SSI and Medicaid Issues in Trust Estate Planning For Disabled Persons

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R. Shawn Majette, VSB 19372
Thompson and McMullan P.C.
100 Shockoe Slip
Richmond, Virginia 23219
804/698-6233 (V) 804/780-1813 (F)
smajette@t-mlaw.com
http://majette.net

I. Checklist Of Medicaid Issues Related to Trusts.

A. What Are The General Rules For Medicaid Eligibility?[2]

1. Individuals must be U.S. citizens[3] or "qualified aliens"[4] residing in the United States to be eligible for all Medicaid services. Virginia residence is required for Virginia Medicaid eligibility. Residence is established by demonstrating the intent to remain in Virginia permanently or for an indefinite period of time.[5]

2. Virginia offers Medicaid payment to "mandatory categorically needy," "optional categorically needy," "medically needy," and medically indigent.[6]

    a. The "mandatory categorically needy class consists of aged (65 or over), blind, or disabled individuals who receive SSI and who meet Virginia's

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[1] The writer acknowledges with gratitude the contributions of his friend, Johnson Kanady, Esq., of Kanady and Quinn, P.C., in the initial version of this article for the Virginia Society of Certified Public Accountants appearing in 1998. Any errors or omissions in the present work are solely the responsibility of R. Shawn Majette.

[2] Virginia Medicaid Manual § M 0220.001.

[3] Virginia Medicaid Manual § M 0220.100.

[4] *Id.*

[5] Virginia Medicaid Manual § M 0230.001 A. Distinctions exist between *sui juris* and *non compos* or incapacitated applicants with different requirements to establish residence.

[6] Virginia Medicaid Manual § M 0210.200 Virginia Medicaid Manual § M 0310.002 has a helpful listing of the various categories Medicaid recognizes in Virginia.

more restrictive Medicaid eligibility criteria, and also to the disabled person whose income is less than 80% of the federal poverty level.[7]

b. The "optional categorically needy" category includes persons who are eligible but have not applied for SSI or an optional state supplement[8], patients in an intermediate care facility operated in a Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services facility whose incomes are less than 300% of the SSI level,[9] persons who receive Medicaid approved community-based personal care and whose income is less than 300% of the SSI level,[10] and aged, blind, or disabled individuals receiving a benefit under the Auxiliary Grant paid to persons living in adult care residences licensed pursuant to section 63.1-175 of the Virginia Code. [11]

   (i) The SSI rate is $545 per month as of January, 2002.[12]

   (ii) The income limit for Virginia public mental health hospitals, and also for several waiver related programs (MR, CBC) is 300% of the SSI rate, or $1,635.

c. The "medically needy" category includes the aged, blind, or disabled person who would receive SSI or AFDC except that his or her income exceeds a certain level,[13] and has insufficient income ad resources to meet medical care needs.[14] Medicaid coverage for this group is based on the so called "spend-down." The spend-down is an ongoing payment of "excess" income (i.e., income over a permissible limit) for incurred medical expenses. If possible, income should be minimized (and resources maximized) due to the low monthly income allowance Virginia permits for necessities of life *other* than medical expenses - food, shelter, and clothing.[15] ***The spend-down should not be confused with the exhaustion***

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[7]See Virginia Medicaid Manual § M 320.210 for the "new" 80% FPL category.

[8]42 C.F.R. § 435.210 (1989).

[9]42 C.F.R. § 435.211, .236 (1991), Virginia Medicaid Manual § M 0320.203.

[10]Medicaid Manual, Volume XIII, Part I, Chapter A.

[11] Virginia Medicaid Manual § M 0320.202.

[12]See http://www.ssa.gov/OACT/COLA/SSI.html, accessible via http://majette.net.

[13] Virginia Medicaid Manual § M 330.001.

[14] Virginia Medicaid Manual § M 0330.001 A 1.

[15] The amount is even less than the SSI "subsistence" value; in Virginia, *all* income of the applicant / recipient is considered available to pay for medical needs to the extent the monthly income exceeds as little as $230.08 per month! See Majette, *Practical Elder Law Entitlements: SSI and Medicaid: 2002*, Virginia Law Foundation 11th Annual Elder Law Seminar, page I-28, for tables.

of assets that is sometimes required before an applicant is impoverished enough to qualify for Medicaid.

3. Long-term Care Coverage. Medicaid is available for aged, blind or disabled persons who are medically needy and located in medical facilities furnishing nursing facility services.[16] Medicaid is available in Department of Mental Health and Mental Retardation facilities in accordance with special limitations[17]

B. What Are The General Financial Requirements?

1. Income Limitations. There is no strict income limit for persons receiving nursing care services in private nursing facilities. A medically needy resident's income affects the amount of "patient pay" required - i.e., the amount the individual must contribute to the cost of care.

   a. Otherwise eligible residents in Virginia public mental facilities (i.e., generally residents of state hospitals under the age of 21 (22 in certain cases of ongoing treatment, *supra)* or over the age of 65) are eligible only if their income does not exceed 300% of the monthly SSI rate.

2. General Resource Rules. Applicants/recipients may have the following amounts in "*countable*" resources. A "countable resource" is any property which is not excluded from consideration by the Virginia Medicaid Plan or Virginia Medicaid Manual, and which a person owns, has the right, authority or power to convert into cash, and which the person is not legally restricted from using for support and maintenance.[18]

   a. An individual may retain $2,000.00. A couple may retain $3,000.00 in 2002 if both apply.

   b. When one spouse is admitted to a nursing facility and the other remains in the community (defined as anywhere that is not "institutionalized"), the

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[16]12 VAC 30-50-60(2), (5) (medically needy); 12 VAC 35-50-20(2), (4) (categorically needy); Virginia Medicaid Manual § M 1460 (long term care generally), 1470 (patient pay for long term care) and 1480 (spousal impoverishment – when one spouse is institutionalized and the other is not).

[17]Virginia Medicaid Manual § M 0320.203 for medical institutions generally; Virginia residents over the age of 65 and under the age of 21 (or, in cases of ongoing care *prior* to age 21, until the 22nd birthday) are eligible for Medicaid reimbursement for their care while in an institution for treatment of mental diseases (IMD) if they: (1) receive such care and treatment in a specified medical or surgical center, intensive psychiatric center, skilled nursing facility, intermediate care facility, or intermediate care facility for the mentally retarded within in a Virginia public mental facility; (2) meet the resource limitations and transfer of resource policies described below, and (3) if their income does not exceed 300% of the SSI income limit. Virginia Medicaid Manual § M 0280.200. Individuals not meeting these restrictions are not eligible and their cases are closed. Virginia Medicaid Manual § M 1550.400.

[18]Medicaid Manual, S1110.100 (B).

community spouse is entitled to retain a "community spouse resource allowance."[19] The spouse in the nursing facility is still entitled to retain $2,000.00.

c. Eligibility based upon resources is determined for each calendar month. Resource eligibility exists for the entire calendar month if countable resources were at or below the resource limit at any time in the month.[20]

C. Whose Assets Fund The Trust?

1. Property which is transferred without adequate compensation (i.e., transferred into a trust for less than what Medicaid deems fair value) is presumed to have been transferred for purposes of qualifying for benefits under Medicaid, and generally results in the disqualification of the transferor for a specified period of time dating from the month in which the transfer is made.

