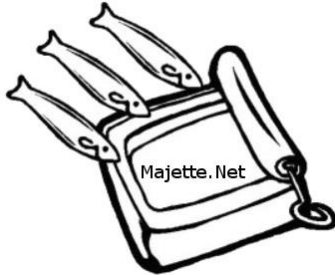


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Virginia Long Term Care Medicaid Planning Highlights
Citations to The Virginia Medicaid Manual Through Transmittal
#DMAS-22 (Effective 1-1-2022)¹
January 1, 2022



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January 1, 2022⁴

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

- A. The present work incorporates limits / standards published in the Virginia Department of Social Services Policy **Transmittal #DMAS-22** (January 1, 2022),⁵ amending the Virginia Medicaid

¹ DMAS-22 (Effective 1-1-2022) is posted [here and should be reviewed to assure its content is incorporated in the assimilated Medicaid Manual.](#)

² On March 16, 2022, the writer completed this edition of papers presented over the past 30 years or so at various Virginia Law Foundation, Virginia Bar Association, and other academic symposia. As in recent years past, Medicaid Manual hyperlinks directly to the writer's Virginia Medicaid Manual assimilation. The writer assimilated the Manual on Valentine's Day, 2022. It is current through the then most recently published Medicaid Manual and transmittal updates reported at the DMAS site address (presently <https://www.dmas.virginia.gov/for-applicants/eligibility-guidance/eligibility-manual/>).

³ The writer gratefully acknowledges the observations and corrections of friends and colleagues at [ThompsonMcMullan, P.C.](#), the [Virginia Academy of Elder Law Attorneys](#), the [Special Needs Alliance](#), and mostly, Mrs. Majette. Errors are the writer's; *kudos* and boundless appreciation belong to them for tolerance and corrections. And especially to Mrs. Majette, upon whom the writer has been inflicted for more than 47 years.

⁴ 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.

⁵ At publication, [Draft Transmittal # DMAS-23](#), to be effective April 1, 2022, is posted but has ***not been fully incorporated in the Va. Medicaid Manual nor extensively reviewed and included in the present work.*** References in the writer's



26 Manual, effective for January 1, 2022. The SSI amounts, ABD deeming standard amount,
27 ABD student child earned income exclusion, CBC personal maintenance allowance, spousal
28 resource standard, spousal resource maximum, maximum monthly maintenance needs
29 allowance, Medicare premiums, etc., for 2022 included through this outline are effective
30 January 1, 2022 unless otherwise noted. When not provided in the Virginia Medicaid Manual,
31 they were gathered from reliable sources.⁶

- 32
- 33 B. The Income Limits for aged, blind and disabled persons as of the date of this work are stated at
34 Medicaid Manual § M 0810.002. It is most easily accessed at the writers compiled (or
35 “stitched”) Medicaid Manual.⁷
- 36
- 37 C. FAMIS income limits are most easily accessed through the FAMIS [Cover Virginia](https://www.coverva.org/famis/) link
38 (<https://www.coverva.org/famis/>).
- 39
- 40 D. Social Security Administration Supplemental Security Income (SSI) for 2022.⁸
- 41
- 42 E. Just a few words about [the Gift of the MAGI](#).
- 43
- 44 1. Medicaid expansion benefits, a powerful blessing to many in the time of COVID, are
45 available to Virginia.
 - 46 2. [MAGI is the technical name of the program, effective January, 2019](#).⁹
 - 47 3. It is available to persons who are between the ages of 19 and 65, not eligible to receive
48 Medicare, whose income is no more than 133% of the FPL plus a 5% income disregard, and
49 who are not eligible in a Medicaid mandatory covered group or covered by the Breast And
50 Cervical Cancer Prevention And Treatment Act.¹⁰

“stitched” Medicaid Manual to [Adobe page numbers 1745 and following](#) are to this transmittal.

⁶ Medicare Advocacy's [Medicare Summaries](#); CMS' [Medicare & You](#); CMS' [Federal-Policy-Guidance](#); [SSI](#) and Spousal Impoverishment Standards described in the CMS letter and linked [table](#). The table is reproduced as Exhibit A of this outline. It contains the SSI and Medicaid “community spouse” (explained below) allowances effective **until the first day of January or the first day of July following the date of this outline**.

⁷ Virginia publishes its Manual in separate chapters. Whatever else its merits, this makes it difficult to search the entire Medicaid policy for a topic. To facilitate global searches the writer’s current assimilated Medicaid Manual is [here](#) and can be accessed [here](#) (<http://majette.net/professional-links/medicaid-and-auxiliary-grant-resources-4>). The instant work is intended to be maintained at <http://majette.net/outlines>, accessible by clicking the sardine can above. Images are hyperlinked to various resources. *Caveat*: click on images with the reader’s speakers at moderate levels.

⁸ The present Supplemental Security Income ([SSI](#)) income level (payment amount) is **\$841** for an individual and **\$1,261** for a married couple. See Exhibit A to this work.

⁹ [Va. Medicaid Manual M 330.250](#).

¹⁰ [Transmittal 23 Draft \(4-1-22\) income limits](#).



- 51 4. There is no ***general*** resource test, but the home equity limitations and transfer of assets tests
52 apply.¹¹
53
54

55 **II. The Six Medicaid Tests For An Institutionalized Spouse Of A Non Institutionalized Spouse.**
56

57 A. Your Papers, Please: Citizenship and Identity Credentials for Non-Medicare / SSI enrollees.
58

- 59 1. Individuals presently entitled to or enrolled in Medicare, individuals receiving Social
60 Security benefits on the basis of a disability and SSI recipients currently entitled to SSI
61 payments are exempt from the citizenship requirement.¹²
62 2. For nonexempt individuals, “Improved Enforcement of Documentation Requirements,”
63 requires submission of documentary proof of citizenship and identity with a Medicaid
64 application.¹³
65 3. Virginia Medicaid policy accordingly requires proof of identity and citizenship for new
66 applications and re-certifications for non-exempt individuals.¹⁴
67 a. When a Medicaid application includes an unsupported allegation of citizenship, the
68 Virginia Department of Medical Assistance Services must extend a “reasonable
69 opportunity” to provide the documentation.¹⁵
70 i. Upon application, if an individual meets all other Medicaid eligibility requirements
71 and declares that he is a citizen, the individual is to be enrolled, giving him the
72 reasonable opportunity period to provide citizenship and identity verification.
73 ii. The individual remains eligible for Medicaid during the reasonable opportunity
74 period.

¹¹ “Although no resource test is applicable for MAGI Adults coverage, the worker must evaluate certain resources for any individuals seeking Medicaid payment for LTSS. These include asset transfers, trusts, annuities, and the home equity limit. See M1410.050.” Emphasis in original. *Op. cit.*

¹² “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 § M [0220.100](#) C 2. The exemption also applies to foster care children and those born to Medicaid eligible mothers.

¹³ The provision amends [42 U.S.C. 1396b](#).

¹⁴ Va. Medicaid Manual § [M 0220.100](#) C 1.

¹⁵ Va. Medicaid Manual § [M 0220.100](#) C 4.



75 iii. The reasonable opportunity period extends from the date of application to the one
76 year annual review.¹⁶

77 4. Sources of proof of citizenship and identity are set out in various parts of the Virginia
78 Medicaid Manual with links to forms, etc.¹⁷

79
80 B. Age or Disability.

81
82 1. Except for MAGI eligible persons in long term care (about 37%),¹⁸ the applicant must be
83 65 or, if younger, disabled for purposes of the Social Security Administration.¹⁹

84
85 C. Prescreening: Activities of Daily Living / U.A.I.²⁰, §M²¹1420.100

86 1. Prescreening is required for persons entering long term care, PACE, or community based
87 care, except, *inter alia*, for persons in long term care for at least 30 days at the time of
88 application for Medicaid, or who have received Medicaid LTC in one or more of the
89 preceding 12 months and LTC was terminated for a reason other than no longer meeting the
90 level of care.²²

¹⁶ *Id.*, C 4.

¹⁷ [Va. Medicaid Manual § M 0220](#), Appendices 6 and 7.

¹⁸ [“Most but not all persons in need of long-term care are elderly. Approximately 63% are persons aged 65 and older \(6.3 million\); the remaining 37% are 64 years of age and younger \(3.7 million\).”](#)

¹⁹ [Va. Medicaid Manual § M 0310.002](#).

²⁰ Virginia's Uniform Assessment Instrument (U.A.I.), the Manual for its use, and related forms search page are located at this [link, http://majette.net/assessment-instruments](http://majette.net/assessment-instruments).

²¹ All cites to “§M” or “§S” are current citations to the Va. Medicaid Manual, accessed as noted above, via <http://majette.net>, and directly at the [official Virginia site](#).

²² Va. Medicaid Manual § [M 1420.400](#) (B). “Screening for LTSS is NOT required “when the individual is a resident in a nursing facility at the time of application and a screening for LTSS was completed prior to the nursing facility admission; the individual is a resident in a nursing facility at the time of application and was a private pay resident at the time of nursing facility admission; the individual is a resident in a nursing facility at the time of application *and was admitted to the nursing facility prior to July 1, 2019*; the individual received Medicaid LTSS in one or more of the preceding 12 months and LTSS was terminated for a reason other than no longer meeting the level of care; the individual enters a nursing facility directly from the CCC Plus Waiver or PACE **and** an LTSS screening was completed prior to the CCC Plus Waiver or PACE services starting; the individual leaves a nursing facility and begins receiving CCC Plus Waiver services or enters PACE **and** an LTSS screening was completed prior to the nursing facility admission **or at the point of a change in nursing facility level of care or care status**. For example, the individual did not receive a Medicaid LTSS Screening prior to nursing facility admission but wishes to leave the nursing facility and receives an LTSS Screening while in the nursing facility in order to be discharged to HCBS; the individual resides out of state (either in a community or nursing facility setting) and seeks direct admission to a nursing facility; the individual is an inpatient at an in state owned/operated facility licensed by DBHDS, in-state or out of state Veterans hospital or in-state or out of state military hospital and seeks direct admission to a nursing facility; the individual will not become financially eligible within six months of admission; the individual is no



- 91 2. The prescreening assesses the institutionalized spouse’s ability to perform activities of daily
92 living by reference to a standardized testing survey, the Uniform Assessment Instrument.
- 93 3. There is a special and separate “Waiver Management System (*WaMS*) Screen Print for
94 Community Living Waiver, Building Independence Waiver, and Family and Individual
95 Supports Waiver Authorizations” to screen for these programs.²³
- 96 4. Screening is generally performed by DMAS authorized local teams or by staff at the acute
97 care facility from which an admission is being made.²⁴
- 98 a. Patients placed directly from acute care hospitals are usually screened by hospital
99 screening teams. Generally, hospitals contract with DMAS to establish pre-admission
100 screening committees to perform the screening process internally.
- 101 b. A state level committee is used for patients being discharged from State Department of
102 Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS)
103 institutions for the treatment of mental illness, and mental retardation.
- 104 c. Patients in a Veterans Administration Medical Center (VAMC) who are applying to
105 enter a nursing facility are assessed by VAMC staff. VAMC discharge planning staff
106 use their own Veterans' Administration assessment form, which serves as the pre-
107 admission screening certification.
- 108 d. Different screening teams may be required for various waiver programs.²⁵
- 109 5. The screening criteria are ongoing, and DMAS can rescind certification while the recipient
110 remains in the nursing home.²⁶
- 111 6. The “Medicaid Funded Long Term Care Authorization Form²⁷” and various waivers are
112 published in the Medicaid Manual.²⁸
- 113 D. Monthly Income.

longer in need of LTSS and is requesting assistance for a prior period of long term care; the individual is being enrolled in Medicaid hospice services or home health services.” Emphasis in original.

