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ESTATE PLANNING—A RACE TO THE POORHOUSE: SHOULD GUARDIANS¹ HAVE A DUTY TO IMPOVERISH THEIR WARDS² FOR ASSET PROTECTION PURPOSES THEREBY PRESERVING ASSETS FOR HEIRS?

INTRODUCTION

Imagine working your entire life and planning to leave your assets to your loved ones only to have those assets completely depleted by the cost of long-term care. This is not an unrealistic scenario and is faced by people young and old.³ So-called “Medicaid planning” is one means people use to legally divest themselves of their assets, which accomplishes the dual purpose of creating Medicaid eligibility and protecting their assets so they may be distributed to loved ones.⁴

Donald Domey, for example, suffered a stroke in October 2003 that left him completely incapacitated.⁵ Because of Donald’s mental incapacity, he was placed under guardianship and moved into a long-term care facility.⁶ Donald’s estate was valued at \$730,000 in total assets, with about \$353,177 consisting of liquid assets and the remaining \$385,500 consisting primarily of the marital

1. In most states, guardian refers to a substitute decision maker for both person and property. LAWRENCE A. FROLIK, *THE LAW OF LATER-LIFE HEALTH CARE AND DECISION MAKING* 159-160 (2006). Yet other states use the terms “conservator” and “conservatorship” to refer to a substitute decision maker regarding an individual’s property. See, e.g., MASS. GEN. LAWS. ch. 190B, § 5-101(2) (2008); N.H. REV. STAT. ANN. § 464-A:2(IX) (2004); N.J. STAT. ANN. § 3B:13A-1 (West 1983); N.Y. MENTAL HYG. LAW § 81.03(a) (McKinney 2006). For purposes of this note “guardian” and “guardianship” will include the duties of a “conservator” or “conservatorship.” *Id.*

2. “The incapacitated individual, for whom a guardian or conservator has been appointed, is often referred to as the ‘ward’ although some states have adopted the nomenclature of ‘incapacitated person,’ with a few states retaining the older term ‘incompetent.’” FROLIK, *supra* note 1, at 160; see, e.g., MASS. GEN. LAWS. ch. 190B, § 5-101(22) (2008) (using the term “[p]rotected person”); N.H. REV. STAT. ANN. § 464-A:2 (XVI) (2004) (using the term “[w]ard”); N.J. STAT. ANN. § 3B:1-2 (West 2007) (providing definitions for “[i]ncapacitated individual” and “[w]ard”). For purposes of this Note, “ward” will refer to an incapacitated individual who has an appointed guardian.

3. See *infra* Part I.A. (noting that over 1.6 million individuals reside in nursing homes) and Part I.C. (discussing the costs of nursing home care and private pay methods).

4. See *infra* Part II.B. (discussing Medicaid planning and strategies).

5. *In re* Guardianship of Domey, 960 A.2d 729, 730 (N.H. 2008).

6. *Id.*

home and other real estate.⁷ By October 2005, only two years after Donald's stroke, the care provided by the nursing home "had eroded the liquid assets of the estate, leaving [only] \$75,000," rendering Donald eligible for Medicaid shortly thereafter.⁸

Donald's wife argued that Donald's guardians owed her a duty of support.⁹ The court disagreed and noted that the "primary objective [of a guardian] is to protect the well-being of the ward," and the guardian's "primary duty . . . is to protect the estate's assets in order to apply them for the support and care of the ward."¹⁰ The court further noted that a guardian would owe a duty to Donald's wife only "when there is a showing of need and when there are 'more than sufficient' resources to provide" for Donald's care.¹¹ The court in *In re Guardianship of Domey*, held that a guardian has no duty to impoverish their ward to obtain Medicaid eligibility so that assets can be protected and distributed to others.¹² Rather, the guardian "has the *option* to . . . engage in estate planning."¹³

Concerns about paying for the costs of care and distributing assets are not merely for the elderly.¹⁴ Bipin Shah was not yet fifty years old when he was seriously injured at work, subsequently became comatose, and diagnosed as unlikely to improve.¹⁵ Bipin's wife was appointed as his guardian and sought to transfer his assets to herself, which would have enabled Bipin to qualify for Medicaid.¹⁶ The court recognized "that *any* person in [this] condition would prefer that the costs of his care be paid by the State, as opposed to his family."¹⁷ The court held "that a guardian spouse is

7. *Id.* at 731.

8. *Id.* at 732.

9. *Id.* at 733. Donald's wife specifically argued that N.H. REV. STAT. ANN. § 546-A:2 (2007) when read in conjunction with N.H. REV. STAT. ANN. § 464-A:26(I) (2004), imposed a duty on the guardians "to perform all other duties required by law," and thus the guardian had a legal duty to support the ward's spouse. *Id.* (quoting N.H. REV. STAT. ANN. § 464-A:26(I) (2004)); see also N.H. REV. STAT. ANN. § 546-A:2 (2007).

10. *Domey*, 960 A.2d at 733.

11. *Id.* (emphasis added).

12. *Id.* at 733-34.

13. *Id.* at 734.

14. *S.S. v. State*, 972 P.2d 439, 440 (Utah 1998) (noting that a "[s]ixteen-year-old . . . suffered massive brain damage and was permanently disabled" in a motorcycle accident and was ultimately placed in a nursing home care). *But see infra* Part I.A (noting that nursing home residents are mostly elderly).

15. *In re Shah*, 733 N.E.2d 1093, 1094-95 (N.Y. 2000).

16. *Id.* at 1095. Although Bipin was not in a nursing home, his care was extremely expensive (about \$1,600 per day). *Id.*

17. *Id.* at 1099 (emphasis added) (quoting *In re Shah*, 694 N.Y.S.2d 82, 87 (App. Div. 1999)).

permitted to [engage in] Medicaid planning . . . pursuant to Mental Hygiene Law article 81.”¹⁸

In fact, the *Shah* court specifically noted that the potential powers of a guardian are “not contingent on the particular purpose for the transfer [and] the guardian can make gifts, provide support for dependents and, simultaneously, apply for government benefits.”¹⁹ Still, despite the broad range of potential authority given to guardians, the court declined to impose a duty on them to engage in planning to protect the ward’s assets.²⁰

Although each state provides its own laws governing guardian duties and powers, a court may authorize guardians to engage in estate planning and Medicaid planning on behalf of their wards.²¹ Currently there is a wide degree of variance among the states. While some states impose a duty on guardians to propose a Medicaid spend-down, other states do not impose a duty, but instead have a presumption in favor of approving a spend-down. Still other states are incredibly hesitant to authorize guardian proposed spend-downs.²²

This Note argues that guardians should have a duty to petition the court for approval of a Medicaid spend-down when the ward requires indefinite nursing home care. Imposing a duty on guardians ensures that vulnerable individuals (the wards) facing ruinously expensive nursing home costs receive adequate protection—namely, the ability to preserve assets for loved ones while still financing the costs of long-term care. Moreover, imposing a duty on guardians potentially enables the wards to dispose of their property as a competent individual would, while ensuring that the courts retain adequate flexibility and discretion to approve or disapprove the proposed spend-down based on the state’s current guardianship laws.

Part I of this Note provides background on Medicaid, nursing home care costs, and methods of financing nursing home care through both private-pay and government benefits. Part II provides background on the current Medicaid transfer laws, Medicaid

18. *Id.* at 1098-99; see also N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2006).

19. *Shah*, 733 N.E.2d at 1099.

20. *Id.* at 1099 (indicating that the statute provides that a court may authorize guardians to engage in Medicaid planning); see also N.Y. MENTAL HYG. LAW § 81.21.

21. See *infra* Appendix (providing citations for guardian statutes); see also *infra* Part II.D.

22. *Infra* Part II.D. (discussing the laws of different states as they apply to guardian proposed Medicaid planning).

planning strategies, and provides an overview of Medicaid planning initiated by guardians. Part III argues that imposing a duty on guardians to propose Medicaid spend-downs is necessary to achieve adequate protection for the ward facing an indefinite term of nursing home care.

I. MEDICAID AND ITS APPLICABILITY TO NURSING HOME CARE

A. *Medicaid and Nursing Homes*

Medicaid was first enacted in 1965 and is a joint, federal-state funded program that provides medical insurance for those who meet specified eligibility standards.²³ The federal Medicaid statute establishes general guidelines for the program, which is administered by each participating state.²⁴ Because the states administer their plans in accordance with the general federal regulations, the interpretation and application of the federal rules vary with each jurisdiction.²⁵ The way “Medicaid operates in any particular state can be answered only by careful examination of the state law, regulations, and state program manuals as well as the actual enforcement of those rules.”²⁶ Although each state plan varies, no state plan can be more restrictive or provide fewer benefits than the fed-

23. See 42 U.S.C. § 1396 (2010); JULIE STONE, CONG. RESEARCH SERV., RL 33593, MEDICAID COVERAGE FOR LONG-TERM CARE: ELIGIBILITY, ASSET TRANSFERS, AND ESTATE RECOVERY 1 (2008) (“Medicaid . . . covers about 57 million people across the nation, including children and families, persons with disabilities, pregnant women, and the elderly.”); FROLIK, *supra* note 1, at 128 (noting specifically that on average states pay for about half the costs of Medicaid); see also *Medicaid Rules*, ELDER L. ANSWERS, http://www.elderlawanswers.com/Elder_Info/Elder_Article.asp?id=2751 (last visited Apr. 15, 2012) (providing important general information about Medicaid which was contributed by practicing attorneys throughout the United States). See generally U.S. DEP’T OF HEALTH & HUMAN SERVS., MEDICAID AT-A-GLANCE 2005 1 (2005) [hereinafter MEDICAID AT-A-GLANCE], available at <http://www.cms.gov/MedicaidDataSourcesGenInfo/downloads/maag2005.pdf>.

The Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029, contains an individual mandate that expands Medicaid coverage, thereby compelling states to provide Medicaid benefits to significant numbers of people. Florida ex rel. Attorney Gen. v. U.S. Dep’t of Health & Human Servs., 780 F.Supp.2d 1256, 1265 (N.D. Fla. 2011), *reversed in part*, 648 F.3d 1235 (11th Cir. 2011), *cert granted*, 132 S. Ct. 604 (2011). The constitutionality of this legislation, which could affect long-term care eligibility requirements set forth in 42 U.S.C. § 1396 is being examined by the Supreme Court as of the publication date of this Note.

24. See generally 42 U.S.C. § 1396 (2006); JEFF SADLER, THE LONG-TERM CARE HANDBOOK 75-80 (1996) (providing information about the joint federal-state laws); MEDICAID AT-A-GLANCE, *supra* note 23.

25. FROLIK, *supra* note 1, at 128.

26. *Id.*

eral law requires.²⁷ In fact, long-term care²⁸ is one service each state's Medicaid plan must provide.²⁹

Nursing homes are the institutions most often identified with long-term care.³⁰ In fact, over 1.6 million individuals (most elderly) reside in nursing homes.³¹ Nursing homes provide long-term care to a range of residents from those with chronic conditions, to those requiring shorter-term care for recovery after hospitalization.³²

27. "The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986); *accord Pharmcare Okla., Inc. v. State Health Care Auth.*, 152 P.3d 267, 269-70 (Okla. Civ. App. 2006) (holding that if a state chooses to participate in the Medicaid program it must comply with federal statutes and regulations).

For example, each state must contain certain mandatory provisions of the federal statute including: the mandatory statewide effect of a program; the types and amounts of medical assistance; and reasonable standards for determining eligibility and the extent of medical assistance needed. 42 U.S.C. § 1396a(a) (2006); *see also* 79 AM. JUR. 2D *Welfare* § 34 (2008) (listing specific services states must provide). Additionally, Medicaid eligibility, care, and services must be provided in a manner consistent with the best interests of recipients. 42 U.S.C. § 1396a(a)(19) (2006). *See generally* 79 AM. JUR. 2D *Welfare* § 36 (2008); *Medicaid Eligibility*, CTR. FOR MEDICARE & MEDICAID SERV. (Aug. 11, 2011, 4:52 PM), http://www.cms.gov/MedicaidEligibility/01_Overview.asp (discussing generally Medicaid eligibility).

28. "Long-term care refers to a wide range of supportive and health services for persons who have lost the capacity for self-care due to illness, cognitive disorders, or a physically disabling condition." STONE, *supra* note 23, at 1 n.1. Examples of medical conditions that create the need for long-term care include dementia, strokes, or cardiovascular disorders. FROLIK, *supra* note 1, at 93. The goal of long-term care is palliative (rather than curative), which aims to maintain the patient's level of care and provide comfort. *Id.*

29. 42 U.S.C. § 1396a(a)(10); *see* 79 AM. JUR. 2D *Welfare* § 34 (2008) (listing specific services states must provide, including nursing facility services).

30. FROLIK, *supra* note 1, at 72. The federal law defines the term "nursing home" as "an institution that provides skilled nursing care or rehabilitation services for injured, disabled, or sick persons." *Id.* at 72; *see also* 42 U.S.C. § 1396r(a) (providing a more detailed definition of nursing home). The federal law notes that nursing facilities provide health-related care and services above the level of room and board to individuals who require it due to their mental and physical condition. 42 U.S.C. § 1396r(a)(1)(C). *See generally* FROLIK, *supra* note 1, at 63 (providing definitions and discussion of other long-term housing options, like assisted living, that provide a lower level of care than nursing homes).

31. FROLIK, *supra* note 1, at 72. In fact, "[fifteen percent] of all residents were under the age of 65" and the average age of residents is about 83 years old. METLIFE MATURE MARKET INSTITUTE, MARKET SURVEY OF LONG-TERM CARE COSTS 6 (Oct. 2009), *available at* <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-market-survey-nursing-home-assisted-living.pdf>.

32. METLIFE MATURE MARKET INSTITUTE, *supra* note 31, at 6. Only a nursing home may offer skilled nursing care, which is defined by the federal regulations as care "so inherently complex that it can be safely and effectively performed only by, or under the supervision of, professional or technical personnel." 42 C.F.R. § 409.32(a) (2010).

While nursing homes are eager to fill beds, admission is contingent upon the individual's insurance coverage and the nursing home agreeing to provide care.³³ Generally, many nursing homes prefer private-pay patients because they can charge more for providing the same services than Medicaid will usually reimburse.³⁴

B. *Federal and State Government Concerns*

Because their residents are in such vulnerable condition, nursing homes are highly regulated by both state and federal governments.³⁵ Since a nursing home cannot operate without a state license, states are able to regulate nursing home operations through their licensing authority.³⁶ Additionally, the federal government has considerable influence over nursing home operations through Medicaid reimbursement programs³⁷ as “[o]nly a small minority of nursing homes do not accept or rely upon Medicaid”³⁸ Consequently, if a nursing home relying on Medicaid reimbursements fails to comply with federal regulations, it could lose its reimbursement and, as a result, face financial disaster.³⁹

By contrast, assisted living facilities provide only custodial care, which “help[s] with the activities of daily living” such as dressing, eating, bathing, and mobility “that can be provided by nonmedical personnel.” FROLIK, *supra* note 1, at 121; *see* STONE, *supra* note 23, at 1 n.2.

33. *See* FROLIK, *supra* note 1, at 121. *See generally* SADLER, *supra* note 24, at 51-55; METLIFE MATURE MARKET INSTITUTE, *Since You Care: Making the Nursing Home Choice*, METLIFE (2006), available at <http://www.metlife.com/assets/cao/mmi/publications/since-you-care-guides/mmi-making-nursing-home-care-choice.pdf> (providing further discussion on choosing a nursing home).

