

WHEN “I DO” BECOMES “I DON’T”: ELIMINATING THE DIVORCE LOOPHOLE TO MEDICAID ELIGIBILITY

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In an attempt to qualify for government assistance to pay for medical costs, some elderly couples have resorted to extreme measures. One such measure has been for the elderly couple to obtain a divorce, and in the process transfer the majority of the couples assets from the ill spouse to the healthy one. This scheme allows the impoverished spouse to qualify for Medicaid assistance for that spouse's long-term care. In this note, Michael Farley discusses the implications of this measure and ultimately recommends eliminating this divorce loophole. Because of the number of alternatives that are available for elderly couples to obtain Medicaid assistance for costly medical expenses like nursing home care, permitting elderly couples to go through the emotional trauma and other significant drawbacks of divorce just to qualify for Medicaid is cruel and unreasonable.

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I. Introduction

The elderly are keenly aware that it is very expensive to grow old in modern society.¹ Despite the skyrocketing prices of goods and services, the income ceiling with which the elderly must comply if they hope to qualify for federal assistance to meet rising medical expenses continues to fall. Medicaid,² the primary government funded program for the long-term care of poor persons, requires the participant to maintain an income that does not exceed subsistence level to retain eligibility for benefits.³ Older couples with higher than subsistence level incomes who want these benefits have employed very creative Medicaid financial planning tools to achieve eligibility. Under current law, one strategy that is available to enable elderly couples to qualify for Medicaid while at the same time preserve marital assets is simply ending the marriage by divorce.⁴

The divorce option will likely become increasingly attractive to the current generation of wealthy baby-boomers as they near retirement age.⁵ They can hardly be expected to willingly give up the standard of living to which they have grown accustomed just because their spouse has suffered a catastrophic injury or illness that requires full-time medical care in a nursing home.⁶ It is unlikely that the current generation will feel it is beneath them to preserve their hard-earned assets by taking advantage of poorly drafted Medicaid legislation.⁷

1. "The fastest growing segment of the American population are people who are sixty-five years old and older . . . [However], living longer only increases the fear that elderly Americans will become impoverished while paying for their long-term care needs." Laura Herpers Zeman, *Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-term Medical Care for the Elderly*, 13 QUINNIPIAC PROB. L.J. 187, 188 (1998).

2. Title XIX of the Social Security Act of 1965, 42 U.S.C. §§ 1396-1396u (1998).

3. See Zeman, *supra* note 1, at 188. "While Medicare is the primary form of public assisted insurance for the elderly population . . . it only pays for about six percent of American's long-term care. Medicaid covers more of an elderly person's long-term care needs but only if the individual meets income and asset requirements." *Id.*

4. See *infra* notes 7-30 and accompanying text.

5. See generally *Are You Ready for This?*, FORTUNE, Aug. 16, 1999, at 52; Barbara Kantrowitz, *The Road Ahead: A Boomer's Guide to Happiness*, NEWSWEEK, Apr. 3, 2000, at 56.

6. "[D]on't expect boomers to go quietly into boring and predictable senescence. They're likely to transform the last decades of life just as they have already demolished other conventional milestones." Kantrowitz, *supra* note 5, at 58.

7. "Whether the middle-class, middle-aged children of America's elderly will inherit anything is ultimately a function of whether their parents stay out of the nursing home or engage in so-called 'divestment planning' to qualify for

This note advocates an outright prohibition on divorce as a strategy to preserve marital assets and qualify for Medicaid benefits because such divorces have detrimental social effects. At the same time, this note encourages the elderly to look at options aside from divorce for spousal asset preservation. Part II explores the variety of ways in which the current Medicaid system encourages elderly couples to divorce. Part III surveys the numerous options for divorce available today and the potential dangers they create. Part IV advocates elimination of the divorce loophole in determining eligibility for Medicaid. While this recommendation may seem harsh on the surface, elimination of the divorce loophole will not disturb a large number of alternative methods to help elderly couples in need that do not have the drastic emotional, financial, and social drawbacks of divorce.

II. Background: Why Many Are Put to a Difficult Choice

Medicaid is a federal safety net that pays the medical bills for low-income individuals who are elderly, blind or disabled.⁸ It is also the only government program that pays for long-term nursing care.⁹ In order to obtain such benefits, elderly couples not qualifying as low income may be tempted to take dramatic steps to alter their income classification.

A. The Problem

Two examples illustrate the problems of a system that forces couples to make major lifestyle changes in order to qualify for Medicaid benefits. The first involves Mike and Sharon Balser of Springvale, Maine.¹⁰ Both Sharon and Mike qualified for Medicaid benefits prior to their marriage.¹¹ Medicaid pays for Mike, a recovering alcoholic with bad kidneys, to undergo dialysis treatment three times per

Medicaid nursing home benefits.” Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlements and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1, 8 (1989).

8. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* § 5.1 (2d ed. 1999).

9. See Dobris, *supra* note 7, at 10.

10. See Bill Nemitz, *Until Death, or Medicaid, Do Us Part*, PORTLAND PRESS HERALD, June 26, 1998, at 1B.

11. See *id.*

week.¹² Medicaid also pays for Sharon's medical care, which involves daily shots and medications for a variety of ailments.¹³ For both of these individuals, continued medical treatment that neither could afford without help from Medicaid is a matter of life and death.¹⁴

Less than one year after the two were married, the Maine Department of Human Services, the state agency that administers the federal Medicaid program in Maine, informed the couple that their combined monthly income was too high for them to continue to receive benefits as a married couple.¹⁵ They faced several unappealing options. First, they could remain married and continue living together, but both would lose their Medicaid benefits.¹⁶ Under this option, they will eventually go bankrupt attempting to pay for life-sustaining medical care without the help of Medicaid. Second, they could retain Medicaid benefits by obtaining a divorce.¹⁷ Under the current rules, the couple would still be permitted to live together, despite the divorce, and retain their Medicaid benefits.¹⁸ Third, they could retain their Medicaid benefits by staying married but maintaining separate residences.¹⁹ Whatever choice they make, the system will ultimately require this couple to choose between marital happiness and medical necessity.

The problem is further exemplified by the situation of L.M. and his wife, residents of Paramus, New Jersey.²⁰ In February of 1992, seventy-five-year-old L.M. had a stroke that left him confined to a nursing home.²¹ He and his wife applied for Medicaid benefits to cover the cost of the nursing home care, but their request was denied.²² In July of that same year, a court appointed L.M.'s daughter as his legal guardian because the court found L.M. to be mentally in-

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See* L.M. v. State, Div. of Med. Assistance & Health Servs., 659 A.2d 450, 451 (N.J. 1995).