²³ Va. Medicaid Manual § M 1420, Appendix 2. Note the [person’s \(mis-spelled\) name](#), establishing that somebody at DMAS has a remarkable sense of humor and shares with the writer a warm for the [Fleischer Brothers](#).

²⁴ Va. Medicaid Manual §M 1420.200 B.

²⁵ *Id.* C.

²⁶ 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 LTSS.”

²⁷ Va. Medicaid Manual § M 1420, [Appendix](#) 1.

²⁸ *Id.*



- 114 1. Unmarried Institutionalized Applicants / Recipients.
- 115 a. When income of applicant / recipient under **\$2,323 (in 2022)**,²⁹ automatic income
- 116 eligibility.³⁰
- 117 b. When Income of applicant / recipient exceeds 300% of the SSI income level, income
- 118 eligibility depends upon the specific facility Medicaid rate:³¹
- 119 1. **Spenddown Liability Less Than or Equal to Facility Medicaid Rate** If the
- 120 spenddown liability is less than or equal to the facility's Medicaid rate,
- 121 determine spenddown eligibility by projecting facility costs at the Medicaid rate
- 122 for the month. Spenddown balance after deducting projected costs at the
- 123 Medicaid rate should be zero or less. The patient is eligible as MN for the whole
- 124 month.
- 125 2. **Spenddown Liability More Than Facility Medicaid Rate** When the
- 126 spenddown liability is **more than** the facility Medicaid rate, determine
- 127 spenddown eligibility **AFTER** the month has passed, on a daily basis (do not
- 128 project expenses) by chronologically deducting old bills and carry-over
- 129 expenses, then deducting the facility daily cost at the **private** daily rate and
- 130 other medical expenses as they were incurred. If the spenddown is met on any
- 131 date within the month, the patient is eligible effective the first day of the month
- 132 in which the spenddown was met. Eligibility ends the last day of the month.
- 133 Each month must be evaluated separately. These patients will always be enrolled
- 134 after the month being evaluated has passed.
- 135 2. Married Applicants / Recipients.³²
- 136 a. **ONLY** income of institutionalized adult is counted.³³
- 137 b. When an institutionalized person is married to a spouse who is not institutionalized, the
- 138 institutionalized spouse is an "institutionalized spouse" (the "IS") under special rules.

²⁹ Va. Medicaid Manual §M [0810.002](#) A 3.

³⁰ 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.

³¹ Va. Medicaid Manual § M [0810.002](#) (generally); [M1460.410](#) C. 4 (for facility resident), C. 5 for [CBC waiver service costs](#). ***There are different rules for a facility resident / CBC recipient who is married to a spouse who is neither, see Va. Medicaid Manual § M 1480.300.***

³² Va. Medicaid Manual § M [1480.300](#), Income Eligibility Of Institutionalized Spouse.

³³ "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*.



- 139 c. The non-institutionalized spouse is referred to as the community spouse (the “CS”).
140 d. The income of the CS is not considered in determining Medicaid eligibility for the IS.
141 e. After eligibility of the institutionalized spouse is conferred, income of the IS may be
142 paid to the CS under the rules below.
- 143 3. Income of IS under 300% of SSI,³⁴ automatic eligibility; otherwise, daily, retroactive
144 counting may be required.³⁵
- 145 4. Supplementing CS Income: The "Minimum Monthly Maintenance Needs Allowance"
146 (MMNA)³⁶
- 147 a. “Standard” (minimum: \$2,177.50³⁷ until the first day of July following the date of this
148 work.
- 149 b. Maximum MMNA (including a Monthly Excess Shelter Allowance): \$3,435.00 until
150 the first day of January following the date of this work.

151
152 The Excess Shelter Standard (or Allowance) is intended to assist a community spouse
153 with qualified housing / utility costs exceeding the "shelter standard," which Congress
154 set at 30% of the community spouse's income allowance.³⁸ The excess shelter
155 allowance is calculated by subtracting the shelter standard (\$653.25³⁹ until the first day
156 of July following the date of this work) from the sum of these expenses: CS monthly
157 mortgage (PITI) or rent, homeowner association dues, homeowner insurance, and a
158 utility allowance (\$322.00 or, with more than 3 in the household, \$402.00).⁴⁰
159

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

³⁴ \$2,349 (in 2022). Va. Medicaid Manual § M 0810.002, see *supra*.

³⁵ Va. Medicaid Manual § M 0810.002; Va. Medicaid Manual § M 1480.310 (F).

³⁶ Va. Medicaid Manual § M 1480.410.

³⁷ *Id.*

³⁸ Medicaid Manual § M 1480.010 (B)(10).

³⁹ *Id.* The standard is 30% of the Monthly Maintenance Needs Allowance. The shelter standard is set at Va. Medicaid Manual §M 1480.410.

⁴⁰ The higher utility allowance applies to households in which more than three persons reside. Va. Medicaid Manual §M 1480.410.



- 162 c. Dependent Family Member⁴¹ Allowance. The allowance is calculated by reference to
163 the minimum monthly maintenance needs standard allowance as follows: the community
164 spouse MMNA – the dependent family member’s income divided by 3.⁴²
- 165 1. The income allowance available as a patient-pay deduction to the institutionalized spouse
166 may be increased by a hearing officer upon a showing that “exceptional circumstances
167 resulting in extreme financial duress” require the increase.⁴³
- 168 2. For *post-eligibility* support supplements, the CS may secure a court order for support using
169 familiar domestic relations law, but only *after* having exhausted the Medicaid
170 administrative process.⁴⁴ The Commonwealth’s domestic relations support law does not
171 require any showing of “extreme financial duress” in determining the support needs of the
172 CS.⁴⁵
- 173
174 E. Resources: Exempt and Countable.

⁴¹ A dependent family member is “a parent, minor child, dependent child, or dependent sibling (including half-brothers/sisters and adopted siblings) of either member of a couple who resides with the community spouse and who may be claimed as a dependent by either member of the couple for tax purposes under the Internal Revenue Code. Tax dependency is verified by a verbal or a written statement of either spouse.” Medicaid Manual § [M 1480.010](#) B 8.

⁴² Va. Medicaid Manual § [M 1480.010](#) A 11. The example reflects the MMNA in 1999; substitute the current minimum monthly maintenance needs standard from Va. Medicaid Manual § M 1480.410, *supra*.

⁴³ Va. Medicaid Manual § [M 1480.430](#) D 3. Cf. *Urrutia v. Daines*, 2011 NY Slip Op 9137; 2011 N.Y. App. Div. LEXIS 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).

⁴⁴ “The Eligibility Worker [EW] has no flexibility to calculate a minimum monthly maintenance needs allowance greater than the one calculated using the steps listed above. If the individual states there is a need for a greater amount, he has the right to file an appeal using the procedures in chapter 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 individual disagrees with the outcome of the appeal, he may then appeal the decision through his local circuit court. The EW 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, emphasis supplied by writer. The writer knows of no authority to support the quoted limitation, which imposes a significant burden upon the institutionalized spouse to obtain support: an unsuccessful administrative appeal through the circuit court level.

⁴⁵ 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, Part Eight, Juvenile and Domestic Relations District Courts. 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](#).



- 175 1. Exempt and countable resources.
- 176 a. What's a resource for Medicaid purposes?
- 177 i. It's property, but not every interest in property is a resource.⁴⁶
- 178 ii. A resource is any property which a person owns **and which** the person has the
- 179 right, authority, or power to convert to cash (if not already cash); **and which** is not
- 180 legally restricted from using for his/her support and maintenance.⁴⁷
- 181 b. All resources are countable unless specifically exempted.
- 182 c. Otherwise countable resources exempted equal to value of Partnership Long Term Care
- 183 Insurance Policy payments made at the time of application.⁴⁸
- 184 i. The value of assets disregarded in the Medicaid eligibility determination is equal to
- 185 the dollar amount of benefits paid to or on behalf of the individual as of the month
- 186 of application, even if additional benefits remain available under the terms of a
- 187 qualified partnership policy. Interestingly, the resources disregarded by reason of
- 188 such a long term care insurance policy is not applicable to the resource assessment
- 189 for married individuals with a community spouse.⁴⁹
- 190 ii. A long term care insurance policy is a qualified partnership policy only if it meets
- 191 these conditions:
- 192 1. it must be issued on or after 09/01/2007;
- 193 2. it must contain a disclosure statement indicating that it meets the requirements
- 194 under § 7702B(b) of the Internal Revenue Service Code of 1986, and
- 195 3. it must provide inflation protection for persons under 76 years of age and under
- 196 as follows:
- 197 A. compound annual inflation protection for persons under 61 years of age; and

⁴⁶ 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."

⁴⁷ *Id.* B.

⁴⁸ Va. Medicaid Manual § M [1460.160](#).

⁴⁹ *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](#). Va. Medicaid Manual § M [1480.220 B](#) 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 B. 3](#).



- 198 B. any level of inflation protection for persons 61 to 76 years of age.⁵⁰
- 199 2. Selected Exempt Resources: §S [1130](#) and §M [1480.210](#).
- 200 a. Home of the institutionalized person.⁵¹
- 201 i. Home is defined as the property which serves as the principal residence.⁵²
- 202 ii. Married persons when one is institutionalized but the other spouse is resident in the
- 203 home, and applicants in the 80% FPL category, may exempt *all* real property
- 204 contiguous to the residence.⁵³
- 205 iii. The home (including contiguous property of limited value for an unmarried
- 206 applicant / recipient, or unlimited value when the applicant / recipient has a CS or
- 207 when the applicant / recipient is in the 80% FPL category⁵⁴) is exempt for six
- 208 months after institutionalization, or longer when certain persons⁵⁵ reside there.
- 209 iv. **Caveat:** \$**636,000** Home Equity Limitation.⁵⁶
- 210 1. Applicable to persons whose long term care Medicaid is effective after January
- 211 1, 2006.
- 212 2. Virginia's rule is that home property that exceeds the limit will make the
- 213 homeowner ineligible for Medicaid payment of LTC services, unless the home
- 214 is occupied by a spouse, dependent child under age 21, or a blind or disabled
- 215 child of any age.⁵⁷
- 216 A. During the life of the community spouse, the limitation can be avoided:
- 217 a. While the community spouse resides in the home.

⁵⁰ Va. Medicaid Manual § M [1460.160](#) C.

⁵¹ Va. Medicaid Manual § [M 1460.530](#) applies to the home exclusion generally regarding Medicaid applications for long term care benefits. However, it expressly **exempts 80% FPL and MAGI adults, and warns that the substantial home ownership valuation rules do apply to MAGI**. 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.

⁵² Va. Medicaid Manual § [M 1460.530](#) (B)(3).

⁵³ Va. Medicaid Manual § [M 1480.010 B](#) (6); Va. Medicaid Manual § M [1480.210](#), [220 \(B\)\(2\)](#).

⁵⁴ 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.” Medicaid Manual § [S 1130.100](#). The Home, Resource Exceptions For ABD MI, [Appendix 2](#).

