

NOTES

THE ASSET TRANSFER DILEMMA: DISPOSAL OF RESOURCES AND QUALIFICATION FOR MEDICAID ASSISTANCE

Congress recognized the need for assistance to the medically indigent and in 1965 established the Social Security Act as a cooperative federal and state program to provide basic medical services to medicaid applicants.¹ This program provides federal financial assistance to states that elect to reimburse specified costs for medical treatment of needy individuals.² Participating states must each develop a plan containing "reasonable standards for determining eligibility"³ and state plans must comply with the act and implementing regulations.⁴ States entering into the Medicaid program have a choice of whether to cover the "medically needy" group.⁵ In an effort to control spending, many states now impose transfer of assets rules to prevent the disposal of assets,⁶ and they may impose liens on transferred property which would otherwise be unrecoverable.⁷ At the same time, they may provide for the termination of medical benefits for persons who transfer assets to prevent the state from recovering the cost of the medical treatment from the estate of the recipient after his or her death.⁸

1. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 343. See S. REP. No. 404, 89th Cong., 1st Sess. 9, reprinted in [1965] U.S. CODE CONG. & AD. NEWS 1943, 1950.

2. See generally 42 U.S.C. § 1396 et seq. (1982).

3. 42 U.S.C. § 1396a(a)(17) (1982). See *infra* note 102 and accompanying text.

4. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1981).

5. 42 C.F.R. § 435.301(a) (1986) states:

A Medicaid agency may provide Medicaid to individuals specified in this subpart who—

(1) either—

(i) have income that meets the applicable standards in §§ 435.812 [reasonableness] through 435.814 [state plan requirements]; or

(ii) if their income is more than allowed under those standards, have incurred medical expenses at least equal to the difference between their income and the applicable income standard.

Id. (emphasis supplied).

6. See *infra* note 69 and accompanying text.

7. 42 U.S.C. § 1396p(a)(1) (1983).

8. 42 U.S.C. § 1396p(c) (1983). See *infra* note 45 and accompanying text.

On January 14, 1983, after being briefly hospitalized, ninety-four year old Raymond Tate transferred \$1,250 each, to his daughter and to his son-in-law.⁹ A short time later Mr. Tate was placed in a nursing home and Mrs. Downer, on behalf of her father, applied for medicaid benefits.¹⁰ Despite this transfer of assets, which could have been used to pay for his care, Mr. Tate was found eligible for medical assistance benefits.¹¹ Mr. Tate lives in Nevada.¹²

On August 18, 1983, Rosa Schultz transferred 27.32 acres of land to her daughters in allocations divided previously in her will.¹³ Six months later Mrs. Schultz's daughter applied for medical assistance benefits on her mother's behalf.¹⁴ The county social service board denied Mrs. Schultz's application for assistance based on the 1983 transfer of property and the fact that she had not presented evidence to rebut the presumption that the transfer was made for the purpose of qualifying for medical assistance.¹⁵ Mrs. Schultz lives in North Dakota.¹⁶

Mr. Tate and Mrs. Schultz are among a group of individuals who have sufficient income to support themselves and provide for their daily expenses but do not have the resources to pay for extended medical care.¹⁷ These medically indigent or medically needy individuals cannot be expected to have the ability to pay for the increasing cost of professional health care.

Even with the efforts of Congress to allow states to impose asset transfer rules there remain problems in interpretation of the statutory and regulatory language resulting in conflicting opinions illustrated by the *Schultz* and *Tate* cases.¹⁸ This is partly a result of the conditions which a state Medicaid plan must meet.¹⁹ These regulations have grown from the original 22 in 1965 to 46 in 1985.²⁰ "Almost all the regulations have subdivisions,

9. *Downer v. Nevada Human Services*, 705 P.2d 144, 145 (Nev. 1985).

10. *Id.* at 145. Mrs. Downer was forced to file for benefits because of growing medical bills and her otherwise "impoverished" state. *Id.*

11. *Id.* The state Medicaid agency's original determination was a denial of assistance to Mr. Tate based on a transfer of assets made ten days prior to filing an application for benefits. *Id.* The district court affirmed the state agency decision. *Id.* The main reason stated by the court was that the money transferred had been for past services to Mr. Tate for care by his daughter and most had already been spent on his medical care. *Id.*

12. *Id.*

13. *Schultz v. North Dakota Human Services*, [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 34,860. At the time of the transfer Mrs. Schultz's daughters had incurred expenses totalling \$49,875 for her care. *Id.*

14. *Id.*

15. *Id.* The agency also found that Mrs. Schultz had not rebutted the presumption that services rendered by a child to a parent are gratuitous. *Id.* The decision of the agency was affirmed by the Executive Director and the district court. *Id.*

16. *Id.*

17. *See supra* note 5 and accompanying text.

18. *See supra* notes 9-17 and accompanying text.

19. *See* 42 U.S.C. § 1396a(a) (1983).

20. *DeJesus v. Perales*, 770 F.2d 316, 321 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3301

exceptions and qualifications."²¹ With these new amendments to the regulations, the courts must now continue to adjudicate the difficult, and at times heart-breaking, attempts of families to transfer property and assets to loved ones and friends under complex and rigid statutes.²²

This Note focuses on the problems that have resulted since states began enacting transfer laws to recovery costs of an expanding Medicaid program. Section I will cover the original federal statute and subsequent efforts by Congress to expend the federal transfer law. Section II will concentrate on state treatment of asset transfer laws with Section III focusing on Iowa law and administrative regulations of the Medicaid program. Section IV discusses how the courts have dealt with the many issues brought by adverse parties and the conflicting decisions that have often occurred. Finally, after Section V presents some possible solutions to persistent problems in asset transfer laws, the conclusion presents a typical problem that could occur and a possible solution as representative of the asset transfer dilemma.

I. THE ASSET TRANSFER DILEMMA

There are eligibility requirements to qualify for Medicaid assistance, and only certain categories of individuals may qualify for the Medicaid program.²³ The Medicaid statute covers two types of beneficiaries. First, it covers low income individuals who come within certain federal cash assistance programs (Supplemental Security Income for the aged, blind, and disabled (SSI), and Aid to Families with Dependent Children (AFDC)).²⁴ These programs pay only a subsidy to cover living expenses, since those who qualify have insufficient income and resources to live on.²⁵ This group of people qualify automatically for Medicaid assistance and are referred to as "categorically needy."²⁶ Second, at its option, a state may provide Medicaid bene-

(1986). The Supreme Court has characterized the Social Security Act as one of the most intricate ever drafted by Congress and that the Act is "almost unintelligible to the uninitiated." (quoting *Freedman v. Berger*, 547 F.2d 724, 727 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977)).

21. *Freedman v. Berger*, 547 F.2d 724, 727 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977).

22. *See DeJesus v. Perales*, 770 F.2d 316, 321 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3301 (1986). "In endeavoring to penetrate this maze [of statutes and regulations], courts must guard against the temptation of allowing a literal reading of a relatively recent amendment to set at naught the experience of administrators acquired over a score of years." *Id.*

23. 42 U.S.C. § 1396a(a) (1983).

