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Avoiding Estate Depletion in the Face of Catastrophic Illness

I. Introduction

An important goal of an individual in planning his estate is to enjoy his property during life while providing for the disposition of that property to chosen beneficiaries, during life or at death, with the least amount of shrinkage.[1] Traditionally, the role of the estate planner has been to help the individual realize this objective, within the bounds of the existing laws, by minimizing the effect of estate, gift, and income taxes.[2]

Today, two additional functions of the estate planner have become important. First, as medical advances prolong life expectancies,[3] there is a greater possibility of extended hospitalization or long-term institutional care resulting from physical or mental incapacity.[4] One's lifetime accumulations may be depleted by

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1. S. KURTZ, FAMILY ESTATE PLANNING 1-4 (1983).

2. *Id.* at 3-4.

3. The death rate of the elderly has decreased substantially since 1940, resulting in higher life expectancy. Specifically, the death rate of the population 65 years of age and older decreased by 26.7% so that in 1978 it was 52.9 deaths per 1000. Fingerhut, *Mortality Among the Elderly*, in U.S. DEP'T OF HEALTH & HUMAN SERV., PUB. NO. 82-1232, HEALTH — UNITED STATES 1981, at 15 (1981). The life expectancy for white males has increased from 62.8 years for those born in 1939-1941 to 70.6 years for those born in 1979; it has increased for white females from 67.3 years for those born in 1939-1941 to 78.2 years for those born in 1979. It has increased for black males from 52.3 years for those born in 1939-1941 to 65.5 years for those born in 1979; it has increased for black females from 55.5 years for those born in 1939-1941 to 74.2 for those born in 1979. *No. 106, Selected Life Table Values: 1939 to 1979,* in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83 [hereinafter cited as STATISTICAL ABSTRACT], at 71 (103d ed. 1982).

4. *See* Weichert, *Health Care Expenditures*, in HEALTH — UNITED STATES 1981, *supra* note 3, at 83. The proportion of people 65 years of age and over has increased from about 8% of the population in 1950 to more than 11% in 1980. As people age, they tend to experience more serious illnesses and more chronic conditions. For example, 86% of those in nursing homes in 1977 were persons 65 years of age and over. *Id.* (citing *National Center for Health Statistics: The National Nursing Home Survey, 1977 Summary for the United States*, in U.S. DEP'T OF HEALTH, EDUC. & WELF., PUB. NO. 79-1794 (PUB. HEALTH SERV.), VITAL HEALTH STATISTICS (Series 10-No. 43, 1979)). In addition, the same age group has a higher rate of hospitalization than younger people, as well as

medical expenses,[5] leaving few or no assets for one's intended beneficiaries. Thus, the estate planner must help the estate owner plan for future health care needs. Second, an estate planner may be called upon to advise a parent on how to provide for his handicapped child while assuring that his other children will ultimately receive a substantial share of his assets.

This Comment focuses on public medical assistance as an entitlement in New York and the estate planning techniques available to a middle income person to qualify for such assistance if disabled. Part II discusses the elderly client, the eligibility requirements under public assistance programs, and the lawful measures an individual may take during life to preclude exhausting his assets in the event of incapacity and extensive medical bills. Part III addresses trusts for handicapped beneficiaries and discretionary provisions that will not defeat the beneficiary's entitlement to public assistance programs. Part IV concludes that planning for disabilities is an essential aspect of estate planning. By carefully structuring the finances of elderly clients, the estate planner can better enable them to qualify for health care assistance under the Medicaid program[6] and avoid extensive estate shrinkage. Similarly, by properly drafting trusts, the estate planner can assure that disabled beneficiaries also qualify for Medicaid coverage, thereby maximizing the trust remainder for other beneficiaries.

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longer stays in short-term hospitals. In 1979, 269.9 persons 65 years and over per 1000 population were discharged from short-stay hospitals and required 2,916.6 days of care, compared with 166.3 persons ages 45-64 requiring 1,562.1 days, 108.9 persons ages 17-44 requiring 749.7 days, and 64.4 persons under 17 years requiring 357.7 days. Weichert, *supra*, at 83, 168 app.

5. The cost of medical care since 1950 has grown at an average rate of 5.5% annually, outpacing the overall Consumer Price Index, which has increased at an average annual rate of 4.2%. Weichert, *supra* note 4, at 83 (citing Bureau of Labor Statistics, U.S. Dep't of Labor: *Consumer Price Index*), 198 app. Furthermore, health care expenditures for persons 65 years and over are higher than those for younger persons. The per capita personal health care expenditure in 1978 for people age 65 years and over was two and one-half times greater than for people 19-64 years of age, and seven times greater than for people under the age of 19. As a result, 29% of total health care expenditures are attributable to the elderly, although they represent only 11% of the population. Weichert, *supra* note 4, at 83, 210-11 app.

6. For a discussion of Medicaid, see *infra* text accompanying notes 24-28.

II. Planning for the Elderly Client's Incapacity

As the average lifespan increases, more persons are faced with extended hospitalization or long-term institutional care.[7] In the absence of adequate private insurance, the cost of such care[8] can quickly exhaust one's lifetime savings, end a comfortable retirement, and eliminate the possibility of providing for others after one's death.

Consequently, lifetime planning is essential to ensure the fulfillment of one's estate plan and to minimize the serious financial problems resulting from physical or mental incapacities. In New York there are various mechanisms for handling asset management should an incapacity be so extensive that an individual cannot manage his[9] own affairs. A court may appoint a conservator to handle the property of an incapacitated person, the conservatee.[10] A friend, relative, or even the disabled person,

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7. *See supra* note 4.

8. Health care costs in the United States in 1980 exceeded $247 billion, averaging $1067 per person and comprising almost 10% of the gross national product. HEALTH — UNITED STATES 1981, *supra*, note 3, at 2. *See also Impact on the Elderly of Proposed Medicare and Medicaid Cuts: Joint Hearing before the House Select Comm. on Aging and the Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging*, 97th Cong., 2d Sess. 106 (1982) (analysis by Rep. Claude Pepper, Chairman). Approximately 12% of those benefiting from Medicare also qualify for Medicaid, with nearly six million persons age 65 and over having incomes under $5000. Although the median incomes for families headed by persons in this group are only one-half the median incomes for families headed by persons under 65 years of age, health costs for those 65 years of age and over are approximately 43% for hospital care, 26% for nursing care, and 23% for physicians' and other practitioners' services. *Id.* (citing *National Center for Health Statistics*). *See also supra* note 5.

9. Throughout this Comment, use of the male gender shall be deemed to include the female gender, where appropriate.

10. N.Y. MENTAL HYG. LAW § 77.01(1) (McKinney Supp. 1983-1984). The supreme court and, outside of New York City, the county courts are empowered to appoint one or more conservators of the property of an individual, the conservatee,

> who has not been judicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support.

Id.

Conservatorship in general refers to court-supervised administration of the property and sometimes of the person of such a disabled individual. *Id.* § 77.19 (McKinney 1978). If one is judicially determined "incompetent to manage himself or his affairs by reason of age, alcohol abuse, mental illness, or other cause, or is a patient who is unable adequately to conduct his personal or business affairs," the court will appoint a committee of his

nominating his own conservator, may initiate the proceeding.[11] In addition, a person, while competent, may execute a general durable power of attorney,[12] empowering another to act in his place and providing that the power "shall not be affected by the subsequent disability or incompetence of the principal."[13] Similarly, a person may create a trust to provide for continuity of management of his estate in the event of disability.[14]

While it is important that an individual arrange for the management of his assets in the event of disability, it is equally essential that he make appropriate arrangements to meet the staggering costs of long-term illness, should that become a reality. Private health insurance, including major medical insurance, may answer this need for some families.[15] Others may look to

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person or of his property or of both. *Id.* § 78.01 (McKinney Supp. 1983-1984). A patient is defined as one lawfully committed or admitted to any department or correction facility for the mentally ill or mentally retarded or to any department of a mental hygiene facility. *Id.* The New York legislature has indicated a clear preference for the appointment of a conservator over a committee. *Id.* § 78.02 (McKinney 1978).

11. An individual, while competent, can nominate a person to serve as a conservator (*id.* § 77.03 (McKinney 1978)) or as a committee (*id.* § 78.05) for himself, with the appointment to take effect if and when he subsequently becomes disabled.

12. A "power of attorney" is "[a]n instrument authorizing another to act as one's agent or attorney. The agent is attorney in fact and his power is revoked on the death of the principal by operation of law. Such power may be either general or special." BLACK'S LAW DICTIONARY 1055 (rev. 5th ed. 1979).

13. N.Y. GEN. OBLIG. LAW § 5-1601 (McKinney 1978). Prior to 1975, when this section was enacted, a power of attorney terminated with the disability of the principal. *See* RESTATEMENT (SECOND) OF AGENCY § 122 (1958).

The durable power of attorney has advantages over the conservatorship. In addition to being simple and straightforward, it avoids the delays and expenses inherent in the appointment of a conservator. For the smaller estate, it is also more advantageous than a trust which is more costly to draft and operate. See Callahan, *The Use of a Convertible Trust in Planning for Disability*, 53 N.Y. ST. B.J. 422, 424 (1981), for a discussion of the durable power of attorney.

14. If an individual has extensive or complex assets, the inter vivos trust is the most flexible, comprehensive, and cost-efficient protection for the administration of his estate should he become disabled. See Callahan, *supra* note 13, at 426-28, for a discussion of the advantages of a convertible trust. The convertible trust agreement provides that the trust will become irrevocable upon the disability of the grantor, at which time the grantor's attorney in fact, under a durable power of attorney, will add the balance of the grantor's assets to the trust. With appropriate provisions, this obviates the need for the appointment of a conservator. *Id.* at 426.

15. Group insurance provided through employment-related plans accounts for a considerable portion of private health insurance. In 1975, employers and labor unions provided 96% of group health insurance, with premiums for such insurance accounting for 83% of total health insurance premiums. Taylor, *Employment-Related Health In-*

Medicare[16] and Medicaid[17] as their only resources. Planning techniques are available to help the less affluent structure their estates to enable them to qualify for health care assistance under the Medicaid program, thereby protecting their estates against astronomical health care claims.[18]

A. *Public Assistance Programs*

1. *Medicare*

Medicare is a federal health insurance program available to persons sixty-five years of age and over who are eligible for social security or railroad retirement benefits and, after a two year waiting period, to persons receiving disability benefits under Social Security.[19] Inpatient hospital care services, posthospital skilled nursing care services, and posthospital home health services are covered in part for all such eligible persons without premium payments.[20] Persons not eligible may voluntarily enroll by paying a monthly premium which is determined annually by the Secretary of the Department of Health and Human Ser-

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surance, in HEALTH — UNITED STATES 1981, *supra* note 3, at 87 (citing B. MITCHELL & C. PHELPS, EMPLOYER-PAID GROUP HEALTH INSURANCE AND THE COSTS OF MANDATED NATIONAL COVERAGE (1975) (Contract No. R-1509-HEW, Santa Monica, Cal., Rand Corp.)). Some corporations provide a continuation of group health insurance including major medical coverage in an employee's retirement package. Unfortunately, some employees, unaware of this coverage, needlessly incur premium costs by enrolling in the Medicare plan for supplemental medical insurance benefits. Telephone interview with Marie Porcari, Coordinator, Senior Citizens Law Project of Westchester Legal Services (Mar. 12, 1984). For a discussion of supplemental medical insurance benefits, see *infra* notes 21-22 and accompanying text.

16. *See infra* text accompanying notes 19-23.

17. *See infra* text accompanying notes 24-28.

18. *See infra* text accompanying notes 113-43.

19. Medicare was enacted in 1965 to provide health care services to the elderly. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 26, 42, 45 U.S.C.); *see also* 42 C.F.R. §§ 405.102-.105 (1982). In 1973, Medicare coverage was extended to the permanently disabled and their dependents and, in 1978, to persons with end-stage renal disease. Social Security Amendments of 1972, Pub. L. No. 92-603, tit. II, sec. 201, 86 Stat. 1371, 1371-74 (codified at 42 U.S.C. § 1395c (1976)); Act of June 13, 1978, Pub. L. No. 95-292, § 4(a), 92 Stat. 315 (codified at 42 U.S.C. § 1395c (Supp. V 1981)).

20. 42 U.S.C. §§ 426, 1395c (1976 & Supp. V 1981); 42 C.F.R. § 405.101 (1982). Such services are covered under "Part A" of Subchapter XVIII, 42 U.S.C. §§ 1395c-1395i-2 (1976 & Supp. V 1981).

vices.[21] Supplemental medical insurance benefits, available to most persons age sixty-five or over regardless of Social Security eligibility and to disabled persons under age sixty-five, require payment of a monthly premium.[22] Despite the availability of Medicare, however, its coverage is limited in scope, dollar amount, and duration.[23] Thus, an elderly person with no additional insurance can watch his assets disappear to meet extraordinary health care payments.

2. *Medicaid*

The Medicaid program was established by Congress in 1965 to provide government financed medical care to the poor.[24] States choosing to participate in the program are required to provide benefits to the "categorically needy": persons receiving cash payments to cover daily expenses because their income and other resources are inadequate.[25] States may also cover as cate-

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21. 42 U.S.C. § 1395i-2 (1976); 42 C.F.R. § 405.106 (1982). For persons uninsured for social security or railroad retirement benefits and who are not otherwise eligible for hospital insurance, monthly premiums for the 12 month period commencing Jan. 1, 1984 are $155. 48 Fed. Reg. 44,913 (1983).

22. 42 U.S.C. § 1395r (1976 & Supp. V 1981); 42 C.F.R. §§ 405.201, .202, .205 (1982). During September of each year the Secretary of the Department of Health and Human Services determines the premium applicable to the 12 month period commencing January 1 in the succeeding year. Monthly premiums for the 12 month period commencing Jan. 1, 1984 are $29.20 for persons age 65 and over, and $54.30 for disabled persons under age 65. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 169-71 (to be codified at 42 U.S.C. § 1395r); 48 Fed. Reg. 44,914 (1983).

