

A PENNY SAVED CAN BE A PENALTY EARNED: NURSING HOMES, MEDICAID PLANNING, THE DEFICIT REDUCTION ACT OF 2005, AND THE PROBLEM OF TRANSFERRING ASSETS

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ABSTRACT

The Deficit Reduction Act of 2005 (DRA) makes it difficult for a senior citizen to transfer financial assets and subsequently qualify for Medicaid's long-term care benefit. It makes it so difficult, in fact, that it creates a class of sick, poor senior citizens who do not qualify for Medicaid because they inadvertently transferred assets long before they had reason to believe that they would need long-term care. Essentially, Medicaid law expects senior citizens who gave away money during the past five years to recover it and spend it on nursing home care before they qualify for Medicaid. However, senior citizens who simply spend their money—on cars, home improvements, or whatever they choose—are not expected to recover it and incur no penalty. The hardship waivers that are supposed to provide a safety net for ill senior citizens who are denied Medicaid coverage are useless because they are applied so restrictively. The result is the exclusion from Medicaid of the people it was designed to serve.

This article discusses how financial asset transfers are treated under Medicaid law, both before and after the DRA's enactment, and analyzes whether Medicaid policy is served by the DRA's changes. The article also proposes solutions to the problems caused by the DRA and presents a strategy for seniors to transfer some financial assets and still qualify for Medicaid. Finally, the article advocates for changes to Medicaid law, including changing the hardship waiver procedures, increasing the asset exemption amount, and rolling back the DRA. These changes would

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enable Medicaid law to perform the function for which it was designed—to provide a safety net for our nation’s poorest and sickest citizens.

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INTRODUCTION

Imagine four single women, each seventy-two years old, who all earned the same amount of money during their lives and who all own modest homes. Each woman now faces an illness so severe that she will need nursing home care for a long time, but each woman intends to return home when she is feeling better. The first woman, Delores,¹ likes to gamble and spent every bit of spare money she had at casinos and racetracks. She has \$2000 in a checking account and receives Social Security and pension income in the amount of \$2000 per month. Delores does not have to worry about the cost of her nursing home care because she qualifies² for Medicaid,³ and it will pay for her nursing home care for as

1. The names used in this article are fictional and do not refer to specific or known individuals.

2. See 42 U.S.C. § 1382 (2006) (stating the eligibility requirements for Social Security,

long as she needs it.⁴ The second woman, Florence, was more careful with her money and saved \$92,000. She also receives a monthly Social Security and pension income of \$2000. Upon hearing that she would have to spend her savings down to \$2000 before she could qualify for Medicaid, Florence went shopping and bought the Mercedes-Benz that she had always wanted. With the rest of her money, she remodeled her kitchen, buying new cabinets, granite countertops, and expensive appliances. Two months later, after she has spent all her money and has only \$2000 left, Florence qualifies for Medicaid,⁵ and it will pay for her nursing home care for as long as she needs it.⁶

The third woman, Agnes, has a different result. Like Florence, she was careful with her money and saved up \$92,000. She also receives a Social Security and pension income of \$2000 per month. However, four years ago, long before Agnes had any reason to believe that she would ever need nursing home care, Agnes gave \$45,000 to her niece, Amy, for Amy's medical school tuition. She also gave \$45,000 to her nephew, Albert, who was severely injured in a car accident and needed the money to support his family of five and keep them off public aid while he recovered. Agnes is shocked to discover that although she has only \$2000 to her name, like her friends Delores and Florence, Medicaid will not pay for her nursing home care for quite a while. Specifically, she will not receive Medicaid coverage for a period of time equal to the number of months of care that the \$90,000 would have paid for had Agnes not given it away.⁷

The fourth woman, Rose, was also careful with her money, saving up \$92,000, and she too receives Social Security and pension income of \$2000 per month. However, Rose has a granddaughter, Lily, who is disabled and who will never be able to support herself. Rose does not want to spend her money on a Mercedes-Benz and a new kitchen, like Florence, so she can qualify for Medicaid. And Rose never cared much for gambling, like Delores. Most importantly, Rose does not want to end up like her friend Agnes, who gave her money away and is now in dire straits: elderly, sick, and too poor to pay for her nursing home care, yet unable to qualify for

of which Medicaid is a part and therefore uses many of the same rules). *See also* Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 423–25 (2007) (discussing Medicaid eligibility requirements for unmarried applicants); *infra* Part I.A.

3. 42 U.S.C.A. §§ 1396–1396v (West 2009).

4. Kaplan, *supra* note 2, at 423 (stating that there are no provisions in Medicaid law that limit the length of the recipient's Medicaid coverage for nursing home care).

5. *See supra* note 2.

6. *See supra* note 4.

7. *See* § 1396p(c)(1)(E)(ii) (stating the rules for asset transfers and the imposition of penalty periods in which Medicaid does not pay for nursing home care after asset transfers); *infra* Part II.A.

Medicaid. What Rose really wants to do is put aside as much of her money as she can for Lily, to make Lily's life a little easier, but still be able to qualify for Medicaid if she needs to. After all, Rose figures that if Delores can spend her money at the casinos and Florence can spend her money on cars and kitchens and both still qualify for Medicaid, why shouldn't Rose be able to "spend" her money by setting it aside for her disabled granddaughter? She wonders whether this is possible under the current Medicaid laws.

The answer lies in the Deficit Reduction Act of 2005 (DRA),⁸ a law that made it much more difficult for people to qualify for Medicaid if they transferred money or assets for less than fair market value within the past five years,⁹ with limited exceptions.¹⁰ On the one hand, the DRA penalizes a senior citizen like Agnes for transferring assets even though she transferred the money for a good cause—to support a family member in need. On the other hand, the law places no restrictions at all on senior citizens like Florence or Delores, who simply spent their money.¹¹ The DRA made the asset transfer rules much harsher for Medicaid applicants¹²—primarily by targeting the methods applicants used before its enactment to transfer assets in order to qualify for Medicaid¹³—because nursing home care is very expensive.¹⁴ The federal government runs a huge budget deficit that it wanted to reduce,¹⁵ and federal policy-makers

8. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered sections of 42 U.S.C.).

9. See 42 U.S.C.A. § 1396p(c)(1)(B)(i) (West 2009).

10. See *id.* § 1396p(c)(2) (stating circumstances under which asset transfers for less than fair market value are allowed, chiefly to benefit a surviving spouse or a minor or disabled child). It is possible but not probable that Rose would adopt Lily in order to transfer money to her without Medicaid repercussions; Rose is unlikely to do this due to her age, Lily's disability, and the generational gap between them.

11. There are no Medicaid provisions that limit what the applicant's money can be spent on. See Alison Barnes, *Long Term Care in the Political Balance*, 9 MARQ. ELDER'S ADVISOR 1, 1 (2007) ("The rules cannot penalize the spender, only the thrifty."); Editorial, *Medicaid for Millionaires*, WALL ST. J., Feb. 24, 2005, at A14 ("[S]omeone who wishes to qualify for Medicaid may shield his money by remodeling his house, investing in the family business, or purchasing expensive cars.").

12. See, e.g., William J. Brisk & Kathalene C. MacPherson, *Fair Hearing Decisions on Medicaid "Hardship" and "Intent" Claims*, 4 NAT'L ACAD. ELDER L. ATT'YS J. 83, 95 (2008) (describing how the Board of Hearings of the Massachusetts Medicaid program have used the DRA's rules regarding asset transfers to deny the vast majority of hardship waiver applications).

13. Ellen O'Brien, *What Is Wrong with the Long-Term Care Reforms in the Deficit Reduction Act of 2005?*, 9 MARQ. ELDER'S ADVISOR 103, 108 (2007).

14. See Jason Frank, *The Case for Asset Protection*, 205 ELDER L. ADVISORY 1, 1 (2008) (stating that the average cost of a year of nursing home care is \$197,000 in Alaska, \$136,000 in New York City, \$120,000 in Connecticut, and \$44,000 in Louisiana).

15. The name "Deficit Reduction Act" implies that Congress wants to reduce the budget deficit. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered sections of 42 U.S.C.).

wanted to allocate the scarce resources that were earmarked for Medicaid to the poorest and sickest members of society.¹⁶ Understandably, the federal government wanted senior citizens who have financial assets to pay their fair share of their nursing home costs.¹⁷ To effectuate these policies, the DRA changed Medicaid laws.¹⁸ This article examines the way that asset transfers made by unmarried elderly citizens are treated under Medicaid law,¹⁹ and whether the DRA accomplished its goal of stopping abusive asset transfers by senior citizens seeking to qualify for Medicaid.²⁰ Additionally, negative consequences of the DRA are presented, including its creation of a class of poor senior citizens who require medical care but do not qualify for Medicaid because they transferred assets long before they had reason to believe that they would need long-term care.²¹ Solutions to these problems are discussed, including a technique for transferring financial assets that minimizes the penalties of the current Medicaid laws,²² changing Medicaid law so hardship waivers are granted more frequently,²³ increasing the amount of money that a Medicaid applicant can have and still qualify for Medicaid's long-term care benefit,²⁴ and rolling back the DRA's changes to Medicaid law.²⁵

16. See Ga. Dep't of Cmty. Health v. Medders, 664 S.E.2d 832, 835 (Ga. Ct. App. 2008) (stating that the primary purpose of the Medicaid program is "to provide medical assistance to *financially needy* individuals"); ELLEN O'BRIEN, GEORGETOWN UNIV. LONG-TERM CARE FIN. PROJECT, MEDICAID'S COVERAGE OF NURSING HOME COSTS: ASSET SHELTER FOR THE WEALTHY OR ESSENTIAL SAFETY NET? 2 (2005) (discussing the perception that people who transfer assets are pulling from a limited pool of resources intended for needy children and families).

17. See W.T. v. Div. of Med. Assistance & Health Servs., 916 A.2d 1066, 1073 (N.J. Super. Ct. App. Div. 2007) (describing the agency that administers the New Jersey Medicaid program as a "gatekeeper to prevent individuals from using Medicaid to avoid payment of their fair share for long-term care").

18. See Frank, *supra* note 14, at 1-3 (describing the context in which the DRA was passed).

19. The financial situation is more complex when there is a surviving spouse or disabled child to care for in the Medicaid applicant's family. The Medicaid eligibility rules are different for these family situations, which are beyond the scope of this paper. See *generally* Kaplan, *supra* note 2, at 425-27 (explaining the Medicaid eligibility rules for beneficiaries with a spouse who lives in the community).

20. George W. Bush, U.S. President, Remarks on Signing the Deficit Reduction Act of 2005 (Feb. 8, 2006), in 42 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 213, 214 (2006).

21. See *infra* Part II.A.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

24. See *infra* Part III.C.

25. See *infra* Part III.D.

I.