⁵⁵ Spouse, minor or disabled children, etc. See Medicaid Manual § [M 1130.100](#).

⁵⁶ Va. Medicaid Manual § [M 1460.150](#). **The limit changes each year.**

⁵⁷ *Id.*



- 218 b. If the institutionalized spouse transfers the home (or any portion of the
219 same, sufficient to reduce the institutionalized spouse’s share) to the
220 community spouse.⁵⁸
- 221 v. Thus the home and all real estate contiguous to it is excluded as long as the
222 community spouse resides in the home.
- 223 b. Life estate in real property.
- 224 i. Life estates created before August 28, 2008, are exempt resources.
- 225 ii. Life estates created on and after August 28, 2008 but before February 23, 2009, are
226 to be treated in the same manner as real property, including the application of real
227 property exclusions, if any.
- 228 iii. Life estates created on or after February 24, 2009, are exempt resources.⁵⁹
- 229 iv. *Caveat*. While a life estate purchased after February 23, 2009 will be exempt, the
230 funds “to purchase a life estate in another individual’s home [emphasis supplied
231 by R. Shawn Majette] **on or after February 8, 2006” triggers an uncompensated**
232 **asset transfer analysis**.⁶⁰ Failure to reside in the home of another in which a life
233 estate is purchased for at least 12 consecutive months **after** the purchase⁶¹ could
234 therefore result in an uncompensated transfer of assets (equal to the purchase price
235 for the life estate).

⁵⁸ Except in consideration of the community spouse’s individual debts (especially those reduced to judgments, thus creating liens), 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. Sometimes the community spouse is in poor health and the institutionalized spouse near death. In such a case, a transfer from the spouses to the institutionalized spouse may be considered. The institutionalized spouse might fund a testamentary trust for the community spouse, or bypass the community spouse altogether, as described below.

⁵⁹ Medicaid Manual § M [1110.515](#) B. Note: a life estate created by a “QDWI,” a qualified disabled working individual, is counted regardless of the date of its creation. Va. Medicaid Manual §M [1140.110](#) A 6. d. [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](#).”

⁶⁰ Va. Medicaid Manual § M [1450.545](#). “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 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, not to retaining the right to live in a house for the rest of the individual’s life while selling the remainder in the individual’s home to another party. See [CMS State Medicaid Directors Letter](#), July 27, 2006 with [CMS SMDL #06-018 Enclosure](#), § IV, discussed *infra*.

⁶¹ [12 V.A.C. 30-40-300](#) (F) (1) *Definitions* [for purpose of uncompensated transfer of assets penalty determination]: “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.”



- 236 a. United States EE or I Savings Bonds.⁶²
- 237 i. U.S. Savings Bonds are resources the first month following the mandatory retention
- 238 periods listed:
- 239 1. 6 months for Series E, EE and I bonds issued prior to 2/1/03,
- 240 2. 12 months for Series EE and Series I bonds issued on or after 2/1/03, and
- 241 3. 6 months for Series H and HH bonds.⁶³
- 242 ii. I-Bonds and EE Bonds issued on or after February 1, 2003, are subject to a twelve
- 243 month mandatory holding period, during which they are ‘not ... resource[s] at all.’⁶⁴
- 244 iii. Treasury dollar and timing limitations on the acquisition of the bonds.⁶⁵
- 245 1. Purchases are limited to \$10,000 per Social Security number in each series of
- 246 EE and I bonds.⁶⁶
- 247 2. Separate \$5,000 limit applies to Series I savings bonds in paper, which may only
- 248 be purchased with federal tax refund.⁶⁷
- 249 3. Denominations.
- 250 A. Series I savings paper bonds (with tax refund only): \$50, \$100, \$200, \$500,
- 251 \$1,000. Series I electronic bonds via [TreasuryDirect](#)⁶⁸ purchased to the
- 252 penny for \$25 or more.⁶⁹
- 253 B. EE⁷⁰ savings bonds via [TreasuryDirect](#)⁷¹ purchased to the penny for \$25 or
- 254 more.⁷²

⁶² Va. Medicaid Manual §§ M [1140.240](#) A; [1110.305](#) C 1 (example).

⁶³ H and HH bonds are no longer available.

⁶⁴ Va. Medicaid Manual § M [1110.305 C 1](#) (example), *supra*.

⁶⁵ See http://www.treasurydirect.gov/indiv/products/prod_eebonds_glance.htm.

⁶⁶ "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). See https://www.treasurydirect.gov/indiv/research/articles/res_invest_articles_purchaselimits_0406.htm.

⁶⁷ Paper I bonds can [only be purchased with federal tax refunds](#). See [I Savings Bonds](#).

⁶⁸ See <https://www.treasurydirect.gov/tdhome.htm>.

⁶⁹ I Series generally, https://www.treasurydirect.gov/indiv/products/prod_ibonds_glance.htm.

⁷⁰ EE Series generally, https://www.treasurydirect.gov/indiv/products/prod_eebonds_glance.htm. Purchase link (opening a new account), <https://www.treasurydirect.gov/RS/UN-AccountCreate.do>.

⁷¹ General Instructions, <https://www.treasurydirect.gov/tdhome.htm>.

⁷² See https://www.treasurydirect.gov/indiv/products/prod_eebonds_glance.htm.



- 255 iv. There is a penalty for redemption within five years of purchase. Redemption will
256 generally be required as of the first date that the bond(s) can be counted as a
257 resource.⁷³ The penalty is forfeiture of interest for 3 months immediately preceding
258 redemption.
- 259 b. Motor vehicle of any value.⁷⁴
- 260 c. Burial arrangements.
- 261 i. Burial space or agreements which represent the purchase of a burial space held for the
262 burial of the individual, his or her spouse, or any other member of his or her immediate
263 family is an excluded resource, regardless of value.⁷⁵ Cemetery plots are exempt
264 regardless of number owned (except QDWI) and may not necessarily be limited to
265 the use of the individual or other family members.⁷⁶
- 266 1. The burial space exclusion is in addition to, and has no effect on, the burial
267 funds exclusion below.⁷⁷
- 268 ii. Burial funds set aside for expenses.
- 269 1. Single person or married couple when both spouses reside together: \$3,500
270 burial account.⁷⁸

⁷³ “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.

⁷⁴ Generally, Medicaid Manual § M [1130.200](#). An automobile is excluded for the CS with an institutionalized spouse. Va. Medicaid Manual § [M 1480.010 B \(6\)](#); Va. Medicaid Manual § M [1480.210, -220](#) (B)(2).

⁷⁵ Va. Medicaid Manual § [M 1130.400](#). See helpful Table, [Va. Medicaid Manual M 1110.210](#).

⁷⁶ “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](#). Cf. [TSD](#).

⁷⁷ Va. Medicaid Manual § M [1130.400](#) A (2), *supra*.

⁷⁸ 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**).”



- 271 2. Married persons under the spousal impoverishment policy at Va. Medicaid
272 Manual § M 1480.000 *et seq*: \$1,500 burial account each,⁷⁹ perhaps because two
273 can die as cheaply as one?⁸⁰
- 274 iii. Burial insurance policies,⁸¹ unlimited in value.⁸²
- 275 iv. Tangible personal property for the grave is considered a burial space, and is exempt
276 regardless of value.⁸³
- 277 d. Household goods and personal effects are excluded from countable resources.⁸⁴
- 278 i. Household goods are items of personal property customarily found in the home and
279 used in connection with the maintenance, use, and occupancy of the premises as a
280 home.
- 281 ii. Personal effects are items of personal property that are worn or carried by an
282 individual or that have an intimate relation to the individual.
- 283 a. Qualifying annuities.⁸⁵
- 284 i. An annuity is a countable resource unless it meets certain requirements.⁸⁶
- 285 ii. A non-employment related annuity will be a countable resource unless the annuity:
286 1. is irrevocable;
287 2. is non-assignable;
288 3. is actuarially sound; and

⁷⁹ Va. Medicaid Manual § M [1480.220 \(B\) \(2\)](#). “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 **when one spouse is institutionalized and applying for long term care benefits and the other is not**]: ... up to \$1,500 of burial funds for each spouse (NOT \$3,500), *if there are designated burial funds.*” (Emphasis in original.)

⁸⁰ [But hopefully not.](#)

⁸¹ “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](#).

⁸² 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 [1130.300 \(B\) 1](#). However, burial insurance on the life of the individual reduces the burial set aside limit. Va. Medicaid Manual § [M 1130.300 \(B\) 4](#).

⁸³ Va. Medicaid Manual § M [1130.400 \(A\)](#).

⁸⁴ Medicaid Manual § M [1130.430](#).

⁸⁵ See discussion at III. B. 6., below.

⁸⁶ Va. Medicaid Manual §M [1140.260](#).



- 289 4. provides for payments in equal amounts during the term of the annuity with no
290 deferral and no balloon payments made.⁸⁷
- 291 iii. *Caveat*: Based upon the foregoing policy, if the annuity is not actuarially sound,
292 Virginia can deem an otherwise excluded annuity as a countable resource *and*
293 imposes a period of ineligibility upon its acquisition.⁸⁸
- 294 2. Personal resource allowance for countable resources of any aged, blind or disabled
295 Medicaid recipient is limited to \$2,000.
- 296
- 297 3. Lump sum for protection of the community spouse.
- 298 a. The Community Spouse Resource Allowance ("CSRA")⁸⁹ or the Community Spouse
299 Protected Resource Amount ("CSPRA")⁹⁰ is the value of countable resources which can
300 be excluded from the couple's countable resources, and thus protected for the
301 community spouse ("CS") while the institutionalized spouse ("IS") receives Medicaid.
- 302 b. 50% of countable resources owned by spouses as of first day of month in which one
303 spouse becomes institutionalized, subject to:
- 304 i. Minimum (as of 1/1/2022 until the first day of January following the date of this
305 work): \$27,480.⁹¹
- 306 ii. Maximum⁹² (as of 1/1/2022 until the first day of January following the date of this
307 work) \$137,400.⁹³
- 308 c. Resource valuation and eligibility dates different for unmarried vs. married
309 institutionalized person.

⁸⁷ *Id.* (B)(4).

⁸⁸ 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 reference to the Life Expectancy Table, Appendix 2); and provides for equal payments with no deferral and no balloon payments."

⁸⁹ Va. Medicaid Manual § M 1480.010 (B) (4).

⁹⁰ Va. Medicaid Manual § M 1480.010 (B) (25).

⁹¹ Va. Medicaid Manual M 1480.231.

⁹² See III B below regarding limited revisions (institutionalization before DRA 2005).

⁹³ Va. Medicaid Manual § M 1480.231. See Exhibit A., *infra*. These limits are published annually by CMMS, generally at this link: <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html>.



- 310 i. For *unmarried* institutionalized applicant, valued at any time in the month (the “any
311 day in month” rule).⁹⁴
- 312 ii. For *married* institutionalized spouse, resource eligibility exists when the total of all
313 countable resources of *both* the IS and CS does not exceed the CSRA / CSPRA +
314 \$2,000 on the first day of the calendar month for which eligibility is being
315 determined.⁹⁵
- 316 d. For IS with CS.
- 317 i. Assets (of both spouses) are initially valued on what is often referred to as the
318 “snapshot date.”
- 319 1. Snapshot date is 1st day of the month in which the IS becomes
320 “institutionalized.”⁹⁶
- 321 2. A person is “institutionalized” on the first day of month of admission to nursing
322 home when residence is expected for at least 30 consecutive days.⁹⁷
- 323 3. Snapshot can be based on any institutionalization, in a nursing home or
324 otherwise.⁹⁸
- 325 e. A couple with “excess resources” cannot become resource eligible in the month of
326 institutionalization.⁹⁹

⁹⁴ Medicaid Manual § M [1110.600](#) (A) (1) states that “[w]e 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.”

