

## **MEDICAID SPEND DOWN, ESTATE RECOVERY AND DIVORCE: DOCTRINE, PLANNING AND POLICY**

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*Medicaid is the need-based government program that pays for much of the health care for the poor in the United States. Medicaid often ends up paying the costs of nursing home care for middle-class seniors who have descended into poverty as a result of the high costs of such care. For married couples, Medicaid requires a "spend down" of both spouses' assets before one spouse can qualify for Medicaid support. This Article posits that, unless the law is changed, divorce may well become standard Medicaid planning practice in many circumstances. This will be especially true for middle and upper-middle-class married couples because they have the most to gain from divorce in this context. This Article argues that Medicaid's approach toward married couples is based on a narrow and outmoded image of marriage. It assumes a marriage where the spouses have enjoyed a long life together, have common intended beneficiaries, have no other person to whom they have an equal or greater commitment, and it assumes a high level of commitment to the institution of marriage itself. This view of marriage tends to not fit the modern landscape where the marriage one inhabits in old age may be of newer vintage and may not include children of the marriage. Added to this is the*

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trend toward the “de-institutionalization” of marriage. The article contends that as marriage becomes less sacred in our society, the utility of divorce as a Medicaid planning strategy will outweigh its moral repugnance. This is especially true because in this context, divorce does not require ending or even substantially changing the day-to-day relationship of the parties. It simply becomes a rational asset protection plan.

The alternative recommended to this developing trend is the disaggregation of marital property for most Medicaid purposes. Thus, instead of requiring the healthy spouse to spend down her or his assets before the unhealthy spouse can qualify for Medicaid assistance as the present law does, the Article recommends that only the assets properly allocable under state law to the unhealthy spouse should be required to be spent down. Similarly, estate recovery should only apply to the assets properly allocable to the deceased person who received the Medicaid assistance during life. This last point is particularly important in light of the apparent trend toward more aggressive estate recovery in some states.

## I. Introduction

In the United States, much of the cost for long-term disability care is borne by the state and federal governments through the Medicaid program.<sup>1</sup> These costs are enormous because of the millions of people who need such care and because of the high individual costs involved.<sup>2</sup> In fiscal year 2012, Medicaid expenditures for long-term care exceeded 120 billion dollars.<sup>3</sup> For 2014, it was esti-

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1. Medicaid paid for nearly half of all nursing home care in 2008. See RALPH C. BRASHIER, *MASTERING ELDER LAW* 345 (Carolina Academic Press 2010). This is because for most people, a period of extended disability leads to impoverishment. A companion program, Medicare, provides nearly universal acute care health insurance for those sixty-five and older, but it does not cover custodial care such as the care one might receive in a nursing home. For a useful summary of Medicare and its limits see *id.* at Ch. 8. The costs of long-term health care represent one of the biggest financial risks of old age. See John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL’Y 81, 88 (2003). Long-term care insurance is available to those who are healthy and wealthy enough to qualify and pay for it. However, its widespread use seems unlikely. *Id.* at 90 n.67.

2. In 2012, over eight million persons were receiving long-term care services in the United States. About two million of those people were in nursing homes or residential care communities. LAUREN HARRIS-KOJETIN, ET AL., NAT’L CTR. FOR HEALTH STATISTICS, *LONG-TERM CARE SERVICES IN THE UNITED STATES: 2013 OVERVIEW* 38 (2013), available at [http://www.cdc.gov/nchs/data/nsltcp/long\\_term\\_care\\_services\\_2013.pdf](http://www.cdc.gov/nchs/data/nsltcp/long_term_care_services_2013.pdf) (estimating of the total annual costs of long-term care in the United States to range from \$200 to \$300 billion).

3. *Distribution of Medicaid Spending by Service*, THE HENRY J. KAISER FAMILY FOUND. (2012), <http://kff.org/medicaid/state-indicator/distribution-of-medicaid-spending-by-service/>.

mated that the average annual base cost of a nursing home stay in a semi-private room in the United States was about eighty thousand dollars.<sup>4</sup>

Medicaid is need-based and, thus, usually requires spend down by the disabled person and his or her spouse before it can be accessed.<sup>5</sup> In addition, though it exempts certain assets, most importantly the home, from being counted in determining need, federal law requires the states to recover Medicaid outlays from the “estate” of a deceased Medicaid recipient under certain circumstances.<sup>6</sup> Though the primary asset to which this “estate recovery” typically applies is the recipient’s home, estate recovery can range much more broadly.<sup>7</sup> In some states, estate recovery can even apply to the estate of the Medicaid recipient’s spouse.<sup>8</sup> In essence, Medicaid is designed to assure that it will bear the long-term care costs of a married person in a manner that is thoroughly impoverishing to both spouses.

Planners have found many ways to ameliorate some of the harder edges of Medicaid. In an earlier article, two co-authors and I described the Medicaid planning process in detail.<sup>9</sup> Now, this Article turns its attention to barriers to Medicaid planning presented by the Medicaid spend down requirements and the estate recovery rules. Most particularly, it illustrates the planning problems, opportunities, strategies, and hazards associated with those rules in the context of marriage.<sup>10</sup> It is my thesis that the overall direction of the Medicaid

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4. GENWORTH FINANCIAL, GENWORTH 2014 COST OF CARE SURVEY: EXECUTIVE SUMMARY (2014), available at <https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/131168-032514-Executive-Summary-nonsecure.pdf>.

5. *Medicaid*, MEDICARE.GOV, <http://www.medicare.gov/your-medicare-costs/help-paying-costs/medicaid/medicaid.html> (last visited March 10, 2015).

6. 42 U.S.C. § 1396p(b) (2012).

7. See *infra* Part III.B.

8. See *infra* Part III.C.

9. Sean R. Bleck et al., *Preserving Wealth and Inheritance Through Medicaid Planning for Long-term Care*, 17 MICH. ST. U. J. MED. & L. 153, 153–96 (2013) [hereinafter Bleck et al.]. One technique we did not address is what is known as “spousal refusal”. For a useful treatment of this technique see Andrew W. Wone, Note, *Don’t Want to Pay for Your Institutionalized Spouse? The Role of Spousal Refusal and Medicaid in funding Long-Term Care*, 14 ELDER L.J. 485 (2006).

10. For an excellent broader treatment of disability planning see Ralph J. Moore & Ron. M. Landsman, *Planning for Disability*, in TAX MGMT. PORTFOLIOS 816 (2d ed., 2000). Commerce Clearing House publishes a six-volume loose-leaf service called the MEDICARE AND MEDICAID GUIDE. See MEDICARE AND MEDICAID

system is toward encouraging divorce where one spouse needs Medicaid assistance and the other does not.

Elder law attorneys have understood for some time that divorce can be an effective Medicaid planning tool.<sup>11</sup> But, in the past,<sup>12</sup> married couples have been reluctant to take that path and other strategies were available. As a new generation, the baby boomers, enters old age and as states become more aggressive in their approaches to estate recovery, I think this will change. Divorce will be an especially important Medicaid and estate recovery planning technique in those states that employ estate recovery against the estate of the independent spouse to pay for costs incurred on behalf of the Medicaid recipient spouse.<sup>13</sup>

This Article posits that, unless the law is changed, divorce may well become standard Medicaid planning practice in many circumstances. This will be especially true for middle-and upper-middle class married couples because they have the most to gain from divorce in this context. Part of the reason for this is that Medicaid's approach toward married couples is based on a narrow and outmoded image of marriage.<sup>14</sup> It assumes a marriage where the

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GUIDE (Commerce Clearing House, Inc., 1969-1972). Other valuable loose leaf resources are JOHN J. REGAN, ET AL., *TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY* (Matthew Bender 2014) (there is an accompanying forms book); THOMAS D. BEGLEY, JR. & JO-ANNE HERINA JEFFREYS, *REPRESENTING THE ELDERLY CLIENT: LAW AND PRACTICE* (Wolters Kluwer 2015); A. KIMBERLEY DAYTON ET AL., *ADVISING THE ELDERLY CLIENT* (West 2010); ROBERT B. FLEMING & LISA NACHMIAS, *ELDER LAW ANSWER BOOK* (Wolters Kluwer 2014); JERRY A. HYMAN, *ELDER LAW AND FINANCIAL STRATEGIES: PLANNING FOR LATER LIFE* (Law Journal Press 2015). In this article I rely heavily on BEGLEY & JEFFREYS, *supra*, to address matters that are typically established by state law. Medicaid is a remarkable mosaic of state and federal law, and that makes writing about it from a national perspective especially challenging.

11. See, e.g., Clifton B. Kruse, Jr., *Love May Be Less Wonderful The Second Time Around (Medicaid Considerations When Well-to-do, Healthy Clients Remarry and their Late-in-Life Companions are less Well-to-Do)*, 13 NAELA Q. 11 (2000); Michael Wytychak III, *Payment of Nursing Home Bills Through the Medicaid Program*, 36 IDAHO L. REV. 243 (2000); Michael Farley, Note, *When "I Do" Becomes "I Don't": Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001).

12. Greta Weber, *Till Debt Do Us Part*, MILWAUKEE MAG. (Aug. 26, 2014), <http://www.milwaukee.com/2014/08/26/tilldebt-does-part/>.

13. *Id.*; Craig Reaves, *Paying for the Institutionalized Spouse*, N.Y. TIMES (June 4, 2010), <http://newoldage.blogs.nytimes.com/2010/06/047/paying-for-the-institutionalized-spouse/>.

14. See Farley, *supra* note 11.

spouses have enjoyed a long life together, have common intended beneficiaries, have no other person to whom they have an equal or greater commitment, and it assumes a high level of commitment to the institution of marriage itself.<sup>15</sup> This view of marriage tends to not fit the modern landscape where the marriage one inhabits in old age may be of newer vintage and may not include children of the marriage. Added to this is the trend toward “de-institutionalization” of marriage described in some detail by Professor Anne Alstott in a recent article in *The Tax Law Review*.<sup>16</sup> In her view, “[m]ore than ever before, Americans see marriage as one of many options for personal growth and fulfillment, and they form and exit marriages along with other relationships as a normal part of the life course.”<sup>17</sup> I suggest that as marriage becomes less sacred in our society, the utility of divorce as a Medicaid planning strategy will outweigh its moral repugnance. This is especially true because in this context divorce does not require ending or even substantially changing the day-to-day relationship of the parties. It simply becomes a rational asset protection plan. The great irony of this state of affairs is that the persons who could derive the most financial benefit from divorce, the upper-middle class, are among the class of persons who heretofore have been the most likely to marry and stay married.<sup>18</sup> In a sense, Medicaid has laid siege to the last bastion of marriage as a life-long institution.

The alternative I recommend to this developing trend is the disaggregation of marital property for most Medicaid purposes. Thus, instead of requiring the healthy spouse to spend down his or her assets before the unhealthy spouse can qualify for Medicaid assistance as present law requires, I recommend that only the assets properly allocable under state law to the unhealthy spouse should be required to be spent down. Similarly, estate recovery should only apply to the property interests allocable to the deceased person who received the Medicaid assistance during life. This last point is particularly important in light of the apparent trend toward more aggressive estate recovery in some states.<sup>19</sup>

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15. *Id.*

16. Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 *TAX L. REV.* 695, 697 (2013).

17. *Id.* at 697.

18. *Id.* at 699.

19. *Medicaid Estate Recovery*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (2005), <http://aspe.hhs.gov/daltcp/reports/estaterec.htm>.