MEDICAID AND THE GAP BETWEEN POLICY AND LAW

A. *About Medicaid*

The Medicaid program, under Title XIX of the Social Security Act,²⁶ provides health care to needy children and families, people with disabilities, pregnant women, and senior citizens.²⁷ Its rules are complex. Medicaid is among the most intricate laws ever drafted by Congress, and its construction has been described by the courts as “Byzantine”²⁸ and “almost unintelligible to the uninitiated.”²⁹ Medicaid pays for necessary medical care and services for people who qualify for the program due to financial need, which requires both insufficient income and insufficient financial resources.³⁰ It provides a safety net for our nation’s sickest and poorest citizens by paying their medical bills.³¹ The federal government shares the cost of the Medicaid program with the states,³² who must ensure their programs comply with federal Medicaid requirements and regulations.³³

Medicaid is the only federal government program that pays for long-term nursing home care.³⁴ It was designed to be a “payer of last resort,”³⁵ only for the truly needy.³⁶ The state agencies that administer Medicaid also serve as gatekeepers to prevent people from using Medicaid if they can afford to pay for their own long-term care.³⁷ A senior citizen who needs nursing home care and who does not have enough money to pay for it can apply for Medicaid, and, if she meets the financial and medical qualifications,³⁸ Medicaid will pay for her nursing home care for as long as she needs it.³⁹ Eligibility requires that an applicant have financial

26. 42 U.S.C.A. §§ 1396–1396v (West 2009).

27. H.R. 985, 109th Cong. § 2(1) (1st Sess. 2005).

28. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

29. *Id.* (quoting *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976)).

30. 42 U.S.C. § 1382(a)(2) (2006); *Atkins v. Rivera*, 477 U.S. 154, 156 (1986).

31. *See W.T. v. Div. of Med. Assistance & Health Servs.*, 916 A.2d 1066, 1073. (N.J. Super. Ct. App. Div. 2007); *Bush*, *supra* note 20.

32. *See* 42 U.S.C. § 1396 (2006).

33. *See* 42 U.S.C.A. § 1396a (West 2009); *Atkins*, 477 U.S. at 157.

34. *W.T.*, 916 A.2d at 1073.

35. *Ark. Dep’t Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 291 (2006) (quoting S. REP. NO. 99-146, at 313 (1985)).

36. *W.T.*, 916 A.2d at 1074 (describing the Medicaid assistance requirement as the “truly needy” prerequisite).

37. *Id.* at 1073.

38. *See* 42 U.S.C. § 1382(a) (2006) (stating the amount of financial resources the applicant is allowed to have to be eligible for Social Security; many of the rules are the same for Social Security and Medicaid because Medicaid is part of the Social Security Act).

39. There is no limit to the duration of Medicaid benefits, and the law is written so qualification can be determined each month. So long as the individual fits the

resources that total no more than \$2000;⁴⁰ this includes any real or personal property owned by the applicant that can be converted to cash and used for her support and maintenance.⁴¹ Certain assets, like equity in a home that the applicant intends to return to,⁴² are exempt from this rule.⁴³ Also, if the applicant receives income from any source, such as Social Security, pension plans, interest, or dividends, all of the applicant's income except for a "personal needs allowance" of at least thirty dollars per month⁴⁴ must go to the nursing home to pay for her care. If that contribution is insufficient to cover the costs of her care, then Medicaid pays the difference.⁴⁵ Additionally, in order to qualify for Medicaid's long-term care benefit, the applicant has to show that she medically needs the nursing home care—that is, she needs services that, as a practical matter, can only be provided in a nursing facility.⁴⁶

Medicaid covers a surprisingly large number of people—one in six Americans.⁴⁷ The Medicaid program is somewhat different in each state because Medicaid law allows states options for implementing some parts of the program;⁴⁸ however, Medicaid in every state is financed through both

qualifications, Medicaid pays: "Each aged, blind, or disabled individual who [meets the qualifications] . . . shall be an eligible individual for purposes of this subchapter." *Id.* See Kaplan, *supra* note 2, at 423 ("Medicaid has no duration-of-stay limits or other major restrictions on the scope of its nursing home coverage."). See also 42 U.S.C. § 1382(c) (2006) (stating that an individual's eligibility for benefits in a given month is determined by the individual's income and resources for the month).

40. See § 1382(a)(3)(B).

41. See § 1382(a) (stating the eligibility rules); 42 U.S.C.A. § 1382b(a) (West 2009) (enumerating the only property that can be excluded from the individual financial resources calculation, implying that all other assets must be counted).

42. Owned property that serves as an individual's principal place of residence is excluded from the financial resources calculation if the individual moves out with the intent to return. 20 C.F.R. § 416.1212(c) (2009). See 42 U.S.C.A. § 1396p(f)(1)(A)–(B) (West 2009) (limiting the amount of equity in the home to either \$500,000 or \$750,000 at the discretion of the state); Kaplan, *supra* note 2, at 424.

43. See § 1382b(a) (listing the applicant's home as among the exempt assets); Kaplan, *supra* note 2, at 424. There is a possibility that the state may recoup the cost of nursing home care benefits from the estate of the Medicaid recipient after her death. However, while the law requires the state to do this, 42 U.S.C.A. § 1396p(b)(1)(B)(i) (West 2009), enforcement is sporadic, see *Medicaid for Millionaires*, *supra* note 11 (finding that the states "make only half-hearted efforts" to collect).

44. 42 U.S.C.A. § 1396a(q)(2) (West 2009); 42 C.F.R. § 435.725(c)(1)(i) (2008). See Kaplan, *supra* note 2, at 424 ("Medicaid essentially confiscates [an applicant's] income.").

45. See 42 C.F.R. § 435.725 (2008) (describing the applicant's contribution to services provided that the Medicaid agency can rely on for paying treatment's total costs).

46. See 42 U.S.C.A. § 1396d(f) (West 2009) (defining "nursing facility services" with reference to an individual's need for *daily* nursing care or rehabilitative services).

47. H.R. 985, 109th Cong. § 2(1) (1st Sess. 2005).

48. See, e.g., 42 U.S.C.A. § 1396p(f)(1)(B) (West 2009) (describing an option given to the states allowing them to choose whether their Medicaid program applicants are allowed a maximum of either \$500,000 or \$750,000 in equity in the applicant's home while still being able to qualify for Medicaid's long-term care benefits).

federal and state tax dollars.⁴⁹ Despite the states' contributions, the Medicaid program represents a huge transfer of money from the federal to the state governments.⁵⁰ In 2006, total Medicaid spending was over \$300 billion, and the federal government's contribution varied between fifty and seventy-six percent of each state's Medicaid costs, depending on the state.⁵¹ Medicaid spending accounts for over forty percent of all federal grants to states.⁵² Paying for Medicaid presents financial challenges for both federal and state governments, especially since the numbers of both uninsured and low-income Americans are increasing.⁵³

Medicaid is the largest single purchaser of nursing home and other long-term care services in the United States, covering approximately half of nursing home residents.⁵⁴ One third of total Medicaid spending goes to long-term care services—\$112 billion in 2007—and of that amount, fifty-seven percent went to institutional or nursing home care in 2007.⁵⁵ The balance, forty-three percent, went to services that enable the recipient to live independently in the community.⁵⁶ Increasing federal government spending on Medicaid⁵⁷—due, in part, to the increasing U.S. population and retiring baby boomers who need long-term care⁵⁸—leaves future generations with impossible choices: staggering tax increases, immense deficits, or deep cuts in spending.⁵⁹ The huge cost of the Medicaid

49. *Atkins v. Rivera*, 477 U.S. 154, 156–57 (1986); Sara Rosenbaum, *Medicaid at Forty: Revisiting Structure and Meaning in a Post-Deficit Reduction Act Era*, 9 J. HEALTH CARE L. & POL'Y 5, 9 (2006).

50. See VERNON K. SMITH, KATHLEEN GIFFORD, EILEEN ELLIS, ROBIN RUDOWITZ, MOLLY O'MALLEY WATTS & CARYN MARKS, HEALTH MGMT. ASSOCS. & KAISER COMM'N ON MEDICAID & THE UNINSURED, *THE CRUNCH CONTINUES: MEDICAID SPENDING, COVERAGE AND POLICY IN THE MIDST OF A RECESSION* 9, 13–14 (2009) [hereinafter *THE CRUNCH CONTINUES*] (describing the federal and state expenditures on Medicaid).

51. *Id.* at 13 (explaining also that the federal contribution is “inversely proportional to a state's average personal income, relative to the national average”).

52. H.R. 985, 109th Cong. § 2(13) (1st Sess. 2005).

53. *Id.* § 2(16).

54. See *id.* § 2(7) (stating that Medicaid covers the majority of nursing home residents). See also U.S. GOV'T ACCOUNTABILITY OFFICE, *MEDICAID LONG-TERM CARE: FEW TRANSFERRED ASSETS BEFORE APPLYING FOR NURSING HOME COVERAGE; IMPACT OF DEFICIT REDUCTION ACT ON ELIGIBILITY IS UNCERTAIN 1* (2007) (finding that, in 2004, Medicaid “paid for nearly one-half of the nation's total long-term care expenditures of about \$193 billion”).

55. *THE CRUNCH CONTINUES*, *supra* note 50, at 11 fig.4. See also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54, at 1 (stating that long-term care expenditures comprised thirty-two percent of the total \$296 billion that Medicaid spent in 2004).

56. *THE CRUNCH CONTINUES*, *supra* note 50, at 11 fig.4.

57. Spending on entitlement programs like Medicaid, Medicare, and Social Security is growing at nearly three times the rate of inflation. Bush, *supra* note 20, at 214.

58. “As the nation's population ages and more individuals are likely to need long-term care services, federal Medicaid spending is expected to nearly double in size during the next 10 years.” U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54, at 1.

59. Bush, *supra* note 20, at 214.

program makes it a target whenever Congress searches for ways to reduce federal government spending in the face of an increasing federal budget deficit.⁶⁰

B. The DRA and Medicaid Planning

Congress passed the DRA—and changed the rules regarding how senior citizens transfer assets to others before applying for Medicaid—in part to address its concern over the cost of Medicaid for an increasing number of low-income Americans in need of long-term care services.⁶¹ The DRA contains many reductions in the federal budget,⁶² including measures that modified the Medicaid program in an attempt to reduce the growth in Medicaid spending.⁶³ Among these changes, the DRA modified the rules for an individual who transfers financial assets and subsequently applies for the Medicaid long-term care benefit.⁶⁴ These rule changes focused on several specific practices that troubled Congress.