Supplemental medical insurance benefits are covered under "Part B" of Subchapter XVIII, 42 U.S.C. §§ 1395j-1395x (1976 & Supp. V 1981).

23. *See generally* 42 C.F.R. § 405 (1982). Inpatient hospital care covers reasonable expenses for the first 60 days less a deductible of $356 in 1984 in each benefit period. For the next 30 days, a daily coinsurance amount of $89 is required in 1984. After 90 days in a benefit period, a patient may elect to draw upon a 60-day lifetime reserve, with a coinsurance amount of $178 per day deducted for each reserve day in 1984. Skilled nursing facility care covers up to 100 days following a hospitalization of at least three days for those who need continued skilled nursing care or skilled rehabilitation services. A patient must, however, enter a nursing home within 30 days after hospitalization. For the first 20 days in 1984, a daily coinsurance amount of $44.50 is required. Home health care coverage is limited to 100 days under "Part A" and an additional 100 days under "Part B" as to medically necessary home health visits by nurses, therapists, and other health workers, so long as the services are physician prescribed and the patient is homebound and requires skilled care. *Id.*; 48 Fed. Reg. 44,912 (1983).

24. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 26, 42, 45 U.S.C.).

25. 42 U.S.C. § 1396a(a)(10)(A) (1976 & Supp. V 1981); 42 C.F.R. § 435.100 (1982).

gorically needy, persons who would qualify for cash assistance were they not residing in a medical institution.[26] States participating in the Medicaid program may, at their option, provide Medicaid benefits to the "medically needy": aged, blind, or disabled persons with income and resources too large to qualify for categorical assistance, but insufficient to pay for necessary medical care.[27] State eligibility requirements for the "medically needy," however, may not be more restrictive than federal eligibility requirements for recipients of Supplemental Security Income (SSI).[28]

a. *SSI and the categorically needy*

Included among the "categorically needy" are aged, blind, or disabled persons, or families and children entitled to either Aid to Families with Dependent Children (AFDC) or an optional state cash assistance supplement.[29] From the inception of SSI in 1972, but prior to 1980, SSI applicants were allowed to transfer resources which, if retained, would have made them ineligible to receive cash assistance.[30] Such resources could be given away or sold for less than adequate consideration (fair market value) without defeating eligibility for SSI[31] or for the medical assis-

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The "categorically needy" are those persons whom Congress considers particularly deserving of public assistance because of age, family circumstances, or disability. They were originally included under four programs: Old Age Assistance, 42 U.S.C. §§ 301-304, 306 (1976), *repealed by* Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. III, § 303, 86 Stat. 1484; Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-615 (1976 & Supp. V 1981); Aid to the Blind, 42 U.S.C. §§ 1201-1204, 1206 (1976), *repealed by* Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. III, § 303, 86 Stat.1484; and Aid to the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-1355 (1976), *repealed by* Act of Oct. 30, 1972, Pub. L. No. 92-603, tit. III, § 303, 86 Stat. 1484. In 1972, 42 U.S.C. §§ 1381-1383c (1976 & Supp. V 1981), replaced three of the above state-administered programs, combining them into one federally administered adult assistance program, Supplementary Security Income for the Aged, Blind, and Disabled (SSI), with uniform standards of need. The fourth progam, AFDC, continued as a cooperative federal-state program to assist needy children and the parents and relatives with whom they live.

26. 42 C.F.R. § 435.211 (1982).

27. 42 U.S.C. § 1396a(a)(10)(C)(i) (Supp. V 1981); 42 C.F.R. §§ 435.300-.301 (1982).

28. 42 C.F.R. § 435.401(c)(2) (1982). *See infra* note 37.

29. *See supra* note 25.

30. 42 U.S.C. § 1382b(b) (1976); 42 C.F.R. § 435.120(b) (1979). In 1980, this section of the Code was amended to restrict substantially transfers of resources for eligibility purposes. 42 U.S.C. § 1382b(c) (Supp. V 1981).

31. 42 U.S.C. § 1382b(b).

tance required to be given to SSI recipients.[32]

b. *The medically needy*

Among the states participating in the Medicaid program, several elect an option to pay medical assistance only to those individuals who would have met the eligibility requirements in effect on January 1, 1972.[33] Some, like New York, fear that individuals with significant assets, anticipating substantial medical expenses in long-term care facilities, would transfer assets to a friend or relative in order to qualify for such benefits. The New York Social Services Law,[34] in effect in 1972 when the SSI program was created, addressed this concern. It provided that a voluntary transfer of assets, in order to qualify for or maintain eli-

32. 42 C.F.R. § 435.120(b) (1982).

33. This "209(b) option" was added by the Social Security Amendments of 1972, Pub. L. No. 92-603, § 209(b), 86 Stat. 1329, 1381 (codified as amended at 42 U.S.C. §§ 1396a(f), 1396b(f) (1976)). It permits a state to cover in the Medicaid program less than all SSI recipients, provided such state does not use requirements more restrictive than requirements in effect on Jan. 1, 1972. Some state plans in effect in January 1972 "deemed" available to an applicant for Medicaid, a certain amount of income of a parent or spouse as a financially responsible relative, without requiring proof of actual contribution. Under the "§ 209(b) option," however, an individual eligible for SSI but whose income is greater than the state's Medicaid eligibility standard, must be permitted to "spend down" his excess income by incurring medical expenses. In determining the individual's countable income, the state agency must also deduct SSI and any optional state supplementary benefits received, certain increases in social security benefits and expenses for medical care recognized by the state as deductible. 42 U.S.C. §§ 1396a(f), 1396b(f) (1976).

Among the states exercising their "209(b) option" are: Connecticut, 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 15,566 (Aug. 1983); Hawaii, *id.* ¶ 15,578 (July 1983); Illinois, *id.* ¶ 15,582 (Feb. 1983); Indiana, *id.* ¶ 15,584 (Jan. 1984); Minnesota, *id.* ¶ 15,602 (Oct. 1983); Missouri, *id.* ¶ 15,606 (Nov. 1982); Nebraska, *id.* ¶ 15,610 (Aug. 1982); New Hampshire, *id.* ¶ 15,614 (Feb. 1984); North Carolina, *id.* ¶ 15,622 (Mar. 1983); North Dakota, *id.* ¶ 15,624 (Oct. 1983); Ohio, *id.* ¶ 15,626 (Aug. 1983); Oklahoma, *id.* ¶ 15,628 (Oct. 1983); Utah, *id.* ¶ 15,646 (Jan. 1983); and Virginia, *id.* ¶ 15,652 (Nov. 1983).

New York exercised the "209(b) option" as a result of Caldwell v. Blum, 621 F.2d 491 (2d Cir. 1980), *cert. denied*, 452 U.S. 909 (1981), which invalidated its transfer of assets rule. Morabito v. Blum, 528 F. Supp. 252 (S.D.N.Y. 1981). New York, however, decided in 1982 to cover all SSI recipients. 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 15,620 (Jan. 1983). Effective Aug. 1, 1982, the state re-entered a contract with the Social Security Administration providing for coverage for the aged, blind, and disabled using comparable standards for SSI. N.Y. ST. REG. 17 (Aug. 3, 1983) (codified at N.Y. ADMIN. CODE tit. 18, § 360 (1983)).

34. Law of Apr. 30, 1966, ch. 256, § 3, 1966 N.Y. Laws 275, 281, *repealed by* Medicaid Cost Containment Amendments, ch. 56, 1982 N.Y. Laws 126 [hereinafter cited as N.Y. SOC. SERV. LAW § 366(1)(e) (repealed 1982)].

gibility for Medicaid benefits or to defeat the right of recovery of medical assistance paid, rendered a "medically needy" person ineligible for Medicaid benefits.[35]

In 1980, however, a federal court held New York's "transfer of assets" rule invalid. In *Caldwell v. Blum*,[36] the Second Circuit found that New York's eligibility standards for the "medically needy" were inconsistent with federal standards for SSI applicants.[37] According to the court, states could not impose more

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35. N.Y. SOC. SERV. LAW § 366(1)(e) (*repealed* 1982). The pertinent provisions are:

> 1. Medical assistance shall be given under this title to a person who requires such assistance and who . . . (e) has not made a voluntary transfer of property (i) for the purpose of qualifying for such assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance. A transfer of property made within eighteen months [formerly one year] prior to the date of application shall be presumed to have been made for the purpose specified in subparagraph (i); a transfer of property that would be exempt from consideration under this title, made within eighteen months [formerly one year] prior to the date of application without fair and reasonable consideration or made, without prior approval of the social services official, at any time after the application or determination of eligibility, shall be deemed to have been made for one or more of the purposes specified in subparagraph (ii) hereof. The social services official shall approve such an assignment or transfer if he determines based on the transfer agreement that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes available unless all or a part of it subsequently qualifies as exempt property under subdivision two of this section.

Id.

36. 621 F.2d 491 (2d Cir. 1980), *aff'g* No. 78-CV-569 (N.D. N.Y. 1979) (unreported decision), *cert. denied*, 452 U.S. 909 (1981). See *infra* notes 92-94 and accompanying text for a discussion of current eligibility requirements.

37. *Id. Caldwell* was a class action challenge to New York's transfer of assets rule by aged, blind, and disabled New York residents. These people would have been eligible for SSI benefits (and therefore Medicaid) but for their income and resources; they were denied Medicaid benefits for the medically needy because they had voluntarily transferred property prior to application for or while receiving such benefits. The Second Circuit affirmed the district court which had concluded that New York's "no-transfer rule" for the medically needy was more restrictive than the voluntary transfer rule for SSI applicants and, therefore, in apparent conflict with the federal law. The Social Security Act requires that a state choosing to benefit the medically needy make such assistance available to all persons who would, but for income and resources, be eligible for SSI benefits "and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services." 42 U.S.C. § 1396a(a)(10)(C)(i) (1976). In addition, the accompanying regulations prohibit a state agency from using "requirements for determining eligibility [for Medicaid benefits] for optional coverage groups [e.g., the medically needy] that are . . . (2) For aged, blind, and disabled individuals, more restrictive than those used under SSI."

stringent eligibility requirements on the medically needy than on the categorically needy.[38]

B. *New Legislation and Case Law: An Analysis*

1. *Social Security Act*

In response to a split among the circuits on the validity of "transfer of assets" rules,[39] Congress amended the Social Security Act in 1980 to allow states to deny Medicaid benefits to any individual, whether categorically needy or medically needy, who "would not be eligible . . . but for the fact that he disposed of resources for less than fair market value."[40] The law now contains a presumption that assets transferred for less than full consideration within twenty-four months of an application for SSI benefits should be included in the available resources of the applicant.[41] The presumption is rebuttable by convincing evidence that the transfer was made solely for a purpose other than establishing eligibility.[42] Thus, although the law as amended continues to prevent states from imposing more restrictive eligibility requirements upon the medically needy than upon SSI recipients,[43] the SSI eligibility requirements have been tightened by the addition of a federal transfer of assets provision. Furthermore, the federal law provides that should the uncompensated value of the transferred assets exceed $12,000, states may delay

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42 C.F.R. § 435.401(c) (1982).

38. Caldwell v. Blum, 621 F.2d 491, 496 (2d Cir. 1980), *cert. denied*, 452 U.S. 909 (1981).

39. See Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979), which reached the same result regarding Maryland's no-transfer rule as the Second Circuit in *Caldwell*, and Scarpuzza v. Blum, 73 A.D.2d 237, 426 N.Y.S.2d 505 (2d Dep't 1980), which similarly found N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982) in conflict with the Social Security Act and, therefore, in violation of the supremacy clause. The Ninth Circuit, however, originally upheld California's similar transfer of assets rule in Dawson v. Myers, 622 F.2d 1304 (9th Cir.), *cert. granted sub. nom.* Beltran v. Myers, 449 U.S. 951 (1980). This decision was ultimately reversed due to a change in the Social Security Act. Beltran v. Myers, 701 F.2d 91 (9th Cir.), *cert. denied*, 103 S. Ct. 3115 (1983).

40. Social Security Amendments of 1980, Pub. L. No. 96-611, § 5(b), 94 Stat. 3568 (codified as amended at 42 U.S.C. § 1396a(j)(1) (Supp. V 1981)).

41. Social Security Amendments of 1980, Pub. L. No. 96-611, § 5(a) (codified as amended at 42 U.S.C. § 1382b(c)(1) (Supp. V 1981)).

42. 42 U.S.C. § 1382b(c)(2) (Supp. V 1981).

43. Social Security Amendments of 1980, Pub. L. No. 96-611, § 5(b), 94 Stat. 3568 (codified as amended at 42 U.S.C. § 1396a (Supp. V 1981)).

Medicaid eligibility for a period longer than twenty-four months provided "the period of ineligibility bear[s] a reasonable relationship to such uncompensated value."[44]

2. *New York Social Services Law*

a. *Medicaid eligibility*

To assure that public resources are available to help only the intended beneficiaries of the Medicaid program, the economically disadvantaged, the New York legislature has attempted to limit the cost of the program.[45] In April 1982, New York Social Services Law section 366 was amended in accordance with the federal law to revise state procedures for determining Medicaid eligibility.[46]

Section 366 establishes the eligibility standards for medical assistance to SSI recipients, AFDC recipients, the "medically needy," and others. To preserve public assistance for the genuinely needy, all resources *available* to the applicant are considered. These include the applicant's resources,[47] those of his parents or spouse,[48] assets transferred to meet Medicaid eligibility requirements,[49] and those the applicant could have, but never actually possessed.[50] A limited amount of income and certain resources are exempt.[51]

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44. 42 U.S.C. § 1396a(j)(2) (Supp. V 1981).

