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# Virginia Long Term Care Medicaid Planning Highlights

## Citations to The Virginia Medicaid Manual Through Transmittal DMAS-4 ( Dated April 1, 2017) And Published Entitlement Policy and Limits<sup>1</sup>

June 30, 2017



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<sup>1</sup> Virginia Department of Medical Assistance Services' published Medicaid and FAMIS Income Limits for 2017 are published [here](http://www.dmas.virginia.gov/Content_pgs/pg-home.aspx). The reader may access them as updated at this address: [http://www.dmas.virginia.gov/Content\\_pgs/pg-home.aspx](http://www.dmas.virginia.gov/Content_pgs/pg-home.aspx).

<sup>2</sup> This is a frequently revised compendium of the writer's papers presented for various Virginia Law Foundation, Virginia Bar Association, and other academic symposia. It is current through the most recently published Medicaid Manual and transmittal updates as reported by the Virginia Department of Medical Assistance Services at its site, accessed on **Friday, June 30, 2017**, at **11:44 AM**. That site address, now [http://www.dmas.virginia.gov/Content\\_pgs/pg-home.aspx](http://www.dmas.virginia.gov/Content_pgs/pg-home.aspx), has often changed in the past. Virginia publishes its Manual in separate chapters. Whatever else its merits, this makes it difficult to search the entire Medicaid policy for various topics. To facilitate such searches, the writer periodically combines and posts a "stitched" Medicaid Manual at [www.majette.net](http://www.majette.net). The most current iteration is [here](http://www.majette.net). The present work is intended to be maintained at <http://majette.net/outlines>.

For this edition, the writer gratefully acknowledges the continuing keen observations of his friends and colleagues, especially at ThompsonMcMullan, P.C., the Virginia Academy of Elder Law Attorneys, and the Special Needs Alliance.

Errors, of course, are the writer's; the *kudos*, theirs.

<sup>3</sup> Dates and date specific data are **highlighted** as an aid to the reader. These data change throughout the year. Reader, be diligent in assuring data accuracy at the time of use.

25 I. **Effective Dates of Limits and Standards in this Outline.**

26

27 A. Incorporates limits / standards published in the Virginia Department of Social Services Policy  
28 **Transmittal #DMAS-4**(4-1-2017),<sup>4</sup> amending the Virginia Medicaid Manual, effective  
29 generally for 2017, and [Broadcast DMAS – 13 \(2017\) \(February 16, 2017\)](#), the source for 2017  
30 Aged, Blind and Disabled (“ABD”) income limits in this outline.

31 1. The SSI amounts, ABD deeming standard amount, ABD student child earned income  
32 exclusion, CBC personal maintenance allowance, spousal resource standard, spousal  
33 resource maximum, maximum monthly maintenance needs allowance, Medicare premiums,  
34 and COLA amounts for 2017 included through this outline are effective **January 1, 2017**  
35 unless otherwise noted. When not provided in the Virginia Medicaid Manual, they were  
36 gathered from reliable sources.<sup>5</sup>

37

38 B. Social Security Administration Supplemental Security Income (SSI) for 2017.<sup>6</sup>

39

40 C. Political Uncertainty; Initial Observations. It is impossible to ignore the profound political  
41 process casting its shadow over the core concept of Medicaid as a national entitlement.

42

43 1. In both the House of Representatives Bill and the “discussion draft” of the majority party in  
44 the United States Senate, the core principle of Medicaid as an entitlement is eliminated.  
45 Various means of administrative action at the federal and state levels, and authority for  
46 statutory action at the state level, are provided to convert the present entitlement for care  
47 into a limited grant per state (“block grants”) or per person in each state (“per capita”). The  
48 majority party’s views and plans are sometimes reflected in the published news on the CMS  
49 site.<sup>7</sup>

50

51 2. If the entitlement status and Medicaid restraints upon attributing income and assets of third  
52 parties to Medicaid applicants are eliminated, extant but long dormant statutes are already  
53 in force in Virginia and other states that impose unlimited liability – **enforced through**  
54 **criminal process** - upon adult children for their parents’ care, upon parents of disabled

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<sup>4</sup> [Transmittal #DMAS-4](#).

<sup>5</sup> Medicare Advocacy's [Medicare Summary](#); CMS' [Medicare & You 2017](#); CMS' [Federal-Policy-Guidance](#); 2017 [SSI](#) and Spousal Impoverishment Standards [guidance](#) and [table](#) of levels (the table, reproduced as Exhibit A, includes SSI and Medicaid community spouse allowances effective **until the first day of January or the first day of July following the date of this outline**).

<sup>6</sup> The 2017 Supplemental Security Income (SSI) income level (payment amount) is **\$735** for an individual and **\$1,103** for a married couple.

<sup>7</sup> See <https://www.cms.gov/Newsroom/Newsroom-Center.html>.

55 children of any age, and upon community spouses (described below) regardless of their  
56 assets, will come into focus.<sup>8</sup>

57  
58 **II. The Six Medicaid Tests For An Institutionalized Spouse Of A Non Institutionalized Spouse.**

59  
60 A. Your Papers, Please: Citizenship and Identity Credentials for Non-Medicare / SSI enrollees.

- 61
- 62 1. Individuals presently entitled to or enrolled in Medicare, individuals receiving Social  
63 Security benefits on the basis of a disability and SSI recipients currently entitled to SSI  
64 payments are exempt from the citizenship requirement.<sup>9</sup>
  - 65 2. For non exempt individuals, DRA 2005, § 6036, “Improved Enforcement of Documentation  
66 Requirements,” requires submission of documentary proof of citizenship and identity with a  
67 Medicaid application.<sup>10</sup>
  - 68 3. Virginia Medicaid policy accordingly requires proof of identity and citizenship for new  
69 applications and re-certifications for non-exempt individuals.<sup>11</sup>

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<sup>8</sup> See [Who Will Pay for Mom’s or Dad’s Nursing Home Bill? Filial Support Laws and Long-Term Care?](http://e.nm.com/nw40/pd/articlelibrary/newsbrief2/14-newsbrief/article/169-who-will-pay-for-mom-s-or-dad-s-nursing-home-bill-filial-support-laws-and-long-term.html?email=342df13ac863fde0c1f4617d2023a57c&AgentID=087795), at <http://e.nm.com/nw40/pd/articlelibrary/newsbrief2/14-newsbrief/article/169-who-will-pay-for-mom-s-or-dad-s-nursing-home-bill-filial-support-laws-and-long-term.html?email=342df13ac863fde0c1f4617d2023a57c&AgentID=087795>, for survey of filial support bills generally, and [Grow Up Virginia: Time to Change our Filial Responsibility Law](http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1138&context=law-student-publications), at <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1138&context=law-student-publications>.

As Ms. Macon notes, the statutes are in force in Virginia for parental support.

Va. Code §20-88 imposes liability on adult children and enforces it through criminal proceedings; its use is presently barred when the parent is receiving Medicaid benefits under a federal program that, as Medicaid presently does, restricts consideration of assets to the parent (or in some cases, as seen below, to the parent and the parent’s then “community spouse”).

In addition but largely overlooked is the unlimited, lifetime liability of parents for any “child of whatever age who is crippled or otherwise incapacitated from earning a living,” and the expansion of such liability for *all* spouses in Va. Code §20-61.

Under present law, the cost of medical care for these persons has been eligible for payment by Medicaid, and would be lost under the repeal of Medicaid entitlement status by the currently offered “block grant,” “per-capita” state options promulgated by the majority party in the United States Congress.

<sup>9</sup> “Individuals entitled to or enrolled in Medicare, individuals receiving Social Security benefits on the basis of a disability and SSI recipients currently entitled to SSI payments. Former SSI recipients are not included in the exemption. The local department of social services (LDSS) must have verification from the Social Security Administration (such as a SVES response) of an individual’s Medicare enrollment, benefits entitlement or current SSI recipient status.” Va. Medicaid Manual § M0220.100 C 2; [Medicaid Manual as of June 28, 2017](#), Adobe page 100. The exemption also applies to foster care children and those born to Medicaid eligible mothers.

<sup>10</sup> The provision amends 42 U.S.C. 1396b.

<sup>11</sup> Va. Medicaid Manual § M 0220.100 C 1. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 99.

- 70 a. When a Medicaid application includes an unsupported allegation of citizenship, the  
71 Virginia Department of Medical Assistance Services must extend a “reasonable  
72 opportunity” to provide the documentation.<sup>12</sup>
- 73 i. Upon application, if an individual meets all other Medicaid eligibility requirements  
74 and declares that he is a citizen, the individual is to be enrolled, giving him the  
75 reasonable opportunity period to provide citizenship and identity verification.
- 76 ii. The individual remains eligible for Medicaid during the reasonable opportunity  
77 period.
- 78 iii. The reasonable opportunity period extends from the date of application to the one  
79 year annual review.<sup>13</sup>
- 80 4. Sources of proof of citizenship and identity are set out in various parts of the Virginia  
81 Medicaid Manual with links to forms, etc.<sup>14</sup>

82  
83 B. Age or Disability.

- 84  
85 1. The applicant must be 65 or, if younger, disabled for purposes of the Social Security  
86 Administration.<sup>15</sup>

87  
88 C. Prescreening: Activities of Daily Living / U.A.I.<sup>16</sup>, §M<sup>17</sup>1420.100

- 89 1. Prescreening is required for persons entering long term care, PACE, or community based  
90 care, except, *inter alia*, for persons in long term care for at least 30 days at the time of  
91 application for Medicaid, or who have received Medicaid LTC in one or more of the  
92 preceding 12 months and LTC was terminated for a reason other than no longer meeting the  
93 level of care.<sup>18</sup>

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<sup>12</sup> Va. Medicaid Manual § M 0220.100 C 4. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 100 *et seq.*

<sup>13</sup> *Id.*, C 4.

<sup>14</sup> Va. Medicaid Manual § M 0220, Appendices 6 and 7. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 148 *et seq.*

<sup>15</sup> Va. Medicaid Manual § M 0310.002. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 213.

<sup>16</sup> Virginia's Uniform Assessment Instrument (U.A.I.), the Manual for its use, and related matter are located at this [link](http://majette.net/assessment-instruments), <http://majette.net/assessment-instruments>.

<sup>17</sup> All cites to “§M” or “§S” are current citations to the Virginia Medicaid Manual, accessed as noted above, via <http://majette.net>, and directly at the [official Virginia site](#).

<sup>18</sup> Va. Medicaid Manual § M 1420.400 (B). “Pre-admission screening is NOT required when: • the individual is a patient in a nursing facility at the time of application; • the individual received Medicaid LTC in one or more of the preceding 12 months and LTC was terminated for a reason other than no longer meeting the level of care; the individual is no longer in need of long-term care but is requesting assistance for a prior period of long term care; the individual enters a nursing facility directly from the ED CD waiver or PACE; the individual leaves a nursing facility and begins receiving ED CD waiver services or enters PACE and a pre-admission screening was completed prior to the nursing facility admission; the individual enters a nursing facility from out-of-state; the individual is in a Veteran’s Administration Medical Center

- 94 2. The prescreening assesses the institutionalized spouse’s ability to perform activities of daily  
95 living by reference to a standardized testing survey, the Uniform Assessment Instrument.
- 96 3. There is a special and separate “Waiver Management System (*WaMS*) Screen Print for  
97 Community Living Waiver, Building Independence Waiver, and Family and Individual  
98 Supports Waiver Authorizations” to screen for these programs.<sup>19</sup>
- 99 4. Screening is generally performed by DMAS authorized local teams or by staff at the acute  
100 care facility from which an admission is being made.<sup>20</sup>
- 101 a. Patients placed directly from acute care hospitals are usually screened by hospital  
102 screening teams. Generally, hospitals contract with DMAS to establish pre-admission  
103 screening committees to perform the screening process internally.
- 104 b. A state level committee is used for patients being discharged from State Department of  
105 Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS)  
106 institutions for the treatment of mental illness, and mental retardation.
- 107 c. Patients in a Veterans Administration Medical Center (VAMC) who are applying to  
108 enter a nursing facility are assessed by VAMC staff. VAMC discharge planning staff  
109 use their own Veterans' Administration assessment form, which serves as the pre-  
110 admission screening certification.
- 111 d. Different screening teams may be required for various waiver programs.<sup>21</sup>
- 112 5. The screening criteria are ongoing, and DMAS can rescind certification while the recipient  
113 remains in the nursing home.<sup>22</sup>
- 114 6. The “Medicaid Funded Long Term Care Authorization Form<sup>23</sup>” and various waivers are  
115 published in the Medicaid Manual.<sup>24</sup>
- 116 D. Monthly Income.
- 117 1. Unmarried Institutionalized Applicants / Recipients.