24. 42 U.S.C. § 1396a(a)(10)(A) (1983).

25. *Id.*

26. 42 C.F.R. § 435.4 (1982) defines the categorically needy as "aged, blind, or disabled individuals or families and children (1) who are otherwise eligible for Medicaid and who meet the financial eligibility requirements for AFDC, SSI or an optional state supplement or are considered under section 1619 of the Act to be SSI recipients . . ." Originally, the states ran the Medicaid categorically needy programs and coverage was provided for persons qualifying under four federal cash assistance programs: Old Age Assistance; Aid to the Permanently and

fits to "medically needy" persons who meet the categorical requirements for the aged, blind, and disabled persons, or families with dependent children; but whose income exceeds the limits that would qualify them for these programs.²⁷ A state participating in the Medicaid program is under no obligation to provide coverage for the medically needy.²⁸

Prior to an amendment to the SSI program in 1980,²⁹ applicants were expressly permitted to transfer resources that otherwise would have disqualified them from receiving any benefits.³⁰ A number of decisions confirmed that states were not permitted to deny Medicaid eligibility to an applicant who had divested himself of resources for less than fair market value.³¹ The conflict between the federal rule and state rules, which were promulgated to prevent applicants from divesting themselves of all resources in order to qualify for assistance,³² gave rise to litigation which prompted Congress to make a legislative attempt to resolve this problem.³³

In December of 1980, Senators Boren of Oklahoma, and Long of Louisiana, added an amendment to the Parental Kidnapping Prevention Act of 1980.³⁴ The Boren-Long amendment prohibited the transfer of assets solely to qualify for benefits under the SSI statutes.³⁵ The new requirement allowed states to specify a similar procedure for denying benefits.³⁶ This pro-

Totally Disabled; and Aid to Families with Dependent Children. Pub. L. No. 89-97, 79 Stat. 286 (1965). In 1972 the first three were consolidated into the Supplemental Security Income Program (SSI), with the federal government assuming responsibility for funding payments and setting standards of need. Pub. L. No. 92-603, 86 Stat. 1465 (1972).

27. 42 C.F.R. § 435.4 (1985) defines the medically needy as "aged, blind, or disabled individuals or families and children who are otherwise eligible for Medicaid, who are not categorically needy, and whose income are within limits set under the Medicaid state plan . . ." See also 42 U.S.C. § 1396d(a) (1983).

28. See *Schweiker v. Hogan*, 457 U.S. 569, 591-92 (1982).

29. Social Security Amendments of 1980, Pub. L. No. 96-611, §§ 5(a)-(c), 95 Stat. 3567.

30. 42 U.S.C. § 1382b(b) (1983) provides:

The Secretary shall prescribe the period or periods of time within which, and the manner in which, various kinds of property must be disposed of in order not to be included in determining an individual's eligibility for benefits. Any portion of the individual's benefits paid for any such period shall be conditioned upon such disposal; and any benefits so paid shall (at the time of the disposal) be considered overpayments to the extent they would not have been paid had the disposal occurred at the beginning of the period for which such benefits were paid.

Id.

31. See *e.g.*, *Blum v. Caldwell*, 446 U.S. 1311 (1980); *Fabula v. Buck*, 598 F.2d 869 (2d Cir. 1979); *Dokos v. Miller*, 517 F. Supp. 1039 (N.D. Ill. 1981); *Robinson v. Pratt*, 497 F. Supp. 830 (D. Mass. 1980); *Udina v. Walsh*, 440 F. Supp. 1151 (D. Mo. 1977); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976).

32. See *infra* notes 68-69 and accompanying text.

33. Social Security Amendments of 1980, Pub. L. No. 96-611, § 5(a), 94 Stat. 3567 (codified as amended at 42 U.S.C. § 1396a(j) (1981)).

34. *Id.*

35. 42 U.S.C. § 1396a(j)(1) (1981). See *infra* note 46 and accompanying text.

36. *Id.*

cedure cannot be more restrictive than the procedure specified when an applicant or recipient has disposed of resources for less than fair market value.³⁷ A critical aspect of the law, with which the states were most concerned, was left out.³⁸ The new SSI rule was expressly not applicable to assets which were exempt when transferred,³⁹ and this included the family home.⁴⁰ Because of this exemption, courts were prohibiting states from applying their transfer rules to assets that were exempt when transferred.⁴¹

In an effort to resolve this problem, the Reagan administration proposed new regulations,⁴² and one year after passage of the Boren-Long amendment, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).⁴³ With this legislation, the law was now expanded to establish, in detail, the right of states to impose liens, to recover for the cost of care, and to punish those who attempt to avoid these actions by disposing of their assets.⁴⁴ These three sections were passed and codified as part of an effort to ensure that property is retained by the recipient until the state has an opportunity to recover as much of the medical costs incurred as possible.⁴⁵ The transfer of assets provision contained in TEFRA was essentially the same as the Boren-Long amendment except that it included a key exception which prevented the transfer of homes.⁴⁶ The exemption written

37. *Id.*

38. Generally in the category of the medically needy the greatest asset held by the individual is his or her home, which was not included in the legislation. See *infra* note 40.

39. 42 U.S.C. § 1382b(c)(1) (1981) states:

In determining the resources of an individual (and his spouse, if any) there shall be included . . . any resource (or interest therein) owned by such individual or eligible spouse within the preceding 24 months if such individual or eligible spouse gave away or sold such resource or interest at less than fair market value of such resource or interest for the purpose of establishing eligibility for benefits or assistance under this chapter.

Id.

40. 42 U.S.C. § 1382b(a)(1) (1981). "In determining the resources of an individual (and his eligible spouse, if any) there shall be excluded — (1) the house (including the land appertaining thereto) . . ." *Id.*

41. See *e.g.*, *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982); *Gonzagowski v. Percy*, 4 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 31, 466 (W.D. Wis. 1981).

42. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 132(d), 96 Stat. 324, 373 (1982).

43. *Id.*

44. 42 U.S.C. § 1396p (1983). The three sections of the statute are: (a) The imposition of a lien against property of an individual on account of medical assistance rendered to him under state plan; (b) Adjustment or recovery of medical assistance correctly paid under state plan; (c) Denial of medical assistance; period of ineligibility; exceptions. *Id.*

45. *Id.* See 47 Fed. Reg. 43644 (1982). See *infra* note 52 and accompanying text.

46. 42 U.S.C. § 1396p(c)(1) (1982).