21. *See id.*

22. *See id.* "The Middlesex County Board of Social Services (Board) denied L.M.'s application in April 1992 because his monthly income exceeded the eligibility limit . . ." *Id.*

competent, “incapable of governing himself and managing his affairs.”²³

In an effort to help L.M. qualify for Medicaid benefits, L.M.’s wife filed for divorce from bed and board.²⁴ By agreement between L.M.’s wife and his legal guardian, all of L.M.’s assets were transferred into L.M.’s wife’s name.²⁵ Thereafter, L.M.’s guardian reapplied for Medicaid benefits.²⁶ The Director of the Department of Human Services, Division of Medical Assistance and Health Services (DHS-DMAHS) again denied the application.²⁷

On appeal, the decision of the Director was affirmed.²⁸ The Appellate Division noted that “[t]o reverse the Director on the present record could have the result of encouraging parties to secure divorces in order to establish Medicaid eligibility.”²⁹ The Supreme Court of New Jersey acknowledged the concern engendered by this possibility, but responded:

[G]overnment is equally concerned about federal and state Medicaid policies that are so restrictive that they encourage married couples, like L.M. and his wife, to seek judicial authorization to sever the bonds of a fifty-three-year-old marriage that they would otherwise preserve at all costs. . . . We assume that . . . modifications of the Medicaid eligibility requirements will make it unnecessary for families in the future to resort to the extreme steps taken by L.M. and his spouse to become Medicaid-eligible.³⁰

The Supreme Court then reversed the Appellate Division and granted Medicaid nursing home care benefits to L.M. through his guardian.³¹ However, the assumption the Court made regarding modifications in Medicaid eligibility requirements has yet to materialize.

23. *Id.*

24. *See id.* “A divorce from bed and board ‘does not dissolve the marital bond but merely decrees a judicial separation’ [h]owever, ‘all property rights of the parties are treated as though a judgment of absolute divorce has been entered.’” *Id.* (citing GARY N. SKOLOFF & LAURENCE J. CUTLER, *NEW JERSEY FAMILY LAW PRACTICE* § 2.6, at 2-27 (5th ed. 1984)).

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.* at 484.

29. *Id.*

30. *Id.* at 500.

31. *See id.* at 501.

B. The Structure of Medicaid

Since 1965, the Medicaid program has been meeting the medical needs of poor individuals in this country.³² Structurally, Medicaid is a federal program that depends on voluntary state involvement to accomplish its mission.³³ More specifically, Medicaid provides for federal and state sharing of payments for medical care, including nursing home services, provided to qualified individuals.³⁴ Nevertheless, "states must follow Federal law as to eligibility and what services they must provide."³⁵ Furthermore, a near subsistence level of income is needed to qualify for Medicaid.³⁶ For purposes of determining eligibility for Medicaid benefits, the applicant's Medicaid estate has been defined as:

all his or her nonexempt assets or, if married, those nonexempt assets owned by both spouses, jointly or separately, on either the date the spouse is admitted to an institution or applies for Medicaid. For married individuals, the total fair market value of these assets is considered available to the institutionalized spouse. However, an exception to this rule permits the community spouse to retain a spousal allowance equivalent to one-half of the combined, nonexempt assets without any obligation to spend it on behalf of the institutionalized spouse. Accordingly, the Medicaid estate includes the institutionalized spouse's nonexempt assets above the asset limit and the community spouse's nonexempt assets above the spousal share.³⁷

32. See FROLIK & KAPLAN, *supra* note 8, § 5.1. "The Medicaid program, enacted in 1965 as Title XIX of the Social Security Act, is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services." *L.M. v. State, Div. of Med. Assistance & Health Servs.*, 659 A.2d 450, 452 (N.J. 1995) (citing *Atkins v. Riveria*, 477 U.S. 154, 156 (1986)).

33. See FROLIK & KAPLAN, *supra* note 8, § 5.1. "The state cost of Medicaid varies from approximately 50% to 80%. Responsibility for administering Medicaid rests with the Federal Health Care Financing Administration (HCFA) that oversees the states, who in turn operate the Medicaid program." *Id.* According to one New Jersey court, "[t]he program is a cooperative federal-state endeavor in which the federal government provides 'financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.'" *L.M.*, 659 A.2d at 452 (citing *Harris v. McRae*, 448 U.S. 297, 301 (1980)). "In return, participating States are to comply with requirements imposed by the [program] and by the Secretary of Health and Human Services." *Id.* (citing *Atkins*, 477 U.S. at 157).

34. See FROLIK & KAPLAN, *supra* note 8, § 5.2.

35. *Id.* § 5.1. For a detailed listing of services that state medical assistance programs must offer older persons under Federal law, see *id.* § 5.2.

36. The one-person asset limit in the majority of states is two thousand dollars. See *Tarin v. Commissioner of the Div. of Med. Assistance*, 678 N.E.2d 146, 150 (Mass. 1997); see also FROLIK & KAPLAN, *supra* note 8, § 5.3(b).

37. Amber R. Cook, Note, *Estate Planning with Medicaid: Qualification and Planning for the Elderly*, 99 W. VA. L. REV. 155, 159-60 (1996).

As if the wording of the statute were not confusing enough, Congress additionally requires that “an applicant must meet one of two tests: the categorical test or the medically needy test [T]he applicant must be in the category of persons entitled to participate in the Medicaid program, or the applicant must have assets and income which fall under state specified levels.”³⁸ Generally known as categorically needy³⁹ and medically needy,⁴⁰ the two methods of determining Medicaid eligibility have their own distinct goals and restrictions.⁴¹

1. CATEGORICALLY NEEDY

States extend Medicaid benefits in accordance with federally articulated procedures.⁴² Medicaid benefits must be distributed to those who receive benefits under either Aid to Families with Dependant Children (AFDC) or Supplemental Security Income for the Aged, Blind, and Disabled (SSI).⁴³ Essentially, these persons are categorically needy because they “have already met the income and asset requirements set forth by federally prescribed welfare programs in the Social Security Act.”⁴⁴ Optional coverage for the categorically needy includes persons living in nursing homes.⁴⁵ States that choose to participate in Medicaid are required to provide coverage to persons that are categorically needy because they are persons whom Congress con-

38. Zeman, *supra* note 1, at 192–93.

39. See *infra* notes 42–47 and accompanying text.

40. See *infra* notes 48–60 and accompanying text.

41. See *supra* notes 20–31 and accompanying text.

42. See 42 U.S.C. § 1396(a) (1994); *L.M. v. State, Div. of Med. Assistance & Health Servs.*, 659 A.2d 450, 452 (N.J. 1995).

43. See *L.M.*, 659 A.2d at 453–54. “Categorically needy persons are applicants who are receiving cash payments under any federally prescribed welfare program established by the Social Security Act.” Zeman, *supra* note 1, at 192.

