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I. INTRODUCTION

Not long ago, married women possessed limited rights to own separate property or contract independently of their husbands.[1] Beginning in the nineteenth century, most of the most serious legal impediments to women enjoying ownership rights in property and freedom of contract were removed.[2] Married women could thereafter own, encumber, transfer and enjoy property without first seeking their husband's approval or consent.[3]

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1. *See* Deborah L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1253 (1999) (explaining that "[f]or most of the last century married women were not legally competent to make contracts in their own name."); *see also* Cobine v. St. John, 12 How. Pr. 333, 333 (N.Y. Supp. 1856) (holding that "[m]arried women are not *personally* liable for the payment of debts contracted by them") (emphasis in original); *see* Blood v. Humphrey, 17 Barb. 660, 661 (N.Y. Supp. 1854) (observing that prior to New York legislation in 1848, a married woman could neither own nor convey realty). Only where a woman's husband "has abjured the realm or is banished" would she be capable of "the privilege to contract, sue and be sued, on her own behalf" although a local custom existed in London where married women might carry on a trade and thereby sue and be sued as if she were unmarried. JAMES SCHOULER, A TREATISE ON THE LAW OF HUSBAND AND WIFE 120 (1882).

2. *See generally*, Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1692 (2002) (noting that "[b]etween 1820 and 1860, state legislatures began . . . revising the system of coverture through married women's property acts"). *See infra* note 33 for a definition of coverture.

3. *See* Linda J. Kirk, *Exclusion to Emancipation: A Comparative Analysis of Women's Citizenship in Australia and the United States 1869–1921*, 97 W. VA. L. REV. 725, 729 (1995). Kirk notes that between 1839 and 1869, 29 jurisdictions enacted Married Women's Property Acts "which typically granted married women certain powers to make contracts, hold and convey property, and retain their separate earnings." *Id.*; *see also, generally*, Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983) (examining the development of Married Women's Property Acts); Yvette Joy Liebesman, *No Guarantees: Lessons From the Property Rights Gained and Lost by Married Women in*

Married women could enter into agreements and incur debts and obligations separate from their husbands.[4] If the wife defaulted on an agreement, recovery could be had from her separate property but not her husband's separate property (and vice versa).[5]

Securing property rights for women, however, was an incomplete achievement in view of the biased workings of the law of divorce and inheritance, which often undervalued women's contributions to marital wealth and underestimated the economic rights of widows and divorced women. Reforms next targeted alimony and equitable property division awards in divorce and elective rights upon a spouse's death.[6] At-divorce property rights were gradually revised over time to reflect the partnership theory of marriage—the idea that increases in marital wealth over time were typically due to the efforts and contributions of both spouses, even if one spouse's (typically the wife's) contributions were largely

Two American Colonies, 27 WOMEN'S RIGHTS L. REP. 181, 197–199 (2006) (tracing the evolution of the right of married women to contract and control their own earnings in Pennsylvania and New York). In the early twentieth century, the Supreme Court described the Married Women's Property Acts as follows:

> In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the states looking to the relief of a married woman from the disabilities imposed upon her as a feme covert by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property, and to protect the security of her person against the wrongs and assaults of other.

Thompson v. Thompson, 218 U.S. 611, 615 (1910).

4. Kirk, *supra* note 3, at 729.

5. *E.g.*, Note, *Husband and Wife—Liability of Husband for Wife's Torts—Effect of Married Women's Property Acts*, 27 YALE L.J. 564 (1918) (discussing the evolution of the idea of separate liability for separate torts of husband and wife derived from the Married Women's Property Acts). Moreover, married women could sue and be sued in their names. Wayne F. Foster, Annot., *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions* § 2(a), 92 A.L.R.3d 901, 906–907 (1979). *Compare* Taylor v. Hustead & Tucker, 257 S.W. 232, 233 (Tex. Comm'n App. 1924). "At common law a married woman could not sue or be sued, unless the husband was an alien or was regarded as civilly dead." *Id.* The right of women to sue their spouses was slower to evolve. Foster, *supra*, at 907–10.

6. David H. Relsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 1, 2–7 (1988) (describing the evolution of alimony through the twentieth century). The first state to authorize an award of alimony was Massachusetts with legislation introduced by John Adams. Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK U.L. REV. 13, 13 (2013). The second-to-last state to authorize alimony was Pennsylvania in 1980. Relsey & Fry, *supra*, at 3. Texas still does not. *Id. See also* Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 831 (1985) (emphasizing the removal of prohibitions against women serving on juries in the twentieth century); Liebesman, *supra* note 3, at 182 (briefly tracing the evolution of women's suffrage beginning with Wyoming in 1870).

noneconomic.[7] Later, attention turned to women's income rights, and advocacy for equal pay in the workplace.[8]

Spousal inheritance rights underwent similar changes during the twentieth century, responding to calls for greater protections for married women following the death of their husbands.[9] These rights took form in two primary arenas: intestacy rights and elective share rights. Intestacy rights provided for the right of a spouse to inherit from a deceased spouse's estate in the absence of a valid will.[10] Elective (or forced) share rights provided for the right of a surviving spouse to claim a statutory minimum amount of property from a deceased spouse's estate where the decedent's will disinherited or partially disinherited the survivor. Under the Uniform Probate Code, for example, a surviving spouse has the right to claim a forced share against her late husband's will based on a sliding scale according to the length of the marriage.[11] While reforms are arguably still necessary to fully achieve equal property rights for women, the transformation of women's property rights over the last two hundred and fifty years has certainly been both dramatic and meaningful.

7. BARTH H. GOLDBERG, VALUATION OF DIVORCE ASSETS § 10.4 (rev. ed. 2014) (considering cases which weigh both the economic and noneconomic contributions to a marriage in the context of divorce). *See also* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 86 (1989) (asserting that the partnership theory of marriage "closely approximates the expectations of most people who enter marriage").

8. *E.g.*, Equal Pay Act, Pub. L. No. 87-30, § 5, 75 Stat. 67, June 10, 1963 (codified at 29 U.S.C. § 206(d) (1998)).