Notwithstanding any other provision of this subchapter, an individual who would otherwise be eligible for medical assistance under the state plan approved under this subchapter may be denied such assistance if such individual would not be eligible for such medical assistance but for the fact that he disposed of resources for less than

into the TEFRA legislation was specifically directed at discouraging the transfer of homes, therefore allowing the State to preserve the home for imposition of a lien and later recovery.⁴⁷ TEFRA repealed section 5(b) of the Boren-Long amendment⁴⁸ and replaced it with a more detailed transfer of assets rule.⁴⁹

The legislative history of the TEFRA provision shows that the Senate Finance Committee was aware that under the existing law if a Medicaid recipient owned his own home it would not necessarily render the applicant ineligible for Medicaid.⁵⁰ The Senate committee further noted that under the current federal transfer of assets law the applicant's home was listed as an excludable resource.⁵¹ As proposed by the committee, the amendment "authorized states to deny Medicaid eligibility temporarily, with certain exceptions, to patients in medical institutions who disposed of their home for less than fair market value at any time during, or after, the 24 month period immediately prior to admission to a skilled nursing facility."⁵² The intention of the amendment was "to assure that all of the resources available to an institutionalized individual, including equity in a home, which are not needed for support of a spouse or dependent children [would] be used to defray the cost of supporting the individual in the institution."⁵³ Although similar to the proposed Senate amendment, the House Committee provision applied to any transfer made for less than fair market value which occurred

fair market value. If the state plan provides for the denial of such assistance by reason of such disposal of resources, the state plan shall specify a procedure for implementing such a denial which . . . is not more restrictive than the procedure specified in section 1382(b) of this title.

Id.

47. S. REP. No. 494, 97th Cong., 2d Sess. 38, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 781, 814; see also 47 Fed. Reg. 43,644 (1982).

48. 42 U.S.C. § 1396a(j) (1981). See *supra* note 35 and accompanying text.

49. 42 U.S.C. § 1396p(c) (1983).

50. S. REP. No. 494, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 781, 814.

51. *Id.* The status of the law was such that it was possible for a person "who anticipated needing nursing home care to give his home to a family member without fear of losing or being denied Medicaid eligibility." *Id.* The final TEFRA legislation created a new provision for the imposition of liens on homes of Medicaid recipients prior to his death, in certain circumstances. See 42 U.S.C. § 1396p(a) (1983). This note will not address the lien portion of the statute.

52. *Lewis v. Hegstrom*, 767 F.2d 1371, 1377 (9th Cir. 1985). Under the proposed Senate Finance Committee amendment states could deny eligibility "for medical assistance" to all such individuals: for a period bearing a reasonable relationship to the uncompensated value of the home or; "for a period of at least 24 months, and (at state option) all persons disposing of a home . . . shall be ineligible for a longer period which bears a reasonable relationship to the uncompensated value of the home". 128 CONG. REC. S. 8586, (July 19, 1982).

53. S. REP. No. 494, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 781, 814. The Committee further explained the amendment "would facilitate states' efforts to recover medical assistance costs from [recipients' homes or income producing property] and to assure that all resources available to an individual will be used to defray the public costs of supporting that individual in a long-term medical institution." *Id.*

"within 24 months prior to application for Medicaid benefits."⁵⁴ The final conference agreement allowed for a 24 month ineligibility period; and, in addition, allowed states to provide for a shorter or longer period of disqualification based on the uncompensated value of the home in relation to the cost of 24 months of Medicaid benefits.⁵⁵ "The amendment, proposed and adopted as the federal transfer of assets rule contributed to TEFRA's central purpose by requiring greater patient participation in the overall cost of medical care, and thereby reducing government outlays."⁵⁶

Effective September 3, 1982, TEFRA included the home as a resource for purposes of determining Medicaid eligibility, under specific circumstances.⁵⁷ The rule now allows states to deny assistance to persons who dispose of resources for less than fair market value and who would otherwise be ineligible for assistance because their resources exceed the allowable limits.⁵⁸ Further, states were expressly authorized to establish a period of ineligibility, when an applicant transfers his home for less than fair market value within two years of applying for benefits.⁵⁹ Unlike the Boren-Long amendment, the TEFRA rule allows states to apply an all-purpose waiver when it is determined that undue hardship would result from a denial or revocation of benefits.⁶⁰ There have been no details or regulations forthcoming from HHS as to the circumstances under which a state may wish to impose the waiver provision.

54. *Lewis v. Hegstrom*, 767 F.2d 1371, 1377 (9th Cir. 1985). The House Committee proposal also "allows States to deny Medicaid coverage for a period computed in a manner such that the cost of the services that would otherwise be provided to the individual during this period bears a reasonable relationship to the amount of the uncompensated value of the home." H. CONF. REP. NO. 760, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 1190, 1218.

55. H. CONF. REP. NO. 760, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 1190, 1218. For example, if a \$40,000 home is given as a gift to a family member by the Medicaid recipient and his institutionalized care cost \$50,000 over a 24 month period, the ineligibility could be extended for an additional period of time. The final amendment also included the Senate committee's proposal to allow a waiver if undue hardship from denial of benefits would result.

56. *Lewis v. Hegstrom*, 767 F.2d 1371, 1378 (9th Cir. 1985).

57. 42 U.S.C. § 1396p(c)(2)(B)(i) (1983).

In the case of any individual who is an inpatient in a skilled nursing facility . . . if such person is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and, who at any time during or after the 24-month period immediately prior to application for medical assistance under the State plan, disposed of a home for less than fair market value, the State plan . . . may provide for a period of ineligibility for medical assistance

Id.

58. 42 U.S.C. § 1396p(c)(1) (1983), see *supra* note 49 and accompanying text.

59. 42 U.S.C. § 1396p(c)(2)(B)(i) (1983) see *supra* note 57 and accompanying text.

60. 42 U.S.C. § 1396p(c)(1) (1983), see 42 U.S.C. § 1396p(c)(2)(B)(iii) (1983) which states that "an individual shall not be ineligible for medical assistance if . . . the State determines that denial of eligibility would work an undue hardship."

The TEFRA statute creates an exception to the general rule that states are required not to use more restrictive rules than are used in the SSI program.⁶¹ This is primarily because SSI regulations allow transfers of exempt property.⁶² This exception has generally been directed at institutionalized individuals.⁶³

II. STATE RULES GOVERNING THE TRANSFER OF ASSETS

The requirement that a person use his house and other assets to pay for health care would defeat the understandable desire to give those assets to family members. On the other hand, the state's concern for the sky-rocketing costs of hospital and long-term health care services, which it provides for an increasing number of individuals, must be recognized. It is understandable that states are concerned about preventing fraud and abuse in the system.

Under the statute, states are not required to cover those categorized as medically needy in their Medicaid program.⁶⁴ Currently fifteen states do not allow such assistance,⁶⁵ while another fifteen states have chosen to enforce standards, for eligibility of all recipients under the Medicaid program, that are more stringent than requirements under the SSI program.⁶⁶ Federal regulations allow states to provide Medicaid assistance to various groups considered medically needy; ranging from pregnant women and children under age 21 to the elderly, blind, and disabled.⁶⁷ This allows "medically needy"

61. See 42 U.S.C. § 1396a(a)(17) (1985), see also *infra* notes 121-125 and accompanying text.

62. 20 C.F.R. § 416.1246 (1985).

An individual (or eligible spouse) who gives away or sells a *nonexcluded* resource for less than fair market value for the purpose of establishing SSI or Medicaid eligibility will be charged with the difference between the fair market value of the resource and the amount of compensation received. The difference is referred to as uncompensated value and is counted toward the resource limit (\$1,500 for an eligible individual, \$2,250 for a couple) for a period of 24 months from the date of transfer.