In what follows, this Article begins by explaining the present structure of Medicaid law and especially develops the rules concerning spend down and estate recovery. Then, it describes the various planning strategies that have emerged in response to those rules. It concludes that part by illustrating the ways in which divorce may effectively avoid both spend down and estate recovery. In the final sections, it briefly describes the policy concerns raised by the estate recovery activities of the states and makes the case for disaggregation of marital property for most purposes.

Most of what is found in this Article has application throughout the United States. Even so, it is important for the reader to keep in mind that every state Medicaid program has its unique features and rules. Some of the more prominent differences between states are addressed here, especially the differences that arise between community property and common law states.

## II. An Overview of Medicaid and Its Eligibility Rules

Medicaid is a state and federally funded medical assistance program for certain people, including the elderly and disabled, who have income and assets below specified standards.<sup>20</sup> It provides comprehensive medical coverage for persons in the federal welfare categories (Temporary Assistance for Needy Families and Supplemental Security Income for the Aged, Blind and Disabled) and for various additional classes of persons including those requiring long-term care.<sup>21</sup> As noted above, Medicaid is a significant cost to federal and state governments alike, and they restrict access to its support.<sup>22</sup> Medicaid planning, consequently, often requires the

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20. See 42 U.S.C. § 1396 (2012). As discussed in the text, Medicaid is structured to be implemented on a state-by-state basis. In Washington, for example, Medicaid is administered by the Health and Recovery Services Administration ("HRSA") of the Washington State Department of Social and Health Services ("DSHS"). *Washington Apple Health (Medicaid)*, WASH. STATE HEALTH CARE AUTH., <http://hrsa.dshs.wa.gov/> (last visited Mar. 18, 2015) (outlining updated information related to eligibility standards).

21. *Medical Programs*, WASH. STATE DEP'T OF SOC. & HEALTH SERVS. <http://www.dshs.wa.gov/esa/community-services-offices/medical-programs> (last visited March 18, 2015).

22. See BRASHIER, *supra* note 1; Congressional policy is to resist Medicaid planning and to make concerted efforts to restrict access to Medicaid. This policy was expressed most recently by the Deficit Reduction Act of 2005<sup>22</sup> (often referred to as the "DRA"). The Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat.

assistance of attorneys and others with special expertise in the government benefits field.<sup>23</sup>

As Bleck, Isenhour, & Miller state, “Medicaid planning may be defined as the process of effectively accessing government resources to pay for long-term health care of a disabled person in the manner that is least financially disruptive to the wellbeing of the person’s spouse and family.”<sup>24</sup> As already noted, the government resources come from Medicaid.<sup>25</sup> Estate recovery planning may be described as the end game of Medicaid planning.

At the federal level, Medicaid is administered by the Center for Medicaid and Medicare Services (“CMS”) which is part of the Department of Health and Human Services (“HHS”).<sup>26</sup> In each state, Medicaid is administered by the cabinet-level agency charged with oversight of public health.<sup>27</sup> Each of those agencies promulgates rules and regulations to implement Medicaid within its state’s borders.<sup>28</sup>

#### A. The Basics: Eligibility and Benefits

The state Medicaid agency makes two determinations.<sup>29</sup> First, whether the applicant needs long-term care and, second, whether the applicant meets the financial eligibility criteria.<sup>30</sup> The determination for long-term care requires one to need substantial assistance with two or more of the following activities of daily living (ADLs): eating, bathing, toileting, ambulation, transfer, positioning, and medication management.<sup>31</sup>

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4 was signed into law on February 8, 2006. This legislation made major changes in the rules governing eligibility for Medicaid long-term care coverage that tightened up what is known as the “spend down” process. *Id.*

23. Typically one seeking assistance in this area might look to Legal Aid Attorneys and/or attorneys who are designated Certified Elder Law Attorneys (CELAs) by the National Academy of Elder Law Attorneys (NAELA).

24. Bleck et al., *supra* note 9, at 155. *See also* Miller, *supra* note 1, at 91–92.

25. Bleck et al., *supra* note 9, at 158.

26. 42 C.F.R. § 430 (2015).

27. *See State Medicaid & CHIP Profiles*, MEDICAID.GOV, <http://www.medicaid.gov/medicaid-chip-program-information/by-state/by-state.html>.

28. *Id.*

29. *See* MEDICAID AND LONG-TERM CARE SERVICES FOR ADULTS, WASH. ST. DEP’T OF SOC. & HEALTH SERVS. 1, 5 (2012), *available at* <http://www.dshs.wa.gov/sites/default/files/AL TSA/hcs/documents/22-619.pdf>.

30. *Id.*

31. WASH. ADMIN. CODE § 246-335-015 (44)(e) (2012).

As discussed in more detail below, financial eligibility involves meeting both asset and income tests.<sup>32</sup> There are special rules for married couples for each of these tests.<sup>33</sup> For persons eligible for nursing home coverage, Medicaid requires that all income, after the special allocations described below, be paid to the nursing home.<sup>34</sup> The amount that the Medicaid recipient pays to the nursing home each month is called “participation.”<sup>35</sup> Medicaid will then pay the nursing home the difference between the recipient’s participation and the Medicaid reimbursement rate for the facility.<sup>36</sup> A typical Medicaid reimbursement rate is \$1,080 per month.<sup>37</sup> When a person qualifies for nursing home coverage, Medicaid also provides coverage for most medical expenses, such as prescriptions and physician bills.<sup>38</sup>

Some states have Medicaid programs that are designed to help persons avoid institutionalization.<sup>39</sup> These will cover long-term care delivered at home, in adult family homes, and in assisted-living facilities.<sup>40</sup> States are required to cover benefits for some assisted-living facilities, but coverage of most home and community-based long-term care services is optional.<sup>41</sup> The result is a “historical structural bias toward institutional care.”<sup>42</sup>

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32. See *infra* Part II.A. 1 & 2.

33. See *infra* Part II.A. 4.

34. Pub. 17, Transmittal No. 97-2, Dec. 10, 1997.

35. See also MEDICAID AND LONG-TERM CARE SERVICES FOR ADULTS, *supra* note 29, at 9.

36. The Medicaid reimbursement rate is based on the facility’s costs to provide care and the level of need of the residents and varies with each facility, but is always less than the private pay rate. 42 C.F.R. § 447.253(b)(1)(iii) (2012); see also MEDICAID AND LONG-TERM CARE SERVICES FOR ADULTS, *supra* note 29 at 6.

37. *Medicaid Payments per Enrollee, FY2010*, THE HENRY J. KAISER FAMILY FOUND. (2010), <http://kff.org/medicaid/state-indicator/medicaid-payments-per-enrollee/>.

38. FERD MITCHELL & CHERYL MITCHELL, LEGAL PRACTICE IMPLICATIONS OF U.S. NATIONAL HEALTH CARE PLAN § 3:12 (2014).

39. Erica Reaves & MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer, Medicaid Long-Term Services and Supports*, THE HENRY J. KAISER FAMILY FOUND. (July 30, 2014), <http://kff.org/medicaid/report/medicaid-and-long-term-services-and-supports-a-primer/>.

40. *Id.*

41. *Id.*

42. *Id.*

**1. INCOME**<sup>43</sup>

The federal government has established statutory income requirements for an individual's eligibility for Medicaid.<sup>44</sup> In thirty-nine states, eligibility for Medicaid is automatic when an individual qualifies for Social Security disability benefits.<sup>45</sup> The remaining states use more restrictive requirements than Social Security disability to determine Medicaid eligibility.<sup>46</sup> For individuals applying for an institutional level of care, some states have an income cap.<sup>47</sup> In other states, if an applicant's income is above the Medicaid rate and below the private pay rate, the applicant will be certified as eligible for Medicaid and will only have to pay the Medicaid rate; in that case, however, the applicant must spend down the excess income over the Medicaid rate on medical costs before he or she will be eligible for Medicaid coverage for other medical expenses.<sup>48</sup>

**2. RESOURCES**<sup>49</sup>

An unmarried recipient of Medicaid cannot have more than \$2,000 in *non-exempt* resources.<sup>50</sup> Resources are valued according to the fair market value of the applicant's equity interest in the resource.<sup>51</sup> Joint bank accounts are presumed to be owned entirely by the applicant unless the applicant establishes a different ownership distribution.<sup>52</sup> Assets owned jointly by spouses are presumed to be owned proportionately, unless a different ownership allocation can be

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43. BEGLEY & JEFFREYS, *supra* note 10; see *Eligibility*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html> (last visited Mar. 10, 2015).

44. 42 C.F.R. §§ 435.120, 435.121 (2014); BEGLEY & JEFFREYS, *supra* note 10, at § 7.03.

45. 42 C.F.R. § 435.120; BEGLEY & JEFFREYS, *supra* note 10, at § 7.03[A].

46. 42 C.F.R. § 435.121; BEGLEY & JEFFREYS, *supra* note 10, at § 7.03[B].

47. The cap in 2014 is 300% of the Federal SSI benefit rate, \$2,163 per month. *Eligibility*, *supra* note 43; BEGLEY & JEFFREYS, *supra* note 10, at §7.04[A]; 42 U.S.C. § 1396a(cc)(1)(C)(ii)(I) (2012).

48. 42 C.F.R. § 435.4; see BEGLEY & JEFFREYS, *supra* note 10, at § 7.04[B].

49. See 20 C.F.R. § 416.1201(a) (2014); see also BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1].

50. 42 U.S.C. § 1382(a)(3)(B) (2013); 20 C.F.R. § 416.1205; see BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1][a].

51. 20 C.F.R. 416.1201(b)-(c); BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1][a].

52. 20 C.F.R. § 416.1208(c); BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1][a][i].

established.<sup>53</sup> However, title has little significance in the marital context since, with certain exceptions described below, all assets of the couple are required to be spent down in order to obtain eligibility for either spouse.<sup>54</sup> This can be a vital disadvantage to marriage.

### 3. EXEMPT RESOURCES<sup>55</sup>

Some resources are deemed “exempt” resources when determining whether a Medicaid applicant meets resource ceiling of \$2,000.<sup>56</sup> The applicant’s home (including a mobile home or a condominium) is exempt if the applicant or the applicant’s spouse is residing in the home or the applicant (or his or her representative) states that he or she intends to return home.<sup>57</sup> Under the Deficit Reduction Act of 2005, states must impose a limit on exempt home equity ranging from \$500,000 to \$750,000.<sup>58</sup> The home equity limit does not apply if the home is occupied by a spouse or by a disabled child, blind child, or child under twenty-one.<sup>59</sup> This limit also does not apply to the value of home equity owned by the spouse of an applicant.<sup>60</sup> A home includes all contiguous property, even if this includes several lots, legal descriptions or tax parcels, and includes related “out-buildings” on the property.<sup>61</sup> Proceeds from the sale of a home are exempt if used within three months of receipt of the proceeds to purchase another home.<sup>62</sup>

Rent from the home is income to the recipient, which generally

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53. 20 C.F.R. § 416.1208(c).

54. BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1][a].

55. See 20 C.F.R. § 416.1210; see also BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1][b].

56. *Financial Requirements—Assets*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (2015), <http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/financial-requirements-assets/>.

57. 20 C.F.R. §§ 416.1210, 416.1216.