9. *See* Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave my Property to Whomever I Choose at my Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 738–40 (2006) (describing the evolution of the elective share from its dower and curtsey origins).

10. *E.g.*, UNIF. PROBATE CODE § 2-102(1) (amended 2010) (providing that a surviving spouse is entitled to all of decedent spouse's intestate estate if the decedent had no surviving descendants or parents or if "all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent"). Intestacy rights for surviving spouses have increased over the last century or two from one-third to all of the decedent spouse's estate assuming no separate descendants of the decedent also survived. Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Protection in Intestacy*, 45 U. MICH. J.L. REFORM 787, 792–93 (2002).

11. UNIF. PROBATE CODE §§ 2-202, 2-203. The forced share amount increases for the first fifteen years of marriage, reaching its maximum amount at the couple's fifteenth anniversary. UNIF. PROBATE CODE § 2-203. The maximum claim is essentially one-half of the joint marital net worth, including transfers by the decedent to others within two years of death. UNIF. PROBATE CODE § 2-205(3)(C). The pre-1990 Uniform Probate Code provisions gave a surviving spouse a one-third claim, "largely a carry over [sic] from common-law dower, under which a surviving widow had a one-third interest for life in her deceased husband's land." UNIF. PROBATE CODE § 2-202 cmt. In most jurisdictions today, "the surviving spouse is allowed to elect one-third of the decedent-spouse's property if the decedent had surviving issue or one-half if there are no surviving issue." Turnipseed, *supra* note 9, at 793. Most jurisdictions also do not vary the elective share right based on the length of the marriage. *Id.*

Three twenty-first century developments, however, diminish some of this progress. First, later-in-life (typically second) marriages have become more common.[12] In a typical later-in-life marriage, both spouses may be retired or near retirement age, and hence often switch from an income-generating and wealth-accumulation mode to either a wealth-preservation or a gradual wealth-consumption phase in life.[13] Living on a fixed income, couples in a later-in-life marriage do not typically contribute to the accumulation of marital wealth. They only, to a greater or lesser degree, contribute to the depletion of marital wealth.[14] Moreover, many contemporary later-in-life couples reject traditional mores and values when it comes to their views of the partnership theory of marriage, choosing to keep their financial affairs separate and distinct from one another.[15] These types of couples were not the spouses that reformers had in mind in designing inheritance rights or other property rights arising out of the marital relationship.

Second, perhaps as a product of advocacy for women's property rights, and perhaps out of a larger social remodeling, women's holdings of wealth have made significant advances.[16] In the twenty-first century, more and more later-in-life marriages are comprised of spouses of equal wealth, or of a less-propertied husband and a wife with greater net worth.[17] Gender-neutral forced-share rights can result in a windfall for a surviving spouse in

12. Willard H. DaSilva & Steven J. Eisman, *Gray Divorce and Remarriage*, 83 N.Y. ST. B.J. 26, 26 (2011).

13. James Poterba, Steven Venti, & David Wise, *The Composition and Drawdown of Wealth in Retirement*, 25 J. ECON. PERSPECTIVES 95, 95 (2011) (noting that as individuals "enter their retirement years, the accumulation phase of their life-cycle is nearly over" and the focus shifts "from the accumulation of resources while working to the drawdown of resources").

14. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, AMENDMENTS TO THE UNIFORM PROBATE CODE 55 (Dec. 2008), *available at* http://www.uniformlaws.org/shared/docs/probate%20code/upcamends_final_08.pdf (acknowledging the difficulty in applying the partnership theory of marriage to a "later-in-life marriage (typically a post-widowhood remarriage) in which neither spouse contributed much, if anything, to the acquisition of the other's wealth").

15. *See* DaSilva & Eisman, *supra* note 12, at 27 (noting that "[w]hen a marriage occurs later in life, each partner has his or her own life-long experience which raises distinct issues" and each "has assets and liabilities, developed separately from the new marital partner" with "a family (children, grandchildren and others) separate from the new marital partner."); *see also* LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 365 (1981) (noting that many older persons "are much more likely than the young to explicitly reject marriage and to choose living together as a reasonable and satisfying alternative").

16. Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L.J. 2213, 2220 (1994).

17. Recent data, for example, shows male householders age sixty-five and older with a median net worth of $130,000 and female householders age sixty-five and older with a median net worth of $104,000. United States Census Bureau, *Median Value of Assets for Households, by Type of Asset Owned and Selected Characteristics: 2011*, *available at* http://www.census.gov/people/wealth/files/Wealth_Tables_2011.xlsx (last visited Apr. 2, 2015).

certain circumstances.[18] Legal reforms like forced-share rights were originally designed to protect women as the typically less-propertied spouse of a more assertive and socially empowered husband who controlled the familial wealth. But when the wife has greater wealth than her surviving husband, the forced share offsets wealth gains by women. Forced-share rights are especially difficult to justify in a later-in-life marriage devoid of jointly accumulated wealth. Women of some wealth (in later-in-life marriages, especially) may in fact find themselves penalized by the very gender-neutral reforms that were designed to help them;[19] especially, as will be unpacked and amplified below, when those reforms interface with Medicaid rules.

Third, beginning in the late twentieth century, the possibility of ongoing custodial care costs became the single greatest threat to financial security for older Americans.[20] Medicare, in most cases, provides a safety net for unreimbursed medical expenses for older Americans.[21] Medicaid, however, is the only safety net for unreimbursed long term care costs, and, being strictly a means-tested program, Medicaid only offers relief to individuals in need of nursing home care once their assets have been significantly depleted.[22] The very real threat of wealth loss to middle class Americans is rebarbative.

18. *See* Shari Motro, *Labor, Luck and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1644 (2008) (observing that elective share rights may grant a greater share of property to a disinherited surviving spouse "than they would at divorce under labor-centered partnership principles.").

19. *See infra* text accompanying notes 34–35 for a discussion of same-sex couples in the Medicaid context. *See also* De Leon v. Perry, 975 F.Supp.2d 632 (W.D. Tex. 2014) (considering the impact of denying legal marital recognition to same-sex couples, including, *inter alia*, intersection with Medicaid eligibility rules).