Id. (emphasis added).

63. See *supra* note 57 and accompanying text.

64. 42 U.S.C. § 1396a(a)(10)(C)(i) (1982).

65. States that have decided to exercise their option not to cover the medically needy include: Alabama, [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 15,550; Alaska, *Id.* at ¶ 15,552; Colorado, *Id.* ¶ at 15,564; Delaware, *Id.* at ¶ 15,568; Florida, *Id.* at ¶ 15,572; Idaho, *Id.* at ¶ 15,580; Indiana, *Id.* at ¶ 15,585; Mississippi, *Id.* at ¶ 15,604; Missouri, *Id.* at ¶ 15,606; Nevada, *Id.* at ¶ 15,612; New Jersey, *Id.* at ¶ 15,616; New Mexico, *Id.* at ¶ 15,618; Ohio, *Id.* at ¶ 15,626; South Dakota, *Id.* at ¶ 15,638; Wyoming, *Id.* at ¶ 15,660.

66. The states which have opted for the more restrictive 209(b) version of the Medicaid program include the following: Connecticut, [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 15,566; Hawaii, *Id.* at ¶ 15,578; Illinois, *Id.* at ¶ 15,582; Indiana, *Id.* at ¶ 15,584; Minnesota, *Id.* at ¶ 15,602; Missouri, *Id.* at ¶ 15,606; Nebraska, *Id.* at ¶ 15,610; New Hampshire, *Id.* at ¶ 15,614; New York, *Id.* at ¶ 15,620; North Carolina, *Id.* at ¶ 16,622; North Dakota, *Id.* at ¶ 15,624; Ohio, *Id.* at ¶ 15,626; Oklahoma, *Id.* at ¶ 15,628; Utah, *Id.* at ¶ 15,646; Virginia, *Id.* at ¶ 15,652.

67. See 42 C.F.R. § 435.300 *et seq.* (optional coverage of the medically needy), see also 42

coverage to extend to people with incomes above the guidelines required by public assistance programs linked to Medicaid eligibility. Four states have elected to cover the "medically needy," and have further limited that coverage to pregnant women, and dependent children under the age of 21.⁶⁸ Since the introduction of the federal transfer of assets authorization, all but four states, (and the District of Columbia), now have promulgated rules which prohibit the transfer of resources to qualify for Medicaid benefits.⁶⁹

III. IOWA ELIGIBILITY AND THE TRANSFER OF ASSETS

The Medicaid program in Iowa is the state's largest human services program and provides assistance to over 160,000 low-income persons.⁷⁰ During fiscal year 1983, the cost of the Medicaid program in Iowa was funded through state and federal contributions totalling 304.7 million dollars.⁷¹ As of October 1, 1985, the federal government paid 58.9% of the cost, with the balance paid by the state.⁷² Despite the program's staggering costs, Iowa is not able to provide health care benefits to all those who otherwise cannot afford such care.

Nearly half the total annual costs of the program are exhausted in providing nursing home care to the relatively small percentage of the population that require such care. The largest single category of those eligible for Medicaid are children who are residing in households receiving payments from the AFDC program.⁷³

Eligibility for the Iowa Medicaid program includes those who are categorically needy, that is, eligible for SSI or AFDC benefits.⁷⁴ In addition to

C.F.R. § 435.800 *et seq.* (financial requirements for the medically needy).

68. States which have limited their medically needy coverage include: Georgia, [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 15,574; South Carolina, *id.* at ¶ 15,638; Tennessee, *id.* at ¶ 15,646. Effective April 1, 1986, Iowa Medicaid eligibility will be expanded to include the "SSI" related group under the medically needy program. House File 570, 71st General Assembly, 1985 Session. With this expansion of the medically needy program, elderly, blind, and disabled persons ineligible for SSI because of excess income may be eligible for coverage without being institutionalized.
Id.

69. States which, at present, still do not have a transfer of assets statute include: Arkansas, [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 15,552; Arizona, *id.* at ¶ 15,564 (although the Arizona plan is unique, instituted as a trial program with special permission from HHS, it was the last of all states to implement a Medicaid program in 1982); Delaware, *id.* at ¶ 15,568; Nevada, *id.* at ¶ 15,612; and the District of Columbia, *id.* at ¶ 15,570.

70. Monthly Report of Services Provided, Iowa Dept. of Human Services (May 1985).

71. *Id.*

72. The amount of reimbursement varies widely among the states. In September of 1985 the lowest contribution was 50% in 17 states, while the greatest support went to Mississippi at nearly 78% reimbursement from the federal government. See 47 Fed. Reg. 56,401 (1982).

73. Volunteer Lawyer Project, Practice Manual, 8-245 (1985).

74. IOWA ADMIN. CODE r. 441-75.1(1) (1987) provides that "medical assistance shall be available to all recipients of aid to dependent children." IOWA ADMIN. CODE r. 441-75.1(4) (1987)

these major categories there are several other groups for which Iowa provides coverage.⁷⁵ There still remains, however, a number of groups of low income individuals that are not included in any of the above programs.⁷⁶ In 1984 the Iowa legislature enacted an expansion of Medicaid coverage through the medically needy program.⁷⁷ Further, in 1985, the Iowa legislature expanded the medically needy program so that other groups of people could be covered under the new legislation.⁷⁸ The original "medically needy" program allowed only two categories of individuals to qualify for assistance: pregnant women, and children under age 21.⁷⁹ The 1985 legislation expanded coverage of the medically needy program to persons who are elderly, blind, or disabled.⁸⁰

Iowa has instituted a transfer of assets regulation to prohibit recipients from disposing of non-exempt resources for less than fair market value in an attempt to qualify for Medicaid benefits.⁸¹ The Iowa Department of Human Services has promulgated administrative rules which govern the agency's conduct when there has been an alleged instance of improper disposal of resources.⁸² These rules set a schedule for determining the period of disqualification for benefits when a person has disposed of resources for less than fair market value.⁸³ The periods of ineligibility range from 24 months, when the transfer is for uncompensated value⁸⁴ of \$21,000 or less, to 72 months,

provides for coverage of "beneficiaries of Title XVI of the Social Security Act (Supplemental security income for the aged, blind and disabled)"

75. IOWA ADMIN. CODE r. 441-75.1(4)-(21) (1987).

76. This group includes, single healthy individuals, childless couples, and the parents in a family that might otherwise qualify for medically needy coverage.

77. Senate File 2351, 70th Iowa General Assembly, 1984 Session, IOWA ADMIN. CODE r. 441-86.8 (1987) establishing coverage groups.

78. House File 570, 71st Iowa General Assembly, 1985 Session. *See supra* note 49 and accompanying text.

79. Senate File 2351, 70th Iowa General Assembly, 1984 Session.

80. *See* IOWA ADMIN. CODE r. 441-86.8 (1987).

81. IOWA CODE § 249A.3(6) (1985).

In determining the eligibility of an individual for medical assistance under this chapter, the department shall include, as resources still available to the individual, those nonexempt resources . . . owned by the individual within the preceding twenty-four months, which the individual gave away or sold at less than fair market value for the purpose of establishing eligibility for medical assistance under this chapter.