44. Zeman, *supra* note 1, at 194.

45. The statute provides:

A State plan for medical assistance must provide [benefits] . . . at the option of the State, to any group or groups of individuals . . . who are in a medical institution for a period of not less than 30 consecutive days (with eligibility by reason of this subclause beginning on the first day of such period), who meet the resource requirements of the appropriate State plan described in clause (i) or the supplemental security income program, and whose income does not exceed a separate income standard established by the State

42 U.S.C. § 1396a(a)(10)(A)(ii)(V).

siders especially deserving of public assistance based upon family circumstances, age, or disability.⁴⁶

2. MEDICALLY NEEDY

Medically needy individuals are those “whose resources exceed the limit imposed for categorically needy status but are insufficient to finance the costs of medical care.”⁴⁷ The medically needy category is broader than the categorically needy category, because a person whose income exceeds the SSI eligibility limit set for the categorically needy designation can still qualify as medically needy under less stringent tests of income and assets.⁴⁸ The income test varies by state and is based on the applicant’s available income from month to month.⁴⁹ It provides that “[m]edically needy individuals may spend down to the state income and asset limit by deducting incurred medical expenses.”⁵⁰

Under the asset test, “assets that qualify as ‘available’ assets are assigned fair market value while other assets are ‘exempt.’”⁵¹ Generally, exempt assets include the applicant’s home if a dependent lives there or the applicant will return; life insurance with a face value of less than \$1,500; burial plots; wedding and engagement rings and one car worth less than \$4,500.⁵² Also exempted from available assets is “property which is so essential to the patient’s support that it warrants exclusion.”⁵³

46. *See id.*

47. Cook, *supra* note 37, at 159.

48. *See* FROLIK & KAPLAN, *supra* note 8, § 5.4(b). “Even if their income exceeds the SSI eligibility limit, individuals can qualify as medically needy if they meet the applicable SSI resource test and if their income is insufficient to pay for their medical care.” *Id.*

49. *See* Zeman, *supra* note 1, at 194. “‘Available income’ is defined as income that the applicant has a legal interest in and can be used for support and maintenance. However, there are limits to this definition because only income that is received in cash or in kind is considered ‘available’ for Medicaid purposes.” *Id.* at 194.

50. Cook, *supra* note 37, at 159 n.28. “To qualify as medically needy, the individual must meet the resource limitations of \$2,000 for an individual and \$3,000 for married couples In medically needy states, individuals become eligible for Medicaid by spending down their income in payment of their medical expenses until their remaining monthly income is below 133 1/3% of the applicable Aid for Families with Dependent Children (AFDC) payment.” FROLIK & KAPLAN, *supra* note 8, § 5.4.

51. *See* Zeman, *supra* note 1, at 196.

52. *See id.*

53. *Id.* at 196 n.68.

Most states have a medically needy category that applies to nursing home residents with income above the SSI limit.⁵⁴ In these states, persons in nursing homes pay for their own medical care “until their income is spent down to the Medicaid eligibility level with Medicaid paying for the rest.”⁵⁵ One of the quirks of the medically needy category is that eligibility is determined on a month-to-month basis, so “an individual could be eligible in June, ineligible in July, if he or she had few medical expenses, and eligible again in August if medical expenses were very high.”⁵⁶

An often inescapable result of attempts to qualify for Medicaid as either categorically needy or medically needy is the depletion of an entire life’s savings prior to attaining eligibility for assistance.⁵⁷ Congress tried to remedy the harshness of this situation by enacting the Medicare Catastrophic Coverage Act of 1998 (MCCA).⁵⁸

C. The Medicare Catastrophic Coverage Act

The MCCA provides direct relief for the community spouse from spousal impoverishment and applies to persons entering nursing homes on or after September 30, 1989.⁵⁹ Representative Henry Waxman, one of the Act’s proponents, described the goal of the Act as follows:

In this bill we reduce the risk of financial devastation from nursing home care by providing that the Medicaid program allow the spouse of a nursing home resident to retain enough of the couple’s income and resources to continue to live in the community. No longer will a wife be driven to choose between poverty and divorce if her husband enters a nursing home.⁶⁰

As Representative Waxman’s comments indicate, the MCCA was principally designed to allow persons who need full-time nursing home care to qualify for Medicaid benefits without impoverishing

54. See FROLIK & KAPLAN, *supra* note 8, § 5.4.

55. *Id.*

56. *Id.*

57. See Cook, *supra* note 37, at 159. “With nursing-home costs ranging from thirty-thousand to more than fifty-thousand annually, an elderly individual exhausts his or her lifetime savings in a matter of months paying for long-term care. Although public assistance is available to help low-income individuals finance long-term care, the eligibility criteria mandate legal poverty before assistance is available.” *Id.* at 155–56.

58. 42 U.S.C. § 1396r-5 (1994).

59. See Kevin C. Kelly, *Protecting Assets for the Community Spouse When Long-Term Care is Needed*, PROB. & PROP., Mar.–Apr. 1999, at 63.

60. *Id.* at 62.

their spouse.⁶¹ Additionally, “[C]ongress sought to alleviate the spousal impoverishment that resulted from the spend-down of marital income and resources for the medical care of an institutionalized spouse by setting a base minimum of support the community spouse would need to prevent impoverishment.”⁶²

Although the MCCA addresses spousal impoverishment, it was also “designed to eliminate loopholes which allowed couples to qualify for Medicaid even though they had substantial resources.”⁶³ For example, under the old rules an elderly couple could shelter most of their resources in the community spouse’s name, allowing the institutionalized spouse to appear poor and thereby qualifying for Medicaid benefits.⁶⁴ By requiring that a couple’s combined resources be credited to each individual spouse in calculating Medicaid eligibility, the MCCA voided this old loophole. “Thus, the MCCA struck a balance between preventing impoverishment of the community spouse and ensuring that no one avoided contributing his or her fair amount to medical care.”⁶⁵

1. FEAST OR FAMINE FOR THE COMMUNITY SPOUSE

One of the goals of the MCCA was to lessen the “feast” or “famine” effect on the community spouse that resulted from the old rules for medically needy Medicaid applicants.⁶⁶ “A community spouse experienced a ‘feast’ if he or she held title to all of the couple’s income and resources. . . . [B]ecause of his or her technical separation from the institutionalized spouse, the community spouse was under no obligation to use her or his income and resources to assist the institutionalized spouse with medical costs.”⁶⁷ Conversely, the community spouse experienced near “famine” conditions when the institutionalized spouse held title to the couple’s income and resources.⁶⁸ In these famine situations, all of the institutionalized spouse’s resources and most

61. *See id.*

62. *Id.*

63. *Thomas v. Comm’r of the Div. of Med. Assistance*, 682 N.E.2d 874, 876 (1997).