⁹⁵ Valuation (“**For resource assessment and eligibility determination, the resource value is its value as of the first moment of the first day of a calendar month.**” (Emphasis in original)), Va. Medicaid Manual § M [1480.000](#) A; eligibility as of such date, [-230 \(B\)](#).

⁹⁶ Va. Medicaid Manual § M [1480.010 \(B\) \(12\)](#). Va. Medicaid Manual § M [1480.200 \(A\)](#) provides that 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.”

⁹⁷ 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.”)

⁹⁸ “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 \(B\) \(2\)](#); § [M 1480.010 \(B\) \(15\)](#) (married persons).

⁹⁹ Medicaid Manual § M [1480.230 \(B\)](#) states that when “determining eligibility of an institutionalized spouse with excess resources, 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 resource limit as of the first moment of the first day of a calendar month.”



- 327 f. Post-eligibility increases in resources of CS immaterial to eligibility of IS.¹⁰⁰
328
329 F. Transfer of Resources: 12 VAC 30-40-300; §M 1450 *et seq.*
330 1. Criminal liability.
331 a. So called “Granny I” and “Granny II” statutes enacted and amended in 1997 and 1998,
332 respectively, created criminal exposure in relation to asset transfers.
333 i. Granny I initially targeted transferors – “Grannies” - who made transfers of assets to
334 qualify for Medicaid benefits.
335 ii. Granny II amended the law to exempt seniors but substituted their paid advisors,
336 under language in [42 U.S.C. 1320a-7b](#), which made it a crime to “knowingly and
337 willfully counsel[] or assist[] an individual to dispose of assets (including by any
338 transfer in trust) in order for the individual to become eligible for medical assistance
339 under [Medicaid] if disposing of the assets results in the imposition of a period of
340 ineligibility for such assistance.”
341 b. The legislation was held unconstitutional in [New York State Bar Assoc. v. Reno](#), 999 F.
342 Supp. 710, 715 (E.D.N.Y. 1998).
343 c. In fact, as the United States has conceded the statute “plainly unconstitutional,” cautious
344 attorneys seeking additional relief from its reach have been denied relief on the basis of
345 a lack of a justiciable controversy. See, *e.g.*, [Magee v. Reno](#), C.A. NO. 98-073-T
346 (D.C.R.I. 2000).¹⁰¹
347 d. While criminal prosecution for uncompensated transfer of assets (or advice and
348 assistance to effect such transfers) has been enjoined and does not appear to have
349 resulted in any published case as of 2022, criminal¹⁰² and civil liability for the use of

¹⁰⁰ Va. Medicaid Manual § M [1480.232](#) (A) 2. Va. Medicaid Manual § M [1480.200](#) (B) 3 provides that “[o]nce an institutionalized spouse has established Medicaid eligibility as a Non-MAGI 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.” **This section includes a commendably helpful table explaining and directing the Medicaid worker’s imputation (or exclusion) of resources held by the institutionalized spouse and community spouse.**

¹⁰¹ “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.”

¹⁰² Virginia Code § [32.1-321.4](#).



- 350 “willful false statement, (ii) willful misrepresentation or concealment of a material fact,
351 or (iii) any other fraudulent scheme or device,” does.¹⁰³
- 352 2. Transfers by either spouse affects both spouses when made before initial eligibility
353 established for the IS.
- 354 a. Transfers by a community spouse which cause ineligibility of the institutionalized
355 spouse will be apportioned between the two spouses should the community spouse
356 become institutionalized.¹⁰⁴
- 357 b. Transfers made by the community spouse after eligibility has been established for the
358 institutionalized spouse have no effect upon eligibility of the institutionalized spouse,
359 **except** as respects a non-conforming annuity purchased by the community spouse after
360 eligibility.¹⁰⁵
- 361
- 362 3. Exempt transfers.
- 363
- 364 a. Transfers exempt regardless of value or timing by reason of the character of the
365 transferee, Va. Medicaid Manual § M 1450.400.¹⁰⁶
- 366 i. Any property from spouse to spouse.
- 367 ii. Any property from spouse to Trustee of trust for sole benefit of spouse.
- 368 iii. Any property to applicant’s child under age 21.
- 369 iv. Any property to applicant’s blind or disabled child (of any age).
- 370 v. Any property to Trustee of a special needs trust per 42 USC 1396p(d)(4)(A) for
371 disabled person under 65.¹⁰⁷

¹⁰³ “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](#).

¹⁰⁴ Va. Medicaid Manual § [M 1450.630 F](#).

¹⁰⁵ Va. Medicaid Manual § M [1450.400](#) (F) 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.)

¹⁰⁶ Va. Medicaid Manual § M [1450.400](#).

¹⁰⁷ Va. Medicaid Manual §M [1450.400 D](#) refers the reader to Va. Medicaid Manual § M [1120.202](#).



- 372 vi. Any property to Trustee of “pooled” special needs trust for disabled persons under
373 the age of 65 per 42 USC 1396p(d)(4)(C), with limitations.¹⁰⁸
- 374 vii. An applicant’s *home* may be transferred:
- 375 1. to a sibling or half sibling who has an equity interest in the home and who
376 resided in the home for at least one year before the applicant / transferor became
377 an institutionalized person.
- 378 2. to an adult child who resided in the home for at least two years immediately
379 before the date the individual became institutionalized and provided care at
380 home which would otherwise have been provided in a nursing home.¹⁰⁹
- 381
- 382 b. Transfers in which the applicant’s intention at the time of the transfer, or circumstances
383 extant at the time of the application, cause the transfer to be disregarded.
- 384 i. Transfers in which the applicant intended to receive adequate compensation for the
385 asset or that he/she actually received adequate compensation for the asset.¹¹⁰
- 386 ii. Transfers for reasons **exclusive** of becoming or remaining eligible for Medicaid
387 long term care services’ payment.¹¹¹
- 388 iii. *De minimis* transfers after February 7, 2006.¹¹²
- 389 1. Transfers after February 7, 2006 with a total cumulative value not exceeding
390 \$1,000 per calendar year will not be considered a transfer for less than fair
391 market value and no penalty period will be calculated.
- 392 2. Transfers after February 7, 2006, between \$1,000 and \$4,000 per calendar year
393 will not be considered a transfer for less than fair market value if documentation

¹⁰⁸ “[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.” Va. Medicaid Manual §M [1450.550 \(D\)](#).

¹⁰⁹ Va. Medicaid Manual § M [1450.400 \(C\) \(3\)](#). SSI policy is more tolerant and realistic. POMS [SI 01150.122 Exceptions—Transfer of a Home \(C\)](#) provides simply that the “transfer of a home exception requires that the son or daughter (who received the transferred home) provided care that enabled the transferor to reside at home instead of in an institution or facility. Such care 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.”

¹¹⁰ Va. Medicaid Manual § M [1450.400 B](#).

¹¹¹ *Id.*

¹¹² Va. Medicaid Manual § M [1450.400 H](#).



394 is provided that such transfers follow a pattern that existed for at least three
395 years prior to applying for Medicaid payment. Christmas gifts, birthday gifts,
396 graduation gifts, wedding gifts, etc. meet the criteria for following a pattern that
397 existed prior to applying for Medicaid payment of LTC services.

398 3. Although not factored into the examples provided by the Virginia Medicaid
399 Manual, the exemptions effectively provide a reduction in penalties that can be
400 imposed by reason of a transfer for a minimum of 7 days and a maximum of 30
401 days per year in jurisdictions other than Northern Virginia.¹¹³
402

403 iv. Undue Hardship: Does Virginia Mean What Congress Said?¹¹⁴
404

405 1. 42 USC 1396p(c)(2)(C) provides that each State **shall** provide for a hardship
406 waiver process in accordance with 42 U.S.C. 1396p(c)(2)(D))--

407
408 (1) under which an undue hardship **exists** when application of the transfer of
409 assets provision would deprive the individual--

410 (A) of medical care such that the individual's health or life would be
411 endangered; or

412 (B) of food, clothing, shelter, or other necessities of life; and

413
414 (2) which provides for--

415
416 (A) notice to recipients that an undue hardship exception exists;

417 (B) a timely process for determining whether an undue hardship waiver will be
418 granted; and

419 (C) a process under which an adverse determination can be appealed.
420

421 2. The Centers for Medicare and Medicaid Services (CMS), previously HCFA,
422 interpreted the statute and imposed specific requirements for state Medicaid
423 programs in the CMS [State Medicaid Manual \(Transmittal 64\) § 3258.10 \(C\)](#)
424 as follows:

425
426 4. Imposition of Penalty Would Work Undue Hardship.--When
427 application of the transfer of assets provisions discussed in these sections
428 would work an undue hardship, those provisions do not apply. Unlike the
429 policies applying to transfers made on or before August 10, 1993, which
430 only required that you acknowledge that the statute included an undue

¹¹³ \$1,000 / 207 [6,422/30] = 4 days; \$4,000 / 207 = 19 days. Va. Medicaid Manual § [M 1450.630 E](#) (example).

¹¹⁴ [12VAC 30-110-710](#), Undue Hardship; Transfer of Resources. Va. Medicaid Manual § M [1450.700](#).



431 hardship provision, under OBRA 1993 you must implement an undue
432 hardship procedure for transfers of assets. Further, that procedure must
433 be described in your Medicaid State Plan. You have considerable
434 flexibility in implementing an undue hardship provision. However, your
435 undue hardship procedure must meet the requirements discussed in
436 subsection 5.

437
438 5. Undue Hardship Defined.--Undue hardship exists when application of
439 the transfer of assets provisions would deprive the individual of medical
440 care such that his/her health or his/her life would be endangered. Undue
441 hardship also exists when application of the transfer of assets provisions
442 would deprive the individual of food, clothing, shelter, or other
443 necessities of life.

444
445 Undue hardship does not exist when application of the transfer of assets
446 provisions merely causes the individual inconvenience or when such
447 application might restrict his or her lifestyle but would not put him/her at
448 risk of serious deprivation. You have considerable flexibility in deciding
449 the circumstances under which you will not impose penalties under the
450 transfer of assets provisions because of undue hardship.

451
452 For example, you can specify the criteria to be used in determining
453 whether the individual's life or health would be endangered and whether
454 application of a penalty would deprive the individual of food, clothing,
455 or shelter.¹¹⁵ You can also specify the extent to which an individual must
456 make an effort to recover assets transferred for less than fair market
457 value. As a general rule, you have the flexibility to establish whatever
458 criteria you believe are appropriate, as long as you adhere to the basic
459 definition of undue hardship described above.

- 460
461
462 3. The exclusive focus of the federal statute is upon the impact of the denial upon
463 the Medicaid applicant / recipient.¹¹⁶

¹¹⁵ As noted below, every Medicaid recipient or applicant for LTSS care has been screened to certify the need for Medicaid funded medical services.

¹¹⁶ See Centers for Medicare and Medicaid Services, Center for Medicaid and State Operations July 27, 2006, Letter to 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.



