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LONG-TERM CARE FINANCING CRISIS— RECENT FEDERAL AND STATE EFFORTS TO DETER ASSET TRANSFERS AS A MEANS TO GAIN MEDICAID ELIGIBILITY

I. INTRODUCTION

America is aging,[1] and inevitably, many members of our elderly population will require long-term care in a nursing home.[2] Faced with limited options for financing the increasing costs of such care,[3] our growing elderly population is coming to rely heavily on the Medicaid[4] program.[5] Currently, the Medicaid system faces a serious financial crisis, and the need for a clear policy on long-term care financing is urgent.[6] There is concern at both the federal and state levels over where public responsibility for long-term care ends and private responsibility begins.[7]

Generating much of the controversy is the practice of "Medicaid Estate Planning," whereby "individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings."[8]

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1. *See generally* AMERICAN HEALTH CARE ASSOCIATION, RESEARCH AND INFORMATION SERVICES GROUP, FACTS AND TRENDS: THE NURSING FACILITY SOURCEBOOK (1997), [hereinafter FACTS AND TRENDS]. The Census Bureau estimates project a steady rise in the number of elderly Americans over the next 23 years, with a dramatic jump occurring between 2020 and 2050. *Id.* at 4. It is estimated that by 2025, people age 65 and over will comprise 18.5% of the national population. *Id.*

2. *Id.* at 7. The increase in the elderly population, coupled with a declining mortality rate will result in the steady rise of the number of nursing facility residents nationwide, with the total elderly nursing facility population quadrupling over the next 40 years. *Id.*

3. Shawn Patrick Regan, Note, *Medicaid Estate Planning: Congress' Ersatz Solution for Long-Term Health Care,* 44 CATH. U. L. REV. 1217, 1223 (1995). The underlying problem in long-term care financing is the lack of options. *Id. See also* Janice Cooper Pasaba & Alison Barnes, *Public-Private Partnerships and Long-Term Care: Time for a Re-Examination?*, 26 STETSON L. REV. 529, 537 (1996) (stating that the elderly have few options in paying for the costs of long-term care).

4. The Medicaid program was established under Title XIX of the Social Security Amendments of 1965, Pub. L. No. 89-97, § 121-22, 79 Stat. 370 (codified as amended at 42 U.S.C. §§ 1396-1396s (1994 & West Supp. 1998) and 42 C.F.R. §§ 430-56 (1998)0. Its primary purpose was and is to pay a portion of health care costs for needy persons of all ages. Regan, *supra* note 3, at 1217-18.

5. FACTS AND TRENDS, *supra* note 1, at 50. Medicaid spending on nursing facility care is 26% of the nation's total expenditures for all Medicaid programs. *Id.* Between 1991 and 1995, Medicaid expenditures for all programs increased nearly 69%. *Id.* at 53. The rapid growth of Medicaid expenditures is attributed to changes in the program over the last decade which have resulted in expanded eligibility and financing and reimbursement changes. *Id.*

6. Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends,* 12 J.L. & POL. 195, 207 (1996). Because of the growing elderly population and the consequent growth in the need for long-term care financing options, citizens and the government are expressing their concern over the pending crisis. *Id.* at 211.

7. *Id.* at 197. The issue of long-term care finance is currently "the subject of heated debate in the White House, United States Congress, state legislatures, mayoral offices, health care agencies, and affected citizens throughout the land." *Id.* at 195.

8. Regan, *supra* note 3, at 1222. For example, in anticipation of the need for Medicaid, an individual could transfer approximately half of his or her assets away, and then use the remaining half to cover his expenses until he or she became eligible for Medicaid. *See* Brian Burwell & William H. Crown, *Medicaid Eligibility Policy and Asset Transfers: Does Any of this Make Sense?*, GENERATIONS, Sept. 1996, at 5, *available in* 1996 WL 10572170. Implicit in this method of Medicaid estate planning

Medicaid estate planning is a legal practice that involves utilization of the complex rules for Medicaid eligibility,[9] arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes.[10] Medicaid estate planning is criticized by some as unethical and contrary to the legislative intent to reserve Medicaid for the truly needy.[11] Others defend it, and argue that the right to transfer assets is an integral part of "America's wealth transmission system."[12]

The challenge facing Congress is to implement effective legislation to deal with the problem presented by Medicaid estate planning through asset transfers. Over the years, Congress has attempted to do this, but with marginal success.[13] Their most recent effort is a provision aimed at attorneys,[14] which makes it a crime to take a fee for advising a person to

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is that the transferor anticipates that as a result of any asset transfers, the law will impose a period of ineligibility for Medicaid, and therefore will keep an amount sufficient to cover expenses for that period. *Id.* For a discussion of the process of qualifying for Medicaid and the imposition of ineligibility periods as a result of asset transfers, *see infra*, Sections II and III.

9. *See generally* Rein, *supra* note 6, at 212-13. Medicaid laws are very complex and voluminous, with the federal statute consuming about 640 pages. *Id.* at 212. In addition, the laws vary from state to state and are subject to the particular practices of the local agency charged with administration of the program. *Id.* at 213.

10. Regan, *supra* note 3, at 1255 n.240.

11. Burwell & Crown, *supra* note 8, at 1. "Our current long-term care [financing] policy has created a system of such ambiguity that the well-heeled and well-informed often get more financial assistance from the general public than the truly poor, who do not know how to 'work the system.'" *Id. See also* Jeffrey L. Soltermann, *Medicaid and the Middle Class: Should the Government Pay for Everyone's Long-Term Health Care?*, 1 ELDER L.J. 251, 251 (1993) (stating that Medicaid was enacted as a welfare program for the poor, but it has now become a multi-billion dollar insurance policy for the elderly middle class).

12. Rein, *supra* note 6, at 195. Rein argues that the rights to pass on property at death and to receive property by intestate succession, though not constitutionally protected, are fully recognized in this country, and even though the states have the power to limit, condition, or even abolish these rights, it does not necessarily follow that the federal government has such power. *Id.* at 200-01. Rein concedes that congressional attempts to tax the passage of estates and gifts have usually withstood constitutional challenges, but points to the United States Supreme Court's opinion in *Hodel v. Irving*, 481 U.S. 704 (1986), where the Court held that a complete abolition of both the descent and devise of a class of property that had been allotted to a Native American tribe constituted a taking for which the Fifth Amendment requires compensation. Rein, *supra*, at 201. Rein argues that this holding "is difficult to reconcile with the traditional judicial position that freedom of testation is not a constitutional right." *Id.* It should be noted that the extent to which Medicaid estate planning by the middle and upper classes actually takes place is disputed. *Compare* Rein, *supra*, at 206 (stating that evidence of abuse by truly wealthy individuals who obtain Medicaid qualification even though private resources could cover their costs is largely anecdotal) *with* Regan, *supra* note 3, at 1222 n.18 (citing the *Medicare and Medicaid Budget Reconciliation: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 338 (1993) (statement of Brian O. Burwell, Division Manager for SysteMetrics/MEDSTAT Systems) wherein Burwell states that though the evidence of Medicaid estate planning may be anecdotal, it overwhelmingly indicates that the practice is widespread, and that there are attorneys who have established their entire practice on their expertise in this field). Basically, participants in the debate over long-term care financing and Medicaid belong to one of two ideological camps: those who believe that people should pay privately or buy insurance to cover their long-term care expenses; and those who believe that the government should ensure decent long-term care for all through some social program. Rein, *supra*, at 211.

13. *See infra* Section III (discussing legislation passed to discourage asset transfers).

14. Timothy L. Takacs, *Elder Law Fax* (Aug. 4, 1997) <http://www.nashville.net/~ttakacs/prior/970217.html>. In a paragraph subtitled "First, Let's Kill all the Lawyers," Takacs

transfer assets in order to become eligible for Medicaid.[15] As this article is being written, the fate of this provision is questionable,[16] and its meaning and possible ramifications are unclear.[17] In addition, the few cases dealing with the provision are contradictory as to its proper interpretation.[18]

In addition to federal changes in this area of law, there have also been recent efforts at the state level to enact provisions to deter asset transfers in lieu of Medicaid eligibility.[19] The North Dakota Legislature has introduced bills in the last three legislative sessions which, if passed, would have labeled such transfers fraudulent.[20] The original bill was amended twice in response to criticism, primarily from farm groups, but failed to pass each time.[21] In light of the new federal statute, it is unclear whether such a law, if reintroduced and passed, would even be necessary.

The purpose of this Note is to summarize the rules governing Medicaid eligibility and asset transfers, to provide a detailed analysis of recent legislative efforts at both the federal and state levels, and to discuss the need for better options for America's elderly to finance their long-term care. Section II discusses the laws pertaining to Medicaid eligibility and how a recipient may qualify for benefits. Section III provides a chronological progression of congressional acts aimed at

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writes, now "[g]ranny can transfer assets without fear, it's her lawyer that goes to jail." *Id.*

15. 42 U.S.C. § 1320a-7b(a) (1994 & West Supp. 1998). Section 1320a-7b was amended by Section 217 of The Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996), by adding the following provision to the list of acts which constitute a federal crime:

> (6) knowingly and willfully disposes of assets (including by any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under subchapter XIX of this chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under Section 1396p(c) of this title. § 217, 110 Stat. 2008-09.

The provision was recently amended, as part of the Balanced Budget Act of 1997, as follows:

> (6) for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under Section 1917(c).

Pub. L. No. 105-33, § 4734, 111 Stat. 522 (codified as amended at 42 U.S.C. § 1320a-7b(a)).

16. H.R. 216, 105th Cong. (1997). H.R. 216, which calls for the repeal of the criminalization provision, was introduced in the House on January 7, 1997. *Id.*

17. *See infra* Section IV, part B (discussing the meaning of the new criminalization provision).

18. *See infra* Section IV (discussing the problems with the interpretation of the provision, taking into consideration the leading case, *Peebler & Nay v. Reno*, 965 F. Supp. 28 (D. Or. 1997), as well as *In re* Pugliese, N.Y. L.J. (visited July 28, 1997) <http://www.ljx.com/cgi-bin/f_cat?prod/local/http/nylj/nyljcontent/072897d2htm>, and *In re* DiCecco, 661 N.Y.S.2d 943 (N.Y. Sup. Ct. 1997)).

19. *See infra* Section V.

20. H. B. 1084, 53d Leg. Sess. (N.D. 1993) (providing for an act to limit the transfer of assets to avoid medical creditors); H.B. 1490, 54th Leg. Sess. (N.D. 1995) (providing "for an [a]ct to create and enact a new section to Chapter 13-02.1 of the North Dakota Century Code, relating to limiting transfers of assets to avoid medical creditors"); H.B. 1062, 55th Leg. Sess. (N.D. 1997) (providing "for an [act] to create and enact a new section to Chapter 13-02.1, relating to the transfer of assets" by medical assistance recipients).

21. *See infra* Sections V(B) and V(C) (discussing H.B. 1490 and H.B. 1062 and their amendments).

deterring asset transfers since 1980. Section IV deals with the new criminalization provision recently passed by Congress. Section IV, part A discusses the possible meanings and ramifications of the new provision, and part B, examines the principal case of *Peebler & Nay v. Reno*,[22] wherein the provision was attacked as unconstitutional.[23] Section V analyzes the recent efforts at legislation to deter asset transfers in North Dakota. Lastly, Section VI explores a possible solution to long-term care financing in the context of a public-private partnership.