64. *See id.*

65. *Id.*

66. *See Kelly*, *supra* note 59, at 62.

67. *Id.* at 62–63.

68. *See id.*

of his or her income were factored in to calculate the availability of resources for the institutionalized spouse's medical needs.⁶⁹

The key provisions of the MCCA are the deeming⁷⁰ and diversion provisions.⁷¹ Feast situations are reduced under the MCCA deeming provision by allowing the community spouse greater deeming capability while at the same time setting upper limits on the level of resources protected.⁷² This provision ensures that the community spouse contributes some portion of the couple's finances toward medical care. To combat the famine situation and its attendant impoverishment of the community spouse, Congress put in place a Community Spouse Resource Amount (CSRA) and a Minimum Monthly Maintenance Needs Allowance (MMMNA).⁷³ This process works as follows:

The MCCA defines the CSRA as the amount by which the greatest of (1) \$16,152, (2) the lesser of the spousal share computed by the spousal assessment process or \$80,760, (3) an amount established by an administrative fair hearing or (4) an amount transferred under a court order exceeds the amount of resources otherwise available to the community spouse without regard to this calculation. 42 U.S.C. § 1396r-5(f)(2)(A)(i)-(iv) & (g). . . . These amounts may differ from state to state.

In essence, a community spouse can have no less than \$16,152 of the total nonexempt joint resources unless the couple's joint resources do not amount to \$16,152. In those cases, the community spouse can protect the entire value of the couple's resources. Congress wanted to stop the depletion of resources at a specified amount to prevent the impoverishment of the community spouse.

The MCCA set a maximum CSRA at the lesser of one-half of the total nonexempt joint marital resources, or \$80,760. This allowance limits the amount a community spouse can maintain during the institutionalized spouse's eligibility period and contemplates an applicant who applies with more than \$161,520 in nonexempt joint resources. An applicant with resources in excess of \$161,520 can provide the community spouse with no more than \$80,760.⁷⁴

Although the CSRA varies by state, under federal law the 1998 minimum was \$16,152 and the maximum was \$80,760, with these

69. *See id.*

70. *See id.* at 63. "Deeming represented income and resource transfers from the community spouse to the institutionalized spouse." *Id.*

71. *See id.* "Diversion represented transfers from the institutionalized spouse to the community spouse." *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

amounts adjusted annually for inflation.⁷⁵ Courts have found that establishing the MMMNA and the CSRA is the most difficult aspect of applying the statute.⁷⁶

2. THE MMMNA AND THE CSRA

Under the MCCA, the community spouse has a right to receive money from the institutionalized spouse's income if the community spouse's monthly income is less than the MMMNA.⁷⁷ The MMMNA could hardly be considered a financial windfall for the community spouse, as in 1998 it amounted to a mere \$1,357 and, with an excess shelter allowance added in, still did not exceed \$2,019.⁷⁸

The CSRA is determined by "the value of the couple's assets on the first day of the institutionalized spouse's continuous institutionalization for at least 30 days regardless of when the application for Medicaid occurs."⁷⁹ The State Medicaid agency will make this determination by combining the nonexempt joint resources of the couple as of the relevant date and dividing the resources into equal shares.⁸⁰ The CSRA does not include the family home or its furnishings, the family car, or other resources up to a maximum amount determined by the State.⁸¹ The CSRA is combined with the community spouse's other income to form the MMMNA.⁸² Disagreements by either spouse with the CSRA are handled in a statutorily prescribed "fair hearing."⁸³

States may elect to provide benefits under the MCCA using an income first or resources first method.⁸⁴ Under the income first method, if the community spouse does not have a sufficient monthly income to meet the MMMNA, income from the institutionalized spouse is diverted to the community spouse until the community

75. See FROLIK & KAPLAN, *supra* note 8, § 5.5.

76. See generally *In re Dianne DaRonco*, 638 N.Y.S.2d 275 (1995).

77. See FROLIK & KAPLAN, *supra* note 8, § 5.5.

78. See *id.* These figures are adjusted annually for inflation. See *id.*

79. *Id.* In essence, a "snapshot" is taken based on the value of the couple's assets from which the CSRA will be deducted when the institutionalized spouse applies for Medicaid benefits. See *id.*

80. See Kelly, *supra* note 59, at 63.

81. See FROLIK & KAPLAN, *supra* note 8, § 5.5.

82. See *id.*

83. See 42 U.S.C. § 1396r-5(e)(1994); see also *Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 803 (3d Cir. 1998).

84. See *Thomas v. Comm'r of the Div. of Med. Assistance*, 682 N.E.2d 874, 879 (Mass. 1997) (allowing Massachusetts to employ an income first rule); see also *Cleary ex rel. Cleary*, 167 F.3d at 811-12 (allowing New Jersey to employ the income first approach).

spouse's monthly income is raised to the proper MMMNA level.⁸⁵ The resources first method requires a revision of the CSRA in order to bring the community spouse up to the proper MMMNA level.⁸⁶ While the MCCA has done much to prevent spousal impoverishment, it has done little to prevent the use of divorce to preserve assets.

III. Analysis: Divorce, American Style

Divorce for the sake of spousal asset preservation and Medicaid benefits qualification is only an option in situations where obtaining a divorce is a viable alternative.⁸⁷ The importance of this issue is highlighted by the many ways the elderly can legitimately obtain a divorce.

A. On What Grounds is Divorce Possible?

1. PHYSICAL ILLNESS

A physical illness of one spouse that requires full-time care in a nursing home may strongly influence the couple to seek a divorce.⁸⁸ The divorce will make it possible for the ill spouse to begin receiving Medicaid benefits immediately because that spouse will most likely be classified as categorically needy or medically needy.⁸⁹

2. MENTAL ILLNESS

Mental illness has been a major obstacle for a couple seeking divorce because of the issue of capacity.⁹⁰ Courts have reasoned that it may not be possible to divorce due to lack of capacity because a spouse's mental incapacity "prevents the spouse from having the state

85. See Kelly, *supra* note 59, at 64.

86. See *id.*

87. "Sometimes a divorce will simply be unavailable. At other times, it is a possibility, but not a productive one once the delays and costs of obtaining the divorce have been taken into account." PETER J. STRAUSS ET AL., *AGING AND THE LAW*, (CCH) ¶ 1801, at 2202 (1996).