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4. The penalty only applies to persons certified (by the prescreening process) to be in need of long term nursing care in a facility or in the community.¹¹⁷ Every such person must have that level of care to have their minimal activities of daily living met. **Thus, every denial of Medicaid funding for long term care services that results in denial of admission or expulsion from a nursing home will meet the standard for endangerment and privation.**
5. The present policy provides that undue hardship “**may** exist when the imposition of a transfer of assets penalty period would deprive the individual of medical care such that the individual’s health or life would be endangered or he would be deprived of food, clothing, shelter, or other necessities of life.”¹¹⁸
6. Further limitations – arguably in violation of federal law - are cobbled onto the exception in Virginia, by virtue of the policy that “[a]n undue hardship may be granted when documentation is provided that shows:
 - A. that the assets transferred cannot be recovered, and
 - B. that the immediate adverse impact of the denial of Medicaid coverage for payment of LTC services due to the uncompensated transfer would result in the individual being removed from the institution or becoming unable to receive life-sustaining medical care, food, clothing, shelter or other necessities of life.”¹¹⁹
 - C. Virginia requires a specific form to be completed,¹²⁰ and provides a minimum of 10 days in which to return the completed form claiming undue hardship, and if the individual requests additional time to provide the form and documentation, the worker must allow up to 30 calendar days from the

¹¹⁷ Eligibility determinations follow a mandatory sequence. [Va. Medicaid Manual § M 0130.300 \(A\)](#). Before resource or transfer of assets policy is applied, Medicaid requires the applicant to be screened. *Id.* Screening for LTC / LTSS is a nonfinancial requirement for all persons seeking Medicaid coverage for such care. [Va. Medicaid Manual § M 1420.100 \(B\) \(2\)](#). Only after a person is screened as requiring LTC supports does Medicaid determine financial requirements, [Va. Medicaid Manual § M 0130.300 \(A\)](#), including analysis of the person’s transfer of assets. “Individuals who are eligible for Medicaid may NOT be eligible for Medicaid payment of long-term care (LTC) services, *also referred to as long-term services and supports (LTSS)*, for a specific period of time (penalty period) if they or their spouses have transferred assets for less than fair market value without receiving adequate compensation. The asset transfer policy applies to all individuals in all types of *LTSS: facility based and community based care (CBC)*, *also referred to as home and community based services (HCBS)*.”(Emphasis in original). [Va. Medicaid Manual § M 1450.001](#).

¹¹⁸ Medicaid Manual § M [1450.700](#).

¹¹⁹ *Id.*

¹²⁰The [form is "Asset Transfer Undue Hardship Claim Form,"](#) number 032-03-0417-04-eng (1/17).



489 date the checklist requesting information was sent. If the form and
490 documentation are not returned within 30 calendar days, the penalty period
491 must be imposed.¹²¹

492
493 7. In stark contrast, Virginia requires specific documentation that is entirely
494 without justification in the federal statute’s intentionally limited scope. The
495 scope is limited because the Commonwealth, in imposing the penalty, will be
496 denying essential medical care necessary to maintain life. Federal limitations
497 on the Commonwealth’s power to deprive the otherwise eligible Medicaid
498 recipient of care are exceeded in the Commonwealth’s requirements, especially
499 when considered in practice. They always apply to only persons screened as
500 needing the care.¹²²

501
502 The requirements *always* apply to a resident who cannot possibly pay for them.
503 To take a single example, they *always* require copies of documents and reports
504 from third parties. In *virtually every case* legal and accounting skills are
505 required to search titles, interact with physicians, and then identify and obtain
506 documents which an impoverished nursing home resident – already determined
507 to be “otherwise eligible” and therefore impoverished - cannot hope to pay.

508
509 Bad as they are as written, they are worse in actual practice.

510
511 The requirements will *likely* apply to a cognitively impaired resident¹²³ confined
512 to a nursing home.

513
514 Finally, they require the same proof of facts which the exhaustively intrusive
515 pre-screening and Medicaid application process have already verified.

516
517 The demanded documents:¹²⁴

¹²¹ Medicaid Manual § M [1450.700 B. 1. b.](#)

¹²² See *Prescreening: Activities of Daily Living / U.A.I., §M1420.100, supra.*

¹²³ The United States Centers for Disease Control and Prevention reported in February, 2019, that the percentage of persons residing in nursing homes for 100 days or more diagnosed with Alzheimer’s disease and other dementias was 58.9%. *Table IX. Nursing home residents, by selected characteristics and length of stay: United States, 2016,*” Long-term Care [Providers and Services Users in the United States, 2015–2016](#), Vital and Health Statistics, Series 3, Number 43, p. 78. In 2007, the Alzheimer’s Association determined that “[m]ore than 50 percent of residents in assisted living and nursing homes have some form of dementia or cognitive impairment, including Alzheimer’s. Available research indicates that about 67 percent of dementia-related deaths occur in nursing homes.” Alzheimer’s Association, [Alzheimer’s Association Releases Dementia Care Practice Recommendations For End-Of-Life Care](#), accessed July 4, 2020.

¹²⁴ Va. Medicaid Manual §M [1450.700 B \(1\) \(a\).](#)



- 518 A. the reason(s) for the transfer;
- 519 B. attempts made to recover the asset, including legal actions and the results of
520 the attempts;¹²⁵
- 521 C. notice of pending discharge from the facility, or discharge from PACE,
522 hospice, or CBC services due to denial or cancellation of Medicaid payment
523 for these services and include the actual date discharge will take place;¹²⁶
- 524 D. physician’s statement stating the inability to receive nursing facility or CBC
525 services would result in the applicant/recipient’s inability to obtain life-
526 sustaining medical care;
- 527 E. documentation that individual would not be able to obtain food, clothing,
528 shelter, or other necessities of life;¹²⁷
- 529 F. list of all assets owned and verification of their value at the time of the
530 transfer if the individual claims he did not transfer resources to become
531 Medicaid eligible;¹²⁸ and
- 532 G. documents such as deeds or wills if ownership of real property is an issue.
533
- 534 8. All requests for waivers under the undue hardship standard must be considered
535 by the central DMAS office.¹²⁹
536
- 537 9. Denial of an unclaimed hardship exception may be appealed¹³⁰ pursuant to
538 Virginia Administrative Code provisions.¹³¹
539

¹²⁵ There is no basis in federal law nor in the Virginia Administrative Code for any attempt to recover property through a court proceeding. In policy captioned “No Access Without Litigation,” Virginia Medicaid policy expressly declares that Virginia does **not** require litigation to obtain access to a resource not in the possession of the individual. Va. Medicaid Manual § S 1120.010 (C)(2), (D)(6).

¹²⁶ This provision alone often results in a legal impossibility for reasons beyond the scope of this outline.

¹²⁷ Since the Medicaid agency will already have required proof that the sick resident is medically needy (or medically indigent), of what does this documentation consist?

¹²⁸ There is no basis in federal law nor in the Virginia Administrative Code for the assertion that the resident or applicant make any such declaration.

¹²⁹ Va. Medicaid Manual §M 1450.700 B.

¹³⁰ “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.” Va. Medicaid Manual §M 1450.700 (B) 1 d.

¹³¹ [12 VAC 30-110-90](#). In practice there is little possibility that an eligible recipient will have sufficient resources to engage professionals needed for the purpose.



- 540 c. Transfers exempt by reason of the character or value of the transferred asset.¹³²
541 i. Personal Effects and Household Items.
542 ii. Automobiles.
543 1. If used for employment or treatment transportation, or which are specifically
544 equipped for disabled persons, no limitation on value.
545 2. Otherwise, automobile of up to \$4,500 in trade-in value is excluded.
546 iii. Life insurance.
547 1. Term life policies, no limitation on transfer amount.
548 2. Other policies, up to \$1,500 in face value.
549 iv. Property essential to self support (business use property).
550
551 4. Disqualifying Transfers: The look-back and the penalty.
552
553 a. Ineligibility is imposed, if at all, only for long term care services, including nursing
554 facility services and home or community based care services under the Virginia
555 waiver.¹³³
556
557 b. The look-back, 42 USC 1396p.
558
559 i. The look-back is the period of time in which Medicaid may consider gifts and
560 under-valued sales ("uncompensated transfers") to disqualify an applicant / spouse
561 from certain Medicaid services.
562
563 ii. The look-back for uncompensated transfers made after February 7, 2006, is sixty
564 months.¹³⁴
565
566 c. Penalty calculation for long term care services by reason of uncompensated transfers
567 effected within the look-back.

¹³² Va. Medicaid Manual § M [1450.300](#).

¹³³ "As long as an individual in a penalty period meets a full or limited-benefit Medicaid covered group and all nonfinancial and financial requirements for that covered group, he is eligible for all services covered under that group EXCEPT the Medicaid payment of LTSS." [Va. Medicaid Manual § M 1450.630 \(A\)](#); Va. Medicaid Manual § M [1450.004](#) (chart).

¹³⁴ "When a Medicaid applicant reports an asset transfer, or the worker discovers a transfer, determine if the transfer occurred within 60 months prior to the month in which the individual is both institutionalized and a Medicaid applicant/enrollee." [Va. Medicaid Manual § M 1450.200 \(B\)](#).



- 568 i. Uncompensated transfers made within the look-back.
- 569 1. Calculate period of ineligibility for uncompensated transfers in the 60 month
- 570 period preceding application date.¹³⁵
- 571 A. Single gift within look-back.¹³⁶
- 572 a. Divide value of gift by average monthly cost of private nursing home
- 573 payment \$6,422 (\$9,032 in Northern Virginia).¹³⁷
- 574 b. Quotient is the ineligibility period, which is the number of months and
- 575 partial months (days) of ineligibility for long term care services.¹³⁸
- 576 i. Example: Applicant's \$10,000 gift on October 9.
- 577 ii. $\$10,000 / \$6,422 = 1.557$
- 578 iii. $10,000 - 6,422 = \$3,578$ [partial month]
- 579 iv. Daily rate is $6,422 / 31 = \$207.16$
- 580 v. $3,578 / \$207.16 = 17.271$ days.
- 581 vi. Ineligibility period = 1 month, 17 days.¹³⁹
- 582 B. Multiple gifts in look-back.¹⁴⁰
- 583 a. Add the total, cumulative value of all assets transferred.
- 584 b. Divide total by average monthly cost of private nursing home payment
- 585 \$6,422 (\$9,032 in Northern Virginia).¹⁴¹
- 586 c. Quotient is the ineligibility period, which is the number of months (&
- 587 partial months) of ineligibility for long term care services.

¹³⁵ [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].

¹³⁶ Medicaid Manual § [M 1450.400 \(H\)](#), 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 discussed above.

¹³⁷ Va. Medicaid Manual § [M 1450.630 D](#).

¹³⁸ Va. Medicaid Manual § [M 1450.630 E](#) provides details on the calculation of partial months of ineligibility for transfers.

¹³⁹ The penalty period includes the fractional portion of the month, rounded down to a day. Medicaid Manual § [M 1450.630 A](#).

¹⁴⁰ Caveat: Va. Medicaid Manual § [M 1450.400 H](#), 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.

¹⁴¹ [Va. Medicaid Manual M 1450.630 \(D\)](#).