II. QUALIFYING FOR MEDICAID

A. "SPENDING DOWN" TO BECOME "NEEDY"

In order to be eligible for Medicaid benefits, an individual must qualify as "needy."[24] The individual may fall into one of three groups of needy: the "categorically needy,"[25] the "optionally categorically

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22. 965 F. Supp. 28 (D. Or. 1997).

23. Peebler & Nay v. Reno, 965 F. Supp. 28, 29 (D. Or. 1997).

24. 42 U.S.C. §§ 1396-1396s (1994 & West Supp. 1998); 42 C.F.R. §§ 430-56 (1998). Medicaid was established to pay a portion of health care costs for needy persons of all ages. Regan, *supra* note 3, at 1217-18. Medicaid is to be distinguished from Medicare, the health insurance program for the elderly and disabled, codified at 42 U.S.C. § 426 (1994 & West Supp. 1998). *See* Louis D. Torch, *Spousal Impoverishment or Enrichment? An Assessment of Asset and Income Transfers by Medicaid Applicants*, 4 ELDER L.J. 459, 462-63 (1996). Medicaid was developed to cover the areas not already covered by Medicare, namely prescription drugs, dental care, vision, hearing, and long-term institutional care and community based services. *Id.* (citing Medicare and Medicaid Budget Reconciliation Hearings held on April 1, 1993, *Before the House Subcomm. on Health and the Environment of the Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 255 (1993) (statement of Trish Riley, on behalf of Kaiser Commission on the future of Medicaid)).

25. Regan, *supra* note 3, at 1223-24. In the majority of states, a person is categorically needy if he or she receives Aid to Families with Dependent Children (AFDC), or is aged, blind, or disabled, and receives assistance under the federal Supplemental Security Income (SSI) program. *Id.* States are required by law to provide Medicaid coverage to this group. *Id.* However, under Section 209(b) of the Social Security Act Amendments of 1972, states may choose to follow their own income and resource eligibility standards. *Id.* at 1224 n.21 (citing the Social Security Amendments of 1972, Pub. L. No. 92-603, § 1611, 86 Stat. 1466). This option was provided to ensure state participation in the Medicaid program, and states electing this option are known as "209(b) states." *Id.* The 209(b) option has been characterized as a "quid pro quo arrangement that ensures that states follow federal guidelines for determining eligibility levels to receive federal assistance and also ensures continued state participation." Torch, *supra* note 24, at 459. Under 42 U.S.C. § 1396a(a)(10)(C) and 42 C.F.R. §§ 435.4 and 435.840(b), "209(b) states" may not use methods for determining Medicaid eligibility levels that are more restrictive than those used by states which follow the SSI levels. *Id.* at 464-65. North Dakota, Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, and Virginia are "209(b) states." Regan, *supra*, at 1224 n.21.

needy,"[26] or the "medically needy."[27] The elderly in need of nursing home care[28] often qualify or seek to qualify as "medically needy."[29] This requires a showing that the individual's resources and assets, though above the level allowed to receive state or federal cash assistance,[30] are insufficient to cover the cost of medical bills.[31] States must follow complex financial eligibility rules to determine whether an individual

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26. Regan, *supra* note 3, at 1224-25. This group includes individuals receiving optional state SSI supplements, but not federal SSI payments, residents of nursing homes or other specified institutions who would otherwise be eligible for cash assistance, persons receiving home or community-based services, and institutionalized individuals whose income does not exceed 300% of the federal SSI payment level. *Id.* at 1225 n.22. A state has the option of extending coverage to this group, but if it does, it is obligated to extend benefits to all eligible individuals within that group. *Id.* The regulations regarding qualification as "optionally categorically needy" are codified at 42 C.F.R. § 435.200. *Id.* at 1223 n.19.

27. Soltermann, *supra* note 11, at 255. "Medically needy" means individuals who, although their income and resources exceed levels allowed under SSI or other applicable levels, have insufficient income and resources to cover their medical expenses. *Id.* States have the option of providing coverage to individuals in this group. *Id.* Some states simply offer Medicaid coverage to "medically needy" nursing home residents whose income "is below the private rate for nursing home care." Rein, *supra* note 6, at 213 (citing Janine A. Lawless, *Who Will Pay for the Nursing Home*, in NAT'L ACADEMY OF ELDER LAW ATTORNEYS, 6TH ANNUAL SYMPOSIUM, PRE-SYMPOSIUM MANUAL 19 (1994)). In "209(b) states," coverage for the "medically needy" is mandatory, even if the state does not otherwise elect the "medically needy" option. Rein, *supra*, at 214 n.91. States that are not so obliged and do not have "medically needy" programs are called "income cap" states. *Id.* at 214. Most "income cap" states limit coverage to individuals whose income is not greater than 300% of the SSI level. *Id.* at 214 (citing JOHN J. REGAN, MEDICAID, TAX ESTATE & FINANCIAL PLANNING FOR THE ELDERLY (1994)).

28. Rein, *supra* note 6, at 208. "Individuals requiring long-term care typically have a 'chronic condition' that produces 'disability or functional impairment over an extended time period.'" *Id.* (citing TOWARD A JUST AND CARING SOCIETY, THE AARP PUBLIC POLICY AGENDA 173 (1994)). "The greatest risk factors for entering a nursing home are: being a woman, over the age of 85, and living alone." NORTH DAKOTA LONG TERM CARE ASSOCIATION ISSUE AND DATA BOOK FOR LONG TERM CARE 4 (1997). Thus, the problem of inadequate options for funding long-term care has a disproportionate effect on women who are much more likely to need care, are poor, or are single. *Id.* at 30.

29. Rein, *supra* note 6, at 254. Medicaid is the primary source of financing for long-term care services, and in 1997 will purchase about $58 billion in nursing home and homecare services for elderly people who need long-term care assistance. Burwell & Crown, *supra* note 8, at 3..

30. Regan, *supra* note 3, at 1223-25. The income levels for eligibility for SSI payments are the benchmark for Medicaid eligibility in most states. *Id.* Alternate levels may be used in "209(b) states" such as North Dakota. *Id.* at 1224.

31. 42 U.S.C. § 1396d(a) (1994 & West Supp. 1998).

qualifies as "medically needy,"[32] taking into account the individual's available[33] assets.[34] In most states,[35] an applicant's level of non-exempt,[36] or "countable" assets cannot exceed $2000 per individual or $3000 per married couple.[37] In trying to reach these set levels of relative poverty, the elderly in need of long-term care inevitably participate in a "spend-down" of their resources.[38] This is done either by actually exhausting resources on medical bills to the point where one qualifies for Medicaid,[39] or it is done artificially, by intentionally divesting oneself

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32. Rein, *supra* note 6, at 213-14. State income limits and resource standards must be based on family size and must be "reasonable." *Id.* Income includes all earned and unearned income not specifically exempted, and resources include all available liquid and nonliquid assets not specifically exempted. *Id.* at 216.

33. 42 U.S.C. § 1396a(a)(17)(B) (1994). This provision, known as the "availability principle," means that in determining Medicaid eligibility, a state may count only income and resources that are available to an individual. Soltermann, *supra* note 11, at 257. "The most challenging aspect of determining Medicaid eligibility is determining whether a resource is available." *Id.* At 257 n.29. According to federal regulations, income and resources are considered available when they are actually available and when the applicant has the legal ability to make them available. 45 C.F.R. § 233.20(a)(3)(ii)(D)(1995).

34. Regan, *supra* note 3, at 1226. "Resources" and "income" have been collectively known as "assets" since the passage of the Omnibus Budget Reconciliation Act (OBRA) of 1993. *Id.* at 1234.

35. Rein, *supra* note 6, at 216. Thirty-six states have adopted the federal SSI limits of $2000 per individual and $3000 per married couple. *Id.* Ten states have higher levels, the highest being $4000. *Id.* More restrictive standards are allowed in "209(b) states." *Id.* The most restrictive level in use is $1000. *Id.*

36. 42 U.S.C. § 1382b(a) (1994 & West Supp. 1998). The major exempt assets are:

1. Home equity in the primary residence of the community spouse who continues to live there or if either the resident or the community spouse state an intent to return home;
2. Life insurance if the aggregate face value of all policies is under $1500;
3. Burial plots of any value or an approved burial fund of up to $1500 ($1500 apiece for spouses) reduced by the face value of any exempted life insurance policies;
4. Wedding and engagement rings plus "up to $2000 of household goods and personal effects";
5. Annuities incapable of being cashed or assigned;
6. One car valued at or under $4500; and
7. "[O]ther property . . . so essential to the means of self-support . . . as to warrant its exclusion."

Id.

37. *Id.* "While financial criteria for unmarried applicants have remained relatively unchanged over the past twenty-five years, financial criteria for married applicants changed dramatically under spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988." Burwell & Crown, *supra* note 8, at 3. *See also* Torch, *supra* note 24, at 461 (discussing the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988).

38. Regan, *supra* note 3, at 1221. Spending down refers to two processes. *Id.* First, it may be the process by which elderly individuals gradually deplete their assets by paying for long-term care until they reach a level of poverty which qualifies them for Medicaid benefits. *Id.* at 1221-22. Second, it also refers to the process of divesting one of the assets known as Medicaid estate planning, whereby an individual transfers and shelters assets in order to appear to be at the required level of poverty to be eligible for Medicaid. *Id.*

39. *Id.* Both paid and unpaid medical bills may serve as proof of incurred medical expenses. 42 C.F.R. § 435.831 (b)-(d) (1998).

of assets in order to achieve eligibility.[40] The latter method of "spend-down" is known as Medicaid estate planning, which involves the transfer of assets for less than fair market value.[41]

B. LEGAL OBSTACLES TO ASSET TRANSFERS AS A FORM OF SPEND-DOWN

In an effort to control the rising cost of Medicaid, Congress has enacted provisions which penalize applicants for making such transfers.[42] Under current federal law, states must impose periods of ineligibility for Medicaid when applicants have made transfers of assets for less than fair market value within the thirty-six months prior to application for Medicaid.[43] This thirty-six month window is known as the "look-back period."[44] After assessing whether any transfers were made within the "look-back period," the number of months of ineligibility is calculated by dividing the value of the transferred assets by the average monthly cost of nursing facility care.[45] The ineligibility runs from the first day of the first month during or after which assets have been transferred.[46] In a typical example of Medicaid estate planning, the amount many people transfer is roughly half of their assets, the other

40. Regan, *supra* note 3, at 1221-22. Aside from complete alienation of assets through transfers, there exists the option of using trusts to shelter assets. *Id.* at 1231. Trusts may be preferred when: an individual does not have family or friends to whom she could transfer assets; she is concerned that the transferee will squander the assets and fail to provide for her; or she currently relies on income from the asset for living expenses. *Id.* At 1231 n.61 (citing BRIAN BURWELL, SYSTEMETRICS, MIDDLE-CLASS WELFARE: MEDICAID ESTATE PLANNING FOR LONG-TERM CARE COVERAGE 19 (1991)). For a detailed explanation of the use of trusts and the laws governing their use in Medicaid estate planning, see generally *id.* at 1231-32.

41. *Id.* at 1221-22.

42. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 5(b), 94 Stat. 3568 (codified as amended at 42 U.S.C. § 1396a (1994 & West Supp. 1998)); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248,§ 132(b), 96 Stat. 370-71 (codified as amended at 42 U.S.C. § 1396p (1994 & West Supp. 1998)); Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 303(b), 102 Stat. 760-61 (codified as amended at 42 U.S.C. § 1396p(c)(1)(A) (1994 & West Supp. 1998)); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611(a)(1), 107 Stat. 622-23 (codified as amended at 42 U.S.C. § 1396p(c)(1) (1994 & West Supp. 1998)). *See also infra* Section III.

