still has a bill pending before its General Assembly. *See* Ind. S. 504 (1985).

15. *See, e.g.*, VA. CODE ANN. § 20-88 (Cum. Supp. 1984).

16. *See infra* notes 23-26 and accompanying text.

ment of existing relative responsibility laws. However, this practice may be changing. In February 1983, the Department of Health and Human Services (the Department) issued a policy clarification entitled "Treatment of Contributions from Relatives to Medicaid Applicants or Recipients."[17] This Transmittal provides that states may require "adult family members to support adult relatives without violating the Medicaid statute by the use of a statute of general applicability."[18] The Transmittal may be construed as an implicit invitation to states to enact relative responsibility laws.[19]

This recent change in a long-standing policy of one federal program providing health care to the elderly may signal a similar change in other federal programs delivering health care coverage to the elderly. In light of pressure to require additional patient contributions to Medicare costs, it is foreseeable that the recent shift in Medicaid policy will be paralleled by a change in Medicare policy. Such a change could require monetary contributions by adult children to either the health insurance costs of parents or to hospital and treatment costs rendered to their needy parents treated under Medicare.

This article will examine the Virginia family responsiblity statute and recently promulgated federal Medicaid policy relating to contributions made by children to the health care costs of their parents. The conclusion reached is that adult children cannot be required to make financial contributions for medical assistance provided to their parents through Medicaid under either the Virginia family responsibility statute or federal Medicaid policy.

II. Relative Responsibility for Medical Costs

In 1983, the Department of Health and Human Services published Transmittal Number 2, section 3812, "Treatment of Contri-

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17. 1983-1 Medicare & Medicaid Guide (CCH) ¶ 32,457 (Feb. 1983) [hereinafter cited as Transmittal].

The Health Care Financing Administration (HCFA) is the agency of the U.S. Department of Health and Human Services that administers Medicare, Medicaid and other programs related to delivery of health care services. HCFA employees have no direct responsibility for the operation of individual Medicaid programs; such programs are administered at the state and local level. HCFA is responsible, however, for oversight of the state administration of the program through the promulgation of regulations and the issuance of interpretive guidelines to clarify these regulations. *See generally* 42 C.F.R. §§ 431.10-.803 (1983).

18. Transmittal, *supra* note 17, at 10,287.

19. *Relative Responsibility*, 66 Nursing Home L. Letter 4 (Nov. 1982).

butions from Relatives to Medicaid Applicants or Recipients."[20] This Transmittal states that under both the Social Security Act (Medicaid) and Medicaid regulations, a state Medicaid plan may not take into account the financial responsibility of any individual for any applicant or recipient of Medicaid, except that income and resources of spouses may be considered as available to each other, and income and resources of parents may be considered as available to children under age 21 or children over 21 if blind or disabled.[21] Thus, the state may assume that the income and resources of spouses and parents are available for coverage of medical expenses of spouses and children, but may not consider a child's ability to contribute to the parents' medical care. The state may reduce its Medicaid payments to elderly parents only to the extent that children in fact do contribute to a parent's medical costs.

The Transmittal further states that "[t]he [Social Security] law and [Medicaid] regulations permit states to require adult family members to support adult relatives without violating the Medicaid statute by the use of a statute of general applicability."[22] The policy of the Transmittal would require support under a state statute of general applicability and not under a specific state Medicaid plan requirement applicable only to Medicaid recipients. Therefore, the Transmittal reasons that there would be no violation of the Social Security Act prohibition against considering financial responsibility of relatives other than parents or spouses.

This Transmittal is contrary to the federal statute it interprets and to the legislative history of that statute. The Medical Assistance Program [Medicaid], enacted by Congress in 1965,[23] prohibits states from requiring relatives other than spouses or parents to contribute to the cost of medical care. The statute requires that a state Medicaid plan "include reasonable standards [which] do not take into account the financial responsibility of any individual for

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20. TRANSMITTAL, *supra* note 17.

21. *Id.* at 10,287.

