

chapter 6

MEDICAID PLANNING

The current societal crisis posed by the increasing need for long-term care is a relatively new one. Prior to the advent of nursing homes in the 1950s, those seniors who lived into old age were typically cared for in the homes of their children. Life expectancy was such that most people died before the advent of chronic diseases such as Alzheimer's. Healthier lifestyles and advances in modern medicine have been causing Americans to live longer and longer. Unfortunately, this increased life expectancy means that Americans are often out-living their ability to care for themselves.

The governmental program that provides benefits for chronic and custodial long-term care is Medicaid. Many Americans falsely believe that Medicare will provide chronic/custodial care for themselves and their parents. These people are shocked when they learn the truth — that Medicaid, with its strict eligibility requirements, is the only governmental benefit available.

WHAT IS MEDICAID?

Medicaid is a benefits program that is funded by the federal and state governments and administered by each state. While the rules for eligibility vary from state to state, the primary benefit of Medicaid is that it will pay for long-term care in a nursing home once you have qualified. As mentioned previously, according to AARP about 70 percent of nursing home residents are supported, at least in part, by Medicaid.

In our lifetime, Medicaid has effectively become the long-term care insurance of the middle class because most people cannot afford to pay the Virginia average of \$4,060 per month (\$5,403 in Northern

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Virginia) indefinitely for nursing home care. As the primary source of nursing home funding in the United States, Medicaid, created in 1965 under President Lyndon Johnson, is, according to Senator Jay Rockefeller IV, one of the Federal Government's three "social contracts" with America — the other two being Social Security (which provides retirement income for older Americans), and Medicare (which provides health coverage). In 2005 Senator Rockefeller, then the ranking member of the Senate Finance Committee's Subcommittee on Health Care, in marking the 40th anniversary of the Medicaid program, stated that

“President Johnson's noble concept was not just a Democratic ideal; it had been an inspiration shared throughout the early part of the century by legislators and presidents from both parties. And since the signing of the landmark legislation, administrations - both Republican and Democratic - have fought to preserve the Medicaid mission of providing healthcare for the nation's most vulnerable citizens.

“Sadly, in the past few years, we have seen a misguided, darker view of Medicaid emerge - one that loses sight of its original goal and underlying moral framework. Medicaid has become a scapegoat for the larger ills facing our entire healthcare system. But Medicaid isn't the problem. . . . Taking care of our most vulnerable people is a moral obligation.

“Our representative democracy has a responsibility to do for the future what we have repeatedly done in the past: protect, preserve, and strengthen Medicaid.”

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HOW TO APPLY FOR VIRGINIA MEDICAID

Applications for Virginia Medicaid are filed with the appropriate local office of the Department of Social Services or Department of Family Services (hereinafter referred to as the “Department”) in the city or county where the applicant lives; assuming the applicant is already living in a nursing home, then the application is submitted to the Department in the city or county where the nursing home is located, regardless of where the applicant lived prior to entering the nursing home and regardless of whether the applicant lived in Virginia prior to entering the nursing home. A list of all local Departments in Virginia can be found online at www.dss.state.va.us/localagency. A Medicaid application must be filled out and signed by the applicant, the applicant’s attorney, the applicant’s agent under a durable power of attorney, or the applicant’s legal guardian, conservator, or other authorized representative. A face-to-face interview is not required. Among other things, applicants for Medicaid are asked to:

- Provide Social Security numbers.
- Confirm Virginia residency.
- Confirm U.S. citizenship or provide documentation of alien status.
- Disclose and verify all income and assets.
- Disclose and verify all transfers of assets during the 60-month period prior to application.
- Submit income tax returns for the past 3 years.
- Submit all bills for medical services and nursing home care received in the past three months.

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Once a completed application is received, it will be assigned to an eligibility worker at the local Department, who will typically make an initial review of the application and supporting documentation and send the applicant a checklist of additional required information and documentation. If the eligibility worker has questions that can not be easily answered by written documentation, a face-to-face meeting may be requested. Unfortunately, however, the local Department is often extremely busy and/or short-handed, and applications will frequently be denied without the applicant having been given the opportunity to submit the missing information or verifications.

For each Medicaid application, the local Department is required to issue a written determination as to whether the applicant is deemed eligible for Virginia's Medicaid Program within 45 days (90 days if a disability determination is needed) from the date the application was filed. If the applicant disagrees with the decision made by the local Department, an appeal may be filed within thirty days.

WHY SEEK LEGAL ADVICE FOR MEDICAID?