43. Rein, *supra* note 6, at 219 (citing 42 U.S.C. § 1396p(c)(1)(B) (1994 & West Supp. 1998)).

44. 42 U.S.C. § 1396p(c)(1)(E). The "look-back period" has increased over time from 24 to 30 months, as a result of the Medicare Catastrophic Coverage Act of 1988, and from 30 to 36 months as a result of the Omnibus Budget Reconciliation Act of 1993. Rein, *supra* note 6, at 219. The "look-back period" for transfers to trusts is 60 months. *Id. See also infra* Section III (discussing the background of assets transfer penalty provisions).

45. *Id.* § 1396(c)(1)(D). Since there is no limit on the period of exclusion, the greater the amount of assets transferred, the longer the ineligibility period. Rein, *supra* note 6, at 219. Rein gives the following illustrations: "a person giving away a million dollars who applies for Medicaid 35 months later will be found ineligible for 27 years. If the same person waits until the 37th month to apply, there will be no ineligibility period." *Id.*

46. Rein, *supra* note 6, at 219. In addition, if more than one gift is made during the "look-back period," the totals are added up, and the resulting ineligibility period runs from the date of the first transfer. *Id.*

half being kept to pay for care during the anticipated ineligibility period.[47] Until recently, the penalties for asset transfers have consisted only of the above described ineligibility periods. However, in 1996, Congress passed a provision which made it a crime to make an asset transfer before applying for Medicaid, thus subjecting such transferors to criminal liability.[48] This new statute was then amended to make it a crime to advise someone to make an asset transfer in lieu of Medicaid eligibility, thereby shifting the liability from the transferor to his or her attorney or other advisor.[49] The new provision represents a marked change in the way Congress has dealt with this aspect of Medicaid estate planning.[50]

III. BACKGROUND OF ASSET TRANSFER PENALTY PROVISIONS

Congress initially penalized spend-down through asset transfers in the Parental Kidnapping Prevention Act of 1980,[51] which gave states the option to penalize transfers of "countable"[52] assets made within twenty-four months of the application for Medicaid benefits.[53] The Act penalized such transfers by imposing ineligibility periods of up to twenty-four months.[54] Two years later, Congress permitted states to consider both "countable" and "excluded" assets that had been transferred within twenty-four months of the application for Medicaid.[55]

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47. Burwell & Crown, *supra* note 8, at 5. Because the penalty periods are calculated from the date of the transfer, no matter how many assets one has, she can always give away half, use the remaining half for nursing facility care, and not be subject to any penalty. *Id.* Thus, "penalties that result in actual delays in Medicaid eligibility after the date of application are virtually nonexistent." *Id.*

48. The Health Insurance Portability and Accountability Act, Pub. L. No. 104-91, § 217, 110 Stat. 2008 (codified as amended at 42 U.S.C. § 1320a-7b(a)(6) (1994 & West Supp. 1998)).

49. 42 U.S.C. § 1320a-7b(a)(6). *See infra* Section IV (regarding the statute as it was originally enacted, and as it was recently amended).

50. *See infra* Section III (discussing the way asset transfers have been dealt with to date).

51. Pub. L. No. 96-499, § 5, 94 Stat. 3566 (relevant portions codified as amended at 42 U.S.C. § 1396a (1994 & West Supp. 1998)).

52. *Id.* § 5(a), 94 Stat. at 3567. Assets are either countable in or excludable from the assessment of eligibility for Medicaid. Regan, *supra* note 3, at 1228. For a list of excluded, or exempt, assets, *see supra* note 34.

53. *Id.*

54. *Id.* § 5(b), 94 Stat. at 3568. A state could impose a penalty in excess of 24 months if the uncompensated value of the transferred assets exceeded $12,000, provided that the period "bear[s] a reasonable relationship to such uncompensated value." *Id.*

55. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 132, 96 Stat. 372. The most significant change was that states could consider the transfer of an applicant's home, which is considered an exempt asset. *Id.* "The purpose of this policy is to keep the home in the Medicaid recipient's estate so that states can eventually seek recovery (and partial recoupment of incurred Medicaid costs) upon the recipient's death." Burwell & Crown, *supra* note 8, at 6. TEFRA gave states the further option to impose liens on the homes of institutionalized individuals in order to recover money expended by the state for their care. § 132, 96 Stat. at 370-71. States were prohibited from foreclosing liens if a spouse, dependent child, or other primary caregiver still lived in the home. *Id.*

In 1988, Congress passed the Medicare Catastrophic Coverage Act (MCCA),[56] which for the first time mandated that states penalize transfers of both countable and excluded assets for less than fair market value.[57] The MCCA increased the look-back period from twenty-four to thirty months.[58] The MCCA also exempted non-institutionalized individuals from the asset transfer rules which allowed an institutionalized spouse to transfer assets to his or her non-institutionalized spouse, who was then free to transfer those assets to third parties without affecting the institutionalized spouse's Medicaid eligibility.[59] Congress closed this loophole in the Omnibus Budget Reconciliation Act (OBRA) of 1989 by restricting asset transfers by the non-institutionalized spouse.[60]

The Omnibus Budget Reconciliation Act (OBRA) of 1993[61] brought about changes with respect to asset transfer penalties that are still in effect today.[62] The OBRA of 1993 expanded the definition of "assets" to include those held jointly by the Medicaid applicant and another individual.[63] Moreover, the look-back period was extended

56. Pub. L. No. 100-360, § 303, 102 Stat. 754 (codified as amended at 42 U.S.C. § 1396r-5 (1994 & West Supp. 1998)).

57. *Id.* § 303(b), 102 Stat. at 760-61. In order to meet the requirements of the law, "the State plan [had to] provide for a period of ineligibility . . . ," and the ineligibility period was to be "equal or lesser [to] 30 months or the total uncompensated value of the resources so transferred, divided by the average cost . . . of nursing facility services in the state." *Id.*

58. *Id.*

59. Torch, *supra* note 24, at 474. The main purpose of MCCA was to remedy the unintended effects that prior legislation had on spousal impoverishment. *Id.* at 465-66. Congress directed special attention to revising the rules for determining eligibility that had contributed to the hardships endured by elderly couples dealing with the expenses of long-term care. *Id.* Thus, the total value of the non-exempt resources in which either spouse had an interest were assessed and documented by the state, and then divided equally between the two spouses. *Id.* at 471. The transfer of half of the assets to the non-institutionalized, or community spouse reduced the institutionalized spouse's non-exempt assets while it provides support for the community spouse. *Id.* The amount of nonexempt resources that the community spouse ultimately receives is known as a Community Spouse Resource Allowance (CSRA), which is established by the state pursuant to 42 U.S.C. § 1396r-5(e)(2)(C) for purposes of determining Medicaid eligibility. *Id.* Also, the community spouse's resources must not fall below the Minimum Monthly Needs Allowance (MMNA) established by the state pursuant to 42 U.S.C. § 1396r-5(d) to ensure sufficient income for the community spouse. *Id.* at 470.

60. Pub. L. No. 101-239, § 6411(e), 103 Stat. 2106 (codified as amended at 42 U.S.C. 1396P(c) (1994 & West Supp. 1998)).

61. Omnibus Budget Reconciliation Act (OBRA) of 1993, Pub. L. No. 103-66, 107 Stat. 312.

62. Ira Stewart Weisner, *OBRA '93 And Medicaid: Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 47 SOC. SEC. REP. SERV. 757, 757 (1995). OBRA 1993 operated to impede Medicaid estate planning in three major ways. *Id.* It increased the ineligibility periods that would result from asset transfers prior to institutionalization, nearly eliminated a Medicaid recipient's ability to be beneficiaries of income sequestered in trust arrangements, and increased the ability of states to recover from the estates of deceased Medicaid recipients. *Id.*

63. *Id.* at 770. The OBRA of 1993 provided that where an individual held an asset in common with another person, such as in a joint tenancy, tenancy in common, or other similar arrangement, any action by the Medicaid applicant, or any other person, which reduced or eliminated such individual's ownership or control of the asset would be considered a transfer. *Id.* (citing Pub. L. No. 103-66, § 13611 (a)(3), 107 Stat. 624 (codified as amended at 42 U.S.C. § 1396p)).

again, this time to thirty-six months,[64] and the potential penalty for asset sheltering was increased.[65] Yet, the law exempted certain types of transfers,[66] most notably those not made to gain eligibility,[67] or those where non-exemption would cause undue hardship.[68]

IV. CRIMINALIZATION PROVISIONS

Arguably prompted by the perception of widespread Medicaid estate planning by middle class Americans, coupled with a rising Medicaid budget, Congress recently enacted a provision that criminalized asset transfers in lieu of Medicaid eligibility.[69] In 1996, Congress passed

64. *Id.* at 766. The "look-back period" for uncompensated transfers became 36 months, except for certain payments from trusts, or portions of trusts treated as assets disposed of by the applicant which are subject to a 60 month "look-back period." *Id.*

65. *Id.* at 767-68. The ineligibility period no longer had a durational limit. *Id.* It was calculated in three steps. *Id.* at 768. First, the total value of all asset transfers during the "look-back period" are added up; second, the total amount is divided by the state's average monthly costs of nursing home care as of the application date; third, the ineligibility period begins on 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. *Id.* (citing § 13611(a)(1), 107 Stat. at 622-23).

66. *Id.* Transfers from spouses to another for the sole benefit of the individual's spouse, and transfers to an individual's child who is blind or disabled were previously exempted under § 1917(c)(2)(B) of the Social Security Act. *Id.* The OBRA of 1993 added exemptions for transfers from the individual's spouse to another for the sole benefit of the individual's spouse, transfers to a trust established solely for the benefit of a disabled child, and transfers to a trust established solely for the benefit of a disabled individual under the age of 65. *Id.* (citing § 13611(a)(2)(B), 107 Stat. at 623).

67. Regan, *supra* note 3, at 1237. If an individual can affirmatively prove that he or she intended to dispose of the assets for valuable consideration, the transfer will not be considered in determining Medicaid eligibility. *Id.* (citing 42 U.S.C. § 1396p(c)(2)(C)(i)).

68. Weisner, *supra* note 62, at 769. A waiver of the transfer rules would be available where the state determined that denial of eligibility would work an undue hardship. *Id.* (citing § 13611(a)(2)(D), 107 Stat. at 623-24). "Undue hardship" has been defined as deprivation of medical care such that the individual's health or life would be endangered or where the individual would be deprived of food, clothing, shelter, or other necessities of life. *Id.* at 769 n.83. Weisner also details the various changes in the treatment of trusts, opining that "Congress identified trusts as the single most offensive Medicaid estate planning vehicle and tried, in almost every manner short of criminalization, to inhibit their use." *Id.* at 771. The OBRA of 1993 also required states to practice estate recovery, the process of recovering Medicaid dollars spent on a deceased individual from his or her estate. *Id.* at 779-80. Before the OBRA of 1993, states were not required to have estate recovery programs. *Id.* If a state did practice estate recovery, it could only do so where the deceased recipient had no surviving children under 21. *Id.* After the OBRA of 1993, states were required to recover from recipient's estates, including all real and personal property and other assets included in the estate for purposes of probate law. *Id.* States could opt to include any other real or personal property and other assets in which the individual had any legal title or interest at the time of death, including property passing by joint tenancy, survivorship, life estate, living trust, or other arrangement. *Id.* (citing 42 U.S.C. § 1396(b)(3)). *See also* Burwell & Crown, *supra* note 8, at 7 (discussing the issues raised by estate recovery programs in the public versus private interface of long-term care financing).