45. *See* Memorandum of State Executive Department, 1982 N.Y. Laws 2429; Governor's Approval Memorandum, 1982 N.Y. Laws 2590 (in support of Medicaid Cost Containment Amendments, ch. 56, 1982 N.Y. Laws 126 (codified as amended at N.Y. Soc. Serv. Law § 366(5) (McKinney 1983))).

46. Medicaid Cost Containment Amendments, ch. 56, 1982 N.Y. Laws 126 (codified as amended at N.Y. Soc. Serv. Law § 366(5) (McKinney 1983)).

47. N.Y. Soc. Serv. Law § 366(2)(b) (McKinney 1983).

48. *Id. See also* 42 C.F.R. § 435.602 (1982). The resources of other members of the applicant's household, however, are not considered available for his support.

49. N.Y. Soc. Serv. Law § 366(5)(a) (McKinney 1983). *See infra* notes 52-76 and accompanying text.

50. *See infra* notes 77-90 and accompanying text.

51. N.Y. Soc. Serv. Law § 366(2)(a) (McKinney 1983 & Supp. 1983-1984). The statute provides:

> The following income and resources shall be exempt and shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care and services available under this title:
>
> (1) a homestead which is essential and appropriate to the needs of the household;

(i) *Availability of transferred assets*

In amending section 366, the legislature specifically sought to end assistance to persons transferring assets to meet Medicaid eligibility requirements. In determining the initial or continuing eligibility of any person, "the amount of resources considered available to such person [includes] the uncompensated value of any nonexempt resource transferred within twenty-four months prior to the application for medical assistance."[52] The "uncompensated value" is the fair market value of the resource at the time of transfer, less the amount of compensation received in exchange.[53] "Nonexempt resource" covers any resource which, if retained by the applicant, would not be exempt.[54] In addition, there is a rebuttable presumption that a transfer of a nonexempt resource made within twenty-four months before the date of the person's application was made for the purpose of

(2) essential personal property;

(3) liquid resources in the amount of five hundred dollars for each person, but not in excess of two thousand dollars per family, as a burial reserve;

(4) savings in amount equal to at least one-half of the appropriate income exemptions allowed;

(5) income taxes;

(6) health insurance premiums;

(7) payments for support of dependents required to be made pursuant to court order; and

(8) income in an amount set forth in schedule:

Annual net income — Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility.

One	Two	Three	Four	Five	Six	Seven
$4,500	$6,600	$6,700	$6,800	$6,900	$7,000	$7,400

Such income exemptions shall be increased by seven hundred dollars for each member of a family household in excess of seven.

(9) subject to subparagraph eight, the department upon the application of a local social services district, after passage of a resolution by the local legislative body authorizing such application, may adjust the income exemption based upon variations between cost of shelter in urban areas and rural areas in accordance with standards prescribed by the United States secretary of health, education and welfare.

(10) for the personal expenses of a resident of a residential health care facility as defined by section twenty-eight hundred one of the public health law, the amount of forty dollars per month.

Id.

52. N.Y. Soc. Serv. Law § 366(5)(a) (McKinney 1983). *See infra* note 71.

53. N.Y. Soc. Serv. Law § 366(5)(b)(3). *See infra* note 71.

54. N.Y. Soc. Serv. Law § 366(5)(b)(1). *See infra* note 71.

qualifying for such assistance.[55]

If, as a result of this presumption, an applicant is determined to have excess resources of $12,000 or less, such applicant shall remain ineligible for assistance for twenty-four months from the date of transfer.[56] If excess resources exceed $12,000, an applicant shall remain ineligible for twenty-four months plus one additional month for each $2000 in excess of $12,000.[57] In either case, the period may be shortened if the applicant can show medical expenses incurred after the date of transfer in excess of the otherwise allowable resources.[58]

The most significant exempt resource is a "homestead which is essential and appropriate to the needs of the household."[59]

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55. N.Y. Soc. Serv. Law § 366(5)(b)(2). *See infra* note 71. It is important to note, however, that a transfer more than 24 months before the person's application for medical assistance does not necessarily mean he is "home free." The Department and courts may still look to intent. If any fraud is involved, medical assistance will still be denied. *See infra* notes 56-65, 75-76, 142-49 and accompanying text. Note also, however, that since the presumption under § 366(5)(b)(2) only covers transfers made within 24 months before a person's application, the burden after that period presumably switches to the Department, which must prove intent by substantial evidence.

56. N.Y. Soc. Serv. Law § 366(5)(c)(1). *See infra* note 71. For example, if a woman with limited assets were to transfer gratuitously to her son a $10,000 bond on Jan. 1, 1983, enter a nursing home six months later, and apply for Medicaid benefits on Sept. 1, 1983, the $10,000 would be included in determing the value of her nonexempt resources. If her total nonexempt resources were $12,000 or less, she would remain ineligible for medical assistance until Jan. 1, 1985 (24 months from the date of the transfer) or until such sooner time that her incurred medical expenses exceed such excess resources ($12,000 or less). It appears from the text of the statute that this would apply even if the transferee exhausted the assets. If the assets were so exhausted, they would not *actually* be available although according to the statute, they would still be *deemed* available. N.Y. Soc. Serv. Law § 366(5)(c)(1). The applicant would, of course, have the right to rebut. Note also that there should be a different result, however, should the transferee exhaust the assets for the transferor.

57. N.Y. Soc. Serv. Law § 366(5)(c)(2). *See infra* note 71. Given the example in note 56, *supra*, but changing the amount transferred and her total nonexempt resources from $10,000 to $50,000, the woman would be ineligible for medical assistance until Aug. 1, 1987 (24 months from date of transfer plus one month for each $2000 in excess of $12,000) or until such time as her medical expenses exceed $50,000, whichever is sooner. Note that the applicant must show that medical expenses were *incurred*. They need not necessarily have been paid.

58. N.Y. Soc. Serv. Law § 366(5)(c)(1), (2).

59. *Id.* § 366(2)(a)(1). *See infra* note 71. *See also* N.Y. Admin. Code tit. 18, § 360.23(b) (1983) (defining "homestead" as "the home and land *owned and occupied* by an applicant") (emphasis added). N.Y. Civ. Prac. Law § 5206(a) (McKinney Supp. 1983-1984) exempts from application to the satisfaction of a judgment, unless recovered fully for the purchase price thereof,

Under prior law, once property was transferred or sold the state considered it no longer essential to the transferor.[60] Accordingly, the state maintained that such transferred property, whether originally exempt or nonexempt, was to be considered a resource to the transferor in determining his eligibility for Medicaid benefits.[61]

In *Sherman v. Sanfilippo*,[62] for example, the appellate division upheld a denial of medical assistance to an eighty-two year old widow, who shortly after being admitted to a nursing home, transferred her house to her son and daughter-in-law, allegedly to qualify for medical assistance and to defeat claims for Medicaid reimbursement.[63] The court concluded that Mrs. Sherman's

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[p]roperty of one of the following types, not exceeding ten thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence . . . :

1. a lot of land with a dwelling thereon,
2. shares of stock in a cooperative apartment corporation,
3. units of a condominium apartment, or
4. a mobile home.

Id. Thus, a house used only as a vacation or weekend retreat does not qualify as a homestead. *In re* Estate of Galcia, 59 Misc. 2d 511, 299 N.Y.S.2d 723 (Sur. Ct. N.Y. County 1969).

60. *See* Memorandum of State Dep't of Soc. Serv., 1977 N.Y. Laws 2422 (statement in support of Act of Aug. 5, 1977, ch. 755, 1977 N.Y. Laws 1224 (N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982))).

61. *See* Memorandum of State Dep't of Soc. Serv., 1977 N.Y. Laws 2422 (statement in support of Act of Aug. 5, 1977, ch. 755, 1977 N.Y. Laws 1224 (codified at N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982))). See also Mondello v. D'Elia, 39 N.Y.2d 978, 355 N.E.2d 286, 387 N.Y.S.2d 232 (1976), where the court of appeals found that, due to a gap in N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982) (see *supra* note 35 for text of repealed statute), the transfer of exempt property could not disqualify one from eligibility for medical assistance. The court reasoned that the owner of exempt property is not disqualified from receiving medical assistance because of such ownership. If one transfers property without consideration, it loses its exempt status. Therefore, since the transfer of nonexempt property renders one ineligible to receive assistance, one would not transfer exempt property to enable one to qualify for assistance. To cure the gap noted in *Mondello*, § 366(1)(e) was amended to render ineligible for medical assistance those who made voluntary transfers of property not only "for the purpose of qualifying for such assistance, [but also] for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance." Act of Aug. 5, 1977, ch. 755, 1977 N.Y. Laws 1224 (codified at N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982)).

62. 74 A.D.2d 675, 424 N.Y.S.2d 540 (3d Dep't 1980).

63. *Id.* at 675, 424 N.Y.S.2d at 541. *See also* N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982). *See supra* note 61.

house was no longer an exempt homestead once transferred.[64] The nonessential nature of the property was evidenced, the court reasoned, by the fact that due to Mrs. Sherman's advanced age and poor health, it was unlikely that she would ever return to her house.[65]

When a homestead is sold, rather than transferred without consideration, there is no question as to whether the house is still a homestead of the transferor. The conversion into cash proceeds removes the exemption for determining eligibility for medical assistance,[66] unless, of course, the proceeds are used to purchase another homestead. The proceeds, until depleted, constitute an available resource.[67]

Section 366(1)(e) of the New York Social Services Law[68] denied or terminated medical assistance to persons who within eighteen months of applying for such assistance had voluntarily transferred any property to qualify or continue eligibility for such medical assistance or to defeat the right to recovery of medical assistance paid. This section was repealed in 1982,[69] when a new subdivision 5 was added.[70] The new subdivision looks to available resources in determining initial or continued

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64. Sherman v. Sanfilippo, 74 A.D.2d at 676, 424 N.Y.S.2d at 542.

65. *Id.* at 676, 424 N.Y.S.2d at 541. *But see* Kruk v. Blum, 76 A.D.2d 882, 428 N.Y.S.2d 719 (2d Dep't 1980) (where the court held that a transfer of a residence by an applicant to her children a few weeks prior to her experiencing a disability did not preclude her from eligibility for medical assistance); Troll v. Toia, 68 A.D.2d 927, 414 N.Y.S.2d 371 (2d Dep't 1979) (where evidence was insufficient to support findings that an applicant confined to a nursing home indefinitely would not return to her house, and that her house having been transferred without consideration was no longer her homestead, the court held that the house remained her homestead and was, therefore, exempt).

66. *See* McManus v. D'Elia, 66 A.D.2d 783, 410 N.Y.S.2d 655 (2d Dep't 1978). Mrs. McManus appointed her daughters as attorneys in fact and in that capacity the daughters transferred their mother's house to themselves, individually, and then sold the house. Because the daughters were acting as their mother's attorneys in fact, the court deemed the sale to be made by Mrs. McManus.

67. *Id. Cf.* Moran v. Lascaris, 61 A.D.2d 405, 402 N.Y.S.2d 486 (4th Dep't 1978) (where son sold his mother's house to a third party, cash proceeds, until depleted, would have been available resources for determining eligibility; the court refused to terminate mother's benefits, however, because there was insufficient evidence that she was aware of the sale and, therefore, it was questionable whether she had knowingly and willfully made a voluntary transfer).

68. N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982).

69. Medicaid Cost Containment Amendments, ch. 56, 1982 N.Y. Laws 126.

70. *Id.* (codified as amended at N.Y. Soc. Serv. Law § 366(5) (McKinney 1983)).

eligibility for medical assistance.[71] Available resources include "the uncompensated value of any *nonexempt* resource transferred within twenty-four months prior to the date of application for medical assistance."[72] Although there is still a presumption that a transfer made within the stated period was made to qualify for medical assistance,[73] the new subdivision applies only

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71. N.Y. Soc. Serv. Law § 366(5). The statute provides:

(a) In determining the initial or continuing eligibility of any person for assistance under this title, there shall be included in the amount of resources considered available to such person the uncompensated value of any nonexempt resource transferred within twenty-four months prior to the date of application for medical assistance.

(b) For purposes of this subdivision:

(1) a nonexempt resource shall mean any resource which if retained by such person would not be exempt from consideration under the provisions of subdivision two of this section;

(2) any transfer of a nonexempt resource made within twenty-four months prior to the date of a person's application for medical assistance shall be presumed to have been made for the purpose of qualifying for such assistance; however, if such person furnishes evidence to establish that the transfer was exclusively for some other purpose, the uncompensated value shall not be considered available to such person in determining his or her initial or continued eligibility for medical assistance;

(3) the uncompensated value of any such resource shall be the fair market value of such resource at the time of transfer, minus the amount of the compensation received by the person in exchange for the resource.

(c)(1) Any person determined to have excess resources of twelve thousand dollars or less because of the application of this subdivision shall remain ineligible for assistance under this title for a period of twenty-four months from the date of the transfer, or until such person can demonstrate that he or she has incurred medical expenses after the date of transfer in the amount of such excess above otherwise allowable resources, whichever period is shorter.

(2) Any person determined to have excess resources of more than twelve thousand dollars because of the application of this subdivision shall remain ineligible for assistance under this title for a period which exceeds twenty-four months, which period shall be determined by adding an additional month of ineligibility for each two thousand dollars in excess of twelve thousand dollars, or until such person can demonstrate that he or she has incurred medical expenses after the date of transfer in the amount of such excess above otherwise allowable resources, whichever period is shorter.

(d) The commissioner shall promulgate such rules and regulations as may be necessary to carry out the provisions of this subdivision.

(e) The provisions of this subdivision shall not be applicable to any transfer made prior to April tenth, nineteen hundred eighty-two.

Id.

72. *Id.* § 366(5)(a).