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(VAMC) at the time of the request for nursing facility or EDCD/PACE services (these individuals receive an equivalent VAMC screening); an individual with full Medicaid coverage was or is expected to be admitted to a nursing facility for less than 30 days; or the individual is no longer in need of long-term care but is requesting assistance for a prior period of long term care.” [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1224.

<sup>19</sup> Va. Medicaid Manual § M 1420, Appendix 3. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1229.

<sup>20</sup> Va. Medicaid Manual §M 1420.200 B.

<sup>21</sup> *Id.* C.

<sup>22</sup> Va. Medicaid Manual §M 1420.400 D 2. “For an individual in a nursing facility who no longer meets the level of care but continues to reside in the facility, continue to use the eligibility rules for institutional individuals even though the individual no longer meets the level of care criteria. If the individual is eligible for Medicaid, Medicaid will not make a payment to the facility for LTC.”

<sup>23</sup> Va. Medicaid Manual § M 1420, Appendix 1. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1227.

<sup>24</sup> Va. Medicaid Manual §M 1420, Appendix 1; the form online,

[http://www.dss.virginia.gov/files/division/bp/medical\\_assistance/forms/all\\_other/000-00-0000-00-eng.pdf](http://www.dss.virginia.gov/files/division/bp/medical_assistance/forms/all_other/000-00-0000-00-eng.pdf).

- 118 a. When income of applicant / recipient under \$2,205 (in 2017),<sup>25</sup> automatic income  
119 eligibility.<sup>26</sup>
- 120 b. When Income of applicant / recipient exceeds 300% of the SSI income level, income  
121 eligibility depends upon the specific facility Medicaid rate:<sup>27</sup>
- 122 1. **Spenddown Liability Less Than or Equal to Facility Medicaid Rate** If the  
123 spenddown liability is less than or equal to the facility's Medicaid rate,  
124 determine spenddown eligibility by projecting facility costs at the Medicaid rate  
125 for the month. Spenddown balance after deducting projected costs at the  
126 Medicaid rate should be zero or less. The patient is eligible as MN for the whole  
127 month.
- 128 2. **Spenddown Liability More Than Facility Medicaid Rate** When the  
129 spenddown liability is **more than** the facility Medicaid rate, determine  
130 spenddown eligibility AFTER the month has passed, on a daily basis (do not  
131 project expenses) by chronologically deducting old bills and carry-over  
132 expenses, then deducting the facility daily cost at the **private** daily rate and  
133 other medical expenses as they were incurred. If the spenddown is met on any  
134 date within the month, the patient is eligible effective the first day of the month  
135 in which the spenddown was met. Eligibility ends the last day of the month.  
136 Each month must be evaluated separately. These patients will always be enrolled  
137 after the month being evaluated has passed.
- 138 2. Married Applicants / Recipients.<sup>28</sup>
- 139 a. **ONLY** income of institutionalized adult is counted.<sup>29</sup>
- 140 b. When an institutionalized person is married to a spouse who is not institutionalized, the  
141 institutionalized spouse is an "institutionalized spouse" (the "IS") under special rules.
- 142 c. The non-institutionalized spouse, is referred to as the community spouse (the "CS").
- 143 d. The income of the CS is not considered in determining Medicaid eligibility for the IS.

<sup>25</sup> Va. Medicaid Manual §M 0810.002 A 3. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 602.

<sup>26</sup> The figure is 300% of the present SSI level for one person. Such persons categorically meet the test for long term care if they also meet the other Medicaid tests. Va. Medicaid Manual §M 1460.200 A 1 b; 1460.400 D 3.

<sup>27</sup> Va. Medicaid Manual § M 0810.002 (generally); M1460.410 C 4 (unmarried persons).

<sup>28</sup> Va. Medicaid Manual § M 1480.300, Income Eligibility Of Institutionalized Spouse. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1486 *et seq.*

<sup>29</sup> "Do not deem a community spouse's income available to an institutionalized spouse for purposes of determining the institutionalized spouse's Medicaid eligibility for any month of institutionalization (including partial months). For the month of entry into institutionalization and subsequent months, only the institutionalized individual's income is counted for eligibility and patient pay purposes." Va. Medicaid Manual § M 1480.300 B 3, *Income Deeming*. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1487.

144 e. After eligibility of the institutionalized spouse is conferred, income of the IS may be  
145 paid to the CS under the rules below.

146 3. Income of IS under 300% of SSI,<sup>30</sup> automatic eligibility; otherwise, daily, retroactive  
147 counting may be required.<sup>31</sup>

148 4. Supplementing CS Income: The "Minimum Monthly Maintenance Needs Allowance"  
149 (MMNA)<sup>32</sup>

150 a. Minimum: \$2002.50<sup>33</sup> until the first day of July following the date of this work.

151 b. Maximum MMNA (including a Monthly Excess Shelter Allowance): \$3,022.50 until  
152 the first day of January following the date of this work.

153

154

155 The Excess Shelter Standard (or Allowance) is intended to assist a community spouse  
156 with qualified housing / utility costs exceeding the "shelter standard," which Congress  
157 set at 30% of the community spouse's income. The excess shelter allowance is  
158 calculated by subtracting \$600.75<sup>34</sup> (until the first day of July following the date of this  
159 work) from the sum of these expenses: CS monthly mortgage (PITI) or rent,  
160 homeowner association dues, homeowner insurance, and a utility allowance (\$287.00  
161 or, with more than 3 in the household, \$357.00).<sup>35</sup>

161

162

163

The remainder is added to the MMNA. The total monthly allowance for the CS is  
capped at the Maximum Excess Shelter Allowance.

164 c. Family Dependent Amount, until the first day of July following the date of this work:  
165 \$667.50 (maximum).<sup>36</sup>

166 1. The income allowance available as a patient-pay deduction to the institutionalized spouse  
167 may be increased by a hearing officer upon a showing that "exceptional circumstances  
168 resulting in extreme financial duress" require the increase.<sup>37</sup>

<sup>30</sup> \$2,205 (in 2017). Va. Medicaid Manual § M 0810.002. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 602.

<sup>31</sup> Va. Medicaid Manual § M 0810.002; Va. Medicaid Manual § M 1480.310 (B) 2.

<sup>32</sup> Va. Medicaid Manual § M 1480.410. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1508.

<sup>33</sup> *Id.* [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1508.

<sup>34</sup> *Id.* The standard is 30% of the Monthly Maintenance Needs Allowance. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1508.

<sup>35</sup> The higher utility allowance applies to households in which more than three persons reside. Va. Medicaid Manual § M 1480.410.

<sup>36</sup> Va. Medicaid Manual §§ M1480.010 B 11 ([Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1448), 1480.430 E 2 ([Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1516). The dependent amount is one third of the MMNA, reduced by any income of the dependent family member, viz: "EXAMPLE #1: \$2,002.50 monthly maintenance needs standard - 300 family member's income = 1,702.50 (amount by which monthly maintenance needs standard exceeds the family member's income) ÷ 3 = \$567.50 family member's monthly income allowance [2017 allowances substituted]." [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1448.

<sup>37</sup> Va. Medicaid Manual § M 1480.430 D 3. Cf. *Urrutia v. Daines*, 2011 NY Slip Op 9137; 2011 N.Y. App. Div. LEXIS

169 2. For post-eligibility support supplements, the CS may secure a court order for support using  
170 familiar domestic relations law, but only *after* having exhausted the Medicaid  
171 administrative process.<sup>38</sup> The Commonwealth’s domestic relations support law does not  
172 require any showing of “extreme financial duress” in determining the support needs of the  
173 CS.<sup>39</sup>

174  
175 E. Resources: Exempt and Countable.

176 1. Exempt and countable resources.

177 a. What’s a resource for Medicaid purposes?

178 i. It’s property, but not every interest in property is a resource.<sup>40</sup>

179 ii. A resource is any property which a person owns; has the right, authority, or power  
180 to convert to cash (if not already cash); and is not legally restricted from using for  
181 his/her support and maintenance.<sup>41</sup>

182 b. All resources are countable unless specifically exempted.

183 c. Otherwise countable resources exempted equal to value of Partnership Long Term Care  
184 Insurance Policy payments made at the time of application.<sup>42</sup>

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8961 (Sup.Ct., December 13, 2011)(“significant financial distress” from “exceptional circumstances” not demonstrated within meaning of 42 USC § 1396r-5[e][2][B], citing, *inter alia*, *Gomprecht v. Gomprecht*, 86 NY2d 47, 52, 652 N.E.2d 936, 629 N.Y.S.2d 190).

<sup>38</sup> The CS “has the right to file an appeal using the procedures in chapter [Va. Medicaid Manual] M16. A Hearing Officer may increase the community spouse income allowance if it is determined that exceptional circumstances resulting in extreme financial duress exist. If the [CS] disagrees with the outcome of the appeal, he may then appeal the decision through his local circuit court.” The Department of Social Services “cannot accept a court order for a greater community spouse allowance unless the individual has exhausted the Medicaid administrative appeals process.” Va. Medicaid Manual §M 1480.430 D. 3. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1513.

<sup>39</sup> Va. Code § 16.1-241 (L). See Va. CLE publication, [Virginia Family Law - A Systematic Approach](#), Balnave, §6.2 (footnote.2). Venue in the Juvenile and Domestic Relations District Court is where either party resides or the defendant is present. Va. Code § 16.1-243 (A)(2) and Rule 8.3(C), Rules of the Virginia Supreme Court. Form DC-610, <http://www.vbgov.com/government/departments/courts/juvenile-domestic-relations-court/Documents/court-forms/dc-610-inst.pdf>. Local rules of court should be consulted (available sites for Juvenile and Domestic Relations District Courts with forms and local rule information, see <http://www.courts.state.va.us/courts/jdr/home.html>). See statutory references, IV., *infra*, to binding effect of post-nuptial settlement agreements in establishing support, Title 20, [Chapter 8](#), Code of Virginia, and especially Virginia Code § 20-155, [Marital agreements](#).

<sup>40</sup> Va. Medicaid Manual § S 1110.100 (A). “Not everything an individual owns (assets) are resources for Medicaid purposes. Moreover, in certain situations, an asset that is not a resource may become one at a later date or vice versa. The distinction is important since an asset that is not a resource does not count against the resource limit; and proceeds from the sale or trade of a resource (i.e., the amount representing conversion of principal from one form to another) are also resources but what a person receives from a non-resource [asset] is subject to evaluation as income at the time of receipt.” [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 860.

<sup>41</sup> Va. Medicaid Manual § S 1110.100 (B). [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 860.

<sup>42</sup> Va. Medicaid Manual § M 1460.160. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1320.

- 185 i. The value of assets disregarded in the Medicaid eligibility determination is equal to  
186 the dollar amount of benefits paid to or on behalf of the individual as of the month  
187 of application, even if additional benefits remain available under the terms of a  
188 qualified partnership policy. Interestingly, the resources disregarded by reason of  
189 such a long term care insurance policy is not applicable to the resource assessment  
190 for married individuals with a community spouse.<sup>43</sup>
- 191 ii. A long term care insurance policy is a qualified partnership policy only if it meets  
192 these conditions:
- 193 1. it must be issued on or after 09/01/2007;
- 194 2. it must contain a disclosure statement indicating that it meets the requirements  
195 under § 7702B(b) of the Internal Revenue Service Code of 1986, and
- 196 3. it must provide inflation protection for persons under 76 years of age and under  
197 as follows:
- 198 A. compound annual inflation protection for persons under 61 years of age; and
- 199 B. any level of inflation protection for persons 61 to 76 years of age.<sup>44</sup>
- 200 2. Selected Exempt Resources: §S 1130 and §M 1480.210.
- 201 a. Home of the institutionalized person.<sup>45</sup>
- 202 i. Home is defined as the property which serves as the principal residence.<sup>46</sup>
- 203 ii. Married persons when one is institutionalized but the other spouse is resident in the  
204 home, and applicants in the 80% FPL category, may exempt *all* real property  
205 contiguous to the residence.<sup>47</sup>
- 206 iii. The home (including contiguous property of limited value for an unmarried  
207 applicant / recipient, or unlimited value when the applicant / recipient has a CS or

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<sup>43</sup> *Id.* “The resource assessment is not affected by the amount disregarded in the eligibility determination as a result of an LTC Partnership Policy (Partnership Policy).” Va. Medicaid Manual § M 1480.210 B. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1455; Va. Medicaid Manual § M 1480.220 B. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1460. In community spouse / institutionalized spouse cases, the resources disregarded by reason of a Partnership Policy is a further deduction from the total countable resources. Va. Medicaid Manual § M 1480.232 A. 2., [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1469.