First, congressional lawmakers addressed Medicaid abuses. President George W. Bush, in a statement made when he signed the DRA, explained:

The bill tightens the loopholes that allowed people to game the system by transferring assets to their children so they can qualify for Medicaid benefits. Along with Governors of both parties, we are sending a clear message: Medicaid will always provide help for those in need, but we will never tolerate waste, fraud, or abuse.⁶⁵

The policy reasons set out by former President Bush for the passage of the DRA as it relates to Medicaid are clear: Medicaid's mission is to help the needy, the sickest and poorest members of society, without waste,

60. "In the long run, the biggest challenge to our budget is mandatory spending—or entitlement programs like Medicare and Medicaid and Social Security." *Id.*

61. H.R. 985, 109th Cong. § 2(16) (1st Sess. 2005).

62. See generally Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified as amended in scattered sections of 42 U.S.C.). For an exhaustive treatment of the Medicaid law changes wrought by the DRA, see generally Gene V. Coffey, Jason A. Frank, Gregory S. French, Michael A. Gilfix, Howard S. Krooks, Susan H. Levin, Vincent J. Russo, Charles P. Sabatino, Scott R. Severns, Timothy L. Takacs & Ira S. Wiesner, *Analysis of Changes to Federal Medicaid Laws Under the Deficit Reduction Act of 2005*, 2 NAT'L ACAD. ELDER L. ATT'YS J. 189 (2006) [hereinafter Coffey et al.].

63. Bush, *supra* note 20, at 214 ("The Deficit Reduction Act will also reduce the growth in Medicaid spending by nearly \$5 billion over then next 5 years.").

64. *Id.* See *infra* Part II.A. See generally 42 U.S.C.A. § 1396p (West 2009) (stating the rules for asset transfers and the imposition of penalty periods in which Medicaid does not pay for nursing home care as a result of the transfer); Deficit Reduction Act §§ 6011–6016 (codified as amended in scattered sections of 42 U.S.C.) ("Reform of Asset Transfer Rules").

65. Bush, *supra* note 20, at 214.

fraud, or abuse.⁶⁶ One goal of the DRA, then, was to tighten loopholes that allowed abusive asset transfers,⁶⁷ thereby saving money and hopefully forestalling staggering tax increases and immense deficits.⁶⁸

Second, congressional lawmakers attempted to lower the rate of increase in federal government spending for Medicaid.⁶⁹ The name of the law, the Deficit Reduction Act, gives insight into why Congress wanted to achieve this: the country was spending more money than it took in, and lawmakers were trying to reduce the budget deficit.⁷⁰ One way to limit Medicaid spending was to limit the number of people who qualify for Medicaid benefits, ensuring that Medicaid goes only to the poorest and sickest people.

These compelling reasons to limit Medicaid to needy people raised the issue of personal responsibility: should not people be expected to pay their own nursing home bills if they are able? Former President Bush thought so.⁷¹ He mentioned senior citizens who transferred their assets to their children in order to qualify for Medicaid benefits as an example of people “gam[ing] the system,” suggesting that such people were abusing Medicaid.⁷²

Recall Agnes, who paid medical school tuition for her niece and supported her nephew’s family after a debilitating accident, and Rose, who wants to “spend” her money by putting it aside for her disabled granddaughter. People like Agnes and Rose who transfer assets to their family and then apply for Medicaid probably do not see themselves as “gaming the system.” Agnes transferred assets *four years* before she needed nursing home care, long before she foresaw the need for it.⁷³ Additionally, long-term care is immensely expensive.⁷⁴ Many elderly

66. *Id.*

67. *Id.*

68. *See id.*

69. “Bringing entitlement spending under control is a critical priority of our Government. . . . The Deficit Reduction Act is estimated to slow the pace of spending growth in both Medicare and Medicaid.” *Id.*

70. *Id.* “At the same time, my budget tightens the belt on Government spending. Every American family has to set priorities and live within a budget, and the American people expect us to do the same right here in Washington, DC.” *Id.* at 213.

71. *Id.* at 214.

72. *Id.*

73. There are many reasons why a person may not foresee the need for nursing home care, including discomfort at the thought of getting older; a strong preference for informal, at-home care over institutional care; and a tendency to grossly underestimate the future need for long-term care. For an extremely interesting and in-depth look at the complexities of persuading people to fund their (possible) future need for long-term care, see Diana Lourdes Dick, *Tax and Economic Policy Responses to the Medicaid Long-Term Care Financing Crisis: A Behavioral Economics Approach*, 5 CARDOZO PUB. L. POL’Y & ETHICS J. 379 (2007).

74. *See* Frank, *supra* note 14, at 1 (“Nursing home care costs on average are

citizens who must pay for it face financial ruin and poverty.⁷⁵ They know that the money they have saved will be used up very quickly by large monthly nursing home bills, and they may choose to try and keep some of their life savings by attempting instead to use Medicaid,⁷⁶ a government program that they have supported with their tax dollars.⁷⁷ As one attorney put it:

More often, people don't address this issue unless and until it becomes necessary. At that point of necessity, when the individual is presented with the opportunity to become eligible for a government program that will pay for their nursing home care, and armed with the knowledge that their care will be the same whether paid for by Medicaid or paid for by them, clients frequently choose Medicaid. This choice is often made because they feel that they have contributed to this program through their tax dollars, and they see it as another form of health care that should be partially paid for by the government.⁷⁸

It is easy to understand why senior citizens would wish to preserve some of their financial assets for themselves or their family members when facing an illness that will result in catastrophic long-term care costs. Medicaid law allows the applicant to keep little.⁷⁹ On the other hand, for some seniors, giving away assets and then relying on the federal government to pay for necessary long-term care conflicts with their desire for independence and their sense of obligation to take care of themselves. Many do not want to accept government assistance.⁸⁰ Regardless, under federal law, asset transfers are legal and permitted in advance of a Medicaid application, but they come with consequences in the form of transfer penalties⁸¹ that the donor must pay before she can receive

approximately \$205 per day, or \$75,000 per year . . .”).

75. *See* W.T. v. Div. of Med. Assistance & Health Servs., 916 A.2d 1066, 1074 (N.J. Super. Ct. App. Div. 2007) (stating that the cost of medical treatment can cause financial ruin).

76. *See id.* at 1074 (describing Medicaid planning, a method of handling one's money so as to qualify for Medicaid assistance).

77. Linda S. Ershow-Levenberg, *Court Approval of Medicaid Spend-Down Planning by Guardians*, 6 MARQ. ELDER'S ADVISOR 197, 199 (2005).

78. *Id.*

79. A Medicaid applicant is required to possess no more than \$2000 in financial resources to be eligible for services. *See supra* note 2. *See generally supra* Part I.A.

80. *See* O'Brien, *supra* note 13, at 3, 7 (stating that many elderly people who expect to need nursing home care save more, not less, than those who do not expect to need nursing home care; this is especially true for those of limited financial means who are likely to qualify for Medicaid).

81. A penalty is a period of months during which the Medicaid applicant is ineligible for benefits, and it is imposed by the state Medicaid agency that examines the financial records of the Medicaid applicant if it finds that the applicant transferred assets to someone else for less than their fair market value. *See* 42 U.S.C.A. § 1396p(c)(1)(A) (West 2009).

Medicaid.⁸²

Before the DRA, there was a huge gap between what Medicaid law allowed and Medicaid policy, as expressed by President Bush.⁸³ The DRA was passed to bring Medicaid law closer to Medicaid policy.⁸⁴ Yet questions remain about whether the DRA accomplished its goal of closing the gap, and, if so, at what cost to society?

II. THE DRA'S ATTEMPT AT CLOSING THE GAP

This section questions whether the DRA⁸⁵ accomplished its goals of stopping people from transferring assets to their children in order to qualify for Medicaid benefits⁸⁶ and of slowing the rate of increase in federal government spending for Medicaid.⁸⁷ It also considers the costs that the DRA's changes impose on society.⁸⁸ The discussion is illustrated with examples—recall from the introduction: Delores, who gambled away her money; Florence, who spent her money on a Mercedes and a new kitchen; Agnes, who paid her niece's medical school tuition and supported her nephew after an auto accident; and Rose, who wants to set money aside for her disabled granddaughter.

The DRA's changes to Medicaid law affect senior citizens who transfer financial assets to their families. These changes include an adjustment to the start date for penalty periods imposed for asset

The penalty is equal to the amount transferred divided by the state's divisor. *See id.* § 1396p(c)(1)(E). The state's divisor is, at the option of the state, either the cost of monthly nursing home care in the community where the resident is receiving care (Illinois uses this method, *see* ILL. ADMIN. CODE tit. 89, § 120.387(g) (2007)) or the average monthly cost of nursing home care in the state (New Jersey uses this method, *see* N.J. ADMIN. CODE § 10:71-4.7(b)(4)(ii) (2009)). *See* 42 U.S.C.A. § 1396p(c)(1)(E)(ii) (West 2009) (giving the state the option to choose between the two methods).

82. Ershow-Levenberg, *supra* note 77, at 200.

83. *See* Bush, *supra* note 20, at 214 ("The bill I sign today restrains spending for entitlement programs, while ensuring that Americans who rely on . . . Medicaid continue to get the care they need.").

84. *See id.* (stating that the bill was passed to tighten loopholes and prevent system gaming).

85. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified in scattered sections of 42 U.S.C.).

86. Bush, *supra* note 20, at 214.

87. *Id.*

88. The DRA changed many provisions of the Medicaid laws, only some of which are discussed here. For an exhaustive treatment of the Medicaid law changes wrought by the DRA, *see* generally Coffey et al., *supra* note 62. This article is only concerned with the sections of the DRA that changed the Medicaid laws affecting unmarried taxpayers who want to transfer liquid financial assets to another person. There are asset transfer methods involving trusts, annuities, promissory notes, and life estates. For a thorough treatment of these Medicaid planning methods, *see* generally Frank, *supra* note 14.

transfers,⁸⁹ an extension to the look-back period for asset transfers,⁹⁰ and a modification in how partial-month penalty periods are computed.⁹¹ Although the DRA made only a minor change to the rules for hardship waivers,⁹² these rules are discussed because hardship waivers are one of the Medicaid applicant's few options when facing a penalty period imposed for an asset transfer made long before the senior citizen had any idea that she would need nursing home care.⁹³ The goal of the discussion is to analyze how the DRA's changes to Medicaid law affect asset transfers and the resulting penalty periods, how the DRA's changes can hurt the very same senior citizens that Medicaid sets out to protect, and whether the DRA ultimately accomplished its goals of stopping asset transfers and lowering the rate of increase in federal government spending on Medicaid.⁹⁴ Essentially, the first question is whether the federal government is spending less, on average, on the individual Medicaid recipient after the enactment of the DRA as compared to before.⁹⁵ The next question is whether any savings is worth the cost to these senior citizens.