34. FROLIK, *supra* note 1, at 75. While a nursing home has the right to accept only private-pay patients, this is impractical for most facilities, and they will be unable to fill their beds if they do not accept some Medicaid patients. *Id.* Some states prevent nursing homes from giving preference to private pay patients and require a certain number of Medicaid patients to be admitted. *Id.* at 76.

35. FROLIK, *supra* note 1, at 74; *see, e.g.*, 42 C.F.R. § 483.35 (2010) (requiring that nursing homes provide “nourishing, palatable, well-balanced” meals); 42 C.F.R. § 483.40 (2010) (requiring nursing home residents to be examined by a physician regularly).

36. FROLIK, *supra* note 1, at 75.

37. *Id.* This author would like to note that federal Medicare reimbursements also ensure compliance with federal regulations, however, this Note focuses entirely on Medicaid; a discussion of Medicare is beyond the scope of this Note. For additional information on Medicare, *see generally* FROLIK, *supra* note 1 at 1-40; 70C AM. JUR. 2D *Social Security & Medicare* §§ 2044-2682 (2008) (providing a detailed outline of Medicare eligibility, payment and claims for benefits, and appeals process).

38. FROLIK, *supra* note 1, at 75.

39. *Id.* The concern over losing federal funding is highly relevant as residents have over half of their care paid for by Medicaid. *Id.*

C. *Covering the Costs of Nursing Home Care: Private-Pay*

Nursing home care is costly and individual residents must find a way to pay for their care.⁴⁰ On average, nursing home care costs approximately “\$5,000 to \$8,000 or more a month.”⁴¹ A 2009 MetLife survey of selected nursing homes noted a national average rate for a semi-private room of \$198 daily or \$72,270 annually; these figures indicate a 3.7% increase from the average rates in 2007.⁴²

40. *See, e.g.*, *Rainey v. Guardianship of Mackey*, 773 So.2d 118, 118 (Fla. Dist. Ct. App. 2000) (noting that the ward had about “\$78,725 in assets, a monthly income of \$980.97, and a monthly deficit of \$4,377.78” and her guardians alleged that the ward “would deplete all of her assets to pay for her nursing expenses in 10.64 months”); *In re Guardianship of Domey*, 960 A.2d 729, 731-32 (N.H. 2008) (noting that in December 2004 the ward had over \$730,000 in assets with a monthly income of about \$5,700, but the costs of the ward’s care quickly depleted his assets and he qualified for Medicaid about two years later); *In re Keri*, 853 A.2d 909, 911-12 (N.J. 2004) (noting that the ward’s “monthly nursing home expenses [were] \$6,500”); *In re Labis*, 714 A.2d 335, 336 (N.J. App. Div. 1998) (noting that while the ward “was treated at the Morris Hills Multicare Center” the cost of care was “\$10,000 per month”); *In re Shah*, 694 N.Y.S.2d 82, 83 (App. Div. 1999) (noting that the ward’s hospital “care amounts to over \$1,000 per day” with a private pay rate “of \$1,608.13 per day”) *aff’d*, 95 N.E.2d 148 (2000); *In re John*, 652 N.Y.S.2d 329, 330 (App. Div. 1996) (approving a proposed Medicaid spend-down which left the ward “with approximately \$150,000 in assets . . . together with [an] annual income [of] (approximately \$33,000) which was enough to cover the ward’s nursing home costs for only 36 months”).

41. FROLIK, *supra* note 1, at 94. *See, e.g.*, 130 MASS. CODE REGS. 520.016 (2009) (providing the relevant asset limitations in Massachusetts); *see also, e.g.*, 20 KATE MCEVOY, CONNECTICUT PRACTICE, CONNECTICUT ELDER LAW § 7:17 (2011) (setting forth Connecticut’s Medicaid asset limitations as provided by the Department of Social Services’ Uniform Policy Manual). *See generally State Information*, ELDER L. ANSWERS (2008), <http://www.elderlawanswers.com/> (providing information about each state’s average monthly cost for nursing home care, under the “state information” heading, which provides a link to “key Medicaid information” for each state once the drop-down menu for a particular state is selected).

42. *Compare* METLIFE MATURE MARKET INSTITUTE, *supra* note 31, at 4-5, 14-19 (noting that the average daily rate for nursing home care in a semi-private room is \$198), *with* STONE, *supra* note 23, at 2 & n.3 (noting that the average daily rate for a semi-private room was \$189 according to a *MetLife Market Survey of Nursing Home and Assisted Living Costs* published in 2007).

The cost of \$198 per day is an average cost, so some nursing homes may have higher or lower daily rates. *See, e.g.*, *State Information*, *supra* note 41 (noting that the average monthly cost of nursing home care in New York is approximately \$9,500 (about \$316 per day) which is above average, while the average monthly cost in Idaho is \$5,994 (about \$197 per day) which is below average).

Similarly, a MetLife Market Survey noted that the highest daily rate for a semi-private room in a New York nursing home is \$500 with a state average of \$323, which is still well above the national average. METLIFE MATURE MARKET INSTITUTE, *supra* note 31, at 17. By contrast, the highest daily rate for a semi-private room in a Missouri nursing home is \$179, with a state average of \$134, both numbers being well below the national average. *Id.*

Although nursing home care is costly, individuals may still look to several private-pay options to cover these expenses.⁴³

One option for financing nursing home care is through sources of private-pay such as personal savings, annuities, refinancing the home, reverse mortgages, or selling the home, to name a few.⁴⁴ For individuals who resort to paying through personal savings, some may be able to bear the cost; however, by purchasing the level of care they desire, they will greatly deplete or completely exhaust their savings.⁴⁵ On the other hand, if the individuals have only modest savings, they may be “house rich,” and the sale of their homes can create a pool of funds that will often meet the costs of nursing home care for some period of time.⁴⁶ In either case, it is apparent that private funding alone is insufficient to finance nursing home care if people do not wish to deplete their savings.

Another option for financing nursing home care is long-term care insurance.⁴⁷ In general, these “policies pay benefits when the insured has physical or mental impairments significant enough to require daily assistance.”⁴⁸ However, most people are unable to finance their entire cost of long-term care with long-term care insurance, because the daily cost of nursing home care almost always

43. See *Paying for Long-Term Care*, MEDICARE.GOV (Apr. 10, 2007), <http://www.medicare.gov/longtermcare/static/PayingOverview.asp> (listing and providing the costs and risks of several private-pay options which include: personal savings, long-term care insurance, and reverse mortgages, to name a few).

44. See generally FROLIK, *supra* note 1, at 94-154 (providing in depth description and use of private pay methods for nursing home patients).

45. *Id.* at 94; see, e.g., *supra* note 40 (providing examples of how quickly the costs of care can exhaust the ward's assets).

46. FROLIK, *supra* note 1, at 95.

47. *Id.* at 117. It is estimated that private insurance pays about 7.2% of the national long-term care costs. *National Spending on Long-Term Care*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (May 12, 2010, 6:27 PM), http://www.longtermcare.gov/LTC/Main_Site/Paying/Private_Financing/LTC_Insurance/Buying.aspx; see also FROLIK, *supra* note 1, at 112-27 (providing a more detailed discussion on long-term insurance benefits); MetLife Mature Market Institute, *Purchasing Long-Term Care Insurance: Ten Key Considerations*, METLIFE (2009), available at <http://www.metlife.com/assets/cao/mmi/publications/helpful-hints/mmi-purchasing-long-term-care-insurance-generic.pdf> (providing general information about long-term care insurance and important considerations before purchasing a policy); *Map of NAIC States & Jurisdictions*, NAIC, http://naic.org/state_web_map.htm (last visited Apr. 15, 2012) (providing general information about long-term care insurance and links to each state's department of insurance).

48. FROLIK, *supra* note 1, at 117. See *id.* at 120 for more specific information on the required physical or mental deficits. Some policies pay a fixed per-diem amount for every day the insured qualifies for benefits and lives in a nursing home, some policies pay a percentage of the daily rate for a pre-set daily limit, and other policies pay all costs for a specified period of time. *Id.* at 117.

exceeds the daily benefit paid by the policy.⁴⁹ Moreover, before issuing a policy, the insurer will require the insured to have a physical examination,⁵⁰ which enables the insurance company to assess the risk in insuring a particular individual based on age and pre-existing medical conditions.⁵¹ Individuals must balance the costs of buying long-term care insurance early in life and paying premiums for many years against the possibility of delaying the purchase and being denied coverage due to health problems and old age.⁵² In any case, long-term care insurance, by itself, will likely be insufficient to cover the complete costs of nursing home care.

D. *Covering the Costs of Nursing Home Care: Medicaid*

The final option for financing nursing home care is government-subsidized benefits. Medicaid is the most popular means for financing nursing home care.⁵³ In fact, Medicaid is “the largest single source of financing for long-term care,”⁵⁴ “paying for almost half of all long-term care spending in the United States.”⁵⁵ Medicaid typically covers the costs of nursing home care in excess of the amount that a Medicaid-eligible individual is capable of paying.⁵⁶ Even though Medicaid eligibility requires proof of “financial need,” nursing home care is so costly that “many middle-class elderly who reside in nursing homes are driven into poverty,” thus rendering them Medicaid-eligible.⁵⁷

Individuals will qualify for Medicaid only if they meet the program’s “categorical *and* financial eligibility requirements.”⁵⁸ The categories of people who may qualify for Medicaid coverage include individuals 65 or older, certain disabled individuals, parents

49. *Id.* at 117.

50. *Id.* at 123.

51. *Id.* at 123-24.

52. *Id.* at 124.

53. Medicare does cover some nursing home costs but provides limited reimbursement and typically only reimburses care that qualifies as “skilled nursing” care. 42 C.F.R. §§ 409.31, .32 (2010). A lengthy discussion of Medicare coverage is outside the scope of this Note; for more specific information on Medicare, see generally 42 U.S.C. § 1395 (2006) (federal statute governing Medicare); FROLIK, *supra* note 1 (addressing Medicare coverage in Chapter One).

54. STONE, *supra* note 23, at 1; *see also* FROLIK, *supra* note 1, at 128.

55. FROLIK, *supra* note 1, at 128. Medicaid pays approximately 49% of all long-term care services. *National Spending on Long-Term Care*, *supra* note 47.

56. FROLIK, *supra* note 1, at 128.

57. *Id.* at 129; *see, e.g., supra* note 40 (listing examples of cases in which the costs of care depleted the ward’s assets).

58. STONE, *supra* note 23, at 4.

and children, and pregnant women.⁵⁹ However, coverage of nursing home costs typically falls into the category of aged persons or persons with disabilities.⁶⁰

After individuals satisfy Medicaid's categorical requirement, they must also meet the financial requirement.⁶¹ This requirement, commonly referred to as a standard or threshold, limits the amount of income and assets an individual may possess before qualifying.⁶² These criteria are usually met in the following ways:

- (1) [people] have income and assets equal to or below the state-specified thresholds; (2) [people] deplete their income and assets on the cost of their care, thus "spending down"; or (3) [people] divest of their assets to meet these income and asset standards sooner than they otherwise might if they had to spend their income and assets on the cost of their care.⁶³

Because the thresholds are set through a combination of federal guidelines and state definitions, the specific income and asset restrictions vary among states.⁶⁴

The asset limitations usually require individuals to satisfy a resource eligibility test. Following federal parameters, the states set standards stipulating the uppermost amount of countable assets a person may possess while still qualifying for Medicaid.⁶⁵ Generally, individuals satisfy the resource eligibility test if they have no more than \$2,000 in countable resources (e.g. "savings accounts, stocks, or other equities").⁶⁶ The value of assets may be counted entirely,

59. *Id.*; see 42 U.S.C. § 1396a (2006); FROLIK, *supra* note 1, at 130-33.

60. STONE, *supra* note 23, at 4.

61. *Id.*

62. *Id.*

63. *Id.* at 1.

64. *Id.* at 4.

65. *Id.* at 7; see also *id.* at 37-45 (providing a Table with detailed information about excludability of assets under SSI); *Definition of a Resource for the SSI Program*, SOC. SECURITY ONLINE (Oct. 20, 2011, 9:12 AM), http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/412/kw/countable/session/L3RpbWUvMTI4Njg0NTY2MS9zaWQvZHZvVVJmY2s%3D (providing definition of a resource for the SSI program). See generally FROLIK, *supra* note 1, at 132-33 (citing specific examples of non-countable assets); *Countable Income for SSI Program*, SOC. SECURITY ONLINE (last modified Oct. 13, 2011), <http://www.ssa.gov/OACT/COLA/countableincome.html> (providing Social Security's definition of countable income).

66. STONE, *supra* note 23, at 7; see also FROLIK, *supra* note 1, at 132-33 (listing examples of non-countable assets which include: the principal residence, the value of household goods, engagement rings, and a non-revocable burial contract).

It is also important to note that special rules apply to an individual's primary place of residence. Under federal law, the applicant's equity interest in the home is exempt and non-countable only up to \$500,000 or \$750,000 if the state elects to increase the

excluded entirely, or excluded partially while counting the remaining portion.⁶⁷ Individuals retaining countable resources in excess of the maximum amount allowed by their state “must ‘spend down’ those resources by paying for the costs of their medical care, by converting the resource into a non-countable resource, or by paying support needs for themselves or their spouse.”⁶⁸

II. MEDICAID PLANNING AND GUARDIAN INITIATED SPEND-DOWNS

A. *Medicaid Planning in General*

Medicaid planning is the process by which individuals protect their assets by giving them to loved ones, or spending them, to create eligibility.⁶⁹ Because nursing home care is so costly, individuals could quickly deplete the resources they have built over a lifetime.⁷⁰ For example, if an individual sold his or her home to create

equity amount. 42 U.S.C. § 1396p(f)(1)(B) (2006). Any equity in excess of the amount chosen by the state is considered an available asset. 42 U.S.C. § 1396p(f)(1)(A) (2006). To qualify for Medicaid, people with home equity in excess of the threshold could use a reverse mortgage or home equity loan to reduce their equity interest. STONE, *supra* note 23, at 8. See generally FROLIK, *supra* note 1, at 101-05 (addressing specifically nursing home private-pay methods that utilize home equity).

67. STONE, *supra* note 23, at 7.

68. FROLIK, *supra* note 1, at 133. Medicaid has special eligibility requirements for married individuals that aim to protect the economic independence of the “community spouse” (the spouse not living in a nursing home). For a more detailed discussion on the protections provided to the “community spouse,” see *id.* at 135-42; see also STONE, *supra* note 23, at 9-10 (discussing the Medicare Catastrophic Coverage Act (MCCA) of 1998, which established new rules allowing the community spouse to retain higher amounts of assets and income than the federal law allows); *State Information*, *supra* note 41.

69. FROLIK, *supra* note 1, at 142 (underscoring the need for proper planning by noting that some spend-down attempts may render the individual *ineligible* for benefits); see also 42 U.S.C. § 1396p(c); STONE, *supra* note 23, at 2.