58. Deficit Reduction Act of 2005, Pub. L. 109–171, Title VI, Chap. 2, Subchap. A, § 6014, 120 Stat. 65 (enacted Feb. 8, 2006), available at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ171/pdf/PLAW-109publ171.pdf> [hereinafter DRA 2005]; 42 U.S.C. § 1396p(f)(1) (2012). There was no value limit on the home for applications prior to this date. Federal law now allows the states to exclude no less than \$500,000 and no more than \$750,000 of equity. *Id.* See Michael Gilfix, *Planning for the Home Under Tougher Medicaid Rules*, 35 Est. Plan. 27, 29 (2008).

59. 42 U.S.C. § 1396p(f)(2).

60. *Id.*

61. 20 C.F.R. § 416.1212(a) (2014).

62. 20 C.F.R. § 416.1212(e)–(f).

must be paid toward the cost of care.<sup>63</sup> However, certain expenses such as interest (but not principal) on home mortgage debt, taxes, insurance, and maintenance expenses for the home can be offset in calculating countable income from rent.<sup>64</sup> It is not uncommon for family members of a Medicaid recipient to reside in the home rent-free, and this use is generally ignored by state Medicaid authorities.<sup>65</sup>

As explained in the discussion of Medicaid estate recovery below, Medicaid will usually have a claim against the Medicaid recipient's interest in an exempt home at the time of death of the Medicaid recipient for most costs paid by Medicaid after the recipient turned fifty-five.<sup>66</sup> Exempt items other than the home may include a vehicle, household furnishings, personal effects, burial plots, certain burial funds, small life insurance policies, and certain annuities.<sup>67</sup> With respect to annuities, however, the payments are counted as income for Medicaid participation purposes.<sup>68</sup>

#### 4. ADDITIONAL RULES FOR MARRIED COUPLES

Medicaid has a number of rules that in theory are designed to protect the income and assets of one spouse, often called the "community spouse," when the other spouse qualifies for Medicaid.<sup>69</sup> Nominally speaking, these rules are designed to avoid the "impoverishment" of the community spouse. The income rules are reasonably generous, but the resource rules are not.<sup>70</sup>

The federal Medicaid statute expressly preempts state community property law for purposes of determining the ownership of income and assets.<sup>71</sup> Medicaid determines ownership according to

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63. See generally 20 C.F.R. § 416.1212.

64. *Id.*

65. See *Buying a House for a Special Needs Beneficiary: Proceed with Care!*, SPECIAL NEEDS ALLIANCE (May 2011), <http://www.specialneedsalliance.org/the-voice/buying-a-house-for-a-special-needs-beneficiary-proceed-with-care-2/>.

66. BEGLEY & JEFFREYS, *supra* note 10, at §§ 9.02[C], 9.04.

67. Michael Wytychack III, *Payment of Nursing Home Bills Through the Medicaid Program*, 36 IDAHO L. REV. 243, 249 (2000).

68. *Id.*

69. HFCA Transmittal 64 § 3528.11.

70. These Medicaid eligibility rules for a married couple apply only when one spouse is in the nursing home. If both spouses are in a nursing home, they will be treated as though they were single and the Medicaid income and resource rules for single persons, discussed above, will apply for each.

71. 42 U.S.C. §1396r-5(b)(2) (2012).

the name in which income is received.<sup>72</sup> This is sometimes called the “name on the check” rule.<sup>73</sup> With respect to resources, Medicaid nominally accords importance to the titling of an asset.<sup>74</sup> However, the asset spend down rules apply without regard to title in most instances.<sup>75</sup>

*a. Income Eligibility*<sup>76</sup>

For one spouse of a married couple to receive Medicaid coverage for nursing home care, some states require that the income of that spouse must be less than the facility’s private pay rate plus his or her regularly recurring monthly medical expenses.<sup>77</sup> Other states have an income cap for the Medicaid applicant of 300% of the federal SSI rate.<sup>78</sup> The income of the nursing home spouse (called the “institutional” spouse) is determined by first seeing what income comes in the name of that spouse.<sup>79</sup> If this amount exceeds the eligibility standard, the person, under certain circumstances, may still be eligible if one-half of the income of *both* spouses is less than the eligibility standard.<sup>80</sup>

*b. Resource Eligibility*

All resources of both spouses are considered in determining eligibility, regardless of which spouse owns what resource or whether the property is considered to be separate or community property.<sup>81</sup> Prenuptial and Separate Property Agreements are disregarded.<sup>82</sup> Transfers between spouses before application have no effect on this

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72. DEP’T OF HEALTH & HUMAN SERVS., SPOUSES OF MEDICAID LONG-TERM CARE RECIPIENTS 5 (2005), available at <http://aspe.hhs.gov/daltcp/reports/spouses.pdf>.

73. *Id.*

74. *Id.*

75. *Id.*

76. See 42 U.S.C. §1396r-5(b), (d), §182-513-1395 (2012); see 20 C.F.R. § 416.1100 (2014).

77. See BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][2][a].

78. *Id.*

79. See 42 U.S.C. § 1396r-5(b)(2); BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][4][a]. This is aptly called the “Name on the Check” rule.

80. *Id.*

81. See 42 U.S.C. §1396r-5(c)(2), (f).

82. UNIF. PREMARITAL AGREEMENT ACT § 9(b) (2012); *The Elder Law Approach to Estate Planning*, SH059 ALI-ABA 375, 388 (2003); See *Elder Law and Estate Planning*, SH092 ALI-ABA 509, 530 (2003).

initial eligibility determination.<sup>83</sup>

Because the resources test for Medicaid eligibility lumps all of the assets of a married couple together, assets owned solely by the community spouse may have to be spent down in order for the institutional spouse to qualify.<sup>84</sup> In order for the institutional spouse entering a nursing home to qualify for Medicaid nursing home coverage, the married couple's combined non-exempt resources must be less than an inflation-adjusted specified amount.<sup>85</sup> This inflation-adjusted specified amount is called the Community Spouse Resource Allowance (CSRA).<sup>86</sup> In 2015, the maximum CSRA is \$119,220.<sup>87</sup> Any of the couple's combined non-exempt assets in excess of the maximum CSRA plus \$2,000 must be spent down before Medicaid eligibility is obtained for the institutional spouse.<sup>88</sup>

##### 5. TRANSFER OF ASSETS RULES

Medicaid's transfer of asset rules *delay* eligibility for nursing home coverage for a period of time.<sup>89</sup> This is called the transfer penalty.<sup>90</sup> The purpose of the penalty is to deter transferors from voluntarily impoverishing themselves in order to qualify for Medicaid coverage for their long-term care costs.<sup>91</sup> The typical example of such a transfer is a large gift of cash or property to the transferor's child.<sup>92</sup>

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83. See 42 U.S.C. § 1396r-5(f)(1).

84. See 42 U.S.C. §§ 1396r-5(f), (c); BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][4][d].

85. 42 U.S.C. § 1396r-5(f). The 2015 minimum spousal resource allowance is \$23,844. See *2015 SSI and Spousal Impoverishment Standards*, MEDICAID.GOV (Jan. 1, 2015), <http://medicaid.gov/Medicaid-CHIP-Program-Information/by-topics/eligibility/downloads/2015-ssi-and-spousal-impoverishment-standards.pdf> [hereinafter *Spousal Impoverishment Standards*].

86. See 42 U.S.C. § 1396r-5(f)(2).

87. 42 U.S.C. § 1396r-5(f)(2); see *Spousal Impoverishment Standards*, *supra* note 85.

88. See 42 U.S.C. §§ 1396r-5(c), (f); BEGLEY & JEFFREYS, *supra* note 10 at § 7.05[F][4][d].

89. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 132 (West Academic Publishing, 6th ed. 2014).

90. 42 U.S.C. § 1396p(c)(1)(A).

91. Gratuitous transfers are the primary target of these rules but some transfers for value are also subject to them. See Bleck et al., *supra* note 9, at 174.

92. See Bernard A. Krooks, *How Gifts Can Affect Medicaid Eligibility*, FORBES (Dec. 17, 2012, 12:30 PM), <http://www.forbes.com/sites/bernardkrooks/2012/12/17/how-gifts-can-affect-medicaid-eligibility/> (discussing Medicaid's "look back" and "transfer penalty" rules).

There is no transfer penalty for transfers to a spouse because such transfers generally do not avoid spend down.<sup>93</sup>

Only transfers within a certain period of time before application is made, called the "look-back period," are subject to the transfer penalty.<sup>94</sup> The look-back period is *sixty* months for all transfers made on or after February 8, 2006.<sup>95</sup> Transfers not within the look-back period have no effect on Medicaid eligibility.<sup>96</sup> Thus, for example, if a person gives away one million dollars six years before applying for Medicaid, that gift will not be considered in determining eligibility. A typical way to calculate the transfer penalty is to "divid[e] the fair market value of the transferred asset by the statewide monthly average lowest semiprivate room rate for Medicaid certified nursing facilities calculated annually."<sup>97</sup> The result of this division, rounded down to the next whole number, will result in the number of days of ineligibility caused by the gifts given in that month.<sup>98</sup> The penalty is imposed on the day of the transfer or the month following the day of transfer.<sup>99</sup>

There are a number of transfers that are exceptions to the Medicaid asset transfer rules and do not cause the imposition of a period of ineligibility. These include gifts not within the sixty month "look-back period," transfer of the home to a child of the applicant who has lived in the home, and provided care to the applicant (which was necessary for the applicant to remain independent) for the two year period immediately prior to institutionalization.<sup>100</sup> Transfer of the home to a sibling of the applicant who has an equity interest in the home and who has lived in the home for the one-year period immediately prior to institutionalization and a transfer of the home to a child

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93. *See id.*

94. *See* 42 U.S.C. § 1396p(c) (2012).

95. *Id.*

96. *Id.*

97. This is the number for applications submitted on or after October 1, 2010, and it will be adjusted each October. BEGLEY & JEFFREYS, *supra* note 10, at § 7.06[G][1].

98. HEALTH CARE FIN. ADMIN. TRANSMITTAL 64 § 3258.4E; BEGLEY & JEFFREYS, *supra* note 10, at § 7.06[G][1].

99. HEALTH CARE FIN. ADMIN. Transmittal 64 § 3258.5A; BEGLEY & JEFFREYS, *supra* note 10, at § 7.06[G][1].

100. *See Medicaid Treatment of the Home: Determining Eligibility and Repayment for Long-Term Care*, U.S. DEP'T OF HEALTH AND HUMAN RESOURCES (Apr. 2005), <http://aspe.hhs.gov/daltcp/reports/hometreat.htm>.

under age twenty-one.<sup>101</sup>

## 6. POST-ELIGIBILITY RULES

Generally, a person in a nursing facility who has been determined eligible for Medicaid must pay virtually all of his or her income to the facility for the cost of his or her care.<sup>102</sup> The community spouse can keep all checks paid in his or her name, regardless of amount and regardless of whether the income may be characterized as community income.<sup>103</sup> Income includes wages, pensions, social security, VA or military payments, interest or dividends, and annuities.<sup>104</sup>

If the income in the name of the community spouse is less than an inflation adjusted amount (\$1,938.75 in 2014) the community spouse can keep enough of the nursing home spouse's income to bring the community spouse's income up to that amount.<sup>105</sup> This is referred to as the spousal Minimum Monthly Maintenance Needs Allowance (MMMNA).<sup>106</sup>

Generally, money or property received by a Medicaid nursing home resident, will be deemed income in the month received.<sup>107</sup> States take different approaches to setting income caps on Medicaid eligibility. But if a Medicaid recipient's income exceeds the state-determined cap then the income will cause ineligibility.<sup>108</sup> To the extent the income is not spent and causes the resident's non-exempt resources to exceed \$2,000 as of the first moment of the next month, the excess resources may cause ineligibility (or require a resource spend-down).<sup>109</sup>

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101. *See id.*

102. *See* 42 U.S.C. §1396r-5(d) (2012).