A. Rules Relating to Asset Transfers: Overaggressive and Overinclusive

1. The DRA Changed the Start Date for the Penalty Period

One issue for people like Agnes who transfer assets is the start date of the penalty period, which was changed by the DRA.⁹⁶ A penalty period is

89. 42 U.S.C.A. § 1396p(c)(1)(D) (West 2009) (stating the rules that determine when the penalty period begins). For a complete explanation of penalties, see *supra* note 81.

90. A look-back period is the length of time for which the state Medicaid agency requests and examines the financial records of the Medicaid applicant. 42 U.S.C.A. § 1396p(c)(1)(B) (West 2009) (stating the length of the look-back period).

91. *Id.* § 1396p(c)(1)(E)(iv). For an explanation of how partial-month penalty periods are calculated, see *infra* Part II.A.3.

92. See 42 U.S.C.A. § 1396p(c)(2)(D) (West 2009) (allowing the nursing home to file a hardship waiver on behalf of the resident; this is the biggest change to the hardship waiver rules made by the DRA).

93. See generally Brisk & MacPherson, *supra* note 12 (discussing hardship waiver hearings).

94. Bush, *supra* note 20, at 214.

95. The federal government cannot control the increasing number of people who may need Medicaid services resulting from the aging baby boom generation reaching retirement age. The federal government is choosing to slow the rate of growth of Medicaid spending by limiting access to Medicaid programs through tighter financial eligibility requirements. Since it cannot control the size of the population it serves, the federal government is attempting to limit the services that population is eligible for in order to spend less on average per recipient.

96. The rules governing the start date of the penalty period are as follows:

(i) In the case of a transfer of asset made before February 8, 2006, the date specified in this subparagraph is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this subsection.

a period of months during which the Medicaid applicant is ineligible for services, and it is imposed by the state agency that administers Medicaid.⁹⁷ The new start date of the penalty period makes it harder for a Medicaid applicant to transfer assets and qualify for Medicaid.⁹⁸ Before the enactment of the DRA, the penalty period that resulted from transferring assets for less than fair market value began either on the first day of the month in which the assets were transferred, or the first day of the month after the assets were transferred.⁹⁹ After the enactment of the DRA, the penalty period that results from transferring assets begins on *the later of* the first day of the month during or after the assets are transferred, or the date the Medicaid applicant is eligible for Medicaid and would otherwise be receiving institutional-level care but for the application of the penalty period.¹⁰⁰ This means that the Medicaid applicant who transfers assets at less than fair market value has to need institutional care *and* meet the financial resource requirements *before* the penalty period starts to run.¹⁰¹ That is, the Medicaid applicant has to have less than \$2000 of countable assets¹⁰² before the penalty period starts.¹⁰³ This is a huge change from Medicaid law before the enactment of the DRA, which let the penalty period run as soon as the asset transfer was made, regardless of whether institutional-level care was needed by the applicant at that time and regardless of the level of the applicant's financial resources.¹⁰⁴ Examples

(ii) In the case of transfer of asset made on or after February 8, 2006, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.

42 U.S.C.A. § 1396p(c)(1)(D) (West 2009).

97. The state agency examines the financial records of the Medicaid applicant, and, if it finds that the applicant transferred assets to someone else for less than fair market value, it assesses the penalty period. *See id.* § 1396p(c). For a more complete explanation of penalties, see *supra* note 81.

98. *See* Frank, *supra* note 14, at 3–4 (stating that the change of start date has a significant (negative) effect on old asset transfer methods).

99. § 1396p(c)(1)(D)(i) (containing the penalty start date law prior to the enactment of the DRA).

100. § 1396p(c)(1)(D)(ii) (containing the penalty start date law after the enactment of the DRA).

101. *Id.*

102. Assets are either “countable,” like money in a checking account, or “exempt,” like the value of a car. *See id.* § 1382b(a) (noting those sources of income that are exempt). *See also* Kaplan, *supra* note 2, at 423–25 (discussing the asset eligibility standards for unmarried applicants); *supra* Part I.A.

103. *See supra* Part I.A.

104. 42 U.S.C.A. § 1396p(c)(1)(D) (West 2005). *See also* 42 U.S.C.A. § 1396p(c)(1)(D)(i) (West 2009) (preserving the pre-DRA penalty start date for transfers of

will help illustrate the impact.

Recall that Agnes helped her niece, Amy, to pay for her medical school tuition, which constitutes a transfer of assets for less than fair market value because Agnes did not get the benefit of the money that was spent. Suppose that Agnes gave the tuition money to Amy just two years ago, when she was in perfect health and had no idea that she would be needing long-term care. Assume Agnes lives in Illinois and needs nursing home care that costs \$5000 per month, and Agnes has \$2000 in monthly income from a pension and Social Security. Before the enactment of the DRA, Agnes's gift to Amy two years ago would not affect her Medicaid eligibility now.¹⁰⁵ Although the \$45,000 transfer would have caused a nine-month penalty to be assessed when Agnes eventually applied for Medicaid, before the enactment of the DRA the penalty would have started to run immediately after the assets were transferred and lasted for nine months.¹⁰⁶ When Agnes applied for Medicaid two years after the transfer, the penalty period would be over, and she would be eligible for Medicaid benefits.¹⁰⁷

From the federal government's perspective, the problem with Medicaid law before the enactment of the DRA was that the penalty period had no bite, no deterrent effect.¹⁰⁸ A senior citizen could transfer assets while in perfect health or when her health just started to decline, and the transfers would not affect Medicaid eligibility at all so long as the penalty period ended before she needed nursing home care.¹⁰⁹

Once the DRA is finally implemented in Illinois,¹¹⁰ and assuming

assets made before February 8, 2006).

105. See § 1396p(c)(1)(D)(i); Frank, *supra* note 14, at 3.

106. \$45,000 divided by \$5000 per month equals nine months. See § 1396p(c)(1)(D)(i). In Illinois, the penalty is figured by taking the amount of the asset transfer and dividing it by the cost of one month's nursing home care at the facility the resident actually enters. See ILL. ADMIN. CODE tit. 89, § 120.387(g) (2007). A state can opt instead to use the average monthly cost to a private patient of nursing facility services in the state. The calculation method is the same, only the cost of nursing home care changes depending on what the state selects. See *supra* note 81.

107. See § 1396p(c)(1)(D)(i); Frank, *supra* note 14, at 3 (describing when the penalty period started, both prior to and after the passage of the DRA).

108. The law allowed people to transfer money before they needed Medicaid, wait until the penalty period was over, and then still qualify for Medicaid. See § 1396p(c)(1)(D)(i) (stating the old rules for the penalty start date, which allowed the penalty period to start as soon as assets were transferred, regardless of whether the applicant needed nursing home care at the time; any time after the penalty period was over, the applicant would qualify financially for Medicaid's nursing home benefit).

109. See *id.*; Frank, *supra* note 14, at 4 (describing the pre-DRA practice of giving away sizable portions of one's assets at the first sign of decline in health in order to qualify for Medicaid).

110. Illinois missed the deadline of July 1, 2007, to enact the Medicaid law changes mandated by the DRA; it is expected to change its law to reflect the DRA's Medicaid law changes soon. See Deficit Reduction Act of 2005, Pub. L. 109-171, § 6016(e)(3), 120 Stat. 4, 67 (2006) (codified as amended in scattered sections of 42 U.S.C.) (describing the effective date of the DRA and delays to that date for state law amendments related to the DRA).

Illinois continues to use its current method for determining the penalty period,¹¹¹ Agnes's actions—giving her niece \$45,000 for medical school and then applying for Medicaid two years later—would have very different results. Under the new rules, the penalty period will begin only when Agnes applies to Medicaid for necessary institutional-level care, care for which she is otherwise qualified.¹¹² This means that Agnes must have less than \$2000 in countable assets before the penalty period starts to run,¹¹³ as well as a medical need for the nursing home care.¹¹⁴ So Agnes will have to privately pay for the nursing home for nine months before Medicaid benefits are available, but, since she just met the Medicaid financial qualifications, she has, at most, \$2000 plus her monthly income of \$2000; obviously, Agnes will not be able to pay for \$45,000 of nursing home care. The law expects Agnes to recover the \$45,000 from Amy, but the money has already been spent on medical school tuition and cannot be recovered. Agnes needs constant skilled nursing care,¹¹⁵ but she cannot afford it, she cannot recover the money to pay for it from Amy, and she cannot get Medicaid until the penalty period expires. Therefore, she must apply for a hardship waiver¹¹⁶ or appeal the penalty decision on the grounds that she lacked the intent to transfer assets for the purpose of becoming eligible for Medicaid.¹¹⁷ If the hardship waiver or intent appeal is not granted, and most are not,¹¹⁸ then Agnes will have two untenable choices: to go without nursing home care because she cannot pay, even though she needs the service; or to stay at the nursing home she already lives in without

111. See ILL. ADMIN. CODE tit. 89, § 120.387(f)–(i) (2007) (describing the penalty period calculations).

112. See 42 U.S.C.A. § 1396p(c)(1)(D)(ii) (West 2009).

113. See 42 U.S.C. § 1382(a)(3)(B) (2006); Kaplan, *supra* note 2, at 424. See also *supra* Part I.A.

114. See 42 U.S.C.A. § 1396d(f) (West 2009) (discussing the “need” for nursing home care).

115. The Medicaid applicant who is not already institutionalized must be eligible for medical assistance and would otherwise be receiving institutionalized care but for the penalty period. See *supra* note 112 and accompanying text. This has been interpreted by the Centers for Medicare and Medicaid Services, the federal Medicaid agency, to mean that the Medicaid applicant must be residing in a nursing home and file a Medicaid application to trigger a disqualifying transfer-related penalty period under the DRA. Coffey et al., *supra* note 62, at 200.

116. See 42 U.S.C.A. § 1396p(c)(2)(D) (West 2009) (stating that a hardship waiver is available if the denial of eligibility for Medicaid causes an undue hardship for the applicant).

117. See *id.* § 1396p(c)(2)(C)(ii) (stating that an individual shall not be ineligible for medical assistance if the applicant makes a satisfactory showing that the assets were transferred exclusively for a purpose other than to qualify for medical assistance).

118. Brisk & MacPherson, *supra* note 12, at 91–92, 95 (stating that the approval rate for “intent” cases in 2007 was less than twenty-five percent and the approval rate for plain “hardship” cases was zero during the period 2004–2007: “Not a single hardship waiver was issued in the years we reviewed, despite the new, harsher regulations.”).

paying.¹¹⁹ Obviously, nursing homes would not stay in business very long if their customers did not pay, so the latter choice is not a viable option.¹²⁰ Thus, the DRA creates a class of people, like Agnes, who by definition are elderly, frail, sick, and poor; yet they are denied the nursing home care they need because—instead of spending their money, like Florence who bought the Mercedes, or never saving money at all, like Delores who gambled—they gave their money to a family member who needed it at a time when they did not.