Meeting the eligibility rules for Medicaid benefits requires passing certain very strict tests regarding income and assets. In addition to being strict, the Medicaid eligibility rules are extremely complicated and confusing. The United States Supreme Court has called the Medicaid laws "an aggravated assault on the English language, resistant to attempts to understand it." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981). The United States Court of Appeals for our own Fourth Circuit (just below the U.S. Supreme Court), in a case arising out of Virginia, has called the Medicaid Act one of the "most completely impenetrable texts within human experience" and "dense reading of the most tortuous kind." *Rehab. Association of Virginia v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994).

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Due to tremendous complexity of the Medicaid laws, the Medicaid application process is also extremely complicated, and many persons who file for Medicaid without professional assistance will wind up with the application being rejected for a variety of reasons. Rejection often occurs due to financial issues — either excess resources, excess income, or improperly-timed gifts or transfers. Rejection in many cases is due to missing or incomplete information or verifications. Applications are also sometimes improperly rejected by an eligibility worker (most of whom are underpaid and overworked) who has not had the time to carefully and thoroughly review the application and verifications, or who has improperly applied the legal or financial requirements for eligibility.

Worse yet, an application that is filed at the wrong time can result not only in rejection, but in the imposition of significant penalties against the applicant that could have been avoided by a more timely filing. For these and many other reasons, an experienced elder law attorney should always be hired to represent the applicant through the entire Medicaid process — including planning for eligibility, preparing and filing the application, working with the local Department during the application and verification process, filing an appeal when necessary, and representing the applicant in connection with any required hearings and appeals.

Without proper planning and legal advice from an experienced elder law attorney, many people spend much more than they should on long-term care, and unnecessarily jeopardize their future care and well-being, as well as the security of their family.

WHAT TYPE OF PLANNING CAN BE DONE?

The type of planning done by most experienced elder law attorneys is known by many names — it may be called *Asset Protection*, *Long-term Care Planning*, *Life Care Planning*, or *Medicaid*

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Planning. What is the goal of this type of planning? The goals differ from person to person and family to family. Generally, for a married couple the most important goal is to ensure that the spouse remaining at home is able to live the remaining years of his or her life in utmost dignity, without having to suffer a drastic reduction in his or her standard of living. For a single or widowed client, the most important goal is typically to be able to enjoy the highest quality of life possible in the event of an extended nursing home stay. When there is an adult child or grandchild who is disabled, the primary goal is typically to protect assets to be used for the benefit of that disabled family member who is often also receiving Medicaid and Social Security Disability benefits. Money that is protected through proper planning can be used to provide a nursing home resident with an enhanced level of care and a better quality of life while in a nursing home and receiving Medicaid benefits. For instance, protected assets can be used to hire a private nurse or a private health aide — someone to provide one-on-one care to the resident — to help the resident get dressed, to help the resident get to the bathroom, to help the resident at mealtime, and to act as the resident’s eyes, ears and advocate.

Money that is sheltered through proper planning can also be used to purchase things for the nursing home resident or disabled child that are not covered by Medicaid — such as special medical devices, upgraded wheel chairs, transportation services, trips to the beauty salon, etc.

Lastly, some parents do have a strong desire to leave a financial legacy for their children, particularly if there is a disabled child or someone who needs special financial help.

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EXEMPT ASSETS AND COUNTABLE ASSETS: WHAT MUST BE SPENT?

To qualify for Medicaid, applicants must pass some very strict tests on the type and amount of assets they can keep. To understand how Medicaid works, one first needs to learn to differentiate what are known as “exempt assets” from “countable” assets.

Exempt assets are those that Medicaid does not take into account. In Virginia, that currently includes:

- The applicant’s principal residence (however, after the nursing home resident has been in the nursing home for six months of continuous institutionalization, the resident’s home will become a countable resource unless the resident’s spouse or other dependent relatives live in the home);
- Personal possessions, such as clothing, furniture, and jewelry;
- One motor vehicle, without regard to value;
- Property used in a trade or business;
- Certain prepaid burial arrangements;
- Term life insurance policies;
- A life estate in real estate (however, the transfer rules on life estates are very complicated and must be carefully observed);
- IRS Code d(4)(A) and d(4)(C) Special Needs Trusts; and

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- Any assets that are considered inaccessible for one reason or another.