<sup>44</sup> Va. Medicaid Manual § M 1460.160 C. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1320.

<sup>45</sup><sup>45</sup> Va. Medicaid Manual § M 1460.530 applies to the home exclusion generally regarding Medicaid applications for long term care benefits. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1338. Va. Medicaid Manual § M 1480.010 B (6) states that “[f]or purposes of determining the combined and separate resources of the institutionalized and community spouses when determining the institutionalized spouse’s eligibility, the couple’s home, contiguous property, household goods, and one automobile are excluded.”

<sup>46</sup> Va. Medicaid Manual § M 1460.530 (B)(3).

<sup>47</sup> Va. Medicaid Manual § M 1480.010 B (6); Va. Medicaid Manual § M 1480.210, 220 (B)(2).

when the applicant / recipient is in the 80% FPL category<sup>48</sup>) is exempt for six months after institutionalization, or longer when certain persons<sup>49</sup> reside there.

iv. **Caveat:** \$560,000 Home Equity Limitation (2017).<sup>50</sup>

1. Applicable to persons whose long term care Medicaid is effective after January 1, 2006.
2. Virginia's rule is that home property that exceeds the limit will make the home owner ineligible for Medicaid payment of LTC services, unless the home is occupied by a spouse, dependent child under age 21, or a blind or disabled child of any age.<sup>51</sup>

A. During the life of the community spouse, the limitation can be avoided:

- a. While the community spouse resides in the home.
- b. If the institutionalized spouse transfers the home (or any portion of the same, sufficient to reduce the institutionalized spouse's share) to the community spouse.<sup>52</sup>

v. Thus the home and all real estate contiguous to it is excluded as long as the community spouse resides in the home.

b. Life estate in real property.

- i. Life estates created before August 28, 2008, are exempt resources.
- ii. Life estates created on and after August 28, 2008 but before February 23, 2009, are to be treated in the same manner as real property, including the application of real property exclusions, if any.
- iii. Life estates created on or after February 24, 2009, are not counted as resources.<sup>53</sup>
- iv. **Caveat.** While a life estate purchased after February 23, 2009, will be exempt, the **funds used to acquire a life estate after February 6, 2006 may constitute an**

<sup>48</sup> For the 80% FPL applicant or recipient, "[t]he home exclusion applies not only to the plot of land on which the home is located, but to any land that adjoins it." S1130.100 The Home, Resource Exceptions For ABD MI, Appendix 2. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1098.

<sup>49</sup> Spouse, minor or disabled children, etc. See Medicaid Manual § M 1130.100.

<sup>50</sup> Va. Medicaid Manual § M 1460.150. The limit changes each year. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1380.

<sup>51</sup> *Id.*

<sup>52</sup> In practice, it would be rare for a well advised institutionalized spouse not to transfer his entire interest in the home to the community spouse to avoid loss of benefits should the spouse precede him in death, and to avoid Medicaid estate recovery.

<sup>53</sup> Va. Medicaid Manual § M 1140.110 A 6. d. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1037. 12 [VAC 30-40-290](#) C provides that "[l]ife rights to real property are not counted as a resource. The purchase of a life right in another individual's home is subject to transfer of asset rules. See [12VAC30-40-300](#)."

- 232 **uncompensated transfer of assets.**<sup>54</sup> Failure to reside in the home of another in  
 233 which a life estate is purchased for at least 12 consecutive months **after** the  
 234 purchase<sup>55</sup> could therefore result in both an uncompensated transfer of assets (equal  
 235 to the purchase price for the life estate) and a resulting resource.
- 236 c. United States EE or I Savings Bonds.<sup>56</sup>
- 237 i. I-Bonds and EE Bonds issued on or after February 1, 2003, are subject to a twelve  
 238 month mandatory holding period, during which they are ‘not ... resource[s] at all.’<sup>57</sup>
- 239 ii. Treasury dollar and timing limitations on the acquisition of the bonds.<sup>58</sup>
- 240 1. Purchases are limited to \$10,000 per Social Security number in EE and I  
 241 bonds.<sup>59</sup>
- 242 2. Separate \$5,000 limit applies to Series I savings bonds in paper, which may only  
 243 be purchased with federal tax refund.<sup>60</sup>
- 244 3. Denominations.
- 245 A. I savings paper bonds (with tax refund only): \$50, \$100, \$200, \$500, \$1,000.  
 246 Electronic bonds via [TreasuryDirect](#)<sup>61</sup> purchased to the penny for \$25 or  
 247 more.<sup>62</sup>
- 248 B. EE savings bonds via [TreasuryDirect](#)<sup>63</sup> purchased to the penny for \$25 or  
 249 more.<sup>64</sup>

<sup>54</sup> Va. Medicaid Manual § M 1450.545. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1280. “For Medicaid purposes, the purchase of a life estate is said to have occurred when an individual acquires or retains a life estate as a result of a single purchase transaction or a series of financial and real estate transactions.” The emphasized language conflicts with federal law, which CMS has expressly interpreted to apply only to the purchase of a life estate in the residence of another, and not with regard to a retained life interest in a residence already owned by the applicant, CMS SMDL #06-018 Enclosure, § IV, discussed *infra*.

<sup>55</sup> [12 V.A.C. 30-40-300](#) (F) (1) Definitions: “The term ‘assets’ includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least one year after the date of the purchase.”

<sup>56</sup> Va. Medicaid Manual § M 1140.240 A, . [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1054; §1110.305 C 1 (example), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 866. Note: H and HH bonds are no longer available.

<sup>57</sup> Va. Medicaid Manual § M 1110.305 C 1 (example).

<sup>58</sup> See [http://www.treasurydirect.gov/indiv/products/prod\\_eebonds\\_glance.htm](http://www.treasurydirect.gov/indiv/products/prod_eebonds_glance.htm).

<sup>59</sup> "Effective January 4, 2012, the annual (calendar year) purchase limit applying to electronic Series EE and Series I savings bonds is \$10,000 for each series. The limit is applied per Social Security Number (SSN) or Taxpayer Identification Number (TIN). For paper Series I Savings Bonds purchased through IRS tax refunds, the purchase limit is \$5,000 per SSN." See <http://www.savingsbonds.gov/indiv/research/faq/annualpurchasechangeqa.htm>. See also EE bonds, see [https://www.treasurydirect.gov/indiv/products/prod\\_eebonds\\_glance.htm](https://www.treasurydirect.gov/indiv/products/prod_eebonds_glance.htm); I bonds, see [https://www.treasurydirect.gov/indiv/products/prod\\_ibonds\\_glance.htm](https://www.treasurydirect.gov/indiv/products/prod_ibonds_glance.htm).

<sup>60</sup> Paper I bonds can only be purchased with federal tax refunds. See [I Savings Bonds](#).

<sup>61</sup> See <https://www.treasurydirect.gov/tldhome.htm>.

<sup>62</sup> [https://www.treasurydirect.gov/indiv/products/prod\\_ibonds\\_glance.htm](https://www.treasurydirect.gov/indiv/products/prod_ibonds_glance.htm).

<sup>63</sup> See <https://www.treasurydirect.gov/tldhome.htm>.

- 250                   iii. There is a penalty for redemption within five years of purchase. Redemption will  
251                   generally be required as of the first date that the bond(s) can be counted as a  
252                   resource.<sup>65</sup> The penalty is forfeiture of interest for 3 months immediately preceding  
253                   redemption.
- 254                   d. Motor vehicle of any value.<sup>66</sup>
- 255                   e. Burial arrangements.
- 256                   i. Burial space or agreements which represent the purchase of a burial space held for the  
257                   burial of the individual, his or her spouse, or any other member of his or her immediate  
258                   family is an excluded resource, regardless of value.<sup>67</sup> Cemetery plots are exempt  
259                   regardless of number owned (except QDWI) and may not necessarily be limited to  
260                   the use of the individual or other family members.<sup>68</sup>
- 261                   1. The burial space exclusion is in addition to, and has no effect on, the burial  
262                   funds exclusion below.<sup>69</sup>
- 263                   ii. Burial funds set aside for expenses.
- 264                   1. Single person or married couple when both spouses reside together: \$3,500  
265                   burial account.<sup>70</sup>
- 266                   2. Married persons under the spousal impoverishment policy at Va. Medicaid  
267                   Manual § M 1480.000 *et seq*: \$1,500 burial account each.<sup>71</sup>
- 268                   iii. Burial insurance policies,<sup>72</sup> unlimited in value.<sup>73</sup>

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<sup>64</sup> See [https://www.treasurydirect.gov/indiv/products/prod\\_eebonds\\_glance.htm](https://www.treasurydirect.gov/indiv/products/prod_eebonds_glance.htm).

<sup>65</sup> "U.S. Savings Bonds are not resources during a mandatory retention period. They are resources (not income) as of the first day of the month following the mandatory retention period." Va. Medicaid Manual §M 1140.240 B.

<sup>66</sup> Va. Medicaid Manual § M 1480.010 B (6); Va. Medicaid Manual § M 1480.210, 220 (B)(2).

<sup>67</sup> Va. Medicaid Manual § M 1130.400 A (1), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 942.

<sup>68</sup> "Cemetery plots are not counted as resources, regardless of the number owned, except when evaluating eligibility as QDWI. ... *Accept declaration regarding ownership of cemetery plots. Verification is not required.*" Va. Medicaid Manual § M 1130.400. *Id.*

<sup>69</sup> Va. Medicaid Manual § M 1130.400 A (2). [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 942.

<sup>70</sup> Va. Medicaid Manual § M 1130.410. "Up to \$3,500 of burial funds may be excluded for each member of the ABD assistance unit (i.e., the individual and the individual's spouse, if living together)." . [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 945.

<sup>71</sup> Va. Medicaid Manual § M 1480.220 B 2. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1459. "For the purposes of the resource assessment and spousal share calculation, countable and excluded resources are determined ... using ... policy in Chapter S11, regardless of the individual's covered group and regardless of community property laws or division of marital property laws, except for the following resources which are excluded as indicated below when completing the resource assessment and spousal share: ... up to \$1,500 of burial funds for each spouse (NOT \$3,500), *if there are designated burial funds.*" (Emphasis in original.)

<sup>72</sup> "A burial insurance policy is a contract whose terms preclude the use of its proceeds for anything other than payment of the insured's burial expenses." Va. Medicaid Manual § M 1130.300 (A) 8, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 936.

- 269 f. Qualifying annuities.<sup>74</sup>
- 270 i. An annuity is a countable resource unless it meets certain requirements.<sup>75</sup>
- 271 ii. A non-employment related annuity will be a countable resource unless the annuity:
- 272 1. is irrevocable;
- 273 2. is non-assignable;
- 274 3. is actuarially sound; and
- 275 4. provides for payments in equal amounts during the term of the annuity with no
- 276 deferral and no balloon payments made.<sup>76</sup>
- 277 iii. *Caveat*: Based upon the foregoing policy, if the annuity is not actuarially sound,
- 278 Virginia deems an otherwise excluded annuity as a countable resource *and* imposes
- 279 a period of ineligibility upon its acquisition.<sup>77</sup>
- 280 iv. Tangible personal property for the grave is considered a burial space, and is exempt
- 281 regardless of value.<sup>78</sup>
- 282 3. Personal resource allowance for countable resources of any aged, blind or disabled
- 283 Medicaid recipient is limited to \$2,000.
- 284
- 285 4. Lump sum for protection of the community spouse.
- 286 a. The Community Spouse Resource Allowance ("CSRA")<sup>79</sup> or the Community Spouse
- 287 Protected Resource Amount ("CSPRA")<sup>80</sup> is the value of countable resources which can
- 288 be excluded from the couple's countable resources, and thus protected for the
- 289 community spouse ("CS") while the institutionalized spouse ("IS") receives Medicaid.
- 290 b. 50% of countable resources owned by spouses as of first day of month in which one
- 291 spouse becomes institutionalized, subject to:

<sup>73</sup> In determining the value of life insurance on the individual, burial funds and term policies do not count because "[a] life insurance policy owned by the individual is a resource if it generates a [cash surrender value] CSV." Va. Medicaid Manual § M 1130.000, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 937. However, burial insurance on the life of the individual reduces the burial set aside limit. Va. Medicaid Manual § M 1130.300 (B) 4, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 937.