2. *The DRA Lengthened the Look-Back Period*

Another issue for senior citizens like Agnes, who transfer assets and later need nursing home care, is the look-back period, which the DRA lengthened. The look-back period is the period of time for which the state requests financial records from the Medicaid applicant. The state then examines the records and determines if an asset transfer for less than fair market value has occurred.¹²¹ This type of asset transfer, made during the look-back period, determines the subsequent penalty period.¹²² The look-back period before the DRA was three years; with the DRA, the look-back period has expanded to five years.¹²³ This is consistent with the federal government's goals of saving money and stopping asset transfers made solely to qualify for Medicaid.¹²⁴ Presumably, the state will find more asset transfers by looking back five years rather than three, and thus

119. Ben A. Neiburger, Rick L. Law & James Haertel, *Feds Bite U.S. Seniors: Innocent Seniors Take Medicaid Hit*, 18 DUPAGE COUNTY B. ASS'N BRIEF 6, 8 (2006) (“[T]he DRA may become known as the ‘Nursing Home Bankruptcy Act’ due to its shift of this burden of uncompensated care from the government to the nursing home industry.”).

120. *Id.*

121. See 42 U.S.C.A. § 1396p(c)(1)(A)–(B) (West 2009) (describing the look-back period and its purpose). See also Coffey et al., *supra* note 62, at 194–97.

122. See § 1396p(c)(1)(A) (stating that asset transfers for less than fair market value during the look-back period are used to compute the penalty period).

123. See § 1396p(c)(1)(B), which states:

(i) The look-back date specified in this subparagraph is a date that is 36 months (or, in the case of payments from a trust or portions of a trust that are treated as assets disposed of by the individual pursuant to paragraph (3)(A)(iii) or (3)(B)(ii) of subsection (d) of this section or in the case of any other disposal of assets made on or after February 8, 2006, 60 months) before the date specified in clause (ii).

(ii) The date specified in this clause, with respect to—

(I) an institutionalized individual is the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan, or

(II) a noninstitutionalized individual is the date on which the individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value.

§ 1396p(c)(1)(B).

124. See Bush, *supra* note 20, at 214.

will impose more and longer penalty periods, which may result in both the federal and state governments spending less money on Medicaid.

The lengthened look-back period results in a problem similar to the start date problem in that the law penalizes asset transfers made at a time when the applicant reasonably did not foresee that she would need nursing home care in the future. The DRA accomplishes its goal, but at a cost. This law does make it harder for people to transfer assets and then qualify for Medicaid,¹²⁵ but in so doing, the new law also likely catches more people like Agnes, who are transferring assets for another reason, such as helping a family member, rather than to avoid paying for nursing home care. Recall from the introduction that Agnes transferred assets for less than fair market value four years ago when she gave her niece money for medical school tuition and when she gave her nephew money to support his family after a debilitating auto accident. The law punishes an elderly person who gives money to a family member and later experiences an unforeseeable medical event that results in the need for nursing home care.¹²⁶ For example, Agnes could have suffered a stroke four years after she gave money to her niece and nephew. There would be no way Agnes could have foreseen the stroke and her resulting need for nursing home care when considering the asset transfers.

Also, the lengthened look-back period places a burden on elderly people who may not be competent to produce financial records for the previous five years—in some states, they could be denied nursing home care because of inadequate record-keeping or poor memory.¹²⁷ If Rose, the grandmother, paid \$20,000 for a car and four years later needed nursing home care that she could not afford, but had lost the cancelled checks that proved to whom she paid the money and for what purpose, in some states she would be assessed a four-month penalty even though she did not transfer assets for less than fair market value. If her hardship waiver request was denied,¹²⁸ as most are,¹²⁹ the new law would penalize Rose because she could not remember enough to prove where she spent her money.

The DRA's changes to Medicaid law overreach because they have the potential to penalize elderly people for unforeseeable illness, poor record-keeping, and memory competency issues that arise after an asset transfer but before the need for nursing home care becomes apparent.¹³⁰ Any

125. See *supra* Part II.A.1.

126. Coffey et al., *supra* note 62, at 195.

127. *Id.* at 196.

128. See 42 U.S.C.A. § 1396p(c)(2)(D) (West 2009) (stating a hardship waiver is available to a Medicaid applicant if denial of eligibility results in undue hardship).

129. See *supra* note 118.

130. See 42 U.S.C.A. § 1396p(c)(1)(B) (West 2009); Coffey et al., *supra* note 62, at 195–96.

senior citizen who has an asset transfer penalty imposed on her due to the lengthened look-back period will be a Medicaid applicant who is needy, sick, and poor, just like Agnes and Rose.¹³¹ For seniors who have the asset transfer penalty imposed because they cannot remember how they spent their money, the DRA's change to Medicaid law actually takes advantage of an elderly, vulnerable, forgetful population—precisely the people that Medicaid is supposed to protect. Compare Rose to Florence, the Mercedes owner. Both are elderly, sick, and poor. Both spent money on a car. But in some states, Florence would receive Medicaid coverage and Rose would not, simply because Rose cannot remember or cannot prove how she spent her money.

3. *The DRA Changed the Way Partial-Month Penalties Are Treated*

Another potential issue for people like Agnes, the generous aunt, who transfer assets and subsequently need nursing home care, is the DRA's change to the way multiple partial-month penalties are treated.¹³² A Medicaid applicant can transfer an amount smaller than the cost of one month of nursing home care and be assessed only a partial-month penalty. The applicant could have several partial-month penalties if she transferred several small amounts for less than fair market value in different months. In that case, the State Medicaid Manual—a guide for state Medicaid agencies put out by the federal Health Care Financing Administration—directs states to treat each transaction, and its corresponding penalty period, separately, unless the penalty period for one transaction would overlap with the penalty period of the next transaction.¹³³ For example, a ten-day penalty for a January transaction would be considered a separate penalty from a twenty-five-day penalty for a February transaction, but a forty-day penalty for a January transaction would combine with a twenty-five-day penalty for a February transaction and create a sixty-five-day penalty starting in January.

The law before the DRA did not mention the rounding of penalty periods at all,¹³⁴ which provided the opportunity for making a series of small transfers that resulted in a lower penalty period than would be incurred by transferring the same amount in a lump sum.¹³⁵ This meant

131. See *supra* Part I.A.

132. 42 U.S.C.A. § 1396p(c)(1)(E)(iv) (West 2009).

133. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE STATE MEDICAID MANUAL § 3258.5(I) (2005). See also Coffey et al., *supra* note 62, at 236.

134. Compare 42 U.S.C. § 1396p(c)(1)(E) (2000), with 42 U.S.C.A. § 1396p(c)(1)(E) (West 2009) (demonstrating the addition of a partial-month calculation provision in subsection (iv) of the current statute).

135. See Kirsten Izatt, *Medicaid Planning in Illinois: Are You Ready for the DRA?*, 95 ILL. B.J. 586, 589 (2007).

that a state could forgive a penalty of less than a month.¹³⁶ Illinois, for example, allowed this policy.¹³⁷ Using this idea, if an asset transfer were divided up into amounts smaller than the cost of one month of nursing home care, and if one of these small amounts were transferred each month, timed at least a month apart so that the penalties for each transaction would not overlap, the Medicaid applicant could transfer a substantial sum and incur no penalty at all due to the rounding down of partial-month penalties.¹³⁸ A similar asset transfer method was to transfer an amount equal to just a little less than two months of nursing home care each month, thereby incurring a one-month penalty with each transfer due to rounding down of fractional month penalties, and the one-month penalty would run out by the time the applicant made the next transfer.¹³⁹ This accomplished the total asset transfer twice as quickly as transferring less than one month of care at a time, and the penalty incurred was roughly half of what it would have been had the applicant made a lump sum transfer.¹⁴⁰

To eliminate this asset transfer method, the DRA added a section to Medicaid law, which states: "A State shall not round down, or otherwise disregard any fractional period of ineligibility determined . . . with respect to the disposal of assets."¹⁴¹ The effect of this provision is to block the Medicaid applicant from escaping asset transfer penalties by using the asset transfer techniques described above. Under the new provision, if the Medicaid applicant transferred just a little less than the cost of nursing home care each month until her assets fell below \$2000, a partial-month penalty would accrue each time the assets were transferred.¹⁴² When all the partial-month penalties were added together, the total penalty would equal the penalty incurred by transferring the lump sum. Similarly, if the Medicaid applicant transferred just a little less than the cost of two months of nursing home care each month, the applicant would receive a proportionately sized penalty for each transfer,¹⁴³ and all together, the sum of the penalties would be the same as if she had transferred a lump sum. All advantage that previously existed due to this asset transfer method is lost due to the DRA's changes to Medicaid law. In this situation, the DRA was very effective in closing a loophole that allowed Medicaid applicants to transfer assets to their families and then qualify for Medicaid.

An example will illustrate. Suppose Rose has \$47,000 in liquid

136. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 133, at § 3258.5(D).

137. Izatt, *supra* note 135, at 589.

138. *Id.*

139. See Coffey et al., *supra* note 62, at 235–36.

140. *See id.*

141. 42 U.S.C.A. § 1396p(c)(1)(E)(iv) (West 2009).

142. *See id.*

143. *See id.*

financial assets and wishes to transfer some money to her disabled granddaughter, Lily, instead of spending all her money on nursing home care and then qualifying for Medicaid. Rose still has \$2000 of monthly income, which she spends on her living expenses. Additionally, suppose that the nursing home Rose will soon enter costs \$5000 per month. Before the DRA was enacted, Rose could have transferred \$4900 per month to Lily, and it would have taken less than ten months for Rose to have \$2000 left and be financially eligible for Medicaid. Although all of the transfers would have occurred during the three year look-back period, Rose would have incurred no penalty because each transfer, except the last one,¹⁴⁴ treated individually, would have resulted in a 0.98-month penalty, and as long as the asset transfers were at least one month apart, each fractional transfer penalty would have been rounded down to no penalty at all.¹⁴⁵ So before the enactment of the DRA, Rose could have transferred all \$45,000 to her granddaughter and incurred no penalty. Under the same scenario after the DRA was enacted, each fractional monthly penalty will no longer be rounded down to zero,¹⁴⁶ instead, they will all be added together to equal a total penalty of nine months,¹⁴⁷ exactly the same penalty for transferring \$45,000 in one lump sum.¹⁴⁸ Rose is expected to recover all the money she transfers in order to help pay for her nursing home care, and the penalty period will not start to run until she qualifies financially for Medicaid and needs nursing home care.¹⁴⁹

Even if she did not transfer assets with Medicaid eligibility in mind, this new law could negatively impact Rose if she regularly gave small gifts to her family for birthdays or to her church or to charity; the gifts could be added together and could result in a partial or multiple month penalty for

144. In the last (tenth) month Agnes would only need to transfer \$900 to hit her goal of \$2000 in liquid assets, so the penalty for that month would be equal to only 0.18 months.