- 588 d. Example: Richmond applicant's \$10,000 gift on October 9, and of
589 \$10,000 on November 5.
- 590 i. $\$20,000 / \$6,422 = 3.11$.
- 591 ii. Ineligibility period = 3 months 13 days.¹⁴²
- 592
- 593 2. Commence calculated ineligibility period from the later of:
- 594 A. First day of month during or after which assets have been transferred for
595 less than fair market value, or
- 596 B. the date on which the individual is eligible for Medicaid and would
597 otherwise be receiving institutional level care but for the application of the
598 penalty period, and which does not occur in any other period ineligibility
599 imposed for any other reason.¹⁴³
- 600 C. Example:
- 601 a. Grandmother pays \$5,000 tuition for her 19 year old grandchild on May
602 6. In January in the following year, she pays \$14,266 for medical bills of
603 her adult (non-disabled) daughter.
- 604 b. Grandmother (or Grandfather) slips, breaks her hip, and cannot return
605 home. She enters a nursing home in April.
- 606 c. She exhausts her income and remaining assets as of September.
- 607 d. Her application for benefits is otherwise granted, in Richmond, Virginia,
608 in the same month. She receives Medicaid except for her nursing home
609 expense.
- 610 e. With these transfers (totaling \$19,266), Grandmother is ineligible for
611 Medicaid for 3 months, 0 days,¹⁴⁴ commencing September 1, and
612 concluding on December 2.¹⁴⁵
- 613
- 614 **II. Planning Considerations: Initial Eligibility For Institutionalized Spouse .**
- 615

¹⁴² Medicaid Manual § M [1450.630](#), *op. cit.*

¹⁴³ Va. Medicaid Manual § [M 1450.630 B.](#)

¹⁴⁴ $\$19,266 / 6,422 = 3.00$.

¹⁴⁵ 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.



616 Example:

617

- 618 ○ H and W own a home and have non-working farmland which is contiguous to the home.
- 619 ○ They own real estate valued at \$200,000 with no mortgage.
- 620 ○ They have \$200,000 in cash or stocks.
- 621 ○ She has Social Security Administration benefits of \$500 per month.
- 622 ○ He has Social Security Administration benefits of \$1,100 and a private pension of \$350.
- 623 ○ He goes into the nursing home on August 3.
- 624 ○ No gifts of any kind (including Christmas, birthdays, etc.) made in preceding five years, or
- 625 gifts having no greater value than \$1,000 made in any calendar year.¹⁴⁶
- 626 ○ Powers of attorney with gifting authority in place.¹⁴⁷

627

628 A. Initial eligibility.

629

- 630 a. Home is exempt as well as all contiguous real estate.¹⁴⁸
- 631 b. CSRA for W: \$100,000 (1/2 of \$200,000, not exceeding \$137,400).¹⁴⁹
- 632 c. MMNA for W: \$2,177.50¹⁵⁰ - \$500 (Soc. Sec. For Wife) = \$1,677.50
- 633 d. Excess resources, \$98,000 (\$200,000 - [\$100,000 + \$2,000]).
- 634 e. First possible eligibility date is September.

635

636 B. More Than A Baker's Dozen Excess Resource Dispositions.

637

- 638 1. Payment for long term care of IS and living expenses of CS.
- 639 2. Enhanced home, car, contiguous property to home.
- 640 3. Purchase of home for CS¹⁵¹ and creation of HECM reverse mortgage for CS.
 - a. Purchase of home is exempt.

¹⁴⁶ 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 **LTSS** 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 **LTSS** services."

¹⁴⁷ The Virginia Uniform Power of Attorney Act, § [64.2-1622 \(A\) \(2\)](#), prohibits gifts on behalf of an agent in the absence of express, specific authorization in the power of attorney.

¹⁴⁸ Only \$5,000 in surrounding property would be exempt were H single unless the single H qualified under the 80% FPL category.

¹⁴⁹ Caveat: Current year values in equation unless otherwise marked. [Va. Medicaid Manual § M 1480.231](#)

¹⁵⁰ Va. Medicaid Manual [M 1480.410](#).

¹⁵¹ Note the home equity limitation does not apply since the community spouse will own (and live) in the home.



- 641 b. Loan proceeds are excluded from income calculations.¹⁵²
- 642 4. Long term care insurance for CS.
- 643 5. Enhanced (increased) CSRA when sum of CS and IS income less than MMNA via fair
- 644 hearing for institutionalizations occurring after February 7, 2006,¹⁵³ limited court order.¹⁵⁴
- 645 6. Conversions of CS resources to income.
- 646 a. Loan to child for non-negotiable, actuarially sound promissory note payable to CS.
- 647 i. Transfer of assets analysis.¹⁵⁵
- 648 1. The note will not be considered an uncompensated transfer of assets if it:
- 649 A. has a repayment term that is actuarially sound (see [M1450.400](#)),
- 650 B. provides for payments to be made in equal amounts during the term of the
- 651 loan with no deferral and no balloon payments, and
- 652 C. prohibits the cancellation of the balance upon the death of the lender.
- 653 2. If the promissory note, loan, or mortgage does not meet the above criteria, the
- 654 uncompensated amount is the outstanding balance as of the date of the
- 655 individual's application for Medicaid.
- 656 3. The countable value as a resource is the outstanding principal balance for the
- 657 month in which a determination is being made.
- 658 ii. Resource analysis.¹⁵⁶

¹⁵² Va. Medicaid Manual § [M 1120.225 B](#). Writer's 2014 [outline](#) with current updates, HECM [FAQ](#); [borrower credit history limitations A](#), [Mortgagee Letter 2016-10](#), and [HECM Financial Assessment And Property Charge Guide Revised July 13, 2016](#) (see esp. §§ 2.01, 2.12).

¹⁵³ [12VAC 30-110-856](#); §M [1480.232 F](#) (1,3); and proposed federal rule [42 CFR 431.260 \(conferring authority to make "income first" a state option\)](#) and [Wis. Dep't of Health and Family Servs. v. Blumer](#), 543 U.S. 473 (2002).

¹⁵⁴ Va. Code § [20-88.02:1](#). See [CMS SMDL #06-018 Enclosure](#), §[6013](#) (income first), § [6011 \(V\)](#) (undue hardship).

¹⁵⁵ Va. Medicaid Manual § M [1450.540](#). See also [42 USC 1396p](#) (c) (1) (I) (I) (providing that "with respect to a transfer of assets, the term "assets" includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage— (i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); (ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and (iii) prohibits the cancellation of the balance upon the death of the lender; and [12VAC30-40-300](#) (F) (1), which provides "the term 'assets' [for which any penalty may be imposed] also includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage: a. Has a repayment term that is actuarially sound (determined in accordance with actuarial publications of the Social Security Administration); b. Provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments made; and c. Prohibits the cancellation of the balance upon the death of the lender." Emphasis supplied by the writer.

¹⁵⁶ Va. Medicaid Manual § S [1140.300](#).



- 659 1. Presumption is that a promissory note is a countable resource.
- 660 A. “A promissory note is a written, unconditional agreement whereby one party
- 661 promises to pay a specified sum of money at a specified time (or on demand)
- 662 to another party. It may be given in return for goods, *money loaned*, or
- 663 services rendered.”
- 664 B. The Medicaid worker is instructed to “[a]ssume that the value of a
- 665 promissory note, loan, or property agreement as a resource is its outstanding
- 666 principal balance unless the individual furnishes reliable evidence that it has
- 667 a CMV of less than *the outstanding principal balance* (or no CMV at all).”
- 668 C. The Medicaid worker is further instructed that “[i]f including the outstanding
- 669 principal balance in countable resources causes ineligibility, **inform the**
- 670 **individual** that we will use the outstanding principal balance in determining
- 671 resources unless he or she submits: • evidence of a legal bar to the sale of the
- 672 agreement ; or • an estimate from a knowledgeable source, showing that the
- 673 CMV of the agreement is less than its outstanding principal balance.”
- 674 D. “Knowledgeable sources include anyone regularly engaged in the business
- 675 of making such evaluations: e.g., banks or other financial institutions, private
- 676 investors or real estate brokers. The estimate must show the name, title, and
- 677 address of the source.”
- 678 2. However, while a *non-negotiable, non-assignable* promissory note is an asset,
- 679 under long established policy, it can never be a resource.
- 680 A. “Not everything a person owns (i.e., not every asset) is a resource and not all
- 681 resources count against the resource limit.”¹⁵⁷
- 682 B. “Resources are cash and any other personal or real property that an
- 683 individual (or spouse, if any):
- 684 • owns;
- 685 • ***has the right, authority, or power to convert to cash*** (if not already cash);
- 686 and
- 687 • is not legally restricted from using for his/her support and maintenance.”¹⁵⁸
- 688 C. “Any property (an asset) that does not meet the criteria in 1. above is not a
- 689 resource even though it may be an asset (e.g., an individual who has an

¹⁵⁷ Va. Medicaid Manual §M [1110.001](#) (B) (2); [S 1110.100 A](#).

¹⁵⁸ Va. Medicaid Manual §[S 1110.100](#) (B) (2).



- 690 ownership interest in property but is not legally able to transfer that interest
691 to anyone else does not have a resource).”¹⁵⁹
- 692 3. A community spouse’s loan of funds to a child, in exchange for a non-
693 negotiable, non-assignable, and non-transferable promissory note which meets
694 the foregoing transfer of assets criteria will result in a resource which has a zero
695 CMV for liquidation (as the note will require that payments be made only to the
696 community spouse or to her estate regardless of any attempted sale or
697 negotiation). The payments which the community spouse receives on a monthly
698 basis will be attributable to her only as income.
- 699 b. Annuity for CS or single person (purchased after February 7, 2006).
- 700 i. Transfer of assets analysis.¹⁶⁰
- 701 1. Virginia remainder-person.
- 702 A. To meet the remainder person test, the annuity must name the
703 Commonwealth as a remainder beneficiary for at least the total amount of
704 medical assistance paid on behalf of the “*institutionalized individual*,” the
705 institutionalized spouse or the institutionalized person other than a spouse.
- 706 B. However, when there is a community spouse or minor or disabled child, the
707 Commonwealth is a secondary remainder beneficiary.¹⁶¹
- 708 2. Irrevocability, actuarial soundness, and regularity; exception for tax annuities.¹⁶²
- 709 Unless the annuity is described in IRC 408,¹⁶³ the purchase money paid for the
710 annuity will be considered an uncompensated transfer of assets unless the
711 annuity
- 712 A. is irrevocable and non assignable; and
- 713 B. is actuarially sound;¹⁶⁴ and
- 714 C. provides for equal payments¹⁶⁵ with no deferral and no balloon payments.

¹⁵⁹ Va. Medicaid Manual § [S 1110.100](#) B 3.

¹⁶⁰ Va. Medicaid Manual § [M 1450.520](#). See also [42 USC 1396p](#) (c) (1) (F).

¹⁶¹ The policy states the state must be the remainder beneficiary “in the first position.”

¹⁶² Va. Medicaid Manual § M [1450.520 \(B\) \(2\) \(a\)](#).

¹⁶³ [IRC 408](#) includes IRA, simplified retirement accounts, simplified employee pension; Roth IRA, or certain other accounts established by employers and associations.

¹⁶⁴ Va. Medicaid Manual § [M 1450.520 C](#), relevant to purchases of all annuities. See below.

¹⁶⁵ Not necessarily monthly payments.