<sup>74</sup> See discussion at III. B. 6., below.

<sup>75</sup> Va. Medicaid Manual §M 1140.260. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1056 *et seq.*

<sup>76</sup> *Id.* (B)(4).

<sup>77</sup> Va. Medicaid Manual §M 1450.520 B 2 provides that "[a]n annuity [other than an employment related annuity] purchased by the institutionalized individual on or after February 8, 2006, will be considered an uncompensated transfer unless ... the annuity is: irrevocable and non-assignable; actuarially sound (see [M1450.520 C.](#)); and provides for equal payments with no deferral and no balloon payments." [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1277.

<sup>78</sup> Va. Medicaid Manual § M 1130.400 (A).

<sup>79</sup> Va. Medicaid Manual § M 1480.010 (A) (4), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1446.

<sup>80</sup> Va. Medicaid Manual § M 1480.010 (A) (25), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1450.

- 292 i. Minimum (as of 1/1/2017 until the first day of January following the date of this  
293 work. ): \$24,180.
- 294 ii. Maximum<sup>81</sup> (as of 1/1/2017 until the first day of January following the date of this  
295 work) \$120,900.<sup>82</sup>
- 296 c. Resource valuation and eligibility dates different for unmarried vs. married  
297 institutionalized person.
- 298 i. For *unmarried* institutionalized applicant, valued at any time in the month (the “any  
299 day in month” rule).<sup>83</sup>
- 300 ii. For *married* institutionalized spouse, resource eligibility exists when the total of all  
301 countable resources of *both* the IS and CS does not exceed the CSRA / CSPRA +  
302 \$2,000 on the first day of the calendar month for which eligibility is being  
303 determined.<sup>84</sup>
- 304 d. For IS with CS.
- 305 i. Assets (of both spouses) are initially valued on what is often referred to as the  
306 “snapshot date.”
- 307 1. Snapshot date is 1st day of month IS in which IS becomes “institutionalized.”<sup>85</sup>
- 308 2. A person is “institutionalized” on the first day of month of admission to nursing  
309 home when residence is expected for at least 30 consecutive days.<sup>86</sup>
- 310 3. Snapshot can be based on any institutionalization, in a nursing home or  
311 otherwise.<sup>87</sup>

<sup>81</sup> See III B below regarding limited revisions (institutionalization before DRA 2005).

<sup>82</sup> Va. Medicaid Manual §M 1480.231. [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1468.

<sup>83</sup> Medicaid Manual § M 1110.600 (A) (1) (“We make all resource determinations per calendar month. Resource eligibility exists for the full month if countable resources were at or below the resource standard for any part of the month..”)

<sup>84</sup> Valuation: see Va. Medicaid Manual § M 1480.000 A, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1445.

Eligibility: see Va. Medicaid Manual § M 1480.230 (B), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1467.

<sup>85</sup> Medicaid Manual §§ Va. Medicaid Manual § M 1480.010 (A) 12, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1448, 1480.200 (A), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1453. “A resource assessment is strictly a compilation of a couple's reported resources that exist(ed) at the first moment of the first day of the month in which the first continuous period of institutionalization began on or after September 30, 1989 ....”

<sup>86</sup> Medicaid Manual § M 1480.010 B (15) (“Institutionalized Spouse means an individual who: is in a medical institution, or who is receiving Medicaid waiver services, or who has elected hospice services; is likely to remain in the facility, or to receive waiver or hospice services for at least 30 consecutive days; and who is married to a spouse who is NOT in a medical institution or nursing facility.” [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1449.

<sup>87</sup> “Institutionalization means receipt of 30 consecutive days of care in a medical institution (such as a nursing facility), or waiver services (such as community-based care); or a combination of the two.” Medicaid Manual § M 1410.010 B 2, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1203; § M 1480.010 (B) 15 (married persons), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1449.

- 312 e. A couple with “excess resources” cannot become resource eligible in the month of  
313 institutionalization.<sup>88</sup>
- 314 f. Post-eligibility increases in resources of CS immaterial to eligibility of IS.<sup>89</sup>  
315
- 316 F. Transfer of Resources: 12 VAC 30-40-300; §M 1450 *et seq.*
- 317 1. Criminal liability.
- 318 a. So called “Granny I” and “Granny II” statutes enacted and amended in 1997 and 1998,  
319 respectively, created criminal exposure in relation to asset transfers.
- 320 i. Granny I initially targeted transferors – “Grannies” - who made transfers of assets to  
321 qualify for Medicaid benefits.
- 322 ii. Granny II amended the law to exempt seniors but substituted their paid advisors,  
323 under language in 42 U.S.C. 1320a-7b, which made it a crime to “knowingly and  
324 willfully counsel[] or assist[] an individual to dispose of assets (including by any  
325 transfer in trust) in order for the individual to become eligible for medical assistance  
326 under [Medicaid] if disposing of the assets results in the imposition of a period of  
327 ineligibility for such assistance.”
- 328 b. The legislation was held unconstitutional in *New York State Bar Assoc. v. Reno*, 999 F.  
329 Supp. 710, 715 (E.D.N.Y. 1998).
- 330 c. In fact, the statute has been held so obviously unconstitutional that cautious attorneys  
331 seeking additional relief from its reach have been denied relief on the basis of a lack of  
332 a justicable controversy. See, *e.g.*, *Magee v. Reno*, C.A. NO. 98-073-T (D.C.R.I.  
333 2000).<sup>90</sup>

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<sup>88</sup> Medicaid Manual § M 1480.230 (B), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1467. (“An institutionalized spouse cannot establish resource eligibility by reducing resources within the month. The institutionalized spouse may become eligible for Medicaid payment of LTC services when the institutionalized spouse's resources are equal to or below the \$2,000 CNNMP/MN resource limit as of the first moment of the first day of a calendar month.”)

<sup>89</sup> Va. Medicaid Manual § M 1480.232 (A) 2, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1469; § M 1480.200 (B) 3 provides that “[o]nce an institutionalized spouse has established Medicaid eligibility as an institutionalized spouse, count only the institutionalized spouse’s resources when redetermining the institutionalized spouse’s Medicaid eligibility. Do not count or deem the community spouse’s resources available to the institutionalized spouse.” [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1454 (*emphasis* in original). This section includes a helpful table directing the Medicaid worker's imputation (or exclusion) of resources held by the institutionalized spouse and community spouse.

<sup>90</sup> “However, like self-censorship that is prompted by a fear of prosecution, self-censorship that stems from a desire to comply with the law must be subjectively felt and objectively reasonable. Here, there is no claim that the plaintiffs feel ethically constrained to obey Section 4734. On the contrary, they have made it clear that they believe Section 4734 to be unconstitutional. Moreover, the Attorney General, as the chief law enforcement officer responsible for upholding the laws, shares that belief and has disavowed any intention to prosecute alleged violations. Because a lawyer’s obligation to uphold the Constitution takes precedence over the obligation to uphold a statute; and, because all concerned agree that Section 4734 is unconstitutional, the plaintiffs have failed to establish an objectively reasonable subjective belief that Section 4734 prevents them from properly counseling their clients.” Magee, [http://www.rid.U.S.C.courts.gov/opinions/torres/05022000\\_1-](http://www.rid.U.S.C.courts.gov/opinions/torres/05022000_1-)

- 334 d. While criminal liability for uncompensated transfer of assets (or advice and assistance  
335 to effect such transfers) does not exist, criminal<sup>91</sup> and civil liability for the use of  
336 “willful false statement, (ii) willful misrepresentation or concealment of a material fact,  
337 or (iii) any other fraudulent scheme or device,” does.<sup>92</sup>
- 338 2. Transfers by either spouse affects both spouses *when made before initial eligibility*  
339 *established* for the IS.
- 340 a. Transfers by a community spouse which cause ineligibility of the institutionalized  
341 spouse will be apportioned between the two spouses should the community spouse  
342 become institutionalized.<sup>93</sup>
- 343 b. Transfers made by the community spouse *after eligibility has been established for the*  
344 *institutionalized spouse* have no effect upon eligibility of the institutionalized spouse,  
345 **except** as respects a non-conforming annuity purchased by the community spouse after  
346 eligibility.<sup>94</sup>
- 347
- 348 3. Exempt transfers.
- 349
- 350 a. Transfers exempt regardless of value or timing by reason of the character of the  
351 transferee, Va. Medicaid Manual § M 1450.400.<sup>95</sup>
- 352 i. Any property from spouse to spouse.
- 353 ii. Any property from spouse to Trustee of trust for sole benefit of spouse.
- 354 iii. Any property to applicant’s child under age 21.
- 355 iv. Any property to applicant’s blind or disabled child (of any age).
- 356 v. Any property to Trustee of a special needs trust per 42 USC 1396p(d)(4)(A) for  
357 disabled person under 65.<sup>96</sup>

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[98CV0073T MAGEE V USA P.pdf](#).

<sup>91</sup> Virginia Code § 32.1-321.4.

<sup>92</sup> “The Department of Medical Assistance Services (DMAS) investigates and accepts referrals regarding fraudulent and non-fraudulent payments made by the Medicaid Program. DMAS has the authority to recover any payment incorrectly made for services received by a Medicaid recipient or former Medicaid recipient. DMAS will attempt to recover these payments from the recipient or the recipient’s income, assets, or estate, unless such property is otherwise exempt from collection efforts by State or Federal law or regulation.” Va. Medicaid Manual §M 1700.100.

<sup>93</sup> Va. Medicaid Manual § M 1450.630 F, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1299.

<sup>94</sup> Va. Medicaid Manual § M 1450.400 (F), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1274, states that “[p]ost-eligibility transfers of resources owned by the community spouse (institutionalized spouse has no ownership interest) do not affect the institutionalized spouse’s continued eligibility for Medicaid payment of LTC services. **Exception: The purchase of annuity by the community spouse on or after February 8, 2006 may be treated as an uncompensated transfer.**” (***Emphasis supplied*** by R. Shawn Majette.)

<sup>95</sup> Va. Medicaid Manual § M 1450.400, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1270 *et seq.*

<sup>96</sup> Va. Medicaid Manual §M 1450.400 D, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1272, which refers the

- 358 vi. Any property to Trustee of “pooled” special needs trust for disabled persons under  
 359 the age of 65 per 42 USC 1396p(d)(4)(C), with limitations.<sup>97</sup>
- 360 vii. An applicant’s *home* may be transferred:
- 361 1. to a sibling or half sibling who has an equity interest in the home and who  
 362 resided in the home for at least one year before the applicant / transferor became  
 363 an institutionalized person.
- 364 2. to an adult child who resided in the home for at least two years immediately  
 365 before the date the individual became institutionalized and provided care at  
 366 home which would otherwise have been provided in a nursing home.<sup>98</sup>
- 367
- 368 b. Transfers in which the applicant’s intention at the time of the transfer, or circumstances  
 369 extant at the time of the application, cause the transfer to be disregarded.
- 370 i. Transfers in which the applicant intended to receive adequate compensation for the  
 371 asset or that he/she actually received adequate compensation for the asset.<sup>99</sup>
- 372 ii. Transfers for reasons **exclusive** of becoming or remaining eligible for Medicaid  
 373 long term care services’ payment.<sup>100</sup>
- 374 iii. *De minimis* transfers after February 7, 2006.<sup>101</sup>

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reader to Va. Medicaid Manual § M 1120.202, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 903.

Of note here is that on December 13, 2016, the President signed the 21st Century Cures Act (P.L. 114-255). Under this statute, mentally capable persons can establish their own self-settled special needs trusts (SNTs). Before December 13, such trusts could only be established by a parent, grandparent, a guardian or a court. The Medicaid policy at Va. Medicaid Manual § M 1120.202 (as published on the Virginia Department of Medical Assistance Services site as of the effective date of this work) does not reflect Section 5007 of the Act, captioned “Fairness in Medicaid Supplemental Needs Trusts,” which adds two words (“the individual”) to the laws governing SNTs. The writer inquired in December or January, 2017, of the Virginia Department of Medical Assistance Services concerning an updated Manual provision (Va. Medicaid Manual § M 1120.202, cited in Va. Medicaid Manual § M 1450.400 (D) relating to trusts).