All other assets are generally “countable” assets, technically called “resources.” Basically all money and property, and any item that can be valued and turned into cash, is a countable asset unless it is listed above as exempt. This includes:

- Cash, savings and checking accounts, credit union share and draft accounts;
- Certificates of deposit;
- U.S. Savings Bonds;
- Individual Retirement Accounts (IRAs), Keogh plans, 401(k) and 403(b) accounts;
- Nursing home accounts;
- Prepaid funeral contracts that can be canceled;
- Certain trusts (depending on the terms of the trust);
- Real estate other than the primary residence;
- Any additional motor vehicles;
- Boats or recreational vehicles;
- Stocks, bonds, or mutual funds; and
- Land contracts or mortgages held on real estate;

An unmarried applicant may have no more than \$2,000 in “countable” assets in his or her name in order to be “resource eligible” for Medicaid.

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Does this mean that if you need Medicaid assistance, you'll have to spend nearly all of your assets to qualify? No — there are numerous different strategies that can be employed to legally and ethically protect assets. An experienced elder law attorney can walk a family through the different strategies that apply to a particular situation and discuss these strategies with the family to determine which ones are appealing and viable under the circumstances, and which strategies are inappropriate. Consider the following case study:

CASE STUDY: MEDICAID PLANNING FOR A SINGLE PERSON

Jill is worn out. Three years ago her mother died, and for the past two years she's been caring for her aging father, Harry. At first it was little things . . . grocery shopping, trips to the doctor, and help with medications. But as Harry's health has deteriorated, Jill's burden has increased. The last six months have been brutal because Jill finally had to move Harry to a nursing home — Harry couldn't safely stay at home by himself any more.

Jill thought her job would be easier once the nursing home staff took over, but it hasn't turned out that way. She's the oldest daughter, so she still feels responsible, even though the nursing home is now responsible for Harry's day-to-day care. Between visiting Harry every day, paying Harry's bills, and handling other matters involving her dad, Jill spends at least two hours a day on her dad's affairs.

Jill is running herself ragged, and Harry is running out of money. There's only about \$90,000 left, and at \$6,000 per month for the nursing home, Jill knows the money will only last about another 15 months. Once the money runs out, how can Jill pay for Harry's

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care? Jill has heard that Medicaid will cover the nursing home, but she's also heard that Medicaid won't cover everything. "What then?" she asks, distraught. "Is there anything else I can do?"

Yes, there are steps she can take. Given her high degree of involvement, a *personal care contract*, sometimes called a *life care agreement*, should be considered. Jill and Harry can enter into a formal agreement in which Jill becomes Harry's care manager. Even though Harry is in a nursing home, if the agreement is properly drawn, Harry can pay Jill for her care management services.

For example, if Jill spends about 2 hours a day caring for Harry, that's about 60 hours per month (30 days per month times 2 hours per day). If the personal care agreement specifies that Jill's time can be compensated at the rate of \$15 per hour, that's \$900 per month for Jill's services. In and of itself, that doesn't sound exciting. However, if Jill and Harry enter into a properly drawn life care agreement, Harry can agree to have Jill act as his care manager for as long as Harry lives. In other words, Harry can pay Jill \$10,800 per year (\$900 per month times 12 months), and Harry can make this payment in a lump sum for Harry's life expectancy. So, if Harry has a life expectancy of 8 years, he can pay Jill \$86,400 (\$10,800 per year times 8 years) up front, in one lump sum. This arrangement will permit Jill to provide her father with the care he needs, and still allows Harry to qualify for Medicaid, which solves Jill's and Harry's dilemma.

Please note that the scenario outlined above is the "short version." This sort of planning must be handled in a very specific manner, and it's important to seek the assistance of a knowledgeable elder law attorney before attempting to use this method, or any of the other planning methods that are available.

MEDICAID PLANNING FOR MARRIED COUPLES

Federal law provides some basic built-in protection for married couples. The Medicare Catastrophic Coverage Act of 1988 contained “spousal impoverishment” provisions that offer assistance to married couples. The law’s intent was to change the eligibility requirements for Medicaid where one spouse needs nursing home care but the other spouse remains at home in the community. This law recognizes that it makes little sense to impoverish both spouses when only one needs to qualify for Medicaid assistance for nursing home care.

Division of Countable Assets and “Spend Down.” To begin the division of assets, the couple must list all of their countable assets (exempt assets, as discussed above, are not included). The countable assets are then divided, for purpose of calculation, into equal halves. One-half of said countable assets, up to \$99,540², is then allocated to the at-home spouse (technically called the “community spouse,” though we will use the term “at-home spouse” throughout this book for clarity). This amount that is allocated to the “community spouse” is called the “Community Spouse Resource Allowance” or CSRA. The other half of the countable assets is allocated to the nursing home spouse, and must be “spent down” until only \$2,000 remains, at which time the nursing home spouse will then qualify for Medicaid. As a practical matter, when married couples in Virginia do proper planning, all assets should almost always be transferred to the at-home spouse prior to the spouse in need entering the nursing home. For example, if a couple owns \$100,000 in countable assets just prior to the date the applicant enters the nursing home, all of these assets would generally be transferred to the at-home spouse. The applicant will be eligible for Medicaid once the couple’s combined

² All dollar amounts on this and the next page are effective as of January 1, 2006, and are subject to change over time.