2. The disqualification period is for Medicaid long term care services.[21]

   a. "Long term care services" includes nursing home and "waivered" home health care services under the Virginia Medicaid plan.

3. If the transferor is married, the transferor and the transferor's spouse are *each* made ineligible.[22]

4. If the Medicaid applicant or recipient (or the transferor's spouse) is entitled to property which he fails to take, such as through a disclaimer,[23] he is treated as having made a transfer of such property.

D. Who Is The Medicaid Applicant Or Recipient?

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[19]The rules for the calculation of the CSRA are inherently complex. Virginia Medicaid Manual § M 1480.000 *et seq.* They are often the subject of Medicaid appeals. *Wisconsin v. Blumer*, 122 S.Ct. 962 (2002)(states may require that institutionalized spouse's income be wholly allocated to the community spouse before allowing additional resources to be protected). Creation of a trust for a disabled child of a nursing home spouse should be considered, but only after suitable provision is made for the community (well) spouse is provided for under these rules. A good text on the subject is the Virginia Law Foundation, *Estate Planning in Virginia, 2d. Ed*., Chapter 8 (by writer).

[20]Medicaid Manual, M1100.001 (B)(1).

[21] 42 U.S.C. § 1396p(e)(1); 12 VAC 30-40-300(E); Medicaid Manual § M1450.500 et seq.

[22]12 VAC 30-40-300 (E)(2) provides that "[a]n institutionalized individual who disposes of, or whose spouse[0] disposes of, assets for less than fair market value on or after the look-back date specified in subdivision 2.b. shall be ineligible for nursing facility services, a level of care in any institution equivalent to that of nursing facility services and for home or community-based services furnished under a waiver granted under subsection (c) of §1915 of the Social Security Act."

[23]Id. (E)(1), definition of "Asset" for purposes of transfers of assets..

1. If the transferor into the trust is not the Medicaid applicant or recipient, or his surrogate, the anti-transfer rules will not apply to the transferor.

    a. Surrogates for purposes of asset transfers under 42 USC 1396p / 12 VAC 30-40-300 (E) are:

        (i) the individual's spouse,
        (ii) any person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, or
        (iii) any person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.[24]

    b. *Crummey* withdrawal power *caveat*.

        (i) A *Crummey* power is the right to take property from a trust.

        (ii) The power is required in order to meet the "present interest" element of a gift for the annual gift tax exclusion. When the holder of the power fails to exercise it, a gift is nevertheless imputed to the holder, and the donor of the property to the trust qualifies for the annual exclusion equal to the value of the property over which the power is given.

        (iii) Failure to take available property from a trust pursuant to a *Crummey* power is construed as a transfer of assets by the holder of the power for Medicaid purposes.[25]

        (iv) When a *Crummey* power is required for gift and estate tax purposes, the trust should provide the power to a remainder beneficiary or some third party.

2. If the transferor into the trust, or the spouse of the transferor, is or may become a Medicaid applicant or recipient, the anti-transfer rules will be applied to the transferor upon the creation of *any* irrevocable trust.

E. When Does The Transferor Apply For Medicaid?

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[24] 42 USC 1396p (e) (1), definition of "Asset," and 12 VAC 30-40-300 (E)(1), definition of "Asset" for purposes of transfers of assets.

[25] 12 VAC 30-40-300 (E)(1), definition of "Asset" for purposes of the regulation; Virginia Medicaid Manual § M 1450.003 (B)(assets not claimed may be deemed transferred for less than value).

1. The "look-back date" is the first date of a period during which Medicaid may scrutinize the transfers of assets made by a Medicaid applicant or recipient.[26]

2. Transfers to anyone other than a trust sets a 36 month look-back.

3. Transfer to an irrevocable trust sets a 60 month look-back.

F. Who Can Be Made Medicaid Ineligible By *Establishment* Of The Trust?

1. The *transferor* can be rendered ineligible if assets are transferred to a non-exempted trust is by reason of the *act* of transferring assets into the trust.

2. The *spouse of the transferor* can be rendered ineligible if the trust is not exempted under the Virginia Medicaid plan by reason of the *act* of transferring assets into the trust.[27]

G. Who Can Be Made Medicaid Ineligible By Reason Of The *Existence* Of The Trust?

1. The *beneficiary* (who is not also the transferor) can be rendered ineligible based upon the *availability* of the trust assets to him. This can be avoided by providing the trustee with total discretion in the administration of the trust and a specific instruction to consider public benefits as a resource to be protected by the trustee in the exercise of such discretion.[28]

2. See *Crummey* discussion above with respect to powers over an otherwise exempt trust.

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[26] Virginia Medicaid Manual § M 1450.500.

[27] *Id.* Once Medicaid has been established for the institutionalized spouse of a community spouse, Virginia appears to insist that it may disqualify the institutionalized spouse from Medicaid by reason of a (post-eligibility) transfer of assets by the community spouse. This is contrary to the stated position of HCFA (predecessor to the present Center for Medicare and Medicaid Services (CMS)): "[A]fter the month in which an institutionalized spouse is deemed eligible for Medicaid, any resources belonging to the community spouse are solely the property of that spouse. That is, the community spouse can do whatever he or she wants to do with them." Ronald Preston, Associate Regional Administrator, HCFA, April 5, 2000; posted at http://majette.net.

[28] Trust assets in a completely discretionary trust are exempt as resources to the beneficiary because they are not considered resources to him under the definition provided in Virginia Medicaid Manual § M 1120.010: the trust beneficiary has no ownership interest, no legal right to access the trust corpus or income, and no legal ability to use, or compel the use, of the same for his support. More specifically, when "an individual … has legal authority to revoke the trust and then use the funds to meet his food, clothing or shelter needs, or if the individual can direct the use of the trust principal for his/her support and maintenance under the terms of the trust, the trust principal is resource for Medicaid purposes[,]" Virginia Medicaid Manual § M 1120.200 D 1, but when he "does not have the legal authority to revoke the trust or direct the use of the trust assets for his/her own support and maintenance, the trust principal is not the individual's resource." *Id.* D 2.

H. How Does The Transfer Of Assets Into A Trust Affect The Medicaid Applicant?

1. Federal law requires that property of the applicant / spouse transferred into a trust for sixty months before (and at any time after) an institutionalized person files an application for Medicaid be reviewed by DMAS to determine whether the transfer renders the transferor, or the transferor's spouse, disqualified for Medicaid payment of long term care services for a certain period of time.