103. *See* 42 U.S.C. §1396r-5(d). *See generally* U.S. DEPARTMENT OF HEALTH AND HUMAN RESOURCES, SPOUSES OF MEDICAID LONG-TERM CARE RECIPIENTS (2005), available at <http://aspe.hhs.gov/daltcp/reports/spouses.htm>.

104. 42 U.S.C. § 1382a (2010); BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][2][b].

105. *See* MEDICAID, SSI AND SPOUSAL IMPOVERISHMENT STANDARDS, MEDICAID.GOV (2014), available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Downloads/Spousal-Impoverishment-2014.pdf>.

106. *See Tools & Calculators*, ELDER LAW ANSWERS, <http://www.elderlawanswers.com/tool-andcalculators> (last visited Mar. 9, 2015).

107. 42 U.S.C. § 1382(c) (2014); 20 C.F.R. § 416.1201, 416.1207 (2014); BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][1][c].

108. *See* BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[2][a].

109. 42 U.S.C. § 1382(a)(3)(B); 20 C.F.R. § 416.1205.

Disclaimer cannot avoid this outcome.<sup>110</sup>

In most states, cash received from the sale of an exempt or non-exempt resource other than the home is not income in the month received, but is a countable resource if it is held as of the first of the next month.<sup>111</sup> The proceeds from the sale of a home remain exempt provided they are reinvested in another home “within three months of receipt.”<sup>112</sup> The proceeds from the sale of other exempt resources are counted as available resources unless reinvested in another exempt resource.<sup>113</sup> While not required, transferring title of exempt resources solely into the name of the community spouse can avoid ineligibility in some states for the nursing home spouse in the event the resources are sold, as well as protect the assets from Medicaid estate recovery.<sup>114</sup> While this result is sensible, it is not required of the states. It may be that, in time, more and more states will act to close this planning opportunity.

With respect to the community spouse, there is a one-time only “snapshot” of community resources: at the time of initial eligibility.<sup>115</sup> Unless the nursing home spouse is deinstitutionalized, or becomes ineligible for Medicaid, increases or changes of the form of wealth of the community spouse—and, in many states, even uncompensated transfers by the community spouse—are disregarded.<sup>116</sup>

### III. Medicaid Estate Recovery

Since 1993, Federal law has required that the states seek to recover Medicaid outlays from the “estate” of the recipient under certain circumstances.<sup>117</sup> The primary asset to which this estate recovery rule

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110. See generally, Cynthia L. Barrett, *Disclaimer and Elective Share in the Medicaid Context*, 1 MARQUETTE'S ELDER ADVISOR 40 (2000); See also LAWRENCE A. FROLIK & ALISON MCCHRISTAL BARNES, *ELDER LAW: CASES AND MATERIALS*, 263, 317–21 (4th Ed. 2007).

111. BEGLEY & JEFFREYS, *supra* note 10, at § 7.05[F][6].

112. 20 C.F.R. § 416.1212.

113. DEP'T OF HUMAN SERVS., FAMILIES FIRST ONLINE POLICY MANUAL § 17.2, available at [http://www.tennessee.gov/humanserv/adfam/ff\\_olm/17.2%20Resources-Countable-NonCountable%20Resources.htm](http://www.tennessee.gov/humanserv/adfam/ff_olm/17.2%20Resources-Countable-NonCountable%20Resources.htm).

114. 20 C.F.R. § 416.1242; 42 U.S.C. § 1396p(c)(2)(A) (2014); see BEGLEY & JEFFREYS, *supra* note 10, at § 8.05[B][1][a] note 52, 8.05[B][2].

115. 42 U.S.C. § 1396r-5(c).

116. 42 U.S.C. § 1396p(a).

117. 42 U.S.C. § 1396p(b).

applies is the home,<sup>118</sup> but as discussed below, its application can range much more broadly. Also, as discussed below, there are strategies for avoiding estate recovery. It is in states that are most aggressive in pursuing estate recovery that divorce may become the paramount strategy. Before delving into this area, it is necessary to appreciate the basic rules.

#### A. The General Rule

The State has a right to recover from the “estate” of a Medicaid recipient when Medicaid benefits were paid on behalf of the decedent after he or she turned fifty-five.<sup>119</sup> This right of recovery normally arises at death against any property in which the Medicaid recipient had an interest at the moment of death.<sup>120</sup> However, as I will describe, some states have broadened the estate recovery rule to include property transferred away prior to death.<sup>121</sup>

#### B. The Recipient’s “Estate”

Medicaid estate recovery only applies to the “estate” of the Medicaid recipient.<sup>122</sup> However, the definition of “estate” employed in some states is much broader than the typical use of the term.<sup>123</sup> Normally, the term “estate” might be thought to include only property owned at death—that is, the probate estate. However, a federal statute gives states the latitude to broaden the definition to include non-probate assets which pass at death.<sup>124</sup> That statute, 42 U.S.C. § 1396p(b)(4), provides in pertinent part:

[T]he term “estate”, with respect to a deceased individual—  
(A) shall include all real and personal property and other assets included within the individual’s estate, as defined for purposes of State probate law; and (B) may include, at the option of the

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118. See FLEMING & NACHMIAS, *supra* note 10, at Q 17:92. The states are required to attempt recovery against the home. *West Virginia v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d, 281, 297 (4th Cir. 2002).

119. 42 U.S.C. § 1396p(b)(1)(B).

120. 42 U.S.C. § 1396p(b)(4).

121. See, e.g., *Idaho Dep’t of Health & Welfare v. McCormick*, 283 P.3d 785 (Idaho 2012) (discussed *infra*).

122. 20 C.F.R. § 416.570 (2014); BEGLEY & JEFFREYS, *supra* note 10, at § 7.07[F][5].

123. *Medicaid Estate Recovery*, *supra* note 19.

124. 42 U.S.C. § 1396p(b)(4)(B).

State . . . any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.<sup>125</sup>

A reasonable reading of 42 U.S.C. § 1396p(b)(4) is that the state can make recovery against assets in which the recipient had an interest during life to the extent of the interest that passed from the recipient at death to some other person by means of a will, trust, contract, intestacy, or by operation of law.<sup>126</sup> However, at least one court has interpreted “estate” to include even assets in which the Medicaid recipient had no property interest at death if the recipient had an interest in the asset at some earlier point and transferred it away gratuitously.<sup>127</sup> That case, *Idaho Dep’t. of Health & Welfare v. McCormick*,<sup>128</sup> arose from bad, yet not unusual, facts and, as will be discussed, creates particular pressure for the use of divorce as a mechanism for avoiding estate recovery. But, before discussing *McCormick*, it will be useful to consider how the estate of the recipient’s spouse may also be subject to estate recovery.

### C. The Estate of the Recipient’s Spouse

The application of estate recovery against the estate of the Medicaid recipient’s spouse can arise by two distinct paths depending on whether the state involved is a common law or a community property state.<sup>129</sup>

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125. *Id.*

126. This reading of the statute was embraced by the Minnesota Supreme Court. See *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008).

127. *Idaho Dep’t of Health & Welfare v. McCormick*, 283 P.3d 785, 790–91 (Idaho 2012) (“However, the federal statute also expressly allows states to expand the definition of ‘estate’ beyond the ‘real and personal property and other assets’ in the individual’s own estate to also include ‘any other real and personal property and other assets in which the individual had any legal title or interest at the time of death.’”).

128. *McCormick* has been followed in Idaho by another decision that again upheld estate recovery against the estate of the community spouse. See *Idaho v. Wiggins*, 306 P.3d 201 (Idaho 2013).

129. Begley & Jeffreys argue that estate recovery against the estates of community spouses was never intended under federal law but accept that it is occurring. See BEGLEY & JEFFREYS, *supra* note 10, at § 9.08[A].

In common law states, the surviving spouse has the right to elect against the will of the decedent spouse.<sup>130</sup> If the decedent spouse dies intestate, the surviving spouse is also entitled to a share.<sup>131</sup> Thus, in common law states, the surviving spouse nearly always has some claim against the estate of the predeceasing spouse.<sup>132</sup> If the surviving spouse is a Medicaid recipient, some states apply estate recovery to the survivor's claim against the decedent spouse's estate.<sup>133</sup> In these states, the state Medicaid agency may force the election by the surviving spouse.

In community property states, each spouse is deemed to own one half of the community property, and, with limited exceptions, there is no right to elect against the will.<sup>134</sup> However, the first spouse to die has no right to deprive the surviving spouse of his or her share of the community property. In other words, the decedent's will cannot dispose of the surviving spouse's share of the community property without his or her consent. Moreover, in a community property state if a spouse dies intestate, the decedent's half of the community property usually passes to the surviving spouse.<sup>135</sup> In that case, creditors of the survivor can pursue the survivor's interest acquired by intestate succession.<sup>136</sup> Even if the decedent spouse dies with a will, the creditors

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130. See, e.g., U.P.C. § 2-202(a) (2013). ("The surviving spouse of a decedent who dies domiciled in this state has a right of election . . . to take an elective-share amount equal to 50 percent of the value of the marital property portion of the augmented estate.")

131. *Id.*

132. See, e.g., *id.*; *In re Estate of Barg*, 752 N.W.2d 52, 54 (Minn. 2008).

133. Cynthia L. Barrett, *Disclaimer and Elective Share in the Medicaid Context*, 1 MARQ. ELDER ADVISOR 40, 43–45 (2000). See, e.g., *In re Estate of Shipman*, 832 N.W.2d 335 (S.D. 2013); *See Tannler v. Wisconsin Dep't of Health and Soc. Servs.*, 564 N.W.2d 735 (Wis. 1997). For an interesting variation on this theme see *Estate of Demartino v. Div. Med. Assistance Health Serv.*, 861 A.2d 138 (N.J. 2011). For more discussion see also Julia Belian, *Medicaid, Elective Shares, and the Ghosts of Tenures Past*, 38 CREIGHTON L. REV. 1111, 1133 (2005).

134. What constitutes community property may vary somewhat from state to state. But, in general, it is the earned income of a married couple and the property acquired with that income while domiciled in a community property state. See, e.g., CAL. FAM. CODE § 760 (2015). In some community property states, income from separate property is community property. See, e.g., IDAHO CODE § 32-906 (2015). See, e.g., *I.G. v. Dep't of Human Servs.*, 900 A.2d 840 (2006); *Miller v. Kansas Dep't of Soc. & Rehab. Servs.*, 275 Kans. 349 (2003); BEGLEY & JEFFREYS, *supra* note 10, at § 7.06[E][3].