22. *Id.*

> The transmittal was reportedly issued in response to an August 27, 1981 letter from the Indiana Attorney General questioning whether enforcement of Indiana's relative responsibility statute would be consistent with federal Medicaid law. The Attorney General's Official Opinion No. 81-15 . . . interpreted [the Social Security Act] to preclude Medicaid use of relative responsibility other than the reponsiblity of spouses or parents for children. It concluded that the Medicaid statute prohibits actions against adult children of indigent parents receiving Medicaid benefits.

Relative Responsibility, supra note 19, at 2 n.6.

23. 42 U.S.C. §§ 1396a-1396o (1982).

any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 . . . ."[24] Although this language could be interpreted as only prohibiting attribution of a relative's income to an applicant or recipient, the legislative history suggests the broader congressional intent of prohibiting the requirement of monetary contributions by any relative other than a spouse or parent of a recipient.

In its hearing prior to the enactment of the Medical Assistance Program, the Senate Finance Committee stated that it believed it proper to "expect spouses to support each other and parents to be held accountable for the support of their minor children and their blind or permanently and totally disabled children . . . ."[25] The Committee concluded, however, that beyond such degrees of relationship, Medicaid support requirements were often destructive and harmful to the relationships among members of the family group. Therefore, the Committee decided that "[s]tates may not include in their plans provisions for requiring contributions from relatives other than a spouse or the parent of a minor child or children over 21 who are blind or permanently and totally disabled."[26]

When considering amendments to the Medicaid Plan in 1967, the Senate Finance Committee studied the practice of supplementation of nursing home care costs by relatives. Once again, the Committee determined the practice of supplementation by relatives to be undesirable.[27] Neither the Committee nor Congress addressed the issue in legislation, due to representations by the Department of Health, Education and Welfare[28] (HEW), that supplementation would be phased out by January 1, 1971.[29] It is clear that the federal Medicaid statute and its legislative history demonstrate that only the spouse and parents of a Medicaid recipient can be held financially responsible for the costs of medical assistance provided to the recipient.

In addition to being inconsistent with the federal statute that it

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24. *Id.* § 1396a(a)(17)(D).

25. S. REP. No. 404, 89th Cong., 1st Sess. 77, *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 1943, 2018.

26. *Id.*

27. S. REP. No. 744, 90th Cong., 1st Sess. 187-88, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 3026.

28. The Department of Health, Education and Welfare was the predecessor to the Departments of Education and Health and Human Services.

29. *See Relative Responsibility*, 56 NURSING HOME L. LETTER 3 (Feb. 1982).

interprets, the Transmittal is also inconsistent with federal regulations relating to Medicaid in general, and specifically to state Medicaid plans. All federal regulations published throughout the history of the Medicaid plan have been in conformity on the issue of relative responsibility; relative responsibility has always been limited to parents for children and spouses for spouses.

Federal regulations addressed relative responsibility for the first time in 1969. The regulations stated that a state Medicaid plan must "[p]rovide that financial responsibility of any individual for any applicant or recipient of medical assistance will be limited to the responsibility of spouse for spouse and of parents for children under age 21, or blind, or permanently and totally disabled."[30]

In 1971, the Medicaid regulations concerning eligibility were augmented. The new regulations provided that a state Medicaid plan must require, as a condition of eligibility for medical assistance, that:

> [n]o person unrelated to the applicant or recipient is held financially responsible for him; nor is any condition of eligibility imposed that holds a relative responsible who is not the spouse of the individual who needs medical care or services or the parent of such individual, who is under 21, or is blind, or is permanently and totally disabled.[31]

In 1977, the first substantial change in over nine years was made to the language of federal regulations concerning relative contributions.[32] The pertinent sections were rewritten to state that "[t]he financial responsibility (including later collection for assistance paid) of any individual for any applicant or recipient of medical assistance will be limited to the responsibility of spouse for spouse and of parents for children under age 21 (or blind or disabled)."[33] HEW clarified the prohibition on relative responsibility as not being limited solely to eligibility. The prohibition extended to all possible methods of holding relatives responsible, including reimbursement to the state for Medicaid payments previously made on a recipient's behalf.

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30. 45 C.F.R. § 248.21(a)(5) (1969).

31. *Id.* § 248.10(c)(5) (1972).

32. 42 Fed. Reg. 2684 (1977).