20. *See* Eric S. Kim, *Paying for the Long-Term Care of the Elderly: Current Sources of Payment, Potential Issues, and Proposal for a New Way to Finance Long-Term Care*, 22 ANNALS HEALTH L. ADVANCE DIRECTIVE 172, 172 (2013) (noting that a 65-year-old individual has a 35%–50% chance of using long term care service which cost, on average $72,000 per year). "[T]he costs of long-term care are staggering, and seniors can exhaust their life savings in a short time while in long-term care." Gillmore v. Illinois Dept. of Human Serv., 843 N.E.2d 336, 349 (Ill. 2006).

21. *See infra* notes 102-10 and accompanying text for a brief discussion of Medicare. "When Congress created the Medicare program in 1965, its purpose was to provide hospital and medical insurance for persons over the age of sixty-five. . . ." Dean M. Harris, *Beyond Beneficiaries: Using the Medicare Program to Accomplish Broader Public Goals*, 60 WASH. & LEE L. REV. 1251, 1252 (2003).

22. *See infra* notes 111–14 and accompanying text for an introduction to the Medicaid program in the long-term care context.

> Medicaid is a health insurance program for the poor. It is administered by the states and funded by both the federal government and the states. The purpose of Medicaid is to provide adequate medical assistance and rehabilitative services to individuals who are unable to afford sufficient care on their own.

Marlaina S. Freisthler, Comment, *Unfettered Discretion: Is Gonzaga University v. Doe A Constructive End to Enforcement of Medicaid Provider Reimbursement Provisions?*, 71 U. CIN. L. REV. 1397, 1397 (2003).

These three trends—later-in-life marriages, women with greater wealth than their husbands, and the destructive force of nursing home costs—frequently coalesce in real world situations. Women of equal or greater wealth than their male partners in later-in-life marriages commonly endure significant and troubling depletions of their separate wealth when their husbands require long-term care. The three following case studies are designed to introduce and frame a discussion of these issues. Married women of average means in second marriages often encounter these legal doctrines in quick succession, all of which either advance the erosion of the woman's wealth or serve as very imperfect protective mechanisms. The case studies are typical examples of recurring events in many women's lives.[23]

The following discussion builds on these three case studies in a client-centric way. Often, marriage provides women and men with more costs than benefits at least insofar as property rights are concerned. The legal benefits to marriage—estate, gift and income tax advantages and child custody/adoption rights—are of limited utility to older individuals of average means.[24] The legal downsides—loss of estate planning flexibility and support obligations—represent serious concerns.[25] The expectations of women entering marriage later in life may be radically different from the one-size-fits-all bundle of legal rights and obligations that the law delivers.[26]

In this article, after an abbreviated overview of the evolution of married women's property rights that is designed to place an analysis of Medicaid's treatment of marital wealth in its historical context, the three case studies are introduced. The hypothetical case studies are intended to provide a framework for analysis in much the same way that individuals would

23. Although no case study is based on any actual clients of your author, they are all composites based on hypothetical real life events which very likely recur on a common basis for many individuals.

24. *See* 26 U.S.C. § 2001(c) (2011) (providing a $5 million exemption, indexed for inflation, against federal estate and gift taxes); 26 U.S.C. § 2056(a) (2011) (providing for a marital deduction against federal estate and gift taxes). The marital deduction against federal estate and gift taxes is only useful for individuals otherwise subject to the estate and gift tax and since the exemption is in excess of $5 million, the benefit to marriage in the federal estate and gift tax context is nonexistent for individuals of average means. Despite the so-called "marriage penalty," there are federal income tax planning opportunities available to unmarried individuals which are unavailable to married couples. *See generally*, Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008). For retired couples on fixed incomes and little or no income tax liability, however, any income tax advantages associated with marriage are comparatively insignificant.

25. *See* 41 AM. JUR. 2d *Husband and Wife* § 163 (2014) (outlining spouse's liabilities for necessaries furnished to other spouse).

26. *See* Clifton B. Kruse, Jr., *Love May Be Less Wonderful the Second Time Around (Medicaid Considerations When Well-to-Do, Healthy Clients Remarry And Their Late-in-Life Companions Are Less Well-to-Do)*, 13 NAELA Q. 11, 11 (2000) ("Our clients are told that for Medicaid benefit purposes, they and their spouses are one—something that the clergyman may have reminded them of when they each pledged their troth to the other" and as they voice "their vows, they became—in the eyes of the king—a single economic unit.").

encounter the rules of Medicaid eligibility in the real world. Following the case studies is an introduction to Medicaid eligibility rules including resource tests and gifting penalties. The explication of Medicaid rules then narrows to how Medicaid eligibility rules view spousal income, spousal wealth, and gifts (including gifts made by one spouse with or without the knowledge or consent of the other spouse) and demonstrates Medicaid's embrace and reembodiment of medieval *coverture* in a contemporary context.

Some readers may object to the recurring tragedies suffered by the women of these case studies. After all, it is true enough that a well-drafted premarital agreement, a zealous divorce attorney, or a deftly executed Medicaid strategy may ameliorate some of the harsher results. Additionally, adequate levels of long-term care insurance can either greatly diminish or even eliminate the wealth loss that accompanies long term care expenses.[27] Therefore, perhaps the lessons to be taken from these discussions are to be found in greater advocacy and pre-planning for long-term care.[28] More significantly, emphasis should be placed on counseling individuals considering marriage of the financial costs—especially the exposure to wealth loss on account of the other spouse's long term care needs—that accompany the legal status of matrimony.[29]

27. *See* Robert R. Pohls, *Long Term Care Insurance*, 32 BRIEF 28 (2002).