135. See, e.g., U.P.C. § 2-102A(b) (2013).

136. *Id.*

of the surviving spouse have a claim against all of the community property of the two spouses.<sup>137</sup> Under this logic, estate recovery may be had against the estate of the community spouse for Medicaid benefits paid on behalf of the institutional spouse. An important difference to note between common law states and community property states is that, normally, in a community property state, one would not expect estate recovery to apply to the community spouse's estate where there is no community property and no bequest to or inheritance by the institutional spouse.<sup>138</sup>

This brings us back to *McCormick* which involved the estate of George Perry.<sup>139</sup> Mr. Perry and his wife, Martha Perry, resided in Idaho, a community property state.<sup>140</sup> Their home originally was Martha's separate property, which she subsequently converted to community property.<sup>141</sup> A few years later, she executed a durable power of attorney appointing George as her agent.<sup>142</sup> A few months later, George used the durable power to quit claim Martha's interest in the home to himself.<sup>143</sup> About that same time, Martha qualified for Medicaid assistance.<sup>144</sup> Less than three years later, George predeceased Martha.<sup>145</sup> She then died a little more than a year after George's passing.<sup>146</sup> The only significant asset in George's estate was the home, which was formerly owned by Martha, and now worth about \$80,000.<sup>147</sup> Idaho's Medicaid agency filed a claim against his estate for the more than \$100,000 in Medicaid benefits it had bestowed upon Martha.<sup>148</sup>

One can readily see the equity in the state's claim. The only major asset in George's estate was the home that originally belonged to

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137. For a discussion of this principle as applied in California see CHARLOTTE K. GOLDBERG, CALIFORNIA COMMUNITY PROPERTY: EXAMPLES & EXPLANATIONS 225–26 (Wolters Kluwer, 3d ed. 2010).

138. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 27 (1994) (discussing the default rules followed when allocating property in community property and separate property states).

139. *Idaho Dep't of Health & Welfare v. McCormick*, 283 P.3d 785, 791 (Idaho 2012).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 786.

148. *Id.* at 786–87.

Martha.<sup>149</sup> Upon George's death, one could argue that it represented good policy to have the home used to help pay for Martha's medical bills.<sup>150</sup> But, George's estate consisted of no community property.<sup>151</sup> Thus, under general principles of Idaho law, Martha's creditor, the Idaho Medicaid agency, should have had no allowable claim against the home. Nonetheless, the Idaho Supreme Court upheld the agency's claim.<sup>152</sup> It did so relying on a complex web of federal and state Medicaid statutes and regulations that we will not seek to fully recapitulate here.<sup>153</sup> However, the portion of the court's analysis of the applicable federal statutes is worth reviewing since it represents a major departure from most prior interpretations by other state courts.<sup>154</sup> It may represent the direction that estate recovery will take in the future if, as it seems likely, pressure grows for more draconian treatment of Medicaid recipients and their families.<sup>155</sup>

In *McCormick*, the Idaho Supreme Court focused on two of the federal statutes.<sup>156</sup> The first statute defines the scope of estate recovery and the second defines the word "assets" as it is used in Medicaid law.<sup>157</sup> Let us take them one at a time.

Recall that 42 U.S.C. § 1396p allows estate recovery against the "estate" of the Medicaid recipient and also against:

“. . . any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual

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149. *Id.*

150. Medicaid does not seek to levy against the home while the community spouse is living in it, even when the home is owned solely by the institutional spouse. See *infra* Part II.A.3.

151. *McCormick*, 283 P.3d at 795.

152. *Id.* at 785–86.

153. The end of the Idaho Supreme Court's analysis was to uphold a state regulation that authorized estate recovery against any asset that had ever been community property, even where the institutional spouse had no present interest in the property at the time of her death.

154. *McCormick*, 283 P.3d at 792.

155. This assumes no interference at the federal level. This appears to be a safe assumption since the federal government already seems to be turning a blind eye to state actions that arguably contravene federal policy. See BEGLEY & JEFFREYS, *supra* note 10 at § 9.04[B][5].

156. *McCormick*, 283 P.3d at 790.

157. *Id.* at 791.

through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.”<sup>158</sup>

The Idaho Supreme Court concluded from this language that the state Medicaid agency could lay claim to assets in which the deceased Medicaid recipient had no interest at death.<sup>159</sup> It arrived at this conclusion by assuming that the language “life estate or living trust” could refer to circumstances in which the decedent had conveyed away all interest in the asset prior to death.<sup>160</sup>

This analysis fails to appreciate how life estates and living trusts are normally used in the estate planning environment. Transfer of a remainder while retaining a life estate is a common device in estate planning.<sup>161</sup> The range of tools to accomplish this is large and can extend from outright transfer of the remainder in fee to the use of various trusts, including living trusts. A typical living trust is a will substitute involving transfer of assets to an inter vivos revocable trust for the benefit of the grantor.<sup>162</sup> These are widely used for disability planning and for probate avoidance.<sup>163</sup> Only at the grantor’s death do such trusts benefit third parties.<sup>164</sup> If the grantors are a married couple, the trust typically continues until the death of both grantors, upon which the trust is then distributed to the children or other beneficiaries.<sup>165</sup> In such circumstances, the transfer of beneficial ownership occurs at the death of the grantor just like the other arrangements referred to in the statute.<sup>166</sup>

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158. 42 U.S.C. § 1396p(b)(4) (2012).

159. *McCormick*, 283 P.3d at 793.

160. *Id.* at 792. The Court declined to follow the reasoning of the Minnesota Supreme Court in *In Re Estate of Barg* where the court applied the doctrine of *ejusdem generis* to find that the phrase must refer to conveyances of interests that occur at death. See *In Re Estate of Barg*, 752 N.W.2d 52, 70 (Minn. 2008).

161. See, e.g., RAY D. MADOFF ET AL., *PRACTICAL GUIDE TO ESTATE PLANNING* §§ 4.05, 8.07 (Wolters Kluwer 2014). Many of these tools have a significant estate tax planning purpose that is not relevant in the Medicaid context. See John A. Miller & Jeffrey A. Maine, *Wealth Transfer Tax Planning for 2013 and Beyond*, 2013 B.Y.U. L. REV. 879, 880 (2013).

162. See, e.g., WAYNE M. GAZUR & ROBERT M. PHILLIPS, *ESTATE PLANNING: PRINCIPLES AND PROBLEMS*, 398–99 (3d ed. 2012); RAY D. MADOFF ET AL., *supra* note 161.

163. *Do I Need a Living Trust?*, THE STATE BAR OF CA. (2011), <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=7xX4AesY230%3d&tabid=1341>.

164. *Id.*

165. *Id.*

166. *Id.*

Certainly the phrase “life estate or living trust” can describe many other arrangements concluded during life. However, a sensible application of the doctrine of *ejusdem generis*<sup>167</sup> leads to an understanding that the “life estates, living trusts and other arrangements” referred to are ones where beneficial enjoyment passes to another upon the death of the original owner.<sup>168</sup> In short, contrary to the Idaho Supreme Court’s decision, 42 U.S.C. § 1396p, fairly interpreted, does not lend itself to the conclusion that estate recovery can be had against property in which the decedent had no interest at the moment prior to death.

The Idaho Supreme Court’s second important bit of statutory construction involved the definition of “assets” found in 42 U.S.C. § 1396p(h)(1). That definition includes income and resources of both the community spouse as well as those of the institutional spouse.<sup>169</sup> The definition of “assets” found in 42 U.S.C. § 1396p(h)(1) overrules state marital property law in both common law and community property states, forcing spend down of the community spouse’s property to pay for the nursing home costs of the institutional spouse.<sup>170</sup> The Idaho Supreme Court argued that the broad definition of assets in 42 U.S.C. § 1396p(h)(1) includes property of the community spouse, and therefore supports estate recovery against that spouse’s estate even when the institutional spouse has no claim to those assets under state law.<sup>171</sup> This bootstrap reasoning leads to the state having two bites out of the same apple. That is, the state can force spend down of both spouses’ assets during life and then lay claim to the remaining assets of the community spouse upon his or her death.<sup>172</sup>

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167. “A cannon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” BLACK’S LAW DICTIONARY 594 (9th ed. 2009). See also NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.17 (7th ed. 2007).

168. In fairness we might say that the statute is not well drawn to achieve clarity. The last phrase might have been written to read “[retained] life estates, living trusts and other [similar] arrangements.”(bracketed words added).

169. Idaho Dep’t of Health & Welfare v. McCormick, 283 P.3d 785, 794 (Idaho 2012).

170. Recall that resources of both spouses are considered for the Medicaid’s means testing, subject to the spousal income and resource allowance rules. See *supra* part II.A.4.

171. *McCormick*, 283 P.3d at 792–93.

172. The Idaho rule does, however limit estate recovery against the community spouse’s estate to property that had some community property history. *Id.*

Though we may question the reasoning employed in *McCormick*, our main concern is to consider where this sort of court-made law is taking Medicaid recipients and their spouses. It seems to argue for increased use of divorce as a Medicaid planning mechanism, at least in cases with more typical facts than *McCormick*.<sup>173</sup> That idea will be explored more fully after the paper addresses a few other aspects of the mechanics of estate recovery.

#### **D. A Life Estate and Other Transitory Interests Owned by the Recipient**

In some states, estate recovery can be had against the actuarial value of a life estate owned by the recipient determined on the date of death disregarding the fact of death.<sup>174</sup> In other words, life estate interests are valued as of the moment immediately prior to death.<sup>175</sup> From a common sense standpoint, this seems unfair since the deceased person's estate has no ownership interest in the property. However, there is a certain logic to this approach when the remainder was transferred gratuitously by the Medicaid recipient outside of the look-back period.<sup>176</sup> In those cases, the transferor may be seen as having employed the transfer as a device to avoid the transfer penalty while retaining the enjoyment of the asset during life. Inclusion of the actuarial value of the retained life estate simply dampens the efficacy of this planning strategy. The rule makes less sense in those cases where the Medicaid recipient is the beneficiary of a life estate created by a third party.

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173. I am thinking here of the case where the home was always community property and thus would likely be divided 50-50 in a divorce. Following divorce in such a case, I doubt even the Idaho Supreme Court would argue that the entire home was subject to estate recovery. In *McCormick*, recall that the home was originally the separate property of Martha, the Medicaid recipient spouse. Had George sought a divorce, the divorce court might have awarded the entire home to Martha thus leaving it subject to estate recovery.

174. See BEGLEY & JEFFREYS, *supra* note 10 at § 9.04[B][4]. See, e.g., *State v. Willingham*, 136 P.3d 66 (Ore. Ct. App. 2006).

175. *Id.*

176. Those persons familiar with the federal estate tax will recognize some similarity to 26 U.S.C. § 2036 (2012). Indeed Section 2036 is even more draconian since it draws the entire remainder interest back into the gross estate. *Id.*

### E. The Deferral Rule

Estate recovery will be deferred until the death of the community spouse.<sup>177</sup> Further, the state will release the lien described below if the surviving spouse wishes to sell the property because the state cannot recover anything prior to the death of the surviving spouse.<sup>178</sup> In some states, the right to recover does not apply to the property in the name of the community spouse, or the portion of the property owned by the community spouse if the property is jointly owned.<sup>179</sup> In most states, if the couple leaves any assets in the name of the institutional spouse, including title to the home, there could be a Medicaid lien against the institutional spouse's share of the property.<sup>180</sup>

### F. The Undue Hardship Rule

Medicaid recovery may be waived where it will cause an "undue hardship."<sup>181</sup> If a Medicaid recipient is survived by a registered domestic partner, some states will recognize an undue hardship and defer recovery as it would in the case where a spouse survived the Medicaid recipient.<sup>182</sup>

### G. Estate Recovery Liens

Federal law allows the states to place liens on the property of Medicaid recipients in various circumstances.<sup>183</sup> Usually, Medicaid's right to file a lien only arises at the death of the Medicaid recipient.<sup>184</sup> However, some states permit an earlier filing.<sup>185</sup> If the property is sold, Medicaid will be entitled to a share of the proceeds, even if the Medicaid recipient is still living.<sup>186</sup> In some states, the state can cause a notice of encumbrance to be recorded in the chain of title of any real

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177. BEGLEY & JEFFREYS, *supra* note 10, at § 9.03; 42 U.S.C. § 1396p(b)(2) (2012). Further deferral can occur if the couple who died was survived by a minor or disabled child. *Id.*

178. *Id.*

179. BEGLEY & JEFFREYS, *supra* note 10, at §§ 9.04[B][1], 9.04[B][2], 9.08[B].

180. 42 U.S.C. § 1396p(b)(4)(B).