88. See *supra* notes 10–19 and accompanying text.

89. See *supra* Part II.

90. See generally Kurt X. Metzmeier, *The Power of Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend*, 33 U. LOUISVILLE J. FAM. L. 949 (1994–95). "The issue that is often litigated in divorce matters where the defendant is incompetent is whether the defendant had the capacity to engage in the conduct which led to the application for the fault-based divorce." Edward B. Borris, *Mentally Incompetent Spouses as Parties to Divorce Actions*, 1997 DIVORCE LITIG. 52, 58.

of mind necessary to establish a fault-based divorce."⁹¹ This is by no means a black letter rule. In *Kuester v. Kuester*,⁹² the court held that a divorce could be granted if there was intolerable conduct on the part of the mentally ill spouse in a no-fault divorce state.⁹³ Sometimes cruelty may be considered a sub-category of mental illness.⁹⁴ While some courts have recognized this as such, in *Hessen v. Hessen*,⁹⁵ the court made it clear that the standard is very hard to meet.⁹⁶ The alleged conduct must endanger, not just worry, the spouse.⁹⁷

3. ABANDONMENT

Some couples have tried to advance a theory of abandonment as the grounds for divorce.⁹⁸ The abandonment theory requires that the abandonment must be a voluntary act.⁹⁹ Entering a nursing home to receive chronic care is not voluntary,¹⁰⁰ so the abandonment theory for divorce would probably fail in this situation.

B. The Power of Guardians in Divorce Actions

In certain situations a party may have the grounds but lack the power to petition for divorce.¹⁰¹ In these situations the powers of a guardian are key.¹⁰² The majority rule, as held in *In re Marriage of Drews*,¹⁰³ is that guardians lack standing to dissolve a ward's marriage.¹⁰⁴ Many courts have firmly upheld this rule.¹⁰⁵ Nevertheless, a

91. Borris, *supra* note 90, at 58; *see also* Boggs v. Boggs, 289 A.2d 479, 479–80 (1972).

92. 633 S.W.2d 281, 284 (Mo. Ct. App. 1982).

93. *See id.*

94. *See* Hessen v. Hessen, 308 N.E. 2d 891 (N.Y. Ct. App. 1974).

95. 308 N.E. 2d 891.

96. *See id.*

97. *See id.*

98. *See* Schine v. Schine, 319 N.Y.S.2d 967, 969 (N.Y. 1971).

99. *See id.* at 969.

100. *See* Dailey v. Dailey, 463 N.E.2d 427, 429 (Ohio Ct. App. 1983).

101. *See infra* notes 103–13 and accompanying text.

102. *See id.*

103. 503 N.E.2d 339 (Ill. 1986), *cert. denied*, 107 S. Ct. 3222 (1987) (noting that a guardian's authority is financial and does not extend to personal decisions).

104. *See id.* In many states mentally incompetent persons are not allowed to file a divorce action due to the following rationale:

The traditional common-law rule is that in the absence of a statute which specifically authorizes the filing of a divorce action by a mentally incompetent person, it is improper to permit a mentally incompetent person to file a divorce action through a representative. Courts reach this conclusion in spite of the existence of statutes which generally authorize the filing of civil actions by representatives of incompe-

number of more recent opinions hold that a guardian can file a divorce action for his or her ward.¹⁰⁶ For example, the court in *In re Marriage of Kutchins*¹⁰⁷ held that spouses can circumvent *Drews* by having the ward bring the divorce action.¹⁰⁸ However, courts are split as to whether having the ward bring the divorce action will work. In *Syno v. Syno*,¹⁰⁹ a Pennsylvania court held that a ward can only obtain a divorce decree through a guardian.¹¹⁰ This holding was followed in *Boyd v. Edwards*,¹¹¹ in which a guardian was allowed to finalize a pending divorce for a ward rendered incompetent by a car accident.¹¹²

From the foregoing it is clear that it is becoming increasingly easier to obtain a divorce in American society. The advent of no-fault divorces on a widespread basis throughout the nation has made the task even easier.¹¹³ However, divorce, despite its advantages under Medicaid, can also lead to serious problems, particularly for the elderly.¹¹⁴

C. Weighing the Positive and Negative Aspects of Divorce

An elderly couple should carefully consider the positive and negative aspects of divorce before deciding on a course of action because they may be woefully unprepared to face the consequences of their actions.

tents. The reason for the traditional rule is that divorce matters are too personal to permit guardians to file actions on the behalf of incompetents. Presumably, if legislatures intended to permit mentally incompetent persons to file divorce actions, the legislatures would have provided specific legislation authorizing these actions.

Borris, *supra* note 90, at 52.

105. See, e.g., *Cox v. Armstrong*, 221 P.2d 371 (Colo. 1950); *Sternberg v. Sternberg*, 46 S.E.2d 349 (Ga. 1948); *Johnson v. Johnson*, 170 S.W.2d 889 (Ky. 1943).

106. See Borris, *supra* note 90, at 54. "They reached this conclusion because the rationale for the traditional rule is no longer valid. Essentially, guardians are now empowered to make many personal decisions for wards Therefore, guardians should be permitted to make other personal decisions, such as whether to file divorce actions." *Id.*; see also *In re Marriage of Ballard*, 762 P.2d 1051 (Or. Ct. App. 1988); *Wahlenmaier v. Wahlenmaier*, 762 S.W.2d 575 (Tex. 1988) (per curiam); *In re Marriage of Gannon*, 702 P.2d 465 (Wash. 1985).

107. 482 N.E.2d 1005 (Ill. App. Ct. 1985).

108. See *id.* at 1007.

109. 594 A.2d 307 (Pa. Super Ct. 1991).

110. See *id.* at 311.

111. 446 N.E.2d 1151 (Ohio Ct. App. 1982).

112. See *id.* at 1159-60.

113. See generally Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741.

114. See *infra* Part III.C.

1. THE ADVANTAGES OF DIVORCE

Divorce can help two people lead more productive lives.¹¹⁵ This is especially true under an economic view of marriage.¹¹⁶ According to the economic view of marriage, marriage consists of a number of sacrifices that can be described as costs and benefits.¹¹⁷ In general, most people get married because they feel their lives will be enhanced in some way, or they feel that there is some benefit to be gained by marriage.¹¹⁸ As one commentator has observed, “[t]he essence of marriage consists of reciprocal arrangements. While neither washing the family car nor cooking dinner will result in positive net benefits for that person, the combination of activities will result in positive net benefits for the couple.”¹¹⁹ The economic view further posits that if one spouse determines that his or her sacrifices are neither improving the marriage nor being reciprocated, that spouse may decide that it is in their best interests to end the marriage.¹²⁰ This analysis also holds true if the marriage has deteriorated into an unhealthy or abusive situation. Consequently, from a purely economic perspective, the costs of being married can become greater than the rewards or benefits.¹²¹ Divorce is simply one way to stop placing precious resources in a failed investment.¹²²

2. THE NEGATIVE EMOTIONAL IMPACT OF DIVORCE

Despite the widespread and growing availability of divorce to the elderly, empirical evidence reveals that “the longer a marriage endures, the less the likelihood that the couple will ever divorce.”¹²³ Perhaps this is so because traditionally, divorce was available only on the ground of adultery and only to the innocent party.¹²⁴ Old laws, and perhaps old values, subscribed to the following point of view:

115. “For most of American history, the consensus was that a divorce would seldom improve social welfare; therefore, severe restrictions were placed on divorce.” Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51, 57 (1999).