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assets (now all in name of the at-home spouse) have been reduced to a combined figure of \$52,000 (\$2,000 for the applicant plus \$50,000 for the at-home spouse). If the couple owned \$200,000 in combined assets, the spouse entering the nursing home would not become eligible for Medicaid until their combined assets were reduced to \$101,540 (\$2,000 for the applicant plus a maximum of \$99,540 for the at-home spouse). There is also a minimum resource allowance for the community spouse in the amount of \$19,908.

The determination of the amount of the couple's assets is made as of the first day of the month that the applicant enters the nursing home. This is often called the “snapshot date.” It may be advantageous for the couple to have as much money as possible in their names on the snapshot date, up to \$201,080 ($\$99,540 \times 2 + \$2,000$) so that the amount the at-home spouse is allowed to keep will be as high as possible.

After the spouse in the nursing home qualifies for Medicaid long-term care assistance, the assets of the at-home spouse are no longer deemed available to the institutionalized spouse.

Calculation of Minimum Monthly Income. Each state also establishes a monthly income floor for the at-home spouse, called the Minimum Monthly Maintenance Needs Allowance, or MMMNA. In Virginia, the MMMNA ranges from a low of \$1,603.75 per month to a high of \$2,377.50 per month, and cannot exceed \$2,488.50 unless a court orders support in a greater amount. In Virginia, the MMMNA is calculated as follows:

- (1) \$1,603.75 plus
- (2) The Excess Shelter Allowance, which equals the amount by which rent, mortgage payments, taxes, insurance, and utilities exceed the “Excess Shelter Standard” of \$481.13. There is a standard utility allowance in the amount of \$227 for a household of 1 to 3 members, and \$282 for a household of 4 or more 3 members.

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If the at-home spouse's income falls below his or her MMMNA, the shortfall can be made up from the nursing home spouse's income. That is, the at-home spouse may take as much income of the nursing home spouse as is necessary to reach the MMMNA, which should avoid the necessity of the at-home spouse dipping into savings each month, which might result in gradual impoverishment.

For example, assume (1) that the at-home spouse's sole source of income is \$800 per month in Social Security benefits and (2) that her MMMNA has been calculated to be the Virginia minimum of \$1,603.75. Since she is entitled to a minimum monthly income of \$1,603.75, but only receives \$800, she is entitled to collect the difference of \$803.75 every month from the nursing home spouse's Social Security check. The rest of the nursing home spouse's income will be paid to the nursing home, to partially cover the cost of her husband's care.

\$1,603.75	At-home spouse's maximum income allowance, as determined by formula
(\$800.00)	Less the at-home spouse's actual income, from Social Security
\$803.75	The shortfall, which will be paid to her from her spouse's Social Security.

On the other hand, if the at-home spouse's gross monthly income is \$2,000, he or she is expected to contribute \$15 per month to the cost of the nursing-home spouse's care. This monthly payment by the at-home spouse increases by \$10 per month for each additional \$100 of monthly income. For example, if the at-home spouse's gross monthly income is \$2,300, he or she will be expected to contribute \$45 per month ($\$10 \times 3 = \$30 + \$15 = \45). Note that if the at-home spouse is entitled to receive an allowance from

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the nursing home spouse, the at-home spouse does not have an expected contribution.

There are many other planning alternatives that a married couple can pursue. Though some families do spend virtually all of their savings on nursing home care, Medicaid laws do not require it. There are numerous legal and ethical strategies which can be used, with the assistance of a knowledgeable elder law attorney, to protect family financial security. These strategies include: prepayment of real estate taxes; payment of certain types of debts at the proper time; conversion of countable assets to non-countable assets; payment for home improvements; purchase of a new home; transfer of the residence to the at-home spouse; transfer of the residence to a disabled child; transfer of financial assets to the at-home spouse; purchase of pre-paid funeral arrangements; purchase of a new car; creation of a life care agreement; creation of a life estate in real estate; creation of an irrevocable trust; purchase of a special type of commercial annuity; or by obtaining a reverse mortgage. Consider the following case studies.