181. U.S.C. § 1396p(b)(3). See BEGLEY & JEFFREYS, *supra* note 10, at § 9.05[A]; DAYTON ET AL., *supra* note 10, at 29:118.

182. 42 U.S.C. §§ 1396p(b)(3)(A), 1396p(c)(2)(D), 1396p(d)(5).

183. *Id.* at § 1396p(a)(1). See DAYTON ET AL., *supra* note 10, at § 29:113.

184. Bleck et al., *supra* note 9.

185. *Id.*

186. *Id.* at 30.

property interest held by a Medicaid recipient.<sup>187</sup> The transition from a Medicaid claim to a Medicaid lien depends on state law.<sup>188</sup>

#### **IV. Planning Techniques to Avoid Spend Down and Estate Recovery**

Based on the foregoing background and discussion we can now set out various planning options to avoid or minimize estate recovery.

##### **A. An Overview of Medicaid Planning Techniques and Their Relation to Estate Recovery**

In our earlier work on this topic, my co-authors and I described many Medicaid planning strategies.<sup>189</sup> These include gifts beyond the five-year look-back period, disinheritance of the institutionalized person; the use of special needs trusts for the institutional spouse; annuitization of retirement accounts and savings (often for the benefit of the community spouse); spend down on the home or other exempt assets (called asset repositioning); caregiver agreements with family members; certain transfers of the home to a spouse, child or sibling; use of exempt assets (i.e., the home) to pay for the nursing home during a penalty period arising from gratuitous transfers; and, finally, divorce or marriage avoidance.<sup>190</sup>

Some of these are only designed to obtain Medicaid eligibility while preserving wealth during the recipient's lifetime. Others, most prominently gifts and annuities, are designed to avoid estate recovery as well. The liberal income rules and the restrictive resource rules make the purchase of an annuity for the community spouse with excess resources an important planning tool for middle class couples. Indeed, the annuity purchase option is the chief planning alternative to divorce in many cases.<sup>191</sup> But, annuitization has its limitations as a planning tool. First, it does not work to protect the home since, normally, the community spouse will want to continue to live there.<sup>192</sup>

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187. DAYTON ET AL., *supra* note 10, at 29:113.

188. See BEGLEY & JEFFREYS, *supra* note 10, at § 9.10[A].

189. Bleck et al., *supra* note 9, at 188-96.

190. *Id.*

191. See *generally id.* (discussing the benefits of annuitization and divorce to avoid transfer penalties).

192. Indeed, both spouses may continue to reside there in states that support Home and Community Based Services (HCBS) through Medicaid.

Additionally, there are at least two other problems that can make annuitization less appealing. One problem is, it may force the sale of appreciated assets and the sale of assets that are preferred to be kept in the family.<sup>193</sup> Another is that, it creates risk of loss due to premature death.<sup>194</sup> As discussed earlier, the single asset most at risk of estate recovery is the home.<sup>195</sup> But, recall that in some states estate recovery can also be had against other property as well.<sup>196</sup> In the next section, I focus on whether, and to what extent, planning can avoid estate recovery with respect to homes, life estates of the institutional spouse, the institutional spouse's elective share of the community spouse's estate, and property in which the institutional spouse once held a community property interest. What we see is that for married couples, divorce cuts most cleanly through all of the bureaucratic Gordian knots.

## **B. Estate Recovery Planning with Respect to the Home**

As I noted at the outset, the Medicaid recipient's home is the most common asset subject to estate recovery. There are, however, a number of lawful methods for avoiding estate recovery with respect to part or all of the value represented by the home.

### **1. TRANSFER THE HOME AND PAY THE PENALTY**

For a single person with a home of substantial value, it may be advantageous to gift a partial interest in the person's home after qualifying for Medicaid. For this approach to work, it is necessary to maintain enough funds to fully cover long-term care during any penalty period arising from the transfer.

#### *EXAMPLE: Effective Gifting of a Partial Interest in the Home*

Mary, a single person already receiving Medicaid LTC services owns an exempt house worth \$400,000. Mary then gifts a 50% interest in the house and reports the gift to the state Medicaid agen-

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193. See Bleck et al., *supra* note 9, at 174-75 (discussing how annuities can be consider "gifts" and how the state will attempt to recover the value of gifts if a person is unable to pay for nursing home care).

194. See *id.* at 174 ("The purchase of an annuity will be treated as a gift unless it is irrevocable, non-assignable, pays out in equal periodic payments, and it is equal to or less than the life-expectancy of the annuitant.").

195. See *id.* at 162-63 (discussing the limits of exempt home equity).

196. See, e.g., *Estate Recovery*, INDIANA FAMILY & SOC. SERVS. ADMIN., <http://www.in.gov/fssa/OMPP/4874.htm>.

cy. Medicaid coverage would be terminated for X months beginning with the month after the month of the gift. The house is then sold, and 50% of the sales proceeds to which Mary is entitled is used to pay for care during the X month period of ineligibility.

## 2. TRANSFER THE HOME TO CERTAIN CHILDREN OR SIBLINGS

It is always important to determine whether a penalty-free transfer of the home may be made. Such transfers are transfers to a child who has lived in the home and cared for the applicant for the two-year period immediately prior to institutionalization, or transfers to a sibling who has lived in the home for one year and has an equity interest in the home, or transfers to a disabled child.<sup>197</sup>

## 3. ESTABLISH TRUSTS FOR DISABLED PERSONS LESS THAN SIXTY-FIVE OR FOR A DISABLED CHILD OF ANY AGE

As discussed above, there is no penalty for transfers to trusts for the sole benefit of disabled children of the Medicaid applicant or for the sole benefit of any disabled person under sixty-five.<sup>198</sup> Thus, transfer of exempt property, such as the home, in those circumstances will avoid estate recovery.

## 4. TRANSFERS OF REMAINDER INTERESTS IN THE HOME OUTSIDE OF LOOK-BACK

A planning technique for avoiding estate recovery is to transfer a remainder interest in the home to a loved one outside of the look-back period.<sup>199</sup> The retained interest can be a life estate or a term of years, but a life estate may not completely avoid estate recovery because of the peculiar rules concerning life estates that some states have adopted.<sup>200</sup> A typical Qualified Personal Residence Trust ("QPRT") might well do the job.<sup>201</sup> In many states, married couples may not need this technique since transfers from one spouse to another are exempt from the transfer penalty rules.<sup>202</sup> Instead, they will likely employ the techniques described below. However, the great limitation of the remain-

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197. 42 U.S.C. §§ 1396p(a)(2), 1396p(c)(2)(A)(iv) (2014). See *supra* Part IV.D. See also Gilfix, *supra* note 58, at 31.

198. See *supra* Part IV.D.

199. See Gilfix, *supra* note 58, 31–32.

200. For an illustration of the problem, see *State ex rel. Dep't of Human Servs. v. Willingham*, 136 P.3d 66, 69–70 (Or. Ct. App. 2006).

201. For a discussion of QPRTs, see Miller & Maine, *supra* note 161, at 945.

202. 42 U.S.C. § 1396p(c)(2)(B)(i), (ii) (2014).

der transfer strategy is that it requires considerable advance planning on the part of the homeowner since it must occur more than five years before any Medicaid application is filed.<sup>203</sup> Of course, it also involves parting with property that might otherwise be kept for the community spouse's future benefit.

#### 5. TRANSFER OF THE HOME FROM THE INSTITUTIONAL SPOUSE TO THE COMMUNITY SPOUSE

With respect to the community spouse, there is a one-time only "snapshot" of community resources taken at the time of the institutional spouse's initial eligibility.<sup>204</sup> Generally speaking, after the snapshot, increases or changes to the form of the community spouse's wealth, and uncompensated transfers made by the community spouse, are disregarded.<sup>205</sup> For this reason, transferring title of the home solely into the community spouse's name may prevent the nursing home spouse from becoming ineligible in the event the home is sold, as well as protect the home from Medicaid estate recovery in some cases.<sup>206</sup> This area of opportunity may be closing as states ramp up their estate recovery efforts. There is no federal law barrier to the states closing this opportunity.

#### 6. REVISE THE COMMUNITY SPOUSE'S ESTATE PLAN

The community spouse should consider revising his or her estate plan to take into account the possibility that he or she may die before the spouse on Medicaid. This is because an inheritance by the nursing home spouse could cause ineligibility or subject the inherited resources to estate recovery.<sup>207</sup> Through a new will, the community spouse could leave the estate to a special needs trust for the institutional spouse or directly to children. In many states, the death of the community spouse would not cause the disqualification of an institu-

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203. FROLIK & KAPLAN, *supra* note 89, at 132–33. See 42 U.S.C. § 1396r-s(c)(1)(B).

204. FROLIK & KAPLAN, *supra* note 89, at 132–33.

205. *Id.* In this context, it is important to recall that the resource test for Medicaid eligibility combines the assets of both spouses without regard to title. Thus, transfers between spouses are irrelevant in the initial determination of eligibility. *Id.*

206. See Michael J. Millonig, *Post-Eligibility Transfers*, 3 NAELA J. 33 (2007). Recall, however, the discussion of the *McCormick* decision in Part III.C.

207. Millonig, *supra* note 206, at 34.

tional spouse and the assets would not be subject to Medicaid estate recovery upon the death of the institutional spouse.<sup>208</sup> However, a special needs trust created through a revocable living trust would be subject to the look-back rules and, thus, would result in the disqualification of the institutional spouse.<sup>209</sup>

#### 7. DIVORCE, LEGAL SEPARATION, OR NON-BINDING UNIONS

Finally, we come to divorce as the emerging planning tool of choice. When a married couple has at least moderate wealth, the asset spend down requirements for Medicaid eligibility are painful to meet and the prospect of estate recovery sweeping up what is left is a serious concern. In such circumstances, divorce can serve as a planning option to protect the community spouse and to preserve resources to meet the special needs of the institutional spouse. Divorce is also a possible mechanism to preserve resources for loved ones. This is because, after a divorce, the assets allocated in the dissolution decree to the non-applying ex-spouse are not countable resources for the Medicaid applicant and are not subject to estate recovery.<sup>210</sup> An order allocating assets to a community spouse pursuant to a decree of legal separation appears to be as effective for this purpose as a divorce decree.<sup>211</sup> In many divorces, it will be necessary to appoint a guardian ad litem to represent the nursing home spouse and it may not be possible to convince a court to allocate disproportionate resources to the community spouse. Even an equal division may be beneficial to the community spouse where there is a substantial amount of countable assets. For example, if the couple has \$500,000 in countable assets, an

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208. See Moore & Landsman, *supra* note 10, at A-91. This may not be true in all states. *Id.* See discussion in the preceding section of Idaho Dept. of Health & Welfare v. McCormick, 283 P.3d 785, 791 (Idaho 2012). In that case, the institutional spouse had converted her separate property (her home) into community property a few years prior to entering a nursing home. *Id.* at 786. Later, the community spouse exercised a durable power of attorney to quitclaim the institutional spouse's interest to himself. *Id.* The community spouse predeceased the institutional spouse and that led the state to seek recover Medicaid benefits paid to the institutional spouse from the estate of the community spouse. *Id.* The Idaho Supreme Court held that federal law did not preempt Idaho state law permitting such a recovery. *Id.* at 795.