116. *See id.* at 75.

117. *See id.* at 76.

118. *See id.*

119. *Id.*

120. *See id.*

121. *See id.*

122. *See id.*

123. Joseph N. DuCanto, *Divorce Among the Graying Generation*, 12 FAIRSHARE 13, 14 (1992).

124. *See Wardle, supra* note 114, at 750.

Divorce is an act of violence. It is a traumatic, tearing act of violent emotional, physical, social, and economic separation Some people had settled expectations and attitudes about the permanence of their marriages, the boundaries defining their family relationships, the conditions on which their marriages could be terminated, and the consequences for doing so.¹²⁵

Generally, divorce among the elderly subjects the relationship to a terrible rupture. It also has the potential to cause many couples mental pain and anguish as they reevaluate their fundamental beliefs and expectations regarding marriage.¹²⁶ As one commentator has observed, “[s]omething inherent in the very essence of human nature abhors divorce. It is very painful to all involved, both adults and children Even the survivors of divorce, like survivors of war, often are significantly transformed by the experience.”¹²⁷

These harsh emotional and mental consequences persist even in situations where both parties still love each other but feel they must divorce for financial reasons. Susan Stern, a resident of Denver, Colorado who helps senior citizens in Colorado obtain Medicaid benefits, has observed the consequences of divorce among the elderly first-hand.¹²⁸ Commenting on the situation of some of her clients, Ms. Stern notes that “[s]ome of them have never been apart before, except during the war. Suggesting they get divorced [in order to qualify for Medicaid] is like suggesting they commit murder.”¹²⁹

3. THE NEGATIVE FINANCIAL IMPACT OF DIVORCE

On a more mundane level, divorcing in order to qualify for Medicaid also results in the healthy spouse losing Medicaid protection for his or her own needs.¹³⁰ All of Congress’s work to prevent spousal impoverishment is inapplicable in situations where the couple divorces because they each become spouseless.¹³¹ Ultimately, the decision to divorce is a decision to forgo two safety nets established by Congress: the community spouse resource allowance (CSRA) as well as the minimum monthly maintenance needs allowance (MMMNA).¹³²

125. *Id.* at 748–49.

126. *See id.* at 751.

127. *Id.* at 752.

128. *See* David Algeo, *When a Divorce Is Price of Staying Together: Bill Tackles Home-Care Disparity*, DENVER POST, Apr. 22, 1998, at A01.

129. *Id.*

130. *See* STRAUSS ET AL., *supra* note 87, at 2202.

131. *See id.*

132. *See supra* notes 66–86 and accompanying text.

Consequently, while the decision to pursue divorce may appear beneficial in the short-term, it may prove disastrous in the end if the healthy spouse runs into economic difficulty later in life.¹³³ This spouse is likely to have reduced levels of available savings because the couple has been forced not to save in order to meet the extremely low Medicaid asset requirements.¹³⁴

Additionally, the couple may be required to redraft all medical and legal documents that mention the spouse.¹³⁵ This can be a time consuming process if all the required records are not readily accessible.¹³⁶ Wills, life insurance policies, and pension beneficiary designations may have to be altered after divorce.¹³⁷ The financial difficulties that may result from Medicaid motivated divorce are illustrated by the example of Loyd and Jean Nichols.¹³⁸ This couple decided to divorce in order to allow Loyd to qualify for Medicaid benefits after Loyd was diagnosed with amyotrophic lateral sclerosis, or ALS, and was unable to work.¹³⁹ It was not until after Loyd died that the full implications of the divorce became apparent.¹⁴⁰ As a result of the divorce, Jean was unable to collect on the substantial life insurance policies for which Loyd had named her the beneficiary.¹⁴¹ Realizing that the divorce was a mistake, Jean filed a motion with the court to set aside the divorce because both parties entered into it under duress.¹⁴² Loyd's children by a previous marriage, who became the beneficiaries of the life insurance policies after the divorce, contested the motion.¹⁴³ After a long and difficult battle, the court finally granted the motion to set aside the divorce because it found that Loyd and Jean had:

entered into the divorce for the sole purpose of aligning their assets so that Loyd could qualify for financial assistance from Medicaid. . . . Clearly, there was sufficient evidence for the [lower] court to have found that the extreme duress caused by the emotional, physical, and financial stress of Loyd's illness forced Jean

133. See *supra* notes 47–58 and accompanying text.

134. See Dobris, *supra* note 7, at 23.

135. See Paul J. Buser, *Old Divorce Problems: Special Issues Arise When Elderly Couples Retire*, 83 ABA J., Sept. 1997, at 78.

136. See *id.*

137. See *id.*

138. See Nichols v. Nichols, 907 S.W.2d 6 (Tex. Ct. App. 1995).

139. See *id.* at 7–8.

140. See *id.*

141. See *id.* at 8.

142. See *id.* at 9.

143. See *id.*

and Loyd to overcome their will and caused them to do that which they would not otherwise have done. . . .¹⁴⁴

Thus, using divorce to qualify for Medicaid embroiled family members in a heated legal dispute just when they needed support and encouragement from each other the most. Such ironic and contradictory circumstances should be discouraged because of their negative effect on common social bonds.

4. THE NEGATIVE SOCIAL IMPACT OF DIVORCE

Allowing elderly couples to divorce in order to preserve assets while at the same time qualify for Medicaid diminishes the value of a long, happy marriage and weakens the social fabric of the nation. For example, after thirty-four years of marriage, Glenda and Jimmy Beard of Florida were proud to have raised three children without government assistance.¹⁴⁵ However, after Glenda was diagnosed with terminal cancer, she divorced her husband and transferred all her assets to her husband via the divorce settlement.¹⁴⁶ These maneuvers allowed Glenda to qualify for Medicaid to pay her medical expenses after her private health insurance ran out, without having to tap into the couple's savings.¹⁴⁷ After obtaining the divorce, a tearful Glenda Beard asked reporters, "Why is it that we get all this lip service from the government when in reality the laws are written to destroy families?"¹⁴⁸

In Hudson, Florida, John and Lil Frain faced a similar predicament.¹⁴⁹ Sixty-eight-year-old John had emphysema, diabetes, a missing appendix and gall bladder, and a terrible heart condition.¹⁵⁰ Unless John became eligible for Medicaid through divorce, he would

144. *Id.* at 12.

145. See Larry Dougherty, *Ill Woman Forced to Divorce; Huge Medical Bills Leave Cancer Patient with Choice of Burdening Husband of 34 Years or Medicaid*, ROCKY MTN. NEWS, Apr. 12, 1998, at 2A.