73. *Id.* § 366(5)(b)(2). See also New v. New York State Bd. of Social Welfare, 49 N.Y.2d 857, 404 N.E.2d 1333, 427 N.Y.S.2d 792 (1980), where the statutory presumption

to resources which if retained would not be exempt.[74] It would appear, therefore, that the transfer of a homestead or any other property exempt in the hands of the transferor will no longer disqualify the transferor from eligibility for medical assistance. One must note, however, that *Sherman* was not decided on the basis of the statutory presumption, since Mrs. Sherman transferred her house more than one year (the prohibited period at the time) prior to her application for medical assistance.[75] Despite the fact that the statutory presumption was not applicable, the court placed the burden on the applicant to disprove the adverse inferences regarding the transfer.[76]

(ii) *Other available assets*

Not only resources transferred by the applicant but resources he never actually possessed may be considered available resources.[77] For example, a widow's elective share of her husband's estate has been held to be a resource available to her even where she did not exercise her right of election and, therefore, never possessed the elective share.[78] This result is justified, the court in *Flynn v. Bates*[79] reasoned, because " 'the word 'needy' does not in its ordinary meaning encompass a person who is creating the need by consistently avoiding or refusing to

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under N.Y. Soc. Serv. Law § 366(1)(e) (repealed 1982) was brought into play with evidence showing a transfer of all bank accounts to the applicant's son within two months of the application for medical assistance. The form of the accounts, the fact that applicant had received funds in her own right over the years and had commingled them with her son's, and lack of proof regarding her living expenses helped support denial of her application. But see Radano v. Blum, 89 A.D.2d 858, 453 N.Y.S.2d 38 (2d Dep't 1982), where the statutory presumption was rebutted with credible, plausible, uncontradicted testimony of the applicant and her daughter that all the money in a joint account belonged to the daughter who was using the account solely for convenience with no intention to confer a present beneficial interest on her mother.

74. N.Y. Soc. Serv. Law § 366(5)(b)(1) (McKinney 1983). *See supra* note 71.

75. Sherman v. Sanfilippo, 74 A.D.2d at 676, 424 N.Y.S.2d at 542.

76. *Id.* Since Mrs. Sherman did not transfer her house (one of her few assets) until 40 days after she was admitted to a nursing home, and at a time when it was highly unlikely that she would ever return to her house, the court determined that she had the burden to disprove the adverse inference that the transfer was made for medical eligibility purposes.

77. *See infra* text accompanying notes 78-90.

78. Flynn v. Bates, 67 A.D.2d 975, 413 N.Y.S.2d 446 (2d Dep't 1979).

79. *Id.*

provide for his needs.' "[80]

Similarly, the New York County Supreme Court deemed a renounced inheritance an available resource,[81] despite the fact that it is well established in New York that a distributee may renounce an inheritance "even if the renunciation has the effect [or objective] of frustrating creditors."[82] In *In re Estate of Scrivani*,[83] Marie Scrivani died intestate, leaving her sister, Mrs. Molinelli, as her sole distributee. If not renounced, the entire estate would have been immediately subject to the claims of Mrs. Molinelli's creditors, primarily a nursing home.[84] Mrs. Molinelli's granddaughter, as her conservator, sought permission to renounce the inheritance on her grandmother's behalf.[85]

In denying permission, the court considered *In re Estate of Schiffman*[86] where an administrator was permitted to renouce an inheritance on behalf of an intestate decedent even though the renunciation was for the express purpose of defeating a claim for Medicaid recovery. In that case, the fact that one-half of the assets renounced would pass to the administrator individually was not sufficient reason to set the renunciation aside.[87] The *Scrivani* court reasoned, however, that an inheritance is "an inchoate property interest, which clearly has value and is available to the beneficiary [as] an 'available resource' for Medicaid

80. *Id.* at 977, 413 N.Y.S.2d at 448 (quoting Barie v. Lavine, 48 A.D.2d 36, 38, 367 N.Y.S.2d 587, 590 (3d Dep't 1975)).

81. *In re* Estate of Scrivani, 116 Misc. 2d 204, 455 N.Y.S.2d 505 (Sup. Ct. N.Y. County 1982).

82. *Id.* at 208, 455 N.Y.S.2d at 509 (citing *In re* Estate of Schiffman, 105 Misc. 2d 1025, 430 N.Y.S.2d 229 (Sur. Ct. N.Y. County 1980); *In re* Estate of Deitch, 106 Misc. 2d 690, 435 N.Y.S.2d 244 (Sur. Ct. Nassau County 1981)). A renunciation is made retroactive to the date of the decedent's death and must be treated as if no inheritance or gift ever passed to or vested in the renouncing person. N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(d) (McKinney 1981). Furthermore, subject to court authorization, a guardian of an infant, a committee of an incompetent, a conservator of a conservatee, or a personal representative of a decedent may renounce on behalf of his ward. *Id.* § 2-1.11(c).

83. 116 Misc. 2d at 205, 455 N.Y.S.2d at 507.

84. *Id.*

85. *Id.* at 204, 455 N.Y.S.2d at 507. The proceeding was one in which the conservator was seeking permission of the Supreme Court of New York County to renounce an inheritance on behalf of the conservatee. Under N.Y. EST. POWERS & TRUSTS LAW § 2.1-11(c), a conservator desiring to make such a renunciation must obtain authorization to do so from the court having jurisdiction of the conservatee.

86. 105 Misc. 2d 1025, 430 N.Y.S.2d 229 (Sur. Ct. N.Y. County 1980).

87. *Id.* at 1027-28, 430 N.Y.S.2d at 230-31.

[eligibility] purposes."[88] On the basis of the new section 366(5) of the Social Services Law and other eligibility requirements of the statute, the court reasoned that a distributee would effectively be denied Medicaid benefits until he incurred medical expenses exceeding the value of the inheritance, whether or not he were to renounce.[89] While there was no assurance that if renunciation were allowed, the family members benefiting would take care of Mrs. Molinelli's future needs, the court's denial of the renunciation guaranteed that her personal needs would be met until the inheritance was exhausted, at which time Mrs. Molinelli would be eligible for Medicaid.[90]

b. *Medicaid recoupment*

Once an applicant meets the eligibility requirements under section 366(5),[91] Medicaid will cover most medical expenses.[92]

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88. *In re* Estate of Scrivani, 116 Misc. 2d at 209, 455 N.Y.S.2d at 510. The court acknowledged that a renunciation is retroactive to the decedent's date of death. The gift never vests in the beneficiary who renounces, because he is deemed to have predeceased the decedent for inheritance purposes. *Id.* at 208, 455 N.Y.S.2d at 509. Therefore, although technically there cannot be a "transfer of specific property in which the beneficiary holds title, [renunciation] is [a] transfer of a resource." *Id.* at 209, 455 N.Y.S.2d at 510. *See supra* note 82 and accompanying text.

Note that New York State law clearly prohibits renunciation of property already accepted by the renouncing party. N.Y. EST. POWERS & TRUSTS LAW § 2-1.11(f) (McKinney 1981). Section 2518 of the Internal Revenue Code of 1954 (I.R.C. § 2518(b) (West 1983)) and the proposed Treasury Regulations § 25.2518-1 set forth the rules for a "qualified disclaimer [which] is an irrevocable and unqualified refusal to accept the ownership of an interest in property." Prop. Treas. Reg. § 25.2518-1, 45 Fed. Reg. 48,921, 48,925 (1983). For estate planning purposes, one meeting the requirements for a qualified disclaimer can be assured that the disclaimed property will not be included in his estate for federal estate tax purposes. Prop. Treas. Reg. § 25.2518-1(b). Thus, the property, if allowed to be disclaimed on behalf of Mrs. Molinelli (Mrs. Scrivani's beneficiary), would not at death be included in Mrs. Molinelli's estate for estate tax purposes, even though it would be considered during her lifetime as an available resource for Medicaid eligibility purposes.

Because the amount here is nominal, however, there would be no federal estate tax even if it were included in her estate for federal estate tax purposes. I.R.C. §§ 2001, 2010 (West 1983).

89. *In re* Estate of Scrivani, 116 Misc. 2d at 209, 455 N.Y.S.2d at 510.

90. *Id.* at 211, 455 N.Y.S.2d at 511. The court also pointed to the possible conflict of interest of the conservator, Mrs. Molinelli's granddaughter. *Id.* at 210, 455 N.Y.S.2d at 510. She had a fiduciary duty to function as the court's agent in her jurisdiction over her grandmother, the conservatee. She also had potential self-interest as an indirect distributee through her mother. *Id.* at 210-11, 455 N.Y.S.2d at 510-11.

91. N.Y. SOC. SERV. LAW § 366(5) (McKinney 1983).

Upon the applicant's death, however, the Department of Social Services may be able to recover amounts previously expended on an "implied contract" theory.[93] Thus, assuming an applicant's exempt property had not affected his eligibility for medical assistance, such property in the recipient's estate at death might be subject to recoupment by the Department of Social Services to the extent of the cost of assistance or care received.[94] If so, plans to transfer the homestead or other exempt property at death may be defeated. As a result, individuals anticipating extensive medical costs have effected such transfers during life, so that at death the homestead or other exempt property would not be found in the estate and, therefore, would not be subject to recovery by the Department of Social Services.

(i) *Fraudulent conveyances*

The effectiveness of lifetime transfers for defeating Medicaid recoupment is doubtful after the decision in *Crabb v. Mager*.[95] There an appellate court held that the Debtor and Creditor Law may be used in conjunction with section 369 of the Social Services Law to set aside an allegedly fraudulent transfer.[96] With the transfer set aside, the homestead is included in the Medicaid recipient's estate from which the Department of Social Services can recoup its expenses.[97]

In *Crabb*, Gladys Mager, at seventy-nine years of age, became a patient in a nursing home and began receiving medical assistance. Shortly thereafter, she gratuitously transferred her

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92. N.Y. Soc. Serv. Law § 365-a(2) (McKinney Supp. 1983-1984). The statute provides in part:

> 'Medical assistance' shall mean payment of part or all of the cost of care, services and supplies which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person is [in] accordance with this title, and the regulations of the department.

Id.

93. N.Y. Soc. Serv. Law § 104(1) (McKinney 1983). The statute provides that "[a]ny public assistance or care received by such person shall constitute an implied contract." *Id.*

94. *Id.*

95. 66 A.D.2d 20, 412 N.Y.S.2d 508 (4th Dep't 1979).

96. *Id.*

97. *Id.*

house to her son and daughter-in-law.[98] At Mrs. Mager's death, the homestead was not included in her estate and, based on the provisions of section 369(1)(b),[99] was no longer property from which the Department could recover medical assistance correctly paid.[100] The court looked to the Debtor and Creditor Law,[101] however, under which the creditors of a person who fraudulently conveys property may have the conveyance set aside.[102] According to the court, the local Department of Social Services, having a claim against Mrs. Mager's estate for benefits paid, was a creditor.[103] Therefore, the Department could have the fraudulent conveyance set aside, subject to any contrary provision of law.[104] The court found no conflict between the Debtor and Creditor Law and Social Services Law section 369(1)(b), which limits recovery by the Department to the deceased recipient's estate. Rather, the court held that the Department could use the remedies of the Debtor and Creditor Law to set aside the fraudulent conveyance, thus bringing it back into the estate from which the

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98. Because the house was considered homestead property, Mrs. Mager's ownership had not affected her original eligibility for Medicaid. *Id.* at 21, 412 N.Y.S.2d at 509. The gratuitous transfer, similarly, did not defeat her continued eligibility, because the court had found in an earlier action that the transfer had not been made to qualify for assistance, but "to advance the inheritance expectation of her son, to provide consideration for past services and to defeat the future lien interest" of the Department of Social Services in the estate at her death. *In re* Mager, 57 A.D.2d 725, 725, 395 N.Y.S.2d 785, 786 (4th Dep't 1977).

99. N.Y. Soc. Serv. Law § 369(1)(b) (McKinney 1983). The relevant portion of the statute provides:

> Any inconsistent provision of this chapter or other law notwithstanding, . . .
>
> (b) there shall be no adjustment or recovery of any medical assistance correctly paid on behalf of such individual under this title, except from the estate of an individual who was sixty-five years of age or older when he received such assistance, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under twenty-one years of age or is blind or permanently and totally disabled . . . .

Id.

100. Crabb v. Mager, 66 A.D.2d at 23, 412 N.Y.S.2d at 510.

101. N.Y. Debt. & Cred. Law §§ 278, 279 (McKinney 1945).

102. Creditors whose claims have matured do not have such rights as against "a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser." *Id.* § 278(1).

103. Crabb v. Mager, 66 A.D.2d at 24, 412 N.Y.S.2d at 510. A creditor is defined as a "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." N.Y. Debt. & Cred. Law § 270.

104. Crabb v. Mager, 66 A.D.2d at 24, 412 N.Y.S.2d at 510.

Department was permitted by the Social Services Law to satisfy its claim.[105]

(ii) *Limitations on recoupment*

Under section 104 of the Social Services Law,[106] the Department may recover the cost of medical assistance not only from the recipient's estate, but also from the estate of a person liable for his support.[107] It may even bring fraudulently conveyed assets back into an estate for this purpose. Section 369, which deals specifically with recovery of medical benefits correctly paid,[108] imposes limits on the Department's right to recover.

First, the Department may not recover against the recipient's estate so long as his spouse is living or he has any living child who is under the age of twenty-one years, blind, or permanently and totally disabled.[109] The provision, however, may not

105. *Id.* at 25-26, 412 N.Y.S.2d at 511-12.

106. N.Y. Soc. Serv. Law § 104 (McKinney 1983). *See supra* notes 93-94 and accompanying text.

107. N.Y. Soc. Serv. Law § 104(1). The statute limits recovery to funds expended during the 10 year period preceding (1) the discovery of the person's real or personal property or (2) his death should he die leaving real or personal property. *Id.*

108. *Id.* § 369(1)(b).