70. STONE, *supra* note 23, at 2; see, e.g., *Rainey v. Guardianship of Mackey*, 773 So.2d 118, 118 (Fla. Dist. Ct. App. 2000) (noting that the ward had about “\$78,725 in assets, a monthly income of \$980.97, and a monthly deficit of \$4,377.78” and “[h]er guardians . . . alleged that [the ward] would deplete all of her assets to pay for her nursing expenses in 10.64 months”); *In re Guardianship of Domey*, 960 A.2d 729, 731-32 (N.H. 2008) (noting that in December 2003 the ward had over \$730,000 in assets with a monthly income of about \$5,700, but the costs of the ward’s care quickly depleted his assets and he qualified for Medicaid in January 2006); *In re Keri*, 853 A.2d 909, 911-12 (N.J. 2004) (noting that the ward’s “monthly nursing home expenses [were] \$6,500”); *In re Labis*, 714 A.2d 335, 336 (N.J. 1998) (noting that while the ward “was treated at the Morris Hills Multicare Center” the cost of care was “\$10,000 per month”); *In re Shah*, 694 N.Y.S.2d 82, 83 (App. Div. 1999) (noting that Shah’s hospital “care amounts to over \$1,000 per day” and a private pay rate “of \$1,608.13 per day”); *In re John*, 652 N.Y.S.2d 329, 330 (App. Div. 1996) (approving a proposed Medicaid spend-down which left the ward “with approximately \$150,000 in assets . . . together with [an] annual income [of]

a “pool of funds” to pay for nursing home care, the opportunity to pass on the life savings or home to his or her heirs is lost.⁷¹ Some critics may contend that this “is not a problem of affordable long-term care, but rather a failure or inability of the older person to save enough to pay for life’s vicissitudes and still have an estate to leave to the heirs.”⁷² Yet, Medicaid planning has quickly become a subset of estate planning that allows individuals to legally divest themselves of their wealth to qualify for Medicaid earlier than they otherwise would if those assets were used to pay for their care.⁷³

When individuals make gifts (one Medicaid planning technique),⁷⁴ they may incur a period of Medicaid ineligibility known as a “penalty period,”⁷⁵ the length of which varies based on the amount of assets “improperly transferred” divided by the average monthly cost of nursing home care in the state.⁷⁶ “Under [the] current law, the look-back date is five years prior to [the] application

(approximately \$33,000)” which was enough to cover ward’s nursing home costs for only 36 months).

71. FROLIK, *supra* note 1, at 95.

72. *Id.*

73. STONE, *supra* note 23, at 2; FROLIK, *supra* note 1, at 142. *See generally Medicaid Rules*, *supra* note 23 (answering whether transferring assets is legal).

74. *See infra* Part II.B.

75. 42 U.S.C. § 1396p (2006); *see also* STONE, *supra* note 23, at 10; FROLIK, *supra* note 1, at 142-45; Donald D. Vanarelli, *Financial Exploitation of the Elderly: Impact on Medicaid Eligibility*, 6 NAT’L ACAD. ELDER L. ATT’Y J. 39, 40 (2010).

76. The author uses the term “improperly transferred” to define those asset transfers incurring a penalty period, and one example of an improper transfer is a gift (an asset transferred for less than fair market value). *See* 42 U.S.C. § 1396p(c)(1)(A) (2006) (stating that penalty periods are incurred for transferring assets for less than fair market value, which is an improper transfer); 42 U.S.C. § 1396p(c)(E)(i) (2006) (defining calculations for the penalty period); STONE, *supra* note 23, at 10 n.23; FROLIK, *supra* note 1, at 142-43 (noting that “[t]he number of months [of the penalty period] is determined by dividing the total . . . uncompensated value of all assets transferred (e.g. gifts), on or after the look-back date by the average monthly cost . . . of a nursing facility in the state . . . at the time of application”); *see, e.g.*, *Makepeace v. Dougherty*, No. 10-10266-RWZ, 2010 WL 4180575, at *1 (Mass. Dist. Ct. 2010) (noting that Makepeace’s Medicaid application was not approved because “he made a \$11,005 disqualifying transfer of funds resulting in a 43-day penalty period of ineligibility”); *V.S. v. Div. of Med. Assistance & Health Serv.*, 2010 WL 1658592, at *3 n.1 (N.J. Super. Ct. App. Div. 2010) (imposing a 23 month and 14 day ineligibility period after the Medicaid applicant transferred her home to her son); *Talarico v. Dept. of Human Serv.*, 2009 WL 88118, at *1 (N.J. Super. Ct. App. Div. 2009) (noting that Talarico made a \$5,000 transfer from his bank account to another’s and consequently incurred a one-month period of ineligibility); *Lancashire Hall Nursing & Rehab. Ctr. v. Dep’t of Pub. Welfare*, 995 A.2d 540, 541 (Pa. Commw. Ct. 2010) (affirming the imposition of a 415 day penalty period of long-term care benefit ineligibility for transferring \$98,763.85 for less than fair market value).

[for] Medicaid,”⁷⁷ and whether individuals incur a penalty depends on whether they made a gift of an asset on or after the look-back period.⁷⁸ Currently, those applying for “Medicaid nursing home benefits” care must disclose any gifts made within the five years preceding the application.⁷⁹

Once an individual incurs a penalty period, it begins to run on the later of “the first day of the month during or after which the assets [were gifted], or the date on which the individual is eligible for Medicaid *and* would otherwise be receiving [nursing home care].”⁸⁰ Furthermore, subsequent gifts will extend the penalty period because the value of the gifts are combined and treated as if the aggregate value were initially gifted.⁸¹

B. *Medicaid Planning: Strategies and Important Considerations*

Because individuals will likely incur a penalty period for gifts transferred within the look-back period, it is important that they consider a strategy for, and the consequences of, transferring assets

77. STONE, *supra* note 23, at 10; *see* 42 U.S.C. § 1396p (2006). Under the prior law the look-back period was 36 months and 60 months for some trusts. STONE, *supra* note 23, at 10 n.22; *see, e.g.*, Zander v. Adams, 928 N.E.2d 492, 502-03 (Ill. App. Ct. 2010) (finding that because Zander applied for Medicaid only 37 months after transferring assets from a trust, a period of ineligibility must be imposed because the transfer of assets is subject to a 60 month look-back period); *In re Sandra*, 818 N.Y.S.2d 439, 440 (App. Div. 2006) (noting that the new Medicaid laws changed the look-back period from 36 months to 60 months); *see also* Omnibus Budget Reconciliation Act of 1993 (OBRA), Pub. L. No. 103-66, 107 Stat. 312 (1993). *But see* V.S., 2010 WL 1658592, at *3 n.1 (noting that while the DRA extended the look-back period, most counties still apply the 36 month look-back period, and it is anticipated that all New Jersey counties will begin applying the 60 month look-back period in 2011).

78. STONE, *supra* note 23, at 10. There are some exceptions to the general rule that a gift triggers a penalty period. *See, e.g.*, 42 U.S.C. § 1396p(c)(1)(B) (2006) (providing that transfers of exempt assets do not trigger a penalty period); 42 U.S.C. § 1396p(c)(2) (2006) (listing specific transfers that do not incur a penalty period such as: transfers that would cause undue hardship; transfers that were intended to be disposed of at fair market value; or transfers to trusts meeting statutory criteria); 42 U.S.C. § 1396p(c)(2)(A) (2006) (listing specific situations in which transfer of a house does not invoke a penalty period); FROLIK, *supra* note 1, at 146 (citing specific examples of exempt transfers such as: gifts to a spouse or disabled child; when denying eligibility would cause undue hardship; or the transfer of the applicant’s home if it meets the statutory conditions).

79. FROLIK, *supra* note 1, at 142; *see also* 42 U.S.C. § 1396p(c)(1)(B).

80. STONE, *supra* note 23, at 10. Prior to the Deficit Reduction Act (DRA), the period of ineligibility began to run during the month when the assets were transferred or, if the state chose, in the month following the transfer. *Id.* at 10 n.24; *see also* 42 U.S.C. § 1396p(c)(1)(B).

81. 42 U.S.C. § 1396p(c)(1)(E) (providing that ineligibility is determined by the total cumulative value of uncompensated transfers); STONE, *supra* note 23, at 10 n.23; FROLIK, *supra* note 1, at 144.

for Medicaid eligibility.⁸² “[T]he goals are twofold: first, to preserve assets in order to supplement Medicaid and thereby maintain the elder person’s quality of life until the very end, and, second, to assure that the person’s life savings are passed on to loved ones rather than consumed by long-term health care costs.”⁸³ A common Medicaid planning technique is to transfer a portion of a person’s assets, while retaining a portion that will satisfy the costs of nursing home care during the penalty period incurred as a result of the transfer.⁸⁴ Individuals may also look to long-term care insurance to cover some of the costs incurred during the penalty period.⁸⁵ If gifting the property, individuals must also consider consequences that affect themselves or third parties. For example, having a child hold assets in the Medicaid applicant’s name could jeopardize the ability of the applicant’s grandchildren to qualify for college financial aid.⁸⁶ Furthermore, even in a stable family, some family members may prove unwilling or unable to hold the gifted funds for the applicant’s benefit.⁸⁷

Another useful strategy for protecting savings is to convert countable assets into non-countable assets.⁸⁸ In this case, individuals spend down assets used to determine eligibility on non-countable assets, which, are not considered when determining Medicaid

82. See FROLIK, *supra* note 1, at 142-54; Joan M. Krauskopf et al., *Elderlaw: Advocacy for the Aging*, 1 ELDERLAW ADVOC. AGING § 11:41 (Nov. 2009); *Medicaid Planning*, ELDER L. ANSWERS, http://www.elderlawanswers.com/elder_info/elder_article.asp?id=701 (last visited Apr. 15, 2012) [hereinafter *Medicaid Planning*] (outlining strategy and techniques for Medicaid planning and potential consequences). Because every state has discretion in determining eligibility within the federal parameters, Medicaid planning strategies differ in every state. See, e.g., Margaret H. Kreiner, *Basic Medicaid Strategies*, OHIO ELDER L. § 8:10 (2009); Jennifer H. Leibson & Bernard M. Faller, *Medicaid Planning*, 23 KY. PRAC. KY. ELDER L. § 9:12 (2010); Vincent J. Russo & Marvin Rachlin, *Medicaid Planning: Transfer of Assets*, N.Y. ELDER L. PRAC. § 15:11 (May 2010) (discussing the role of attorneys and relevant strategies for Medicaid planning).

83. John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J. L. & PUB. POL’Y 81, 92 (2003).

84. Krauskopf et al., *supra* note 82, § 11:41.

85. See *supra* notes 47-52 and accompanying text, which discuss the cost-benefit analysis an individual must make before purchasing long-term care insurance. See also FROLIK, *supra* note 1, at 118 (noting that some individuals take out long-term care insurance that pays benefits to cover any penalty period incurred due to disqualifying gifts).

86. *Medicaid Planning*, *supra* note 82.

87. See generally *id.* (noting that once an applicant divests himself of the asset, he loses ownership, and that asset is now owned by the donee who may lose it to bankruptcy, divorce, or lawsuit).

88. *Id.*

eligibility.⁸⁹ “For example, money in checking or savings accounts may be used, without creating a period of ineligibility, to purchase or improve a home, pay off a mortgage, buy a cemetery lot, [or] pre-pay funeral services”⁹⁰ These expenditures are examples of non-countable assets that will not be considered part of an individual’s assets when determining his or her Medicaid eligibility. The laws of Medicaid are complex, and the transfer of assets requires consideration of many factors, so it is recommended that individuals consult with an attorney before executing any transfers in pursuit of Medicaid eligibility.⁹¹

C. *Reducing Medicaid Costs by Discouraging Medicaid Planning*

More and more middle-class and wealthier individuals are using Medicaid to pay for nursing home care,⁹² and “[a]s a result, Medicaid expenditures [have] soared.”⁹³ Recognizing the appeal of transferring wealth to “create Medicaid eligibility,” Congress has reacted by enacting several rules that make donors of these gifts ineligible for Medicaid.⁹⁴ The Deficit Reduction Act (DRA) of 2005 was Congress’s most recent attempt to curb Medicaid planning; the Act made a number of changes to the rules concerning asset transfers to ensure that Medicaid applicants apply their assets

89. *Id.*

90. Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power to do Medicaid Planning*, 32 WAKE FOREST L. REV. 341, 363 (1997); see 20 C.F.R. § 416.1210 (2010) (listing assets that are excluded when determining Medicaid eligibility).

91. Krauskopf et al., *supra* note 82, § 11:41; *Medicaid Planning*, *supra* note 82.

92. SADLER, *supra* note 24, at 80.

93. *Id.*

94. FROLIK, *supra* note 1, at 142. The DRA is not Congress’s first attempt to discourage Medicaid planning. The court in *Miller*, when considering whether to approve a Medicaid spend-down, gave great deference to a 1986 amendment to the federal Medicaid laws that rendered certain trusts (previously considered a non-countable asset) an available asset for determining Medicaid eligibility. The court noted that this amendment was consistent with the Congressional intent that Medicaid is designed to provide benefits to those who are truly needy. *Miller v. State Dep’t of Soc. & Rehab. Serv.*, 64 P.3d 395, 401-02 (Kan. 2003).

Moreover, OBRA of 1993 was another attempt by Congress to “restrict access to Medicaid’s long-term care services to those . . . who are poor or . . . have very high medical or long-term care expenses” by establishing stricter asset transfer rules. STONE, *supra* note 23, at 2. OBRA 1993 required the transfer of assets to occur 36 months prior to applying for Medicaid and required the states to enact legislation concerning estate recovery. *Id.* at 10 n.22; see also *supra* note 77 (noting that look-back period under OBRA was 36 months). See generally SADLER, *supra* note 24, at 80-81 (providing more detailed information about OBRA 1993).

toward the cost of their care.⁹⁵ First, the DRA lengthened the look-back period for all income and asset transfers from 36 months to 60 months.⁹⁶ Additionally, the DRA changed the start date of the penalty period to “[i]ncrease[] the probability that penalties applied will actually be experienced by applicants,”⁹⁷ and enabled states to calculate the penalty period by treating the cumulative value of assets transferred by an individual as one transfer.⁹⁸ Overall, these measures aim to impose stricter penalties on persons who make multiple transfers; essentially, periods of ineligibility now run consecutively rather than concurrently.⁹⁹

Even though the DRA does not completely prohibit Medicaid planning, it is clear that the legislative intent is to discourage individuals from engaging in such planning as it diverts scarce resources away from those who are truly in need to pay for care of people who are less in need.¹⁰⁰ Critics of Medicaid planning also argue

95. STONE, *supra* note 23, at 10, 29. See generally *Summary of the New Medicaid Rules (the DRA)*, ELDER L. ANSWERS, http://www.elderlawanswers.com/Elder_Info/Elder_Article.asp?id=2751#9 (last visited Apr. 15, 2012); *Transfer of Assets*, CTR. FOR MEDICARE & MEDICAID SERV., (June 29, 2010, 6:41 A.M.), http://www.cms.gov/MedicaidEligibility/10_TransferofAssets.asp#TopOfPage (providing basic information about how the DRA affects Medicaid planning).

96. 42 U.S.C. § 1396p (2006); STONE, *supra* note 23, at 10 n.22. See *supra* note 94 for more information on the prior look-back period, which discusses OBRA.

97. STONE, *supra* note 23, at 29.

98. *Id.* at 29-30; see also *supra* note 81 (for further information on accumulation of assets transferred).

99. STONE, *supra* note 23, at 30; Krauskopf et al., *supra* note 82, § 11:41 (noting that the prior law did not trigger new penalty periods for subsequent transfers). The DRA made other changes that significantly impacted the asset transfer and eligibility rules. Addressing each of these changes is outside of the scope of this Note. See generally FROLIK, *supra* note 1 (discussing further information on the treatment of: trusts; annuities; notes and loans; home equity; life estates; continuing care retirement communities; the income first rule for community spouses); STONE, *supra* note 23.