146. See *id.*

147. See *id.*

148. *Id.*

149. See Tom Jackson, *When Too Much Isn't Quite Enough*, TAMPA TRIB., June 16, 1998, at 1.

150. See *id.* "His assorted pre-existing conditions render supplemental coverage unaffordable. Medicaid has prescription paying provisions, but they are disqualified by their monthly income, a shade over \$900 in Social Security payments. Current policy cuts off Medicaid eligibility at \$814 per month for couples." *Id.*

be unable to pay for his medical expenses.¹⁵¹ Unlike the Beards, the Frains rejected the idea of “dissolving their legal tie.”¹⁵²

“I ain’t living that way,” John says. “I was raised a good Catholic.” To the Frains, their marriage certificate, framed and hanging on their bedroom wall is far more than a scrap of paper. It represents commitment, loyalty, and more. It represents doing what is right. And that means sticking together come what may, as they vowed not quite 30 years ago.¹⁵³

The strength of character and social cohesion of the Frains stands in stark contrast to the example of the Beards. The policies of government should seek to preserve the family, not rip it apart for monetary gain.

Once couples are aware of the pros and cons of divorce, they can make a rational decision as to whether or not to pursue a divorce. As the previous discussion shows, if the couple decides to go forward with the divorce in order to qualify for Medicaid benefits, relatively few material obstacles stand in their way. However, divorce by an elderly couple may disrupt estate planning schemes and cause unanticipated negative emotional, financial and social problems.¹⁵⁴

IV. Recommendation

Congress should eliminate the divorce loophole in the Medicaid statute by expressly forbidding the use of divorce to concurrently preserve assets and qualify for Medicaid benefits because it is detrimental to the social fabric of the nation. While this recommendation will not solve all of the problems associated with the non-poor trying to qualify for Medicaid, it is a necessary first step. Society should not condone the use of divorce in this manner, given its negative social ramifications.

Congress has previously enacted similar legislation designed to promote social objectives in the employment context.¹⁵⁵ Like marital relationships, most employment relationships can be terminated at will. However, there are certain circumstances in which termination of an employment relationship is not allowed, such as those pro-

151. *See id.*

152. *Id.*

153. *Id.*

154. *See supra* notes 123–54 and accompanying text.

155. *See, e.g.,* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (1994).

scribed under the Age Discrimination in Employment Act (ADEA).¹⁵⁶ The Supreme Court has explained that “[t]he ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide.”¹⁵⁷

A similar prohibition should be instituted against using divorce to qualify for Medicaid. The prohibition could be enforced by bringing divorce within the already established thirty-six month look back period for transfer of resources.¹⁵⁸ The point is to reinforce the idea that marriages should not be dissolved in order to qualify for a government benefit. Government should encourage, not discourage, the continued union of an elderly couple who would never consider divorcing if the loophole in the law did not exist.

It should be noted that, like the ADEA, which is not implicated when a person is terminated for a reason other than age, this new law would not in any way hamper elderly couples who sincerely want a divorce for reasons other than preserving assets while at the same time qualifying for Medicaid. Closing the divorce loophole in the Medicaid statute still leaves plenty of other Medicaid planning tools available, short of divorce, to help the non-poor elderly qualify for Medicaid.¹⁵⁹ Three such planning tools are investing money in exempt assets, Medicaid trusts, and long-term care insurance.¹⁶⁰

A. Investing Money in Exempt Assets

One way a person can legally deplete income and assets below the Medicaid eligibility level is to invest in assets that are considered exempt under the Medicaid rules.¹⁶¹ Exempt assets are not included in the calculation of the asset limits for Medicaid.¹⁶² Exempt assets include:

156. 29 U.S.C. § 621.

157. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).

158. See FROLIK & KAPLAN, *supra* note 8, § 5.6. In the context of nursing home care, a divorce within thirty-six months of applying for Medicaid would render the applicant “ineligible for as many months as determined by dividing the total value of the transfer by the average monthly cost of nursing home services for private pay patients in the state or community where the applicant resides.” *Id.*

159. See generally Cook, *supra* note 37.

160. See *infra* notes 162–99 and accompanying text.

161. See Zeman, *supra* note 1, at 206.

162. See *id.*

the applicant's home so long as a spouse or a dependent is living there or the applicant intends to return; life insurance if the face value is lower than \$1500; burial plots or burial funds for the exempted life insurance policies; wedding rings and engagement rings regardless of their value; one car valued at \$4,500; and property which is so essential to the patient's support that it warrants exclusion.¹⁶³

Of all the possible exemption investments, the largest and most useful may be the personal residence exemption. "A nursing home patient may exclude the entire value of her residence so she may be able to protect all of her assets by investing in an expensive home, paying off the mortgage on an existing home, or investing money in home furnishings and improvements."¹⁶⁴ Smaller, but substantial amounts could be invested in rings, prearranged burial plots and funeral expenses.¹⁶⁵ "Depletion" of assets in this manner allows the elderly person to qualify for Medicaid.

Care should be exercised when utilizing these exemptions. For one thing, estate recovery programs allow states to recoup Medicaid payments after the Medicaid patient dies via probate proceedings.¹⁶⁶ Consequently, a person needs to be aware of how state laws operate if she wants to be certain that she will be able to pass money to heirs or beneficiaries via sheltered assets.¹⁶⁷

Another potential problem is differential state law treatment of exempt assets. For example, in some states, under certain conditions, the home could lose its exempt status and leave the Medicaid patient with a large asset that could be used to pay nursing home expenses.¹⁶⁸ Nevertheless, investing in exempt assets is a good way to reduce assets for Medicaid eligibility despite such potential drawbacks.

B. Medicaid Trusts

A valuable, yet somewhat more difficult, method to preserve assets is the creation of Medicaid trusts.¹⁶⁹ Timing is a crucial aspect of Medicaid trusts because the value of the principle will only be ex-

163. *Id.*

164. *Id.*

165. *See id.* at 206-07.

166. *See id.* at 207.

167. *See id.*

168. *See id.* at 208; *see also* *Cacchillo v. Perales*, 576 N.Y.S.2d 916, 917 (N.Y. App. Div. 1991).