109. *Id. See, e.g., In re* Estate of Rundell, 41 A.D.2d 995, 344 N.Y.S.2d 6 (3d Dep't 1973); *In re* Estate of McLane, 90 Misc. 2d 1067, 398 N.Y.S.2d 460 (Sur. Ct. Ontario County 1976).

N.Y. Soc. Serv. Law § 369 was enacted to meet the requirements of 42 U.S.C. § 1396a(a)(18) (1976), thereby qualifying the state for federal funds. *In re* Estate of Waring, 11 Misc. 2d 421, 422-23, 444 N.Y.S.2d 409, 411 (Sur. Ct. Nassau County 1981). The federal statute provides:

A State plan for medical assistance must —

> (18) provide that no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual), and that there shall be no adjustment or recovery (except in the case of an individual who was 65 years of age or older when he received such assistance, from his estate, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under age 21 or . . . is blind or permanently and totally disabled . . .) of any medical assistance correctly paid on behalf of such individual under the plan.

42 U.S.C. § 1396a(a)(18).

N.Y. Soc. Serv. Law § 369 imposes similar limitations on recovery so that those receiving medical assistance will not become impoverished. *In re* Estate of Waring, 111 Misc. 2d at 422, 444 N.Y.S.2d at 411 (citing *In re* Estate of Kummer, 104 Misc. 2d 978, 982, 429 N.Y.S.2d 983, 986 (Sur. Ct. Westchester County 1980); *In re* Estate of Harris, 88

have been intended to be all embracing. For example, the law disallows recovery not only from a recipient's estate while his spouse is alive, but from the spouse's estate once both have died. Thus, the beneficiaries of the estate may receive a windfall.[110] Had the statute provided for recovery from the estate of a spouse as a relative who had been responsible for the support of a recipient prior to the recipient's death, recovery could be had from the estate of the spouse. The court, in *In re Estate of Waring*,[111] recommended that the legislature remedy this situation. Similarly, under New York law, there is no requirement that a parent provide for the support of a child after the parent's death.[112] Recovery, however, is precluded from the estate of a recipient who is survived by a child who is under the age of twenty-one years, blind or disabled, even where the estate in no way provides for the benefit of such child. This also may be an unintended result of the law.

Second, section 369(1)(b) prevents recovery from a deceased recipient's estate of medical assistance correctly paid prior to

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Misc. 2d 60, 64, 387 N.Y.S.2d 796, 798 (Sur. Ct. Wayne County 1976), *aff'd*, 61 A.D.2d 881, 402 N.Y.S.2d 978 (4th Dep't 1978)).

110. *In re* Estate of Waring, 111 Misc. 2d at 423, 444 N.Y.S.2d at 411.

111. 111 Misc. 2d 421, 423, 444 N.Y.S.2d 409, 411. In *Waring*, both husband and wife had been recipients of medical assistance. Where, however, one spouse has sufficient income and resources, but *refuses* to provide assistance for the medical care of the other spouse, the Department of Social Services may recover from the estate of the responsible spouse at his death. Estate of Imburgia, N.Y.L.J., Feb. 29, 1984, at 13, col. 5 (Sur. Ct. Nassau County). The court distinguished this case from *Waring*, which did not involve N.Y. Soc. Serv. Law § 366(3)(a) (McKinney 1983) (erroneously stated in N.Y.L.J. as § 366(5)(a)). Section 366(3)(a) provides that medical assistance be furnished to an applicant whose responsible relative, having sufficient income and resources, refuses to provide the necessary assistance. "In such cases, however, the furnishing of such assistance shall create an implied contract with such relative, and the cost thereof may be recovered from such relative." N.Y. Soc. Serv. Law § 366(3)(a). Although N.Y. Soc. Serv. Law § 369(1)(b) has a general prohibition of recovery of medical assistance correctly paid, it further provides "that nothing herein contained shall be construed to prohibit any adjustment or recovery for medical assistance furnished pursuant to subdivision three of section three hundred sixty-six of this chapter." The court, therefore, found that Mr. Imburgia's refusal to provide for his wife's medical care triggered the implied contract under § 366(3)(a), thereby allowing for recovery from his estate. Estate of Imburgia, N.Y.L.J., Feb. 29, 1984, at 13, col. 6.

112. Although N.Y. Est. Powers & Trusts Law § 5-1.1 allows the surviving spouse, in certain instances, to elect to take a share of the decedent's estate, there is no similar provision for a child.

the date when he attained sixty-five years of age.[113] In determining the constitutionality of this statute, the New York Court of Appeals noted that in contrast to the more difficult eligibility requirements for those under age sixty-five (total and permanent disability, catastrophic illness, blindness, or public assistance status), economic need is the sole criterion for eligibility for those sixty-five and over.[114] The New York Court of Appeals has held that this provision does not violate the equal protection clause of either the federal or state constitutions, because the difference in treatment of those under sixty-five and those over sixty-five has a rational basis and the two groups are clearly distinguishable.[115]

C. *Lawful Means to Transfer Assets and Qualify for Medicaid*

Although many transfers of property will disqualify the transferor from eligibility for Medicaid under Social Services Law section 366(5),[116] certain transfers do not have this effect.

1. *Exempt resources*

As has already been noted, section 366(5) requires that "the uncompensated value of any nonexempt resource transferred within twenty-four months prior to the date of application for medical assistance"[117] be included in determining the assets available to a person whose initial or continuing eligibility for medical assistance is at stake.[118] The statute also creates a rebuttable presumption that any such transfers made within the stated time period were made for the purpose of qualifying for such assistance.[119] Inasmuch as the new section refers only to the transfer of nonexempt assets, arguably, one should now be able to transfer a homestead at any time without being disquali-

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113. N.Y. Soc. Serv. Law § 369(1) (McKinney 1983). *See supra* note 99.

114. *In re* Estate of Davis, 57 N.Y.2d 382, 388, 442 N.E.2d 1227, 1230, 456 N.Y.S.2d 716, 719 (1982).

115. *In re* Estate of Davis, 57 N.Y.2d 382, 442 N.E.2d 1227, 456 N.Y.S.2d 716 (1982).

116. N.Y. Soc. Serv. Law § 366(5) (McKinney 1983). *See supra* note 71.

117. N.Y. Soc. Serv. Law § 366(5) (McKinney 1983).

118. *See supra* notes 71-73 and accompanying text.

119. N.Y. Soc. Serv. Law § 366(5) (McKinney 1983). *See supra* note 71.

fied from eligibility.[120]

Section 366(5), however, addresses only eligibility for assistance under section 366. It does not deal with recoupment under section 369. The provisions of the Debtor and Creditor Law with respect to conveyances by one about to incur debts[121] presumably may still be used to set aside and bring back into an estate a homestead fraudulently conveyed at any time.[122] Therefore, in the case of a transfer of exempt property which is not covered under section 366(5), the Department of Social Services may still have a valid claim against the transferor's estate for recoupment of benefits correctly paid, provided the transferor was sixty-five years or older when he received medical assistance and has no surviving spouse or surviving child who is under twenty-one years, blind, or permanently and totally disabled. If, on the other hand, the transfer was not fraudulent, the property would not be subject to creditors' claims at death.

Since a personal residence is often the most significant asset in the estate of a Medicaid recipient, such a recipient might wish to convey a remainder interest[123] in the house to his intended beneficiaries to minimize his probate estate. By retaining a life estate,[124] the transferor preserves the income tax benefits availa-

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120. Note, however, that the intent of the transferor may still be a factor. Sherman v. Sanfilippo, 74 A.D.2d 675, 442 N.Y.S.2d 540 (3d Dep't 1980).

121. N.Y. DEBT. & CRED. LAW § 275 (McKinney 1945). The statute provides:

> Conveyances by a person about to incur debts
>
> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

Id.

122. In Sherman v. Sanfilippo, 74 A.D.2d at 676, 424 N.Y.S.2d at 542, the court denied medical assistance although the applicant had transferred her house more than one year (the prohibited period at the time) prior to her application for such assistance. Although the transfer of a homestead (exempt property) presumably will not disqualilfy an applicant from eligibility for medical assistance under the new law, a fraudulent conveyance of such property may well cause it to be brought back into the estate under the provisions of the Debtor and Creditor Law for recoupment purposes. *See generally supra* notes 89-96 and accompaning text.

123. A "remainder" interest is the interest one has in "[t]he property that passes to a beneficiary after the expiration of an intervening income interest." BLACK'S LAW DICTIONARY 1162 (rev. 5th ed. 1979).

124. A "life estate" is "[a]n estate whose duration is limited to the life of the party holding it, or some other person." *Id.* at 833.

ble to owners of real property.[125] In addition, the transferor does not subject himself to the whims of the transferee. Finally, since he owns a life estate in the homestead, it remains exempt[126] and should not be subject to creditors' claims, provided the transfer of the remainder interest occurs well in advance of the application for medical assistance and no fraud can be shown. Since the new section 366(5) speaks only of "determining the initial or continuing eligibility of any person for assistance"[127] and contains no reference to a "voluntary transfer [to defeat the] future right to recovery of medical assistance"[128] as did the repealed section 366(1)(e), it would appear that the "implied contract" between the recipient and the Department[129] is no longer intended to cover exempt assets properly transferred prior to initial eligibility.

Eligibility, however, may be jeopardized under section 366(5) by a transfer of nonexempt property. If medical benefits are paid without knowledge of an improper transfer, the benefits are incorrectly paid and, as such, are also subject to recoupment

125. The interest paid on an outstanding mortgage may be used as a deduction in determining taxable income. I.R.C. § 163(a) (West 1983). This section provides: "General Rule. — There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness." *Id.* Similarly, taxes paid on or in connection with real property (e.g., school taxes) may be deducted from gross income for the taxable year within which paid or accrued. *Id.* § 164(a)(1).

126. The New York regulations covering the exempt status of the homestead provide:

> (b)(1) A homestead of the applicant or recipient shall be considered as his homestead, and therefore exempt, while he is under the care in a medical institution if it continues to be maintained as such by him or on his behalf. 'Continues to be maintained' shall include the leasing or renting of the homestead. In such cases, the income shall be treated in accordance with subdivision (a) of this section. [Net income from realty is considered current income and applied to the income exemption.]
>
> (2) A homestead shall lose its exempt status if the following conditions are met:
>
> (i) the homestead is not being maintained on the client's behalf;
>
> (ii) no spouse, minor child or blind or disabled child of the client is living in the homestead; and
>
> (iii) the agency has medical verification that the client will be unable to return to such homestead.

N.Y. ADMIN. CODE tit. 18, § 360.6 (1983).

127. N.Y. SOC. SERV. LAW § 366(5)(a) (McKinney 1983).

128. *Id.* § 366(1)(e) (repealed 1982). *See supra* note 35.

129. N.Y. SOC. SERV. LAW § 104(1). *See supra* note 94.

under section 369(1)(a) during the transferor's life. The provision of the Debtor and Creditor Law on conveyances made with intent to defraud also applies in this situation.[130] Where a transfer is made more than two years before an incapacity that triggers an application for assistance, the two year statutory presumption does not apply. The burden of proof may still be on the transferor, however, to show that the transfer was not fraudulent.[131] Although it is unpredictable how far back a court will look, one willing to give up dominion and control of property at a relatively early age may leave the door open for eligibility. Particularly as they get older, however, many persons are reluctant to give up such control for fear of being dependent on the generosity of family members who were the donees of such property.[132] Furthermore, to the extent the gift exceeds the donor's unused equivalent exemption, payment of a gift tax will be required.[133] Should the original donee later transfer property back to the donor, their roles reverse and a gift tax may then be imposed upon the original donee (now the donor).

2. *Discretionary trusts*

To eliminate some of the problems inherent in an outright transfer, a discretionary sprinkling trust[134] may be used to re-

130. N.Y. DEBT. & CRED. LAW § 276 (McKinney 1945). The statute provides:

Conveyance made with intent to defraud

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

Id.

131. Sherman v. Sanfilippo, 74 A.D.2d at 676, 424 N.Y.S.2d at 542.

132. The donees may have the potential for being spendthrifts or might not be willing to use funds at a later date to assist their donor.

133. Sections 2501 and 2505 of the Internal Revenue Code of 1954 impose on the donor a tax on transfers of property by gift to the extent the value of the transfers exceeds certain authorized deductions and exclusions. I.R.C. §§ 2501, 2503, 2505 (West 1983) and Treas. Reg. § 25.2501-1, T.D. 7910, 48 Fed. Reg. 40,371, 40,372 (1984). A unified credit, equivalent to an exemption at the lowest bracket, is then applied against the tax imposed by § 2501. I.R.C. § 2505 (West 1983). The unified credit in 1984 is $96,300, which is equivalent to an exemption (at the lowest bracket) of $325,000. The unified credit will be increasing through 1987 when it will remain at $192,800, equivalent to an exemption of $600,000. *Id.* §§ 2001, 2501.

134. A trust is an arrangement under which one person (grantor, settlor, donor, testator, testatrix) gives part or all of his property to a trustee, who takes legal title to the property and manages it in accordance with the creator's instructions, accumulating or

duce the resources "actually available" to a potential applicant or recipient of medical assistance.[135] To avoid the statutory presumption, the trust must be created more than twenty-four months prior to the date of application. The earlier a person makes such a transfer, the better his chances will be to prove that the transfer was not made for the purpose of qualifying for assistance.[136] The trust should be irrevocable and should give a wholly independent trustee absolute and uncontrolled discretion to use such amounts of income as he determines necessary for the benefit of the grantor and other persons (generally family members) and to accumulate the balance of income.[137] Principal may also be invaded in the trustee's discretion for any beneficiaries other than the grantor.[138] The grantor, in turn, must not

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paying out the income and, eventually, the principal to one or more persons or organizations. *See* S. KURTZ, *supra* note 1, at 185-89.