CASE STUDY: ADVANCED MEDICAID PLANNING FOR MARRIED COUPLES

Ralph and Betty, both age 82, were high school sweethearts who lived in Annandale, Virginia their entire adult lives. They purchased their modest-sized home for \$22,000 and now the land alone is worth over \$450,000. Two weeks ago, their son and daughter threw Ralph and Betty a surprise 60th anniversary party. Yesterday, Ralph, who has Alzheimer's, wandered away from home. The police found him, hours later, sitting on a curb, talking incoherently, with a broken hip. They took him to Inova Fairfax Hospital. Now the family doctor has told Betty that she needs to place Ralph in a nursing home. The nursing home closest to their house charges \$220 per day — approximately \$6,600 per month. Ralph and Betty grew up during the Depression, and always tried

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to save something each month. Their financial assets, totaling \$140,000 (not including the real estate), are as follows:

Savings	\$65,000.00
CDs	\$35,000.00
Money Market	\$27,000.00
Checking	\$13,000.00
Total	\$140,000.00

Ralph gets a Social Security check for approximately \$1,000 each month; Betty's check is \$450. Her eyes fill with tears as she says, "Ralph's dad lived to age 95, and spent his last 7 years in a nursing home. If we have to pay \$6,600 to the nursing home every month, our entire life savings will be gone in a little over two years! And then I'll have to sell the home and will have nowhere to live." Betty's also afraid she won't be able to pay her monthly bills because a friend told her that the nursing home will be entitled to all of Ralph's Social Security check.

There is good news for Ralph and Betty. It's possible they Betty can get to keep everything — all of their assets and all of the income — and still arrange for the Virginia Medicaid program to pay for Ralph's nursing home costs.

To apply for Medicaid, Betty will have to go through her local Department of Social Services — DSS (or, in some jurisdictions, the Department of Family Services — DFS). If she does things strictly according to the way DSS tells her, Ralph will qualify for Medicaid once their joint assets have been reduced to \$72,000 (\$70,000 which she is allowed to keep as her CSRA — since their total assets are \$140,000 — and \$2,000 which Ralph is allowed to keep), and she will be entitled to a Minimum Monthly Maintenance Needs Allowance to pay her own monthly expenses. As we have already seen, the Minimum Monthly Maintenance Needs Allowance starts at a low of \$1,603.75 per month, so Betty would

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be entitled to all of Ralph's income. But the situation can actually be much better than this. Ralph and Betty can also transfer Ralph's half of the joint family assets to Betty, so that all \$140,000 of the family assets are in Betty's name. This must be done quickly, while Ralph is still having some "good days," unless Ralph previously has given a power of attorney to make this transfer. Then, instead of having to spend down Ralph's \$68,000, Betty can use Ralph's \$68,000 to purchase a special type of irrevocable commercial annuity — sometimes called a Medicaid Annuity — that pays income to Betty only — and will not be a countable resource in determining Medicaid eligibility for Ralph. This annuity can be set up to pay income to Betty for at little as 1 or 2 years, or for as long as Betty's life expectancy. Since Betty desperately needs additional income, her annuity will be set up to pay her income each month for the remainder of her life expectancy.

What about their marital home? If it stays titled jointly, Betty could predecease Ralph and the home would then pass to Ralph, at which time the house would have to be sold and the proceeds used to pay the nursing home until Ralph has spent all of those proceeds and can then reapply for Medicaid once his total assets have been depleted back down to \$2,000. To prevent this possibility, the home can and should be deeded to Betty, so if Betty were to die before Ralph, the house will pass to the children. The children can then sell the house and hold the proceeds from the sale for the use and benefit of their father, to supplement Ralph's care in the nursing home while still allowing Ralph to remain on Medicaid.

CASE STUDY: ADVANCED MEDICAID PLANNING FOR A SINGLE OR WIDOWED INDIVIDUAL

Five years later, after Ralph's death, Betty is becoming concerned that she may one day wind up in a nursing home like Ralph. She has her Social Security income, and Ralph's survivor benefit, and the income from the Medicaid Annuity, but her income is still not

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nearly enough to afford the monthly cost of nursing care. She's afraid that her home will have to be sold and all of the proceeds spent to pay for her nursing home care. Although this is what DSS will tell her, there are numerous other options. With proper planning, Betty can protect some or all of the value of her home while still continuing to live in the home as long as she is able to. One method of accomplishing this goal would be to transfer the remainder interest in her home to her children while keeping a life estate, and either keeping enough financial assets to pay for a nursing home stay during the period of ineligibility caused by the transfer of the remainder interest, or entering into a life care agreement. There are several other methods as well, and an experienced elder law attorney can walk the family through the different options and select which options make the most sense under the circumstances.