<sup>97</sup> Va. Medicaid Manual § M 1450.550 D, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1283. “[P]lacement of an individual’s funds into a pooled trust when the individual is age 65 years or older must be evaluated as an uncompensated transfer, if the trust is structured such that the individual irrevocably gives up ownership of funds placed in the trusts. A trust established for a disabled individual under age 65 years is exempt from the transfer of assets provisions. However, any funds placed in the trust after the individual turns 65 must be evaluated as an asset transfer.”

<sup>98</sup> Va. Medicaid Manual § M 1450.400 (C) (3), [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1271. SSI policy is considerably more tolerant (and realistic); SI 01150.122 Exceptions—Transfer of a Home (A)(3), <http://policy.ssa.gov/poms.nsf/lnx/0501150122>, and provides that “care [required to meet this exception] is substantial but not necessarily full-time care. A son or daughter is providing care for purposes of this exception if he/she does most of the following for the transferor on regular basis: prepares meals; shops for food and clothing; helps maintain the home; assists with financial affairs (banking, paying bills, taxes); runs errands; provides transportation; provides personal services; arranges for medical appointments; assists with medication.”

<sup>99</sup> Va. Medicaid Manual § M 1450.400 B, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1270.

<sup>100</sup> Va. Medicaid Manual § M 1450.400 B, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1270.

<sup>101</sup> Va. Medicaid Manual § M 1450.400 H, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1274.

- 375 1. Transfers after February 7, 2006 with a total cumulative value not exceeding  
376 \$1,000 per calendar year will not be considered a transfer for less than fair  
377 market value and no penalty period will be calculated.
- 378 2. Transfers after February 7, 2006, between \$1,000 and \$4,000 per calendar year  
379 will not be considered a transfer for less than fair market value if documentation  
380 is provided that such transfers follow a pattern that existed for at least three  
381 years prior to applying for Medicaid payment. Christmas gifts, birthday gifts,  
382 graduation gifts, wedding gifts, etc. meet the criteria for following a pattern that  
383 existed prior to applying for Medicaid payment of LTC services.
- 384 3. Although not factored into the examples provided by the Virginia Medicaid  
385 Manual, the exemptions effectively provide a reduction in penalties that can be  
386 imposed by reason of a transfer for a minimum of 7 days and a maximum of 30  
387 days per year.<sup>102</sup>  
388

389 iv. Undue Hardship: Does Virginia Mean What Congress Said?<sup>103</sup>  
390

- 391 1. Section 6011 of the Deficit Reduction Act of 2005<sup>104</sup> requires that each State  
392 ***shall*** provide for a hardship waiver process in accordance with section  
393 1917(c)(2)(D) of the Social Security Act (42 U.S.C. 1396p(c)(2)(D))--  
394  
395 (1) under which an undue hardship ***exists*** when application of the transfer of  
396 assets provision would deprive the individual--  
397 (A) of medical care such that the individual's health or life would be  
398 endangered; or  
399 (B) of food, clothing, shelter, or other necessities of life; and  
400  
401 (2) which provides for--  
402  
403 (A) notice to recipients that an undue hardship exception exists;  
404 (B) a timely process for determining whether an undue hardship waiver will be  
405 granted; and  
406 (C) a process under which an adverse determination can be appealed.  
407
- 408 2. The exclusive focus of the federal statute is upon the impact of the denial upon  
409 the Medicaid applicant / recipient.<sup>105</sup> This follows because the penalty only

<sup>102</sup> \$1,000 / 130.97 [4,060/31] = 7.64 days; \$4,000 / 130.97 = 30.54 days. See example, Va. Medicaid Manual § M 1450.630 E, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1298.

<sup>103</sup> Va. Medicaid Manual § M 1450.700, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1301.

<sup>104</sup> <https://www.gpo.gov/fdsys/pkg/PLAW-109publ171/html/PLAW-109publ171.htm>.

<sup>105</sup> See Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations July 27, 2006, Letter to

410 applies to persons certified (by the prescreening report) to be in need of long  
411 term care in a nursing home. They must have that level of care to have their  
412 minimal activities of daily living met. **Thus, every denial of Medicaid funding**  
413 **for long term care services that results in denial of admission or expulsion**  
414 **from a nursing home will meet the standard for endangerment and privation.**  
415

- 416 3. Virginia recognizes this and has revamped its undue hardship claim policy in  
417 recent transmittals.
- 418
- 419 4. That is not what Virginia policy says. The present policy provides that undue  
420 hardship “**may** exist when the imposition of a transfer of assets penalty period  
421 would deprive the individual of medical care such that the individual’s health or  
422 life would be endangered or he would be deprived of food, clothing, shelter, or  
423 other necessities of life.
- 424 5. Further limitations – arguably in violation of federal law - are cobbled onto the  
425 exception in Virginia, by virtue of the policy that “[a]n undue hardship may be  
426 granted when documentation is provided that shows:
- 427 A. that the assets transferred cannot be recovered, and
- 428 B. that the immediate adverse impact of the denial of Medicaid coverage for  
429 payment of LTC services due to the uncompensated transfer would result in  
430 the individual being removed from the institution or becoming unable to  
431 receive life-sustaining medical care, food, clothing, shelter or other  
432 necessities of life.”<sup>106</sup>
- 433 C. Virginia requires a specific form to be completed,<sup>107</sup> and provides a  
434 minimum of 10 days in which to return the completed form claiming undue  
435 hardship, and if the *individual requests additional time to provide the form and*  
436 *documentation, the worker must allow up to 30 calendar days from the date the*  
437 *checklist requesting information was sent.* If the form and documentation are not  
438 returned within 30 calendar days, the penalty period must be imposed.<sup>108</sup>  
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State Medicaid Directors Number SMDL #06-018 Enclosure captioned, “Sections 6011 and 6016 New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005.” The [letter](#) and the [enclosures](#) address the transfer of asset penalties and policy for transactions allegedly being for less than fair market value, including purchase of promissory notes, loans, or mortgages, purchase of life estates, and undue hardship.

<sup>106</sup> Va. Medicaid Manual §M 1450.700 A, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1302.

<sup>107</sup> The form, "Asset Transfer Undue Hardship Claim Form," number 032-03-0417-03-eng (6/12),

[https://www.dss.virginia.gov/files/division/bp/medical\\_assistance/forms/all\\_other/032-03-0417-03-eng.pdf](https://www.dss.virginia.gov/files/division/bp/medical_assistance/forms/all_other/032-03-0417-03-eng.pdf).

<sup>108</sup> *Id.* B. 1. b, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1302.

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Virginia Medicaid Planning Highlights  
Through DMAS Transmittal #DMAS -4 (4-1-2017)

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- 440 6. Specific documentation is required.<sup>109</sup>  
441  
442 7. All requests for waivers under the undue hardship standard must be considered  
443 by the central DMAS office.<sup>110</sup>  
444  
445 8. Denial of an unclaimed hardship exception may be appealed<sup>111</sup> pursuant to  
446 Virginia Administrative Code provisions.<sup>112</sup>  
447  
448 c. Transfers exempt by reason of the character or value of the transferred asset.<sup>113</sup>  
449 i. Personal Effects and Household Items.  
450 ii. Automobiles.  
451 1. If used for employment or treatment transportation, or which are specifically  
452 equipped for disabled persons, no limitation on value.  
453 2. Otherwise, automobile of up to \$4,500 in trade-in value is excluded.  
454 iii. Life insurance.  
455 1. Term life policies, no limitation on transfer amount.  
456 2. Other policies, up to \$1,500 in face value.  
457 iv. Property essential to self support (business use property).  
458  
459 4. Disqualifying Transfers: The look-back and the penalty.  
460  
461 a. Ineligibility is imposed, if at all, only for long term care services, including nursing  
462 facility services and home or community based care services under the Virginia  
463 waiver.<sup>114</sup>  
464  
465 b. The look-back, 42 USC 1396p.  
466  
467 i. The look-back is the period of time in which Medicaid may consider gifts and  
468 under-valued sales ("uncompensated transfers") to disqualify an applicant / spouse  
469 from certain Medicaid services.

<sup>109</sup> Va. Medicaid Manual §M 1450.700 B 1 a, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1302.

<sup>110</sup> *Id.* B. 2, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1303.

<sup>111</sup> "The individual must be informed that a denial of a claim for undue hardship may be appealed in accordance with the provisions of 12 VAC 30-110." (B) 1 d, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1303.

<sup>112</sup> 12 VAC 30-110-90, <http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+12VAC30-110-90>.

<sup>113</sup> Va. Medicaid Manual § M 1450.300, [Medicaid Manual as of June 28, 2017](#), Adobe page(s) 1268.

<sup>114</sup> Va. Medicaid Manual § M 1450.004.

- 470
- 471           ii. The look-back for uncompensated transfers made after February 7, 2006, is sixty
- 472           months.<sup>115</sup>
- 473
- 474           c. Penalty calculation for long term care services by reason of uncompensated transfers
- 475           effected within the look-back.
- 476           i. Uncompensated transfers made within the look-back.
- 477           1. Calculate period of ineligibility for uncompensated transfers in the 60 month
- 478           period preceding application date.<sup>116</sup>
- 479           A. Single gift within look-back.<sup>117</sup>
- 480           a. Divide value of gift by average monthly cost of private nursing home
- 481           payment \$5,933 (\$8,367 in Northern Virginia).<sup>118</sup>
- 482           b. Quotient is the ineligibility period, which is the number of months and
- 483           partial months (days) of ineligibility for long term care services.<sup>119</sup>
- 484           i. Example: Applicant's \$10,000 gift on October 9.
- 485           ii.  $\$10,000 / \$5,933 = 1.667$
- 486           iii.  $10,000 - 5,933 = \$4,007$  [partial month]
- 487           iv. Daily rate is  $5,933 / 31 = \$159.81$
- 488           v.  $\$4,007 / \$159.81 = 20.727$  days.
- 489           vi. Ineligibility period = 1 month, 21 days.<sup>120</sup>
- 490           B. Multiple gifts in look-back.<sup>121</sup>

<sup>115</sup> Va. Medicaid Manual § M 1450.200.

<sup>116</sup> DRA 2005 provides explicit state authority to accumulate multiple transfers into one penalty period. DRA 2005 § 6016 (b). The provision appears unnecessary because the statute, with DRA 2005 amendments to the commencement date of the penalty, will cause the same result. 42 U.S.C. 1396p (c) (1) (E) (i) (I) [requiring consideration of "the total, cumulative uncompensated value of all assets ... on or after the look-back date", for institutionalized persons], and 42 U.S.C. 1396p (c) (1) (E) (ii) (I) [same, for non-institutionalized persons].

<sup>117</sup> Caveat: Va. Medicaid Manual § M 1450.400 G, discussed above, provides a de minimis exemption between \$1,000 and \$4,000, from the transfers of assets penalty. The exemption has not been factored into this equation. The exemption is valued at a minimum of 7.64 days per year, and a maximum of 30.54 days per year.

<sup>118</sup> Va. Medicaid Manual § M 1450.630 D.

<sup>119</sup> Va. Medicaid Manual § M 1450.630 E provides details on the calculation of partial months of ineligibility for transfers occurring after February 7, 2006. No applications filed on or after the date of this outline will fall under the "old" rule.

<sup>120</sup> Or possibly 20 days. The example for "partial month" penalty determinations at Va. Medicaid Manual §M 1450.630 E used an example in which the number of days was "16.14." It is not clear whether the number of days is to be rounded up or down at this level.