145. *See supra* note 134 and accompanying text. The rules say that the penalty can begin either during the month the transfer was made or in the following month, 42 U.S.C.A. § 1396p(c)(1)(D)(i)–(ii) (West 2009), but the rules are not clear on when or under what circumstances the penalty starts the following month. Therefore, it seems that before the enactment of the DRA, the senior citizen could have transferred money on the last day of a month and the first day of the next month and rounded down each penalty, spacing the asset transfers closer than one month apart. Whether the state Medicaid official would have allowed this is questionable. However, even regular monthly transfers theoretically could have technically resulted in aggregated penalties (the first penalty starting the month after the first transfer and the second penalty starting on the same month of the second transfer).

146. *See* § 1396p(c)(1)(E)(iv).

147. After the enactment of the DRA, the total penalty would be the sum of all the fractional monthly penalties and would therefore be equal to nine months (nine times 0.98 plus 0.18).

148. Dividing the \$45,000 transfer by the \$5000 monthly nursing home cost equals nine months of care.

149. *See* § 1396p(c)(1)(D)(ii).

Rose.¹⁵⁰ In that case, however, Rose would have strong evidence of a pattern of giving, which means she should be able to avoid having a penalty assessed by demonstrating that “the assets were transferred exclusively for a purpose other than to qualify for medical assistance.”¹⁵¹ If the penalty were assessed anyway, Rose would have a strong case for an intent appeal—an appeal of the penalty decision based on lack of intent to transfer assets in order to qualify for Medicaid.¹⁵²

*B. Medicaid Hardship Waivers and Intent Appeals:
Deficient and Delusive*

This section discusses Medicaid hardship waivers and intent appeals, which existed before the DRA was enacted.¹⁵³ Their purpose is to mitigate the harshness of the Medicaid laws regulating asset transfers.¹⁵⁴ The DRA did not make major changes to the hardship waiver rules.¹⁵⁵ The rules for applying for and receiving hardship waivers vary somewhat in each state.¹⁵⁶ For example, in order to receive a hardship waiver in Massachusetts an applicant must show: that a denial of medical care would endanger her health, or deprive her of food, shelter, clothing or other necessities; that all attempts to retrieve the transferred resources were exhausted; or that she would be discharged from the nursing home for not paying.¹⁵⁷ Illinois has similar hardship criteria. Its provisions require evidence showing that the applicant does not have the mental capacity to explain how the assets were transferred; that the denial of assistance would force the resident to move from the long-term care facility where she resides; or that the applicant would be prohibited from joining a spouse in a facility or from entering a

150. See 42 U.S.C.A. § 1396p(c)(1)(E) (West 2009). If there were a pattern of giving, that would provide solid evidence that the assets were transferred for a purpose other than to qualify for Medicaid. *Id.* § 1396p(c)(2)(C)(ii). There is no minimum transfer threshold mentioned in the statute. *Id.* Small transfers for birthday gifts or charity could be problematic. See Coffey et al., *supra* note 62, at 234.

151. See § 1396p(c)(2)(C)(ii); *In re Franchina*, 873 N.Y.S.2d 511 (Sup. Ct. 2008) (discussing the circumstances in which an asset is transferred exclusively for a purpose other than to qualify for medical assistance). See also *infra* Part II.B.

152. Brisk & MacPherson, *supra* note 12, at 85, 92–95, 96–97.

153. For more information about hardship waivers and intent appeals and a discussion about their rates of approval, both before and after the DRA, see generally *id.*

154. *Id.* at 83.

155. Compare 42 U.S.C. § 1396p(c)(2) (2000), with 42 U.S.C.A. § 1396p(c)(2) (West 2009) (additionally allowing the health care facility to file a hardship waiver on behalf of the resident; this is the only change in the hardship waiver rules enacted by the DRA).

156. 42 U.S.C.A. § 1396p(c)(2)(D) (West 2009) (“[T]he State determines, under procedures established by the State . . . that the denial of eligibility would work an undue hardship as determined on the basis of criteria established by the Secretary.”).

157. 130 MASS. CODE REGS. 520.019(L)(1) (2009). Massachusetts keeps hardship waiver records that the public can access dating to 1995. Brisk & MacPherson, *supra* note 12, at 83.

facility that is close to her family.¹⁵⁸

However reasonable the rules may seem, they are applied in an extremely restrictive manner.¹⁵⁹ A study examining the rate of hardship waiver approvals in Massachusetts from 2004 to 2007 found that not one of the twenty-three claims presented was granted.¹⁶⁰ A survey of elder law attorneys in other states corroborated the Massachusetts study's finding that hardship waivers are almost never granted,¹⁶¹ with one attorney opining that hardship waivers "require a 'special dispensation from God.'"¹⁶² Effective hardship remedies do not exist because of the extremely restrictive interpretations of the definition of hardship, the complete discretion of the Medicaid agency officers to decide whether to grant hardship waivers, harsh time standards, and a disregard of the impact of hardship on impoverished spouses.¹⁶³

A slightly more successful way to present a hardship claim is to prove that the resources were transferred exclusively for a purpose other than to qualify for Medicaid, called an "intent appeal."¹⁶⁴ Any asset transfer made during the look-back period for less than fair market value is presumed to have been transferred for the purpose of qualifying for Medicaid, but this presumption is rebuttable by evidence that the transfer was made solely for some other purpose.¹⁶⁵ Consistent, long-term behavior is the type of evidence usually required to show a motive for gifting unrelated to Medicaid eligibility.¹⁶⁶ It is very difficult to prove the necessary intent with

158. ILL. ADMIN. CODE tit. 89, § 120.387(e)(9) (2007).

159. See Brisk & MacPherson, *supra* note 12, at 83–84.

160. *Id.* at 83, 92–93 (stating that the best outcome for hardship cases was when the hearing officer was willing to recalculate the disqualifying penalty period if the assets were returned or if there was overwhelming evidence that the assets were inaccessible).

161. See *id.* at 84 (including comments from elder law attorneys in other states regarding hardship waivers, such as "it exists on paper, but has likely never been granted," and "rarely permitted").

162. *Id.* at 84.

163. *Id.* at 83–84. See, e.g., 130 MASS. CODE REGS. 520.019(L)(4) (2009) (in Massachusetts, a Medicaid applicant must apply for a hardship waiver within fifteen days of the denial of an application for Medicaid benefits).

164. Brisk & MacPherson, *supra* note 12, at 90, 92–95, 96–97.

165. See 42 U.S.C.A. § 1396p(c)(1) (West 2009) (stating that an individual is ineligible for medical assistance if she transferred assets for less than fair market value during the look-back period); *id.* § 1396p(c)(2)(C) (stating that an individual is not ineligible for medical assistance for transferring assets for less than fair market value during the look-back period if a satisfactory showing is made to the state that the assets were transferred for a purpose other than to qualify for medical assistance). These statutes taken together are the basis for the presumption and rebuttal. See, e.g., *Wild v. La. Dep't of Health & Hosps.*, 7 So. 3d 1, 6 (La. Ct. App. 2008); *Ptashkin v. Dep't of Pub. Welfare*, 731 A.2d 238, 245–46 (Pa. Commw. Ct. 1999).

166. See, e.g., *In re Franchina*, 873 N.Y.S.2d 511 (Sup. Ct. 2008) (granting hardship waiver). See also Brisk & MacPherson, *supra* note 12, at 90 ("Applicants who can demonstrate a pattern in their gift making that significantly predates their move to a nursing home are likely to be approved.").

a one-time gift.¹⁶⁷ According to the Massachusetts survey, hardship waivers based on intent have been granted less than twenty-five percent of the time since the DRA's changes to the Medicaid rules took place.¹⁶⁸

Current Medicaid law—including the delayed penalty start date, the lengthened look-back period, and the required aggregation of partial-month penalties—combined with the restrictive hardship waiver rules, have made qualifying for and receiving Medicaid benefits after transferring assets much more difficult for senior citizens.¹⁶⁹ In these instances, the DRA may have accomplished its goal of saving the federal government money, specifically by eliminating seniors' ability to transfer assets and wait for the penalty period to run out before applying for Medicaid.¹⁷⁰ The problem, again, as illustrated by the previous examples, is that the law's blind focus on stamping out abusive asset transfers does not effectively account for the many reasons a senior citizen may transfer assets besides the avoidance of future nursing home care bills. In one example, Agnes gave money to her niece for medical school tuition and money to her nephew to help support his family while he recovered from a serious accident; in neither case is there a very high probability that the money is recoverable. Agnes did not transfer this money to avoid paying for nursing home care. And yet, as a result, Agnes has a total of eighteen months of nursing home care to pay for¹⁷¹ at a point when the state has already ascertained that she does not have the money to cover even one month of care. The fact that the transfers were one-time, lump-sum transfers means there is little chance she will be able to prove an intent appeal, and hardship waivers are almost never granted. As a result, there is a strong possibility that Agnes will not get the institutional-level care that the state has already determined she needs, even though she transferred her money two or four years ago when she did not need nursing home care and did not foresee that she would. This DRA change to Medicaid law tightens a loophole at the cost of catching asset transfers that were made for legitimate reasons at a time when the senior citizen reasonably did not anticipate needing nursing home care, and it does so without addressing the existing and related problem of minimal hardship waiver and intent appeal approval rates.

167. Brisk & MacPherson, *supra* note 12, at 90 ("One time lump-sum transfers . . . are especially difficult to get past caseworkers and hearing officers because there is little to demonstrate intent that is exclusive of qualifying for [Medicaid].").

168. *Id.* at 92.

169. *See supra* Part II.A.

170. *See* Bush, *supra* note 20, at 214 (describing the goals of the DRA).

171. Transferring \$45,000 to her niece and \$45,000 to her nephew, for a total of \$90,000, would incur an eighteen-month penalty for care valued at \$5000 per month.

C. Transferring Assets: The Problems Encountered by Agnes and Rose

By focusing on eliminating abusive asset transfers and excess spending in general, the DRA overlooks one of the basic goals of Medicaid—to be a safety net for those in need,¹⁷² the poorest and sickest members of society. Agnes is old, ill, and has less than \$2000; Agnes is one of the nation's poorest and sickest citizens. If her hardship waiver is denied, as it probably will be,¹⁷³ she faces going without the nursing home care she needs, or, if she already lives in a nursing home, faces eviction from that facility because she cannot pay for her care. This is a huge hole in the Medicaid safety net, which was created, in large part, by the DRA.