100. STONE, *supra* note 23, at 2; see *Striegel v. South Dakota Dep't of Soc. Serv.*, 515 N.W.2d 245, 247-48 (S.D. 1994) (holding that “[t]he Medicaid program is not to be used as an estate planning tool” and allowing “[the ward] to receive Medicaid benefits while tens of thousands of dollars are sheltered in a trust violates the spirit and intent of the Medicaid program and is unjust to those who do not have access to the supplemental funds yet desperately need the benefits”); see also *Zander v. Adams*, 928 N.E.2d 492, 495-97 (Ill. App. Ct. 2010); *Miller v. State Dep't of Soc. & Rehab. Serv.*, 64 P.3d 395, 401 (Kan.2003); *Lebow v. Comm'r of Div. Med. Assistance*, 740 N.E.2d 978, 980 (Mass. 2001); *In re Rosckes*, 783 N.W.2d 220, 225 (Minn. Ct. App. 2010) (noting that Congressional intent indicates that Medicaid is intended to be the payor of last resort limited to the financially needy, and individuals are expected to use their assets to pay for their care rather than engaging in Medicaid planning). See generally Karla Levinson, Comment, *Long-Term Care Alert: An Analysis of Delaware's Approach to Medicaid Planning Techniques and Why Curbing Medicaid Planning Will Not Solve the Nation's Long-Term Care Problem*, 13 WIDENER L. REV. 223 (2007); Bryn A. Poland, Comment,

that it shifts the financial burden from those individuals capable of paying for their care to the Medicaid program. Essentially, “people should assume financial responsibility . . . before relying on tax dollars to pay for care they could otherwise afford.”¹⁰¹ Congress determined that “cutting benefit packages, eligibility, or reimbursement[s] . . . to providers” were not desirable outcomes.¹⁰² Instead, discouraging Medicaid planning and restricting eligibility to those who are truly needy better accomplishes Congress’s goal of preserving Medicaid benefits for the neediest persons.¹⁰³

By contrast, others contend that Medicaid planning is an essential tool for individuals who wish to protect their assets.¹⁰⁴ The proponents note that although the DRA discourages Medicaid planning, it does not completely prohibit individuals from engaging in such planning.¹⁰⁵ They further argue that individuals should have the absolute power to do whatever they want with their assets, and this includes giving them away.¹⁰⁶ In fact, the government has no right to complain when middle class individuals, faced with desperate circumstances, intentionally impoverish themselves because the government “established the rule that poverty is a prerequisite to [receiving] government assistance [to] defray[] . . . the costs of ruinously expensive, but absolutely essential, medical treatment.”¹⁰⁷ “Few would suggest that it is improper for taxpayers to maximize their deductions under our tax laws to preserve income for themselves and their families—even though they are . . . reduc-

Don't Plan on Aging: The Kansas Supreme Court Reaffirms its Hostility Toward Medicaid Planning, 45 WASHBURN L.J. 491 (2006) (evaluating Delaware’s and Kansas’s approaches, respectively, aiming to curb Medicaid planning).

101. STONE, *supra* note 23, at 2; *see also supra* note 100 (noting that this concept is consistent with Medicaid being the payor of last resort).

102. STONE, *supra* note 23, at 22.

103. *Id.*

104. *Id.*; *see also* H.K. v. State, 877 A.2d 1218 (N.J. 2005); *In re Keri*, 853 A.2d 909 (N.J. 2004); *In re Shah*, 733 N.E.2d 1093, 1098-99 (N.Y. 2000) (determining that Medicaid planning is permissible under the current Medicaid laws and reasonable individuals aim to preserve assets for themselves and their families); *In re Daniels*, 618 N.Y.S.2d 499, 500 (Sup. Ct. 1994).

105. *Keri*, 853 A.2d at 920 (noting that “Medicaid planning is legally permissible”); *see In re John*, 652 N.Y.S.2d 329 (App. Div. 1996). Although this case was decided before the DRA was enacted, the court’s point is still applicable today. The court noted that “Medicaid . . . was not designed to provide medical benefits to those who [purposely] render themselves ‘needy,’” but “the simple fact is that the current law rewards prudent ‘Medicaid planning.’” *Id.* at 331-32; *see also supra* note 82 (providing strategies for Medicaid planning post-DRA).

106. *Shah*, 733 N.E.2d at 1101 (citing the lower court’s opinion in *In re Shah*, 694 N.Y.S.2d 82, 86-87 (App. Div. 1999)).

107. *Id.*

ing . . . money available to [the] government for its public purposes.”¹⁰⁸ Similarly, Medicaid planning allows individuals to protect their assets from depletion and then distribute them in accordance with their wishes.¹⁰⁹

Typically, individuals “feel they should be able to leave their estates to their loved ones.”¹¹⁰ Supporters of Medicaid planning also argue that the low asset thresholds require people to become penniless before they can qualify for assistance, thus leaving them without the resources they need.¹¹¹ The final argument in support of Medicaid planning is that the cuts to Medicaid under the DRA were misguided, as “planning was not a large contributor toward Medicaid’s financial strain.”¹¹² Though the critics of Medicaid planning argue that spend-downs should be discouraged, the fact remains that Medicaid planning is not entirely foreclosed to individuals wishing to engage in it.

D. *Guardians and Medicaid Planning*

While Medicaid planning itself is a controversial subject, Medicaid planning initiated and executed by guardians on behalf of their wards who require nursing home care is even more contested. The law presumes that adults possess mental capacity, which is defined as being “capable of making rational decisions and [being] best situated [to do so on one’s] own behalf.”¹¹³ An individual’s autonomy and independence are founded on the absolute right to make

108. *Keri*, 853 A.2d at 920 (contending that Medicaid planning is the analog to estate planning, which is common and acceptable); In *In re Trott*, the court held that courts may authorize the transfer of a ward’s property to minimize estate taxes and fees in accord with the following courts:

Accord: In *re DuPont*, . . . 194 A.2d 309 (Ch.1963); In *re Morris*, 281 A.2d 156 (N.H.Sup.Ct.1971); In *re Carson*, . . . 241 N.Y.S.2d 288 (Sup.Ct.1962); In *re Groff Estate*, 38 Pa.Dist.C.R.2d 556 (1965). *Cf.* In *re Johnson*, . . . 162 A.96 (Ch.1932); In *re Brice’s Guardianship*, 233 Iowa 183, 8 N.W.2d 576 (Sup.Ct.1943); In *re Buckley’s Estate*, 330 Mich. 102, 47 N.W.2d 33 (Sup.Ct.1951); In *re Trusteeship of Kenan*, 262 N.C. 627, 138 S.E.2d 547 (Sup.Ct.1964). *Contra*: In *re Neal*, 406 S.W.2d 496 (Tex.Civ.App.1966).

In *re Trott*, 288 A.2d 303, 306 (N.J. Super. Ct. App. Div. 1972); *see also* Fliegelman & Fliegelman, *supra* note 90, at 368 (noting that Medicaid planning should be allowed like other tax and estate planning).

109. *Keri*, 853 A.2d at 920.

110. STONE, *supra* note 23, at 3.

111. *Id.* *But see* FROLIK, *supra* note 1, at 95 (noting that this is not a problem concerning health care costs or Medicaid eligibility but is really a failure of individuals to save enough money to pay for their care).

112. STONE, *supra* note 23, at 22.

113. FROLIK, *supra* note 1, at 155.

choices regarding “his or her property or person.”¹¹⁴ For those who are incapacitated,¹¹⁵ a guardian may be appointed as a “substitute decision maker”;¹¹⁶ legally, the decisions of the guardian are treated as if they were made by the ward.¹¹⁷ Without a guardian, the incapacitated persons would reside in a “legal limbo” because they are unable to make decisions for themselves.¹¹⁸ Appointment of a guardian ensures that the incapacitated person is fully able to participate in life.¹¹⁹

When appointing a guardian, professional guardians are distinguished from nonprofessional guardians. Generally, the former is required to meet age, experience, education, and character requirements,¹²⁰ while the latter is a friend or family member of the

114. *Id.*

115. UNIF. PROBATE CODE § 5-102(4) (2006) defines “[i]ncapacitated person” as “an individual who, for reasons other than being a minor, . . . lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.” Discussing the various standards for determining incapacity is beyond the scope of this Note. *See also* FROLIK, *supra* note 1, at 160-63 (discussing more specifically the various definitions and approaches for determining whether an individual is incapacitated).

116. FROLIK, *supra* note 1, at 156. Each state has its own laws that provide procedures empowering the courts to appoint guardians. *Id.*; *see also* Fliegelman & Fliegelman, *supra* note 90, at 343 (explaining that each state’s “definitions, procedures, and requirements” vary a great deal, but that each “state requires some [form] of petition, notice, and judicial consideration”). *See generally* 39 AM. JUR. 2D *Guardian & Ward* §§ 1-220 (2008) (discussing guardian ward jurisprudence).

117. FROLIK, *supra* note 1, at 156; *see* Romo v. Kirschner, 889 P.2d 32, 34 (Ariz. Ct. App. 1995) (holding that the trust created by a conservator on behalf of the ward was “[i]n reality . . . created by [the ward]”); Forsyth v. Rowe, 629 A.2d 379, 382-84 (Conn. 1993) (holding that the Medicaid qualifying trust established by the ward’s conservator was in fact established by the ward as the ward provided all of the consideration); Williams v. Kansas Dep’t of Soc. & Rehab. Servs., 899 P.2d 452, 456 (Kan. 1995) (holding that for purposes of determining whether a trust is a Medicaid qualifying trust, “implicit in the term ‘individual’ is a person acting as an individual’s legal representative where the individual is incapable of acting on his or her own”).

“Guardianship is the legal process of providing a substitute decision maker for a mentally incapacitated individual.” FROLIK, *supra* note 1, at 159. This Note aims only to provide a general understanding of the guardian-ward relationship, and specific discussion of guardianship is beyond the scope of this Note. *See generally id.* at 155-213; Fliegelman & Fliegelman, *supra* note 90 (providing an in depth discussion on the history of guardianships, guardian duties and powers, and the implications of guardian appointment for a ward).

118. FROLIK, *supra* note 1, at 156.

119. *Id.*

120. *E.g.*, ALASKA STAT. § 08.26.020 (2010) (requiring a minimum age, casework experience, education standard, certification, and criminal background checks); TEX. PROB. CODE ANN. § 697 (West 2010) (requiring a statement providing educational background, professional experience, references, information regarding value of assets managed, and past resignations).

ward.¹²¹ To alleviate the knowledge and experience disparity between professional and nonprofessional guardians, a nonprofessional guardian may be required to take an educational course discussing the powers and duties of the position.¹²² Although a professional guardian, due to greater education and experience, is likely more familiar with guardian powers and duties, courts usually express a tendency to appoint nonprofessional guardians.¹²³ Once a guardian is appointed he or she is charged with making the best decisions on behalf of the ward.¹²⁴

Whether a guardian may engage in Medicaid planning on behalf of the ward depends upon the state law.¹²⁵ Currently, every state has a statute that contemplates guardian capabilities for engaging in estate planning and gifting.¹²⁶ Whether the guardian may actually engage in this planning depends on how the court exercises its discretion and interprets the statute, and whether the court authorizes the guardian's proposed spend-down.¹²⁷ Several states list

121. See WASH. REV. CODE ANN. § 11.88.008 (West 2011) (defining professional guardian as someone "who is *not* a member of the incapacitated person's family and who charges fees for carrying out [their] duties" (emphasis added)). The negative implication of this definition is that nonprofessional guardians include family members who do not charge fees and do not meet professional licensing requirements. See *supra* note 120.

122. E.g., CAL. PROB. CODE § 1457 (West 2012); FLA. STAT. ANN. § 744.3145(c)(4) (West 2010); W. VA. CODE ANN. § 44A-1-10 (LexisNexis 2010).

123. *In re Joshua H.*, 880 N.Y.S.2d 645, 646 (App. Div. 2009) (holding that "[t]he appointment of a family member is preferable, but if a suitable family member is not available, it is within the court's discretion to appoint an outsider") (citations omitted); *In re Hancock*, 828 S.W.2d 707, 709 (Mo. Ct. App. 1992) (holding that relatives are preferred appointees, but that the court reserves discretion to appoint a professional fiduciary).

124. See *supra* note 117 (noting that the powers of each guardianship and whether the guardian's acts are permissible vary with the type of guardianship and the applicable state laws).

125. FROLIK, *supra* note 1, at 167.

126. See *infra* Appendix (providing the statutes and principal cases for each state); see, e.g., *Rainey v. Guardianship of Mackey*, 773 So.2d 118, 119-20 (Fla. Dist. Ct. App. 2000); *In re Keri*, 853 A.2d 909, 916 (N.J. 2004); *In re John XX*, 652 N.Y.S.2d 329, 332 (App. Div. 1996) (holding that incapacitated persons have the same rights as those who are competent to engage in Medicaid planning through their guardian). *But see In re Guardianship of Domey*, 960 A.2d 729, 732 (N.H. 2008) (finding that the trial court erred in "ruling that the [guardians] had a fiduciary duty to impoverish the ward in order to qualify him for Medicaid so that his assets could be protected for his spouse"). See generally Fliegelman & Fliegelman, *supra* note 90.

127. See, e.g., *Keri*, 853 A.2d at 920; *Shah*, 733 N.E.2d at 1098-99; *John*, 652 N.Y.S.2d 329, 331-332 (holding specifically that guardians may engage in Medicaid spend downs); see also *In re Guardianship of Christiansen*, 56 Cal. Rptr. 505, 522-23 (Cal. Ct. App. 1967); *In re Estate of Berger*, 520 N.E.2d 690, 705 (Ill. App. Ct. 1987) (holding that the courts may authorize guardians to make gifts for estate planning).

factors to be considered within the statutes,¹²⁸ while other states have incorporated a range of factors through their common law.¹²⁹ Some of the more common factors the courts consider before approving a spend-down include: the permanency of the ward's condition; whether the remaining assets will meet the needs of the ward and his dependents (if any); whether a reasonable person under the circumstances would have made the transfer;¹³⁰ who is receiving the property; whether the transfer will benefit the estate; the size of the estate; and past gifts, donative intent, or prior estate planning.¹³¹

Once a state allows Medicaid planning by guardians, each state adopts a doctrine that determines the permissibility of such planning. *See* Fliegelman & Fliegelman, *supra* note 90, at 349-53 (enumerating and explaining guardianship standards: continuing pattern, best interests, and substituted judgment).

128. *See* CAL. PROB. CODE §§ 2580-86 (2002); N.H. REV. STAT. ANN. § 464-A:26-a (2004); N.J. STAT. ANN. §§ 3B:12-50, -58 (West 2007); N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2006). *See generally infra* Appendix.

129. *See In re* Guardianship of Bohac, 380 So.2d 550, 552-53 (Fla. Dist. Ct. App. 1980) (incorporating several factors enumerated in *Christiansen*, 56 Cal. Rptr. at 523-25); *Keri*, 853 A.2d at 913 (adopting the factors enumerated in *Trott*); *see also Christiansen*, 56 Cal. Rptr. at 523-25 (providing factors the court must consider before allowing a guardian to divest a ward of his assets, which were later codified in California Probate Code 2580-86).

130. The doctrine of substituted judgment provides courts with the authority to permit a guardian's transfer of the ward's property so long as the transfer would have been made by either: the ward, if competent, or a reasonably prudent person in the ward's position.