2. The period of time for which the applicant must disclose transfers is referred to as the "look-back" period.[29]

3. At least for civil purposes, a "transfer" is considered to be made by any action that reduces or eliminates the applicant's ownership or control of an asset. Included are gratuitous transfers, sales, disclaimers, transfers of income, etc. Transfers may be made by the applicant, and, depending upon the date of the transfers, will be deemed to have been made by the applicant even if made by the applicant's spouse, a joint owner of an asset, a court or administrative body with legal authority to act in place of the applicant, or any other person acting at the direction of, or upon the request of, the applicant or his spouse.[30]

4. In analyzing the transfer DMAS presumes that a transfer of a resource for less than the fair market value was for the purpose of establishing Medicaid eligibility. To rebut the presumption, the applicant must demonstrate by "convincing evidence" that the purpose of the transfer was wholly one other than qualifying for Medicaid. In practice, this is very difficult to do.

I. Who Can Be Prosecuted For A Criminal Act In The Creation Of The Trust Under The Health Insurance Portability And Accountability Act Of 1996 And The Balanced Budget Act Of 1997?

1. Section 217 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) amended 42 U.S.C. § 1320a-7b, "Criminal penalties for acts involving Medicare or State health care programs," to make the "knowing and willful dispos[itions] of assets in order for an individual to become eligible for medical assistance" a criminal act "if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c)." Under Section 218 of HIPAA, the criminal provision became effective on January 1, 1997.

2. In August, 1997, Section 4734 of the Balanced Budget Act of 1997 amended the statute by repealing the criminal penalty as applied to persons *making* the transfer of assets and *imposing* it upon any person who, "for a fee knowingly

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[29] 42 U.S.C. § 1396p; 12 VAC 30-40-300; Medicaid Manual § M1450.500 et seq.

[30] 42 U.S.C. § 1396p(e)(1); 12 VAC 30-40-300; Medicaid Manual § M1450.500 et seq.

and willfully *counsels or assists* an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX [Medicaid], if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917 (C). Section 4734 became effective on August 5, 1997.

3. When it initially enacted HIPAA, Congress failed to proscribe criminal conduct in the statute. While the statute described intent and conduct (knowingly and willfully transferring assets), it failed to proscribe the conduct in the part of the statute that penalizes the behavior, subsections (i) and (ii). The 1997 revision to the statute corrected the error in subsection (ii) of the statute by including "provision of counsel or assistance" by any person who "for a fee … knowingly and willfully counsels or assists" a third person to dispose of assets in order for the individual to become eligible for medical assistance."

4. The statute permits the *act* of transferring assets to obtain eligibility for Medicaid while it criminalizes *communication* of a statement that the law permits such transfers.

5. Constitutional concerns were raised early in connection with the criminalization of the transmission of legal advice, and the generally ambiguous language of the statute.[31]

6. In March, 1998, Attorney General Reno opined that the statute was unconstitutional and informed Congressional leadership in both chambers that she would not defend the same.[32] On April 7, 1998, in *New York State Bar*

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

[32]Text of March 11, 1998 Letter from Attorney General Janet Reno to then Speaker of the House of Representatives Newt Gingrich:

Dear Mr. Speaker:

I am writing to you regarding Section 1128B(a)(6) of the Social Security Act, as amended by Section 4734 of the Balanced Budget Act of 1997, which was signed into law on August 5, 1997. As amended by Section 4734, Section 1128B(a)(6) of the Social Security Act, to be codified at 42 U.S.C. Sec. 1320a-7b(a)(6), provides that whoever: for a fee knowingly and willfully counsels or assists an individual to dispose of assets 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), shall ... (ii) in the case of such a ... provision of counsel or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year or both. Pub. L. No. 105-33, 11 Stat. 522-23. Section 1128B(a)(6) is the subject of constitutional challenges in New York State Bar Association v. Reno, 97-CV-1768-TJM-DRE in the District Court for the Northern District of New York, and Magee v. United States, 98-CA-073, in the

Association v. Reno, case number 97-CV-1760, the United States District Court for the Northern District of New York issued a preliminary injunction preventing the United States, its agents, servants, employees, attorneys, and all persons in active concert and participation with Attorney General Reno, from commencing, maintaining, or otherwise taking action to enforce 42 U.S.C. § 1320a-7b(a) (6). The injunction has since been made permanent.

District Court for the District of Rhode Island.

This is to respectfully inform you that, after close and careful scrutiny of the matter, the Department of Justice will not defend the constitutionality of Section 1128B(a)(6) because the counseling prohibition in that provision is plainly unconstitutional under the First Amendment and because the assistance prohibition is not severable from the counseling prohibition.

Notably, Section 4734 of the Balanced Budget Act of 1997 repealed the prior Section 1128B(a)(6) of the Social Security Act, which had been added by Section 217 of the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 2008, and which was codified at 42 U.S.C. Sec. 320a-7(a)(6) (Supp. II 1996)). The prior Section 1128B(a)(6) of the Social Security Act made it unlawful for any person to "knowingly and willfully dispose[ ] of assets (including by any transfer in trust) in order for an 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 1317(c).

Because Section 4734 repealed the provision just quoted, the new Section 1128B(a)(6) of the Social Security Act would prohibit attorneys and other professional advisors from "counsel[ing]" their clients to engage in an estate-planning strategy that itself is lawful. Under these unique circumstances, and in light of the fact that, pursuant to this provision, professional advisors such as attorneys would be prohibited from providing truthful, non-misleading advice to their clients about lawful behavior, we are unable to identify a governmental interest that would justify this restriction on protected speech. Accordingly, we believe that the "counseling" prohibition in Section 1128B(a)(6) of the Social Security Act plainly is unconstitutional under First Amendment, and cannot survive judicial scrutiny.

The amended Section 1128B(a)(6) of the Social Security Act also would prohibit attorneys and other professionals from "assist[ing]" an individual "to dispose of assets in order for the individual to become eligible for medical assistance", if disposing of the assets results in the imposition of a period of ineligibility for Medicaid nursing home benefits under Section 1917(c). Congress may enjoy greater authority under the Constitution to restrict professional "assist[ance]" that is distinct from "counsel[ing]," since such assistance need not necessarily take the form of protected speech. However, we do not believe that Congress would have intended to impose an assistance prohibition in the absence of a concomitant prohibition either on the underlying conduct (the disposal of assets itself) or on the counseling to engage in such conduct. Accordingly, we have concluded that the assistance prohibition is not severable from the counseling prohibition.

Therefore, in accordance with the practice of the Department, I am hereby informing the Congress that the Department of Justice will not defend the constitutionality of the counseling prohibition in Section 1128B(a)(6) of the Social Security Act. Consistent with my determination on the constitutional and severability questions, I also am hereby informing the Congress that the Department of Justice will not bring any criminal prosecutions under the current version of that Section.

Finally, I would like to stress that the Department of Justice is available to assist Congress, if it so desires, in attempting to draft new legislation that would address the concerns of Congress in a manner that comports with contemporary First Amendment jurisprudence and that meets other policy objectives of the Congress and the Executive Branch.

Sincerely,

Janet Reno"

7. Apart from the constitutional issues, the statute itself states that that persons who receive a fee for counsel or assistance in effecting a transfer may only be subjected to the penalty when such a transfer will "result in the imposition of a period of ineligibility for such [Medicaid] assistance." Transfers which do not result in the imposition of ineligibility are not sanctioned.[33]

8. Under the statute, only those dispositions made within a "look-back" period, and which are not specifically exempted, constitute a basis for disqualification.