The implications of this problem are illuminated by contrasting Agnes with Florence, the senior citizen who bought the Mercedes-Benz and remodeled her kitchen, and Delores, who gambled her money away. Both Florence and Delores qualified for Medicaid.¹⁷⁴ They now live in the nursing home and their bills are paid by the state and federal government, while Agnes is left out. The difference between Agnes and the other two is that Agnes used her money to help her niece and nephew, while Florence and Delores spent their money on themselves. Here, the DRA punishes the desirable conduct of helping other people and rewards selfishness. The DRA accomplishes its goal of blocking below fair market value asset transfers, but at a price. Agnes is paying the price.

Returning to Rose, who, like Agnes, has saved up \$92,000, the question remains: who will bear the cost of the DRA's changes? Some of the recipients of the assets transferred are truly needy, like Rose's granddaughter, Lily, who is disabled and cannot support herself. Rose's problem is that she does not want to spend her money on herself, like Florence and Delores, and instead wants to transfer as much of her money as she can to Lily. But she does not want to end up like Agnes—poor, sick, unable to afford nursing home care, and barred from Medicaid. Unwilling to rely on the hardship waiver application or an appeal proving intent, Rose needs to find a way to transfer some money to Lily and still be able to qualify for Medicaid if necessary.

III. SOLUTIONS

In the plan outlined below, Rose can provide for Lily and keep her

172. See *W.T. v. Div. of Med. Assistance & Health Servs.*, 916 A.2d 1066, 1073. (N.J. Super. Ct. App. Div. 2007) (describing Medicaid as a “safety net for payment of medical bills for low-income individuals who are elderly, blind or disabled”).

173. See Brisk & MacPherson, *supra* note 12, at 83–84 (describing the difficulty in getting a hardship exemption granted).

174. See *supra* INTRODUCTION.

eligibility for Medicaid's long-term care benefit. However, helping those like Agnes, who transfer assets unaware that they jeopardize their futures, requires more than careful planning; to help Agnes, the law needs to change. One solution is changing the law so hardship waivers and intent appeals are more easily granted. This would help alleviate much of the misery created by the DRA, and it would allow Agnes to get the nursing home care she needs, even though she gave money to her family when they needed it. Another solution for senior citizens who want to be independent and fear the insecurity of Medicaid's poverty requirement is increasing the amount of money a Medicaid applicant is allowed to keep and still qualify for Medicaid-funded nursing home care. This increased amount could be kept by the senior citizen or transferred to her family exempt from the asset transfer penalties, at her option. Then if a senior citizen inadvertently runs afoul of the asset transfer rules, like Agnes did, this amount would not be counted when figuring the asset transfer penalty. Finally, rolling back the DRA's changes to Medicaid law as they relate to asset transfers would alleviate all of the problems the DRA created.

A. An Asset Transfer Plan That Works

There is a way for Rose to transfer some money to Lily within the current Medicaid laws.¹⁷⁵ An unmarried Medicaid applicant who receives a monthly income has a choice. On the one hand, she could spend all her money on her nursing home care until she has less than \$2000 and then qualify for Medicaid. On the other hand, that same Medicaid applicant could transfer her assets to another person, and the recipient could use the transferred assets to help pay for the nursing home care of the donor/Medicaid applicant during the resulting penalty period. Suppose the Medicaid applicant pays her monthly income directly to the nursing home she is living in. Then the recipient would pay the balance of the nursing home bill each month—the total bill minus the donor's monthly income—from the assets that were transferred. At the end of the penalty

175. There is another asset transfer technique, the "gift and return" strategy, that is beyond the scope of this paper. See generally Frank, *supra* note 14, at 4–7. Where it is allowed, the Medicaid applicant is able to keep roughly half of her assets. The Medicaid applicant transfers virtually all her assets to her child and is assessed a penalty. In at least some states, when half the assets are transferred back, half the penalty is forgiven. The applicant's child transfers back just enough assets as is necessary to pay for the reduced penalty period and keeps the remainder. There are possible gift tax implications for both the Medicaid applicant and her child. See *id.* at 6 (providing an example that includes the calculation required). This technique does not work where blocked by state law, including in at least eleven states (Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, and Virginia). See O'BRIEN, *supra* note 16, at 7. In New Jersey, this method used to work until a recent administrative decision disallowed the reduction of the penalty period. See Donald D. Vanarelli, *Emerging Medicaid Eligibility Strategies*, N.J. L.J., Feb. 16, 2009, at S-3.

period, the recipient will have and be able to keep an amount of money equal to the monthly income of the Medicaid applicant times the number of months of the penalty period.

This works because the asset transfer rules and penalty periods do not take into account the monthly income of the Medicaid applicant.¹⁷⁶ Essentially, this method “freezes” the penalty period at the amount of money transferred, instead of letting the monthly income increase the amount of money that eventually needs to be used up before Medicaid will pay for nursing home care. This method works best when the Medicaid applicant’s monthly nursing home cost is smaller than, equal to, or only slightly larger than the state divisor, the amount the state uses to figure the penalty.¹⁷⁷ Of course, the Medicaid applicant would have to trust the person who receives the transferred assets, because there are no legal ramifications if that person absconds with the Medicaid applicant’s money.¹⁷⁸ Additionally, it follows logically that there would be no protection for the Medicaid applicant’s assets if the recipient were sued by creditors and could no longer pay the nursing home bills during the penalty period. Also, any time financial assets are transferred, there could be gift tax consequences.¹⁷⁹ These concerns exist any time a Medicaid applicant transfers financial assets that she needs for her own care to another person.

Recalling one of the original examples will illustrate how this works. Rose has \$92,000 in assets and a monthly income of \$2000. Assume she lives in Illinois and needs nursing home care that costs \$5000 per month, so she enters the nursing home and pays for her care until her money runs out, and then she applies for Medicaid. For simplicity’s sake, assume Rose has no monthly expenses beyond the cost of her nursing home care. Because she receives \$2000 per month, Rose must remove \$3000 per month from her savings to pay for her care. It takes Rose *thirty* months to become financially eligible for Medicaid.¹⁸⁰ She then applies for Medicaid and receives it. She has \$2000 left to cover anything that Medicaid does not.

Contrast this situation with Rose’s other option once the DRA is enacted in Illinois.¹⁸¹ She still has \$92,000 in assets and a monthly income

176. See 42 U.S.C.A. § 1396p(c) (West 2009) (stating the asset transfer rules).

177. The divisor is the cost of nursing home care for the penalty period, calculated as either the monthly cost of nursing home care in the community where the resident is receiving care or the average monthly cost of nursing home care in the state. See *supra* note 81.

178. Cf. Frank, *supra* note 14, at 7 (describing this effect in a similar “gift and return” strategy).

179. See *id.* at 5 (citing 26 U.S.C.A. § 2503 (West 2008)).

180. \$3000 per month times thirty months equals \$90,000.

181. See *supra* note 110.

of \$2000. She still needs nursing home care, but this time she transfers \$90,000 to her disabled granddaughter, Lily, and keeps \$2000. She immediately enters the nursing home, applies for Medicaid, and is assessed an *eighteen-month* penalty.¹⁸² Rose pays her \$2000 monthly income to the nursing home, and Lily pays the remaining \$3000 per month to the nursing home from the assets she received from Rose. Eighteen months later, the penalty period has run and Lily has spent \$54,000 on Rose's nursing home care, but she still has \$36,000 left, which she can keep.¹⁸³ If Rose were lucky enough to have \$3000 of monthly income, and the same \$92,000 in total assets and \$5000 monthly nursing home cost, Lily would have to spend only \$36,000 on Rose's nursing home care and would get to keep \$54,000.¹⁸⁴ Basically, Lily gets to keep the amount of Rose's monthly income multiplied by the number of months in the penalty period, which is determined by the amount of assets transferred.¹⁸⁵

Even though the DRA made many changes to Medicaid laws in order to prevent senior citizens from transferring assets to others and then qualifying for Medicaid, it did not prevent all forms of asset transfers, as in this example. This way of transferring assets and then qualifying for Medicaid works within the current Medicaid laws. It is an unexpected result of the DRA, but it is very useful in that it would allow a Medicaid applicant to transfer a potentially significant amount of money to a family member. Rose now has a way to transfer some money to Lily, and she is still able to pay for Medicaid during the penalty period; when that period is over, she can qualify for Medicaid.

However, it is important to recognize that asset transfer strategies relating to the current Medicaid law will not help those who made transfers some time ago, as in Agnes's example, assuming the recipient has used up or cannot return the money. This different problem requires a different remedy.

B. Change the Hardship Waiver Rules

Another solution to the problems created by the DRA would be to change the hardship waiver law so that a senior citizen suffering from

182. \$90,000 transferred divided by \$5000 per month for nursing home care equals eighteen months.

183. \$90,000 less \$54,000 (arrived at by multiplying \$3000 per month by eighteen months) equals \$36,000.

184. \$90,000 less \$36,000 (arrived at by multiplying \$2000 per month by eighteen months) equals \$54,000.

185. The penalty period is calculated by dividing the assets transferred by the state divisor. In Illinois, for example, the state divisor is the applicant's monthly nursing home cost. See *supra* note 81. Rose's penalty period in Illinois would be eighteen months, calculated by dividing \$90,000 (the assets transferred) by \$5000 (the monthly cost of nursing care).

harsh application of the new Medicaid laws might still be allowed coverage for the nursing home care she needs. Hardship waivers exist to mitigate the harshness of the DRA's changes to Medicaid's laws regulating asset transfers.¹⁸⁶ The law needs to be changed so that hardship waivers are more easily granted.

The law should be sympathetic to all elderly people who are medically and financially in need of nursing home care; this includes those like Agnes, who inadvertently run afoul of the Medicaid asset transfer rules by giving money to needy family members long before they needed nursing home care and are now facing desperate circumstances. The hardship waiver and intent appeal rules must change to address the DRA's problems and protect senior citizens like Agnes. One such modification is for Congress to eliminate the presumption that assets are transferred to qualify for Medicaid.¹⁸⁷ This would do much to level the playing field between the state Medicaid agency and the elderly, infirm applicant.¹⁸⁸ As the rule now stands, it is almost impossible for a one-time gift to be free from asset transfer penalties.¹⁸⁹ With the proposed change, applicants would no longer have the extremely difficult task of proving that a one-time gift was made for a purpose other than to qualify for Medicaid. Of course, a gift given right before a Medicaid application was submitted would still raise red flags, and rightly so. Ultimately, with the removal of the rebuttable presumption, the penalty determination would favor whichever side offered stronger evidence. Instead of giving elderly, infirm

186. Brisk & MacPherson, *supra* note 12, at 83.

187. *Wild v. La. Dep't of Health & Hosps.*, 7 So. 3d 1, 6 (La. Ct. App. 2008) (applying the rebuttable presumption).