- 715 ii. Resource analysis.¹⁶⁶
- 716 1. The annuity must be issued by an entity licensed to do business in the state in
- 717 which the annuity is established.¹⁶⁷
- 718 2. “Annuities purchased with the assets of a third party such as those *received*
- 719 through a legal settlement are not considered to be countable resources.”¹⁶⁸
- 720 3. The annuity:¹⁶⁹
- 721 A. Must be irrevocable.
- 722 B. Must be non-assignable.
- 723 C. Must be actuarially sound.¹⁷⁰
- 724 a. Use the tables at Va. Medicaid Manual § M 1450, Appendix 2.¹⁷¹
- 725 b. The annuity should be for no more than the life of the annuitant, and as
- 726 long as the same does not exceed the life expectancy, will not be
- 727 considered actuarially unsound so as to cause inclusion as a resource.¹⁷²
- 728 c. A state’s attempt to characterize an otherwise compliant annuity as a
- 729 “sham” because of its short term nature was held to violate federal
- 730 law.¹⁷³
- 731 D. Must provide for payments in equal amounts during the term of the annuity
- 732 with no deferral and no balloon payments made.

¹⁶⁶ Va. Medicaid Manual § M [1140.260](#).

¹⁶⁷ Id. A.

¹⁶⁸ 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?

¹⁶⁹ Id. B 4.

¹⁷⁰ It is unclear whether an annuity for a community spouse must be actuarially sound.

¹⁷¹ [Direction to use, Va. Medicaid Manual § M 1450.520 C; Life Expectancy Table](#).

¹⁷² “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.

¹⁷³ “Congress created a ‘safe harbor’ pursuant to which [] certain annuities are not considered resources for purposes of Medicaid eligibility. Therefore, the value of such annuities does not disqualify those otherwise eligible for Medicaid assistance from Medicaid eligibility. See [42 U.S.C.S. § 1396p\(c\)\(1\)\(G\)\(ii\)](#) as there was no requirement of a minimum term for an annuity to qualify under the safe harbor, and the annuities were actuarially sound because they did not exceed the annuitant’s life expectancy.” [Zahner v. Sec’y Pa. Dep’t of Human Servs., 802 F.3d 497](#) (3rd Cir. 2015)(specifically rejecting that the annuities in issue were “trust-like”).



- 733 4. According to Va. Medicaid Manual § M 1140.260 (B)(5), “[p]rior to receiving
734 long-term care services paid by Medicaid, all annuities purchased by the
735 institutionalized individual *or the community spouse* on or after February 8,
736 2006, must name the Commonwealth of Virginia as the primary [remainder?]
737 beneficiary for at least the total amount of medical assistance *paid on behalf of*
738 *the institutionalized individual*. If there is a community spouse or minor or
739 disabled child, the Commonwealth must be named as the remainder beneficiary
740 behind the spouse or minor or disabled child.”¹⁷⁴
- 741 5. Reducing the payback period in the community spouse’s annuity is permissible
742 and perhaps advisable.
- 743 7. Burial Planning for H & W?¹⁷⁵
- 744 8. Trust for disabled child of any age, or disabled person under age 65?¹⁷⁶
- 745 9. “Pooled” Disability Trust for disabled person under 65 years of age?
- 746 a. Trust is recognized as an exempt trust in Virginia Medicaid policy.¹⁷⁷
- 747 b. Transfers exempt as long as made to the trustee before age 65.¹⁷⁸
- 748 10. Split interest (life/remainder estate planning)?
- 749 a. Life estates are not countable resources.¹⁷⁹
- 750 b. No limitations in acquisition of life estate through February 7, 2006.
- 751 c. Limitations after February 7, 2006.
- 752 i. Acquisition life estate in another individual’s home will be treated as
753 uncompensated transfer of assets unless the purchaser resides in the home for at
754 least twelve consecutive months after the acquisition.

¹⁷⁴ Does this provision conflict with Va. Medicaid Manual § M [1450.520 \(B\)\(1\)](#)?

¹⁷⁵ Va. Medicaid Manual § M [1130.300](#), - [410](#) et seq.; §M [1450.510](#) B.1. (Burial insurance).

¹⁷⁶ Va. Medicaid Manual Va. Medicaid Manual § M [1120.202](#) (B) (resources); Va. Medicaid Manual § M [1450.400](#) (C) (uncompensated transfer of assets exemption).

¹⁷⁷ Va. Medicaid Manual § M [1120.202](#) (B) (2).

¹⁷⁸ See discussion above.

¹⁷⁹ Va. Medicaid Manual § M [1140.110](#) (A) (6) and § S [1140.110](#). 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).



- 755 ii. According to CMS¹⁸⁰ and the Virginia Medicaid policy, the limitation applies only
756 to acquisition of a life estate in the residence of another individual; thus it has no
757 impact on life estates in commercial property or other non-residential home.
- 758 iii. While CMS has interpreted federal law to state that the 12 month residence rule in
759 inapplicable when the individual purchases a home and then conveys a remainder
760 interest (for value) to a third party (because the individual owned a fee simple
761 interest in a home and then conveyed a remainder interest to the third party),
762 Virginia policy imposes a transfer of assets penalty.¹⁸¹
- 763 11. Contract for services rendered by family member ?¹⁸²
- 764 a. Services provided by the child to the Medicaid applicant, or the IS or CS, may be
765 compensated.
- 766 b. *Caveat* income tax consequences.¹⁸³

¹⁸⁰ State Medicaid Director Letter [SMDL #06-018](#), July 27, 2006 and [Enclosure: Sections 6011 and 6016 New Medicaid Transfer of Asset Rules Under the Deficit Reduction Act of 2005](#), accessed July 5, 2020.

¹⁸¹ “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*).

¹⁸² Va. Medicaid Manual § M 1450.003 [E](#), [H](#), as modified by Va. Medicaid Manual § M [1450.570](#), Services Contracts.

¹⁸³ 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 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 \(06-2021\)](#). 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



- 767 c. Limitations.
- 768 i. Physician statement stating types of services that were to be provided under the
769 contract, and that these services were necessary to prevent the individual's entrance
770 into LTC.¹⁸⁴
- 771 ii. Advance lump sum payment for services that have not been performed is
772 considered an uncompensated transfer of assets because the Medicaid
773 applicant/recipient has not received valuable consideration.
- 774 iii. Payments to other individuals for services received after the individual enters LTC
775 are considered an uncompensated transfer for Medicaid purposes, because "[o]nce
776 an individual begins receipt of Medicaid LTC services, the individual's personal and
777 medical needs are considered to be met by the LTC provider. Payments to other
778 individuals for services received after the individual enters LTC are considered an
779 uncompensated transfer for Medicaid purposes."¹⁸⁵
- 780 12. Divorce following transfer of assets to CS?
- 781 a. Transfers between spouses are exempt.
- 782 b. Divorce following transfer of assets from institutionalized spouse to community spouse
783 severs the conduit (marriage) which imputes resources of the (former) community
784 spouse to the institutionalized spouse.
- 785 i. **Caveat:** MMNA income support rules no longer applicable to the former
786 community spouse.
- 787 ii. Consider QDROS by which ownership of the income producing asset (pension) is
788 itself transferred to the community spouse in the divorce decree.
- 789 13. Purchase of United States EE or I Bonds post-institutionalization (\$20,000 limit per spouse,
790 12 month holding period)?¹⁸⁶

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.

¹⁸⁴ 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?

¹⁸⁵ 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?

¹⁸⁶ See discussion above; Va. Medicaid Manual §M [1140.240](#) A.



- 791 14. Reverse Mortgage.¹⁸⁷
- 792 a. Reverse mortgage payments are not considered income for Medicaid purposes in the
- 793 month of receipt and become a resource only to the extent retained in the next calendar
- 794 month.¹⁸⁸
- 795 i. Payments from the home equity when title is vested in the CS will not alter the
- 796 Monthly Maintenance Needs Allowance payments due from the IS.
- 797 ii. Payments retained *by a community spouse after eligibility of the institutionalized*
- 798 *spouse* is established will have no effect upon the continuing coverage of the
- 799 institutionalized spouse.
- 800 b. Reverse mortgage payments as means of “covering” DRA penalty periods.
- 801

802 **III.Planning Considerations: Survivor Eligibility**

803

- 804 A. When a benefactor (such as a spouse, parent, or other significant other in the life of a Medicaid
- 805 or potential Medicaid recipient) dies and leaves to the Medicaid recipient, the assets will trigger
- 806 disqualification and fund a source of Medicaid estate recovery.
- 807 B. Advise likely benefactors (e.g., parents, unmarried siblings, adult children) to bypass spouse(s)
- 808 or create special needs trust for spouse(s) in benefactor’s estate plan.
- 809 C. In addition to the loss of eligibility, Virginia will recoup its Medicaid expenditures for benefits
- 810 paid after the recipient’s 55th birthday from whatever remains in the estate of the Medicaid
- 811 beneficiary after death.¹⁸⁹ Example: Great uncle leaves niece, 65, \$50,000 in his will. She has
- 812 been on Medicaid for 9 years. She will lose eligibility, but dies 5 days after Uncle, before any
- 813 distribution has been made to her. Medicaid is entitled to recover its claim for 9 years of
- 814 payments from the gift Uncle made absent a posthumous disclaimer by niece’s administrator.¹⁹⁰
- 815 D. Benefactors other than spouses.

¹⁸⁷ Writer’s 2014 [outline](#) with current updates, [HECM FAQ; borrower credit history limitations A](#), [Mortgagee Letter 2016-10](#), and [HECM Financial Assessment And Property Charge Guide Revised July 13, 2016](#) (see esp. §§ 2.01, 2.12).

¹⁸⁸ Va. Medicaid Manual §M [1120.225](#).

¹⁸⁹ Estate recovery for Medicaid recipient, [12 VAC 30-20-141](#)(C) for past benefits paid (after age 55).

¹⁹⁰ [Shrouds](#) are woven without pockets. 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.”



- 816 1. Any trust (either one created by will or during lifetime of the benefactor) in which the
817 benefactor retains the use during life but creates a spendthrift, purely discretionary trust
818 effective to supplement assets of the Medicaid beneficiary during life.
- 819 2. At death of Medicaid beneficiary, residue in trust will avoid estate recovery and pay to third
820 parties (grandchildren, charities, etc.).
- 821 E. Spouse benefactors.
- 822 1. Because of the elective share rules applicable to spouses,¹⁹¹ beware of both resource and
823 transfer of assets issues.
- 824 2. **DO NOT USE** living trusts when one spouse is Medicaid eligible, or expected to be.¹⁹²
- 825 3. Marital agreements waiving elective share.
- 826 a. A surviving spouse married to a deceased Virginia spouse has a right to an elective
827 share.
- 828 b. An unanticipated elective share could disqualify the surviving spouse on Medicaid, or
829 vest additional countable resources in the spouse.
- 830 c. A well crafted marital agreement is an enforceable contract based upon lawful
831 consideration.¹⁹³

¹⁹¹ 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, three Virginia cases have addressed Va. Code § 64.2-308.1 *et seq.* *Brown v. Brown, Adr.*, 69 Va.App. 462 (Ct.App. Va. 2018) (in a bifurcated divorce proceeding, husband's death after divorce but before equitable distribution decree did not deprive court of jurisdiction to dispose of wife's equitable distribution claims, the Court "fail[ing] to see the equity" in the final order's termination of the elective share rights and, were jurisdiction not retained, any share in the "monetary fruits of the marriage."); *Thompson v. Administrator*, 103 Va. Cir. 170, 2019 WL 11838609 (2019)(unpublished circuit court opinion, court not specified) (widow did not abandon deceased husband, elective share in addition to exempt property, family allowance, or the homestead allowance); *Algabi v. Dagvadorj, et al.*, 106 Va. Cir. 153, 2020 WL 10458186 (2020)(unpublished)(elective share not applicable when waived in pre-nuptial agreement);

¹⁹² 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*.