9. Dispositions for less than fair market value cannot cause a period of Medicaid ineligibility or exposure under the statute are as follows:

    a. Dispositions occurring *before* the "look-back" date (42 U.S.C. § 1396p(c)(1)(A)), as defined in 42 U.S.C. § 1396p(c)(1)(B)(i), (ii), cannot be the basis for a period of ineligibility.

    b. The "look-back date" is 36 months prior to the month in which the Medicaid application is made, unless the disposition is in favor of a nonexempt trust (see below).

    c. In the case of a disposition in favor of a nonexempt trust, the look-back date is 60 months.[34]

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[33]42 U.S.C. § 1396p(c)(4) provides that "[a] State (including a State that has elected treatment under section 1902(f) [42 U.S.C. § 1396a(f)]) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection."

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

[34]A critical issue in the interpretation of the criminal statute is whether legal advice to apply within the "look-back" period but beyond the calculated period of ineligibility (see below) subjects the paid counselor to criminal liability. See *Peebler* and *Matter of Gersten, supra*. The issue is directly answered in a *non-binding* but persuasive opinion issued by the Office of the Inspector General pursuant to 42 C.F.R. Part 1008.41 in 1997. D. McCarty Thornton, Chief Counsel to the Inspector General, opined in OIG Advisory Opinion 97-3 that an attorney counseling a recipient to make a series of transfers which resulted in a period of ineligibility under the Oregon Medicaid plan did not breach the criminal statute when the transfers caused a period of disqualification, but no period of ineligibility was imposed because the Medicaid application was filed *after* the date ineligibility would lapsed.

Referring to the “key” portion of 42 U.S.C. § 1320a-7b(a)(6), “the last phrase, if disposing of the assets results in the imposition of a period of ineligibility for such assistance[,]’ the Office of the Inspector General concluded that the transferor and the attorney “will not be subject to sanction under 42 U.S.C. § 1320a-7b(a)(6), because no period of ineligibility will be imposed because of Mrs. P's disposition of assets.”

10. Dispositions occurring *within* the "look-back" period but which are expressly exempted by the state's Medicaid plan[35] and the federal statute cannot cause a period of ineligibility.

11. 42 U.S.C. § 1396p(C) (2) and the applicable portion of the Virginia Medicaid Plan[36] provides that an "individual shall not be ineligible for medical assistance by reason o paragraph (1) (i.e., transfers made after the look-back date) to the extent that:

    a. the assets transferred were a home and title to the home was transferred to -

        (i) the spouse of such individual;

        (ii) **a child of such individual who** is under age 21,

        (iii)**(with respect to States eligible to participate in the State Program established under title XVI [42 U.S.C. § 1381 et seq.]) is blind or permanently and totally disabled, or (with respect to States that are not eligible to participate in such program) is blind or disabled as defined in Section 1614 [42 U.S.C. § 1382c]**

        (iv)a sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date the individual becomes an institutionalized individual; or

        (v) a son or daughter of such individual (other than a child described in clause (ii)) who was residing in such individual's home for a period of at least two years immediately before the date the individual becomes and institutionalized individual, and who (as determined by the State) provided care to such individual which permitted such individual to reside at home rather than in such an institution or facility;

    b. the assets [including but not limited to a home]

        (i) were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;

        (ii) were transferred from the individual's spouse to another for the sole benefit of the individual's spouse;

        (iii)**were transferred to, or to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of, the**

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[35]See 12 VAC 30-40-300.

[36]Id., (E.)(3), (3)(g).

individual's child described in subparagraph (A)(ii)(II), or

(iv) **were transferred to a trust (including a trust described in subsection (d)(4)) established solely for the benefit of an individual under 65 years of age who is disabled (as defined in section 1614 (a)(3)) [42 U.S.C. § 1382c(a)(3)].**

II. Third Party Trusts.

A third party trust for purposes of this presentation is a trust in which the settlor of the trust and the contributor of the assets funding the trust is ***not*** the same as the *beneficiary* of the trust.

A. Testamentary Spendthrift Trust.

1. Testator's Medicaid Implications.

   a. 42 U.S.C. § 1396p (d)(2)(A) expressly applies to all trusts created "other than by will."[37]

   b. Virginia Medicaid estate recovery from the testator's estate will reduce the assets which may fund the testamentary trust.[38]

      (i) When the testator is a Medicaid recipient with a potentially large estate recovery claim an *inter vivos* (d)(4)(A) trust, even with the mandatory payback provision for the beneficiary's Medicaid claim, is advantageous.

      (ii) Example: chronically ill grandparent wishes to benefit disabled grandchild; if the grandparent does not transfer the property from his estate during lifetime, Medicaid will recover its payments from the same (usually a home) *before* the testamentary trust is established, leaving little for the grandchild. In contrast, establishment of a (d)(4)(A) trust during the lifetime of the grandparent avoids estate recovery and protects more resources for the disabled grandchild.

2. Beneficiary's Implications.

   a. Available or Unavailable Resource Analysis.

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[37] 12 VAC 30-40-300-(E)(3)(b).

[38] 12VAC30-20-140. Estate recoveries. A. General. Under the authority and consistent with the requirements of the Social Security Act §1917, the Commonwealth recovers certain Medicaid benefits when they have been correctly paid on behalf of certain individuals. The Commonwealth seeks recovery for all services which have been paid for consistent with the coverage and reimbursement policies in the State Plan for Medical Assistance.

(i) Virginia Code § 55-19 governs spendthrift trusts and permits such trusts to be created with up to $1,000,000.00.

(ii) § 55-19 (D) permits the Attorney General or DMAS to file a circuit court petition "seeking reimbursement without first obtaining a judgment" from the trustee by "[o]rder[ing] the trustee to satisfy ... the liability out of [the trust] ... to the extent the beneficiary [can] ... compel ... pay[ment of] income or principal.... A duty in the trustee under the instrument to make disbursements in a manner or in amounts that do not cause the beneficiary to suffer a loss of eligibility for public assistance ... shall not be considered a right possessed by the beneficiary to compel such payments." The Court may also "order the trustee to satisfy ... the liability [from] future payments, if any, that ... the trustee chooses to make."

(iii)"Whether a beneficiary is entitled to support from the trust if other resources are available is a question of trust interpretation. *Smith v. Gillikin,* 201 Va. 149, 153-54, 109 S.E.2d 121, 124 (1959). **In reaching the correct interpretation, the intent of the testator in establishing the trust as ascertained from the plain language of the instrument controls a court's inquiry.** *Gasque v. Sitterding,* 208 Va. 206, 210-11, 156 S.E.2d 576, 580 (1967); *Smith,* 201 Va. at 154, 109 S.E.2d at 124; *Mills v. Embrey,* 166 Va. 383, 385, 186 S.E. 47, 48 (1936)." *NationsBank v. Grandy*, 248 Va. 557, 561, 450 S.E.2d 140 (1994) (emphasis added).