69. The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1940 (codified at 42 U.S.C. § 1320a-7b(a)(6) (1994 & West Supp. 1998) (establishing a criminal penalty for advising a person to transfer assets in anticipation of Medicaid eligibility)). Because the provision was passed with little or no public debate, and no legislator has claimed responsibility for it, one can only speculate as to the primary motivation behind its enactment. *See infra* note 71 (discussing the lack of background information on the provision). However, the debate over the prevalence of Medicaid estate planning and the rising costs of Medicaid were likely contributing factors. *See supra* notes 11-12 and accompanying text (discussing these factors in the long-term care financing debate).

the Health Insurance Portability and Accountability Act (HIPAA),[70] commonly known as the Kennedy-Kassebaum Act.[71] Section 217 of HIPAA made it a crime to "knowingly and willfully dispose of assets in order . . . to become eligible for [Medicaid], if disposing of the assets results in the imposition of a period of ineligibility for such assistance."[72] The provision came to be known as the "Granny Goes to Jail Law."[73] No legislator claimed responsibility for the Act,[74] and it apparently passed with little or no public debate.[75] Nonetheless, considerable debate arose over the Act's purpose and application,[76] and one case was brought in an attempt to have it declared unconstitutional.[77] Before resolution on the meaning of the statute could be reached, Congress amended the provision as part of the Balanced Budget Act of 1997.[78] The amendment changed the focus of who would be subject to criminal

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70. Pub. L. No. 104-191, 110 Stat. 1940 (codified at 42 U.S.C § 1320a-7b).

71. CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996: GUIDANCE ON FREQUENTLY ASKED QUESTIONS (Apr. 10, 1997). The Bill, H.R. 3103, was named for Senators Edward Kennedy and Nancy Kassebaum, who introduced it. *Id.* The purpose of the Act was to provide for changes in the health insurance market, guaranteeing the availability and renewability of health insurance coverage for certain employees and individuals, and limiting the use of preexisting condition restrictions. *Id.* The Act created federal standards for insurers, health maintenance organizations (HMOs), and employer plans. *Id.* It made changes to the Internal Revenue Code to permit small businesses and the self-employed to establish and contribute to Medical Savings Accounts (MSAs), and increased the tax deduction for health insurance for the self-employed. *Id.* It also amended the Internal Revenue Code to provide tax credit for private long-term care policies. *Id.*

72. The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 217, 110 Stat. 2008 (codified as amended at 42 U.S.C. § 1320a-7b(a)(6)). This section was added to five other acts which constitute fraud and for which there are criminal penalties: making false representations of material facts in applying for benefits; making false representations of material facts used in determining rights to benefits; concealing knowledge of any occurrence or event affecting the right to receive benefits; using benefit payments for something other than intended; and presenting a claim for benefits based upon services of one not licensed as a physician. 42 U.S.C. § 1320a-7b(a)(1)-(5).

73. *See, e.g.*, Kathy M. Kristof, *Medicare Law Change Could Land Granny or Gramps in Jail*, L. A. TIMES, Feb. 2, 1997, at D2 (writing that the assessment of Certified Financial Planners with respect to the provision was that "Granny could go to jail"); Luisa Beltran, *Penalty Provision Sends Granny up the River*, ACCOUNTING TODAY, Feb. 10, 1997, at 12 (writing that opponents of the measure denounce it as the "Granny Goes to Jail Law"); Timothy L. Takacs, *Clinton Official Urges Repeal of Asset Transfer Law*, ELDER LAW FAX ¶ 2 (Feb. 17, 1997) <http:/www.nashville .net/~ttakacs/prior.html> (calling the provision the "Granny Goes to Jail" law); Gregory C. Larson & Melissa Hauer, *Medicaid Gag Law*, ELDER LAW FAX OF LIFE 1 (July 28, 1997) (discussing the possible repeal of the "Granny Goes to Jail Law").

74. *See* Takacs, *supra* note 73, at ¶4. The measure was added quietly, and once word of the criminalization of asset divestiture got out, no Congressperson has come forward to claim authorship of it. *Id. See also* Margaret Turner, *New Federal Law Attempts to Curb Medicaid Transfers*, BUSINESS FIRST OF BUFFALO, Dec. 9, 1996, at ¶¶6, 11 *available in* 1996 WL 11598624 (calling Section 217 a little known "provision . . . inserted [into the bill] in the dead of night").

75. *See* Takacs, *supra* note 73, at ¶ 4.

76. *See infra* Section IV, part A (discussing the various interpretations of the new provision, its enforceability, and the introduction of bills calling for its repeal).

77. Peebler & Nay v. Reno, 965 F. Supp. 28, 29 (D. Or. 1997). *See infra* Section IV, part B (discussing the case in detail).

78. Pub. L. No. 105-33, § 4734, 111 Stat. 522-23 (codified as amended at 42 U.S.C. § 1320a-7B(a) (1994 & West Supp. 1998)).

penalties by making it a crime for one who "for a fee knowingly and willfully counsels or assists an individual to dispose of assets . . . in order for the individual to become eligible for medical assistance . . . if disposing of the assets results in the imposition of a period of ineligibility for such assistance."[79] As such, the aim was redirected from the transferor to his or her attorney. To date, there is little information and no case law on the amended version, but the analysis done prior to the amendment addressed questions that are undoubtedly being asked about the revised provision.[80]

A. PROBLEMS WITH AMBIGUITIES REGARDING APPLICABILITY, ENFORCEABILITY, AND THE APPROPRIATE PENALTY

Questions regarding the original version of the statute centered on enforceability and who would be considered criminally liable.[81] Without a current understanding as to what the provision meant, it was unlikely that there could have been a clear answer on how or when it would be enforced.[82] Under the statute, a penalty attaches to "a statement, representation, concealment, failure or conversion."[83] However, since a "'disposition of assets' is not really any of these activities," no penalty could be attached unless one interprets the disposition of assets to be the equivalent of a "conversion."[84]

The transferor would likely be considered an offender of the new law.[85] However, there was also speculation as to whether the transferor's accountant or lawyer, or anyone else who advised him or her, might also be the focus of this provision.[86] The recent amendment clarifies that

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79. *Id.*

80. This is true as both versions of the statute contain the language, "if disposing of the assets results in the imposition of a period of ineligibility for [Medicaid]." 42 U.S.C. § 1320a-7b(a).

81. *See* Takacs, *supra* note 73, at ¶6. "Experts have called Section 217 unenforceable due to the ambiguities in the provision." *Id.*

82. *Id.* Bruce Vladeck, Administrator of the Health Care Finance Administration (HCFA), was questioned at a hearing of the Senate Labor and Human Resources Committee, and said that the administration will not take any steps to enforce the provision. *Id.* In fact, the HCFA supports legislation that has been introduced to repeal the provision. *Id.* Representative Steven C. LaTourette of Ohio introduced a bill to repeal Section 217. *Id.* LaTourette is a former prosecutor who agrees that the provision is difficult to interpret and impossible to enforce. *Id.* His bill has 36 cosponsors, and strong bipartisan support. David Goldfarb, *The Criminalization of Asset Transfer in Medicaid Planning* (June 18, 1997) <http://www.seniorlaw.com/crimmed.html>. Senate Bill 369, which also calls for the repeal of Section 217, has been introduced as well. *Id. at* ¶ 6

83. 42 U.S.C. § 1320a-7b(6). Congress first imposed criminal penalties for fraud involving Medicare or Medicaid in 1972. *See* Regan *supra* note 3, at 1227. These provisions provide the basis for prosecuting anyone who tries to fraudulently secure benefits, and the new criminalization provision was added to these provisions. *Id.*

84. *In re* DiCecco, 661 N.Y.S.2d 943, 946 (N.Y. Sup. Ct. 1997).

85. *See supra* note 73 (discussing the "Granny Goes to Jail" nickname given to the provision).

86. Goldfarb, *supra* note 82, at ¶ 4. Federal law provides that "whoever commits an offense against the US or aids, abets, counsels, commands, induces, or procures its commission is punishable as

liability would now fall on the attorney or other adviser, rather than the transferor.[87]

The new criminalization provision, both as originally enacted and as amended, provides for a penalty specifically "if disposing of the assets results in the imposition of a period of ineligibility for [Medicaid] . . . ."[88] This language is ambiguous at best and seems open to interpretation.[89] No advisory opinion has been issued which would give clear guidance on this point.[90] Neither the Conference Committee Report[91] nor the penalty section of the provision, which was unchanged by either the original enactment or the amendment, offer any real insight into its meaning.[92]

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principal." *Id.* at ¶ 15 (citing 18 U.S.C. § 2(a)).

87. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 522-23 (codified as amended at 42 U.S.C. § 1320a-7b(a)(6) (West Supp. 1998).

88. 42 U.S.C. § 1320a-7b(a)(6).

89. Goldfarb, *supra* note 82, at ¶ 13.

90. *See* Plaintiff's Response to Defendant's Motion to Dismiss at 6, Peebler & Nay v. Reno, 965 F. Supp. 28 (D. Or. 1997). The plaintiff's efforts in this case, as well as others, to obtain information regarding the coverage of the statute at issue were met with silence. *See id.* at 31. The Department of Justice took no position on the meaning of the provision before filing its motion to dismiss in the *Peebler* case. Aff. of Tim Nay at 2, Peebler & Nay v. Reno, 965 F. Supp. 28 (D. Or. 1997) (No. CV 97-256-HA).

91. H.R. CONF. REP. NO. 104-736, at 251-52 (1996) *reprinted in* 1996 U.S.C.A.N.N. 2064-65. The conference committee report for the provision states:

> CRIMINAL PENALTY FOR FRAUDULENT DISPOSITION OF ASSETS IN ORDER TO OBTAIN MEDICAID BENEFITS (Section 217 of the House Bill). Current law: Under Section 1128B, upon conviction of a program related felony, an individual may be fined not more than $25,000 or imprisoned for not more than five years or both. House bill: This provision would add a new crime to the list of prohibited activities under Section 1128B of the Social Security Act for cases where a person knowingly and willfully disposes of assets by transferring assetc in order to become eligible for benefits under the Medicaid program, if disposing of the assets results in the imposition of a period of ineligibility. Senate amendment: No provision. Conference agreement: The conference agreement includes the House provision.

Id.

92. Turner, *supra* note 74, at 2. Turner writes that "a specific penalty is nowhere set out, nor is there any legislative history on this provision to explain what is being attempted." *Id.* The actual penalty provision provides that:

> Whoever [commits the crime] shall (i) . . . be guilty of a felony and upon conviction thereof fined not more than $25,000 or imprisoned for not more than five years or both, or (ii). . . be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both. In addition, in any case where an individual who is otherwise eligible for assistance under a Federal health care program is convicted of an offense under the preceding provisions of this subsection, the administrator of such program may at its option (notwithstanding any other provision of such program) limit, restrict, or suspend the eligibility of that individual for such period (not exceeding one year) as it deems appropriate; but the imposition of a limitation, restriction, or suspension with respect to the eligibility of any individual under this sentence shall not affect the eligibility of any other person for assistance under the plan, regardless of the relationship between that individual and such other person.