Id.

82. IOWA ADMIN. CODE r. 441-75.6 (1987) provides that

[i]n determining eligibility for medical assistance of individuals . . . resources which were not exempt at the time of the transfer which the individual gave away or sold at less than fair market value for the purpose of establishing eligibility for medical assistance shall be counted as resources still available to the individual. . . .

83. *Id.* "Fair Market Value" is defined as the price that the item can reasonably be expected to sell for on the open market in the particular geographical area involved, and may be established by independent appraisal. IOWA ADMIN. CODE r. 441-75.6(3)(a) (1987).

84. *Id.* "Uncompensated Value" is defined as the fair market value of the resource minus the amount of compensation received by the individual in exchange for the resource. IOWA AD-

for uncompensated value of \$50,000 or more.⁸⁵ Iowa also has enacted a provision which allows for the prosecution of persons who transfer or receive property at less than fair consideration for the purpose of obtaining assistance as a fraudulent practice, punishable by fines or imprisonment.⁸⁶ The statute⁸⁷ and regulation⁸⁸ both allow for a presumption, that disposal of assets is for the purpose of qualifying for benefits, which may be rebutted by the applicant.⁸⁹ Although there is no Iowa case law on the transfer of resources problem, someone who disposes of resources within 24 months of applying for assistance and is not ill at the time of application, with no foreseeable reason for becoming institutionalized, can avoid the provisions for disqualification under the regulation.⁹⁰

MIN. CODE r. 441-75.6(3) (1987).

85. IOWA ADMIN. CODE r. 75.6(1) (1987). Once the period of ineligibility is established, the applicant is ineligible for the entire period which has been established, but if the resource has been given back or compensation rendered the period of ineligibility will be reexamined. Iowa Dept. of Human Services, Employees Manual, V-B-68 (1985). If the resource that has been transferred or divested is returned, the disqualification period shall be changed; if the resource is returned entirely, the disqualification period is expunged; and if the resource is partly returned, the period of disqualification is determined by the difference in the value of the property transferred or divested and the value of the property returned - this difference is then applied to the schedule for determination of the period of ineligibility. *Id.* at V-B-72.

86. IOWA CODE § 714.8(12) (1985) states a person who [k]nowingly transfers or assigns a legal or equitable interest in property . . . for less than fair consideration with the intent to obtain public assistance . . . or accepts a transfer of or an assignment of a legal or equitable interest in property . . . with the intent of enabling the party transferring the property to obtain public assistance . . . the maximum sentence shall be the penalty established for a serious misdemeanor

87. IOWA CODE § 249A (6)(a) (1985) states: "A transaction described in this subsection is presumed to have been for the purpose of establishing eligibility for medical assistance under this chapter unless the individual furnishes convincing evidence to establish that the transaction was exclusively for some other purpose."

88. IOWA ADMIN. CODE r. 441-75.6(2) (1987).

89. IOWA ADMIN. CODE r. 441-75.6(2)(a) (1987). Convincing evidence to establish that the transfer of the resource was exclusively for a purpose other than establishing eligibility may include documents or letters made at the time of the transfer. Iowa Dept. of Human Services, Employees Manual, V-B-69 (1985).

Factors may include that the transfer was exclusively for some other purpose than attaining eligibility include the following occurrences after the transfer of the resource:

1. Traumatic onset of disability (i.e. traffic accident).
2. Diagnosis of previously undetected disabling condition.
3. Unexpected loss of other resources which would have precluded eligibility.
4. Unexpected loss of income which would have precluded eligibility.

Id.

90. For a complete discussion of Iowa Medicaid and Medicare programs *see*, Volunteer Lawyers Project, Practice Manual (1985).

IV. JUDICIAL TREATMENT OF ASSET TRANSFER STATUTES

When deciding the validity of a state asset transfer statute or regulation, courts have faced a number of claims and various arguments concerning due process,⁹¹ equal protection,⁹² the precise language of the state statute or regulation at issue,⁹³ whether any presumptions raised are rebuttable or irrebuttable,⁹⁴ and the language of the statute or regulation contained within the Medicaid program.⁹⁵ As a result of these complex and interrelated factors, the courts have reached seemingly inconsistent results in determining the validity of transfer statutes.⁹⁶ In 1981 the issue came before the Supreme Court in *Beltran v. Myers*.⁹⁷ In *Beltran*, the Court, after granting certiorari, remanded the case for reconsideration in light of the substantial change in federal transfer of assets law.⁹⁸ The *Beltran* Court resolved the question of the validity of state transfer laws by interpreting the new federal law to allow such statutes to be enacted by states in the future.⁹⁹ The Court particularly noted that the California statute included the claimant's residence as an asset which may not be given away without a corresponding loss in Medicaid coverage. The Court also stated that under the Boren-Long amendment, "arguably such an asset must be excluded."¹⁰⁰ Concluding a series of appeals and remands, the Ninth Circuit held that the California Medicaid statute disputed in the *Beltran* case, which was in effect prior to the federal amendments, was invalid¹⁰¹ as in conflict with the federal statutes and regulations requiring equal treatment¹⁰² of the medically

91. See *Dawson v. Myers*, 622 F.2d 1304 (9th Cir. 1980); *Fabula v. Solomon*, 463 F. Supp. 830 (D. Md. 1978).

92. See *Dawson v. Myers*, 622 F.2d 1304 (9th Cir. 1980); *Fabula v. Solomon*, 463 F. Supp. 830 (D. Md. 1978); *Owens v. Roberts*, 377 F. Supp. 45 (D. Fla. 1974).

93. See *Caldwell v. Blum*, 621 F.2d 491 (2d Cir. 1980), cert. denied 452 U.S. 909 (1981); *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979); *Dokos v. Miller*, 517 F. Supp. 1039 (N.D. Ill. 1981).

94. See *Lavine v. Milne*, 424 U.S. 577, (1976); *Dawson v. Myers*, 622 F.2d 1304 (9th Cir. 1980); *Fabula v. Solomon*, 463 F. Supp. 830 (D. Md. 1978); *Owens v. Roberts*, 377 F. Supp. 45 (D. Fla. 1974).

95. See *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981); *Lewis v. Hegstrom*, 767 F.2d 1371 (9th Cir. 1985); *Randall v. Luckhard*, 709 F.2d 257 (4th Cir. 1983); *Synsael v. Ling*, 691 F.2d 1213 (7th Cir. 1982).

96. See *supra* notes 9-15 and accompanying text.

97. *Beltran v. Myers*, 451 U.S. 625, 627 (1981).

98. *Id.* The Court stated that "the petitioner should have the opportunity to argue the validity of California law under the new federal law - an issue that was not addressed by the parties in the Court." *Id.* at 628.

99. *Id.* at 627. The Court said it appeared that in the future states will be permitted to impose transfer of assets restrictions. *Id.*

100. *Id.* at 628. The Court further explained that the amendment to § 1613 of the Social Security Act provides for exclusion from consideration of a claimant's home, household effects, and certain other items. *Id.* See 42 U.S.C. § 1382b(a) (1981).