33. 45 C.F.R. § 248.3(b)(1)(iii) (1978); *see also id.* § 248.21(a)(2)(ii) (substantially same language). In 1977, the regulations were transferred from 45 C.F.R. to 42 C.F.R. with no substantive change. 42 Fed. Reg. 52827 (1977). 45 C.F.R. § 248.3 became 42 C.F.R. § 448.3.

In 1978, the federal regulations were rewritten to read:

> Limitation on the financial responsibility of relatives
>
> Except for a spouse of an individual or a parent for a child who is under age 21 or blind or disabled, the agency must not
>
> (a) Consider income and resources of any relative available to an individual; nor
>
> (b) Collect reimbursement from any relative for amounts paid by the agency for services provided to an individual.[34]

This language has remained unchanged since its initial publication.[35]

The Department's own published regulations interpreting the Medicaid plan totally contradict the Transmittal on the point of relative responsibility. Moreover, the legislative history of the Medicaid plan and the Medicaid statute disagree completely with the Transmittal's interpretation concerning relative responsibility.

III. Relative Responsiblity Laws

Relative financial responsibility laws have a long history. The source of the legal duty to support parents may have come originally from the Ten Commandments.[36] As early as the third century A.D. there were statutory mutual obligations of support and maintenance between children and parents in Roman society.[37] In medieval Europe, obligations to relatives varied regionally. Statutory Roman law applied to southern Europe.[38] In northern Europe, ethics dictated support of relatives.[39] This ethical standard developed, by custom and usage, into a right of support from child to parent and often extended to include support to grandchildren, grandparents and, on occasion, siblings.[40] Even in northern areas of Europe, Roman law supplied a written basis for the custom, and became

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34. 42 C.F.R. § 435.602 (1979); *see also id.* § 436.602. The regulations were rewritten as part of Operation Common Sense to present existing regulations in clearer, simpler language. 43 Fed. Reg. 45176 (1978).

35. *See* 42 C.F.R. §§ 435.602, 436.602 (1983).

36. *Exodus* 20:12.

37. Van Houtte & Breda, *Maintenance of the Aged by Their Adult Children*, 12 Law & Soc'y Rev. 645, 649 (1978).

38. *Id.* at 650.

39. *Id.*

40. *Id.*

the foundation for subsequent substantive rules and laws relating to relative support.[41] Much later, a law imposing a duty of parental support on children was incorporated into the Napoleonic Code.[42] This law was the basis for Civil Code relative responsibility provisions which are currently in effect in Belgium and Louisiana.[43]

Statutory relative responsibility was enacted by the English Parliament in 1597 and applied only to parents and children.[44] In 1601, this responsibility was extended to additional collateral relatives.[45] American family responsibility laws emerged from these sixteenth and seventeenth century British provisions.

Today, twenty-seven jurisdictions in the United States have family support laws requiring children to provide assistance to their needy parents.[46] Generally, this responsibility is triggered by the needy parent filing a petition with the court for a hearing.[47]

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41. *Id.*

42. CODE OF NAPOLEON art. 205, § 1. "Children are liable for the maintenance of their parents and other ascendants in need." *See* Van Houtte & Breda, *supra* note 37, at 651 n.10.

43. *See* Van Houtte & Breda, *supra* note 37, at 651; LA. CIV. CODE ANN. art. 229 (West 1970).

44. 39 Eliz. 1, c. 3, § 7 (1597). For a general history of statutory responsibility, see Lopes, *Filial Support and Family Solidarity*, 6 PAC. L.J. 509-14 (1975).

45. 43 Eliz. 1, c. 2, § VI (1601). "The father and grandfather, the mother and grandmother, and the children of everie poore olde blind lame and impotent person, or other poore person not able to worke, beinge of a sufficient abilitie, shall at their own Chardges releive and maintain everie suche poore person, in that manner and accordinge to that rate, as by the Justices of the Peace of that Countie where such sufficient persons dwell, or the greater number of them, at their generall Quarter-Sessions shalbe assessed; upon paine that everie one of them shall forfeite twenty shillings for everie monthe which they shall faile therein." *Id.*, *quoted in* Tully, *Family Responsiblity Laws: An Unwise and Unconstitutional Imposition*, 5 FAM. L.Q. 32, 46 (1971).