Christiansen v. Christiansen (In re Guardianship of Christiansen), 56 Cal. Rptr. 505, 524 (Ct. App. 1967) (stating that the court must determine whether the incompetent as a reasonably prudent person would make proposed gifts); *Strange v. Powers*, 260 N.E.2d 704, 708-09 (Mass. 1970) (stating that courts have power to authorize transfers of incompetent's property where it appears that incompetent, if sane, would have made the transfers as a reasonably prudent person); *In re Morris*, 281 A.2d 156, 158 (N.H. 1971) (stating that guardian is authorized to act as a reasonable and prudent person would act under same circumstances); *In re Baird*, 634 N.Y.S.2d 971, 975 (Sup. Ct. 1995) (finding that a competent, reasonable person in the position of the incompetent individual would be likely to make same renunciation of inheritance proposed by guardian); *In re Parnes*, N.Y.L.J., Apr. 7, 1995, at 33 (N.Y. Sup. Ct. Apr. 7, 1995) (stating that court must determine whether ward would have transferred own assets if ward had capacity to act); *In re Daniels*, 618 N.Y.S.2d 499, 504 (Sup. Ct. 1994) ([I]t is the Court's conclusion that a competent, reasonable individual in the position of the [disabled individual] would be likely to make the proposed transfer"); *In re Florence*, 530 N.Y.S.2d 981, 982 (Sur. Ct. 1988) (stating that guardian or court has the power to gift ward's property provided that the ward "would be likely to make such a transfer, if capable of doing so").

Fliegelman & Fliegelman, *supra* note 90, at 370 & n.183.

131. CAL. PROB. CODE §§ 2580-86 (West 2002); FLA. STAT. ANN. § 744.441 (West 2010); N.H. REV. STAT. ANN. § 464-A:26-a (2004); N.J. STAT. ANN. §§ 3B:12-50 to -58 (West 2007); N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2006). The author wishes to

Because courts must examine various factors before authorizing guardian-initiated transfers, each proposed spend-down is decided on a case-by-case basis.¹³² Although the states consider many of the same factors when making their decisions, the outcomes vary greatly. For example, both New Jersey and New York have adopted presumptions in favor of allowing guardian-initiated Medicaid planning.¹³³ The primary argument for allowing a guardian to engage in Medicaid planning rests on the premise that guardians typically may engage in other estate planning on behalf of their wards.¹³⁴ In line with this contention, the court in *In re Keri* noted that it is not “improper for taxpayers to maximize their deductions under our tax laws to preserve income for themselves and their families.”¹³⁵ Similarly, the court in *In re Shah* noted that “any person . . . would prefer that the costs of his care be paid by the State, as opposed to his family.”¹³⁶ These courts recognize that individuals prefer their assets be left to loved ones, rather than spending the assets on the costs of nursing home care. However, the more persuasive argument rests on the policies of fairness and equal protection.¹³⁷ Specifically, the court in *Keri* held that “[s]o long as the law

note that the factors provided are illustrative and not exhaustive. *See generally infra* Appendix (providing each state’s statute and cases enumerating the factors that need to be considered).

132. *See generally* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); C. Edward Galfand, *Heeding the Call for a Predictable Rule of Origin*, 11 U. PA. J. INT’L BUS. L. 469, 488-89 (1989) (discussing the benefits and costs of case-by-case analysis, specifically noting the efficiency and clarity of bright-line rules as compared to decreased predictability, but increased flexibility of case-by-case analysis).

133. *Supra* note 17 and accompanying text; *accord Keri*, 853 A.2d at 916-17 (quoting *Shah*, 733 N.E.2d at 1099) (declining to impose a duty, but establishing a presumption in favor of spend-downs on “ground[s] that a reasonable and competent person ‘would prefer that the costs of his care be paid by the State, as opposed to his family’”).

134. *See, e.g., In re Guardianship of Christiansen*, 56 Cal. Rptr. 505, 522-23 (Cal. Ct. App. 1967); *In re Bohac*, 380 So.2d 550, 552-53 (Fla. Dist. Ct. App. 1980); *Strange v. Powers*, 260 N.E.2d 704, 709-10 (Mass. 1970); *In re Morris*, 281 A.2d 156, 158 (N.H. 1971) (holding that a guardian may engage in prudent estate planning on behalf of his ward); *see also Keri*, 853 A.2d at 920 (N.J. 2004) (noting specifically that individuals engage in tax planning to minimize their tax consequence thereby preserving their assets); Jason A. Frank, *The Necessity of Medicaid Planning*, 30 U. BALT. L.F. 29, 38-39 (1999) (comparing Medicaid planning to tax planning); Matthew Wilson, *The Future of Medicaid Planning in Missouri*, 62 J. MO. B. 62, 70 (2006) (comparing Medicaid planning to tax planning).

135. *Keri*, 853 A.2d at 920.

136. *Shah*, 733 N.E. 2d at 1099 (emphasis added) (quoting *In re Shah* 694 N.Y.S.2d 82, 87 (App. Div. 1999)).

137. *Strange*, 260 N.E.2d at 709-10; *Keri*, 853 A.2d at 920; *In re Daniels*, 618 N.Y.S.2d 499, 502 (Sup. Ct. 1994) (holding that denying guardians the ability to transfer

allows competent persons to engage in Medicaid planning, incompetent persons, through their guardians, should have the same right.”¹³⁸

On the other hand, several states tend to examine the factors in a manner that leans against Medicaid planning by guardians.¹³⁹ The most persuasive argument for limiting guardian-initiated Medicaid planning is that the guardian has a duty to protect and preserve the ward’s estate in order to use those assets for the ward’s care.¹⁴⁰ In *Domey*, the court disagreed with the ward’s spouse, who argued that the ward’s guardians had a duty to engage in Medicaid planning so the ward’s assets could be used for her support.¹⁴¹ The court held that “[t]he primary duty of the guardian is to protect the estate’s assets [and] to apply them for the support and care of the ward.”¹⁴² The court reached this decision by narrowly interpreting the guardianship statute and concluding that “its primary objective is to protect the well-being of the ward.”¹⁴³

Similarly, in *In re Adler*, the court held that the guardian’s proposed Medicaid plan, which did not benefit the ward, contravened the guardian’s duty to protect and preserve the ward’s assets for her own enjoyment.¹⁴⁴ This contention is in line with the policy that Medicaid be the payor of last resort, and individuals who can finance their own care should not shelter their assets merely to qualify for Medicaid sooner than they otherwise would.¹⁴⁵ Consequently, these states are more hesitant to allow guardian-initiated Medicaid planning.

In fact, California courts have held, pursuant to the California Probate Code, “that [a] conservator is not required to propose any action under [S]ection 2580” such as making gifts or engaging in

a ward’s assets is denying the ward an opportunity available to all competent persons); see also *supra* note 126 (citing other cases holding that individuals with guardians should be afforded the same ability to engage in planning as competent individuals).

138. *Keri*, 853 A.2d at 920.

139. See, e.g., *In re Guardianship of Domey*, 960 A.2d 729, 733 (N.H. 2008); *In re Adler*, No. 1144IC, 2003 WL 22053309, at *3 (Pa. Com. Pl. 2003) (holding that the guardian has a duty to protect the ward’s assets and apply them to the ward’s care).

140. *Supra* note 139 (noting that the guardian has a duty to apply the ward’s assets for the ward’s care).

141. *Domey*, 960 A.2d at 732.

142. *Id.* at 733.

143. *Id.*; see also N.H. REV. STAT. ANN. § 464-A:26-a (2004).

144. *Adler*, 2003 WL 22053309, at *6.

145. See *supra* note 100; *supra* Part II.C (discussing policies for the DRA).

planning that would benefit the estate.¹⁴⁶ Rather than require the conservator to initiate such action on behalf of the ward, the court held that the remedy is for an “interested person”¹⁴⁷ “to petition [the court] under Section 2580 for an order requiring the conservator to take such action with respect to estate planning or making gifts.”¹⁴⁸

New Hampshire, like California, also takes a more restrictive approach when determining guardian duties for Medicaid planning. Pursuant to *Domey*, a guardian has a duty only “when there is a showing of need and . . . ‘more than sufficient’ resources to provide for the [ward].”¹⁴⁹ With the costs of nursing home care averaging about \$77,000 a year, it is difficult to imagine a situation in which wards will have “more than sufficient resources” to pay for their care so that guardians would have a duty to spend down.¹⁵⁰ In fact, Donald Domey’s \$353,177 of liquid assets was nearly depleted within two years due to the costs of his care.¹⁵¹ The depletion of assets is *not* a failure of the older person to save enough to cover long-term care costs and still have assets to leave to heirs.¹⁵² Rather, this is the result of guardians not being held to a high enough standard to provide adequate protection to a particularly vulnerable group of people. The approaches of California and New Hampshire are lacking because they fail to impose a duty on the guardian to initiate a spend-down.

146. *Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99, 104 (Cal. Ct. App. 1999); see CAL. PROB. CODE §§ 2580-85 (West 2002).

147. CAL. PROB. CODE § 48 (West 2002) (defining interested person); CAL. PROB. CODE § 2616 (West 2002) (expanding interested person to “including persons having only an expectancy or prospective interest in the estate”).

148. *Johnson*, 90 Cal. Rptr. 2d at 104 (quoting 20 CAL. L. REV. COMM. REPORTS 1001 (1990)).

149. *In re Guardianship of Domey*, 960 A.2d 729, 733 (N.H. 2008).

150. *Id.*; see also *supra* notes 40-41 and accompanying text (illustrating the high costs of nursing home care and its effect on a ward’s assets).

151. *Domey*, 960 A.2d at 731-32.

152. FROLIK, *supra* note 1, at 95 (stating specifically that the problem is not the cost of health care, but rather a failure of the elderly to save enough money to cover the costs).

III. PROVIDING ADEQUATE PROTECTION TO A VULNERABLE POPULATION

A. *States Should Impose a Duty on Guardians to Petition Courts for a Spend-Down*

To guarantee that wards are receiving adequate protection from the needless expenditure of assets, guardians should have a duty to petition the court for approval of a Medicaid spend-down where the ward requires nursing home care indefinitely. The Illinois approach, where guardians owe a fiduciary duty to their wards, should be followed.¹⁵³ There, the guardian “is held to the highest standard of fair dealing and diligence, and his [or her] behavior will be closely scrutinized by the courts to insure his adherence to these high standards.”¹⁵⁴ In *In re Connor*, the court held that a guardian violated his duty to the ward by failing to engage in Medicaid planning. In this case, the ward had sufficient assets to pay nursing home bills for about five years.¹⁵⁵ Thereafter, the guardian could have placed the ward’s remaining assets into a prepaid burial plan thus rendering her Medicaid eligible.¹⁵⁶ If the guardian had “[sought] public aid . . . in a diligent and orderly manner,” there would have been no need to liquidate the ward’s assets to pay for her care. Ultimately, the guardian’s failure “resulted in [an] *unnecessary dissipation* of estate assets.”¹⁵⁷ Consequently, a heightened standard of care for guardians is necessary to prevent the needless expenditure of the ward’s assets.

153. *In re Estate of Wellman*, 673 N.E.2d 272, 278 (Ill. 1996); *In re Guardianship of Connor*, 525 N.E.2d 214, 216 (Ill. App. 1988); *In re Estate of Berger*, 520 N.E.2d 690, 697 (Ill. App. 1987).

154. *Berger*, 520 N.E.2d at 697; *see also Wellman*, 673 N.E.2d at 278 (analogizing the guardian relationship to “the relation of trustee and beneficiary between the guardian and the ward”). If this analogy is accurate, then the guardian is bound to follow the statutory scheme and fiduciary standards much like the trustee is bound to follow the powers and duties outlined in the statutes and trust instrument. *See generally Marshall v. First Nat. Bank Alaska*, 97 P.3d 830, 839 (Alaska. 2004) (holding that “[a] trustee is a fiduciary of the highest order and is held to a high standard of conduct”); 76 AM. JUR. 2D *Trusts* § 349 (2010) (providing a more detailed description of trustee duties and describing a trustee as a fiduciary held to a high standard of conduct and loyalty).

155. *Connor*, 525 N.E.2d at 214-16.

156. *Id.* at 217; *see also supra* note 66 (providing examples of other non-countable assets).

157. *Connor*, 525 N.E.2d at 217 (emphasis added).

B. *Imposing a Duty: Promoting Fairness and Equality*

The disadvantages faced by wards (because disposition of property must be court authorized) raise serious equal protection¹⁵⁸ and fairness concerns. Imposing a duty accomplishes the dual purpose of allowing wards to dispose of their property, while alleviating these serious concerns.¹⁵⁹

Usually, individuals can do whatever they wish with their property,¹⁶⁰ and people work their entire lives expecting to leave their assets to their families.¹⁶¹ However, wards are unable to make important decisions for themselves or divest assets on their own,¹⁶² and the courts recognize that a guardian's failure to act leaves the ward in "legal limbo."¹⁶³ Meanwhile, competent individuals have the luxury of engaging in Medicaid planning at any time because their actions do not require court supervision.¹⁶⁴ Without guardians proposing a spend-down, wards cannot dispose of their property and, as a result, are left significantly disadvantaged compared to their competent counterparts. Essentially, wards are unable to avail themselves of the potential benefits of Medicaid planning, yet competent individuals may do so without any judicial supervision.

Although Medicaid planning may be frowned upon by Congress, "the government itself . . . has established the rule that poverty is a prerequisite to the receipt of [Medicaid]."¹⁶⁵ Wards should not be left to shoulder all of their nursing home costs merely because Congress, and many courts, frown upon Medicaid plan-

158. *Supra* notes 126, 127, 137, 138 and accompanying text.

159. *Supra* notes 117-119 (noting that guardians are appointed to protect the incapacitated person who is unable to make decisions); *see also* 42 U.S.C. § 1396r(a)(1)(c) (2006); FROLIK, *supra* note 1, at 72 (noting that individuals in nursing homes require skilled nursing care because of their mental and physical condition).

160. *See, e.g., supra* note 106 and accompanying text.

161. *See supra* note 94 and accompanying text (noting that Congress recognizes the instinct to engage in Medicaid planning in order to pass assets on to family members); *see also In re Keri*, 853 A.2d 909, 916 (N.J. 2004); *In re Shah*, 733 N.E.2d 1093, 1099 (N.Y. 2000); *In re Daniels*, 618 N.Y.S.2d 499, 504 (Sup. Ct. 1994) (noting that people would rather leave assets to their loved ones than spend those assets on the costs of their care).

162. *See infra* Appendix (providing statutes outlining procedures by which a guardian may divest a ward of his assets with court approval); *see FROLIK, supra* note 1, at 156 (stating that without a guardian wards would be left in "legal limbo").

163. FROLIK, *supra* note 1, at 156

164. *See supra* note 137.

165. *Shah*, 733 N.E.2d at 1101 (quoting *In re Shah*, 694 N.Y.S.2d 82 (App. Div. 1999)); *see also Keri*, 853 A.2d at 920 (noting specifically that it is not "improper for taxpayers to maximize their deductions under our tax laws to preserve income for themselves and their families").

ning.¹⁶⁶ The fact remains that Medicaid planning is not entirely prohibited, and competent individuals may engage in such planning without any court approval.¹⁶⁷ States participating in the Medicaid program are required to comply with the federal statute.¹⁶⁸ Generally, a state cannot impose more restrictions than the federal law requires.¹⁶⁹ Because Medicaid spend-downs are not prohibited by federal law, state law cannot prohibit them either. For example, a Connecticut statute states explicitly that a guardian may not impoverish his ward for the purpose of qualifying for federal benefits.¹⁷⁰ Despite this clear language, the Connecticut courts have held that the statute is inapplicable to Medicaid, based on the foregoing reasons.¹⁷¹ The states may not prohibit these petitions where the federal government has not proscribed spend-downs.