(A) The trust instrument should accordingly clarify that the testator intends that the trustee act in such a fashion as to preserve, insofar as is possible the Medicaid and applicable Social Security benefits of the beneficiary

(iv) Since no order for reimbursement can be made under Virginia Code § 55-19(D) "if the beneficiary is an individual who has a medically determined physical or mental disability that substantially impairs his ability to provide for his care or custody and constitutes a substantial handicap," identify the beneficiary as a person with such a disability *in the will itself.*

(v) Va. Medicaid Manual, § M 1140.400 states that assets in a discretionary, testamentary trust cannot be attributed to the beneficiary except to the extent the trustee makes the same available to the beneficiary.

b. Income analysis.

(i) Cash distributions to the beneficiary will be deemed income to the

beneficiary, reducing or eliminating SSI or Medicaid benefits to the beneficiary.[39]

(ii) Loans from the trust to the beneficiary are not considered income under SSI[40] or Medicaid[41] rules.

(iii) Trust distribution of food, clothing, or shelter, or certain incidents of shelter (such as certain utilities) for the beneficiary can be deemed income under special SSI rules which reduce the SSI entitlement by one third each month.[42]

c. When the testator is survived by a Medicaid recipient spouse, the survivor's elective share and augmented estate rights[43] must be considered in making a testamentary trust for the benefit of a disabled child.[44]

(i) Spouses are authorized by statute to enter into marital agreements.[45] These agreements may provide for the disposition of their estates at death.[46]

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[39]Va. Medicaid Manual, § M1120.200 (E)(1)(a).

[40]20 C.F.R. 416.1103(f).

[41]Va. Medicaid Manual, § S0815.350.

[42]Virginia Medicaid "counts" and determines income for blind, disabled and aged beneficiaries in accordance with the SSI rules. 12VAC30-40-100(b) [aged]; (c) [blind]; (d) [disabled]. 20 C.F.R. 416.1131 and 20 C.F.R. 416.1140 are the "one third reduction" and "presumed value" rules, respectively, for counting in-kind income in the SSI program.

When the beneficiary of the trust is living in another person's home, the "one-third" reduction rule applies and counts as income equal to 1/3 of the then existing federal SSI rate (i.e., in 2002, one third of $545, or $182.; see http://ssa.gov/cola/ssi.html for updates). If the SSI income is more than one third of the benefit rate, then the reduction will not terminate Medicaid for the recipient. If the SSI income supplement is less than $182, the reduction will terminate SSI and thus categorical entitlement for Medicaid.

When the beneficiary is not living in another person's home, the presumed value rule applies. It reduces the benefit by the same amount, but permits the recipient to prove that the actual value of the in-kind distributions is less than one third of the benefit amount ($182), in which case the SSI income payment is reduced by the smaller value. If the actual value of the in-kind income exceeds one third of the benefit amount, Social Security uses only the presumed (i.e., smaller) value in determining the amount of imputed income. 20 C.F.R. 416.1140 (b)(1,2).

[43]See Va. Code Ann. § 64.1-13 et seq.

[44]Va. Medicaid Manual, § M1450.003 (B) second bullet, which defines an uncompensated transfer as including the failure to assert an inheritance right in court. Apart from conflicting with the Medicaid policy found in §M1120.010 (C)(2), which provides that Medicaid does not require court action for access to property, the bulleted item begs the question of whether the survivor spouse's transfer of his or her right to a share to the decedent's estate, to the decedent spouse during lifetime eliminates the "right" in the estate at death, see below.

[45]Va. Code Ann. § 20-155.

[46]Va. Code Ann. § 20-150 (3,5). Such agreements do not require consideration apart from the marriage, Va. Code Ann. § 20-149. However, the agreement should contain a cross-waiver of the right to elective

(ii) applicable law on the election of a share by the surviving (institutionalized) spouse should be consulted before pursuing this strategy. States considering this or related questions in the Medicaid context have reached different results, usually in the absence of a lifetime marital agreement.[47]

(iii) A testamentary trust by a husband of an institutionalized community spouse, who is also the father of a disabled child, could direct all or a portion[48] of the trust income to the community spouse, simultaneously providing for the survivor spouse's Medicaid qualification,[49] and providing for full discretion with respect to the disabled child distributions, with a remainder or sprinkle provision for other well

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shares. This may avoid a DMAS argument that an agreement not to claim the elective share is an "uncompensated transfer." A waiver by each spouse to elect against the estate of the other appears to be legal consideration for the agreement. In any event, transfers (uncompensated or otherwise) between spouses do not subject either spouse to Medicaid ineligibility, see 42 U.S.C. § 1396p (c)(2)(B)(i).

[47]See Dionisio v. Westchester County Department of Social Services, 1997 N.Y. App. Div. LEXIS 11585 (Sup.Ct. 1997) (institutionalized spouse's unilateral waiver of estate participation was transfer of assets; counsel failed to proffer copy of mutual waiver); Nielsen v. Cass County Social Services Board, 395 N.W.2d 157 (N.D. 1986) (Medicaid applicant's guardian permitted to disclaim inheritance without rendering ward ineligible); (Flynn v. Bates, 413 N.Y.S.2d 446 (Sur. Ct. 1979) (Medicaid benefits properly denied when surviving spouse does not elect against will of deceased spouse). See also Estate of Ott, 408 N.Y.S.2d 303, 306 (Sur. Ct. 1978) (renunciation not a transfer at common law)(pre-OBRA). For a Virginia treatment of the potential pitfalls, see Majette, "*Decedent's Estate Planning For Spouse Of An Institutionalized Spouse*," Virginia Law Foundation 8th Annual Elder Law Seminar (1999).

If the spousal agreement is bilateral, with cross waivers supporting one another as consideration, there is no "uncompensated" transfer by either spouse of any asset to another. If the agreement is held to be an uncompensated transfer in any case, the transfer is of the elective share right between spouses. Inter-spousal transfers do not form the basis for any Medicaid disqualification. See 12 VAC 30-40-300 (E). Thus, with a post-nuptial waiver, the community spouse could bypass the surviving institutionalized spouse altogether, or establish a purely discretionary, spend-thrift testamentary trust to provide benefits to the disabled child and the surviving spouse which will not prevent either from receiving or retaining Medicaid benefits.

[48]The extent to which trust income would be sufficient to equal one third of the estate's value will depend upon the age of the community spouse at the time of death. See life estate tables at Va. Medicaid Manual, §M1450.1000.

An actuarially unsound annuity will not necessarily be fatal to the surviving spouse's Medicaid entitlement in one and probably two cases. If the survivor spouse is not a Medicaid recipient or applicant when the first spouse dies, or within the penalty period determined under Va. Medicaid Manual, § M1450.701 (D), any possible penalty period will commence to run at the death of the first spouse. If this is expired by the time the survivor spouse applies for Medicaid there is no practical period of ineligibility. See Va. Medicaid Manual, § M1450.702 (B). Even if the income interest is insufficient to equal one-third of the value of the estate under Va. Code Ann. § 64.1-16.2 and or if the trust provides for the sole benefit of the survivor spouse and the remainder to and for the sole benefit of the disabled child, since any transfer to either is fully exempted from disqualification analysis.