¹⁹³ 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."



- 832 d. For decedents dying after 2016, the practice and use of marital agreements waiving the
833 elective share has been clarified by providing that "the right of election of a surviving
834 spouse and the rights of the surviving spouse to homestead allowance, exempt property,
835 and family allowance, or any of them, may be waived, wholly or partially, before or
836 after marriage, by a written contract, agreement, ***or*** waiver signed by the surviving
837 spouse."¹⁹⁴
- 838 i. The General Assembly lists three instruments (contract, agreement, and waiver) by
839 which a surviving spouse can forego the elective share.
- 840 ii. An *agreement* or written contract between the spouses will be enforceable under
841 ordinary contract law and in conformity with the Virginia Premarital Agreement
842 Act, Virginia Code § 20-147 *et seq.*
- 843 iii. The statute provides that a *waiver* will be enforced unless the surviving spouse
844 proves the agreement was involuntary or unconscionable.¹⁹⁵
- 845 4. Possible testamentary dispositions:
- 846 a. Testamentary¹⁹⁶ special needs trust with mandatory income interest to satisfy the
847 elective share requirement for survivor spouse in entire estate is available if it meets the
848 following criteria:
- 849 b. In valuing ... beneficial interests in trust [for the surviving spouse], the following
850 special rules apply:
- 851 i. The value of the beneficial interest of a spouse shall be the entire fair market value
852 of any property held in trust if the decedent was the settlor of the trust, if the trust is
853 held for the exclusive benefit of the surviving spouse during the surviving spouse's
854 lifetime, and if the terms of the trust meet the following requirements:
- 855 1. During the lifetime of the surviving spouse, the trust is controlled by the
856 surviving spouse or one or more trustees who are non-adverse parties;¹⁹⁷
- 857 2. The trustee shall distribute to or for the benefit of the surviving spouse the entire
858 net income of the trust at least annually;

¹⁹⁴ [Virginia Code § 64.2-308.14.](#)

¹⁹⁵ *Id.* (B) (2).

¹⁹⁶ [Skindzier](#), at 784 A.2d 323 (Conn. 2001) (testamentary trust not disqualifying asset transfer).

¹⁹⁷ 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.



- 859 3. The trustee is permitted to distribute to or for the benefit of the surviving spouse
860 out of the principal of the trust such amounts and at such times as the trustee, in
861 its discretion, determines for the health, maintenance, and support of the
862 surviving spouse; and
- 863 4. In exercising discretion, the trustee may be authorized *or required* to take into
864 consideration all other income assets and other means of support available to the
865 surviving spouse.¹⁹⁸
- 866 c. As stated above, the risk of imputation of a disqualifying elective share for a surviving
867 spouse who is an incapacitated person has been addressed by the statutes described
868 above and below.
- 869 d. Testamentary special needs trusts with formula provision providing for the minimum
870 elective share calculable pursuant to Article 1.1 with a disposition of the residue (to
871 third parties or to a *purely discretionary* trust which need not meet the criteria stated
872 above) remains available, as under former law.
- 873 e. The law calculates the elective share of the surviving spouse as a graduated percentage,
874 taking into account both spouses' assets and the length of marriage.
- 875 f. For decedents dying after December 31, 2016, the surviving spouse of a Virginia
876 domiciliary decedent may elect to take an elective-share amount equal to 50 percent of
877 the value of the marital-property portion of the augmented estate.
- 878 i. There is a 2 step determination, being the (i) determination of the augmented estate
879 and (ii) the marital property portion.
- 880 ii. Composition of the augmented estate, subject to certain exclusions,¹⁹⁹ is the sum of:
- 881 1. The decedent's net probate estate;
- 882 2. The decedent's non-probate transfers to others;
- 883 3. The decedent's non-probate transfers to the surviving spouse; and
- 884 4. The surviving spouse's property and non-probate transfers to others.²⁰⁰
- 885 iii. The marital property portion of the augmented estate depends upon the length of the
886 marriage between the decedent and the surviving spouse in accordance with this
887 table, and is the sum of the augmented estate constituent elements above multiplied
888 by a percentage, which in turn is based upon the length of the marriage:²⁰¹

¹⁹⁸ [Va. Code § 64.2-308.9 \(C\)\(2\)\(a\).](#)

¹⁹⁹ [Virginia Code § 64.2-308.9.](#)

²⁰⁰ [Virginia Code § 64.2-308.4 \(A\).](#)

²⁰¹ [Virginia Code § 64.2-308.4 \(B\).](#)



889	1. Less than 1 year	3%
890	2. 1 year but less than 2 years	6%
891	3. 2 years but less than 3 years	12%
892	4. 3 years but less than 4 years	18%
893	5. 4 years but less than 5 years	24%
894	6. 5 years but less than 6 years	30%
895	7. 6 years but less than 7 years	36%
896	8. 7 years but less than 8 years	42%
897	9. 8 years but less than 9 years	48%
898	10. 9 years but less than 10 years	54%
899	11. 10 years but less than 11 years	60%
900	12. 11 years but less than 12 years	68%
901	13. 12 years but less than 13 years	76%
902	14. 13 years but less than 14 years	84%
903	15. 14 years but less than 15 years	92%
904	16. 15 years or more	100%

- 905 g. The elective share right is personal to the surviving spouse,²⁰² with special provisions
906 for incapacitated surviving spouses.²⁰³
- 907 i. When the election is made by a conservator or agent, the statute presumes the
908 surviving spouse for whom the election is made an "incapacitated person."
- 909 ii. When a validly appointed and qualified conservator asserts the surviving spouse
910 election, the surviving spouse is conclusively an incapacitated person.²⁰⁴
- 911 iii. When an *agent* asserts the election, the surviving spouse may not be an
912 "incapacitated person."²⁰⁵

²⁰² [Virginia Code § 64.2-308.13](#), Right of election personal to surviving spouse; incapacitated surviving spouse.

²⁰³ *Id.*, (B). Throughout the Article, the Code refers to a surviving spouse who is an "incapacitated person."

²⁰⁴ "'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.

²⁰⁵ 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



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- h. For an incapacitated surviving spouse,²⁰⁶ a court proceeding is necessary in order to create the trust specified in the statute for the surviving spouse's protection.²⁰⁷
- 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:

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 permit the Court to act under the aegis of [Virginia Code § 64.2-308.13](#)?

Another concern: [42 USC 1396p](#) (d)(2)(A)(iv) 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.”

If the election is made pursuant [Virginia Code § 64.2-308.13](#), the decedent spouse’s assets should not be considered a transfer of assets by the surviving spouse because the assets *in* the estate of the deceased spouse did not vest in the surviving spouse. This foils imputation pursuant to [42 USC 1396p](#) (d)(2)(A)(iv), which provides that “an individual shall be considered to have established a trust [only] 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.”

²⁰⁶ 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.

²⁰⁷ [Virginia Code § 64.2-308.12, -13](#) (A).



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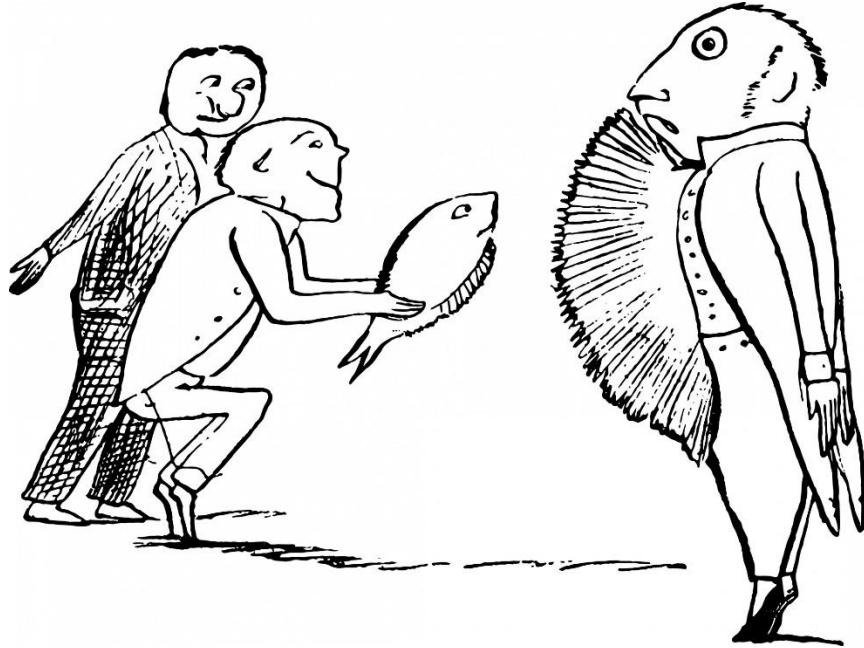
- i. Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse and **benefits of medical 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.**²⁰⁸
- 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 predeceased spouse died immediately after the surviving spouse; or (ii) to the predeceased spouse's heirs under Chapter 2 (§ 64.2-200 et seq.).²⁰⁹

https://ao365508816-my.sharepoint.com/personal/smajette_t-mlaw.com/Documents/VAELA, SNA projects after 3-31-2021/2022/CLE and Web Outlines/Majette Net Outlines/Medicaid/2022/VirginiaLongTermCareMedicaidPlanningHighlights.docx 3/17/2022 8:38 AM

²⁰⁸ ***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), Medicaid Manual § M 1450.003 (C).

²⁰⁹ 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](#).





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There was an old person of Brill,
Who purchased a shirt with a frill;
But they said, "Don't you wish, you mayn't look like a fish,
You obsequious old person of Brill?"

[Lear, *Book of Limericks*, 1888](#)



Exhibit A

Click



2022 SSI and Spousal Impoverishment Standards

Supplemental Security Income (SSI)

Effective 1-1-22

	SSI Federal Benefit Rate (FBR)	SSI Resource Standard	Income Cap Limit (300%)	Earned Income Break Even Point	Unearned Income Break Even Point
Individual	841.00	2,000.00	2,523.00	1,767.00	861.00
Couple	1,261.00	3,000.00	N/A	2,607.00	1,281.00
Substantial Gainful Activity (SGA) Limit:		1,350.00	(Blind SGA: 2,260.00)		
CPI Increase for 2022:		5.4%			
CPI Increase, Since September 1988:		129.0%			

Spousal Impoverishment

Effective 1-1-22 Unless Otherwise Noted

Minimum Monthly Maintenance Needs Allowance (MMMNA): <i>(Effective 7-1-21)</i>	2,177.50 2,721.25 2,505.00	All States (Except Alaska and Hawaii) Alaska Hawaii
Maximum Monthly Maintenance Needs Allowance:	3,435.00	
Community Spouse Monthly Housing Allowance: <i>(Effective 7-1-21)</i>	653.25 816.38 751.50	All States (Except Alaska and Hawaii) Alaska Hawaii
Community Spouse Resources:		
Minimum Resource Standard:	27,480.00	
Maximum Resource Standard	137,400.00	
Home Equity Limits:		
Minimum:	636,000.00	
Maximum:	955,000.00	