<sup>121</sup> Caveat: Va. Medicaid Manual § M 1450.400 G, discussed above, provides a de minimis exemption between \$1,000 and

- 491 a. Add the total, cumulative value of all assets transferred.
- 492 b. Divide total by average monthly cost of private nursing home payment
- 493 **\$5,933** (**\$8,367** in Northern Virginia).
- 494 c. Quotient is the ineligibility period, which is the number of months (&
- 495 partial months) of ineligibility for long term care services.
- 496 d. Example: Applicant's \$10,000 gift on October 9, and of \$10,000 on
- 497 November 5, **2013**.
- 498 i.  $\$20,000 / \text{\$5,933} = 3.37$ .
- 499 ii. Ineligibility period = 3 months 13 days.<sup>122</sup>
- 500
- 501 2. Commence calculated ineligibility period from the later of:
- 502 A. First day of month during or after which assets have been transferred for
- 503 less than fair market value, or
- 504 B. the date on which the individual is eligible for Medicaid and would
- 505 otherwise be receiving institutional level care but for the application of the
- 506 penalty period, and which does not occur in any other period ineligibility
- 507 imposed for any other reason.<sup>123</sup>
- 508 C. Example:
- 509 a. \$5,000 tuition paid for 19 year old grandchild, May 6, 2009, and \$12,979
- 510 for medical bills of adult (non-disabled) daughter in January, 2010.
- 511 b. Donor (or spouse) enters nursing home in April, 2012.
- 512 c. Assets spent on nursing home care and exhausted to \$2,000, and
- 513 application for benefits otherwise granted, in Richmond, Virginia, in
- 514 September, 2012.
- 515 d. If the gifts are \$17,979, the donor is ineligible for Medicaid for 3
- 516 months, 0 days,<sup>124</sup> commencing September 1, 2012, and concluding on
- 517 December 21, 2012.<sup>125</sup>
- 518

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\$4,000, from the transfers of assets penalty. The exemption has not been factored into this equation. The exemption is valued at a minimum of 6 days per year, and a maximum of 25 days per year.

<sup>122</sup> Or possibly 12 days. See footnote above.

<sup>123</sup> Va. Medicaid Manual § M 1450.630 B.

<sup>124</sup>  $\$17,979 / \text{\$5,993} = 3.00$ .

<sup>125</sup> Va. Medicaid Manual § M 1450.630. The penalty does not commence until September because that is the first day of the month in which the applicant is institutionalized and otherwise eligible for nursing home care based upon an approved application.

519 **II. Planning Considerations: Initial Eligibility For Institutionalized Spouse .**

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521 Example:

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- H and W own a home and have non-working farm land which is contiguous to the home.
- They own real estate valued at \$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.
- He goes into the nursing home on August 3.
- No gifts of any kind (including Christmas, birthdays, etc.) made in preceding five years, or gifts having no greater value than \$1,000 made in any calendar year.<sup>126</sup>
- Powers of attorney with gifting authority in place.<sup>127</sup>

A. Initial eligibility.

- a. Home is exempt as well as all contiguous real estate.<sup>128</sup>
- b. CSRA for W: \$100,000 (1/2 of \$200,000, not exceeding \$120,900).
- c. MMNA for W: \$2002.50 - \$500 (Soc. Sec. For Wife) = \$1,502.50.
- d. Excess resources, \$98,000 (\$200,000 - [\$100,000 + \$2,000]).
- e. First possible eligibility date is September.

B. A Baker's Dozen Excess Resource Dispositions.

- 1. Payment for long term care of IS and living expenses of CS.
- 2. Enhanced home, car, contiguous property to home.
- 3. Purchase of home for CS<sup>129</sup> and creation of HECM reverse mortgage for CS.
  - a. Purchase of home is exempt.

<sup>126</sup> Va. Medicaid Manual §M 1450.400 H provides a \$1,000 per year exclusion which may be increased to \$4,000 per year for traditional "pattern" gifts: "Assets transferred on or after February 8, 2006, that have a total cumulative value of more than \$1,000 but less than or equal to \$4,000 per calendar year may not be considered a transfer for less than fair market value if documentation is provided that such transfers follow a pattern that existed for at least three years prior to applying for Medicaid payment of LTC services. Christmas gifts, birthday gifts, graduation gifts, wedding gifts, etc. meet the criteria for following a pattern that existed prior to applying for Medicaid payment of LTC services.

<sup>127</sup> The Virginia Uniform Power of Attorney Act address gifts at Virginia Code §§ 26-95 and 111. §26-95 states that "an agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited or limited by another statute, agreement, or instrument to which the authority or property is subject: ... 2. Make a gift ...."

<sup>128</sup> Only \$5,000 in surrounding property would be exempt were H single unless the single H qualified under the 80% FPL category.

<sup>129</sup> Note the home equity limitation does not apply since the community spouse will own (and live) in the home.

- 546           b. Loan proceeds are excluded from income calculations.<sup>130</sup>
- 547           4. Long term care insurance for CS.
- 548           5. Enhanced (increased) CSRA when sum of CS and IS income less than MMNA via fair
- 549           hearing for institutionalizations occurring after February 7, 2006,<sup>131</sup> limited court order.<sup>132</sup>
- 550           6. Conversions of CS resources to income.
- 551           a. Loan to child for non-negotiable, actuarially sound promissory note payable to CS.
- 552           i. Transfer of assets analysis.<sup>133</sup>
- 553           1. The note will not be considered an uncompensated transfer of assets if it:
- 554           A. has a repayment term that is actuarially sound (see [M1450.100](#)),
- 555           B. provides for payments to be made in equal amounts during the term of the
- 556           loan with no deferral and no balloon payments, and
- 557           C. prohibits the cancellation of the balance upon the death of the lender.
- 558           2. If the promissory note, loan, or mortgage does not meet the above criteria, the
- 559           uncompensated amount is the outstanding balance as of the date of the
- 560           individual's application for Medicaid.
- 561           3. The countable value as a resource is the outstanding principal balance for the
- 562           month in which a determination is being made.
- 563           ii. Resource analysis.<sup>134</sup>
- 564           1. Presumption is that a promissory note is a countable resource.
- 565           A. "A promissory note is a written, unconditional agreement whereby one party
- 566           promises to pay a specified sum of money at a specified time (or on demand)
- 567           to another party. It may be given in return for goods, *money loaned*, or
- 568           services rendered."
- 569           B. The Medicaid worker is instructed to "[a]ssume that the value of a
- 570           promissory note, loan, or property agreement as a resource is its outstanding
- 571           principal balance unless the individual furnishes reliable evidence that it has
- 572           a CMV of less than *the outstanding principal balance* (or no CMV at all)."

<sup>130</sup> Va. Medicaid Manual § M 1120.225 B.

<sup>131</sup> 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). DRA 2005 also mandated this rule as applicable.

<sup>132</sup> Va. Code § 20-88.02:1. See CMS SMDL #06-018 Enclosure, §6013, § 6011 (v).

<sup>133</sup> Va. Medicaid Manual § M 1450.540. See also 42 USC 1396p (c) (1) (I) as amended by DRA 2005.

<sup>134</sup> Va. Medicaid Manual § S 1140.300.

- 573 C. The Medicaid worker is further instructed that “[i]f including the outstanding  
574 principal balance in countable resources causes ineligibility, **inform the**  
575 **individual** that we will use the outstanding principal balance in determining  
576 resources unless he or she submits: • evidence of a legal bar to the sale of the  
577 agreement ; or • an estimate from a knowledgeable source, showing that the  
578 CMV of the agreement is less than its outstanding principal balance.”
- 579 D. “Knowledgeable sources include anyone regularly engaged in the business  
580 of making such evaluations: e.g., banks or other financial institutions, private  
581 investors or real estate brokers. The estimate must show the name, title, and  
582 address of the source.”
- 583 2. However, while a *non-negotiable, non-assignable* promissory note is an asset,  
584 under long established policy, it can never be a resource.
- 585 A. “Not everything a person owns (i.e., not every asset) is a resource and not all  
586 resources count against the resource limit.”<sup>135</sup>
- 587 B. “Resources are cash and any other personal or real property that an  
588 individual (or spouse, if any):  
589 • owns;  
590 • **has the right, authority, or power to convert to cash** (if not already cash);  
591 and  
592 • is not legally restricted from using for his/her support and maintenance.”<sup>136</sup>
- 593 C. “Any property (an asset) that does not meet the criteria in 1. above is not a  
594 resource even though it may be an asset (e.g., an individual who has an  
595 ownership interest in property but is not legally able to transfer that interest  
596 to anyone else does not have a resource).”<sup>137</sup>
- 597 3. A community spouse’s loan of funds to a child, in exchange for a non-  
598 negotiable, non-assignable, and non-transferable promissory note which meets  
599 the foregoing transfer of assets criteria will result in a resource which has a zero  
600 CMV for liquidation (as the note will require that payments be made only to the  
601 community spouse or to her estate regardless of any attempted sale or  
602 negotiation). The payments which the community spouse receives on a monthly  
603 basis will be attributable to her only as income.
- 604 b. Annuity for CS or single person (purchased after February 7, 2006).
- 605 i. Transfer of assets analysis.<sup>138</sup>

<sup>135</sup> Va. Medicaid Manual §M 1110.001 B 2; 1110.100 A.

<sup>136</sup> Va. Medicaid Manual §M 1110.100 B 2.

<sup>137</sup> Va. Medicaid Manual §M 1110.100 B 3.

<sup>138</sup> Va. Medicaid Manual § M 1450.530. See also 42 USC 1396p (c) (1) (F) as amended by DRA 2005.

- 606 1. Virginia remainder-person.
- 607 A. To meet the remainder person test, the annuity must name the
- 608 Commonwealth as a remainder beneficiary for at least the total amount of
- 609 medical assistance paid on behalf of the “*institutionalized individual*,” the
- 610 institutionalized spouse or the institutionalized person other than a spouse.
- 611 B. However, when there is a community spouse or minor or disabled child, the
- 612 Commonwealth is a secondary remainder beneficiary.<sup>139</sup>
- 613 2. Irrevocability, actuarial soundness, and regularity; exception for tax annuities.<sup>140</sup>
- 614 Unless the annuity is described in IRC 408,<sup>141</sup> the purchase money paid for the
- 615 annuity will be considered an uncompensated transfer of assets unless the
- 616 annuity
- 617 A. is irrevocable and non assignable; and
- 618 B. is actuarially sound;<sup>142</sup> and
- 619 C. provides for equal payments<sup>143</sup> with no deferral and no balloon payments.
- 620 ii. Resource analysis.<sup>144</sup>
- 621 1. The annuity must be issued by an entity licensed to do business in the state in
- 622 which the annuity is established.<sup>145</sup>
- 623 2. “Annuities purchased with the assets of a third party such as those *received*
- 624 through a legal settlement are not considered to be countable resources.”<sup>146</sup>
- 625 3. The annuity:<sup>147</sup>
- 626 A. Must be irrevocable.
- 627 B. Must be non-assignable.
- 628 C. Must be actuarially sound.<sup>90a</sup>

<sup>139</sup> The policy states the state must be the remainder beneficiary “in the first position.”

<sup>140</sup> Va. Medicaid Manual § M 1440.530 B 2 a.

<sup>141</sup> IRC 408 includes IRA, simplified retirement accounts, simplified employee pension; Roth IRA, or certain other accounts established by employers and associations.

<sup>142</sup> Va. Medicaid Manual § M 1450.520 C, relevant to purchases of annuities purchased before DRA 2005. See below.

<sup>143</sup> Not necessarily monthly payments.

<sup>144</sup> Va. Medicaid Manual § M 1140.260.

<sup>145</sup> *Id.* A.

<sup>146</sup> *Id.* B 2. This has been interpreted to include structured settlements in which the defendant’s insurer buys the annuity in at least one case in Virginia. Query: would traceable third party funds from inheritances, etc., also permit exclusion?

<sup>147</sup> *Id.* B 4.

<sup>90a</sup> It is unclear whether an annuity for a community spouse must be actuarially sound.

- 629 a. Use the tables at Va. Medicaid Manual § M 1450, Appendix 2.<sup>148</sup>
- 630 b. The annuity should be for no more than the life of the annuitant, and as
- 631 long as the same does not exceed the life expectancy, will not be
- 632 considered actuarially unsound so as to cause inclusion as a resource.<sup>149</sup>
- 633 D. Must provide for payments in equal amounts during the term of the annuity
- 634 with no deferral and no balloon payments made.
- 635 4. According to Va. Medicaid Manual § M 1140.260 (B)(5), “[p]rior to receiving
- 636 long-term care services paid by Medicaid, all annuities purchased by the
- 637 institutionalized individual *or the community spouse* on or after February 8,
- 638 2006, must name the Commonwealth of Virginia as the primary [remainder?]
- 639 beneficiary for at least the total amount of medical assistance *paid on behalf of*
- 640 *the institutionalized individual*. If there is a community spouse or minor or
- 641 disabled child, the Commonwealth must be named as the remainder beneficiary
- 642 behind the spouse or minor or disabled child.”<sup>92a</sup>
- 643 5. Reducing the payback period in the community spouse’s annuity is permissible
- 644 and perhaps advisable.
- 645 7. Burial Planning for H & W?<sup>150</sup>
- 646 8. Trust for disabled child of any age, or disabled person under age 65?<sup>151</sup>
- 647 9. “Pooled” Disability Trust for disabled person under 65 years of age?
- 648 a. Trust is recognized as an exempt trust in Virginia Medicaid policy.<sup>152</sup>
- 649 b. Transfers exempt as long as made to the trustee before age 65.<sup>153</sup>
- 650 10. Split interest (life/remainder estate planning)?
- 651 a. Life estates are not countable resources.<sup>154</sup>

<sup>148</sup> Va. Medicaid Manual § M 1450.520 C.