[49]Virginia Code § 64.1-16.2 specifies that in "determining the elective share, values included in the augmented estate which pass … to the surviving spouse, … are applied first to satisfy the elective share …."

children of the couple.

3. Settlor's Tax Implications.

4. Beneficiary's Tax Implications.

B. Revocable Trust.

1. Settlor's Implications.

   a. Revocable trusts are "transparent" until distributions to anyone other than the applicant or recipient are made. Until such distributions are made, Medicaid treats the assets as available to the settlor or the settlor's spouse for purposes of determining Medicaid eligibility for either.[50]

   b. Distributions made to anyone other than the settlor or the settlor's spouse are treated as a transfer of assets by the settlor or the settlor's spouse.[51]

   c. Because distributions from the trust are "considered assets disposed of by the individual for the purposes of [42 U.S.C. § 1396p (c)]," see 42 U.S.C. § 1396p (d)(3)(A)(iii), such distributions from the trust would be subject to the same exemptions as applicable to outright transfers by the applicant.[52]

2. Beneficiary's Implications.

   a. See discussion relating to the beneficiary implications of the testamentary discretionary trust, *supra*.

   b. <u>When the settlor is survived by a spouse who is or within five years of the death of the settlor spouse becomes a Medicaid applicant or recipient, in addition to the elective share issues noted in the treatment of the testamentary trust, the assets in the revocable trust, unlike those in a testamentary trust, are considered to have been transferred by the surviving spouse.</u>

      (i) If the trust does not meet any transfer of asset exemption[53] the survivor spouse may be disqualified for Medicaid benefits based upon the "uncompensated value" of the assets transferred into the trust at the

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[50]12 VAC 30-40-300(E)(3)(e) (1); Va. Medicaid Manual, § M1450.603 (B)(1).

[51]12 VAC 30-40-300(E)(3)(e)(2); Va. Medicaid Manual, § M1450.603 (B)(2).

[52]Id. Note, however, that a transfer by the trustee will cause a sixty month look-back period instead of a thirty-six month look-back. Va. Medicaid Manual, § M1450.603 (B)(3).

[53]12 VAC 30-40-300(E); Va. Medicaid Manual, § M1450.501, 502.

death of the settlor.

(ii) If the revocable trust is for anything other than the "sole benefit" of the spouse and the disabled child (i.e., no remainder to anyone at the death of the child), then the revocable trust will not meet the transfer of asset exemption.[54]

c. The writer ***NEVER*** employs a revocable living trust when there is a spouse in the nursing home or likely to be in a nursing home when Medicaid is possibly in issue.

3. Settlor's Tax Implications.

4. Beneficiary's Tax Implications.

C. Irrevocable Inter Vivos Trust Created After August 10, 1993, With Assets *Other* Than Those Of The Beneficiary.[55]

1. Settlor's Medicaid Implications.

a. Settlor Retains Interest In Trust.

(i) When the trust allows for circumstances under which payment can be made to or for the benefit of the individual settlor / transferor from all or a portion of the trust, the portion of the trust which *could* be paid to or for the benefit of the settlor / transferor is a resource available to him.[56]

(ii) Income produced by the trust principal which could be paid to or for the benefit of the individual is a resource available to him,[57] and payments which are actually made to the settlor / transferor are counted as income to him.[58]

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[54]12 VAC 30-40-300(E). See also Va. Medicaid Manual, § M1450.502 (C) and HCFA Trans. 64 (11/94), which requires that the trust pay out for the actuarially determined life expectancy of the disabled child.

[55]Trusts created prior to this date are governed by 12 VAC 30-40-300 (A) through (D).

[56]12 VAC 30-40-300(E)(3)(f)(1); M1450.603(C) (1)a. Thus, no period of ineligibility will be imposed for such a transfer, regardless of whether the trustee refuses to use the assets for the benefit of the settlor / transferor. See Va. Medicaid Manual, § M1450.603(C) (1) (a).

[57]Va. Medicaid Manual, § M1450.603 (C) (1)b.

[58]Va. Medicaid Manual, § M1450.603 (C) (1)c.

(iii) Payments from the trust which are not made to the settlor / transferor are viewed as uncompensated transfers of assets.[59]

b. Settlor Retains No Interest In Trust.

(i) When a settlor / transferor transfers property to the trust which does not allow for payment to or for the settlor / transferor, the transfer is considered a transfer of assets for less than fair market value.[60]

(ii) The look-back date for the transfer is sixty months from the date of the transfer, or the last transfer by the settlor / transferor into the trust.[61]

(iii) If the transfer is for the sole benefit of a child under the age of twenty one years, a disabled child of the settlor / transferor, a disabled person under the age of sixty five years (if the state is permitted recovery under the provisions of 42 USC 1396p(d)(4)(A),[62] or the spouse of the settlor / transferor, the settlor / transferor's transfer *into* the trust will have no effect on Medicaid eligibility on the settlor / transferor.[63]

(iv) Transfers by the trustee from such a trust do not affect the Medicaid eligibility status of the settlor / transferor.[64]

2. Non-Settlor (Self Settled) Beneficiary's Implications.

See discussion relating to the beneficiary implications of the testamentary discretionary trust, *supra*.

3. Settlor's Tax Implications.

4. Beneficiary's Tax Implications.

III. Beneficiary Settled Trusts Under 42 USC 1396p(d)(4)(A).

A. SSI Implications.

As this outline is written, there are several unresolved issues concerning the establishment of trusts under the anti-transfer and anti-trust provisions of 42 USC

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[59] Va. Medicaid Manual, § M1450.603 (C) (1)d.

[60] 12 VAC 30-40-300(E)(3)(f)(2); Va. Medicaid Manual, § M1120.201 (C)(2)(b); Va. Medicaid Manual, § M1450.603 (C) (2).

[61] Va. Medicaid Manual, § M1450.603 (C)(2)(c). See Example # 6.

[62] See below.

[63] 12 VAC 30-40-300(E)(2); (G).

[64] Va. Medicaid Manual, § M1450.603 (C)(2)(b).

1382b, as effective on January 1, 2000.

1. Federal Statute.

a. 42 USC 1382b, Resources, specifies exempt resources and, as of January 1, 2000, disqualification procedure for persons who, within three years of apply for SSI, transfer assets.

b. 42 USC 1382b (c) (1) (C) (ii) incorporates Medicaid exceptions to the period of disqualification for SSI (and thus categorical eligibility for Medicaid) for transfer of ***any asset*** to certain beneficiaries (spouses, disabled children, etc.) and to the trusts described in this part of the outline:

"(C) An individual shall not be ineligible for benefits under this subchapter by reason of the application of this paragraph to a disposal of resources by the individual or the spouse of the individual, to the extent that -

….

the resources -

(I) were transferred to the transferor's spouse or to another for the sole benefit of the transferor's spouse;

(II) were transferred from the transferor's spouse to another for the sole benefit of the transferor's spouse;

(III) were transferred to, or to a trust (including a trust described in section 1396p(d)(4) of this title) established solely for the benefit of, the transferor's child who is blind or disabled; or

(IV) ***were transferred to a trust (including a trust described in section 1396p(d)(4) of this title) established solely for the benefit of an individual who has not attained 65 years of age and who is disabled.***"[65]

c. The Medicaid exceptions for trusts funded with the assets of the Medicaid applicant / recipient set forth in 42 USC 1396p (d) are also specifically incorporated for *SSI purposes* at 42 USC 1382b.