209. See FROLIK & KAPLAN, *supra* note 89, at 135-37.

210. See 42 U.S.C. § 1396p(b)(4) (2014); see generally 14.05 PLANNING STRATEGIES FOR THE ELDERLY AND DISABLED, 2001 WL 1585266, 19.

211. *Id.*

equal division would leave the community spouse with \$250,000 rather than the maximum community spouse resource allowance of \$117,400. It is worth noting that divorce does not mean that the couple must live apart. Nor does it mean that the community spouse cannot continue to provide care and certain types of support to the institutional spouse.

Many couples may find the idea of using divorce for Medicaid planning too repugnant to consider. In some cases, other approaches may be beneficial. For example, a married couple with substantial countable assets might upgrade their home or purchase a new car as discussed above<sup>212</sup> and then later transfer any interest the institutional spouse might have in the asset to the community spouse in order to avoid estate recovery. But, this approach will not work in all states.<sup>213</sup>

For moderately well-to-do couples that form late in life it might be prudent to avoid marriage or to marry in a form that does not constitute a legally cognizable union. In this way, neither partner's assets become subject to spend down or the potential application of estate recovery if the other partner should require protracted long-term care.

### C. Scenarios Where Divorce Is a Rational Strategy

There are many scenarios where divorce might make sense. In general, we can say that the underlying circumstances for considering divorce include:

1. The community spouse is reasonably healthy and/or the motivation to provide an inheritance to someone other than the institutional spouse is high;
2. There is a significant amount of wealth and income legally allocable to the community spouse;
3. The life expectancy of the institutional spouse is sufficiently great to create the likelihood of large uninsured long-term care costs;

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212. The essence of this technique, the reader should recall, is to turn a countable asset into an exempt asset.

213. 14.05 PLANNING STRATEGIES FOR THE ELDERLY AND DISABLED, 2001 WL 1585266, 19.

4. And, there are insufficient countervailing circumstances such as adverse pension or Social Security consequences.<sup>214</sup>

As a caveat I might add that I assume here that the divorce and attendant property division would be honored by the state Medicaid authorities. I can, however, imagine such authorities attacking the divorce or the property division as sham transactions. It is not my purpose to advocate inappropriate divisions of property between the spouses upon divorce. In my analysis, I assume a lawful divorce and that state law generally will allocate the assets equally between the spouses unless it is established that one spouse has a separate property interest such as in the case of inherited property that was never commingled. I also assume that Medicaid planning is a rational response to a complex and expensive health care system. There are certainly moral concerns associated with this sort of planning, but I leave those for others to debate and for clients to decide.<sup>215</sup>

Set out below are some examples of when divorce might make sense. The examples focus on moderately well-to-do middle class couples. They are relevant to persons of greater or lesser means as well.

*Scenario 1: The Better off Community Spouse in a Second Marriage*

The paradigm case for divorce is when the marriage is relatively new, there is a prenuptial agreement<sup>216</sup> and the community spouse is well off in her own right.

Example: Alonzo, age seventy-five and Barbara, age seventy, a married couple, have no children in common. Barbara has three children from a prior marriage. They married five years ago and live in Barbara's condominium in a retirement community. They have a standard premarital agreement providing that each has no claim on the property or income of the other. Barbara brought \$600,000 in net assets to the marriage in addition to the condominium. She has pen-

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214. *Id.* at 15.

215. In an earlier article I considered this dimension of Medicaid planning. See Miller, *supra* note 1, at 98–101.

216. It is useful to recall that Medicaid accords no consequences to the existence of a prenuptial agreement for purposes of the resource test. Thus, aside from the Community Spouse Resource Allowance, the community spouse's assets remain subject to spend down. See *infra* Part II.A.4(b).

sion income and Social Security amounting to \$4,000 a month. Alonzo brought \$100,000 of net assets to the marriage and has Social Security and pension income of \$2,000 per month. Alonzo has mid-stage Parkinson's disease but is in otherwise good health and could live for many years. As his Parkinson's becomes more severe, the costs for his long-term care will exceed \$100,000 annually. By divorcing, Alonzo and Barbara could save any part of her assets from Medicaid spend down and save her home from any claim for Medicaid estate recovery. This preserves her quality of life and makes it probable that she will die with sufficient assets to assure her children of an inheritance. Barbara and Alonzo can continue to live together at least until he is obliged to enter a care facility. Barbara can make certain gifts to Alonzo and even establish a special needs trust (SNT) for his benefit without adversely affecting his ability to qualify for Medicaid assistance. The remainder of the SNT can pass to her children without being subject to estate recovery.

*Scenario 2: The Community Spouse in a First Marriage with Separate Property*

Even in a longstanding first marriage, it might be advantageous to consider divorcing if the community spouse has significant separate property.

Example: Callie, age seventy-eight and John, age seventy-nine, a married couple, have two adult children in common and have always lived in a community property state. They married fifty years ago. Five years ago John inherited \$600,000 from his aunt. They used \$200,000 of those assets along with the proceeds from the sale of their former home to buy a much nicer home worth \$500,000 titled as community property in both their names. State law might treat the home purchase as a gift of \$100,000 by John to Callie. John has retained the remaining \$400,000 of his inheritance as his separate property under their state's laws. The combined net worth of their other assets is \$300,000. Callie has pension income and Social Security amounting to \$2,000 a month. John also has Social Security and pension income of \$2,000 per month. Callie has been diagnosed with Alzheimer's disease but is in otherwise good health and could live for many years. As her Alzheimer's disease becomes more severe, the costs for her long-term care will exceed \$150,000 annually. By divorcing Callie, John could save \$400,000 of his inheritance, save his half of

their non-exempt community property from spend down,<sup>217</sup> and save his half of the home from any claim for estate recovery. This preserves his quality of life and makes it probable that he will die with sufficient assets to assure their children of an inheritance. Callie and John can continue to live together at least until she is obliged to enter a memory care facility. In some states, the home would need to be sold in order to fully insulate John's half of the equity from estate recovery. After the divorce, John can make certain gifts to Callie and even establish a special needs trust for her benefit without adversely affecting her ability to qualify for Medicaid assistance. The remainder interest in the trust could pass to their children without being subject to estate recovery.

*Scenario 3: The Well-Housed Couple of Moderate Means*

Even couples with modest amounts of income and exempt assets in long-time marriages might find divorce a plausible strategy if the couple has an expensive home in a state, such as Idaho or Colorado, that aggressively pursues marital property through estate recovery.<sup>218</sup>

Example: Greta, age seventy-five, and Hal, age seventy-seven, are a married couple with three adult children in common and have always lived in a community property state. They married fifty years ago and live in a large home worth \$700,000. The home is community property under their state's law. They have other marital assets worth \$300,000. Greta has pension income and Social Security amounting to \$2,000 a month. Hal also has Social Security and pension income of \$2,000 per month. Greta has been diagnosed with vascular dementia, but, is in otherwise good health and could live for many years. As her dementia becomes more severe, the costs for her long-term care will exceed \$150,000 annually. By divorcing with an equal property division, Hal could save \$150,000 of their net assets from spend down, and save his half of the home from any claim for estate recovery. This preserves his quality of life and makes it probable that he will die with sufficient assets to assure their children of an inheritance. Greta and Hal can continue to live together at least until she is obliged to enter a memory care facility. In some states, the home would need to be sold

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217. *Id.* Of course, he could keep about \$119,000 of their net assets anyway as his Community Spouse Resource Allowance. *Id.*

218. See *infra* Part III. C. See BEGLEY & JEFFREYS, *supra* note 10, at §§ 9.04[B] & 9.08.

in order to fully insulate Hal's half of the equity from estate recovery. In many states, however, the couple might retain the home until they are both deceased and estate recovery would only apply to Greta's half. After the divorce, Hal can make certain gifts to Greta and even establish a special needs trust for her benefit without adversely affecting her ability to qualify for Medicaid assistance. The remainder interest in the trust could pass to their children without being subject to estate recovery.

It is worth noting that there are other options that have significant appeal. They could gift a remainder interest in the home to their children and hope to outlast the look-back period before applying for Medicaid. Or they could sell the home and move to less valuable housing and use the excess funds to purchase an annuity for Hal's benefit.

*Scenario 4: The Well-Off Couple in a Longtime Marriage with Children*

Divorce is at least a plausible strategy if a long-time married couple is well off enough to have much to protect, but not so rich that long-term care costs can be shrugged off.

Example: Dharma, age sixty-eight and Edward, age seventy-one, are a married couple with two adult children in common and have always lived in a common law state. They married fifty years ago and live in a large home worth \$1,000,000. They have other marital assets worth \$1,000,000. Dharma has pension income and Social Security amounting to \$4,000 a month. Edward also has Social Security and pension income of \$4,000 per month. Dharma has been diagnosed with Alzheimer's disease but is in otherwise good health and could live for many years. As her Alzheimer's disease becomes more severe, the costs for her long-term care will exceed \$150,000 annually. By divorcing with an equal property division, Edward could save \$500,000 of their net assets from spend down, and save his half of the home from any claim for estate recovery. This preserves his quality of life and makes it probable that he will die with sufficient assets to assure their children of an inheritance. Dharma and Edward can continue to live together at least until she is obliged to enter a memory care facility. In some states, the home would need to be sold in order to fully insulate Edward's half of the equity from estate recovery.<sup>219</sup> In

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219. See *infra* Part III.C (discussion of *McCormick*). This is because in those states a home with any history as joint tenancy or community property might be

many states, however, the couple might retain the home until they are both deceased.<sup>220</sup> After the divorce, Edward can make certain gifts to Dharma and even establish a special needs trust for her benefit without adversely affecting her ability to qualify for Medicaid assistance. The remainder interest in the trust could pass to their children without being subject to estate recovery.

It is worth noting that there are at least two other options that have significant appeal. The first is to annuitize some of their non-exempt assets for Edward's benefit. The second is to make gifts to their children right away while retaining enough assets to get past the five year look-back period. The children, in turn, might choose to use the assets to fund a special needs trust for the parents while keeping the remainder interest for themselves.<sup>221</sup>

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the subject of an estate recovery action even though it is not marital property at the time of the former community spouse's death. This relates especially to the court's analysis in *Idaho Dep't of Health & Welfare v. McCormick*, 283 P.3d 785 (Idaho 2012). See the discussion *supra* in Part III.C. Of course, *McCormick* did not involve divorced spouses and so it is not directly on point. But the essence of the court's holding in *McCormick* was to permit estate recovery against property that was solely owned by the community spouse because the property had once been community property. It is possible that a court could extend this reasoning to former marital property now owned by a former spouse of a Medicaid recipient. This extreme form of tracing is not presently the norm. See BEGLEY & JEFFREYS, *supra* note 10, at §§ 9.04[B], 9.08.