28. For example, in the case study of Wanda and Hagar, the impact of Medicaid estate recovery might have been mitigated by certain techniques. *See infra*, p. 293. *See* Marvin Rachlin, *What Is a Spouse's Liability for Medicaid Benefits Paid?*, ESTATE PLANNING 119–20 (Mar. 2003) (suggesting the use of *inter vivos* gifts following the death of the community spouse); *but see In re* Estate of Bergman, 688 N.W.2d 187, 191–92 (N.D. 2004) (allowing state Medicaid agency to void gifts by surviving community spouse). In the case study of Wendy and Herbie, the "forced forced share" scenario might have been avoided by an agreement between the spouses mutually waiving their rights to an elective share from the other's estate. *See* Linda S. Ershow-Levenberg, *Elder Law Planning for Older Couples in Second Marriages*, ASPATORE, 2011 WL 959528 * 4 (Mar. 2011); *but see infra* note 158 for cases holding that disclaimers of inheritance rights constitute disqualifying transfers. In the case of Gail and Lucy, perhaps a spousal refusal technique could have mitigated Lucy's exposure for Gail's long-term care costs. *See* Andrew D. Wone, *Don't Want to Pay for Your Institutionalized Spouse? The Role of Spousal Refusal and Medicaid Funding in Long-Term Care*, 14 ELDER L.J. 485 (2006); *but see In re* Shah, 733 N.E.2d 1093, 1095 (N.Y. 2000) (noting that New Jersey does not recognize spousal refusal).

29. *See* Kruse, *supra* note 26, at 13 (writing, concerning marriage for older couples, "[i]t is about this subject that our clients must be warned. They must be informed of a presence—a shadowy apparition who will attend their wedding ceremonies. The unseen government interest will hear the elders' vows: the promises not only to cherish, but to care in sickness and in health—translate that as "for full costs of care"—at least when sickness overcomes the unmonied one—until death, in fact, does part them, and the public policy responsibility of the spouse for this cost may finally cease.").

This article steers neatly around considerations of community property.[30] Community property's historical evolution differs markedly from the trajectory in separate property states, though both share a common concern with the less propertied and noneconomic contributor to the marital team, and both elevate the partnership theory of marriage when it comes to property rights.[31] For sake of clarity and brevity, however, the discussion omits any analysis of community property. The discussion similarly avoids undertaking anything approaching a comprehensive survey of state law variations either in the context of Medicaid eligibility rules or those marital property rights that impact Medicaid eligibility determinations.

This author's aim is to demonstrate recurring confrontations between the financial expectations of women encountering long term care needs of a spouse in a later-in-life marriage and the framework of Medicaid eligibility. The Medicaid rules give no acknowledgement of, nor deference to, the typical expectations of women in later-in-life marriage and often result in significant wealth erosion before the cared-for spouse dies, recovers, or Medicaid eligibility is finally achieved. Even upon achieving Medicaid eligibility, Medicaid's estate recovery program may further impede the ability of the woman to effectively exercise her property rights at death. To be sure, men in later-in-life marriages may very well encounter similar surprises that contradict his and his partner's intent to share a household but not their separate property (or with one another's heirs and creditors). Medicaid eligibility rules and underlying state law marital property rights often contradict the expectations of either spouse.

30. Briefly, it can be noted that community property—recognized in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin, and Alaska—is real or personal property acquired through effort or labor by one or both spouses while domiciled in a community property state. ROBERT L. MENNELL & THOMAS M. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL 1–4 (2nd ed. 1988). Alaska recognized the ability of its residents to elect community property treatment in 1998. ALASKA STAT. §§ 34.77.010, *et seq*. (2014). A number of variations exist among those states recognizing community property; "[t]here is no single community property system." MENNELL & BOYKOFF, *supra*, at 8. "Community property systems treat each item of property which either member of the couple acquired while married and domiciled in a community property state as acquired by them as equal owners of one half each." *Id.* at 5. This treatment has important tax, creditor, management, and inheritance implications. *Id.* Community property also recognizes the distinct legal existence of each spouse, ignoring the dissolution of all property rights of the wife in favor of the husband: "Community property . . . is wholly repugnant and inimical to the common law because of its elevation of the wife to a position of equality with the husband." William A. Reppy, Jr. and Cynthia A. Samuel, COMMUNITY PROPERTY IN THE UNITED STATES 9 (7th ed. 2009) (reprinting sections of Michael Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20 (1967)).

31. *E.g.*, J. Thomas Oldham, *Separate Property Businesses That Increase in Value During Marriage*, 1990 WIS. L. REV. 585, 585–86 (1990) (explaining that with community property, "[t]he partnership is perceived to encompass all property generated during marriage by the efforts of either spouse.").

Yet for women, in this author's thirteen years' experience in private practice, confronting the legal mechanisms which accompany the pursuit of Medicaid benefits for an ailing spouse's long term care needs is more astonishing than it typically is for men in the same circumstances. To risk what modest wealth the woman has accumulated, on account of a spouse's costly care needs, seems especially antipodal to the themes of elevating women's property rights. Perhaps ironically, at least some of the inflexible legal mechanisms in play (elective share rights in particular) are the very rules that were supposed to have helped preserve the financial independence of women.[32] At the same time, Medicaid eligibility determinations reinstate the archaic notions of *coverture*, ignoring the separate property rights of spouses and treating the marriage union as a unity.[33]

Same-sex marital couples should also be considered. Spouses in same-sex marriages can certainly encounter the same Medicaid axioms that run counter to the expectations of those hoping to delineate separate spheres of existence and responsibility when it comes to property and debt in a marital relationship. Many same-sex couples seem ready to plunge headlong into marriage, citing the numerous and plentiful rights which naturally flow from the institution such as social security benefits, health insurance eligibility, federal estate and gift tax advantages, and parenting rights.[34] Those who are critical of the same-sex community's embrace of the institution of marriage may question whether equality can be achieved through mimicry of non-queer institutions, but they fail to acknowledge the

32. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1244 (2005) (noting that "inheritance rights benefit spouses only, yet they also constrain spouses' ability to act independently.").

33. *Coverture* is an archaic legal term describing the legal condition of a woman being married. BLACK'S LAW DICTIONARY 446 (10th ed. 2014).