42 U.S.C. § 1320a-7b(a).

Arguably, the provision could be triggered in different ways.[93] It has been suggested that the provision could apply to all transfers which ultimately render a person eligible for Medicaid.[94] It has also been suggested that the provision applies only to transfers where the applicant transfers assets, calculates the anticipated ineligibility period, and then applies for Medicaid before the calculated penalty period expires, in which case the state agency would impose a period of ineligibility denying Medicaid.[95] Alternatively, the provision could be triggered when one transfers assets and waits to apply for Medicaid until the anticipated transfer penalty has expired, but does apply before the end of the look-back period.[96] Whatever the proper interpretation may be, elder law practitioners seem to agree that criminal penalties do not apply to the following:[97] 1) transfers made prior to January 1, 1997;[98] 2) transfers done exclusively for purposes other than to obtain Medicaid;[99] 3) exempt transfers;[100] and 4) transfers where the application is made

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93. Goldfarb, *supra* note 82, at ¶13. It is unclear what is meant by conduct which "results in the imposition of a period of ineligibility." *Id.* The following are four alternatives:

1. It applies only to transfers where the applicant applies for Medicaid before the calculated penalty period expired and the state agency imposes a period of ineligibility by denying Medicaid.
2. It applies to any nonexempt transfer within a look-back period where either the applicant applies before the penalty period expires and the agency denies Medicaid or the applicant applies after the penalty period expires and Medicaid is granted.
3. It applies to all nonexempt transfers, even beyond a look-back period.
4. It applies to all transfers (exempt and nonexempt) which ultimately render a person eligible for Medicaid.

Id.

94. *Id.* This sweeping interpretation would seem most consistent with a goal to completely eradicate this method of Medicaid estate planning, but the consensus among elder law attorneys is that criminal penalties do not apply to every transfer of assets made by one who eventually qualified for Medicaid. *Id.* The opinion in *Peebler* discussed *infra* Section IV, part B, has been interpreted to be consistent with this consensus. *See* 965 F. Supp. 28, 28 (D. Or. 1997).

95. Goldfarb, *supra* note 82, at ¶13. The Defendant's Memorandum in Support of Motion for Summary Judgment in *Peebler,* discussed infra Section IV, part B, asserts that the statute is not triggered until an ineligibility period is actually imposed has been interpreted to be consistent with this interpretation. *See* 965 F. Supp. at 28.

96. Molly Mead Wood, *Kennedy-Kassebaum Legislation Both Clarifies, Obscures Long-Term Care Issues,* 65 J. KAN. Bar Ass'n 16, 18 (1996).

97. Goldfarb, *supra* note 82, at ¶ 18 (citing BROOKDALE CENTER ON AGING/INSTITUTE ON LAW AND RIGHTS OF OLDER ADULTS: ENTITLEMENT BULLETIN 96-LI-12 (Sept. 1996); NATIONAL ACADEMY OF ELDER LAW ATTORNEYS: NAELA LEGISLATIVE ALERT AND UPDATE (Sept. 1996); Harry S. Margolis, *The Elder Law Report,* Vol. VIII, No.2 (Sept. 1996); Daniel Fish, *Criminal Penalties for Medicaid Motivated Transfers,* N.Y. L.J., Sept. 23, 1996; Vincent Russo, *Memorandum to Members of the Elder Law Section, New York State Bar Ass'n 1* (August 26 & Oct. 4, 1996)).

98. *Id.*

99. *See supra* note 64 (explaining treatment of transfers done for purposes other than obtaining Medicaid).

100. *See* Regan, *supra* note 3, at 1230, (listing the types of transfers which are exempt from the rules).

after the thirty-six month look-back period and thus no penalty period is imposed.[101]

The only case to date dealing specifically with the criminalization provision is *Peebler & Nay v. Reno,* which was decided prior to the 1997 Balanced Budget Act amendment and focused liability on the transferor's advisor.[102] Although it did not squarely address the issue of when the statute would be triggered, the opinion hinted at an answer.[103]

B. *PEEBLER & NAY V. RENO*—THE PROVISION SURVIVES CONSTITUTIONAL ATTACK, BUT A POSSIBLE ANSWER EMERGES

The transferor in *Peebler & Nay* was Margaret Peebler, an eighty-seven year old woman residing in a Gresham, Oregon nursing home.[104] On February 12, 1997, she transferred $7,785 to her nephew to be eligible for Medicaid within three months.[105] She had been advised to make this transfer by her attorney, Tim Nay.[106] On February 14, 1997, Peebler and Nay filed a complaint[107] in the United States District Court for the District of Oregon seeking declaratory relief.[108] Specifically, the plaintiffs sought a declaration that the statute created no crime, that it was

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101. *See* Rein, *supra* note 6, at 221 (explaining how applying for Medicaid 37 months after the date of the transfer will result in no period of ineligibility).

102. *See* 965 F. Supp. 28, 29 (D. Or. 1997).

103. *Id.* The case was dismissed for lack of subject matter jurisdiction on the grounds that enforcement of Section 217 against the plaintiffs was neither actual nor imminent enough to satisfy the standing requirements of Article II of the Constitution for purposes of challenging the provision's constitutionality. *Id.* at 29. From this holding, it has been inferred that the statute is not violated until an individual applies for Medicaid and a period of ineligibility is actually imposed. *See* Goldfarb, *supra* note 82, at ¶3.

104. Julie Tripp, *What's Up With Medicaid,* PORTLAND OREGONIAN, Feb. 24, 1997, at B12. Peebler and her attorney, Tim Nay, were co-plaintiffs in the case. *Id.*

105. Plaintiffs' Response to Defendant's Motion to Dismiss at 3, *Peebler* (No. 97-256 HA). It was intended that Peebler's nephew use the money to provide for Peebler's personal needs for the rest of her life. *Id.* As the average monthly cost of nursing care in Oregon is $2,595, Peebler's transfer of $7,785 made her ineligible for three months. *Id.* Peebler fully intended to apply for Medicaid with the help of her attorney as soon as the penalty period expired. *Id.* at 4. Had Peebler been married, she could have transferred her assets to her spouse without risk of prosecution. Complaint for Declaratory Relief at 4, *Peebler* (No. 97-256 HA). As such, her situation represents the unduly harsh effects of the law on single, elderly women.

106. Complaint for Declaratory Relief at 4, *Peebler* (No. 97-256 HA). Nay is a founding member and was the first president of the National Academy of Elder Law Attorneys. *Id.* He derives a substantial portion of his income from advising elderly clients with respect to making transfers such as the one made by Peebler. *Id.* Nay argued that his conduct in advising Ms. Peebler was possibly a crime. *Id.* If the case were brought today, Nay's liability would be the primary concern. *See* 42 U.S.C. § 1320a-7b(a)(6) (1994 & West Supp. 1998).

107. Tripp, *supra* note 104, at B12. Because Nay was a co-plaintiff, he did not act as an attorney. *Id.* The complaint was actually filed by attorney James S. Coon. *Id.*

108. Complaint, *Peebler* (No. 97-256HA). Plaintiffs had six claims for relief: that the statute was void for vagueness with respect to Plaintiff Peebler; that it created no crime with respect to Plaintiff Peebler; that it was not applicable to Plaintiff Peebler's conduct; that it was void for vagueness with respect to Plaintiff Nay; that it created no crime with respect to Plaintiff Nay; and that it was not applicable to the advice given by Plaintiff Nay. *Id.* at 8-11.

not applicable to either of the plaintiffs' conduct, and that it was void for vagueness.[109] Peebler argued that she was unable to tell from the language of the statute whether the transfer of assets which she made and the application for Medicaid benefits which she intended to make would subject her to criminal liability.[110] The plaintiffs based their arguments on more than one possible interpretation of the statute.[111] They argued that the law could be interpreted to mean that a period of ineligibility resulted as soon as Peebler transferred any of her assets.[112] Alternatively, the plaintiffs claimed that even if they had not yet violated the statute, they inevitably would when Peebler applied for Medicaid after having exhausted her existing resources.[113]

However, the Attorney General argued that the most reasonable interpretation was "that Section 217 only applies if the transfer of assets actually 'results in the imposition of a period of ineligibility' for Medicaid benefits."[114] The plaintiffs' final argument, that the statute did not apply to Peebler's conduct because no period of ineligibility is actually 'imposed' where an elderly patient transfers assets, and then waits for the ineligibility period to expire, was conceded to by the defendant.[115]

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109. *Id.*

110. *Id.* at 8. This argument was based on two principles:

> a. [The provision did] not inform a person of ordinary intelligence whether a knowing and willful transfer of assets intended to provide for a lifetime of needs and to become eligible for Medicaid, with full disclosure of that transfer, where the transfer results in the imposition of a statutory period of ineligibility is a crime at all; and b. A person of ordinary intelligence [could not] tell whether, where an elderly patient transfers assets in order to become eligible for Medicaid but waits to apply for Medicaid benefits until the period of ineligibility has expired, the transfer has resulted in the imposition of a period of ineligibility for such assistance.

Id.

Plaintiffs argued that because the provision failed to inform a person of ordinary intelligence whether or not they had committed a federal crime, it violated the Due Process Clause of the United States Constitution. *Id.* at 10.

111. Plaintiffs' Response to Defendant's Motion to Dismiss, *Peebler* (No. 97-256 HA).

112. *Id.* at 9. The only reason that this argument was disproved was the fact that the defendant in her Memorandum in Support of Motion for Summary Judgment specifically conceded the point. *Id.* Plaintiffs argued, however, that it was not necessary to make a showing as to when their conduct violated the statute in order to have standing to decide the case on the merits. *Id.* (citing San Diego Gun Rights v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996)).

113. *Id.* Plaintiffs argued that prosecution was sufficiently imminent because before filing their lawsuit, they committed themselves to a course of action in which they would inevitably violate the statute. *Id.* at 9. That is, "[w]hen plaintiffs filed their complaint, Mrs. Peebler and her attorney, Mr. Nay, had embarked on an inexorable collision course with Section 217. Having transferred her assets, Mrs. Peebler ha[d] no choice but to apply for Medicaid benefits on May 13, 1997." *Id.* at 7.

114. Goldfarb, *supra* note 82, at ¶4. Simply put, if Peebler waited to apply for Medicaid until after May 13, 1997, the day her ineligibility period would be over, she would not have been subject to prosecution under Section 217. *Id.*

115. *Id.* The Defendant argued that the result of her concession was to remove the controversy from the case and thus remove the case from the court's jurisdiction. Defendant's Memorandum in Support of Motion to Dismiss at 1, 2, 4, 5, 9, 14 *Peebler* (No. 97-256 HA) The Defendant also conceded that the statute did not apply to Nay's conduct in advising Ms. Peebler to transfer her assets.

In light of the defendant's concession, the court dismissed the case for lack of subject matter jurisdiction on the grounds that enforcement of the provision against the plaintiffs was neither actual nor imminent enough to satisfy the standing requirements of Article II of the Constitution necessary to challenge the provision's constitutionality.[116]

Although the *Peebler* opinion did not directly address the question of when exactly the statute is triggered, the Attorney General's memorandum seems to state that the actual imposition of a penalty period is essential to establish a violation of the statute.[117] However, one court has declined to interpret the statute in accordance with the memorandum.[118] In *In re Pugliese*,[119] a New York trial court judge reasoned that hailing the *Peebler* decision as "a ruling which avoids criminal liability in most situations" is too broad an interpretation.[120] The court said that it remains to be seen whether the view expressed in the Attorney General's memorandum will be adopted when the issue is properly presented for determination.[121]

See Plaintiffs' Response to Defendant's Motion to Dismiss at 1, *Peebler* (No. 97-256 HA) (noting the Defendant's concession on Plaintiff Nay's liability). The plaintiffs argued that the defendant could not deprive the court of jurisdiction simply by conceding the relief requested, because a case must remain justiciable not only when the case is filed but throughout. *Id.* at 7 (citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)). Plaintiffs also argued that although the Defendant conceded that Section 217 was not applicable to Attorney Nay's conduct, the case was ripe for decision because it would be a substantial hardship for Nay to be required to go on advising his clients in a manner which may or may not subject them to criminal prosecution. *Id.* at 11 (citing Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967)).