169. *See Zeman, supra* note 1, at 211.

empt¹⁷⁰ if the money is placed into an irrevocable trust¹⁷¹ before the applicant applies for Medicaid.¹⁷² After that the trust should be arranged so that it pays the applicant a fixed amount, but not enough to make the applicant ineligible for Medicaid benefits.¹⁷³

There are a few dangers to be aware of before starting a Medicaid trust. First, federal and state laws strictly regulate Medicaid trusts.¹⁷⁴ If the trust fails to qualify under either body of law, “the trust will be considered an available asset and the full income and principle of the trust will be included in the applicant’s asset limitation test.”¹⁷⁵

Additionally, because both Congress and courts disapprove of using trusts to help applicants qualify for Medicaid, they have placed rather stringent requirements on their use.¹⁷⁶ To escape disqualification, the Medicaid trust must be irrevocable and established by the applicant at least sixty months prior to the Medicaid application.¹⁷⁷ The key point to remember is to plan ahead. Planning ahead includes establishing the Medicaid trust well in advance of the Medicaid application and establishing the trust in such a way that no payments are made to beneficiaries within thirty-six months of the Medicaid application.¹⁷⁸ Otherwise the trust could be considered a divestiture of assets for the purposes of Medicaid eligibility and make the applicant ineligible for Medicaid benefits.¹⁷⁹

170. “If the trust is exempt, only the interest income for the trust will be included in the applicant’s asset limitation test for Medicaid purposes.” *Id.* at 212.

171. “If the trust is revocable in nature, the trust principle and its income will be included in the applicant’s available assets. Therefore, to maintain a Medicaid exempt trust, the applicant . . . must make certain the trust document removes any power to amend the trust or make discretionary contributions.” *Id.*

172. *See id.*

173. *See id.*

174. *See id.* at 211.

175. *Id.* at 212.

176. *See id.* at 211.

177. *See id.*

178. *See id.* at 212. “Transfers from a Medicaid exempt trust within the thirty-six month look-back period will be considered transfers for the purpose of Medicaid eligibility.” *Id.*

179. *See id.* at 221.

C. Long-Term Care Insurance

Long-term care insurance is an excellent way to meet rising nursing home care costs.¹⁸⁰ In recognition of this fact, the number of long-term care insurance policies sold is on the rise. "In 1990, insurers sold approximately two million long-term care policies in the United States, 26% more than in 1989. In 1984, a mere 150,000 policies were in force."¹⁸¹ Persons with long-term care insurance can avoid jumping through the myriad hoops that the federal government requires before an applicant qualifies for Medicaid benefits.¹⁸²

Long-term care insurance can help prevent an elderly person's life savings from being depleted by long-term health care costs, as well as allow the elderly to keep their independence and dignity instead of relying on welfare programs for the poor.¹⁸³ Long-term care insurance policies often do not require prior hospitalization; have wide ranges of available daily benefit disbursements; guarantee renewability for life; pay for skilled, intermediate and custodial care nursing homes; and also pay for home health care.¹⁸⁴

Another important feature of a good long-term care insurance policy is inflation protection. An automatic annual benefit increase, usually five percent, that is funded at the time of purchase is the most widely used method for providing such protection. It assures that policy benefits will increase automatically without additional annual cost, but it does add significantly to the initial cost of the policy. Under another type of inflation rider, an insured may increase benefits annually, even absent evidence of insurability, by paying for the increased benefit when the policyholder reaches a certain age. "An obvious and important advantage is that the initial entry premium with this method is lower."¹⁸⁵

To summarize, investing in exempt assets, establishing Medicaid trusts, and purchasing long-term care insurance are a few of the ways that non-destitute elderly couples can gain Medicaid eligibility without resorting to the drastic measure of divorce. If these alternatives

180. See generally Joshua M. Weiner et. al., *Federal and State Initiatives to Jump Start the Market for Private Long-Term Care Insurance*, 8 *ELDER L.J.* 57 (2000).

181. Jeffery L. Solterman, Note, *Medicaid and the Middle Class: Should the Government Pay for Everyone's Long-Term Health Care?*, 1 *ELDER L.J.* 282 n.167 (1993).

182. See *id.* at 271.

183. See *id.* at 282-84.

184. See *id.* at 283.

185. *Id.* at 284.

are not enough to dissuade non-destitute elderly couples from divorcing, perhaps they should consider the moral problems associated with using divorce to qualify for Medicaid while preserving assets.

The federal government shares the cost of Medicaid with states that elect to participate in the program, and, in return, states comply with the requirements imposed by the Medicaid statutes.¹⁸⁶ Continued use of divorce as an asset preservation device constitutes fraud against both federal and state governments because divorce provides middle-class and higher income citizens access to tax dollars they would not otherwise receive.¹⁸⁷ Legislation that explicitly prohibits using divorce as a means to qualify for Medicaid is needed because current Medicaid law rewards those who do.¹⁸⁸ For example, the court in *In the Matter of Shah*¹⁸⁹ recognized the fraudulent nature of rendering oneself needy in order to qualify for Medicaid benefits.¹⁹⁰ Nevertheless, the court allowed the guardian of an incapacitated man to transfer assets in his name to his spouse so that he would qualify for Medicaid benefits.¹⁹¹ In justifying its action, the court called for legislative change:

[N]o agency of the government has any right to complain about the fact that middle-class people confronted with desperate circumstances choose voluntarily to inflict poverty upon themselves when it is the government itself which has established the rule that poverty is a prerequisite to the receipt of government assistance in the defraying of the costs of ruinously expensive, but absolutely essential, medical treatment.¹⁹²

As the above example demonstrates, courts are almost powerless to prevent elderly couples from divorcing in order to qualify for Medicaid under current law. The solution rests squarely on the shoulders of elected government officials. Ironically, government officials have essentially encouraged the fraudulent conduct. As one commentator noted:

Medicaid began as a need-based system, not as a more universal entitlement such as Medicare. Medicaid is available to the needy, not on the basis of age or the need for care. The elderly are seeking to convert a need-based system into a system of more universal application and, to one degree or another, they are receiving

186. See *supra* notes 28–50 and accompanying text.

187. See Dobris, *supra* note 7, at 31.

188. See *infra* notes 190–93 and accompanying text.

189. 694 N.Y.S.2d 82 (N.Y. App. Div. 1999).

190. See *id.* at 87.

191. See *id.* at 87–88.

192. *Id.* at 87.

the tacit approval of administrators, and the occasional express approval of the courts and the occasional blessing of the legislature. Stated more simply, people are trying to convert a program for the elderly poor into one available to a much larger universe of old people.¹⁹³

V. Conclusion

The current provisions of the Medicaid program provide an inducement for many middle-class couples to divorce in order to preserve marital assets and concurrently qualify for Medicaid benefits. This use of divorce has negative social implications that may not be readily apparent to the divorcing couple, but that can create much mental and emotional pain. The Medicaid statute should be revised to expressly forbid this practice and obviate the need to consider this painful method of access to health care services. Divorcing in order to preserve marital assets and qualify for Medicaid benefits is a perversion of the law that must be stopped because it sends the wrong message about family and commitment. The government should encourage families that have endured over many years to stay together, not entice them to separate because of poorly worded statutes.

193. Dobris, *supra* note 7, at 20.