> *Coverture*, is a french word signifying any thing that covereth, as apparell, a coverlet . . . It is particularly applied in our common lawe, to the estate and condition of a maried woman, who by the lawes of our realme, is in (*potestate viri*) and therefore disabled to contract with any, to the preiudice of her selfe or her husband, without his consent and privity; or at the least, without his allowance and confirmation.

Id. (quoting John Cowell, THE INTERPRETER (1607)).

34. KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 117–23 (2006). Hull lists many legal benefits to marriage without acknowledging the significant financial risk of becoming legally liable for one's partner's support. *Id.* "Marriage is a legal state conferring real, tangible benefits on those who participate in it: specifically, tax breaks as well as other advantages when it comes to inheritance, property ownership, and employment benefits." Sam Schulman, *Gay Marriage—and Marriage* in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 230 (Robert M. Baird & Stuart E. Rosenbaum, eds., 2nd ed. 2004); *but see* DENIS CLIFFORD, HAGARERICK HERTZ & EMILY DOSKOW, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 55–56 (16th ed. 2012) (cautioning under the heading "Is Marriage (or Its Equivalent) Right for You?" that "[m]arrying may cause you or your partner to lose state-provided benefits, because your partner's income will be counted along with yours" but misleadingly suggesting that marriage results in joint liability for all debts).

potential loss of property rights and financial independence that necessarily accompany wedding vows.[35] Both same-sex and different-sex couples on the cusp of marrying should consider the same cautions insofar as the legal negatives—especially with regards to the possibility of one spouse's long term care needs—before walking down the aisle.

Indeed, on a broad scale, the gap between what the law grants to married couples with default or non-waivable rights and obligations, and what couples of all varieties reasonably expect and desire, may be widening.[36] Society and culture have evolved significantly since the days when horses were the primary mode of transportation, yet the law, relatively speaking, has changed little.[37] The aim of this article is not so much to criticize the Medicaid eligibility rules, which were designed to delineate a narrow class of financially needy persons for a means-tested government program, but to highlight how the implementation of those rules, sometimes surprisingly, work an erosion of a woman's property rights when her spouse encounters a decline in health which necessitates a lengthy stay in a long term care facility. The legal assumptions accompanying this kind of wealth erosion mimic the same kinds of eighteenth and early nineteenth century attitudes towards women's property rights that many assume can only be found in the history books.

II. DISCUSSION

A. DOWER, WOMEN'S PROPERTY RIGHTS, AND *COVERTURE*

William Blackstone's *Commentaries*, written in the mid-eighteenth century, explained that while a single woman could hold goods and chattels in her own name, upon marriage her legal existence merged with that of her

35. *See, e.g.*, Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 37–38 (2011) (questioning "how we can be skeptical of marriage a legal category and of its privileged status in law and society, but also favor marriage equality for same-sex couples"); Nancy D. Polikoff, *We Will Not Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VIRGINIA L. REV. 1535, 1536 (1993) (characterizing that for same-sex couples to pursue marriage mimics "the worst of mainstream society"); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NATIONAL GAY AND LESBIAN QUARTERLY 6 (Fall 1989) (arguing that marriage undermines the goals of gay liberation).

36. "The composition of the nuclear American family has now evolved from the classic couple entering into a marital relationship prescribed by state law to a de facto relationship existing outside the legal rules of marriage." Justice Harry Lee Anstead, *New Jersey Abolishes the Death Penalty—Is Legal Marriage Next?*, 48 SANTA CLARA L. REV. 749, 752 (2008). Households headed by married couples constitute a minority of households. *Id.* (*citing* Sam Roberts, *To be Married Means to be Outnumbered*, N.Y. TIMES, Oct. 15, 2006).

37. *But see* Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 41 (2012) (concluding that "[w]hile some states appear to endorse a construct of marriage as an immutable status, others are willing to place marital contracts almost on par with commercial contracts.").

husband.[38] Chattels formerly owned by the wife immediately vested as the husband's "absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revert in the wife or her representative."[39] Blackstone categorized marriage as one of the various methods by which title to property may be obtained (e.g., by succession, by forfeiture, by judgment, or by marriage). Upon marriage those chattels formerly owned by the wife "are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them."[40] Marriage functioned to transfer property owned by the wife to the husband by operation of law.

This automatic divestment of the woman's separate property rested on the notion of the unity of person between the spouses—that they are one person in law "so that the very being and existence of the woman is suspended during the coverture."[41]

With the status of marriage, there could be no separate property of the wife other than limited incidents of ownership associated with separately owned real property.[42] With real property owned by the wife, the husband gained only "a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after to the death of her husband, or to her heirs, if she dies before him; unless, by the birth of a child, he becomes tenant for life by the curtesy."[43] This was an estate *jure uxoris* (or "by the right of the wife").[44] Although the *jure uxoris* was essentially only a life estate for the husband's benefit, the estate was liable to his debts and he could sell or mortgage his interest in it.[45]

38. 2 WILLIAM BLACKSTONE, COMMENTARIES *433 (hereinafter, BLACKSTONE II). Spellings from Blackstone's *Commentaries* have been modernized by the author.

39. *Id.* at *435.

40. *Id.* at *433.

41. *Id.* Although the wife retained her *paraphernalia*, "the apparel and ornaments of the wife, suitable to her rank and degree," if she survived her husband, the husband nevertheless had the authority "(if unkindly inclined to exert it)" to transfer or convey them to others. *Id.* at *436–37.

42. *Id.* at *433–34. "The common law regarded the husband and wife as one and the husband as the one." JOHN E. CRIBBETT & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 89 (3rd ed. 1989). "At common law, the husband and the wife were but one person." GEORGE W. THOMPSON, 4A COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 48 (1979).

> This hierarchical relationship has been maintained by sex differentials in the age at which boys and girls can marry, by laws and customs dictated that a married woman assume her husband's name, by statutes requiring a married woman to take her husband's legal domicile as her own, and by rules establishing the husband's right to his wife's services and affections.

WEITZMAN, *supra* note 15, at 5. *See also, e.g.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971) *aff'd*, 405 U.S. 970 (1972) (upholding an Alabama driver's license regulation requiring married women to use their husband's surnames along with state law which required a woman to assume her husband's surname upon marriage).