46. ALASKA STAT. § 25.20.030 (1983); CAL. CIVIL CODE §§ 206, 242 (West 1984); CONN. GEN. STAT. ANN. § 46b-215 (West Supp. 1983); DEL. CODE ANN. tit. 13, § 503 (Repl. Vol. 1981); GA. CODE ANN. § 36-12-3 (1982); IDAHO CODE § 32-1002 (1983); IND. CODE ANN. § 31-2-9-1 (Burns Repl. Vol. 1980); IOWA CODE ANN. § 252.2 (West Supp. 1984); LA. REV. STAT. ANN. § 13.4731 (West 1968); ME. REV. STAT. ANN. tit. 19, §§ 442-443 (1981); MD. FAM. LAW CODE ANN. art. 27, § 104 (Repl. Vol. 1982); MASS. GEN. LAWS ANN. ch. 273, § 20 (West Supp. 1984); MISS. CODE ANN. § 43-31-25 (1981); MONT. CODE ANN. §§ 40-6-214, -301 (1983); NEV. REV. STAT. § 428.070 (1983); N.H. REV. STAT. ANN. § 167.2 (1978) and § 546-A:2 (1974); N.J. STAT. ANN. § 44:1-140 (West Supp. 1984); N.C. GEN. STAT. §§ 14-326.1 (1981); N.D. CENT. CODE § 14-09-10 (Repl. Vol. 1981); OR. REV. STAT. § 109.010 (1983); PA. STAT. ANN. tit. 62, § 1973 (Purdon Supp. 1984); R.I. GEN. LAWS § 15-10-1 (1981); S.D. CODIFIED LAWS ANN. § 25-7-27 (1977); UTAH CODE ANN. § 17-14-2 (Repl. Vol. 1973 & Supp. 1983); VT. STAT. ANN. tit. 15, § 202 (1974); VA. CODE ANN. § 20-88 (Repl. Vol. 1983); W. VA. CODE § 9-5-9 (Repl. Vol. 1984).

47. CONN. GEN. STAT. ANN. § 46b-215 (West Supp. 1983); DEL. CODE ANN. tit. 13, § 503 (Repl. Vol. 1981).

Some states allow the petition to be filed by welfare workers.[48]

The Commonwealth of Virginia has long had such a family responsibility law. As first enacted in 1920, the law provided that persons sixteen years of age or older, who had sufficient earning capacity, were required to support their parents who lived in cities of one hundred thousand inhabitants or more.[49] This provision was amended to require support of parents in destitute or necessitous circumstances.[50] Subsequent changes maintained this general applicability language.[51] An exception to the statute was added in 1975 to provide that parents receiving public assistance need not be supported by their children.[52] However, a 1982 amendment[53] provides that children are responsible for costs incurred in providing medical assistance to their parents pursuant to the Virginia Medicaid Plan, if such financial responsibility is not restricted by the plan itself.[54]

The 1982 amendment also provides a procedure to compel reimbursement to the Commonwealth. Proceedings are to be instituted in the Juvenile and Domestic Relations District Court, in the name of the Commonwealth, by the state agency administering the program of assistance. The portion of costs which the child must reimburse are those determined by the court to be reasonable. Costs of institutionalization of a parent are limited to no more than sixty months of institutionalization.[55]

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48. IND. CODE ANN. § 31-2-9-1 (Burns Repl. Vol. 1980); MASS. GEN. LAWS ANN. ch. 273, § 20 (West Supp. 1984).

49. VA. CODE, ch. 324 (1922).

50. *Id.*, ch. 324 of Acts 1922 (Supp., Pollard, 1922). The 1922 amendment applied only to cities of the first class. An amendment to the statute in 1928 deleted the references to cites of the first class.

51. *Id.* § 1944a (1942).

52. VA. CODE ANN. § 20-88 (Repl. Vol. 1975). ("This section shall not apply . . . if a parent is otherwise eligible for and is receiving public assistance or services under a federal or state program.").

53. *Id.* (Repl. Vol. 1983).

54. *Id.* "To the extent that the financial responsibility of children for any part of the costs incurred in providing medical assistance to their parents pursuant to the plan provided for in § 32.1-74 of the Code of Virginia is not restricted by that plan . . . the provisions of this section shall apply."