116. Peebler & Nay v. Reno, 965 F. Supp. 28, 31 (D. Or. 1997).

117. *See supra* note 110, (discussing the Attorney General's concession that the statute is not invoked unless a penalty period is actually imposed).

118. *In re* Pugliese, N.Y. L.J. (July 12, 1997) ‹http://www.ljx.com/cgi-bin/f_cat?prod/local/ http/nylj/nyljcontent/072897d2htm›. In *In re* Pugliese, Carleen Pugliese sought to be appointed guardian of her 81 year old mother, a Medicaid recipient, and to be given authority to transfer the home owned by her mother and father. *Id.* Pugliese argued that despite Section 217 of the HIPAA, the original enactment of the criminalization provision, the transfer of the home should not result in the imposition of criminal penalties nor affect her mother's continuing Medicaid eligibility. *Id.* The court reasoned that, pursuant to 42 U.S.C. § 1396p(c)(2)A, it appeared that the home could be transferred to Pugliese's father without an ineligibility period being imposed, but cautioned that the court could not "insulate the guardian or [her mother] from . . . federal criminal liability in connection with the transfer." *Id.*

119. N.Y. L.J. (July 12, 1997) ‹http://www.ljx.com/cgi-bin/f_cat?Prod/local/ http/nylj/nyljcontent/ 072897d2htm›.

120. *See, e.g., id.* The court so reasoned because "the District Court [in *Peebler*] did not rule on the merits of the application [of the provision], did not issue any declaration regarding the constitutionality of Section 217, and did not indicate that Section 217 is not applicable to the transaction made by Peebler;" *Id. See also In re* DiCecco, 661 N.Y.S.2d 943, 947-48 (N.Y. Sup. Ct. 1997) (reasoning that because the *Peebler* court did not issue an order as to the provision's meaning, it remains to be seen whether the view expressed in the Attorney General's memorandum will be adopted).

121. *In re* Pugliese, N.Y. L.J. (July 12, 1997). This language has been said to have "thrown cold water on" the interpretation inferred of Section 217 by many from the *Peebler* decision. Timothy L. Takacs, *Now It Is the "Granny's Lawyer Goes to Jail" Law*, ELDER LAW FAX, ¶ 10 (Aug. 4, 1997) ‹http://www.nashville.net/~ttakacs/prior/920217.html›.

The uncertainty surrounding the criminalization provision may be swept away by the passage of measures to repeal it.[122] For the moment though, the possibility of liability for the advising attorney seems to be firmly in place,[123] but at what point a violation occurs and how the new law will be enforced ultimately remain open questions. With the admission that the HCFA will not be pushing for enforcement,[124] and in the absence of any advisory opinions, it is indeed perplexing to envision a scenario in which an attorney could expect to be prosecuted under the new statute.[125]

V. STATE-LEVEL EFFORTS TO DISCOURAGE ASSET TRANSFERS

The North Dakota Legislature has also made efforts to discourage asset transfers made to gain Medicaid eligibility.[126] Though the measures failed to be passed into law, their introduction has generated a state level long-term care financing debate.[127] Long-term care financing is an important issue in North Dakota, where over half of the approximately 6,900 people living in the state's eighty-eight nursing facilities have Medicaid as their primary payor source.[128] North Dakota's nursing

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122. *See supra* note 74 (discussing bills calling for repeal of the provision that have been introduced in both the House and Senate).

123. 42 U.S.C. § 1320a-7b(a)(6) (1994 & West Supp. 1998). As amended, the statute is now clearly directed at the attorney or other advisor, and not the transferor.

124. *See supra* note 82 (discussing the statement of the HCFA Director that they will not push for enforcement of the provision).

125. Also to be considered is the appropriateness of criminalizing that which is a civilly legal action. Goldfarb, *supra* note 82, at ¶ 11. In addition, there would undoubtedly be problems of proof in any case brought against an attorney for advising a client to transfer assets. For instance, it is difficult to determine whether a transferor would be required to show that but for his or her attorney's advice, no asset transfer would have occurred. Also, though the scope of this note precludes a full discussion of peripheral issues, it is important to note that the provision arguably raises First Amendment concerns by criminalizing certain speech, i.e. counseling and advising, regarding the action of disposing of assets, which is not a criminal action. The provision could thus have a "chilling effect" on lawyers who will be hesitant to discuss any aspect of Medicaid asset transfers for fear that they may be held criminally liable.

126. H.B. 1084, 53d Leg. Sess. (N.D. 1993) (providing "for an [a]ct to limit the transfer of assets to avoid medical creditors"); H.B. 1490, 54th Leg. Sess. (N.D. 1995) (providing "for an [a]ct to create and enact a new section to Chapter 13-02.1 of the North Dakota Century Code, relating to limiting transfers of assets to avoid medical creditors"); H.B. 1062, 55th Leg. Sess. (N.D. 1997) (providing for an act to create and enact a new section to Chapter 13-02.1 relating to the transfer of assets by medical assistance recipients).

127. *See generally* Section V and accompanying notes (discussing the arguments on either side of the debate over the proposed stricter asset transfer provisions).

128. North Dakota Long Term Care Association, Issue and Data Book for Long Term Care 15 (1997). "North Dakota has 7,124 licensed and certified nursing facility beds." *Id.* at 15. With approximately 78.5 beds per 1000 elderly citizens, North Dakota ranks sixth highest in the nation. *Id*. At 7. Ninety-five percent of the residents are over the age of 65, and two-thirds of them are women. *Id.* At 15. Fifty-eight percent of the residents use Medicaid as the primary payor source, while 35% pay privately, and only 3.5% have long-term care insurance. *Id.*

facility payment system is a case mix reimbursement system, which bases payments on sixteen levels of care with corresponding payment rates.[129] Payments are calculated by assessing how much care and what services are provided to residents.[130] Since 1987, equalization of rates between Medicaid residents and self-pay residents has been required by law.[131] As such, all residents are charged the same rate for comparable services, regardless of their primary payor source.[132] This equalization, which requires the state to "pay their fair share," drives the increasing Medicaid budget for long-term care services.[133] North Dakota lawmakers have recognized the need for a better long-term care policy, but their recent efforts to enact laws that would deter asset transfers in lieu of Medicaid eligibility have failed.[134]

A. HOUSE BILL 1084

The first effort, House Bill 1084 which was introduced in the 1993 legislative session, was called "a courageous idea that will get people talking."[135] The Bill would have created a new section of the North Dakota Century Code modeled after the Uniform Fraudulent Transfers Act,[136] and was designed to give the debtor/transferor the statutory right

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129. *Id.* at 9. The system was developed with input from a consulting firm, the long-term care industry, consumers, and state agencies. *Id.* When a patient is admitted, a professional nurse does an assessment of the patient's needs, and calculates the allowable payment based on the number of services required. *Id.*

130. *Id.*

131. *Id.* Equalization of rates was passed in 1987 and became effective in 1990. *Id.* Using information from nursing facility financial reports, the Department of Human Services annually calculates rates based on four components: direct care; other direct care; indirect care; and property. *Id.* Facilities are not reimbursed if they exceed the set rate limits, but they are granted a three percent operating margin, and are rewarded for staying under the rate limit in the indirect care category. *Id.* at 10. In addition, annual inflation is taken into consideration. *Id.* The only other state with equalization of rates is Minnesota. *Id.* at 9.

132. *Id.*

133. *Id.* at 12. The Long Term Care Association blames equalization, inflation, and the decreasing number of residents who pay privately for the rising costs of the Medicaid budget. *Id.* Since 1989, the cost of one day of nursing care has grown from $51.76 to $89.18. *Id.*

134. H.B. 1084, 53d Leg. Sess. (N.D. 1993) (providing for an act to limit the transfer of assets to avoid medical creditors); H.B. 1490, 54th Leg. Sess. (N.D. 1995) (providing for an act to create and enact a new section to Chapter 13-02.1 of the North Dakota Century Code, relating to limiting transfers of assets to avoid medical creditors); H.B. 1062, 55th Leg. Sess. (N.D. 1997) (providing for an act to create and enact a new section to Chapter 13-02.1 relating to the transfer of assets by medical assistance recipients).

135. *Senate Human Serv. Standing Comm. Minutes on House Bill 1084*, 53rd Leg. Sess. 2 (N.D. 1993).

136. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 5, 6 (N.D. 1993) (statement of Blaine Nordwall, Asst. Attorney General Appearing on Behalf of the Department of Human Services). Nordwall explained that the reason the Bill was lengthy was that it had been modeled after the Uniform Fraudulent Transfers Act, N.D. CENT CODE § 13-02.1, in order to protect the rights of innocent third parties who might, for example, make good faith purchases of property from a transferee. *Id.*

to get his or her transferred assets back.[137] Thus, when the transferor applied for Medicaid, the transferred assets could be considered available for purposes of the Medicaid eligibility determination.[138] The fact that the transfer had been made would not result in a period of ineligibility for the applicant.[139] Rather, because the transferred assets were still technically available, the applicant would simply have too many available assets to qualify for Medicaid.[140] Proponents of the Bill said its purpose was to remedy the loopholes left open by the MCCA.[141] The issue of widespread Medicaid estate planning in North Dakota was also raised in hearings on the Bill.[142]

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137. H.B. 1084, 53rd Leg. Sess. 5, 6 (N.D. 1993). The language of the bill provided that the debtor him or herself could obtain:

> a. Avoidance of the transfer or obligation to the extent necessary to satisfy the medical creditor's claim for medical care furnished or likely to be furnished;
> b. Attachment or other provisional remedy against the asset transferred or other property of the transferee. . . ; or
> c. Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, an injunction against further disposition by the . . . transferee. . of the asset transferred or of other property, an appointment of a receiver to take charge of the asset transferred or of other property of the transferee, or any other relief the circumstances may require.

Id.

It further provided that: "In determining the eligibility of applicants for [Medicaid] benefits. . . , the department of human services must treat as available to the applicant those assets, or the value of those assets, that the applicant may be able to recover by bringing an action as a debtor under this Act." *Id.* at 10.

138. 42 U.S.C. § 1396a(a)(17)(B) (1994 & West Supp. 1998). *See supra* note 31 (discussing the availability principle).

139. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 5 (N.D. 1993) (statement of Blaine Nordwall, Asst. Attorney General Appearing on Behalf of the Department of Human Services). Nordwall explained that by creating a right for the debtor to get his or her transferred assets back, those assets could be counted as available in the Medicaid eligibility determination. *Id.* Thus, applicants "would not be disqualified because of,making [the] transfers. . . ; they would be disqualified because they would still have an asset. *Id.*

140. *Id.*

141. Pub. L. No. 100-360, § 303, 102 Stat. 754. The MCCA allowed ineligibility periods to run concurrently for more than one transfer. *Id.* In hearings on the Bill, Blaine Nordwall stated that the MCCA provision requiring imposition of ineligibility periods had not saved Medicaid dollars, but rather had become "a chart by which individuals with the means to pay for their own nursing care manage their affairs to assure that the taxpayers meet the cost" due, in part, to the fact that periods of disqualification from transfers in one month were allowed to run concurrently with periods of disqualification for transfers in subsequent months. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. (N.D. 1993) (Statement of Blaine Nordwall, Asst. Attorney General appearing on behalf of the Department of Human Services). *See supra* notes 55-57 (discussing the provisions of the MCCA).

142. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 2 (N.D. 1993) (statement of Blaine Nordwall, Asst. Attorney General Appearing on Behalf of the Department of Human Services). Nordwall said he regularly received inquiries from North Dakota lawyers who had clients seeking to make transfers of substantial sums of money in order to become eligible for Medicaid. Information regarding widespread Medicaid estate planning in Minnesota was also submitted. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. (N.D. 1993) *See also* Warren Wolfe, *Seeking Shelter from the Storm*, MINNESOTA STAR TRIBUNE, March, 1993, at A1 (stating that Medicaid was spending millions per year for wealthy individuals who sheltered their wealth rather than pay their own nursing home costs, and included a section entitled

Opponents of the Bill did not see it as a courageous idea, but as "an extremely ill-conceived attempt to preserve Medicaid dollars,"[143] that was nothing more than an attempt to promote long-term care insurance.[144] One of the main points of contention was the Bill's statute of limitations, which provided that an action to recover the transferred assets had to be brought within four years of the discovery of the transfer.[145] This would have essentially expanded the look-back period from the federal limit of thirty months to a full forty-eight months.[146] Critics saw this as a direct circumvention of federal law.[147] They also stressed that the Bill would jeopardize family farms and small businesses that people wanted to pass on to their heirs.[148] Opponents further argued that the Bill would create the potential for unfair applications to transfers made to spouses and minor children,[149] and to gifts made to charities.[150] The

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"Voluntary Poverty: How to Shelter Your Wealth").

143. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 1 (N.D. 1993) (testimony of Duane Houdek, Attorney with Legal Assistance of North Dakota). Houdek characterized the Bill as objectionable because it was an attempt to circumvent federal law, and likely to be ineffective because the language was too vague. *Id.*

144. *Id.* at 4. Houdek stated that the Bill was just an attempt to promote nursing home insurance, which is not always an option for many people because of prohibitive costs and waiting periods. *Id.*

145. H.B. 1084, 53rd Leg. Sess. 7 (N.D. 1993). The Bill provided that: "An action with respect to a fraudulent transfer or obligation under this Act must be commenced within four years after the transfer was made or the obligation incurred; provided that the claim for relief may not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraudulent transfer or obligation." *Id.*

146. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. (N.D. 1993) (testimony of Shelly Warner, Executive Director, North Dakota Long Term Care Association). Warner stated that because the Department of Human Services would be making inquiry into any transfers made by an applicant within four years prior to the application, the current 30 month "look-back period" would effectively be extended an additional 18 months for a total of 48 months. *Id.* She saw this as "an ingenious way for North Dakota to tighten the loophole which allows individuals to transfer assets after only paying for 30 months of nursing facility care." *Id.*

147. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 3, 4 (N.D. 1993) (testimony of Greg Larson, Bismarck estate planning Attorney). Larson argued that such circumvention of federal law was not only unfair but unnecessary because of the current movement on the federal level to address the same concerns purportedly addressed by this Bill. *Id.*.

148. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 2 (N.D. 1993) (testimony of Robert O. Wefald, Chairman, Real Property, Probate, and Trust law Section of the North Dakota State Bar Association, on his own behalf). Wefald argued that the Bill would "completely upset the well thought out plans of family farmers and small business owners who . . . legally and effectively make plans to keep their farms and businesses in their families and pass them on to their children, . . . and place in substantial doubt all gifts and other transfers made without fill consideration to family members regardless of how long ago the transfer was made." *Id.*

149. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 4 (N.D. 1993) (testimony of Greg Larson, Bismarck Estate Planning Attorney). Larson testified that the Bill was too far reaching in that it could apply to transfers made to a Medicaid applicant's spouse or minor child. *Id.* For example, if a woman on her second marriage inherited farmland that she then gifted over to her son, the son could later be required to pay for the nursing home care of his mother's second husband. *Id.* Larson argued that the Bill was thus contrary to the public's sense of fairness. *Id.* at 4-5.

150. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. (N.D. 1993) (testimony of Duane Houdek, Attorney with legal Assistance of North Dakota). Houdek stated that if the Bill passed, it would have a tremendous negative impact on charitable giving, because one could never be sure when giving to charities whether he would need the money for future possible medical costs. *Id.*

Bill received a "do pass" recommendation from the House Human Services Committee, but was defeated in the Senate.[151]

B. HOUSE BILL 1490

The idea was resurrected in House Bill 1490 in the 1995 Legislative Session,[152] with three significant changes. First, instead of creating a whole new section of law modeled after The Uniform Fraudulent Transfers Act, the Bill would have merely added to the Act.[153] Second, in response to criticism voiced two years earlier, a provision was added which allowed transfers to charitable organizations to be exempted from consideration.[154] However, this exemption raised a new question over the fairness of being able to gift assets over to a charity, but not to one's heirs.[155] Third, the drafters of the Bill added a provision which protected interfamilial gifts made prior to the Bill's proposed effective date.[156] The issue of whether such a law would be a circumvention of existing federal law was again raised at the hearings on this Bill.[157] Proponents of the Bill argued that it would not bypass federal law, but that it would merely make the federal disqualifying transfer provision irrelevant in the process of determining Medicaid eligibility.[158]

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151. NORTH DAKOTA HOUSE HUMAN SERV. COMM., REPORT OF STANDING COMM. ON HOUSE BILL 1084, 53rd Leg. Sess. (N.D. 1993); NORTH DAKOTA SENATE HUMAN SERV. COMM., REPORT OF STANDING COMM. ON HOUSE BILL 1084, 53rd Leg. Sess. (N.D. 1993).

152. H.B. 1490, 54th Leg. Sess. (N.D. 1995).

153. *Id.* The Bill added to the definitions of "asset," "debt," and "debtor," to include the value of health insurance as an asset, and to include the spouse or minor child of a debtor as debtors. *Id.* at 1. It also clarified, for purposes of finding that a debtor transferred assets in order to avoid a medical creditor, that "a debtor contemplates receiving medical care if the medical care is for the remediation of an illness or condition that exists at the time the transfer is made or obligation is incurred." *Id.* at 2. Further, it provided that debt owed to a relative must be supported by a written contract in order to rebut the presumption that services and payments made to close relatives are gifts. *Id.* at 1.

154. *Id.* at 3. The Bill provided that "[a] transfer made or an obligation incurred by a debtor to an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code [26 U.S.C. 501(c)(3)] may not be treated as fraudulent as to a medical creditor. . ." *Id.*

155. *House Human Serv. Comm. Standing Comm. Minutes on House Bill 1490*, 54th Leg. Sess. 1 (N.D. 1995). Representative Walker inquired as to the fairness of being able to give your assets to charity but not to your family. *Id.*

156. H.B. 1490 at 3. In order to remedy the problem repeatedly cited regarding the extent to which the original bill reached into the past, this Bill provided that it would only apply to obligations incurred or transfers made after the Act's effective date. *Id.*

157. *Hearings on H.B. 1490 Before the House Human Serv. Comm.*, 54th Leg. Sess. (N.D. 1995), (testimony of Greg Larson, Bismarck Estate Planning Attorney and State Director for the National Academy of Elder Law Attorneys, on his own behalf). Larson argued that this Bill, like its predecessor, would circumvent federal law. *Id.* He added that the passage of the federal Omnibus Budget Reconciliation Act of 1993 was done after a great deal of study, discussion, and input, and that North Dakota should not be subject to any stricter standards with respect to asset transfers than those provided for in the OBRA. *Id.*

158. *Hearings on H.B. 1084 Before the House Human Serv. Comm.*, 53rd Leg. Sess. 3 (N.D. 1993) (testimony of Blaine Nordwall, Asst. Deputy Director of the Office of Economic Assistance, North Dakota Department of Human Services). Nordwall explained that federal law prohibited a state from providing for any period of ineligibility except in accordance with 42 U.S.C. § 1396p(c)(4).

At the request of a lobbyist who opposed the Bill, written testimony from a Colorado elder law attorney was submitted to the House Human Services Committee.[159] The testimony cited a New York Supreme Court case where the court held that state statutes or regulations which could be construed as conflicting with the federal laws passed in the OBRA of 1993, could not be binding on the court.[160] The testimony also contained an excerpt from a manuscript on standards for federal preemption with respect to state debtor-creditor laws.[161] The manuscript outlined three different ways in which federal law may supersede state law:[162] First, federal law must control where Congress has preempted state law in express terms;[163] second, intent to preempt state law in a specific area may be inferred where the federal laws are sufficiently comprehensive so as to "leave no room" for anything else;[164] third, federal law must supersede where it actually conflicts with state law.[165] The manuscript authors concluded as follows:

> Examination of the legislative history and plain language of the federal Medicaid statute compels the conclusion that it meets all three standards for preempting state Debtor-Creditor laws. First, Congress expressly prohibited states from applying any transfer penalties other than those contained in the Medicaid statute. Moreover, by providing extensive regulation of transfers, liens and rights of recovery, Congress left no room for supplementary state regulation. Lastly, Debtor-Creditor laws conflict with the transfer, lien and recovery provision of the Medicaid statute.[166]

Id. He stated that this Bill would not circumvent that federal provision, but would simply operate by giving a Medicaid applicant who had transferred assets the right to get the assets back. *Id.*

159. *Hearings on H.B. 1490 Before the House Human Serv. Comm.*, 54th Leg. Sess. (N.D. 1995) (letter from Clifton B. Kruse, Jr., Attorney at Law, Kruse & Lynch, Colorado Springs, Colorado, to the North Dakota House Human Services Committee, January 27, 1995, submitted without testimony).

160. *Id.* (citing *In re* Moretti, 606 N.Y.S.2d 543 (1993)). In *Moretti*, the petitioner sought to transfer the assets of her invalid son into a supplemental needs trust. 606 N.Y.S.2d at 544. The court held that New York state laws, which conflicted with the provisions of the OBRA with regard to such trusts, would not be binding on the court as they were inconsistent with the new federal law. *Id.* at 547-48. Thus, the petitioner was granted authority to transfer the property into a supplemental needs trust. *Id.* at 548.

161. *Hearings on H.B. 1490 Before the House Human Serv. Comm.*, 54th Leg. Sess. 1, 2 (N.D. 1995) (letter from Clifton B. Kruse, Jr., Attorney at Law, Kruse & Lynch, Colorado Springs, Colorado, to the North Dakota House Human Services Committee, January 27, 1995, submitted without testimony). Kruse included an excerpt from a manuscript authored by Law Professor Robert M. Freedman, and Attorney Francis M. Pantaleo regarding federal preemption. *Id.*

162. *Id.* at 2 (citing generally California Federal S. & L. Assoc. v. Guerra, 479 U.S. 272 (1987)). *Id.*

163. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

164. *Id.* (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

165. *Id.* (citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963)).