188. Another option would be to reverse the presumption—that is, create a rebuttable presumption that the money transferred was *not* transferred to qualify for Medicaid but instead for some legitimate purpose. This option would most effectively eliminate the problems faced by senior citizens, like Agnes, who are currently assessed penalties for money transferred long before they were sick. Medicaid applicants facing a penalty are elderly, infirm, and poor, and are at a time in their lives when they are likely unable to effectively advocate for themselves. Reversing the presumption would allow Medicaid to truly be a health care safety net for America's poorest and sickest citizens. See *W.T. v. Div. of Med. Assistance & Health Servs.*, 916 A.2d 1066, 1073 (N.J. Super. Ct. App. Div. 2007). However, reversing the presumption may be politically unpopular because it would seem to encourage elderly Americans to “cheat” by transferring assets to family to avoid paying for their own nursing home care. Bush, *supra* note 20, at 214. This in turn would require the government to spend more, both on unwarranted nursing home care and in administrative costs to change the presumption, including appeals and the costs associated with procedural changes generally. However, the cost of changing procedures should not be the a reason to avoid fixing a flawed policy that harms the population Medicaid was set up to protect. Additionally, the actual savings the DRA provides to Medicaid are dubious, as studies have shown that not many senior citizens transfer assets and those that do usually deal in small sums. See *infra* note 198. The DRA's savings may be more illusory than actual. In light of these questions, the government should not deny elderly, infirm, and poor citizens nursing home care in the context of a social program created to provide health care for the needy.

189. See *supra* note 167 and accompanying text.

Medicaid applicants an almost impossible task with dire consequences for failure, this proposal creates an even playing field that enables gifts to be analyzed within their original context when determining whether they should be subject to the transfer penalties.

Another option is for Congress to add a provision to the law allowing hardship waivers to be granted if the Medicaid applicant shows that the transferred assets have been spent and are not recoverable. Agnes could qualify for a hardship waiver under this approach because the money she transferred to her niece for tuition and to her nephew to support his family is gone and cannot be reclaimed. This approach would parallel the way Medicaid law already treats assets that the applicant spends on herself, like Florence when she bought the Mercedes—money spent is disregarded for the purpose of the asset transfer penalty rules. This change is sensible because if the assets are spent and not recoverable, penalizing the donor does little good. There is no money to be recovered and any penalty only forces the senior citizen to go without long-term care services that the state has already ascertained she needs. Of course, if the gift were spent on assets that could be sold, this provision would not apply because the current value of the gift would still be recoverable by selling the asset. This proposal takes a more balanced approach to the problem of assets that have been exhausted and are not recoverable. Money spent is money spent, and it is no more recoverable if the senior citizen spent it on herself than if she gave it to a family member who spent it. One might argue that this change would encourage spending over saving, but that is exactly the position that Medicaid law already takes for money the applicant spends herself. At least with this suggestion, elderly, poor citizens are not denied medical care that the state has already determined they need because they gave their money away to a relative who spent it. The policy goals of Medicaid include providing a safety net for the nation's poorest, sickest citizens, and these proposed changes would strengthen that safety net instead of ripping it apart.

Any of these changes would go a long way towards easing the desperate circumstances of people like Agnes arising from the DRA's changes to Medicaid laws. The DRA serves as a filter, excluding people from Medicaid benefits who may have made asset transfers to avoid paying for their own long-term care. The hardship waiver, the purpose of which is to ease the harshness of the DRA's changes,¹⁹⁰ serves to refine that filter, singling out the people who did not transfer assets to avoid paying for their medical care and restoring to them the medical care benefits they need. In order for this process to work the way it was designed, the hardship waiver process needs to be strengthened and allowed to do its job—to catch the people who are falling through the Medicaid safety net.

190. Brisk & MacPherson, *supra* note 12, at 83.

C. Increase the Asset Exemption Amount

Another recommendation to alleviate the harshness of the DRA's changes to Medicaid law is to address some of the reasons for asset transfers. One reason senior citizens transfer assets to family members before entering a nursing home is to set aside some money to improve their own quality of life while living in the nursing home.¹⁹¹ Another reason is to leave some of their hard-saved money to family members.¹⁹² If applicants were allowed to keep some savings, the motivation to transfer money would diminish for many senior citizens.

To that end, Congress should increase the amount of money that Medicaid applicants are allowed to have and still qualify for Medicaid—for example, to \$10,000 or \$20,000 from the current \$2000.¹⁹³ A U.S. Government Accountability Office study found that the median amount of money transferred for less than fair market value by Medicaid applicants was a little more than \$15,000,¹⁹⁴ which indicates that this would be a reasonable amount to allow Medicaid applicants to keep. This policy would give an incentive to selfish spenders, like Florence and Delores, to keep some money for their future expenses. Recall again Rose, who wants to leave some money to her disabled granddaughter, Lily. If Medicaid laws allowed Rose to keep a certain amount of money, upon her death she could pass that amount onto Lily in a will. This would eliminate another reason for many senior citizens' asset transfers—the desire to leave money to family members.¹⁹⁵

This proposed change would not substantially undo the government savings created by the DRA. Not all Medicaid applicants have \$10,000 or \$20,000 to keep or transfer,¹⁹⁶ so this change would only affect some potential applicants. Additionally, where the federal government sets the increased asset exemption controls the cost to the federal government. A reasonable exemption, like \$15,000, would not burden the federal government as much as a \$25,000 or \$30,000 exemption. Considering the potential benefit to Medicaid applicants, the loss in federal government

191. See Frank, *supra* note 14, at 3 (“Additionally, Medicaid coverage, limited in nature, does not pay for all the expenses associated with long-term care.”)

192. See *id.* (“[T]he applicant/recipient wants to save as much as possible for his or her heirs, which was why they worked, paid taxes, and saved for the last 50 to 60 years.”)

193. See 42 U.S.C. § 1382(a)(3)(B) (2006).

194. “The median amount of all assets transferred for less than [fair market value] was \$15,152, and ranged from \$1,000 to \$201,516.” U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54, at 7.

195. “[A]pplicants' children or grandchildren were the most common recipients of the transfers.” *Id.* at 7.

196. Overall, seventy-six percent of applicants “were approved for Medicaid coverage for nursing home services the first time they applied.” *Id.* at 6. To be approved, the applicants must have \$2000 or less in liquid financial assets. § 1382(a)(3)(B).

savings is justified.

D. Roll Back the DRA's Changes

A final solution to help senior citizens who have inadvertently run afoul of the DRA's changes to Medicaid law would be to repeal the relevant DRA provisions. The old Medicaid laws still discouraged asset transfers, but they did not have the same harsh consequences for senior citizens who inadvertently violated them. Under the old rules, Agnes, who gave money to her niece and nephew four years ago, would face no penalty period, because it would have run out by the time she needed nursing home care. Rose, too, could transfer money to her granddaughter, Lily, by taking advantage of the partial-month penalty plan described above.¹⁹⁷

While a reversion to pre-DRA laws would clearly help Agnes and Rose, it is uncertain how significant that change would be to total Medicaid spending. Studies conducted by the U.S. Government Accountability Office and others found that not many people—about ten percent of applicants—actually transfer money in advance of applying for Medicaid, and most of those who do transfer financial assets do not transfer very much.¹⁹⁸ These two facts suggest that the DRA's benefits with regards to asset transfers have been minimal, although it is hard to be certain of its effects, since there are no definitive before-and-after studies.

CONCLUSION

The DRA changed the way that asset transfers are treated by Medicaid law. It blocked some asset transfers and it may have saved money,¹⁹⁹ but the human cost is high. Some senior citizens who need

197. See *supra* Part II.A.3.

198. "The extent to which new long-term care provisions in the DRA may affect applicants' eligibility for Medicaid coverage for long-term care is uncertain." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54, at 7. Approximately ten percent of applicants in the U.S. Government Accountability Office study transferred money for less than fair market value ranging from a high of twenty-four percent in a South Carolina county to a low of four percent in a Pennsylvania county. *Id.* The average penalty assessed was six months; nineteen percent of the applicants who transferred money had penalties of less than one month; seventy-six percent of the applicants who transferred money had their penalty expire, under the pre-DRA rules, before they applied for Medicaid. *Id.* "The median amount of all assets transferred for less than [fair market value] was \$15,152, and ranged from \$1000 to \$201,516." *Id.* See also O'Brien, *supra* note 13, at 3–8 (stating that relatively few Medicaid applicants have transferred assets). O'Brien adds: "The elderly who expect to need nursing home care—and especially those of modest financial means who are likely to qualify for Medicaid—save more not less than those who do not expect to use nursing home care." O'Brien, *supra* note 13, at 3. "Analysis of transfers made by the elderly over time out of their accumulated assets show that only 1 in 100 of the elderly gave gifts to children that would be large enough to qualify them for Medicaid nursing home coverage." *Id.* at 7.

199. See Bush, *supra* note 20, at 213.

nursing home care are now denied Medicaid coverage at a time when they have almost no money to pay for the care themselves. The DRA's changes to the Medicaid rules hurt some of the nation's poorest and sickest citizens, exactly the population that Medicaid is designed to protect. Additionally, the law was not a complete success in blocking all asset transfer methods; Rose is still able to transfer some money to her disabled granddaughter.

In an attempt to limit Medicaid coverage to the poor, Medicaid law rewards addictive behavior, like Delores's gambling, with long-term care coverage. In an effort to discourage people from transferring assets, Medicaid law rewards selfish behavior, like Florence's spending all of her money on a Mercedes-Benz and a new kitchen. Meanwhile, the DRA punishes other, arguably more socially-beneficial behavior by withholding Medicaid long-term care coverage from people like Agnes, who helped her niece and nephew by giving them money several years ago when they needed it and she did not. In some states, the DRA's new rules penalize senior citizens who are forgetful and lose their financial records, and as a result, have no way to pay for their nursing home care or prove how they spent their money, all at a time when they are most vulnerable: elderly, forgetful, sick, and poor. These are harsh consequences. Moreover, because the law requires Medicaid applicants to be almost destitute before they can qualify for the long-term care benefit and start the penalty period running, the law itself ensures that these frail, elderly people are without financial resources *and* without the government benefit to pay for their care at a time when they have proven that they need it—people like Agnes and, potentially, Rose.

The purpose of Medicaid is to provide a health care safety net for the nation's poorest and sickest citizens. The intention of the DRA is to stop abuse of Medicaid while still retaining that safety net. The DRA overreaches. In its blind focus on stamping out abusive asset transfers, the DRA penalizes senior citizens who acted long before they had any idea that they would ever need Medicaid. The DRA's changes to Medicaid law deny necessary nursing home care to these senior citizens at a time when the law has ascertained that they are indeed elderly, sick, and without financial resources to pay for their care. These changes conflict with Medicaid's central purpose, which is to provide medical care to the nation's poorest and sickest citizens. Senior citizens are falling through a hole in the safety net which was created to catch them. The hole has a name: it is the DRA.