Because the cost of nursing home care can quickly deplete a ward's assets,¹⁷² and the goal of a guardianship is to ensure that the ward "is able to fully participate in life,"¹⁷³ guardians should have a duty to explore available remedies that alleviate costs and protect assets; this is especially true in light of the fact that Congress and the courts recognize people's preference to leave assets to their

166. See, e.g., *supra* note 100 and accompanying text (providing several cases that note Medicaid is to be the payor of last resort and is reserved for the truly needy).

167. *H.K. v. State*, 877 A.2d 1218, 1226 (N.J. 2005); *Keri*, 853 A.2d at 920; *Shah*, 733 N.E.2d at 1098; *Daniels*, 618 N.Y.S.2d at 501-02 (determining that Medicaid planning is permissible under the current Medicaid laws and it is reasonable for individuals to aim to preserve assets for themselves and their families); see also *infra* Appendix (providing statutes for every state which contemplates estate planning by guardians on behalf of wards).

168. See generally 42 U.S.C. § 1396 (2006).

169. See generally 42 U.S.C. § 1396; FROLIK, *supra* note 1, at 75-76 (providing information about the joint federal-state laws); MEDICAID AT-A-GLANCE, *supra* note 23.

170. CONN. GEN. STAT. ANN. § 45a-655 (West Supp. 2011).

171. *State v. Henneberry*, No. CV020098667S, 2003 WL 23149933, at *2-3 (Conn. Super. Ct. Dec. 16, 2003) (holding that despite Connecticut's strong public policy against spend-downs as a means of qualifying for state or federal aid, "[t]he only exception to such proscription pertains to" Medicaid and "[t]his exception . . . is in accord with . . . federal law").

172. See, e.g., *In re Guardianship of Connor*, 525 N.E.2d 214, 216-17 (Ill. App. Ct. 1988) (holding that the guardian breached the fiduciary duty owed to the ward by failing to invest the ward's assets in a manner so as to qualify her for public aid thereby causing "unnecessary dissipation of estate assets"); *In re Guardianship of Domey*, 960 A.2d 729, 732 (N.H. 2008) (noting that the ward's assets were nearly depleted after two years of care); see also FROLIK, *supra* note 1, at 94 (noting that the cost of care will greatly deplete an individual's assets); METLIFE MATURE MARKET INSTITUTE, *supra* note 31, at 14-19 (stating that the average cost of nursing home care is \$198 per day).

173. FROLIK, *supra* note 1, at 156.

heirs.¹⁷⁴ Requiring guardians to petition the court for a spend-down alleviates the equal protection and fairness concerns by allowing the wards to avail themselves of planning techniques available to competent individuals.¹⁷⁵

C. *Imposing a Duty: Practical and Effective*

There are several reasons why imposing a duty is the most practical and least invasive solution that would effectively provide adequate protection for wards. First, this duty applies in very narrow circumstances to meet the needs of a vulnerable population. Requiring guardians to petition the courts ensures that they will explore all available options and take appropriate action. Such a duty will prevent the guardian from taking less action than necessary,¹⁷⁶ and will avoid shifting the burden of caring for the ward to “interested persons” who would have to petition the courts to take action where the guardian fails to do so.¹⁷⁷ After all, a guardian is appointed to ensure that the ward is not left in “legal limbo”;¹⁷⁸ therefore, the guardian should have the burden and duty of protecting the ward, which encompasses proposing a Medicaid spend-down.

Instituting this heightened standard of care is administratively feasible and efficient. This specific change in the standard of care, in fact, can be accomplished with little or no change to each state’s guardian laws. Currently, each state’s statutes and common law already contemplate estate planning and gifting by guardians.¹⁷⁹ The states need only change the duty of the guardian to petition the courts, in this specific instance, from permissive to mandatory. This change could be effectuated through a common law interpretation of the duty or a change in the statutory language. Moreover, each guardian may be informed of this duty by the court upon appointment.¹⁸⁰ In either situation, this change would be highly effective

174. *Supra* note 161 (noting that Congress and the courts recognize the instinct to leave assets to heirs rather than use those assets to cover costs of care).

175. *See supra* notes 126-127; *infra* Appendix.

176. *See, e.g., Connor*, 525 N.E.2d at 216-17 (requiring the guardian to reimburse the ward’s estate for costs that could have been avoided if the guardian had engaged in Medicaid planning).

177. CAL. PROB. CODE § 2585 (2002); *Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99, 104 (Cal. Ct. App. 1999) (holding “that the conservator is not required to propose any action under section 2580” and requiring interested persons to institute the action where the guardian does not).

178. FROLIK, *supra* note 1, at 156.

179. *Infra* Appendix.

180. One way to ensure that guardians are informed is by requiring them to attend an educational course. *See supra* note 122.

and minimally invasive, as it would affect a narrow population and requires only a minor change in the guardianship laws.

Additionally, this change strikes a balance between a bright-line rule (imposing a duty on guardians to petition the courts under these circumstances) and flexibility (preserving case-by-case analysis and approval based on the court's discretion). If guardians are required to submit a petition, then the court can determine, based on its existing presumptions and statutory and common law factors, whether the spend-down is appropriate.¹⁸¹ This minimal change not only enables the courts to work within the standards of review based on their current state law, but also ensures greater compliance with the law by placing the inquiry with the entity most suitable to properly evaluate a spend-down proposal—the court.

Because this planning typically requires court approval, guardians alone should not determine whether the planning is appropriate or not. Rather, the independent judgment should be taken from the hands of guardians, who have varying degrees of experience and knowledge, and placed with the more apt courts. First, courts tend to favor appointing nonprofessional guardians, which means more guardians less familiar with complex guardian and Medicaid rules.¹⁸² Meanwhile, the lesser-appointed professional guardians, subject to rigorous licensing requirements, are more likely to be familiar with court procedure, Medicaid requirements, and various planning tools that help wards maintain their wealth.¹⁸³ Even the rudimentary crash course given to newly appointed guardians cannot dispense with this knowledge disparity;¹⁸⁴ at best, it scratches the surface of the complexities of the guardian-ward relationship and potential dispositions of property the guardian is authorized to make. A mandatory spend-down ensures that a guardian, who may be less experienced, will not overlook useful planning techniques that prevent unnecessary exhaustion of the ward's assets.

181. *Infra* Appendix (providing the statutes for each state).

182. *See supra* note 123.

183. *See*, ALASKA STAT. ANN. § 08.26.020 (requiring a minimum age, casework experience, education standard, certification, and criminal background checks); TEX. PROB. CODE ANN. § 697 (requiring a statement providing educational background, professional experience, references, information regarding value of assets managed, and past resignations).

184. *Compare* FLA. STAT. ANN. § 744.3145(2) (requiring “a minimum of 8 hours of . . . training” (emphasis added)), *with* ALASKA STAT. ANN. § 08.26.020(a)(2) (requiring at least “two or more years” of experience “or at least an associate degree” in certain fields (emphasis added)).

Even though this increases litigation for a busy court, the court must *already* approve dispositions of the ward's property.¹⁸⁵ In fact, the court is most familiar with guardian laws, Medicaid spend-downs, and determining whether a spend-down is in the best interests of the ward. Furthermore, it is the court's duty to ensure the safety and well being of the ward by managing and protecting the ward's estate, so the guardian acts merely as the hand of the court.¹⁸⁶ Given the complexity of the Medicaid and guardianship laws¹⁸⁷ this is a matter appropriately left in the court's discretion. The cost of busy courts is balanced by the proportionately worthwhile benefit of providing necessary judicial oversight to a particularly vulnerable population and the ruinous long-term care costs to which they are subjected. Therefore, the mandatory petition protects the wards by ensuring that guardians do not dispose of a potential spend-down by failing to submit petitions on their wards' behalves.

D. *Imposing a Duty will not be the Straw that Breaks the Medicaid Camel's Back*

1. Additional Costs for Medicaid

One criticism of a heightened duty deals with the concerns that more planning may require Medicaid to shoulder the costs for some individuals sooner than it otherwise might have. Congress has re-

185. *Infra* Appendix (noting specifically that the statutes require court approval prior to planning).

186. *In re Estate of Wellman*, 673 N.E.2d 272, 278 (Ill. 1996) (noting that “[t]he guardian only acts as the hand of the court and is at all times subject to the court’s direction in the manner in which the guardian provides for the care and support of the disabled person”) (citing *In re Estate of Nelson*, 621 N.E.2d 81, 85 (Ill. App. Ct. 1993)); *In re Estate of Berger*, 520 N.E.2d 690, 697 (Ill. App. Ct. 1987). In *Berger*, the court defined its power as “function[ing] in a central role which permits it to oversee and control all aspects of the management and protection of the incompetent’s estate. The court controls the person and estate of the ward, and directs the conservator’s care, management and investment of the estate.” *Id.* at 696-97; accord *Probate of Marcus*, 509 A.2d 1, 3 (Conn. 1986) (holding that “[t]he court, and *not the conservator*” is primarily in charge of caring for the ward’s estate and “the conservator is but the agent of the court” acting under its supervision (citing *Shippee v. Commercial Trust Co.*, 161 A.2d 775, 777 (Conn. 1932))); *AmSouth Bank v. Cunningham*, 253 S.W.3d 636, 641-42 (Tenn. Ct. App. 2006) (holding that conservators act as agents of the court and “that ‘the court itself is ultimately responsible for the disabled persons who come under its care and protection’” (quoting *In re Clayton*, 914 S.W.2d 84, 90 (Tenn. Ct. App. (1995))).

187. See *supra* notes 128-131 and accompanying text (providing *some* of the factors considered before approving a Medicaid spend-down); *supra* Part II.B. (noting the complexity of Medicaid as it applies to planning techniques); *infra* Appendix (providing the statutes for each state).

acted to increased Medicaid costs by passing OBRA, and later, the DRA.¹⁸⁸ Still, Medicaid covers approximately 49% of all long-term care costs.¹⁸⁹ For these reasons, critics of the proposed change may argue that a heightened duty imposed upon guardians would have a devastating effect on Medicaid.¹⁹⁰ This calamity, however, will not necessarily transpire. First, the duty applies to a narrow population comprised only of people who have guardians *and* are facing an indefinite term of nursing home care. Because the costs of nursing home care are so high, and this population will remain in nursing home care longer, it is probable that the estates of these individuals would be depleted fairly quickly, thus leaving Medicaid to cover the costs of their care anyway.¹⁹¹

Second, while many courts view Medicaid as the payor of last resort,¹⁹² the modern view of Medicaid has changed and Medicaid benefits are not necessarily reserved for the truly needy; rather, more middle class individuals rely upon Medicaid for long-term care benefits.¹⁹³ In fact, Medicaid pays for most long-term care costs, and most nursing home facilities would go bankrupt if they did not receive Medicaid reimbursement for services.¹⁹⁴

Despite clear disapproval of Medicaid spend-downs, Congress has not completely closed the door to such planning. Congress previously attempted to prohibit such planning with the “Granny Goes

188. *Supra* Part II.C.

189. *National Spending on Long-Term Care, supra* note 47.

190. *See, e.g., Forsyth v. Rowe*, 629 A.2d 379, 385 (Conn. 1993) (“The medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving medicaid benefits from the state.”).

191. *See, e.g., Rainey v. Guardianship of Mackey*, 773 So.2d 118, 118 (Fla. Dist. Ct. App. 2000) (calculating the ward’s assets, monthly income, and nursing home costs and determining the ward had “a monthly deficit of \$4,377.78”); *In re Guardianship of Domey*, 960 A.2d 729, 731-32 (N.H. 2008) (noting that the ward’s assets were sufficiently depleted to qualify him for Medicaid after two years nursing home care); *In re Keri*, 853 A.2d 909, 912 (N.J. 2004) (allowing the ward to engage in a Medicaid spend-down and noting that “\$78,000 would be sufficient to pay [her] nursing home [care]” for her 16 month penalty period); *see also FROLIK, supra* note 1, at 94 (noting that the cost of care will greatly deplete an individual’s assets); METLIFE MATURE MARKET INSTITUTE, *supra* note 31, at 14-19 (stating that the average cost of nursing home care is \$198 per day).

192. *Supra* note 100.

193. SADLER, *supra* note 24, at 80 (noting that more and more middle class individuals are using Medicaid to cover nursing home costs).

194. FROLIK, *supra* note 1, at 75 (noting that residents have over half their care paid for by Medicaid); *see* STONE, *supra* note 23, at 1 (noting that Medicaid is the largest provider funding nursing home care). *But see supra* note 100 (providing sources agreeing with Congress that Medicaid is to be the payor of last resort reserved for the truly needy).

to Jail” Act.¹⁹⁵ There, “Congress was so incensed by the practice of voluntary impoverishment to obtain Medicaid that it made it a crime both for citizens to practice it and for lawyers to advise their clients how to do so.”¹⁹⁶ Congress later amended the statute, repealing the portions targeting the elderly and replacing it with language that criminalized the acts of attorneys who assisted clients with transferring assets to qualify for Medicaid.¹⁹⁷ Subsequently, Attorney General Janet Reno announced that the Department of Justice would not enforce these criminal provisions,¹⁹⁸ and courts have similarly declined to enforce the amended statute that targets attorneys.¹⁹⁹

Given the failed attempts to completely prohibit Medicaid planning, Congress has instead opted to control costs with more moderate measures. For example, the means Congress has recently taken to discourage planning specifically contemplate penalties *in response* to those who continue to engage in spend-downs.²⁰⁰ Moreover, the penalty periods do not last indefinitely or completely eliminate Medicaid eligibility, and there are even some exceptions to penalty periods applying in the first place.²⁰¹ The fact that penalties are responsive and easily calculated by the applicants indicates that planning is likely to continue; in fact, new planning techniques have developed despite Congressional discouragement.²⁰²

Those concerned about devastating costs must consider that the DRA has imposed a longer look-back period and a stricter pen-

195. Miller, *supra* note 83, at 82; see 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) (2006)) (imposing criminal sanctions against the Medicaid applicant in some cases); Balanced Budget Act of 1997, Pub. L. No. 105-33 § 4734, 111 Stat. 522 (codified as amended at 42 U.S.C. § 1320a-7b(a) (2006)) (imposing criminal sanctions against those who advise clients about Medicaid planning).

196. Miller, *supra* note 83, at 81-82.

197. Balanced Budget Act of 1997, Pub. L. No. 105-33 § 4734, 111 Stat. 522 (codified as amended at 42 U.S.C. § 1320a-7b(a) (2006)).

198. *New York State Bar Ass'n v. Reno*, 999 F.Supp. 710, 713 (N.D.N.Y. 1998)

199. Miller, *supra* note 83, at 82; see *Rainey v. Guardianship of Mackey*, 773 So.2d 118, 120 n.4 (Fla. Dist. Ct. App. 2000) (noting that “Congress . . . eliminated the criminal penalties against persons transferring the assets”); *New York State Bar Ass'n*, 999 F.Supp. at 716 (holding that amended Act targeting attorneys was unconstitutional).

200. *Supra* pp. 11-12 (noting that penalty periods are determined based on a 60 month lookback period).

