

Elder Law Planning Note: Medicaid for Institutionalized Married Persons in Virginia¹

June 26, 2005

R. Shawn Majette, VSB 19372
Thompson and McMullan P.C.
804/698-6241

<http://majette.net>

Copyright, 2005, by
R. Shawn Majette
All rights reserved.

I. General Power Of Attorney Issues

- A. Change Domicile
- B. Gifting and Support Authority Vested In Agent (Va. Code Ann. § 11-9.5)
- C. Alternate Agents, Health Care Decisions, and Disclosures (Va. Code Ann. § 11-9.6)
- D. HIPAA confidentiality, doctors, and “springing powers” (Va. Code Ann. § 11-9.4)
- E. Divorce issues and waiver agreements; waiver of conflict of interest rules

II. Medicaid Spousal Rights Upon Institutionalization: Five Tests

A. **Age or Disability:** 65 or disabled.

B. **Prescreening:** Activities of Daily Living / U.A.I., §M1420²

- 1. Required for persons entering long term care or community based care, except
- 2. Not required for persons *in* long term care for at least 30 days at application date, §M 1420.400 (B)
- 3. The screening criteria are ongoing, and DMAS can rescind certification while the recipient remains in the nursing home, §M 1420.400 B 6.

C. **Income:** Va. Medicaid Manual § M 1480.410

- 1. **Only** institutionalized spouse’s (IS’) income “counted” for eligibility; community spouse (CS) income may be supplemented (see below) and may be available for “expected” support, see §M 0260.401 C.
- 2. Income of IS under \$1,737 (in 2005), automatic eligibility; otherwise, daily, retroactive counting required.³
- 3. Supplementing the CS by “Minimum Monthly Maintenance Needs Allowance,” §M 1480.410.

¹ There are different income rules (“caps”) applicable to DMHRSAS facilities and the CBC waiver program. Generally, the caps are 300% of the SSI monthly allowance for an eligible individual. See *infra*.

² All cites to “§M” or “§S” are current citations to the Virginia Medicaid Manual, which may be accessed via <http://majette.net>.

³ §M 0810.002 (Internet: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s08.pdf Adobe p. 5 of 253)).

- (a) Minimum: July 1, 2005 and after: \$1,603.75
- (b) Maximum Monthly Excess Shelter Allowance: \$773.75 (The maximum monthly income the CS can receive equals \$2,377.50, calculated thus: \$1,603.75 + [(monthly mortgage (PITI), homeowner association dues, and utility allowance (\$229 or \$283)) - \$481.13 (which is 30% of C.3.a.)]. §M 1480.410.⁴
- (c) Family Dependent Amount: \$520.00 (maximum). §M1480.430 E.2.⁵
- 4. **Post-eligibility** court support orders are recognized to allocate additional income to CS. §M1480.
- 5. Medicaid expects a contribution from the CS when income exceeds \$1,900 per month, but does not impute it to the IS unless paid. §M1480.310 B.3., §M1480 Appendix 6.

D. Resources

- 1. Exempt Resources: §S 1130⁶ and §M 1480.210. Home, Car, Contiguous Property, \$3,500 burial account (\$1,500 for married persons), burial life insurance policies, tangible personal property.
- 2. "CSRA/CSPRA": 50% of resources extant on the institutionalization date, but at least \$19,020 and not more⁷ than \$95,100.⁸ § M 1480.231.
- 3. Personal resource allowance of IS, \$2,000.
- 4. Resources of both spouses valued on snapshot date, generally the 1st day of month IS admitted to nursing home; all other valuations are made as of the first calendar day of month (compare to "any day in month" rule for *other* Medicaid entitlements in aged, blind, and disabled categories). M1480.250 D.⁹
- 5. **Post-eligibility** increases in CS' resources immaterial to IS' eligibility. M1480.240 C, C.2.¹⁰

E. Transfer of Resources: 12 VAC 30-40-300; §M 1450 *et seq.*¹¹

- 1. Granny I and II "criminal" exposure: 42 U.S.C. 1320a-7b; held unconstitutional, *New York State Bar Association v. Reno*, 999 F. Supp. 710; 1998 U.S. Dist. Lexis 4796 (1998) ("pending final judgment, the United States, its agents, servants, employees, attorneys, and all persons in active concert and participation with Defendant are enjoined from commencing, maintaining, or otherwise taking action to enforce 42 U.S.C. § 1320a-7b(a)(6).")
- 2. Transfers by *each* spouse will effect *both spouses*, until after eligibility has been established for the community spouse. §M1450.500 A.¹²

⁴ (Internet: <http://www.dss.state.va.us/policymanual/medicaid/m14.pdf> (Adobe p.343 of 384)).