43. BLACKSTONE II, *supra* note 38, at *433.

44. CRIBBETT & JOHNSON, *supra* note 42, at 89.

45. *Id.* Upon the husband's death (or the very unlikely even of divorce as absolute divorce was not recognized absent a special act of Parliament), the estate *jure uxoris* became

Coverture described how the legal status of a married woman merged with that of her husband.[46] The wife became *feme covert*, incapable of contracting or carrying out most legal acts.[47] Denying women the right to own property independently of their husbands was based in part on low opinions of women's abilities and judgment; women might "run amok if they could own their own property."[48] Paternalism was also at work.[49] Blackstone proudly defended *coverture*: "[W]e may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England."[50] Since women could rarely even earn wages independently of their husbands, some level of protection was certainly in order.[51] Whether such protection was achieved through *coverture* is questionable.

It followed from this doctrine of merger that a husband and a wife could not contract with one another, for "to covenant with her, would be

the wife's if she survived and no children were born of the marriage, but if children were born then the estate merged into the husband's estate by curtsey. *Id.* The birth of issue transformed the estate *jure uxoris* "to curtsey initiate which in turn became curtsey consummate upon the death of the wife." *Id.*

46. *See* BLACK'S LAW DICTIONARY 446 (10th ed. 2014).

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband: under the whose wing, protection, and *cover*, she performs every thing [sic]; and is therefore called in our law-french a *feme-covert*; that said to be a *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

1 WILLIAM BLACKSTONE, COMMENTARIES *430 (hereinafter, BLACKSTONE I); *see also* United States v. Yazell, 382 U.S. 341, 359 (1966) (Black, J., dissenting) (observing that "that though the husband and wife are one, the one is the husband").

47. Rowe v. Kohle, 4 Cal. 285 (Cal. 1854). *Feme covert* is an archaic French legal term for married woman or literally "covered woman." BLACK'S LAW DICTIONARY 737 (10th ed. 2014). A *feme sole* meant an unmarried woman. *Id.*

48. Margaret Valentine Turano, *Jane Austen, Charlotte Bronte, and the Marital Property Law*, 21 HARV. WOMEN'S L.J. 179, 185 (1998).

49. *See* CRIBBETT & JOHNSON, *supra* note 42, at 88 (claiming that marital property interests "were a kind of social security and they gave some assurance that the spouse of a man (or woman) would not be left entirely destitute"). Marital property interests were, Dean Cribbett and Professor Johnson asserted, "created for the protection and use of either the husband or the wife and it is more realistic to look at them in this light." *Id.*

50. BLACKSTONE I, *supra* note 46, at *445.

51. *E.g.*, Bradwell v. Illinois, 83 U.S. 130, 139 (1873) (upholding an Illinois state court decision denying a married woman the right to practice law). "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring). *See also* John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 738–39 (2000) (emphasizing that even if women did earn wages "until the enactment of married women's earning statutes, married women's earnings belonged to their husbands.").

only to covenant with himself."[52] In fact, the wife was deemed unable to contract at all during marriage.[53] The husband became automatically liable for any pre-marriage debts of his wife, as well as for necessaries that she consumed during the marriage.[54] Attempts by the woman to execute a deed to realty were "void, or at least voidable" (unless the conveyance related to something like a fine).[55] A married woman's testamentary freedom was almost nonexistent.[56] The legal condition of a married woman was certainly impaired in Blackstone's day, though the doctrine of merger was not without limits. The husband was not liable for debts incurred by his wife during marriage "for any thing [sic] besides necessaries."[57] Although

52. People *ex rel*. Lee v. Lee, 157 N.Y.S. 821 (N.Y. Sup. Ct. 1916) (quoting these words of Blackstone which were reprinted in an earlier 1842 decision but also noting that "the world has moved since 1842"). Nor could a husband convey any property to his wife since it would be as conveying property to himself. BLACKSTONE I, *supra* note 46, at *430. He could, however, bequeath her property upon his death since death ended the coverture. *Id.* Echoes of the wife's disability to contract can still be heard today. *See, e.g.*, *In re* Estate of Shaffer, 2009 WL 606003 at *2 (Iowa Ct. App. 2009) (reasoning that spouses may not contract with one another to waive elective share rights during marriage, only before); Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1993) (holding that a husband's promise to leave a bequest to a wife in exchange for caring for him during his last illness could not be specifically enforced for lack of consideration since the wife owes a duty to care for her husband as an incident of marriage).

53. Schouler, *supra* note 1, at 125–28. The wife might be seen as "worse off at the common law than infants; for the contracts of an infant are for the most part voidable only, while those of married women are, with few exceptions, absolutely void." *Id.* at 125–26. "But the disabilities incident to these two conditions, arise on grounds distinctly different from each other." PEREGRINE BINGHAM, THE LAW OF INFANCY AND COVERTURE 181 (E. H. Bennett, ed., 2nd ed. 1849). "The disabilities attached to infancy are designed as a protection, for the inexperienced, against the fraudulent; those incident to coverture, are the simple consequence of that sole authority which the law has recognized in the husband, subject to judicial interference whenever he transgresses its proper limits." *Id.* "Common sense teaches that married women have sufficient discretion to act for themselves and stand on a different footing from young children. . . ." SCHOULER, *supra* note 1, at 126. Even these nineteenth century conservative male commentators seemed somewhat uncomfortable with laws which generally treated women as infants.

54. BLACKSTONE I, *supra* note 46, at *430. "If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together." *Id.* at 430–31.

55. *Id.* at 432. The wife was permitted to join a deed executed by her husband "but when she does so she is not bound by her covenants." Schouler, *supra* note 1, at 127.

56. *See* WILLIAM HERBERT PAGE, PAGE ON THE LAW OF WILLS Vol. I 653–57 (2003) (hereinafter, PAGE Vol. I) (noting that a married woman could not make a testament of personal property under ecclesiastical law and could not make a will of her lands under England's Wills Act); HERBERT THORNDIKE TIFFANY & CARL ZOLLMANN, A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND 897 (1940) (stating that "a married woman could not dispose of her legal interest in lands, nor could she so dispose at common law of her personal property, since this belonged to the husband.").