201. *Supra* notes 76, 78 and accompanying text (providing the method for calculating the penalty period and listing some exceptions to incurring a penalty period).

202. *Supra* Part II.A-B (discussing Medicaid planning and techniques).

alty period.²⁰³ These measures, if effective, require individuals to spend more of their own assets on their care before they qualify for Medicaid, *even after* engaging in a spend-down.²⁰⁴ Considering the narrow population to which the duty applies, and the stringent rules imposed by the DRA, it is unlikely that Medicaid would be catastrophically overburdened; this is especially true bearing in mind the already large portion of long-term care that Medicaid currently covers.²⁰⁵

Furthermore, imposing a duty does not necessarily mean that all proposed Medicaid spend-downs will receive court approval and thus be implemented. The courts retain the discretion to approve or reject a suggested spend-down based on their state laws. Courts will continue to determine the appropriateness of a spend-down in a manner consistent with their current doctrine. For example, those proposals in New York and New Jersey are presumptively valid,²⁰⁶ while those proposals in Pennsylvania must meet a higher burden, since there the court views the duty of the guardian as preserving the ward's assets for the ward's care.²⁰⁷ Consequently, imposing a duty in this instance will not necessarily increase the overall burden on Medicaid because not all proposed spend-downs would be approved.

2. Judicial Costs

Despite the narrowness of the population to which the duty applies, another criticism to the heightened duty is that it will increase the burden on the judiciary as more guardians will be required to propose spend-downs to the courts. Courts are currently required to authorize guardian-initiated spend-downs.²⁰⁸ However, the majority of states do not impose a duty on guardians to propose such spend-downs;²⁰⁹ in fact, California does not even require

203. *Supra* notes 76-77 and accompanying text (noting the 60 month look-back period imposed by the DRA).

204. STONE, *supra* note 23, at 10, 29. *See generally Medicaid Rules, supra* note 23; *Transfer of Assets, supra* note 95.

205. *Supra* note 55 (noting that Medicaid covers approximately 49% of all long-term care costs).

206. *Supra* note 133 and accompanying text.

207. *Supra* notes 143-144 and accompanying text.

208. *Infra* Appendix (providing each statute that requires court authorization before a guardian gifts or disposes of the ward's property).

209. *See infra* Appendix. Compare California, New York, and New Jersey (all allowing guardian spend-downs, but declining to impose a duty) with Pennsylvania and New Hampshire (declining to impose a duty because impoverishing the ward is not in the ward's best interests).

guardians to initiate such an action.²¹⁰ Although imposing a blanket duty on guardians in these circumstances will certainly busy the courts and guardians alike, this duty requires no more than is already asked of guardians—or courts, for that matter—to do what is in the best interest of the ward.²¹¹ Furthermore, the courts are the entities most capable of exercising discretion to determine if the spend-down is truly in the best interests of the ward based on the complex Medicaid and guardian laws.²¹² The benefits received by the wards certainly outweigh the costs to the judiciary, or the guardians.

CONCLUSION

This Note illustrates the practical problems involved with Medicaid eligibility, costs of nursing home care, and a person's instinct to leave assets to his or her loved ones. Imposing a duty on the guardian accomplishes each of the following: (1) it prevents the ward from being left in legal limbo; (2) it alleviates equal protection and fairness concerns; (3) it requires the guardian to act as intended (as a substitute decision maker) and avoids shifting the guardian's duty of care to "interested persons";²¹³ (4) it strikes a balance between a bright-line rule, preserving necessary flexibility for the courts, and imposing a duty with little or no change to the current laws; and (5) it appropriately places the approval of a spend-down in the hands of the court (the entity most capable of interpreting the complex body of guardianship law).

Considered separately, each of these goals is persuasive on the point of why a heightened duty is necessary to guarantee that the ward is adequately protected. When considered together, these

210. *Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99, 104 (Cal. Ct. App. 1999) (holding that section 2585 doesn't immunize the conservator from wrongdoing but provides "that the conservator is not required to propose any action under [S]ection 2580").

211. *In re Keri*, 853 A.2d 909, 913 (N.J. 2004) (adopting the *Trott* criteria and holding that guardians may engage in Medicaid planning if the proposed gifts are in the best interests of the ward). *But see In re Guardianship of Domey*, 960 A.2d 729, 733 (N.H. 2008); *In re Adler*, No. 1144IC, 2003 WL 22053309, at *3 (Pa. Com. Pl. 2003) (holding that the guardian has a duty to protect the ward's assets and apply them to the ward's care).

212. *See Murphy v. Wakelee*, 721 A.2d 1181, 1186 (Conn. 1998) (holding that "[t]he court, and *not the conservator*" is primarily in charge of caring for the ward's estate and "the conservator is but the agent of the court" acting under its supervision (quoting *Probate of Marcus*, 509 A.2d 1, 3 (1986))); *see also Shippee v. Commercial Trust Co.*, 161 A. 775, 777 (Conn. 1932) (holding "that the conservator acts merely as the agent" and "his duty is to manage the estate of his ward").

213. CAL. PROB. CODE § 48 (West 2002).

points provide a compelling argument that imposing a duty is necessary to ensure that a guardian is adequately protecting a particularly vulnerable person—the ward—from unnecessary asset depletion.

Perhaps if Donald Domey's guardians had been required to petition the court for a spend-down, rather than merely having the "option," he would not have exhausted hundreds of thousands of dollars of assets on the costs of his long-term care. Rather, Donald's guardians could have petitioned the court for approval of a Medicaid spend-down in which some assets could be divested and converted into non-countable resources, and some retained to cover Donald's care expenses during the penalty period he would likely incur. As a result, Donald's benefits would be twofold: (1) he would have been able to provide the support for his spouse, his dependent; (2) while also covering the long-term care expenses. The loss of autonomy accompanying a guardianship is akin to "the loss of freedom following a criminal conviction."²¹⁴ This duty not only provides more protection for wards facing indefinite nursing home stays, but also allows wards to dispose of their property more freely, thereby curing the loss of autonomy that accompanies a guardianship.

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214. *In re Conservatorship of Groves*, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003).

* J.D., Western New England University School of Law, 2012. I would like to thank the Law Review for working so diligently to prepare my Note for publication, Hyman Darling for his help in developing this topic and for his guidance, and my family and friends for their love and support in all of my endeavors.

APPENDIX²¹⁵

ALABAMA

Guardian Statute: ALA. CODE § 26-2A-136 (LexisNexis 1975).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

ALASKA

Guardian Statute: ALASKA STAT. § 13.26.200 (2010).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

ARIZONA

Guardian Statute: ARIZ. REV. STAT. ANN. § 14-5408 (1956).

Is Planning Allowed? *Romo v. Kirschner*, 889 P.2d 32, 34 (Ariz. Ct. App. 1995) (authorizing the conservator to place funds from an insurance settlement into a trust on behalf of the ward and holding that “[i]n reality, the trust was created by [the ward],” but finding the trust to be an available resource, thus rendering the ward ineligible for Medicaid).

Duty to Plan? No current case law.

ARKANSAS

Guardian Statute: ARK. CODE ANN. § 28-65-308 (2004).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

CALIFORNIA

Guardian Statute: CAL. PROB. CODE §§ 2580-2586 (West 2002).

Is Planning Allowed? *Murphy v. Murphy*, 78 Cal. Rptr. 3d 784, 789 (Cal. Ct. App. 2008) (noting that the probate code codifies the doctrine of “substituted judgment” allowing guardians to transfer the ward’s property as the ward would have if competent to act). *See generally In re Guardianship of Christiansen*, 56 Cal. Rptr. 505, 511-12, 523-25 (Cal. Ct. App. 1967) (recognizing the substituted judg-

215. This Appendix provides a sampling of each state’s guardian statutes and cases discussing guardian-initiated estate planning and Medicaid spend-downs. The author notes that a more comprehensive analysis and comparison are outside the scope of this Note, but would be incredibly useful in this area of law (especially given the high degree of variability and uncertainty).

ment doctrine and enumerating factors to be considered before authorizing guardian transfers of the ward's assets).

Duty to Plan? *Johnson v. Kotyck*, 90 Cal. Rptr. 2d 99, 104 (Cal. Ct. App. 1999) (holding that Section 2585 does not immunize the conservator from wrongdoing but provides "that the conservator is not required to propose any action under [S]ection 2580").

COLORADO

Guardian Statute: COLO. REV. STAT. ANN. § 15-14-411 (West 2011).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

CONNECTICUT

Guardian Statute: CONN. GEN. STAT. § 45a-655 (2011).

Is Planning Allowed? *Dep't of Soc. Servs. v. Saunders*, 724 A.2d 1093, 1106 (Conn. 1999) (holding that a court may authorize a conservator to transfer a ward's assets into a Medicaid supplemental needs trust in order to maintain the ward's Medicaid eligibility).

Duty to Plan? *Murphy v. Wakelee*, 721 A.2d 1181, 1186 (Conn. 1998) (holding that "[t]he court, and *not the conservator* is primarily" in charge of caring for the ward's estate and "the conservator is but the agent of the court" acting under its supervision (quoting *Marcus v. Dep't of Income Maintenance (In re Probate of Marcus)*, 509 A.2d 1, 3 (Conn. 1986))).

DELAWARE

Guardian Statute: DEL. CODE. ANN. tit. 12, §§ 3901, 3923 (2007 & Supp. 2010).

Is Planning Allowed? *Dean v. Del. Dep't of Health & Soc. Servs.*, No. Civ. A00A-05-006, 2000 WL 33201237, at *9 (Del. Super. Ct. Dec. 6, 2000) (emphasizing the court's dissatisfaction with the conversion of countable resources into income, which is not countable for the wife's Medicaid eligibility, but noting that the laws do not prohibit such a transaction); *In re Tarburton*, No. C.M. 8578, 1998 WL 326667, at *4-5 (Del. Ch. June 18, 1998) (appointing the ward's daughter as her guardian and noting that the guardian had been instructed by a social worker as to things she should do to qualify the ward for Medicaid, including spending the ward's assets on non-countable assets such as funeral expenses).

Duty to Plan? No current case law.

DISTRICT OF COLUMBIA

Guardian Statute: D.C. CODE §§ 21-2055, 2070 (LexisNexis 2008). **Is Planning Allowed?** *In re* Estate of Tyler, No. 246-00, 2002 WL 1274125, at *13 (D.C. Super. May 30, 2002) (declining to approve spouse's request to transfer all assets from Tyler to herself on the grounds that the spouse failed to establish her need, or any pattern of gifting by Tyler, and that unlike New York, the D.C. Code does not recognize the substituted judgment doctrine or specifically authorize gifts on behalf of the ward to establish Medicaid eligibility). **Duty to Plan?** No current case law.

FLORIDA

Guardian Statute: FLA. STAT. ANN. § 744.441 (West 2010). **Is Planning Allowed?** *In re* Guardianship of Bohac, 380 So.2d 550, 552-53 n.7 (Fla. Dist. Ct. App. 1980) (holding that the court may approve guardian tax and estate planning based on the following factors: donative intent; what the ward would do if competent; permanency of the ward's condition; size of the estate; the needs of the ward and proposed recipients; whether the recipients of the gifts vary from who would otherwise inherit the property; and whether the recipients are dependent upon the ward for support (citations omitted)). **Duty to Plan?** *Rainey v. Guardianship of Mackey*, 773 So.2d 118, 121-22 (Fla. Dist. Ct. App. 2000) (affirming the broad discretion of the courts to authorize guardian initiated estate planning pursuant to the substituted judgment doctrine and factors enumerated in *In re Guardianship of Bohac* but declining to impose a duty on guardians to attempt to engage in such planning).

GEORGIA

Guardian Statute: GA. CODE ANN. § 29-5-23 (2007 & Supp. 2011). **Is Planning Allowed?** *Cruver v. Mitchell*, 656 S.E.2d 269, 271 (Ga. Ct. App. 2008) (approving appointment of a professional conservator to consider whether the ward's property should be sold and the proceeds used for her benefit, thus disqualifying her for Medicaid benefits). **Duty to Plan?** *Cruver v. Mitchell*, 656 S.E.2d 269, 271 (Ga. Ct. App. 2008) (upholding the probate court's decision to appoint a conservator "who could fully analyze the issues associated with a Medicaid opt-out" and determine whether they are within the ward's best interests).

HAWAII

Guardian Statute: HAW. REV. STAT. ANN. § 560:5-411 (LexisNexis 2010).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

IDAHO

Guardian Statute: IDAHO CODE ANN. § 15-5-408 (2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

ILLINOIS

Guardian Statute: 755 ILL. COMP. STAT. ANN. 5/11a-18 (West 2007 & Supp. 2011).

Is Planning Allowed? *In re* Estate of Berger, 520 N.E.2d 690, 705 (Ill. App. Ct. 1987) (holding that courts may authorize guardians making gifts for estate planning purposes to reduce the taxable estate and noting that courts may deny requests when it is possible that the ward could recover).

Duty to Plan? *In re* Guardianship of Connor, 525 N.E.2d 214, 216-17 (Ill. App. Ct. 1988) (holding that the guardian breached the fiduciary duty owed to the ward by failing to invest the ward's assets in a manner so as to qualify her for public aid and causing "unnecessary dissipation of estate assets").

INDIANA

Guardian Statute: IND. CODE ANN. § 29-3-9-4.5 (West 2010).

Is Planning Allowed? *In re* Guardianship of E.N., 877 N.E.2d 795, 799-800 (Ind. 2007) (holding, as a matter of first impression, that the statute does not authorize disposing of the ward's entire estate, but rather authorizes applying or disposing of excess assets not needed for the ward's future support).

Duty to Plan? First Farmers Bank & Trust Co. v. Whorley, 891 N.E.2d 604, 613 (Ind. Ct. App. 2008) (holding that "it is clear that a guardian's *duties include estate planning* for its protected person, while mindful of the best interests of his ward, spouse or family" (emphasis added)).

IOWA

Guardian Statute: IOWA CODE ANN. §§ 633.647, 633.668 (West 2003).

Is Planning Allowed? *In re* Brice's Guardianship, 8 N.W.2d 576, 578-79 (Iowa 1943) (holding that the probate court possesses broad powers to manage the ward's estate including the authority to approve gifts from the ward to one whom no duty of support is owed and citing several factors to be considered before such gifts are approved).

Duty to Plan? *In re* Brice's Guardianship, 8 N.W.2d 576, 580 (Iowa 1943) (citing New York case law and holding that "[t]he controlling principle is that the court will act with reference to the incompetent and for *his benefit* as he would probably have acted if sane" (emphasis added)).

KANSAS

Guardian Statute: KAN. STAT. ANN. § 59-3078 (2005).

Is Planning Allowed? *In re* Guardianship & Conservatorship of Watkins, 947 P.2d 45, 48 (Kan. Ct. App. 1997) (holding that conservators may establish Medicaid supplemental needs trusts pursuant to both the state and federal law).

Duty to Plan? No current case law.

KENTUCKY

Guardian Statute: KY. REV. STAT. ANN. §§ 387.137, 387.125, 387.065 (LexisNexis 2010).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

LOUISIANA

Guardian Statute: LA. REV. STAT. ANN. §§ 9:1022-1024 (West 2008); LA. CODE. CIV. PROC. ANN. ART. 4566 (West Supp. 2011).

Is Planning Allowed? *Sanders v. Pilley*, 684 So.2d 460, 466 (La. Ct. App. 1996) (holding that a trust created by the ward and his guardian was not considered an asset for determining the ward's Medicaid eligibility and stating that "[the court does] not believe that Congress intended through its enactment of 42 U.S.C. § 1396a(k) to force a disabled individual . . . to exhaust funds intended to improve his qualify of life before seeking Medicaid assistance").