(i) 42 USC 1382b (e)(1) provides, "[i]n determining the resources of an individual, paragraph (3) shall apply to a trust (other than a trust described in paragraph (5)) established by the individual.)

(ii) 42 USC 1382b (e)(3) provides:

[65]Emphasis added.

"(A) In the case of a revocable trust established by an individual, the corpus of the trust shall be considered a resource available to the individual.

(B) In the case of an irrevocable trust established by an individual, if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual (or of the individual's spouse), the portion of the corpus from which payment to or for the benefit of the individual (or of the individual's spouse) could be made shall be considered a resource available to the individual."

d. 42 USC 1382b (e)(5) states that "[t]his subsection shall not apply to a trust described in subparagraph (A) or (C) of section 1396p(d)(4) of this title."

2. Federal POMS.

a. POMS SI 01120.203 (E), *Exceptions to Counting Trusts Established on or after 1/1/00*,"[66] contrary to federal statute and without any underpinning in any known regulation or case law (and expressly contrary to the established judicial practice in Virginia[67] and elsewhere), states:

"e. Who Established the Trust

To qualify for the special-needs trust exception, the trust must have been established by the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

The special-needs trust exception **does not apply** to a trust established by the individual himself/herself.

The person establishing the trust must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust by an individual without the legal right or authority to act with respect to the assets of the individual may result in an invalid trust.

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[66]Available at http://majette.net or by direct link to the Social Security Administration website here: http://policy.ssa.gov/poms.nsf/517e83681a5eb8b28525688d0058721c/a77a5f8f0a02abf985256a5f000b5b79?OpenDocument

[67]See *Commonwealth of Virginia, Department of Medical Assistance Services v. Huynh*, 262 Va. 165 (2001) (writer's case).

NOTE: This requirement refers to the individual who physically took action to establish the trust even though the trust was established with the assets of the SSI claimant/recipient."

b. **Interpretation of Federal POMS in the W. Case.**

Reproduction of Social Security Administration Supplemental Security Income Notice of Reconsideration.

Notice of Reconsideration

September 17, 2002
Claim Number: 123-45-5679
Reconsideration Filed: 06/10/2002

Social Security has determined REDACTEDNAME's Trust of 2002 to be countable for Supplemental Security Income purposes. Based on information shared with Mandy Ballasy, our Systems Support Specialist, we found that REDACTEDNAME'S father, Mr. REDACTEDNAME FATHER, Sr., had no legal authority to act in reference to his adult son's assets. If the legal authority to establish the trust is under the provision of 6.1-125.15:1 (Duties of parties to joint bank accounts), then this appears to be based on the father being considered an agent or attorney-in-fact. As such, the actions of the parent to establish the trust are within the scope of that authorization and, under law, it is as though the actions have been taken by the adult child. This means that although the trust was validly established by the parent, it would not meet the Medicaid exception due to the fact that it was actually established by the adult child (through an agent, the parent). Assuming this trust was validly established, we look to the Medicaid exceptions under 1917 (d) (4) (A) and (C) [42 USC 1396 (d) (4) (A) and (C). The provisions of 42 USC 1382 (c) is in reference to the transfer of assets. This is applied to any claimant that transfers an asset to become eligible for Supplemental Security Income (SSI). There is an exception for any claimant who transfers the assets to a 1396p (d) (4) trust for that claimant's child who is blind or disabled. This would only apply to this trust if REDACTEDNAME FATHER (SSI claimant) established a trust for his son or daughter which is not the case in this particular situation. Therefore, Social Security concludes that the REDACTEDNAME Trust of 2002 is

hereby determined invalid and consequently, countable as a resource for Supplemental Security Income (SSI) purposes.

B. Medicaid Implications.

While Congress obviously limited the use of trusts to qualify or retain eligibility for Medicaid in 1993, it simultaneously incorporated into statutory law the judicial gloss that had developed to help disabled Medicaid beneficiaries.[68]

Two of the OBRA'93 trusts are important in Virginia practice.[69]

1. Trust For Disabled Persons Under Age 65.[70]

a. These trusts are not deemed to be a resource of the beneficiary.[71]

b. Transfers to such a trust are not considered disqualifying transfers of assets.[72]

c. The only persons who may establish these trusts are the disabled person's parent, grandparent, or legal guardian, or a court on behalf of the disabled person.[73]

(i) While the disabled person cannot *establish* the trust, assets of the disabled person, or of any other person, may be transferred to the trust without incurring a period of Medicaid disqualification .

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[68]42 USC 1396p(d),(e); 12 VAC 30-40-300 (E)(1), effectively eliminating by statute and regulation the pre-OBRA law basis for these trusts, see Miller v. Ibarra, 746 F.Supp. 19 (D.Colo. 1990); Navarro v. Sullivan, 751 F. Supp 349 (E.D.N.Y. 1990); Trust Company of Oklahoma v. State of Oklahoma, 825 P.2d 1295 (Ok. Sup. Ct. 1991), cert *den.*, 121 S.E.2d 224 (1992) (court established trust); *Kegel v. State*, 830 P.2d 563 (N.M. App. 1992); *Hughes v. Physicians Hospital*, 566 N.Y.S.2d 496 (Sup. 1991) (settlement paid directly to special needs trust without intervention of guardian, under court order).

[69]The third trust is for use in "income-cap" states, which include the State of Florida.

Income-cap states do not cover the optional medically needy category. Such states impose a strict limit on income as a condition to Medicaid eligibility. The unavailability of Medicaid in these states was the original basis for *Miller v. Ibarra*, 746 F.Supp. 19 (D.Colo. 1990), the seminal case for the judicial gloss.

When the settlor / transferor is likely to reside in an income cap state, counsel should review 42 U.S.C. § 1396p (d) (4)(B) for the specific requirements for these "income" trusts and consult local counsel for drafting nuances of the particular jurisdiction.

[70]42 U.S.C. § 1396p (d)(4)(A); 12 VAC 30-40-300(E)(3)(g)(1); *Medicaid Manual*, M1120.202.

[71]42 U.S.C. § 1396p (d)(4)(A); 12 VAC 30-40-300 (E)(3)(g); Va. Medicaid Manual, § M1120.202(B).

[72]42 U.S.C. § 1396p (c)(2)(B)(iv); 12 VAC 30-40-300 (E)(3)(g); Va. Medicaid Manual, § M1450.502 (C).