57. BLACKSTONE I, *supra* note 46, at *430. Because the wife is assumed to be "inferior to him, and acting by his compulsion," she "cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion." *Id.* at *432.

as a rule of evidence neither could offer evidence for or against one another in criminal matters, the wife could be indicted and punished separately.[58]

Dower rights provided a surviving widow with a meager source of support if she survived her husband. Dower rights were typically limited to a one-third share in a life estate to all freehold land that the husband owned during their married life.[59] Curtsey, the analogous estate for a surviving husband, applied to all of the wife's lands of inheritance, not just one-third.[60] The origin of dower lies with the Saxon invaders of England from what is today Germany, later overlaid with Norman regulations, and was designed "for the sustenance of the widow."[61]

Writing about one hundred years after Blackstone, American lawyer-historian James Schouler spoke of the Married Women's Acts produced by legislation in the nineteenth century as a "radical change" and a "wondrous revolution" that aimed "to secure to the wife the independent control of her own property, and the right to contract, sue, and be sued, without her husband, under reasonable limitations."[62] Maine was the first state that authorized a deserted wife to sue, make contracts, and convey real estate as if unmarried.[63] Massachusetts, New Hampshire Vermont, Tennessee, Kentucky and Michigan followed, and expanded rights to wives not deserted by their husbands.[64] Women became able to dispose of property by will.[65] Married women's separate property was exempted from liability for their husband's debts.[66] These legislative reforms brought married women "nearer to the plane of manhood, and advance[d] her condition from obedient wife to something like co-equal marriage partner."[67] And

58. *But see* BLACKSTONE I, *supra* note 46, at 432 (noting that "in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her").

59. LEE HOLCOMBE, WIVES, AND PROPERTY REFORM OF THE MARRIED WOMEN'S PROPERTY LAW IN NINETEENTH CENTURY ENGLAND 21 (1983). Dower originated in the thirteenth century. *Id.* It was abolished in England by the Dower Act of 1833. *Id.* at 22.

60. RALEIGH COLSTON MINOR & JOHN WURTS, THE LAW OF REAL PROPERTY 201–03 (1909). Curtsey is restricted to estates of inheritance while dower "is permitted in estate of inheritance whereof the husband is seised in law as well as in fact." *Id.* at 201. Curtsey, moreover, is limited to circumstances where issue are born of the marriage while dower does not require "that there should be any issue born of the marriage." *Id.*

61. COLSTON, ET AL., *supra* note 60, at 203.

62. SCHOULER, *supra* note 1, at 251. Schouler was at times lukewarm about this legal reform, predicting "that it will weaken the ties of marriage by forcing both sexes into an unnatural antagonism, teaching them to be independent of one another and to earn their own living apart. . . ." *Id.* at 11.

63. *Id*. at 251.

64. *Id*. The State of Virginia was "the last to yield." *Id*. at 254. Georgia did not permit married women to "'own' their own wages" until 1943. Kathleen M. O'Connor, *Marital Property Reform in Massachusetts: A Choice for the New Millenium*, 34 NEW ENG. L. REV. 261, 293 (1999).

65. SCHOULER, *supra* note 1, at 252.

66. *Id*.

67. *Id*. at 230. Schouler could be just as patriotic about the state of marital property rights in the nineteenth century as Blackstone had been in the previous one. *See id*.

thus did coverture seemingly "fade out of our jurisprudence" over the span of several decades.[68]

The Married Women's Acts related chiefly to property and contract rights.[69] The primary change enacted by the legislation was recognition of the wife's separate property rights.[70] The married woman lost "the strange position of being without an existence, one whose identity is suspended or sunk in the *status* of her husband; she becomes a distinct person, with her own property rights and liabilities."[71] A married woman who kept property separate from that of her husband was entitled to use, enjoy, convey and dispose of that property as her own.[72] Some states initially required a wife's separate property to be scheduled or inventoried in order to enjoy separate property status.[73]

At roughly the same time, modernized intestacy and forced share rights replaced dower and curtsey as a means to redefine marital property rights upon death.[74] In place of dower, the surviving widow was given a statutory

(proclaiming that the "love of justice and individual liberty which always characterized our Saxon race, and the steadfast disposition of English and American courts both to administer the written law impartially and to extend and adapt its provisions to the ever-changing wants of society" favored the end of *coverture*).

68. SCHOULER, *supra* note 1, at 230; Dean Lueck & Sharon Tennyson, *Human Capital Accumulation and the Expansion of Women's Economic Rights*, 55 J.L. & ECON. 839, 841 (2012). But for eight states, all states had enacted laws expanding married womens' property rights between 1848 and 1920 and "[t]he effective demise of coverture in the United States was thus realized in decades rather than in centuries. . . ." *Id.*

69. SCHOULER, *supra* note 1, at 231.

70. *See id*. at 233 (asserting that the Married Women's Acts "impair[ed] the old doctrine which treated the husband as absolute or temporary owner, controller, and manager of his wife's property and acquisitions, by virtue of the marriage, and create[d] in favor of the wife that is commonly known in these days as her separate property").

71. SCHOULER, *supra* note 1, at 234 (emphasis in original); *but see* O'Connor, *supra* note 64, at 292–93 (noting that the creation of separate property rights for married women in the nineteenth century was "an important step in undermining the common law fiction of the unity of the husband and wife in the person of the husband" but also a "small and uneven step" on account of "the reality that the wife had little real opportunity to acquire property by which she might exercise her rights under these new, albeit limited, statutes."). *See, e.g.*, Otto F. Stifel's Union Brewing Co. v. Saxy, 201 S.W. 67, 70–71 (Mo. 1918) (reasoning that the Married Women's Property Acts did not destroy the unity of spouses because the statutes were only meant to destroy the unity of unequals and to restore the unity of equals in the context of property held as tenants by the entireties); Kunz v. Kurtz, 68 A. 450, 453 (Del. Ch. 1899) (strictly construing the Married Women's Property Act). "It is a remedial statute, and we construe it so as to suppress the mischief against which it was aimed, but not as altering the common law any further than is necessary to remove that mischief." *Id.*

72. SCHOULER, *supra* note 1, at 264 (cautioning that "[a] married woman, in order to preserve her separate property, should keep it distinct from that of her husband").