55. *Id.*

> A proceeding may be instituted in accordance with this section in the name of the Commonwealth by the state agency administering the program of assistance or services in order to compel any child of a parent receiving such assistance or services to reimburse the Commonwealth for such portion of the costs incurred in providing the assistance or services as the court may determine to be reasonable. If costs are incurred for the institutionalization of a parent, the children shall in no case be responsible for such costs for more than sixty months of institutionalization.

Therefore, under current Virginia law, an adult child may be forced by the state to contribute to medical costs incurred by the state in providing medical assistance to the child's parents, even when the parent has been receiving public assistance.

IV. The Constitutionality of Relative Responsibility Laws

Virginia Code section 20-88, as amended in 1982, is inconsistent with the federal Medicaid statute[56] and the corresponding regulations.[57] Both the federal statute and the regulations expressly limit any state agency to consideration of income and resources solely from spouses and parents of Medicaid recipients. Medicaid regulations further prohibit any state agency from collecting reimbursement from any relative of a Medicaid recipient except from spouses and parents.[58] The Virginia statute, in direct contravention of federal mandates, imposes financial responsibility upon adult children for the costs of medical assistance provided to their parents by the State Medicaid agency. The statute requires children to make restitution to the Commonwealth for its expenditures on the parents through Medicaid. To this end, the Department of Welfare, which is charged with administering the Virginia Medicaid Plan, is authorized to institute proceedings in court to compel reimbursement by the Medicaid recipient's adult child.[59]

Even if the Transmittal were a valid interpretation of federal law, it would be inapplicable to the Virginia statute. The Transmittal speaks of a "State Statute of general applicability."[60] It is this general application of a statute, as opposed to a specific or special application directed only to Medicaid recipients, which would save a state relative responsibility statute from violating the Federal Medicaid Act.[61]

While purporting to be of general applicability, the Virginia statute, because of the 1982 amendment, is, instead, a statute of spe-

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56. 42 U.S.C. § 1396a(a)(17)(D) (1982). For a discussion of the statute, see *supra* text accompanying note 24.

57. 42 C.F.R. §§ 435.602, 436.602 (1983). For discussion of regulations, see *supra* text accompanying notes 34-35.

58. 42 C.F.R. § 435.602(a)(2) (1983).

59. Va. Code Ann. § 20-88 (Repl. Vol. 1983).

60. *Transmittal, supra* note 17.

61. *See supra* note 22 and accompanying text.

cial applicability for two reasons.[62] First, the requirement that children contribute to the cost of medical assistance provided to their parents under the state Medicaid plan creates a *specific* financial responsibility. Second, the 1982 amendment directly refers to section 32.1-74 of the Virginia Code. That section, the Virginia Medicaid Plan, mandates that the State Medicaid agency establish a program requiring adult children to reimburse the state for costs of medical assistance provided to their parents under the plan.[63] Therefore, section 20-88 creates a specific state Medicaid requirement, applicable only to Medicaid recipients, which is contrary to federal law and regulations as well as to the Transmittal. Because the Virginia family responsibility statute is applicable only under the terms of the State Medicaid Plan, the Virginia statute violates the requirements of the federal Medicaid statute.

The Virginia family responsibility statute, as amended in 1982, has not been tested in court.[64] Similar statutes of other states, however, have been challenged as a denial of equal protection, due process and privacy rights, and as an imposition of double taxation.[65] In the face of such claims, state courts have consistently upheld family responsibility laws.

The California family responsibility law was challenged on equal protection grounds in *Department of Mental Hygiene v. McGilvery*.[66] The court held that, because the support obligation was to be absolute in each relative, the classification of relatives was nondiscriminatory; the collectibility of the obligation was contingent

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62. A special statute is one which relates to particular persons or things of a class or operates upon a selected class, rather than upon the public in general. BLACK'S LAW DICTIONARY 1570 (Rev. 4th ed. 1968). A statute is general if its terms apply to and its provisions operate upon all persons and subject matter in like situations. *See generally* Gandy v. Elizabeth City County, 179 Va. 340, 344, 19 S.E.2d 97, 99 (1942).