101. *Beltran v. Myers*, 701 F.2d 91, 94 (9th Cir. 1983).

102. "A State plan must include reasonable standards (which shall be comparable for all

needy¹⁰³ and the categorically needy.¹⁰⁴ The Court adopted the reasoning of the Fourth and Second Circuits and held that by applying the statute only to the medically needy, California conflicted with the regulation requiring that the eligibility of the medically needy be determined on a basis comparable to that used to determine the eligibility of the categorically needy.¹⁰⁵

Prior to enactment of the Boren-Long amendment, there was a conflict among the courts over whether the transfer of assets and subsequent disqualification was invalid as a denial of due process. A California statute¹⁰⁶ was upheld when it created a rebuttable presumption that denied benefits to the medically needy because a transfer was made for less than full consideration for the purpose of attaining benefits.¹⁰⁷ The Ninth Circuit Court of Appeals found that the statute and regulation did not create an irrebuttable presumption since the regulation¹⁰⁸ expressly stated that the presumption may be overcome by evidence showing the applicant had adequate resources for support and medical care at the time of the transfer.¹⁰⁹ The court concluded that there was no due process violation even though applicants could not rebut the presumption by relying on their subjective intent when the transfer occurred.¹¹⁰

A Maryland transfer of assets regulation has also been upheld against a due process challenge.¹¹¹ The Maryland court rejected the argument that an

groups . . .) for determining eligibility for and the extent of medical assistance under the plan" 42 U.S.C. § 1396a(a) (17) (1980).

103. States which choose to cover the medically needy in the Medicaid plan must provide for "making medical assistance available to all individuals who would, except for income and resources, be eligible for . . . supplemental security income benefits and who have sufficient . . . income and resources to meet the costs of necessary medical and remedial care and services." 42 U.S.C. § 1396a(a)(10)(c)(i) (1983).

104. The disputed regulation provided that

[t]he agency must not use requirements for determining eligibility for optional coverage groups that are -

1. For families and children, more restrictive than those used under the State's AFDC plan; and
2. For aged, blind, and disabled individuals, more restrictive than those under SSI except for individuals receiving an optional State supplement

42 C.F.R. § 435.401(c) (1985).

105. See, e.g., *Caldwell v. Blum*, 621 F.2d 491 (2d cir. 1980), *cert. denied*, 452 U.S. 909 (1981); *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979); *accord*, *Dokos v. Miller*, 517 F. Supp. 1039 (N.D. Ill. 1981); *Robinson v. Pratt*, 497 F. Supp. 116 (D. Mass. 1980); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976) *aff'd*, 434 U.S. 898 (1977).

106. CAL. WELF. & INST. CODE ANN. § 14015 (West 1980).

107. *Dawson v. Myers*, 622 F.2d 1304 (9th Cir. 1980).

108. CAL. ADMIN. CODE tit. 22, § 50409(b)(2) (19___). This type of determination can be based on such things as the applicant's age, health, life expectancy, and ability to understand the extent of his or her resources. *Id.*

109. *Dawson v. Myers*, 622 F.2d 1304, 1314 (9th Cir. 1980).

110. *Id.* The court excluded two likely arguments for the type of transfer in this case: (1) the applicant was unaware of Medicaid benefits; and (2) a desire to avoid probate. *Id.*

111. *Fabula v. Solomon*, 463 F. Supp. 830 (D. Md. 1978).

irrebuttable presumption was created by the regulation and noted that a denial of benefits for the medically needy occurred only if the purpose of the transfer was to attain eligibility.¹¹² Because the state created an administrative procedure to allow applicants and recipients to appeal adverse decisions by social services, the presumption could be rebutted.¹¹³ The court also upheld the Maryland statute against an equal protection challenge.¹¹⁴ The Maryland medical assistance regulation created two classes: the medically needy, who could not transfer assets for the purpose of attaining eligibility, and the categorically needy, who were not covered under the terms of the regulation against transferring assets to qualify.¹¹⁵ The court stated that there is "no reason grounded in the equal protection clause that required Maryland to apply identical standards to two distinct medical assistance programs within the larger state program as a whole."¹¹⁶ Finally, on appeal, the Maryland statute was struck down as in conflict with federal statutes because the regulation governing the transfer of assets contained an additional requirement applicable to the medically needy which was not applicable to the categorically needy.¹¹⁷ The court noted that SSI provisions which governed the eligibility of medically needy persons specifically allowed transfers of assets in order to qualify for assistance.¹¹⁸ To prohibit transfers by these individuals would operate as an additional eligibility requirement in violation of federal law.¹¹⁹ Further, the court rejected the state's argument that the transfer regulation was simply a collateral restriction to eliminate fraudulent practices, applicable only where a transfer was made with the intent of attaining eligibility.¹²⁰ Both the diversity of interpretation in

112. *Id.* at 838.

113. *Id.*

114. *Id.* This case was later reversed on other grounds, *see Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979).

115. *Fabula v. Solomon*, 463 F. Supp. 830, 838 (D. Md. 1978). The court noted that this regulatory classification could only deny equal protection if no reasonable basis could be found. *Id.* *See Dandridge v. Williams*, 397 U.S. 471, 483-87 (1970).

116. *Fabula v. Solomon*, 463 F. Supp. 830, 838 (D. Md. 1978). The court found the reason grounded in the basis for the different classifications was a reasonable one, since the medically needy by definition had greater incomes than the categorically needy and the state had a strong interest in assuring that medical assistance benefits were distributed only to those who were truly in need. *Id.*

117. *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979).

118. 42 U.S.C. § 1382b(b) (1983). *See supra* note 30 and accompanying text.

119. *Fabula v. Buck*, 598 F.2d 869, 873 (4th Cir. 1979). The additional requirement provision was in violation of 42 U.S.C. § 1396a(a)(10)(C)(i) (1983). *Id.* *Accord Rinefield v. Blum*, 66 A.D.2d 351, 412 N.Y.S.2d 526 (N.Y. App. Div. 1979); *Lerner v. Division of Family Services*, 70 Wis. 2d 670, 235 N.W.2d 478 (1975); *but see Udina v. Walsh*, 440 F. Supp. 1151 (E.D. Mo. 1977); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd*, 434 U.S. 898 (1977); *Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974).

120. *Fabula v. Buck*, 598 F.2d 869, 873 (4th Cir. 1979). The court explained that they sympathized with the state's desire to restrict its medical assistance benefits as to those most in need but they were not willing to allow the state to preserve fiscal integrity in its welfare pro-

statutory construction, and the concern for state fiscal policy, indicate that courts are forced to decide asset transfer cases based on equity and fairness rather than strict application.¹²¹ The courts have attempted to balance the statutory intent with the needs of deserving applicants against whom asset transfer rules have been applied unfairly.