<sup>149</sup> “When the average number of years of expected life remaining for the individual (the “life expectancy” number in the table) is less than the life of the annuity, the annuity is NOT actuarially sound. The annuity purchase is a transfer for less than fair market value.” Va. Medicaid Manual § M 1450.610 D.

<sup>92a</sup> Query: Does this provision conflict with Va. Medicaid Manual § M 1450.530 (B)(1)?

<sup>150</sup> Va. Medicaid Manual § M 1130.300, -410 et seq.; §M1450.510 B.1. (Burial insurance).

<sup>151</sup> Va. Medicaid Manual Va. Medicaid Manual § S 1120.202 B (resources); Va. Medicaid Manual § M 1450.400 C (uncompensated transfer of assets exemption). See footnote 88 regarding December, 2016 change in procedure to establish such a trust under 21st Century Cures Act (P.L. 114-255).

<sup>152</sup> Va. Medicaid Manual § S 1120.202 B 2.

<sup>153</sup> See discussion above.

<sup>154</sup> Va. Medicaid Manual § S 1140.110 A 6. See discussion above for life estates acquired between August 28, 2008, and February 23, 2009. Presumably a countable life estate could be sold to the remainder tenant for value, who could then simply sell it again to the applicant / recipient (albeit for a reduced value).

- 652 b. No limitations in acquisition of life estate through February 7, 2006.
- 653 c. Limitations after February 7, 2006.
- 654 i. Acquisition life estate in another individual's home will be treated as
- 655 uncompensated transfer of assets unless the purchaser resides in the home for at
- 656 least twelve consecutive months after the acquisition.
- 657 ii. According to Transmittal 3822, the limitation applies only to acquisition of a life
- 658 estate in the home of another individual; thus it has no impact on life estates in
- 659 commercial property or other non-residential home.
- 660 iii. While CMS has interpreted federal law to state that the 12 month residence rule in
- 661 inapplicable when the individual purchases a home and then conveys a remainder
- 662 interest (for value) to a third party (because the individual owned a fee simple
- 663 interest in a home and then conveyed a remainder interest to the third party),
- 664 Virginia policy imposes a transfer of assets penalty.<sup>155</sup>
- 665 11. Contract for services rendered by family member ?<sup>156</sup>
- 666 a. Services provided by the child to the Medicaid applicant, or the IS or CS, may be
- 667 compensated.
- 668 b. *Caveat* income tax consequences.<sup>157</sup>

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<sup>155</sup> “The DRA provision pertaining to life estates does not apply to the retention or reservation of life estates by individuals transferring real property. In such cases, the value of the remainder interest, not the life estate, would be used in determining whether a transfer of assets has occurred and in calculating the period of ineligibility.” CMS SMDL #06-018. Enclosure, § IV. However, as stated above, Virginia purports to apply the rule to a retained life estate in real estate in violation of the CMS position, applying the same to “funds” used to acquire the interest, stating that “for Medicaid purposes, the purchase of a life estate is said to have occurred when an individual acquires or retains a life estate as a result of a single purchase transaction or a series of financial and real estate transactions.” Va. Medicaid Manual § M 1450.545 (B) (italics in original).

<sup>156</sup> Va. Medicaid Manual § M 1450.003 E, H, as modified by Va. Medicaid Manual § M 1450.570, Services Contracts.

<sup>157</sup> Consider a services agreement in which payments are deferred with interest, and secured by a deed of trust on the home of the service recipient. While the tax implications are beyond the scope of this work, if property is transferred in consideration of services, income tax is generally due. IRC § 83. The IRS provides guidance in this connection with deferred compensation as follows: “Section 83 codifies the economic benefit doctrine in the employment context by providing that if property is transferred to a person as compensation for services, the service provider will be taxed at the time of receipt of the property if the property is either transferable or not subject to a substantial risk of forfeiture. If the property is not transferable and subject to a substantial risk of forfeiture, no income tax is incurred until it is not subject to a substantial risk of forfeiture or the property becomes transferable. For purposes of § 83, the term ‘property’ includes real and personal property other than money or an unfunded and unsecured promise to pay money in the future. However, the term also includes a beneficial interest in assets, including money, that are transferred or set aside from claims of the creditors of the transferor, for example, in a trust or escrow account. Property is subject to a substantial risk of forfeiture if the individual's right to the property is conditioned on the future performance of substantial services or on the nonperformance of services. In addition, a substantial risk of forfeiture exists if the right to the property is subject to a condition other than the performance of services and there is a substantial possibility that the property will be forfeited if the condition does not occur. Property is considered transferable if a person can transfer his or her interest in the property to

- 669 c. Limitations.
- 670 i. Physician statement stating types of services that were to be provided under the
- 671 contract, and that these services were necessary to prevent the individual's entrance
- 672 into LTC.<sup>158</sup>
- 673 ii. Advance lump sum payment for services that have not been performed is
- 674 considered an uncompensated transfer of assets because the Medicaid
- 675 applicant/recipient has not received valuable consideration.
- 676 iii. Payments to other individuals for services received after the individual enters LTC
- 677 are considered an uncompensated transfer for Medicaid purposes, because "[o]nce
- 678 an individual begins receipt of Medicaid LTC services, the individual's personal and
- 679 medical needs are considered to be met by the LTC provider. Payments to other
- 680 individuals for services received after the individual enters LTC are considered an
- 681 uncompensated transfer for Medicaid purposes."<sup>159</sup>
- 682 12. Divorce following transfer of assets to CS?
- 683 a. Transfers between spouses are exempt.
- 684 b. Divorce following transfer of assets from institutionalized spouse to community spouse
- 685 severs the conduit (marriage) which imputes resources of the (former) community
- 686 spouse to the institutionalized spouse.
- 687 i. **Caveat:** MMNA income support rules no longer applicable to the former
- 688 community spouse.
- 689 ii. Consider QDROS by which ownership of the income producing asset (pension) is
- 690 itself transferred to the community spouse in the divorce decree.
- 691 13. Purchase of United States EE or I Bonds post-institutionalization (\$20,000 limit per spouse,
- 692 12 month holding period)?<sup>160</sup>

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anyone other than the transferor from whom the property was received. However, property is not considered transferable if the transferee's rights in the property are subject to a substantial risk of forfeiture." [Nonqualified Deferred Compensation Audit Techniques Guide \(02-2005\)](#). A retained power of appointment in the grantor of the deed of trust to secure the debt to a person other than the creditor (usually child providing services), the grantor, the grantor's creditors, etc., should create a substantial risk of forfeiture as to the property. A deferral of the right to exercise the creditor's rights until the real estate (if a residence) is no longer used as a residence should cause a deferral of income tax recognition until the condition (non residence) occurs.

<sup>158</sup> Federal law requires no such statement or limitation. Would payments made to an assisted living facility or other private duty sitter be deemed to be a disqualifying transfer of assets because the payor would not have gone into nursing home care at the time the payments were made?

<sup>159</sup> Like countless other family members, the writer employs privately paid "feeders," "sitters" and geriatric care managers for privately paying nursing home residents for whom he serves as guardian and conservator. Will these payments disqualify the residents from nursing home care under Medicaid? By what authority?

<sup>160</sup> See discussion above; Va. Medicaid Manual §M 1140.240 A.

- 693 14. Reverse Mortgage.<sup>161</sup>
- 694 a. Reverse mortgage payments are not considered income for Medicaid purposes in the
- 695 month of receipt and become a resource only to the extent retained in the next calendar
- 696 month.<sup>162</sup>
- 697 i. Payments from the home equity when title is vested in the CS will not alter the
- 698 Monthly Maintenance Needs Allowance payments due from the IS.
- 699 ii. Payments retained *by a community spouse after eligibility of the institutionalized*
- 700 *spouse* is established will have no effect upon the continuing coverage of the
- 701 institutionalized spouse.
- 702 b. Reverse mortgage payments as means of “covering” DRA penalty periods.
- 703

### 704 **III.Planning Considerations: Survivor Eligibility**

705

- 706 A. When a benefactor (such as a spouse, parent, or other significant other in the life of a Medicaid
- 707 or potential Medicaid recipient) dies and leaves to the Medicaid recipient, the assets will trigger
- 708 disqualification and fund a source of Medicaid estate recovery.
- 709 B. Advise likely benefactors (e.g., parents, unmarried siblings, adult children) to bypass spouse(s)
- 710 or create special needs trust for spouse(s) in benefactor’s estate plan.
- 711 C. In addition to the loss of eligibility, Virginia will recoup its Medicaid expenditures for benefits
- 712 paid after the recipient’s 55th birthday from whatever remains in the estate of the Medicaid
- 713 beneficiary after death.<sup>163</sup> Example: Great uncle leaves niece, 65, \$50,000 in his will. She has
- 714 been on Medicaid for 9 years. She loses eligibility, but dies 5 days after Uncle. Medicaid is
- 715 entitled to recover its claim for 9 years of payments from the gift Uncle made.<sup>164</sup>
- 716 D. Benefactors other than spouses.
- 717 1. Any trust (either one created by will or during lifetime of the benefactor) in which the
- 718 benefactor retains the use during life but creates a spendthrift, purely discretionary trust
- 719 effective to supplement assets of the Medicaid beneficiary during life.

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<sup>161</sup> See [Reverse Mortgages \(Annual Legal Aid Conference\)](#) (2014).

<sup>162</sup> Va. Medicaid Manual §M 1120.225.

<sup>163</sup> Estate recovery for Medicaid recipient, 12 VAC 30-20-140 for past benefits paid (after age 55).

<sup>164</sup> Shrouds have no pockets, and Medicaid numbers are of little use to the departed soul. There is no effective penalty for a posthumous disclaimer by the personal representative of a deceased Medicaid beneficiary. Virginia Code § 64.2-2603 B provides that “[e]xcept to the extent a fiduciary’s right to disclaim is expressly restricted or limited by another statute of the Commonwealth or by the instrument creating the fiduciary relationship, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, whether acting in a personal or representative capacity.”

- 720 2. At death of Medicaid beneficiary, residue in trust will avoid estate recovery and pay to third  
721 parties (grandchildren, charities, etc.).
- 722 E. Spouse benefactors.
- 723 1. Because of the elective share rules applicable to spouses,<sup>165</sup> beware of both resource and  
724 transfer of assets issues.
- 725 2. **DO NOT USE** living trusts when one spouse is Medicaid eligible, or expected to be.<sup>166</sup>
- 726 3. Marital agreements waiving elective share.
- 727 a. A surviving spouse married to a deceased Virginia spouse has a right to an elective  
728 share.
- 729 b. An unanticipated elective share could disqualify the surviving spouse on Medicaid, or  
730 vest additional countable resources in the spouse.
- 731 c. A well crafted marital agreement pursuant to Virginia statutes is an enforceable contract  
732 based upon lawful consideration.<sup>167</sup>
- 733 d. The General Assembly addressed the practice and use of marital agreements waiving  
734 the elective share in 2016 to be effective for decedents dying in 2017 and thereafter,  
735 providing that "the right of election of a surviving spouse and the rights of the surviving  
736 spouse to homestead allowance, exempt property, and family allowance, or any of them,  
737 may be waived, wholly or partially, before or after marriage, by a written contract,  
738 agreement, **or** waiver signed by the surviving spouse."<sup>168</sup>
- 739 i. The General Assembly lists three instruments (contract, agreement, and waiver) by  
740 which a surviving spouse can forego the elective share.