63. The Board shall prepare and submit to the Secretary of the United States Department of Health and Human Services such amendments to the state plan for medical assistance as may be permitted by federal law to establish a program of family assistance whereby children over the age of eighteen years shall make reasonable contributions, as determined by regulations of the Board toward the cost of providing medical assistance to their parents.

VA. CODE ANN. § 32.1-74D (Cum. Supp. 1984).

64. *But see* Bagwell v. Doyle, 187 Va. 844, 48 S.E.2d 299 (1948); Mitchell-Powers Hardware Co. v. Eaton, 171 Va. 255, 198 S.E. 496 (1938). Before the 1982 amendment, the Virginia statute was the basis for a child's general financial responsibility for a parent.

65. *See generally* Annot., 75 A.L.R.3d 1159 (1977).

66. 50 Cal. 2d 742, 329 P.2d 689 (1958). *But cf.* Levy & Gross, *Constitutional Implications of Parental Support Laws*, 13 U. RICH. L. REV. 517, 531 (1979) (authors conclude that parental support statutes are in direct violation of the Equal Protection Clause).

only upon the relative's ability to pay. In a later California case, *Swoap v. Supreme Court of Sacramento County*,[67] the court reasoned that the "rational basis" test, rather than the "strict scrutiny" test, was applicable because those charged with financial responsibility were selected on the basis of parentage, rather than on the basis of traditional suspect classifications such as race or sex. Three years before *Swoap*, a District of Columbia court, in *Groover v. Essex County Welfare Board*,[68] had applied this same reasoning and determined that classification of children who are charged with the support obligation of their parents is a rational classification not violative of equal protection.

The constitutional issue of taking of private property for public use without just compensation was also addressed and rejected by California in *McGilvery*.[69] It was determined that the responsible relative receives a substantial equivalent from the agents of the state who manage the institution where the supported relative resides. An Alabama court, in *Atkins v. Curtis*,[70] had also rejected a takings argument by deciding that the statute establishes liability only upon those subject to it, rather than transferring property from one citizen to another.

One of the earliest challenges to relative responsibility laws was in 1949, in the Arizona case of *Maricopa County v. Douglas*.[71] There the court rejected a charge of double taxation which was based on the argument that payments under relative responsibility laws impose a tax in addition to taxes already paid, and from which a portion already maintains a social welfare program.

In 1956, an Oregon court found procedural due process to be satisfied in *Mallatt v. Luihn*,[72] where notice and opportunity for a hearing were extended to the responsible relative prior to enforcement of collection through the state's enforcement of judgment procedures. During this pre-enforcement hearing, the responsible relative could defend on the ground that the alleged needy person is not, in fact, in need, or that the relative is financially unable to make the contribution. The court held that no notice to relatives of later financial responsibility was required before extending ben-

67. 10 Cal. 3d 490, 505, 516 P.2d 840, 850, 111 Cal. Rptr. 136, 147 (1973).
68. 264 A.2d 143 (D.C. 1970).
69. *McGilvery*, 50 Cal. 2d at ___, 329 P.2d at 699.
70. 259 Ala. 311, 66 So. 2d 455 (1953).
71. 69 Ariz. 35, ___, 208 P.2d 646, 649 (1949).
72. 206 Or. 678, 294 P.2d 871 (1956).

efits to the parents.

Opinions of the Attorneys General of Idaho[73] and Tennessee[74] have declared their respective state family responsibility statutes, which require adult children to reimburse the State Medicaid Agency for medical costs expended on their parents, to be contrary to federal Medicaid statutes and regulations, and therefore unenforceable.