When Congress expanded Medicaid eligibility in 1972, it gave the states an option to limit Medicaid assistance to people who would have been eligible under the states' plan that was in effect on January 1 of that year.¹²² States taking this option (section 209(b) states) may offer more restrictive coverage than the SSI states.¹²³ The Seventh Circuit Court of Appeals held in *Synesael v. Ling*, that an Indiana transfer of assets regulation, which limited benefits if the disposal of resources occurred within five years of application, did not violate federal law.¹²⁴ The *Synesael* court relied on the legislative history of the federal transfer of assets regulation to conclude that Congress had not intended to restrict "209(b)" states in the same manner as the SSI states, and that the Indiana statute was not contradictory to federal regulations.¹²⁵ The court pointed out that of the three bills that preceded the Boren-Long amendment, and which failed passage, "only one would have placed limitations on the 209(b) states."¹²⁶ Like the amendment that finally passed, the others were silent on the question of limitation, and examination of their legislative history shows a clear intent not to restrict

gram by restricting the class of individuals made eligible by federal statute. *Id.* The court also questioned how transfers by the medically needy could be considered fraudulent when the same transfer would be permitted by an SSI applicant. *Id.* at 874.

121. See *Buckner v. Maher*, 424 F. Supp. 366, 373 (D. Conn. 1976), *aff'd*, 434 U.S. 898 (1977); cf. *Lerner v. Department of Human and Social Services*, 70 Wis. 2d 670, 680, 235 N.W.2d 478, 483 (1975).

122. 42 U.S.C. § 1396a(f) (1982) provides: "no State . . . shall be required to provide medical assistance to any aged, blind or disabled individual . . . for any month unless such state . . . had its plan for medical assistance approved . . . and in effect on January 1, 1972 . . ." 42 C.F.R. § 435.121(b) (1986) allows that "if an agency uses more restrictive requirements under this section— (1) Each requirement may be no more restrictive than that in effect under the State's Medicaid plan on January 1, 1972. . . ." See *supra* note 66 and accompanying text.

123. See *Schweiker v. Gray Panthers*, 453 U.S. 34, 38-39 (1981).

124. *Synesael v. Ling*, 691 F.2d 1213, 1215 (7th Cir. 1982).

125. *Id.* at 1215. The court explained that the Boren-Long amendment was added to P.L. 96-611 on the floor of Congress by voice vote, and doubted that it would have been adopted if the intention was to restrict the now "historical prerogatives" of 209(b) states. *Id.*

It seems improbable that a Congress concerned - in a time of growing national concern with waste, fraud, and extravagance in government spending - with the abuse of the Medicaid program by applicants' transferring their assets to relatives or friends without adequate consideration in order to become eligible for Medicaid should have used a bill designed to correct this abuse as a vehicle for covertly expanding Medicaid benefits to some of those very people - and to do so in derogation of the well-established distinction in the Medicaid statute between SSI and 209(b) states.

Id.

126. *Synesael v. Ling*, 691 F.2d 1213, 1216 (7th Cir. 1982), *citing*, H. REP. NO. 1167, 96th Cong. 2d Sess. 84, *reprinted in*, 1980 U.S. CODE CONG. & AD. NEWS 5526.

these states.¹²⁷

Also in a 209(b) state, the Fourth Circuit Court of Appeals struck down a Virginia transfer of asset law, enacted prior to Boren-Long, and upheld the amended statute enacted pursuant to federal regulations.¹²⁸ The court determined that the transfer law would be applied to persons whose applications for Medicaid were filed before July 1, 1981, and processed on or after July 1, 1981, and to all redeterminations of eligibility made on or after July 1, 1981.¹²⁹ The court distinguished the *Synesael* case by stating that "while we recognize that a necessary premise of the *Synesael* majority's decision that the Indiana statute was valid after Boren-Long, it is an assumption that it also was valid prior to Boren-Long . . ." ¹³⁰ The Fourth Circuit Court of Appeals pointed out that the critical issue was whether transfer of assets rules in section 209(b) states were valid on January 1, 1972, and disagreed with the *Synesael* court in its conclusion that they were valid.¹³¹

In a more recent case, a class action was brought challenging an Oregon administrative rule.¹³² In *Lewis v. Hegstrom*,¹³³ the regulation in question defined the period of ineligibility of an applicant for Medicaid who had transferred his home for less than fair market value.¹³⁴ The issue determined by the Ninth Circuit Court of Appeals was the correct interpretation of the statute¹³⁵ used when making a determination of the period of disqualification of benefits.¹³⁶ The plaintiffs argued that to calculate the period of

127. *Synesael v. Ling*, 691 F.2d 1213, 1216 (7th Cir. 1982), citing, S. REP. NO. 1111, 95th Cong., 2d Sess. 25, reprinted in, 1980 U.S. CODE CONG. & AD. NEWS 1231.

128. *Randall v. Luckhard*, 709 F.2d 257, 265 (4th Cir. 1983). The issue of whether the burden of proof provision to overcome the presumption of ineligibility because of a transfer of property under Virginia's transfer of assets law was upheld on reconsideration. *Randall v. Luckhard*, 729 F.2d 966, 968 (4th Cir. 1984).

129. *Randall v. Luckhard*, 709 F.2d 257, 265 (4th Cir. 1983). These distinctions were made by the court because of the three plaintiff classes that brought this action. *Id.*

130. *Id.* at 267.

131. *Id.* at 265. "Because Virginia's transfer of assets rule was not validly in effect as part of its plan on January 1, 1972, it was invalid as of January 1, 1974, under 42 U.S.C. § 1396a(f), the 209(b) option." *Id.* It remained invalid until Congress, by passing the Boren-Long amendment, allowed the states to use asset transfer rules despite the requirement that these rules must be in effect on January 1, 1972. *Id.*

132. OR. ADMIN. R. 461-04-070(6)(e) (1983). The rule required that "[f]or the purposes of this section, the period of ineligibility shall last for one month for every full \$1000 [one thousand dollars] of uncompensated value beginning with the first month in which Title XIX medical assistance payments would be payable to the skilled nursing facility . . ." *Id.*

133. *Lewis v. Hegstrom*, 767 F.2d 1371 (9th Cir. 1985).

134. *Id.*

135. 42 U.S.C. § 1396p(c)(2)(B)(i) (1983) provides that in the event of transfer of a home for less than fair market value the individual shall be ineligible for medical assistance for a period of 24 months, or for a lesser or longer time "as bears a reasonable relationship (based on the average amount payable under the State plan as medical assistance for care in a skilled nursing facility) to the uncompensated value of the home." *Id.* at § 1396p(c)(2)(B)(ii)(I).