A "discretionary trust" is one "in which trustees have discretion as to types of investment and also as to whether and when distributions may be made to beneficiaries." BLACK'S LAW DICTIONARY 1354 (rev. 5th ed. 1979).

A "sprinkling" or "spray" trust is a discretionary trust for more than one beneficiary. The trustee determines which beneficiaries shall receive distributions and in what amount. Provision may also be made for accumulation. *Id.* at 1356.

135. When a trustee is given discretion as to distributions, the property is no longer controlled by the grantor and is therefore not actually available to him.

136. There are several reasons that one might have to create an irrevocable discretionary sprinkling trust. For example, a person entering into a business venture, may wish to make provisions for family members so that they will not suffer should the business prove to be unsuccessful. A person who is particularly impressionable, e.g., a young person who has received a sizeable inheritance or a recently widowed person, might create such a trust to protect himself and his family against his own indiscretion.

137. The grantor might instead be the sole income beneficiary with alternate provisions should he become disabled. In that event, the trustee would be given discretion to sprinkle income among the grantor, his spouse and other dependents. See *infra* note 181 and accompanying text for suggested provisions to determine when a disability exists.

Note, however, that as a general rule, transfers in trust for the benefit of a grantor-beneficiary are void as against the grantor's existing or future creditors. N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney 1967). *See also* Dillon v. Spilo, 275 N.Y. 275, 9 N.E.2d 864 (1937); *In re* Coyle's Trust, 280 A.D. 857, 113 N.Y.S.2d 878 (1st Dep't 1952), *aff'd*, 305 N.Y. 809, 113 N.E.2d 556, 122 N.Y.S.2d (pagination shown as 305 N.Y. 807, Ct. App.) (1953). Some commentators believe this to be the case even where the trust created by the grantor-beneficiary is merely a spendthrift trust, support trust, or a transfer in which the trustee is given absolute discretion to pay the income to the settlor or accumulate it. *See* Rohan, *Practice Commentary* to N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney Supp. 1983-1984). Where, however, the settlor retains only a partial beneficial interest in the trust, his creditors may reach the trust only to the extent of such interest. *Id.*

138. This will preclude trust corpus from being considered an available resource to

be able to demand that assets be distributed to him.[139] So long as the grantor has parted with such dominion and control and there are no "sniffings" of a fraudulent transfer, his creditors should not be able to reach any of the trust's assets.[140]

If the trustee has unfettered discretion as to income payable to the grantor, such income will not be an actual resource and, possibly, will not be deemed an available resource for purposes of determining medical assistance eligibility.[141] Since principal

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the grantor. On the other hand, the draftsman might take the less cautious path by giving the trustee discretion to invade corpus on behalf of the grantor provided that no such invasions be made for the grantor's medical expenses. This less prudent approach, however, may waive a red flag for those looking for fraudulent intent. This should be pointed out to the grantor.

Should the grantor and draftsman opt instead for extreme prudence, discretionary invasions for anyone responsible for the grantor's support (e.g., his spouse) should be limited to the use of that person, with specific provision that the funds not be used by that person for the payment of the grantor's medical expenses.

139. To the extent the grantor reserves the right to revoke the trust, it is an available resource to him.

140. There is a difference between the Debtor & Creditor Law and the requirements for Medicaid eligibility. The Debtor & Creditor Law does not look to the intent of the transferor as determinative. To the extent the grantor may benefit from property he has placed in trust, it is subject to his creditor's claims. For Medicaid, though, there is a rebuttable presumption that transfers of nonexempt property within 24 months prior to applying for initial or continuing eligibility were made with intent to qualify for assistance. Even if one is deemed ineligible because the transferred assets are included as an available resource, the period of ineligibility is reasonably limited: 24 months from the date of the transfer if excess resources are $12,000 or less, with an additional month of ineligibility for each $2000 in excess of $12,000. N.Y. DEBT. & CRED. LAW § 275 (McKinney 1945); N.Y. SOC. SERV. LAW § 355(5) (McKinney 1983). Transfers made more than 24 months prior to the application for eligibility may also be considered available resources where there is suspicion of fraudulent intent. *See* Harrington v. Blum, 117 Misc. 2d 623, 458 N.Y.S.2d 864 (Sup. Ct. N.Y. County 1982).

141. *See* Talis, *Medicaid as an Estate Planning Tool for the Elderly*, 66 MASS. L. REV. 89 (1981). Compare the wholly discretionary irrevocable trust, where the grantor gives up dominion and control, with a revocable trust, where the grantor reserves the power to terminate the trust. The grantor's creditors can reach the revocable trust assets. The N.Y. Est. Powers & Trusts Law provides that "[a] disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator." N.Y. EST. POWERS & TRUSTS LAW § 7-3.1 (McKinney 1967). Since the grantor continues to control the "purse strings," the assets also remain available to him for Medicaid eligibility purposes. Similarly, if a grantor creates a trust which upon his disability will be converted to an irrevocable trust to benefit him and any other persons desired, his creditors can reach the trust assets. N.Y. EST. POWERS & TRUSTS LAW § 10-7.2 provides that

> [p]roperty covered by a general power of appointment which is presently exercisable . . . is subject to the payment of the claims of creditors of the donee . . . . It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the

may not be invaded for the grantor, it will not be deemed an available resource. Recent case law suggests that where the grantor is the sole beneficiary and the trustee has discretion to invade principal for his benefit, trust principal is a resource available to him.

For example, in *Harrington v. Blum*,[142] Margaret Harrington created and transferred assets worth $60,000 to an irrevocable inter vivos trust providing for her own needs by authorizing invasion of principal in the discretion of the trustee, her son.[143] The New York County Supreme Court held that the denial of Mrs. Harrington's application for health care assistance, made almost four years after she created the trust, was "neither arbitrary nor capricious."[144] The court looked to the state constitution which provides that " '[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions.' "[145] In addition, the court reviewed certain requirements of the Social Services Law,[146] stating that "it is clear that medical assistance is to be limited to *needy* per-

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power.

Since the trust will be revocable until such time as he becomes incapacitated and seeks medical assistance, the statutory presumption will prevail.

Where, however, the grantor is not seeking to qualify for Medicaid benefits, the convertible trust is an excellent estate planning tool to assure the orderly transfer and management of assets upon disability, while avoiding the time, nuisance, and expense involved in the appointment of a conservator or committee. If the trust is not fully funded, a durable power of attorney should be used to transfer all of the grantor's assets into the trust. To maximize flexibility, the trust should include a "substitution of judgment" provision, wherein the trustee is empowered to make such payments of income or principal to such persons as the trustee believes the grantor would have made. The trustee might even be given discretion to change the dispositive provisions for tax planning purposes in light of statutory changes (e.g., the marital deduction). *See* Callahan, *supra* note 13, at 426-28.

142. 117 Misc. 2d 623, 458 N.Y.S.2d 864 (Sup. Ct. N.Y. County 1982).

143. *Id.* at 624, 458 N.Y.S.2d at 865.

144. *Id.* at 625, 458 N.Y.S.2d at 866.

145. *Id.* at 624, 458 N.Y.S.2d at 865 (quoting N.Y. CONST. art. 17, § 1).

146. Harrington v. Blum, 117 Misc. 2d at 624 (opinion incorrectly cites § 366(6)(b) of the Social Services Law; correct cite given in the New York Supplement as § 366(2)(b)), 458 N.Y.S.2d at 865 (quoting N.Y. SOC. SERV. LAW § 365-a (McKinney 1983) and citing *id.* § 366(2)(b)). N.Y. SOC. SERV. LAW § 365-a requires that "[t]he amount, nature and manner of providing medical assistance for needy persons shall be determined by the public welfare official." N.Y. SOC. SERV. LAW § 366(2)(b) authorizes the public welfare official to consider income and resources available to the applicant.

sons."[147] Emphasizing that "'needy' does not encompass a person who may create that need by failing or refusing to provide for her own needs,"[148] the court turned to the regulations of the Department of Social Services which provide that "[r]esources shall be so utilized as to eliminate or reduce the need for public assistance . . . and conserve public funds . . . . Applicants and recipients shall generally be required to utilize available resources and to apply for and otherwise pursue potentially available resources."[149] While Mrs. Harrington had provided for her own needs, her son's failure as trustee to exercise discretion in her behalf was suspect of a conflict of interest.[150]

Harrington involved a trust created by a grantor solely for her own benefit. The court's decision may have turned on the son's conflict of interest as trustee. There is no indication that when Mrs. Harrington created the trust almost four years earlier, she did so with intent to avail herself of Medicaid benefits at a later date and to preserve her own assets for her son. It would appear, however, that New York Estates, Powers & Trusts Law (EPTL) section 7-3.1, entitled *Disposition in trust for creator void as against creditors*, precludes a grantor-sole beneficiary of a trust from doing so.[151]

Where there is no intent to perpetrate a fraud, the taint may not be present if the grantor, when in reasonably good health with no foreseeable disability, creates a sprinkling trust, provided that the trustee has no conflict of interest and the

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147. Harrington v. Blum, 117 Misc. 2d at 624, 458 N.Y.S.2d at 865.

148. *Id.* at 624, 458 N.Y.S.2d at 866 (citing Flynn v. Bates, 67 A.D.2d 975, 413 N.Y.S.2d 446 (2d Dep't 1979); Barie v. Lavine, 48 A.D.2d 36, 367 N.Y.S.2d 587 (3d Dep't 1975).

149. Harrington v. Blum, 117 Misc. 2d at 624-25, 458 N.Y.S.2d at 866 (quoting N.Y. ADMIN. CODE tit. 18, § 352.23(a) (1982)).

150. Harrington v. Blum, 117 Misc. 2d at 625, 458 N.Y.S.2d at 866.

151. N.Y. EST. POWERS & TRUST LAW § 7-3.1 (McKinney 1967).

> [A]n otherwise appropriate procedure cannot be utilized to perpetrate a fraud. In the establishment of inter vivos or testamentary trusts, circumscriptions which would preclude the invasion of the trust to pay costs which would otherwise be payable from a public program can be created. However, with reference to inter vivos trusts, it appears that EPTL 7-3.1 would preclude a settlor of a trust who is also the beneficiary from availing himself of this circumscription. Such transfers suggest part of a scheme to perpetrate a fraud.

Letter from Surrogate Bertram R. Gelfand to author (Dec. 27, 1983) (discussing, in general, transfers of property and potential claims of the Department of Social Services).

other beneficiaries are not solely persons responsible for the grantor's support.[152] The grantor might also retain a testamentary power to appoint the trust remainder among his descendants or anyone other than himself, his estate, his creditors, or the creditors of his estate. This will enable him to determine at a later time who will receive the trust remainder. Despite the fact that the grantor has parted with dominion and control over income and principal payable to him and has retained a limited testamentary power of appointment, the trust will nonetheless be deemed a taxable gift because the trustee has unrestricted power to pay income and principal to the other beneficiaries.[153] The special power of appointment should not, however, affect the rights of creditors,[154] provided the disposition is not fraudulent itself.[155]

By creating a fully discretionary irrevocable sprinkling trust with a special testamentary power of appointment, a person may be able to eliminate the "taint" of "available resources" for Medicaid eligibility purposes (assuming the assets are irrevocably transferred sufficiently before the twenty-four month period). At the same time he can preserve flexibility over the disposition of his assets at death.

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152. Since a spouse is a responsible relative, the beneficiaries should not be limited to grantor and spouse.

153. *See* Rev. Rul. 77-378, 1977-2 C.B. 348; *cf.* Rev. Rul. 76-276, 1976-2 C.B. 299 (where grantor's retained interest in an irrevocable trust was incapable of valuation and was deemed a taxable gift because the trustee had absolute discretion to distribute principal as income). Although the sprinkling provisions would cause the trust to be taxable for federal gift tax purposes, the grantor's ultimate goal of providing for family members is carried out through "substitution of judgment" by empowering the trustee to pay income and principal to the other beneficiaries as the trustee feels the grantor would have done. *See supra* note 141. In addition, a gift tax would only be payable if the value of the trust exceeds the grantor's unused equivalent exemption. *See supra* note 133 and accompanying text.

The transfer would not be taxable as a completed gift if the grantor retained a limited testamentary power of appointment but did not empower the trustee to sprinkle income and principal among other beneficiaries. Treas. Reg. § 25.2511-2(b), T.D. 7910, 48 Fed. Reg. 40,371, 40,374 (1983). This, however, would limit flexibility in providing for family members while the grantor is incapacitated.

154. N.Y. EST. POWERS & TRUSTS LAW § 10-7.1 (McKinney 1967) provides that "[p]roperty covered by a special power of appointment is not subject to the payment of the claims of creditors of the donee, his estate or the expenses of administering his estate."

155. *See* Glasser, *Practice Commentary* to N.Y. EST. POWERS & TRUST LAW § 10-7.1 (McKinney Supp. 1983-1984).

3. *Private annuities*

Another approach is the private annuity. This option is particularly attractive for the individual who does not wish to give the trustee discretion to sprinkle income and principal among other beneficiaries. A private or family annuity is a contractual arrangement between two individuals, usually closely related, wherein the transferee promises to pay an annuity to the transferor in consideration for the property transferred to the transferee.[156] Generally, the annuity is for life.[157] In addition to providing income security to an older family member and removing assets from his taxable estate, the private annuity enables him to transfer property to other family members with beneficial tax consequences.[158] The private annuity has three components:

(1) investment in the contract (treated as return of capital and not taxed),

(2) annuity income (taxed as ordinary income), and

(3) capital gain to the extent the present value of the annuity exceeds the transferor's basis.[159]

For example, Mrs. Harrington,[160] instead of creating a trust, could have transferred her assets valued at $60,000 to her son in exchange for his promise to pay her $4500 annually. Assuming she was seventy years of age and transferred the property in 1983, the present value of her annuity would be $27,234.90.[161] If her basis in the property was $25,000, she would have a gain of $2,234.90.[162] The excess of the fair market value of the property over the value of the annuity received would constitute a gift to

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156. S. KURTZ, *supra* note 1, at 562.