166. *Id.*

Notwithstanding the federal preemption issue, it was the possibility that such a law would adversely affect family farms and small businesses that seemed to most persuade committee members.[167] The Bill was summarily defeated in committee.[168]

C. HOUSE BILL 1062

The asset transfer issue did not go away, however. In the Report of the Task Force on Long-Term Care Planning for June of 1996, the Ad Hoc Committee on Financing of Long-Term Care discussed asset transfers.[169] The Committee made two recommendations to the 1997 legislative assembly: to again introduce a bill to discourage asset transfers made to gain Medicaid eligibility, and to set aside state funds to conduct an educational effort to discourage such transfers.[170]

House Bill 1062, introduced in the 1997 session, contained new changes.[171] As recommended by the Ad Hoc Committee, it would have set aside money for educational efforts.[172] In addition, it contained an exemption for transfers where the transferee purchased a long-term care policy and for transfers made to family members for $75,000 or less.[173] The latter provision was objected to by parties on both sides of the

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167. *House Human Serv. Standing Comm. Minutes on House Bill 1490*, 54th Leg. Sess. 2 (N.D. 1995). Lobbyists representing the North Dakota Farm Bureau, the North Dakota Grain Growers Association, and the North Dakota Stockmen's Association all testified against the Bill. *Id.*

168. HOUSE HUMAN SERV. COMM., REPORT OF STANDING COMM. ON HOUSE BILL 1490, 54th Leg. Sess. (N.D. 1995).

169. NORTH DAKOTA DEPT. OF HEALTH, REPORT OF THE TASK FORCE ON LONG-TERM CARE PLANNING 20-21 (June 1996). The committee recognized the debate that the issue had evoked at both the state and federal levels. *Id.* at 20. It noted a recent study conducted in Minnesota which showed that as many as 25% of people who have assets of more than $2,000 when they became eligible for Medicaid had previously transferred assets for less than fair market value. *Id.* The committee also discussed the two previous bills that had been introduced and failed. *Id.* at 21. They saw the main reason for failure to be opposition from farm and small business advocates who were concerned with rights to transfer property. *Id.* at 20-21. They felt that because of both the legal aspects and the ethical issues, a formalized educational effort was necessary to discourage asset transfers. *Id.* at 21.

170. *Id.* The committee also recommended that the new Bill "would not apply to a family member who used the transferred asset as a sole source of income and the transferred asset would not produce income over a specific threshold limit." *Id.*

171. H.B. 1062, 55th Leg. Sess. (N.D. 1997) (providing for an act to create and enact a new section to Chapter 13-02.1, and two new subsections to § 50-24.1-07 of the North Dakota Century Code relating to the transfer of assets by medical assistance recipients).

172. *Id.* at 3-4. Section 2 of the bill provided that a portion of the non-federal share of money received by the Department of Human Services would be deposited in the Medicaid education fund, a special fund in the state treasury, for the purpose of developing educational materials and providing education services to "inform potential recipients of [Medicaid] benefits . . . of the limitations on taxpayer-supported medical services, the duty of an individual to pay for personal and a spouse's necessary medical care, and the need for planning consistent with the duty." *Id.*

173. *Id.* at 3. To get the exemption, the transferee would be required to purchase "for the debtor a long-term care insurance policy with a value equivalent to the lesser of a lifetime policy or the total cumulative uncompensated value of all assets transferred to the transferee." *Id.*

issue[174] by way of persuasive case examples of the effect the law might have.[175] One lobbyist argued that with the new criminalization provision, which had recently been passed in the Kennedy-Kassebaum Act, efforts like the one being made would not only circumvent federal law, but would be unnecessary.[176] In the end, H.B. 1062 was defeated just as the first two bills had been.[177]

It remains to be seen whether North Dakota will continue these efforts, and whether they will be necessary in light of the new federal provision. However, it is certain that the problem of Medicaid estate planning through asset transfer facing both the federal and state governments will continue.[178] In North Dakota, the unique issues affecting our largely rural state with its sizable population of seniors will have to be addressed in terms of future efforts to remedy the problem of rising Medicaid costs.[179]

VI. CONCLUSION

A possible result of federal and state efforts to set forth legislation preventing Medicaid estate planning will be to force elderly persons to give greater consideration to purchasing long-term care insurance.[180] However, many feel that long-term care insurance policies are too

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174. *See, e.g., Hearings on H.B. 1062 Before the House Human Serv. Comm.*, 55th Leg. Sess. 3 (N.D. 1997) (testimony of Blaine Nordwall, Director, Legal Advisory Unit, North Dakota Department of Human Services, arguing that it did not stand to reason that someone should be able to give away up to $75,000 to close relatives, and then immediately seek and secure Medicaid benefits, because taxpayer-supported benefits should only be available to the truly needy); *Hearings on H.B. 1062 Before the House Human Serv. Comm.*, 55th Leg. Sess. 2-3 (N.D. 1997) (testimony of Ken Bertsch, Director of Government Relations for the North Dakota Farm Bureau). Bertsch argued that a $75,000 exemption, given purportedly to "save" a farm home, is "next to nothing in an industry dealing with millions of dollars in most cases." *Id.*

175. *Id. See also Hearings on H.B. 1062 Before the House Human Serv. Comm.*, 55th Leg. Sess. 1, 2 (N.D. 1997) (testimony of Bonnie Palacek, Executive Director of the North Dakota Council on Abused Women's Services, on her own behalf). Palacek testified regarding the fifth generation family farm that she would likely lose if the bill passed. *Id.* Her elderly father and mother were both very ill, and she had been caring for them in her home with the help of health care professionals, but funds were running low. *Id.* at 2. She explained that passing this Bill would make a transfer of her parents' land to her and two siblings fraudulent, and they would not be able to save it. *Id.* at 3.

176. *Hearings on H.B. 1062 Before the House Human Serv. Comm.*, 55th Leg. Sess. 2, 3 (N.D. 1997) testimony of Greg Larson, Bismarck estate planning attorney and State Director of the National Academy of Elder Law Attorneys, on his own behalf). Larson stated that the federal law negated any possible need for a state law that would make asset transfers fraudulent. *Id.* at 3.

177. NORTH DAKOTA HOUSE HUMAN SERV. COMM., REPORT OF STANDING COMM. ON HOUSE BILL 1062, 55th Leg. Sess. (N.D. 1997).

178. *See supra* notes 1-2 (discussing the rising population of elderly in America).

179. *See supra* note 127 (discussing North Dakota's elderly population and the use of nursing facility care in the state).

180. Brian E. Barriera, *Using a CRAT (Charitable Remainder Annuity Trust) to Pay for Long-Term Care Insurance*, 24 EST. PLAN. 99, 99 March/April, 1997.

expensive.[181] Tax credits for long-term insurance are available at both the state and federal levels,[182] but they alone are not incentive enough for many people to purchase a policy.[183] Some say that a viable alternative exists in the form of a public-private partnership, a solution which involves both the private insurance industry and the government.[184] In such partnerships, a state provides incentives to buy a long-term care insurance policy in exchange for asset protection in the event the person's long-term care costs exceed his or her benefits.[185] Currently, four states are participating in public-private partnerships, and enjoying measurable success.[186]

Clearly there is no "magic bullet" which would accommodate fiscal concerns as well as the moral and ethical considerations in the long-term care financing debate.[187] Brian Burwell, Director of Health Care Organization and Economic Research at the MEDSTAT group, and noted critic of Medicaid estate planning has said,[188] "[r]egardless of where our government decides to draw the line, the division of private versus public responsibilities for financing long-term care services needs

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181. *Id.* at 99. Barriera writes that many elderly see transferring their assets as the less expensive option. *Id.* In addition, they are reluctant to invade their principal assets to pay for insurance. *Id.* Jonathan Spilde, Marketing Director for SIA Marketing of North Dakota, argued before the North Dakota House Human Services Committee that purchasing a long term care policy would not be a great burden. *Hearings on H.B. 1062 Before the House Human Servs. Comm.*, 55th Leg. Sess. 2 (N.D. 1997) (testimony of Jonathan Spilde, Marketing Director of SIA Marketing of North Dakota, a national insurance brokerage specializing in long term care insurance). He explained that for $80.00 per day nursing home coverage, a 50 year old would pay $156.00 a year, a 55 year old would pay $220.00, a 60 year old would pay $356.00, a 65 year old would pay $568.00. *Id.* At age 70, the price jumps to $971.00 per year, and at age 75, it would be $1631.00 per year. *Id.*

182. *See* Wood, *supra* note 96, at 16 (discussing the amendments to Internal Revenue Code enacted in the Kennedy-Kassebaum Bill to provide for tax credits); H.B. No. 2042, 55th Leg. Sess. (N.D. 1997) (providing for a tax credit for long-term care insurance).

183. Rein, *supra* note 6, at 280. "[U]sage numbers show that most Americans don't view private insurance as an answer to their long-term care financing problems." *Id.*

184. Pasaba and Barnes, *supra* note 3, at 544-45. Pasaba and Barnes assert that such a partnership recognizes the preference for private market solutions while also recognizing that the private response needs public help. *Id.*

185. *Id.* at 544. There are two types of public-private partnerships, namely the "dollar-for-dollar" approach, where protection is provided to a specified amount of assets equivalent to the amount of insurance purchased, and the "total assets" approach, where the state protects all of the person's assets, regardless of the amount, after the person's long-term care insurance policy has paid out a certain set amount of care. *Id.* at 545-47. Demonstration projects of public-private partnerships have been tried in four states with some degree of success. *Id.* However, the partnership idea is also criticized as not being affordable to the middle class. *Id.* at 548-49. In addition, they are thought to be hindered by the estate recovery mandates of the OBRA, and by a general unwillingness of the insurance industry and the government to meet halfway. *Id.* at 550.

186. *Id.* Projects in Connecticut, New York, Indiana, and California, are funded by the Robert Wood Johnson Foundation and matching funds from each state. *Id.* at 550 n.90. As of March 31, 1995, the states had received a total of over 20,000 applications and had issued over 15,000 policies. *Id.* at 547.

187. *See* Rein, *supra* note 6, at 340.

188. Burwell is noted as an opponent of Medicaid estate planning in Regan, *supra* note 3, at 122, 262; and Weisner, *supra* note 62, at 763.

to be drawn more boldly."[189] One might say that the criminalization provision is a boldly drawn line, but its utility in deterring Medicaid estate planning is questionable. Further, the proponents of the measure have failed to address the real problem faced by those in need of long-term care: the need for more and better financing options.[190]

"[I]ncremental tinkering with rules and enforcement" has not deterred Medicaid estate planning up to this point.[191] The criminalization provision, as the most recent result of such "tinkering," with all its attendant confusion,[192] will seemingly serve only to delay work on a more viable solution. Perhaps what is needed more than a "boldly drawn line" is a compromise.[193] Congress should explore the public-private partnership concept. While not without weaknesses,[194] the partnership concept has the potential to offer an option which would allow the middle class to "finish well" through a dignified and responsible means of financing long-term care.[195] In addition, it could be the answer for states like North Dakota that are working hard to serve the unique needs of their citizens while controlling escalating Medicaid costs.

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189. Burwell and Crown, *supra* note 11, at 10.

190. *See* Regan, *supra* note 3, at 1223 (discussing lack of options as the central problem in long-term care financing).

191. Regan, *supra* note 3, at 1256-57. Regan suggests that Congress could further tighten the grip on Medicaid Estate Planning by commencing ineligibility periods imposed for asset transfers on the date of the application rather than on the date of the transfer. *Id.* at 1254. He writes, "[r]ealistically, individuals will find ways to circumvent the law as long as medicaid estate planning remains the most rational option available." *Id.* at 1258

192. *See supra* Section IV B. (discussing the meaning of the provision).

193. Pasaba and Barnes, *supra* note 3, at 556. Pasaba and Barnes sum up that "[f]rom the tax-payer's viewpoint, the policy [chosen to deal with long-term care financing] should protect and maximize the resources of the state and federal budgets and prevent fraud or abuse of the system," and "should help the needy, but avoid . . . induced usage of services which are not actually needed." *Id.*

194. *See id.* at 548. Broad implementation of public-private partnerships arguably poses problems because premiums may be beyond the reach of many middle-income people. *Id.* There must be a substantial amount of participation in order to reduce premium costs to an affordable level. *Id.* at 49.

195. *See* Regan, *supra* note 3, at 1260.

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