136. *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985). The court also concluded that the Oregon statute was consistent with federal statute and need not yield under the

ineligibility the amount actually paid to the institution¹³⁷ must be divided by the uncompensated value of the home.¹³⁸ The state claimed that the correct formula to determine the period of ineligibility was to divide the amount paid to the institution by the state¹³⁹ into the uncompensated value of the home.¹⁴⁰ The Ninth Circuit Court of Appeals concluded that Congress intended "all available resources" be used by the recipient so that medical care expenditures of the state will be kept to a minimum.¹⁴¹ Also, individuals will be deterred from attempts to circumvent this requirement through a transfer of their home at less than fair market value.¹⁴² It seems that after this more restrictive interpretation of the statute, the courts have set out on a path of less leniency when asset transfers are made, especially in 209(b) states. As the Ninth Circuit Court has suggested, perhaps those who are affected adversely by this type of decision, and any trend which may result from it, will have to seek relief from Congress.¹⁴³

V. PROPOSALS TO RESOLVE THE ASSET TRANSFER DILEMMA

An approach to the resolution of the asset transfer dilemma could have already taken place had states been forced to invalidate their asset transfer rules and regulations in their application to resources deducted in a determination of eligibility under the SSI guidelines.¹⁴⁴ Through this invalidation, other more valuable commercial property would be prohibited from being transferred which would lower the expenditures of state Medicaid programs for extended medical care.¹⁴⁵ This would facilitate an increase of

supremacy clause. *Id.* at 1378.

137. *Id.* at 1375. The total actually paid to the institution was \$1350. *Id.* at 1373.

138. *Id.* at 1375.

139. *Id.* The total amount paid by the state was \$1000. *Id.*

140. *Id.* The court used a particularly instructive example to illustrate that significantly different results occur from the two different calculations. "For example, the transfer of a home for \$27,000 less than fair market value would result in 27 months of ineligibility, under Oregon's interpretation of its regulation, but only 20 months of ineligibility if the plaintiff class is correct." *Id.* at 1375.

141. *Id.* at 1378. The court further explained that an interpretation of the statutory language based on the argument of the plaintiff class would be contrary to the intent of Congress. *Id.* at 1375.

142. *Id.* at 1378. The court also found that the terms of the statute were not punitive in nature based on the exceptions and waiver provisions provided in the statute. *Id.* See 42 U.S.C. § 1396p(c)(2)(B)(iii) (1983).

143. *Lewis v. Hegstrom*, 767 F.2d 1371, 1378 (9th Cir. 1985).

144. 42 U.S.C. § 1382b(a) (1983), see also 20 C.F.R. § 416.1210 (1986) which provides for the following to be excluded from consideration: the home; household goods and personal effects; property of a trade or business essential for support; nonbusiness property essential for support; resources of a blind or disabled individual necessary to achieve self-support; limited life insurance; and others. *Id.*

145. See *Lerner v. Department of Health and Human Services*, 70 Wis. 2d. 670, 235 N.W.2d 478 (1975) (benefits denied because of the transfer of commercial property worth between \$40,000 and \$89,000 while title holder was a patient in a convalescent center).

funds for the use of the medically needy who are forced to exhaust personal resources without transfer.¹⁴⁶

Several state statutes contain provisions which allow for flexibility in the transfer law to accommodate the sometime unforeseen events which often surround the conditions under which an elderly individual enters into long term medical care.¹⁴⁷ The Maine statute provides a six month grace period in which a person entering a nursing home may still transfer his home without triggering the disqualification provisions.¹⁴⁸ Of the 45 states that have enacted a transfer of assets statute, this is the only such provision of its kind. As a general deterrent, and another possible resolution to prevent fraudulent inducement, some state statutes allow for punishment of the transferee rather than the individual in need of medical care.¹⁴⁹

Congress did not prescribe clear guidelines for states to comply with when establishing an asset transfer policy. The transfer cases show the problems which have been created through diverse and conflicting state statutes.¹⁵⁰ The TEFRA legislation only places a ceiling on the maximum amount of assets which are transferrable with no minimum dollar restriction stipulated.¹⁵¹ States would then be forced to disregard the transfer of minor assets which would otherwise force a disqualification.¹⁵²

The legislation creates a standard of "convincing evidence" which is required to overcome the presumption that the transfer was made to qualify for Medicaid assistance.¹⁵³ It is unknown whether the quantum of proof necessary to overcome this presumption is based on objective or subjective proof standard when presenting a case for rebuttal. Also, because Congress failed to include administrative, procedural guidelines in the statute, states

146. See e.g., *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd*, 434 U.S. 898 (1977) (Connecticut transfer law struck down when disqualification would have rendered plaintiff ineligible for more than eight years); *Udina v. Walsh*, 440 F. Supp. 1151 (D. Mo. 1977) (Missouri transfer law struck down on supremacy grounds).

147. See *infra* notes 148-149 and accompanying text.

148. Maine [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 15,594. The Maine provision states "if an individual become eligible for Medicaid upon entering a nursing home, he or she may transfer property during the first six months of entitlement without consideration of fair-market value."

149. See e.g., Virginia, *Id.* at ¶ 15,652 (an individual who accepts property with an uncompensated value of \$8,000 or more within four years of the Medicaid recipient is determined eligible for benefits is liable to the state); Washington, *Id.* at ¶ 15,654 (anyone receiving non-exempt property from a Medicaid applicant without giving adequate compensation may be subject to criminal prosecution). See *supra* note 86 and accompanying text.

150. See *supra* note 105 and accompanying text.

151. See 42 U.S.C. § 1396p(c)(1) (1983). The statute only provides for a limit of \$12,000 which may incur a 24-month disqualification period. *Id.*

152. See [1985] 3 MEDICARE AND MEDICAID GUIDE (CCH) ¶ 15,632. Pennsylvania has enacted a statute which denies medical assistance to an individual who "transfers real or personal property worth \$500 or more" without adequate consideration. *Id.*

153. 42 U.S.C. § 1396p(c)(1) (1983).

are free to supply their own.¹⁵⁴ A procedure will have to be established to hear evidence in a timely manner concerning the purpose of the applicant's transfer, followed by an appeal process. All of these factors should contribute to the production of a more clear and congruous law.

VI. CONCLUSION

Planning is the key to avoiding the trap of losing Medicaid assistance. Those who wish to transfer homes or other valuable assets must accomplish this well in advance of any need for extended medical care.¹⁵⁵ Generally, with an eye on the three sections of the TEFRA legislation and with long range planning, one can avoid a difficult situation. Perhaps a simple example¹⁵⁶ can be representative of the possible solutions: a married couple who jointly own their home could transfer the interest of the spouse in need of medical care to the healthy spouse.¹⁵⁷ This will not prompt the imposition of a lien or a period of ineligibility.¹⁵⁸ The transferee spouse could and should then transfer title to a child, relative or trusted friend. If the healthy spouse does not require extended medical care within the following two years the impact of the transfer rule will not be felt.¹⁵⁹ Of course this plan is not a complete solution but it is representative of the type of considerations which must be made when disqualification of benefits is a real possibility.

States will continue to attempt to prevent fraud and abuse of the Medicaid system, and conflicts will arise over whether these state attempts destroy the original Congressional intention to provide medical assistance to the needy. Continued litigation is unavoidable.

Timothy N. Carlucci

154. See 42 U.S.C. § 1396a(a) (1983) for general procedural guidelines under a state Medicaid program.

155. See *supra* note 57 and accompanying text.

156. Example from Deford, *Medicaid Liens, Recoveries, and Transfer of Assets after TEFRA*, 18 CLEARINGHOUSE REV. 134, 139 (1984).

157. *Id.*

158. *Id.*

159. *Id.* See *supra* note 57 and accompanying text.