⁵ (Internet: <http://www.dss.state.va.us/policymanual/medicaid/m14.pdf> (Adobe p. 351 of 384)).

⁶ (Internet: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/s11.pdf (Adobe p. 55 of 222)).

⁷ See III B 4 below.

⁸ (Internet: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf (Adobe p. 294 of 384)).

⁹ (Internet: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf (Adobe p.320 of 384)).

¹⁰ (Internet: http://www.dss.virginia.gov/files/division/bp/me_famis/policy/manual/m14.pdf (Adobe p. 305 of 384)).

¹¹ *Caveat*: Waiver requests (introduced in the General Assembly but defeated, in HB 1215 (2004) and HB 2601 (2005)).

¹² (Internet: <http://www.dss.state.va.us/policymanual/medicaid/m14.pdf> (Adobe p. 103 of 384)).

3. Exempt Transfers: Spouses, Children Under 21, Disabled Children, SNT for Disabled Persons <65, Home to Child Taking Care of Parent for 2 years, tangible property, business property, §M 1450.501, -.502.¹³
4. The Look-back : 5/3 Year disclosure / analysis §M 1450.500 B.¹⁴
5. ***Transfers within effective look-back, or How long am I out?*** §M 1450.700, 702.

Equation: (Gift \$) / \$4,060 (\$5,403 in Northern Virginia) = months ineligible (rounded down), usually from date of transfer. Example: Applicant's \$10,000 gift on November 9, 2004 / \$4,060 = 2.46, rounded to 2 months of ineligibility, ending February, 2005.

III. Planning Considerations: Initial Eligibility And Survivor Eligibility

Example: H and W own a home and have non-working farm land which is contiguous to the home; combined real estate value is \$200,000 with no mortgage. They have \$200,000 in cash or stocks. She has Social Security Administration benefits of \$500 per month. He has Social Security Administration benefits of \$1,100 and a private pension of \$350. **H goes into the nursing home on January 3, 2005.** No gifts made. Powers of attorney with gifting authority in place.¹⁵

A. Initial eligibility:

1. Home is exempt as well as all contiguous real estate.¹⁶
2. CSRA for W: \$95,100 (1/2 of \$200,000, not exceeding \$95,100).
3. MMNA for W: \$1,561.25 - \$500 (Soc. Sec. For Wife) = \$1,061.25.
4. **Excess resources, \$102,900** (\$200,000 - [\$95,100 + \$2,000]).
5. First possible eligibility date is February 1, 2005.

B. A Dozen Excess Resource Dispositions.

1. Payment for long term care of H and living expenses of W.
2. Enhanced home, car, contiguous property to home.
3. Purchase of home for W and creation of HECM reverse mortgage.
 - (a) Purchase of home is exempt.
 - (b) Loan proceeds are excluded from income calculations.
4. Long term care insurance for CS.
5. Enhanced CSRA when community spouse's income substantially less than MMNA limit (Available via fair hearing,¹⁷ limited court order.¹⁸)

¹³ <http://majette.net> or <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-40-300>.

¹⁴ (Internet: <http://www.dss.state.va.us/policymanual/medicaid/m14.pdf> (Adobe p. 104 of 384). See http://www.geocities.com/hana+zushi/prac_el.pdf for details and calculator.

¹⁵ A power of attorney without gifting authority can be construed to permit it, see Va. Code Ann. § 1109.5. In the absence of any power of attorney a conservatorship can accomplish the same result, Va. Code Ann. § 37.1-134.5.

¹⁶ Only \$5,000 in surrounding property exempt were H single.

¹⁷ 12VAC 30-110-856; §M 1480.232 F (1,3); and federal rule 42 CFR 431.260 (conferring authority to make "resources first" a state option) and *Wis. Dep't of Health and Family Servs. v. Blumer*, 543 U.S. 473 (2002).