157. Allen, *Factors that Will Influence the Method to Handle Intra-Family Property Transfers*, 10 TAX'N FOR LAW. 228, 228 (1982).

158. *Id.*

159. *See generally* I.R.C. §§ 72(a), (b) (West 1983); Treas. Reg. § 1.72-1, T.D. 6676, 1963-2 C.B. 41, 45; *id.* § 1.72-2, T.D. 6885, 1966-2 C.B. 307, 334; *id.* § 1.72-3 (1956); *id.* § 1.72-4, T.D. 7352, 1975-1 C.B. 34; Rev. Rul. 69-74, 1969-1 C.B. 43.

160. *See supra* text accompanying notes 129-35.

161. Using the 10% tables (effective Oct. 31, 1983) for a 70 year old person to receive a life annuity of $4500: $4500 x 6.0522 = $27,234.90. Prop. Treas. Reg. § 25.2512-5, 48 Fed. Reg. 50,087, 50,108 (1983); Rev. Rul. 69-74, 1969-1 C.B. 43.

162. Gain realized is determined by deducting the transferor's basis in the property from the present value of the annuity. $27,234.90 - $25,000.00 = $2,234.90. Rev. Rul. 69-74, 1969-1 C.B. 43.

her son of $32,765.10 ($60,000 minus $27,234.90).[163] She would be entitled to a deduction of $10,000 for the annual exclusion.[164] Note that if she had three children, she could create an equal separate annuity with each, minimizing the taxable gift by utilizing three annual exclusions of $10,000 each.[165] In either event, however, no gift tax would be incurred so long as her equivalent exemption had not been exhausted.[166] Although there would be no gift tax, the gift portion might well be deemed a transfer without consideration and, to that extent, an "available resource" for medicaid eligibility purposes should the transaction occur within the twenty-four month period. The gain would be reported ratably over Mrs. Harrington's lifetime and only from that portion includible in gross income when applying section 72 of the Internal Revenue Code.[167] The investment in the contract would be her basis in the property transferred. In addition, the taxable and nontaxable portion of each payment during Mrs. Harrington's lifetime would be determined by utilizing the figures calculated above, an exclusion ratio, and her life expectancy.[168]

An annuity is considered a sale or exchange. In addition, it

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163. *Id.*

164. I.R.C. § 2503(b) (West 1983).

165. *Id.*

166. *See supra* note 133.

167. Rev. Rul. 69-74, 1969-1 C.B. 43.

168. I.R.C. §§ 72(a)-(c) (West 1983); Treas. Reg. § 1.72-1, T.D. 6676, 1963-2 C.B. 41, 45; *id.* § 1.72-2, T.D. 6885, 1966-2 C.B. 307, 334; *id.* § 1.72-3 (1956); *id.* § 1.72-4, T.D. 7352, 1975-1 C.B. 34; Rev. Rul. 69-74, 1969-1 C.B. 43.

The expected return would be $67,500 (annual proceeds of $4500 multiplied by 15, the life expectancy) using *No. 107, Expectation of Life and Expected Deaths by Race, Age, and Sex: 1979,* in STATISTICAL ABSTRACT, *supra* note 3, at 72 (103d ed. 1982); I.R.C. § 72(c)(3) (West 1983); Treas. Reg. § 1.72-5 (1956). The exclusion ratio is 37.04%: $25,000 (investment in contract) divided by $67,500 (expected return). I.R.C. § 72(b) (West 1983); Treas. Reg. § 1.72-4, T.D. 7352, 1975-1 C.B. 34; Rev. Rul. 69-74, 1969-1 C.B. 43. Of the annual proceeds of $4500, $1,666.80 (37.04% of $4500) would be excluded each year as a return of capital. I.R.C. § 72(b) (West 1983); Treas. Reg. § 1.72-4, T.D. 7352, 1975-1 C.B. 34; Rev. Rul. 69-74, 1969-1 C.B. 43. Of the balance, $148.99 would be treated as capital gain (capital gain income ($2,234.90) divided by life expectancy (15) equals $148.99) and $2,684.21 as ordinary annuity income. Rev. Rul. 69-74, 1969-1 C.B. 43. Annual proceeds less the exclusion amount and capital gain portion equals ordinary annuity income. Should the annuitant live more than her life expectancy of 15 years, subsequent payments would have two components — the exclusion of $1,666.80 and ordinary annuity income of $2,833.20. I.R.C. §§ 72(a)-(c) (West 1983); Treas. Reg. § 1.72-4, T.D. 7352, 1975-1 C.B. 34; Rev. Rul. 69-74, 1969-1 C.B. 43.

is distinguishable from a trust in that the annuity requires that a *specified* sum of money be payable annually.[169] Therefore, subject possibly to the gift portion, it should not fall within section 366(5)(a) of the Social Services Law as the uncompensated value of a nonexempt, transferred resource.[170] Where a testamentary trust created an annuity, a surrogate's court recently refused to authorize invasion of principal for the trust annuitant.[171] It would seem to follow that in a private annuity (unlike a discretionary trust created by a settlor for his own benefit, e.g., Mrs. Harrington's trust), the transferor is entitled only to the annual annuity payment and not to any of the additional property

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169. In *In re* Estate of Miller, 101 Misc. 2d 778, 421 N.Y.S.2d 981 (Sur. Ct. Monroe County 1979), the court looked to the language in a will creating an annuity payable in a testamentary trust. The will provided for a *fixed* sum payable out of income, and from principal only to the extent income is insufficient. If income is greater than the annuity amount, only the annuity amount is payable to the beneficiary. *Id.* at 779, 421 N.Y.S.2d at 982. The court distinguished the annuity from a trust which can pay or apply to the use of the beneficiary all of the income earned on the trust principal. *Id.* at 780, 421 N.Y.S.2d at 983 (citing N.Y. EST. POWERS & TRUSTS LAW § 7-1.6 (McKinney 1967)).

170. N.Y. SOC. SERV. LAW § 366(5)(a) (McKinney 1983). *See supra* text accompanying notes 52-54.

171. *In re* Estate of Miller, 101 Misc. 2d at 780, 421 N.Y.S.2d at 983. In holding that it could not authorize invasion of principal under N.Y. EST. POWERS & TRUSTS LAW § 7-1.6 (McKinney 1967) where the trust provided for the beneficiary to receive a *fixed* sum from income and only from principal if necessary, the court looked to the legislative history of the modification of spendthrift trusts in New York with respect to creditors' rights. *In re* Estate of Miller, 101 Misc. 2d at 780, 421 N.Y.S.2d at 983 (citing TEMPORARY STATE COMM. ON THE LAW OF ESTATES, REPORT NO. 6.6B, RELAXATION OF SPENDTHRIFT TRUST CONCEPT —TERMINATION OF TRUSTS — CREDITORS, 2 N.Y. LEGIS. DOC., No. 19, at 459 (1963) [hereinafter cited as REPORT]).

Unlike spendthrift trusts, annuities were never subject to limitations and, therefore, were unaffected by the new laws regarding such trusts. REPORT at 465, 476-77. The laws were altered to allow invasion of corpus under certain circumstances to carry out the testator's intent where

> through lack of experience of the draftsman, lack of thought on the part of the settlor or testator, or the result of inflation or substantial decrease in the corpus of the trust which has been considered by neither of the above, *no provision for invasion of corpus has been inserted in the instrument.* The Court being without power to invade is helpless to grant relief and the intent of the settlor or testator that the primary object or objects of his bounty be provided for is thus frustrated.

In re Estate of Miller, 101 Misc. 2d at 780, 421 N.Y.S.2d at 983 (quoting REPORT at 468) (emphasis added by court). *See infra* notes 195-201 and accompanying text. The court made a distinction between trusts and annuities, finding that annuities provide for invasion of trust principal if income is insufficient to meet the precise amount to be paid, thereby leaving no question as to the testator's intent. *In re* Estate of Miller, 101 Misc. 2d at 780, 421 N.Y.S.2d at 983.

transferred. Presumably then, in the example given, only the $4500 annual annuity would be considered in determining Medicaid eligibility for Mrs. Harrington. If she had no other income, the $4500 would be exempt.[172]

III. The Disabled Beneficiary: Discretionary Trusts

A. *Background*

In addition to helping an individual plan for his own future health care needs, the estate planner is often called upon to advise a parent how best to provide for a handicapped child while preserving assets for other children. When a trust for a third party beneficiary has appropriate discretionary provisions, the courts may be powerless to convert the trust corpus into an "available resource" of a disabled income beneficiary for purposes of determining that beneficiary's eligibility for medical assistance. This is particularly significant to an individual who may feel obligated to provide an equal or greater portion of his estate for an incapacitated child or parent,[173] but without total sacrifice to his other children. If an individual's assets are limited, he may wish to ensure that the disabled person will benefit from government assistance programs, while insulating the trust assets from the claims of a social welfare agency.[174]

Eligibility requirements for SSI and Medicaid benefits for a handicapped child are similar to those for Medicaid benefits for an elderly person.[175] To qualify, the handicapped child must

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172. *See* N.Y. Soc. Serv. Law § 366(2)(a)(8); *see also supra* note 51.

173. This section deals with third party, disabled beneficiaries. For convenience, discussion focuses on a disabled child, but is equally relevant to any disabled third party.

174. Concern that governmental agencies will reach the estate or trust has prompted some individuals to create secret trusts by giving money to and imposing a moral obligation on a friend or relative. Since the morally obligated person may not be legally bound, there is always the risk that due to his own disabililty, dishonesty, or death, he will not adequately serve the needs of the incapacitated beneficiary. For those wishing to preserve their assets for other family members, another alternative is to disinherit a handicapped child. Unfortunately, it is that child who most likely needs his parents' help more than the other beneficiaries.

175. *See supra* text accompanying notes 46-52. This Comment focuses on medical assistance. For a discussion of SSI and financial planning for a handicapped child, see Davis, *Financial and Estate Planning for Parents of a Child with Handicaps*, 5 W. New Eng. L. Rev. 495 (1983).

have limited income and resources.[176] Consequently, funds that might vest in the child, such as a custodian account under the Uniform Gift to Minors Act,[177] must be avoided. Similarly, proceeds from life insurance or pension and profit sharing plans should not be payable outright to a disabled child.

A good estate plan, utilizing an effective will[178] with alternate dispositions, is essential, particularly when a disabled beneficiary is involved. The dispute in *In re Estate of Scrivani*[179] could have been avoided had Marie Scrivani not died intestate,[180] but with a will providing for the contingency of Mrs. Molinelli's incapacity. The will might have provided for a discretionary trust for Mrs. Molinelli or for outright distribution to her heirs if she were incapacitated. Thus, if it is not already ob-

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176. The income of a parent with whom the child lives will be deemed to be the child's income for SSI eligibility purposes. 20 C.F.R. § 416.1167(d) (1983); N.Y. Soc. Serv. Law § 208(6) (McKinney 1983). When a child ceases to live with a parent, the deeming rules stop applying after the first full month of separation (unless temporary). 20 C.F.R. § 1167(a). A child away at school who comes home on some holidays or weekends, however, is considered temporarily away. *Id.* Eligibility standards for medical assistance are similar. See 42 C.F.R. § 435.724 for a comparison. The New York Eligibility rule provides:

> In establishing standards for determining eligibility for and amount of such assistance, the department shall take into account only such income and resources, in accordance with federal requirements, as are available to the applicant or recipient and as would not be required to be disregarded or set aside for future needs, and there shall be a reasonable evaluation of any such income or resources. There shall not be taken into consideration the financial responsibility of any applicant or recipient of assistance under this title unless such applicant or recipient is such individual's spouse or such individual's child who is under twenty-one years of age. In determining the eligibility of a child who is categorically eligible as blind or disabled, . . . the income and resources of parents or spouses of parents are not considered available to that child if she/he does not regularly share the common household even if the child returns to the household for periodic visits.

N.Y.Soc. Serv. Law § 366(2)(b) (McKinney 1983).

177. N.Y. Est. Powers & Trusts Law §§ 7-4.1 to -.13 (McKinney Supp. 1983-1984).

178. For a will to effectuate its intended plan, sufficient assets must pass under the will. Some examples of assets that do not pass under the terms of the will are: jointly held property (which passes by operation of law to the survivor), living trusts which continue after the death of the decedent-grantor, and life insurance and employee benefit plans (which can pass by contract to the named beneficiary) if not payable to the estate. 1 A. Casner, Estate Planning 131 (4th ed. 1980); 2 *id.* at 735. If there are not sufficient assets in the decedent's name alone, the will plan might not take effect as anticipated. 1 *id.* at 131.

179. 116 Misc. 2d 204, 204, 455 N.Y.S.2d 505, 505 (Sup. Ct. N.Y. County 1982). *See supra* text accompanying notes 81-90.

180. *In re* Estate of Scrivani, 116 Misc. 2d at 205, 455 N.Y.S.2d at 507.

vious that a beneficiary is "incapacitated," the will should set forth adequate guidelines for making that determination.[181] The trust must then be drafted to enable the beneficiary to take advantage of government entitlement programs.[182]

As a general rule, the Department of Social Services will deny an application for medical assistance on the grounds that the trust corpus is an available resource for the payment of medical expenses.[183] The applicant has the burden of proving eligibility for medical assistance.[184] The New York regulations for the medical assistance program require applicants and recipients to "utilize available resources and to apply for and otherwise pursue potentially available resources."[185] Until a bona fide effort has been made on behalf of the needy income beneficiary to invade the trust corpus, the beneficiary may not be considered a person who requires medical assistance under Social Services Law section 366(1).[186]

Prior to 1978, the courts consistently directed that the trust corpus be invaded so that publicly funded programs would not be used to assist the life beneficiary.[187] This was in keeping with

181. The will (or inter vivos trust) might leave it in the discretion of the trustee, a family member, or physician(s) to determine if a beneficiary

> is unable to engage in any substantial gainful activities by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months; or who, in the case of a child under the age of eighteen, suffers from any medically determinable physical or mental impairment of comparable severity.

