

Medicaid and Elder Law Planning Notes: Institutionalized Unmarried Persons in Virginia¹

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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. Waiver of conflict of interest rules for intra-family, inter-agent dealings.

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. Income under **\$1,737**, automatic eligibility
2. Income of less than daily private rate, eligible (but daily, retroactive counting required).

D. **Resources**

1. Exempt Resources: §§ 1130 and §M 1480.210, including Home, Car, Contiguous Property, \$3,500 burial account, burial life insurance policies, tangible personal property.
2. Personal resource allowance: **\$2,000**.
3. When resources are at or below resource level at any time in the month, applicant is resource eligible.

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>.

E. Transfer of Resources: 12 VAC 30-40-300; §M 1450 *et seq.*³

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. Exempt Transfers: Spouse to spouse, 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, -.502.⁴
3. How Far Back? : 5/3 Year disclosure / analysis §M 1450.500 B.⁵
4. **Whoops!** 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 December, 2004.

III. Planning Considerations: Initial Eligibility And Survivor Eligibility

Example: A singled applicant owns a home and have non-working farm land which is contiguous to the home; combined real estate value is \$200,000 with no mortgage. He has \$200,000 in cash or stocks. He has Social Security Administration benefits of \$500 per month. He goes into the nursing home on January 3, 2005. No gifts made. Powers of attorney with gifting authority in place.⁶

A. Initial eligibility:

1. Home is exempt. Non-working farmland is not exempted except as to \$5,000.
2. **Excess resources, \$198,000 + farmland** (\$200,000 – [\$95,100 + \$2,000]).
3. First possible eligibility date is **January**, 2005.

B. Possible Excess Resource Dispositions.

1. Uncompensated transfers of assets not causing any period of Medicaid ineligibility.
2. Payment for long term care.
3. Enhanced home, car, conversion of contiguous home property to working farm.
4. Annuity?
 - (a) §S0830.160A
 - (b) §M1140.260⁷
 - (i) An annuity containing a balloon payment is considered an available resource.

³ **Caveat:** See **HB 2106, 2005** General Assembly (<http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+HB2601>) for possible waiver requests.

⁴ <http://majette.net> or <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-40-300>

⁵ See http://www.geocities.com/hana+zushi/prac_el.pdf for details and calculator.

⁶ 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.

⁷ Effective for applications filed after November 30, 2004.

- (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 that **equals**⁸ the actuarial life expectancy of the annuitant;
 - (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**⁹ 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 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.

- 5. Burial Planning? §M 1130.400 *et seq.*; §M1450.601 B.1. (Burial insurance).
- 6. Trust for disabled child or other person < 65? §M 1450.502 C
- 7. Split interest (life/remainder estate planning)?
- 8. Life estate in home of child? §1140.110
- 9. Contract for services rendered by family member? §M 1450.003 D, G.
- 10. Purchase of United States EE or I Bonds post-institutionalization (\$30k / \$15k limit, 6-12 month holding period)?¹⁰

C. Survivor Eligibility Issues:

- 1. Advise likely benefactors (e.g., parents, unmarried siblings, adult children) to bypass applicant or create special needs trust for applicant in benefactor's estate plan.
- 2. Estate recovery for Medicaid recipient, 12 VAC 30-20-140 for *past* benefits paid (after age 55)¹¹

⁸ Emphasis supplied. A VDSS technical clarification to the writer advises that an annuity terms equal to **or less than** the life expectancy is acceptable.

⁹ Emphasis supplied. A DMAS technical clarification to the writer advises that the term "individual" here refers to the "annuitant."

¹⁰ §§ 1140.240 (A). See <ftp://ftp.publicdebt.treas.gov/sbibond.pdf> and <ftp://ftp.publicdebt.treas.gov/sbeebond.pdf>

¹¹ <http://majette.net> or <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-20-140>. See HB 1215, *supra*.

[Text which is highlighted in yellow is date sensitive.]