V. Policy Arguments Against Relative Responsibility Laws

Policy arguments have been propounded in favor of the termination of relative responsibility laws. One view suggests that the administrative costs of collecting from the legally responsibile family members outweigh the savings to the state in the form of lower welfare payments;[75] the collection procedures create a new and costly bureaucracy. Another criticism is that parents are reluctant to require their children to support them.[76] The parents' knowledge that a child might be required to reimburse the state may impede many needy parents from applying for state medical assistance.[77] An additional policy argument is that the enforcement

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73. Idaho Code § 32-1008A is applicable only to Medicaid recipients. Although it is in the form of a statute rather than a Medicaid plan, we feel that this is a distinction without consequence in that the net effect on Medicaid recipients and their relatives is identical to that which would have resulted had the state merely adoptd a plan which required contributions solely from the relatives of Medicaid patients. It is our opinion that the limitation of the applicability of § 32-1008A to relatives of Medicaid recipients renders it a statute of special rather than general applicability and, as a consequence, we believe that it does not comport with the requirements of the transmittal or with the Social Security laws which the transmittal attempts to interpret. Therefore, it is our opinion that Idaho is not in compliance with the requirements of the federal Medicaid program.

Op. Idaho Att'y Gen. No. 84-7 (March 23, 1984).

74. This statute [Tenn. Code Ann. § 14-23-115 (Supp. 1984)] by its own terms applies only to "parties" who are "responsible" for the support of persons receiving medical assistance funds. . . . Because the statute is clearly limited in scope and application to the support of persons receiving or eligible for Medicaid funds, it is not a statute of general applicability within the terms of the eligibility transmittal. . . . [T]he only general support obligations imposed by state law are those upon parents and spouses. Tenn. Code Ann. §§ 36-229, 36-820. Therefore, only parents or spouses may be required to make such reimbursements to the state.

Op. Tenn. Att'y Gen. (August 31, 1983).

75. Acford, *Reducing Medicaid Expenditures Through Family Responsiblity: Critique of a Recent Proposal*, 5 Am. J.L. & Med. 59, 62 n.18 (Spring 1979); *see also* Rosenbaum, *Are Family Responsiblity Laws Constitutional?*, 1 Fam. L.Q., 59-61 (Dec. 1967).

76. Acford, *supra* note 75, at 75; Levy & Gross, *supra* note 66, at 530.

77. Acford, *supra* note 75, at 76; Lopes, *supra* note 44, at 527.

mechanism may not reach out-of-state relatives even though the state statute may apply with equal force to relatives residing in and out of the state.[78]

Another argument against family responsibility laws is that children forced to support their parents may do so at the cost of depriving their own immediate families of necessities. This could encourage a perpetuation of poverty. Moreover, such required support may cause resentment and guilt in the children, as well as a lack of identity and independence in the parents. The potential for weakening of family ties is great.[79]

Finally, family responsibility laws may be unenforceable. The elderly simply may not give Medicaid agencies the names of their adult children.[80]

VI. Conclusion

The federal Medicaid statutes and regulations have consistently prohibited states from requiring relatives other than spouses or parents to contribute to the cost of the Medicaid recipient's medical care. The 1983 Transmittal, "Treatment of Contributions from Relatives to Medicaid Applicants or Recipients," incorrectly interprets the Medicaid statute and companion regulations as allowing the requirement of contributions by the recipient's adult children to the cost of a Medicaid recipient's medical care.

The Virginia family responsibility law, as amended in 1982, is equally inconsistent with federal Medicaid statutes and regulations, in that the Virginia law imposes financial responsibility upon adult children for the costs of medical assistance provided to their parents by the State Medicaid agency, and authorizes the state agency to collect reimbursement from the Medicaid recipient's adult children.

Even if the reasoning of the 1983 Transmittal were to be followed, the Virginia statute would still violate the federal Medicaid law. The Virginia law is a statute of special application, as opposed

78. Bond, Our Needy Aged 136, 352 (1954); *see also* Rosenbaum, *supra* note 75, at 62. Although all states subscribe to the Uniform Reciprocal Enforcement of Support Act in its original revised form, not all have family responsibility laws. Such laws that do exist differ in scope and coverage of relative responsiblity, and therefore preclude enforcement by courts of other states.

79. Lopes, *supra* note 44, at 526.

80. *See Relative Responsibility*, 56 Nursing Home L. Letter 3 (Feb. 1983).

to one of general applicability as authorized by the Transmittal. The Virginia statute is applicable only to children of Medicaid recipients, and is a specific State Medicaid Plan requirement applicable only to Medicaid recipients.

An adult child should not be required to make financial contributions for medical assistance provided to parents under Medicaid, under either the Virginia family responsibility law or under federal Medicaid policy.