Duty to Plan? No current case law.

MAINE

Guardian Statute: ME. REV. STAT. ANN. tit.18-A, §§ 5 408, 425 (West Supp. 2010).

Is Planning Allowed? *In re* Conservatorship of Jackson, 721 A.2d 177, 179-80 (Me. 1998) (holding that the conservator had authority to convey the ward's home to his disabled child as retaining a life estate, renting the home, or selling it outright would all produce assets of value for the ward rendering him ineligible for Medicaid).

Duty to Plan? *In re* Estate of Bragdon, 875 A.2d 697, 700 (Me. 2005) (holding that “[a] conservator has a duty to act as a fiduciary and observe the standards of care applicable to trustees”).

MARYLAND

Guardian Statute: MD. CODE ANN. EST. & TRUSTS §§ 13-213, 15-102 (LexisNexis 2011).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

MASSACHUSETTS

Guardian Statute: MASS. GEN. LAWS. ch. 190B, § 5-407 (2010).

Is Planning Allowed? *Strange v. Powers*, 260 N.E.2d 704, 709 (Mass. 1970) (holding that just because an individual is a ward he should not be deprived of the ability to engage in estate planning and as a result be forced into “favoring the taxing authorities over the best interests of his estate”).

Duty to Plan? No current case law.

MICHIGAN

Guardian Statute: MICH. COMP. LAWS ANN. § 700.5407 (West 2002).

Is Planning Allowed? *Nat'l Bank of Detroit v. Dep't of Soc. Serv.*, 614 N.W.2d 655, 664 (Mich. Ct. App. 2000) (affirming the conservator's establishment of a trust on behalf of the ward but finding the trust to be a countable asset rendering the ward ineligible for Medicaid).

Duty to Plan? *In re* Estate of Hromek, No. 203957, 1998 WL 1988943, at *1 (Mich. Ct. App. Nov. 6, 1998) (concluding that the ward needed proceeds from the sale of her stock to cover her care expenses, authorizing the conservator's sale of the stock, and holding that “this statute does not create an absolute duty to preserve the ward's estate plan”).

MINNESOTA

Guardian Statute: MINN. STAT. ANN. § 524.5-411 (West Supp. 2011).

Is Planning Allowed? *In re* Kindt, 542 N.W.2d 391, 399 (Minn. Ct. App. 1996) (affirming the guardian's creation of a trust on behalf of the ward but holding that the trust was an available asset to the ward thus defeating Medicaid eligibility).

Duty to Plan? No current case law.

MISSISSIPPI

Guardian Statute: MISS. CODE ANN. § 93-13-38 (West 2007).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

MISSOURI

Guardian Statute: MO. REV. STAT. ANN. §§ 475.091, .092, .094 (West 2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

MONTANA

Guardian Statute: MONT. CODE ANN. § 72-5-421 (2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

NEBRASKA

Guardian Statute: NEB. REV. STAT. ANN. § 30-2637 (LexisNexis 2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

NEVADA

Guardian Statute: NEV. REV. STAT. ANN. §§ 159.113, .125 (LexisNexis 2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

NEW HAMPSHIRE

Guardian Statute: N.H. REV. STAT. ANN. § 464-A:26-a (West 2004).

Is Planning Allowed? *In re* Guardianship of Domey, 960 A.2d 729, 734 (N.H. 2008) (holding that “the probate court *may* authorize the guardian” to engage in estate planning for the ward to minimize tax consequences).

Duty to Plan? *In re* Guardianship of Phuong Phi Thi Luong, 951 A.2d 136, 141 (N.H. 2008) (noting that the statute’s legislative intent is “clear on its face” and a guardian may engage in estate planning for their ward); *In re* Guardianship of Domey, 960 A.2d 729, 733-34 (N.H. 2008) (holding that the statute gives guardians the option to engage in estate planning but does not impose a duty to do so unless the ward owes a duty of support to an individual and “there are ‘more than sufficient’ resources” to provide for the ward).

NEW JERSEY

Guardian Statute: N.J. STAT. ANN. §§ 3B:12-50, -58 (West 2007).

Is Planning Allowed? *In re* Keri, 853 A.2d 909, 913 (N.J. 2004) (adopting the *Trott* criteria and holding that guardians may engage in Medicaid planning if the proposed gifts are in the best interests of the ward and “such ‘as the ward might have been expected to make’”); *In re* Trott, 288 A.2d 303, 307 (N.J. Super. Ct. Ch. Div. 1972) (allowing a guardian to make gifts from the ward’s estate to reduce estate taxes and enumerating five criteria that must be established).

Duty to Plan? *In re* Keri, 853 A.2d 909, 916 (N.J. 2004) (declining to impose a duty, but establishing a presumption in favor of “spend-down[s] . . . on . . . ground[s] that a reasonable and competent person ‘would prefer that the costs of his care be paid by the State, as opposed to his family’” (quoting *In re* Shah, 95 N.Y.S2d 148, 160 (N.Y. 2000))).

NEW MEXICO

Guardian Statute: N.M. STAT. ANN. § 45-5-402.1 (West 2003).

Is Planning Allowed? *Kegel v. New Mexico Human Serv. Dep’t*, 830 P.2d 563, 567 (N.M. Ct. App. 1992) (concluding that the trust was established by the conservator on behalf of his ward and therefore constituted an available asset for Medicaid eligibility purposes).

Duty to Plan? No current case law.

NEW YORK

Guardian Statute: N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2006 & Supp. 2012).

Is Planning Allowed? *In re John*, 652 N.Y.S.2d 329, 332 (App. Div. 1996) (holding that “guardians have the authority to effect transfers of assets for the purpose of rendering incapacitated persons Medicaid eligible” and noting that a contrary result deprives wards of options available to competent persons).

Duty to Plan? *In re Shah* 733 N.E.2d 1093, 1099 (N.Y. 2000) (declining to impose a duty but agreeing that “any person [comatose and with limited private insurance benefits] would prefer that the costs of his care be paid by the State, as opposed to his family”).

NORTH CAROLINA

Guardian Statute: N.C. GEN. STAT. §§ 35A-1251, -1335, -1340 (2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

NORTH DAKOTA

Guardian Statute: N.D. CENT. CODE § 30.1-29-08 (LexisNexis 2010).

Is Planning Allowed? *Linser v. Off. of Att’y Gen.*, 672 N.W.2d 643, 649 (N.D. 2003) (noting that the ward’s guardian established a special needs trust as a means of qualifying the ward for Medicaid, but holding that the trust assets were available to the ward therefore disqualifying him from eligibility).

Duty to Plan? *Reinholdt v. North Dakota Dep’t of Human Serv.*, 760 N.W.2d 101, 106 (N.D. 2009) (holding that the ward’s guardians breached their fiduciary duty to her by relinquishing her right to all of the marital assets in a divorce action as a means of qualifying the ward for Medicaid).

OHIO

Guardian Statute: OHIO REV. CODE. ANN. § 2111.50 (West 2005).

Is Planning Allowed? *Vieth v. Ohio Dep’t of Job & Family Serv.*, No. 08AP-635, 2009 WL 2331870, at *9 (Ohio Ct. App. July 30, 2009) (holding that marital assets which were used by the ward’s wife to purchase annuities for the sole benefit of the community spouse were not countable resources for Medicaid eligibility purposes).

Duty to Plan? *In re Ewanicky*, No. 81742, 2003 WL 21469181, at *2-4 (Ohio Ct. App. June 26, 2003) (holding that the guardian was personally liable to the ward's estate for damages incurred when the guardian failed to pay the ward's health care expenses and timely file for Medicaid assistance).

OKLAHOMA

Guardian Statute: OKLA. STAT. ANN. tit. 30, § 3-121 (West 2009).

Is Planning Allowed? *McAlary v. State ex rel. Dep't of Human Serv.*, 233 P.3d 399, 406 (Okla. Civ. App. 2009) (holding that the trust established by the wards' daughter was an available resource to the wards rendering them ineligible for Medicaid as the trust was funded by the wards' own money and the wards applied for Medicaid just one day after the funds were placed in the trust).

Duty to Plan? *In re Guardianship of Lee*, 982 P.2d 539, 541 (Okla. Civ. App. 1999) (finding that the ward resided in a nursing home with income insufficient to meet her expenses and holding that the guardian had "both the *authority and duty* to retrieve assets from [the ward's trust] for [her] benefit and to the extent necessary to provide for [her] needs" (emphasis added))

OREGON

Guardian Statute: OR. REV. STAT. ANN. §§ 125.420-450 (West 2009).

Is Planning Allowed? *In re Baxter*, 874 P.2d 1361, 1363 (Or. Ct. App. 1994) (declining to decide whether Oregon statutes authorize Medicaid planning and refusing to approve guardian creation of a trust to render ward Medicaid eligible because ward was not incapacitated).

Duty to Plan? No current case law.

PENNSYLVANIA

Guardian Statute: 20 PA. CONS. STAT. ANN. § 5536 (West 2005).

Is Planning Allowed? *In re Adler*, No. 1144IC, 2003 WL 22053309, at *6 (Pa. Com. Pl. March 19, 2003) (noting that "[i]t is plainly permissible for guardians in Pennsylvania to perform estate planning and to make distributions from estates when such actions are in the best interests of the ward").

Duty to Plan? *In re Adler*, No. 1144IC, 2003 WL 22053309, at *6 (Pa. Com. Pl. March 19, 2003) (declining to authorize a guardian proposed Medicaid spend-down of the ward's assets, refusing to

adopt a presumption that the ward's intent was to "sacrifice . . . her own comfort for the benefit of others," and noting that "most people seek to enjoy the benefits of their own property for as long as possible"); *Pomroy v. Dep't of Public Welfare*, 750 A.2d 395, 398 (Pa. Commw. Ct. 2000) (holding that the law clearly obligates a fiduciary to "use [the ward's] resources . . . prior to receiving any further governmental assistance").

RHODE ISLAND

Guardian Statute: R.I. GEN. LAWS § 33-15-37.1 (1995 & Supp. 2010).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

SOUTH CAROLINA

Guardian Statute: S.C. CODE ANN. § 62-5-408 (West 2009).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

SOUTH DAKOTA

Guardian Statute: S.D. CODIFIED LAWS § 29A-5-420 (2004).

Is Planning Allowed? *Striegel v. South Dakota Dept. of Soc. Servs.*, 515 N.W.2d 245, 246 (S.D. 1994) (noting that the guardian was given authority to transfer the ward's assets into a trust, but holding that Medicaid is not to be used as an estate planning tool, therefore the assets are available to the ward and the ward is ineligible for Medicaid benefits).

Duty to Plan? *Meyer v. South Dakota Dep't of Soc. Serv.*, 581 N.W.2d, 151, 157-58 (S.D. 1998) (emphasizing that Medicaid is "not free insurance coverage for those who have resources available to them to pay their medical expenses").

TENNESSEE

Guardian Statute: TENN. CODE ANN. § 34-1-122 (2007).

Is Planning Allowed? *In re Conservatorship of Childs*, No. M2008-02481-COA-R3-CV, 2011 WL 51740, at *4 (Tenn. Ct. App. Jan. 5, 2011) (noting that the conservator received Medicaid approval for the ward and after the trial court granted conservator's motion to liquidate the ward's insurance policies to apply to proceeds to funeral and burial arrangements (non-countable assets)).

Duty to Plan? *Grahl v. Davis*, 971 S.W.2d 373, 377-78 (Tenn. 1998) (holding that conservators owe a fiduciary duty to their wards but that the conservators primary duty is to *preserve* the estate of the ward).

TEXAS

Guardian Statute: TEX. PROB. CODE ANN. § 774 (West 2003 & Supp. 2010).

Is Planning Allowed? *Paredes v. Alexander*, No. 03-08427-C, 2004 WL 3383446 (Tex. Dist. Oct. 18, 2004) (creating a special needs trust on behalf of the ward).

Duty to Plan? No current case law.

UTAH

Guardian Statute: UTAH CODE ANN. § 75-5-408 (LexisNexis 1993 & Supp. 2011).

Is Planning Allowed? *S.S. v. State*, 972 P.2d 439, 440 (Utah 1998) (noting that after the ward received Medicaid, conservators were appointed and authorized to place \$150,000 of insurance funds in a special needs trust on the ward's behalf).

Duty to Plan? No current case law.

VERMONT

Guardian Statute: VT. STAT. ANN. tit. 14, § 3069 (2010).

Is Planning Allowed? *Samis v. Samis*, 22 A.3d 444, 445, 450 (Vt. 2011) (noting that the lower court approved a stipulation appointing a guardian and providing that the guardian and husband of the ward would cooperate in financial and Medicaid planning on her behalf as her resources might be insufficient to provide for her care).

Duty to Plan? No current case law.

VIRGINIA

Guardian Statute: VA. CODE ANN. § 37.2-1024 (2005).

Is Planning Allowed? *In re Rudwick*, No. 01-633, 2002 WL 31730757, *6 (Va. Cir. Ct. Dec. 5, 2002) (holding that the conservator is authorized to revoke the ward's trust based on board powers granted to conservators in the statutory scheme as well as the non-preclusive language of the trust instrument).

Duty to Plan? No current case law.

WASHINGTON

Guardian Statute: WASH. REV. CODE ANN. § 11.92.140 (West 2006 & Supp. 2011).

Is Planning Allowed? *In re* Estate of Sullivan, No. 49266-7-I, 2003 WL 1742631, at *4 (Wash. Ct. App. Mar. 31, 2003) (noting that “§11.92.140 authorizes a guardian to determine an incapacitated person’s intent regarding his or her estate, *including the intent to qualify for federal and state medical assistance programs*” (emphasis added)).

Duty to Plan? *In re* Estate of Sullivan, No. 49266-7-I, 2003 WL 1742631, at *4 (Wash. Ct. App. Mar. 31, 2003) (holding that the professional guardian owed a duty to represent the ward’s best interests and she violated this duty by failing to ascertain the ward’s intent and by attempting to block the property conveyance which would “result[] in no benefit to her ward due to his status as a Medicaid recipient” as retaining the property would likely render the ward Medicaid ineligible).

WEST VIRGINIA

Guardian Statute: W. VA. CODE ANN. § 44A-3-7 (LexisNexis 2010).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.

WISCONSIN

Guardian Statute: WIS. STAT. ANN. §§ 54.20-21 (West 2008).

Is Planning Allowed? *A.G. v. Dept. of Human Servs. (In re Guardianship of Scott G.G.)*, 659 N.W.2d 438, 443-44 (Wis. Ct. App. 2003) (holding that a court may authorize the guardian to place the ward’s assets into a Medicaid Payback Trust in accordance with Wisconsin and federal statutes and noting the ward’s incompetency should not prevent him from taking advantage of the extra resources that can flow from the trust).

Duty to Plan? *V.D.H. v. Circuit Court (In re Guardianship of F.E.H.)*, 453 N.W.2d 882, 885-87 (Wis. 1990) (noting that the guardian has an affirmative duty to manage a ward’s estate in the ward’s best interests and holding that the lower court abused its discretion by failing to consider whether a guardian could make a transfer to benefit the ward, his estate, or members of his immediate family).

WYOMING

Guardian Statute: WYO. STAT. ANN. §§ 3-3-607, -801 (2011).

Is Planning Allowed? No current case law.

Duty to Plan? No current case law.