[73]42 U.S.C. § 1396p (d)(4)(A); 12 VAC 30-40-300 (E)(3)(g); Va. Medicaid Manual, § M1120.202(B).

d. The trust must be for the sole benefit of an individual under 65 who is disabled for Social Security purposes (i.e., "disabled as defined in [42 U.S.C. § 1382c(a)(3)]").

e. The trust must provide that the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the beneficiary under a the Medicaid plan.

   (i) Since it is impossible to predict how Medicaid may mutate or whether it will even survive, payment should be qualified by language limiting the requirement to the minimum necessary to secure the exemption.

   (ii) If the reimbursement requirement is later eliminated, a naked direction to reimburse could require trust assets to be paid the state that otherwise could have passed to the settlor's more likely remainder persons.

f. Section 3259.7 of HCFA Trans. 64 (11/94) states that the trust exemption continues even after the beneficiary reaches age 65. However, HCFA then states that the trust "cannot be added to or otherwise augmented after the individual reaches age 65. Any such addition ... after age 65 involves assets that were not the assets of an individual under age 65. Thus those assets are not be [sic] subject to the exemption discussed in this section."[74]

g. Grantor / Beneficiary Income Tax Implications.

   To preserve the grantor trust tax status of the income generated on the trust (i.e., to have the income taxed at the same rate as the disabled beneficiary), one or more administrative incidents of control over the trust should probably be retained.[75]

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[74]Virginia has not published a position in *Medicaid Manual* § 1450.502 or M1120.202, both of which merely require that the trust be established for a disabled person under the age of 65.

The cited HCFA policy also requires that when the trust beneficiary has resided in more than one state, the states in which he has resided shall receive a proportionate reimbursement share upon the beneficiary's death.

[75]For tax purposes, the grantor of the trust can be the transferor of funds *into* the trust, even though another person is the nominal settlor of the trust. *Blackman v. United States*, 30 A.F.T.R. 846 (Ct. Cl. 1943); Priv. Ltr. Rul. 90--4-007.

While IRC § 674 provides grantor tax status to a trust when the grantor (here, the beneficiary) retains the unrestricted right to remove, substitute, or add trustees, and to designate any person, including the beneficiary/grantor as the replacement, see Treas.Reg. §1.674(d)-2, this power could easily be deemed to require the beneficiary to appoint the property to himself, thus destroying the exempt status of the trust for Medicaid purposes. A better retained power is found by reference to IRC §675(4), which taxes the grantor on the trust income if the grantor retains possession of a power to reacquire the trust property by

h. Grantor / Beneficiary Gift and Estate Tax Implications.

To preserve a step-up for the remainder-persons as to any residue in the trust which is not paid to the state to reimburse the Medicaid claim, in the beneficiary (and considerably more flexibility in the disposition of the assets at the death of the beneficiary), a special power of appointment may be reserved to the beneficiary.[76]

2. **Non-Profit Pooled Trust For Disabled Persons Of Any Age**.

The second trust available in Virginia practice is the nonprofit pooled trust for disabled persons of any age.[77] These trusts are exempt from the general OBRA trust rules. Assets in the trust are not deemed available resources to the beneficiary of the trust or to the grantor of the trust

a. **Because DMAS regulations do not provide a clear exemption for transfers into these trusts, and the federal statute does not expressly exempt transfers into these trusts, it is possible that paid counsel or assistance in funding these trusts could accordingly result in a violation of the criminal statute described above.**

(i) 12 VAC 30-40-300 (E)(3)(g)[78], "Exceptions," states that "*[t]his section* [emphasis supplied] shall not apply to any of the following trust(s)," and then describes the (d)(4)(C) trust.

(ii) To exactly what does "*this* section" refer? Is it the entire regulation, and thus the transfer of assets provision? Or is its reference only to the *countability* of the assets *in the trust under sub*-section (3)*?*

(iii) The first result is preferred under the rule of statutory construction, since the agency promulgating the regulation could have used "sub-section" if that is what "this section" intended.

(iv) However, until August, 1994, the *Medicaid Manual* provided that "transfer(s) of assets into these trusts will not affect eligibility."[79] The

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substituting property of equal value for the same. See also Rev. Rul. 83-25, 1983-C.B. 116; Priv. Ltr. Ruls. 95-02-019, 95-02-020, 95-02-024, 95-02-029, and 95-02-031.

[76]Treas.Reg. §25.2511-2(c); Priv. Ltr. Rul. 94-37-034. Note that it is not relevant that the beneficiary is actually incapable of exercising the retained power of appointment, *Boeving v. United States,* 493 F.Supp. 665 (D. Mo. 1980), *rev'd*, 650 F.2d 493 (8th Cir. 1981), the mere existence of the retained power of appointment appears to avoid any completed gift for this purpose. *Estate of Alperstein v. Commissioner of IRS,* 613 F.2d 1213 (2d Cir. 1979); Rev. Rul. 55-518, 1955 12 C.B. 384; the

[77]42 U.S.C. § 1396p (d)(4)(C); 12 VAC 30-40-300(E)(3)(g)(2); *Medicaid Manual*, M1120.202.

[78]Available at http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-40-300.

[79]*Medicaid Manual*, Volume XIII, Part II, Chapter D, page 26e (Trans. #93-4, 10/93).

replacement policy, *Medicaid Manual*, M1120.202, is silent on the point.[80]

(v) While removal of the express transfer exemption from the Va. Medicaid Manual indicates that the Department of Social Services might view any such transfer with a jaundiced eye, there is in existence a letter from the Department of Social Services which states that transfers into a pooled-income trust will not trigger a period of Medicaid ineligibility.

(vi) It is not clear whether the POMS policy discussed above[81] will exempt a transfer of assets into a pooled trust.

b. Only nonprofit associations may establish and manage these trusts. The disabled beneficiary's parent, grandparent, legal guardian, court, or the disabled person himself may establish an account in such trust.

c. Separate accounts must be maintained for each beneficiary, but the trust may pool the funds for investment and management purposes. All accounts in the trust must be for the sole benefit of individuals who are disabled for Social Security purposes. The *Medicaid Manual* also requires the individual to have "been found to be disabled" by Social Security.

d. The trust must allow Medicaid to recoup its expenditures when the beneficiary dies, but only to the extent that the residue is not retained by the trust. The donor into the trust (including the Medicaid recipient) can direct the residue of the sub-account be retained by the non-profit association instead of distributing the balance to Medicaid at the beneficiary's death.[82]

R. Shawn Majette, VSB 19372
Thompson and McMullan, P.C.
100 Shockoe Slip
Richmond, Virginia 23219
804/649-7545 Telephone 804/780-1813 Facsimile
Email: smajette@t-mlaw.com

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[80]Va. Medicaid Manual, § M1120.202 (B)(2).

[81] See II A 2 a, *supra*.

[82]The right to direct the residue can provide strong incentives to caring for the disabled beneficiary, who (or whose guardian, child, spouse, etc.) could be provided a power to appoint and apportion the residue between Medicaid and the non-profit sponsor.