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<sup>165</sup> Va. Code § [64.2-300 et seq.](#) As discussed below, elective share calculations for decedents dying on or after January 1, 2017, have become considerably more complex than under prior law. The elective share of a surviving spouse is a graduated percentage of the decedent's assets, taking into account both spouses' assets on a quasi-partnership theory, and the length of marriage. As of this publication, no case law interpreting the statutes exists.

<sup>166</sup> The short reason is that each spouse is a creator of the trust (Va. Medicaid Manual § 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 analog – that a testamentary trust is not a transfer of assets by a spouse, and thus preferable in the planning process for the community spouse's estate – is discussed (and approved) in *Skindizer*, *infra*.

<sup>167</sup> Virginia Code § [20-155](#) provides that married persons " may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ [20-147](#) through [20-154](#) for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution." § [20-150](#) states that such an agreement may "contract with respect to ... disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event."

<sup>168</sup> [Virginia Code § 64.2-308.14.](#)

- 741           ii. An *agreement* or written contract between the spouses will be enforceable under  
742           ordinary contract law and in conformity with the Virginia Premarital Agreement  
743           Act, Virginia Code § 20-147 *et seq.*
- 744           iii. The statute provides that a *waiver* will be enforced unless the surviving spouse  
745           proves the agreement was involuntary or unconscionable.<sup>169</sup>
- 746       4. Possible testamentary dispositions:
- 747           a. Testamentary<sup>170</sup> special needs trust with mandatory income interest to satisfy the  
748           elective share requirement for survivor spouse in entire estate is available if it meets the  
749           following criteria:
- 750           b. In valuing ... beneficial interests in trust [for the surviving spouse], the following  
751           special rules apply:
- 752           i. The value of the beneficial interest of a spouse shall be the entire fair market value  
753           of any property held in trust if the decedent was the settlor of the trust, if the trust is  
754           held for the exclusive benefit of the surviving spouse during the surviving spouse's  
755           lifetime, and if the terms of the trust meet the following requirements:
- 756               1. During the lifetime of the surviving spouse, the trust is controlled by the  
757               surviving spouse or one or more trustees who are non-adverse parties;<sup>171</sup>
- 758               2. The trustee shall distribute to or for the benefit of the surviving spouse the entire  
759               net income of the trust at least annually;
- 760               3. The trustee is permitted to distribute to or for the benefit of the surviving spouse  
761               out of the principal of the trust such amounts and at such times as the trustee, in  
762               its discretion, determines for the health, maintenance, and support of the  
763               surviving spouse; and
- 764               4. In exercising discretion, the trustee may be authorized *or required* to take into  
765               consideration all other income assets and other means of support available to the  
766               surviving spouse.<sup>172</sup>
- 767           c. As stated above, the 2016 General Assembly completely changed the elective share  
768           rules for surviving spouses of persons dying after December 31, 2016.<sup>173</sup> The changes

<sup>169</sup> *Id.* (B) (2).

<sup>170</sup> Skindzier, at 784 A.2d 323 (Conn. 2001) (testamentary trust not disqualifying asset transfer).

<sup>171</sup> The *spouse* should never be made the trustee because of the discretionary rights over principal. Moreover, because "[u]nder section [IRC] 672(a) an adverse party is defined as any person having a substantial beneficial interest in a trust, which would be adversely affected by the exercise or nonexercise of a power which he possesses respecting the trust," 26 CFR 1.672(a)-1 - Definition of adverse party, a remainder-person cannot serve because of the "substantial interest" he would have in making the determination of discretionary distributions.

<sup>172</sup> Va. Code § 64.2-308.9 (C)(2)(a).

<sup>173</sup> Title 64.2. Wills, Trusts, and Fiduciaries » Chapter 3. Rights of Married Persons » Article 1.1. Elective Share of

- 769 reduced the risk of imputation of a disqualifying elective share for a surviving spouse  
 770 who is an incapacitated person under the statutes described below.
- 771 d. Testamentary special needs trusts with formula provision providing for the minimum  
 772 elective share calculable pursuant to Article 1.1 with a disposition of the residue (to  
 773 third parties or to a *purely discretionary* trust which need not meet the criteria stated  
 774 above) remains available, as under former law.
- 775 e. The law calculates the elective share of the surviving spouse as a graduated percentage,  
 776 taking into account both spouses' assets and the length of marriage.
- 777 f. For decedents dying after December 31, 2016, the surviving spouse of a Virginia  
 778 domiciliary decedent may elect to take an elective-share amount equal to 50 percent of  
 779 the value of the marital-property portion of the augmented estate.
- 780 i. There is a 2 step determination, being the (i) determination of the augmented estate  
 781 and (ii) the marital property portion.
- 782 ii. Composition of the augmented estate, subject to certain exclusions,<sup>174</sup> is the sum of:
- 783 1. The decedent's net probate estate;
- 784 2. The decedent's non-probate transfers to others;
- 785 3. The decedent's non-probate transfers to the surviving spouse; and
- 786 4. The surviving spouse's property and non-probate transfers to others.<sup>175</sup>
- 787 iii. The marital property portion of the augmented estate depends upon the length of the  
 788 marriage between the decedent and the surviving spouse in accordance with this  
 789 table, and is the sum of the augmented estate constituent elements above multiplied  
 790 by a percentage, which in turn is based upon the length of the marriage:<sup>176</sup>
- |     |                                  |     |
|-----|----------------------------------|-----|
| 791 | 1. Less than 1 year              | 3%  |
| 792 | 2. 1 year but less than 2 years  | 6%  |
| 793 | 3. 2 years but less than 3 years | 12% |
| 794 | 4. 3 years but less than 4 years | 18% |
| 795 | 5. 4 years but less than 5 years | 24% |
| 796 | 6. 5 years but less than 6 years | 30% |
| 797 | 7. 6 years but less than 7 years | 36% |

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Surviving Spouse of Decedent Dying on or After January 1, 2017.

<sup>174</sup> [Virginia Code § 64.2-308.9](#).

<sup>175</sup> [Virginia Code § 64.2-308.4](#) (A).

<sup>176</sup> [Virginia Code § 64.2-308.4](#) (B).

- 798                    8.    7 years but less than 8 years      42%
- 799                    9.    8 years but less than 9 years      48%
- 800                    10.  9 years but less than 10 years    54%
- 801                    11.  10 years but less than 11 years   60%
- 802                    12.  11 years but less than 12 years   68%
- 803                    13.  12 years but less than 13 years   76%
- 804                    14.  13 years but less than 14 years   84%
- 805                    15.  14 years but less than 15 years   92%
- 806                    16.  15 years or more                    100%
- 807                    g.    The elective share right is personal to the surviving spouse,<sup>177</sup> with special provisions  
808                    for incapacitated surviving spouses.<sup>178</sup>
- 809                    i.    When the election is made by a conservator or agent, the statute presumes the  
810                    surviving spouse for whom the election is made an "incapacitated person."
- 811                    ii.   When a validly appointed and qualified conservator asserts the surviving spouse  
812                    election, the surviving spouse is conclusively an incapacitated person.<sup>179</sup>
- 813                    iii.  When an *agent* asserts the election, the surviving spouse may not be an "individual  
814                    person."<sup>180</sup>

<sup>177</sup> [Virginia Code § 64.2-308.13](#), Right of election personal to surviving spouse; incapacitated surviving spouse.

<sup>178</sup> *Id.*, (B). Throughout the Article, the Code refers to a surviving spouse who is an "incapacitated person."

<sup>179</sup> "'Conservator' means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person." Va. Code § 64.2-2000.

<sup>180</sup> No definition exists for an "incapacitated spouse" in the elective share statutes. There is no separate definition for an "incapacitated person" in these statutes. However, while not defined in the elective share statutes, Chapter 20 of Title 64.2 *does* define "incapacitated person" to mean "an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator."

If the predicate fact for the presumption requires a court adjudication, and none exists, will the presumption require (or even permit) the Court to act under the aegis of [Virginia Code § 64.2-308.13](#)? If so and there is no adjudication of incapacity (and thus, no incapacitated person, and thus, no incapacitated surviving spouse) would the establishment of the trust by the Court on behalf of the surviving spouse pursuant to [Virginia Code § 64.2-308.13](#) be considered a transfer of assets by the spouse, *cf.* [42 USC 1396p](#) (d)(2)(A)(iv), which provides that "an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will: ... (iii) A 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 (iv) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse."

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- h. For an incapacitated surviving spouse,<sup>181</sup> a court proceeding is necessary in order to create the trust specified in the statute for the surviving spouse's protection.<sup>182</sup>
- i. If “the Court enters an order determining the amounts due to the surviving spouse,” the court “must set aside that portion of the elective share amount due from the decedent's probate estate and recipients of the decedent's non-probate transfers to others under subsections C and D of § 64.2-308.10 and must appoint a trustee to administer that property for the support of the surviving spouse.”
- j. “The trustee must administer the trust in accordance with the following terms or such other terms as the court determines appropriate:
  - i. Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse and **benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.**<sup>183</sup>
  - ii. During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to terminate the trust and acquire full ownership of the trust property free of trust.
  - iii. Upon the surviving spouse's death, the trustee must transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that

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imputes the transfers of a court acting on behalf of a Medicaid applicant or recipient to the applicant or recipient?

<sup>181</sup> This includes any spouse for whom the election is made by an agent under a power of attorney, see [Virginia Code § 64.2-308.13 \(B\)](#), which specifies that “an election on behalf of a surviving spouse by a conservator or agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person.” *Caveat*: see footnote 177.

<sup>182</sup> [Virginia Code § 64.2-308.12, -13 \(A\)](#).

<sup>183</sup> ***Emphasis supplied*** by writer. The importance of this provision for incapacitated surviving spouses – including any spouse who chooses to act through a power of attorney to assert any such claim – is difficult to overemphasize in relation to the requirement that the court created trust must be considered a testamentary trust *of the first spouse to die*, [Virginia Code § 64.2-308.13 \(B\)\(4\)](#), and the exclusion of such trusts upon the transfer of assets implications of a failure of the surviving spouse to elect the elective share pursuant to the *policy* (inferior to the statute) expressed in Va. Medicaid Manual § M 1450.003 (C), <http://majette.net/wp-content/uploads/2016/07/Combined-Manual-7-2-2016.pdf>, Adobe page(s) 1306. Cf. Roanoke Department of Social Services opinion, <http://192.254.232.225/%7Emajette/wp-content/uploads/2014/03/roanoke.pdf>.

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predeceased spouse died immediately after the surviving spouse; or (ii) to the predeceased spouse's heirs under Chapter 2 (§ 64.2-200 et seq.).<sup>184</sup>

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<sup>184</sup> This disposition makes clear that the assets remaining in the trust will pass as a part of the residuary estate of the first spouse to die, thus avoiding claims of the surviving spouse creditors, and Medicaid recovery pursuant to [42 USC 1396p](#) and the Virginia regulation, [12VAC30-20-141](#), *Estate recoveries*.

## 2017 SSI and Spousal Impoverishment Standards

### Supplemental Security Income (SSI)

*Effective 1-1-17*

	SSI Federal Benefit Benefit Rate (FBR)	SSI Resource Standard	Income Cap Limit (300%)	Earned Income Break Even Point	Unearned Income Break Even Point
Individual	735.00	2,000.00	2,205.00	1,555.00	755.00
Couple	1,103.00	3,000.00	N/A	2,291.00	1,123.00
<b>Substantial Gainful Activity (SGA) Limit:</b>		1,170.00 (Blind SGA: 1,950.00)			
<b>CPI Increase for 2017:</b>		1.5%			
<b>CPI Increase, Since September 1988:</b>		101.5%			

### Spousal Impoverishment

*Effective 1-1-17 Unless Otherwise Noted*

<b>Minimum Monthly Maintenance Needs Allowance (MMMNA):</b> <i>(Effective 7-1-16)</i>	2,002.50 2,502.50 2,302.25	All States (Except Alaska and Hawaii) Alaska Hawaii
<b>Maximum Monthly Maintenance Needs Allowance:</b>	3,022.50	
<b>Community Spouse Monthly Housing Allowance:</b> <i>(Effective 7-1-16)</i>	600.75 750.75 690.68	All States (Except Alaska and Hawaii) Alaska Hawaii
<b>Community Spouse Resources:</b>		
Minimum Resource Standard:	24,180.00	
Maximum Resource Standard	120,900.00	
<b>Home Equity Limits:</b>		
Minimum:	560,000.00	
Maximum:	840,000.00	