¹⁸ Va. Code Ann. § 20-88.02:1

6. Annuity for W.
 - (a) §S0830.160A, §M1140.260¹⁹
 - (b) 12 VAC 30-40-300 E 3 H (proposed, April, 2005).
 - (i) An annuity containing a balloon payment is considered an available resource.
 - (ii) An annuity that names revocable beneficiaries is considered to be an available resource because it can be surrendered, cashed in, assigned, transferred or have the beneficiary changed. Annuities are presumed to be revocable when the annuity contract does not state that it is irrevocable.
 - (iii) A non-employment related annuity purchased by or for an individual using that individual's assets will be considered an available resource unless the annuity meets all of the following criteria:
 - (a) it is irrevocable;
 - (b) it pays out principal and interest in equal monthly installments (no balloon payment) to the individual over the total number of months **equal to or less than the actuarial life expectancy of the annuitant**,²⁰
 - (c) it names the Commonwealth of Virginia as the residual beneficiary of funds remaining in the annuity not to exceed the amount of any Medicaid funds expended on the individual during his lifetime; and
 - (iv) is issued by an insurance company, bank, or other registered or licensed entity approved to do business in the jurisdiction in which the annuity is established. Payments from the annuity to the Commonwealth of Virginia cannot exceed the total amount of funds for long-term care services expended on behalf of the individual.
 - (v) Annuities issued prior to **12-01-04**²¹ which do not: (a) provide for the payout of principal and interest in equal monthly installments and (b) for which documentation is received from the issuing company that the payout arrangements cannot be changed will be considered to meet the above requirements once amended to name the Commonwealth of Virginia as the primary beneficiary of funds remaining in the annuity, not to exceed the amount of any Medicaid funds expended on the individual during his lifetime.
 - (c) §M 1450.602.
 - (d) Do not use "CS annuity trust."²²
7. Burial Planning for H & W? §M 1130.400 *et seq.*; §M1450.601 B.1. (Burial insurance).
8. Trust for disabled child or other person < 65? §M 1450.502 C
 - (a) See materials in prior discussion.
9. Split interest (life/remainder estate planning)?

¹⁹ Effective for applications filed after November 30, 2004. As written, the policy imposes the new requirements enumerate above. They are a trap for the unwary. The Commonwealth must be made the remainder beneficiary as to Medicaid payments made for the "individual." The Writer has been informed that the "individual" is the annuitant. §M 1140.260 requires the term to "equal" the life expectancy of the annuitant; this conflicts with policy § M 1450.602, and has been corrected in the proposed amendment creating new subsection 12 VAC 30-40-300 E 3 H.

²⁰ See correction in 12 VAC 30-40-300 E 3 H, *op cit.*, and policy at 1140.260 B (Trans. 80 7/05).

²¹ See correction, *op cit.* The correct date will be June 20, 2005.

²² *Johnson*, at 166 F.Supp.2d 42 (2001) (an annuity in the form of a trust was a countable resource). Caveat: see National Association of State Medicaid Directors Report critical of the continued use of annuities in Medicaid planning: (http://www.nasmd.org/Annuities%20Workgroup%20Product_October%202003.pdf); *Estate of Gross v. NDDHS* (ND S.Ct., 10/12/04, <http://www.court.stave.ned.us/court/opinions/200040071.htm>)(non-assignable annuity countable resource).

- (a) Life estates are not countable resources.
 - (b) Acquisition of a new home for value with a child in which the parent acquires a partial life estate, with the remainder acquired by the child, provides:
 - (i) safe harbor for the parent should he be able to return to the community;
 - (ii) a common tenancy as to the child for the lifetime of the parent; and
 - (iii) a remainder interest that passes free of estate recovery.
 - (c) Life estate / Remainder in home of child / parent? §1140.110
 - (d) Parent purchases partial life estate in extant home of child or child purchases a remainder interest in the home of the parent.
 - (i) *Caveat*: causes loss of tax exclusion under IRC §121.
10. Contract for services rendered by family member for CS? §M 1450.003 D, G.
- (a) Services provided by the child to the community spouse may be compensated.
 - (b) *Caveat* income tax consequences.
11. Divorce *following* transfer of assets to CS?
- (a) Transfers between spouses are exempt.
 - (b) Divorce following transfers of assets from institutionalized spouse to community spouse severs the conduit (marriage) which imputes resources of the (former) community spouse to the institutionalized spouse.
 - (c) *Caveat*: MMNA (II.C.3,4) income support rules no longer applicable to the *former* community spouse.
 - (i) Consider QDROS by which ownership of the income producing asset (pension) is itself transferred to the community spouse in the divorce decree itself.
12. Purchase of United States EE or I Bonds post-institutionalization (\$30k / \$15k limit per spouse, 6-12 month holding period)?²³