220. The home would presumably be retained as tenants in common with neither former spouse having any choice or right with respect to the other's half. This is because there should normally be no estate recovery against a former community spouse's interest in the home. Indeed, some states do not pursue estate recovery against the home even if the spouses remain married until death if the home has been transferred entirely into the name of the community spouse. See, e.g., 2 California Elder Law Resources, Benefits, and Planning §§ 11.71 & 83; BEGLEY & JEFFREYS, *supra* note 10, at §§ 9.04[B], 9.08.

221. It is doubtful the gift to the children could be conditioned on their establishing a SNT for the parents without triggering a challenge from the Medicaid authorities.

#### D. Countervailing Financial Factors Concerning Divorce

There are various financial benefits associated with marriage that run counter to seeking divorce even though Medicaid spend down is in the offing. First, if the community spouse has little income, he or she may be entitled to a monthly needs allowance taken from the income of the institutional spouse.<sup>222</sup> Obviously, that right to such an income allocation evaporates upon divorce unless it is awarded in the decree.

Second, if the community spouse outlives the institutional spouse, he or she may be entitled to an increased Social Security benefit by stepping into the deceased spouse's shoes.<sup>223</sup> Generally speaking, the surviving spouse is entitled to succeed to the deceased spouse's monthly benefit if it is greater than her or his own monthly benefit. However, this principle also applies to divorced spouses if the marriage lasted more than ten years and the claimant did not remarry before age sixty.<sup>224</sup>

Third, since transfers between spouses are ignored for transfer penalty purposes, spending down by purchasing an annuity for the benefit of the community spouse does not trigger the penalty.<sup>225</sup> If the spouses were to divorce followed by institutional spouse spend down on an annuity for the ex-community spouse, the transfer penalty would apply.<sup>226</sup> Thus, when an annuity purchase will suffice, it renders divorce unnecessary and even counter-productive.

#### E. The Problem of Incapacity

In some cases, where divorce might be a rational strategy, there may be some question about the capacity of one spouse or the other to engage in such planning. The question naturally arises whether a guardian could bring a suit for divorce on the ward's behalf. Authori-

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222. See *infra* part IV.B.7.b.

223. See RALPH C. BRASHIER, *MASTERING ELDER LAW*, 222–23 (2010).

224. *Id.* See 20 C.F.R. § 404.336 (2015).

225. The annuity does have to be structured to satisfy certain requirements. See Bleck et al., *supra* note 9, at 194–95.

226. See VALERIE J. BOGART, *SELFHOLD CMTY. SERVS., INC., FINANCIAL ELIGIBILITY FOR MEDICAID AND MEDICAID SPEND-DOWN PROGRAM IN NEW YORK* 1, 16–22 (2010), available at <http://www.wnylc.com/health/afile/46/70/>.

ties are divided on the issue.<sup>227</sup> Even where it is permitted, whether the guardian should do so is an open question. Typically we would expect the community spouse to initiate the action, thus placing the guardian in the role of opposing the divorce or not. The guardian is also faced with the matter of taking a stand on the appropriate property division. In general, we would expect the guardian to assert the ward's right to at least an equal division of marital property. Of course, in all cases, the spouses must have separate representation.

#### F. The Problem of Overreaching Children

On occasion, I hear anecdotally of children or other family members seeking to protect their potential inheritances through aggressive Medicaid planning for their parents. In some cases, they may be the holders of durable powers of attorney granted by their parents or they may even be the guardian of an incapacitated parent. Naturally, the attorney must avoid acting in a manner contrary to the best interests of the disabled person when the disabled person is the client.<sup>228</sup> If the client is the guardian, the lawyer must still allow for the guardian's obligations to the ward.<sup>229</sup> A lawyer should withdraw from representing an agent or guardian who intends to act contrary to his or her duties to the principal or ward.<sup>230</sup>

#### V. Is Aggressive Estate Recovery Good Policy?

The primary policy justification for estate recovery is that it reduces the government's costs of providing services to disabled seniors.<sup>231</sup> In 2005, for example, the states recovered over \$400,000,000 from recipients' estates.<sup>232</sup> Estate recovery is consistent with the idea

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227. See 32 A.L.R. 5th 673 (discussing the power an of incompetent spouse's guardian or representative to sue for granting or vacation of divorce or annulment of marriage, or to make compromise or settlement in such a suit).

228. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2014).

229. See *id.* at R 8.4 (2014).

230. *Id.*

231. DEP'T OF HEALTH AND HUMAN SERVS., MEDICAID ESTATE RECOVERY COLLECTIONS 3 (2005), available at <http://aspe.hhs.gov/daltcp/reports/estreccol.pdf>.

232. ERICA F. WOOD & ELLEN M. KLEIN, AARP, PROTECTIONS IN MEDICAID ESTATE RECOVERY: FINDINGS, PROMISING PRACTICES AND MODEL NOTICES 37 (2007), available at [http://assets.aarp.org/rgcenter/il/2007\\_07\\_medicaid.pdf](http://assets.aarp.org/rgcenter/il/2007_07_medicaid.pdf).

that Medicaid should only be available to the poor.<sup>233</sup> When exempt assets are no longer needed by the Medicaid recipient or her spouse, why should not the state have a claim for reimbursement? Moreover, estate recovery discourages applying for Medicaid in the first place.<sup>234</sup> Instead, families may keep ailing seniors at home and care for them by other means in order to preserve their homes for inheritance. The amount of foregone Medicaid claims due to the existence of estate recovery is unknown, but is thought to be substantial.

A counter argument to these points is that estate recovery unduly burdens the poor while failing to significantly reduce governmental costs. Adherents of this view can point to the fact that estate recovery brings back into the government coffers less than 1% of its total costs of providing long-term care.<sup>235</sup> Additionally, the foregone claims induced by the probability of estate recovery may come at the high price of leaving disabled seniors in precarious circumstances. It may also place high care giving strains on already stressed families. The administrative burdens of the estate recovery system are also to be considered. Moreover, the unevenness of application of estate recovery among the states may be seen as unfair. For example, spousal transfers of the home may avoid estate recovery in one state and not another.<sup>236</sup> The existence of a life estate in the recipient may trigger estate recovery in one state and not in another.<sup>237</sup> These striking interstate differences in a quasi-federal program are troubling.

An additional fairness concern is that estate recovery is more easily avoided or mitigated by the well-advised and the well-off. Should a family's ability to navigate the system be such an important determinant of who benefits from governmental largesse and who does not?

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233. *Id.* at iv.

234. *Id.* at 27.

235. *Id.* at 38.

236. *Protecting Your House After You Move Into a Nursing Home*, ELDER LAW NEWS (Jan. 12, 2015), <http://www.elderlawanswers.com/protecting-your-house-after-you-move-into-a-nursing-home-6897>.

237. Keith Lyman, *How Medicaid Recovers the Cost of Long-Term Care From Your Estate After You Die*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-medicaid-recovers-the-cost-long-term-care-from-your-estate-after-you-die.html> (last visited Mar. 9, 2015).

## VI. Medicaid Policy for the Twenty-First Century Should Embrace Disaggregation of Marital Property

Perhaps the most regrettable aspect of the increased estate recovery efforts of the states is the likelihood that divorce may become a more prevalent Medicaid planning tool. Some practitioners tell me the present generation of elderly have been reluctant to employ this tool. Whether the boomers will evince this same reluctance remains to be seen. I doubt it. As noted at the outset, marriage is becoming de-institutionalized in America.<sup>238</sup>

A governmental aid program that encourages divorce must be regarded as questionable in a society that values marriage. Moreover, the penalties that Medicaid imposes on the married are not in step with the modern understanding and character of marriage.<sup>239</sup> Medicaid's assumption that most of the assets of a married couple should be available to pay for the nursing home bills of either spouse is predicated on the idea that a married couple is a single economic unit. This idea in turn rests on the mid-twentieth century norm of a long-term marriage in which the husband was the primary or sole bread-winner and the wife was responsible for child-rearing. The present era of marriage is characterized by dual-working couples, non-marriage for many, and

delayed marriage, divorce, remarriage, and changing gender roles . . . [T]he content of marriage has become heterogeneous and contested. The institution of marriage no longer necessarily implies shared resources, shared expectations, shared children (or any children at all), or defined roles in day-to-day life. Childless couples, blended families, late-in-life marriages, and two-career couples are no longer the exception: They are the new norm.<sup>240</sup>

In this age of heterogeneity and individualism, the fairness of imposing the financial burden of one spouse's long-term disability on the other spouse has become doubtful.

Though a complete disaggregation of marital property for Medicaid purposes might be difficult, that is the path we should be tak-

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238. Alstott, *supra* note 16, at 697.

239. *See id.*

240. *Id.* (citations omitted).

ing.<sup>241</sup> In keeping with its general structure of cooperative federalism, state property law should control. In my view Medicaid's approach toward the assets of married couples should mirror its approach to their income. Recall there that Medicaid follows the name on the check rule. Medicaid should accept that the assets of a married couple should not be pooled to determine a spouse's eligibility. Instead the healthy spouse should be able to keep his or her full share of their aggregate assets. This should be true for estate recovery purposes as well as for spend down. Under this approach, I do not suggest that the community spouse resource allowance or the minimum monthly needs allowance should disappear completely. Instead, they should be kept in place to provide at least minimal assistance to low net worth and low-income community spouses.

## VII. Conclusion

On balance, the Medicaid system for assisting the married disabled elderly is seriously flawed. Various plans for reform have been proposed and, thus far, rejected.<sup>242</sup> This leaves us with Medicaid's requirement that community spouses must spend down their life savings for the long-term care of an unhealthy partner before Medicaid will help pay for that care. This approach is increasingly out of step with the times. As a solution, this article proposes the disaggregation of marital property for spend down and estate recovery purposes. However, the present system seems to favor even greater efforts to restrict access to Medicaid. These efforts include more aggressive estate recovery theories. In some states estate recovery now includes recovery against the estate of the community spouse. Thus, the pressure on the institution of marriage is growing. Divorce may soon be the ultimate Medicaid planning tool. Many will consider this a lamentable

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241. This approach would have something in common with those advocated in the income tax and social security contexts that Professor Alstott addresses. *See id.* at 697 ("My thesis is that the new individualism has rendered obsolete legal doctrines and policy analyses that treat formal marriage as the proxy for family life."). There is a large body of literature on the question of disaggregating the income tax. *See, e.g., id.*; Anthony C. Infanti, *Inequitable Administration: Documenting Family for Tax Purposes*, 22 COLUM. J. GENDER & L. 329 (2011); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTING L.J. 651 (2010); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 985 (1993).

242. *See Miller, supra note 1*, at 101–06. *See Wone, supra note 9*, at 528.

circumstance. I agree. In an era in which the institution of marriage is already under siege, a statutory regime which encourages divorce is unjustified. Nonetheless, if one thinks of marriage as primarily a contractual arrangement for the mutual convenience of the parties,<sup>243</sup> Medicaid policy impacts the relative benefits and detriments of marriage in a substantial way. In some circumstances, Medicaid policy makes divorce a rational, if unpalatable, response.

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243. Of course there are other ways to look at marriage, and I do not mean to disparage them. In our roles as lawyers, however, we are obliged to consider marriage a form of legal partnership with utilitarian advantages and disadvantages.