N.Y. Soc. Serv. Law § 208(5) (McKinney 1983). See also Callahan, *supra* note 13, at 427, which suggests that two disinterested, competent physicians (the grantor's physician or one selected by the trustee and another selected by the closest relative) should determine if a disability has occurred.

182. *See infra* text accompanying notes 215-17.

183. Because the New York regulations require that an applicant for medical assistance seek all possible available resources (N.Y. Admin. Code tit. 18, § 352.23(a) (1982)), the Department generally does not approve the application of a trust beneficiary before such beneficiary, or someone in his behalf, seeks trust invasion.

184. Hoelzer v. Blum, 93 A.D.2d 605, 609, 462 N.Y.S.2d 684, 687 (2d Dep't 1983) (citing Moffett v. Blum, 74 A.D.2d 625, 424 N.Y.S.2d 923 (2d Dep't 1980); Sherman v. Sanfilippo, 74 A.D.2d 675, 424 N.Y.S.2d 540 (3d Dep't 1980)).

185. N.Y. Admin. Code tit. 18, § 352.23(a) (1982).

186. Hoelzer v. Blum, 93 A.D.2d at 609, 462 N.Y.S.2d at 687.

187. *In re* Estate of Escher, 94 Misc. 2d 952, 958, 407 N.Y.S.2d 106, 110 (Sur. Ct. Bronx County 1978), *aff'd sub nom. In re* Gross, 75 A.D.2d 531, 426 N.Y.S.2d 1008 (1st Dep't), *aff'd*, 52 N.Y.2d 1006, 420 N.E.2d 91, 438 N.Y.S.2d 293 (1980) (citing *In re* Estate

a strong public policy that programs funded by the government were only for the destitute and, therefore, should not be used if a trust fund was available.[188] Further, there was a presumption that when one created a trust, under no circumstance would he have wanted his testamentary beneficiary to become a burden on a publicly funded program.[189]

B. *Recent Case Law*

In 1978, in *In re Estate of Escher*,[190] a surrogate's court took a new look at the welfare system and held that a trustee had not abused her discretionary power when she refused to invade the corpus to pay the bills of the life beneficiary.[191] The Surrogate noted that public assistance programs have expanded from classic "welfare" viewed as charity to numerous social insurance programs now looked upon as entitlements.[192] It appears that New York courts will no longer require a trustee to invade a trust for services the state is obligated to provide unless a clear intent to do so can be discerned from the trust instrument.[193]

In a similar vein, the appellate division, in *Hoelzer v. Blum*,[194] recently held that where the trust remainderpersons were not prepared to consent to invasion of the trust corpus for the benefit of the income beneficiary, the courts were without power under EPTL section 7-1.6(a) to convert the trust corpus

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of Harold, 87 Misc. 2d 1001, 386 N.Y.S.2d 972 (Sur. Ct. Erie County 1976) (where in the absence of specific written consent of ultimate remainderman pursuant to N.Y. Est. Powers & Trusts Law § 7-1.6(a), court denied application to invade trust principal although it urged that testator would not have intended to require his spouse to resort to public assistance and welfare aid with other funds available, and stressed that the burden of care and support should not be shifted to the county except for emergency); *In re* Estate of Marafioti, 80 Misc. 2d 206, 362 N.Y.S.2d 807 (Sur. Ct. Monroe County 1974) (where trust provided for income beneficiary to receive payments at stated ages, but no express authority for the trustees to invade corpus for support and maintenance, court directed invasion to the extent of $5000 each year for that purpose rather than to make the beneficiary a public charge)).

188. *In re* Estate of Escher, 94 Misc. 2d at 958-59, 407 N.Y.S.2d at 110.

189. *Id.* at 958, 407 N.Y.S.2d at 110.

190. 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Sur. Ct. Bronx County 1978) (Sur. Bertram R. Gelfand).

191. *Id.*

192. *Id.* at 959, 407 N.Y.S.2d at 111.

193. Estate of Coyne, N.Y.L.J., Mar. 5, 1982, at 6, col. 2 (Sur. Ct. N.Y. County).

194. 93 A.D.2d 605, 462 N.Y.S.2d 684 (2d Dep't 1983).

into an "available resource" of the income beneficiary for purposes of determining the income beneficiary's eligibility for Medicaid assistance.[195] EPTL section 7-1.6, which covers trusts created on or before June 1, 1966, prohibits the courts from invading the corpus for the maintenance, support, or education of an income beneficiary, unless (1) such authorization is given in the trust instrument, or (2) the needy income beneficiary will ultimately be entitled to share in the trust corpus and all other beneficiaries are adult and competent and consent in writing to invasion of corpus.[196]

Where the trustees have refused to exercise a discretionary power to invade principal, the courts will not interfere unless it is shown that the trustees have abused their power.[197] Thus, in *Hoelzer*, where the testator had placed his daughter, disabled from birth, in a nursing home and had provided for trust income to be paid to the home with no additional authorization to use corpus if trust income was insufficient for maintenance, the trust could not be construed to mean that he intended the ongoing care to include any emergency "sickness, accident or other unusual circumstances" for which he had provided for invasion.[198]

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195. *Id.*

196. N.Y. EST. POWERS & TRUSTS LAW § 7-1.6(a) (McKinney 1967). The subsection provides:

> Notwithstanding any contrary provision of law, the court having jurisdiction of an express trust, heretofore created or declared, to receive the income from property and apply it to the use of or pay it to any person, unless otherwise provided in the disposing instrument, may in its discretion make an allowance from principal to any income beneficiary whose support or education is not sufficiently provided for, to the extent that such beneficiary is indefeasibly entitled to the principal of the trust or any part thereof or, in case the income beneficiary is not entitled to the principal of the trust or any part thereof, to the extent that all persons beneficially interested in the trust are adult and competent and consent thereto in writing; provided that the court, after hearing on notice to all those beneficially interested in the trust in such manner as the court may direct, is satisfied that the original purpose of the creator of the trust cannot be carried out and that such allowance effectuates the intention of the creator.

Id.

197. *See* Hoelzer v. Blum, 93 A.D.2d at 612, 462 N.Y.S.2d at 689 (citing Oddo v. Blum, 83 A.D.2d 868, 868, 442 N.Y.S.2d 23, 24 (2d Dep't 1981); *In re* Estate of Damon, 71 A.D.2d 916, 917, 419 N.Y.S.2d 742, 743 (2d Dep't 1979)).

198. Hoelzer v. Blum, 93 A.D.2d at 613, 462 N.Y.S.2d at 689. *See also In re* Estate of Damon, 71 A.D.2d at 916, 419 N.Y.S.2d at 743 (where the trustees' discretionary power to invade "in the event of critical illness, operation or need for operation or other emergency" could not be stretched to provide for increased costs for routine care at an

C. *EPTL Section 7-1.6(b)*

For trusts created after June 1, 1966, the courts have discretion to utilize principal for an income beneficiary for whom support or education is insufficiently provided.[199] They may direct invasion even if such beneficiary is not entitled to any principal.[200] The courts, however, must first be satisfied that the original purpose of the creator of the trust cannot be carried out without invasion of principal and that such invasion effectuates the creator's intent.[201]

1. *Intent*

The creator's intent is significant. For example, in *In re Estate of Ross*,[202] a trust specified that it was not the testatrix' intention to provide for the life beneficiary's support, but to give her supplemental assistance. The Department of Social Services stopped Medicaid payments to the nursing home, because resources in the trust exceeded the exempt amount.[203] Despite the trustees' unfettered discretionary power to invade corpus, the court could not fault them for refusing to invade the corpus when the Department stopped payments.[204] The will expressly required the trustees to consider the beneficiary's other sources

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institution where the beneficiary had been a patient for 30 years).

199. Hoelzer v. Blum, 93 A.D.2d at 611, 462 N.Y.S.2d at 688. *See also* N.Y. Est. Powers & Trusts Law § 7-1.6(b) (McKinney 1967). The subsection provides:

> Notwithstanding any contrary provision of law, the court having jurisdiction of an express trust, hereafter created or declared, to receive income from property and apply it to the use of or pay it to any person, unless otherwise provided in the disposing instrument, may in its discretion make an allowance from principal to any income beneficiary whose support or education is not sufficiently provided for, whether or not such person is entitled to the principal of the trust or any part thereof; provided that the court, after a hearing on notice to all those beneficially interested in the trust in such manner as the court may direct, is satisfied that the original purpose of the creator of the trust cannot be carried out and that such allowance effectuates the intention of the creator.

Id.

200. *Id.* § 7-1.6(b).

201. *Id.*

202. 96 Misc. 2d 463, 409 N.Y.S.2d 201 (Sur. Ct. Yates County 1978).

203. *Id.* at 466, 409 N.Y.S.2d at 202.

204. *Id.* at 468, 409 N.Y.S.2d at 202. *See also* Estate of Coyne, N.Y.L.J., Mar. 5, 1982, at 6, col. 2 (Sur. Ct. N.Y. County).

of support.[205] The court construed this to include her statutory entitlements to Medicaid assistance.[206]

Intent was also considered important in *Maul v. Fitzgerald*[207] where a testator had created a $5000 trust for the "proper care, support and maintenance" of his mentally retarded son.[208] The court found that the testator, a physician, was fully aware of his son's condition and familar with mental hygiene and social services.[209] Monthly expenses at the hospital far exceeded the trust income and his son's meager income from Social Security.[210] Therefore, the court considered it inappropriate to presume that the testator would prefer trust invasion to having society share the burden.[211] Since the testator, if living, would have no obligation to support the beneficiary (who was over twenty-one years of age), the court decided it was powerless to impose this obligation on the testamentary trustee.[212]

In *Moloshok v. Blum*,[213] a testamentary trust gave the trustees absolute discretion to invade the corpus and, in addition, provided that they "should not be held accountable to any court or to any person for the exercise or non-exercise of this completely discretionary power."[214] The court concluded that the trustee's refusal to invade could not be faulted and, therefore, the corpus could not be considered available to the beneficiary for Medicaid eligiblity purposes.[215]

2. *Drafting considerations*

Under New York law since *In re Estate of Escher*, trusts can be drafted to enable the beneficiary to take advantage of public assistance programs.[216] The courts generally will not question the trustee's non-exercise of his complete discretion

205. *In re* Estate of Ross, 96 Misc. 2d at 465, 409 N.Y.S.2d at 202.
206. *Id.* at 468, 409 N.Y.S.2d at 203.
207. 78 A.D.2d 706, 432 N.Y.S.2d 282 (3d Dep't 1980).
208. *Id.* at 707, 432 N.Y.S.2d at 283.
209. *Id.* at 708, 432 N.Y.S.2d at 284.
210. *Id.* at 707, 432 N.Y.S.2d at 283.
211. *Id.* at 708, 432 N.Y.S.2d at 284.
212. *Id.* (citing *In re* Estate of Escher, 94 Misc. 2d at 960, 407 N.Y.S.2d at 111).
213. 109 Misc. 2d 660, 441 N.Y.S.2d 331 (Sup. Ct. Westchester County 1981).
214. *Id.* at 661, 441 N.Y.S.2d at 332.
215. *Id.* at 661-62, 441 N.Y.S.2d at 332-33.
216. *See supra* notes 190-93 and accompanying text.

unless there is obvious abuse.[217] When providing the trustee with such discretion, it would be expedient to specify that the trustee shall look to other resources including entitlements and that he shall not be held accountable to the court. If the trustee is provided with absolute, unfettered discretion over trust income and principal, the beneficiary will have no right to the trust funds. Therefore, the Department of Social Services should be unsuccessful in a court action to compel reimbursement for services provided to the beneficiary.[218]

IV. Conclusion

Public medical assistance, once considered welfare, is now considered an entitlement. Effective estate planning is essential, however, to qualify middle income clients for assistance.

For the client with inadequate insurance, such planning can prevent his assets from being depleted by the spiraling costs of a catastrophic illness or long term disability. He may convey a remainder interést in his residence, retaining a life estate, or he may create a fully discretionary, irrevocable sprinkling trust. So long as such conveyances are not fraudulent, the Department of Social Services will not be able to recoup from the recipient, or his estate, medical benefits paid. Another approach may be for the client to convey his assets in exchange for a private annuity.

Similarly, effective estate planning may enable an individual to provide for a disabled beneficiary while preserving some of the individual's assets for others. In New York, a disabled trust beneficiary may now take advantage of public assistance without first having to exhaust trust assets. The trustee may, in fact, look to public entitlements before invading trust corpus.

It is imperative, therefore, that today's estate planner go beyond his traditional role of helping his clients minimize their estate, gift, and income taxes. He must also explore all legitimate

217. Hoelzer v. Blum, 93 A.D.2d at 612, 462 N.Y.S.2d at 689 (citing Oddo v. Blum, 83 A.D.2d 868, 442 N.Y.S.2d 23 (2d Dep't 1981); *In re* Estate of Damon, 71 A.D.2d 916, 419 N.Y.S.2d 742 (2d Dep't 1979)).

218. Unlike the fully discretionary grantor trust (*see supra* note 137), the present and future creditors of a third party beneficiary cannot successfully claim that the trust was created to perpetrate a fraud.

approaches to qualify his clients for public entitlements, while preserving their assets for distribution to chosen beneficiaries.

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