C. Survivor Eligibility Issues:²⁴

1. **Avoid Living trusts when one spouse is Medicaid eligible, or expected to be.**²⁵
- (a) Exception: Compelling non-Medicaid reason to use an inter vivos trust.
 - (i) The community spouse, Harry, is 80. He has been a diagnosed manic depressive for forty years, with the typical bouts of foolishness with money.
 - (ii) Wanda, the institutionalized spouse, is 80. She is demented, already on Medicaid, and a nursing home resident for the past two years.

²³ §S 1140.240 (A). See <ftp://ftp.publicdebt.treas.gov/sbibond.pdf> and <ftp://ftp.publicdebt.treas.gov/sbeebond.pdf>

²⁴ See **Section IV**, *infra*.

²⁵ The short reason is that each spouse is a creator of the trust (§M 1140.404 B 1a) and to the extent the corpus cannot be paid to the individual, the trust corpus is considered a transfer of assets, *Id.* b. See *Bezzini*, at 715 A.2d 791 (Conn.App., Jul 21, 1998). The long reason is described *infra*.

- (iii) Harry is living in an assisted living facility. His income was supplemented by the community spouse resource allowance, but that has been exhausted. In January, 2005, he will be unable to pay for his care; the difference between the costs of his care and his income is \$1,800 per month.
 - (iv) The couple's only remaining resource is their former home, valued at about \$150,000, held as tenants by the entirety with the right of survivorship as at common law.
 - (v) Waiting in the wings are telemarketers waiting to take further advantage of Harry. They'll have to beat his unemployed son, who has been "taking care" of Harry's affairs under a power of attorney but cannot explain what happened to between \$7,000 and \$18,000 of Harry's bank account.
 - (vi) The tentative plan (subject to tax analysis for compliance with IRC 121) provided to Wanda's daughter was this:
 - (a) seek estate planning authority for Wanda under *Va. Code* § 37.1-134.5 (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+37.1-137.5>) to transfer the house to the deserving daughter as custodial trustee for the benefit of Harry;
 - (b) Deserving Daughter (as custodian) will sell the house;
 - (c) Deserving Daughter then places the proceeds into an irrevocable trust for the sole benefit of Harry during his lifetime, created by Harry, with a remainder provision to provide for distribution to Wanda if the corpus can be construed to be an available resource to her.
 - (vii) While this trust could cause Wanda to lose eligibility at the death of Harry, it will also prevent Harry from losing the proceeds, either by reason of his or his son's profligacy or predations of confidence tricksters.
2. Advise likely benefactors (e.g., parents, unmarried siblings, adult children) to bypass spouse(s) or create special needs trust for spouse(s) in benefactor's estate plan.
 3. Estate recovery for Medicaid recipient, 12 VAC 30-20-140 for *past* benefits paid (after age 55).²⁶
 4. Marital agreements waiving elective share, Va. Code Ann. § 64.1-13 *et seq.*²⁷

²⁶ <http://majette.net> or <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-20-140>. See HB 1215, *supra*.

²⁷ See 9/25/02 Roanoke Department of Social Services disqualification based upon failure to claim elective share at <http://www.geocities.com/hana+zushi/roanoke.pdf>, linked at <http://majette.net>.

5. Testamentary²⁸ special needs trust with mandatory income interest for survivor spouse in entire estate.
6. Testamentary special needs trust with 34% in trust for survivor spouse.

©2005. R. Shawn Majette

[Text which is highlighted is date sensitive.]

²⁸ *Skindzier*, at 784 A.2d 323 (Conn. 2001) (testamentary trust not disqualifying asset transfer).