73. *Id.* at 268. The registry requirements served to protect creditors and purchasers given the then-familiar principle that property in joint possession was presumably the husband's. *Id.* at 269.

74. *See generally*, Joan R. Gunderson, *Women and Inheritance in America: Virginia and New York as a Case Study, 1700–1860*, in INHERITANCE AND WEALTH IN AMERICA 91–118 (Robert K. Miller, Jr. & Stephen J. McNamee, eds., 1998) (examining surviving wills and the evolution of gradual extinction of dower).

share or an interest of which the survivor could not be deprived.[75] Initially, a surviving husband's protections were less comprehensive.[76] If the deceased spouse had attempted to disinherit his surviving spouse by bequeathing his estate to others, the surviving spouse was entitled to elect against the will.[77] This right of election, in the nature of a creditor claim, was superior to other claims or heirs' rights.[78] In this circumstance, the surviving spouse was known as a "forced heir."[79] Loopholes in the forced-share protective statutes, such as the ability of the disinheriting spouse to use nonprobate or lifetime transfers to avoid the survivor's right of election, were gradually closed.[80] The survivor's right to an elective share could be waived only with prescribed written formalities and disclosures.[81]

The idea of marriage has changed over the last two hundred and fifty years, evolving as the original protectionist attitudes towards women have softened.[82] The expansion of women's rights, and married women's rights in particular, underscores the greater swell of societal recognition of women as much individuals and persons as their male counterparts.[83] Greater property rights and workplace opportunities for women have been accompanied by increased property rights, including the ability to contract and devise separately from a husband and the ability to possess and control property free from a husband's interference. Marriage continues to evolve

75. PAGE Vol. I, *supra* note 56, at 900.

76. *E.g.*, Mindler v. Crocker, 18 So.2d 278, 281 (Ala. 1944) (recognizing rights of surviving widows but not surviving widowers).

77. PAGE Vol. I, *supra* note 56, at 902.

78. *E.g.*, Via v. Putnam, 656 So.2d 460, 465–66 (Fla. 1995).

79. PAGE Vol. I, *supra* note 56, at 902. The survivor would also be entitled to homestead and family allowance claims against a decedent spouse's estate. *See* Wigley v. Hambrick, 389 S.E.2d 763, 766 (Ga. Ct. App. 1989) (widow's statutory right to one year's support); Pratt v. Pratt, 37 N.E. 435, 436 (Mass. 1894) (homestead rights).

80. PAGE Vol. I, *supra* note 56, at 902–05.

81. *See e.g.*, Uniform Premarital and Marital Agreements Act § 6 (2012) (requiring agreements waiving rights such as the elective share to be in a signed writing); Uniform Premarital and Marital Agreements Act § 9 (2012) (providing when marital agreements are voidable for lack of disclosure or unconscionability). In some states, spousal abandonment works to defeat an elective share claim. PAGE Vol. I, *supra* note 56, at 906.

82. On evolving perceptions of marriage, *see* Anne B. Brown, Note, *The Evolving Definition of Marriage*, 31 SUFFOLK U. L. REV. 917 (1998); *see also* William C. Duncan, *Portrait of an Institution: How Recent Cases Distort Our Understanding of Marriage*, 50 HOW. L.J. 95 (2006).

83. *See* WEITZMAN, *supra* note 15, at 54 (asserting that "social and legal stereotypes are complexly interrelated and mutually reinforcing."); Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263, 272 (2010) (concluding that "[o]nly when public attitudes change noticeably can movements effectively pressure the government to recognize the legitimacy of their claims."); Donna J. Sullivan, *Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution*, N.Y.U. J. INT'L L. & POL. 795, 854 (1992) (proclaiming that "[l]aw reform to protect the human rights of women must be accompanied by educational measures to foster social change, and economic and political initiatives to advance women's status if it is to have a significant impact on women's de facto rights.").

today, with most attention devoted in recent years to recognition of same-sex marriages. Greater evolution is certain to occur. Some have advocated for abolishing marriage as a legal institution altogether.[84] Others have argued for a range of marriage categories to reflect the diversity of aims and values for couples entering into a marriage.[85] In addition to re-thinking the impact of marriage on property rights, Congress, state legislatures, and regulatory bodies in the next decades may experiment with de-linking government benefit determinations from the status of marriage.[86] But at present, the status of marriage works a transformation in connection with government benefits as dramatic as the spontaneous divestment of the wife's property described in Blackstone's *Commentaries*.

B. THREE CASE STUDIES AS A FRAMEWORK FOR ANALYSIS

1. Wanda and Hagar: *The Spend Down and Estate Recovery*

Wanda and Hagar[87] both grew up in the same moderately sized town but they never met until some forty-five years following high school graduation. They struck up a conversation at a county fair one afternoon and began to date. Within a year, they were married. Both had similar backgrounds. Wanda was recently retired from a clerical position with the local public school administration; Hagar was recently retired from a bulk fuel oil delivery job he'd worked most of his adult life. Both were sixty-three years old.

Wanda was a widow with three daughters, whose husband passed away three years before she met Hagar. Other than her personal property and a late-model sedan, her wealth was limited to a savings account with a balance of $300,000. Hagar was divorced just over a year when he met Wanda. His divorce had dragged on until he agreed to a settlement, which left him with just $100,000, an old pickup truck, and his tools. He, too, rented an apartment that suited his needs. His two adult sons lived within an hour's drive.

84. Jessica Knouse, *Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotype Through the Institution of Marriage*, 16 HASTINGS WOMEN'S L.J. 159 (2006) (calling for the abolition of marriage).

85. *See* Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735 (2011) (arguing for the modernization of archaic procedures used to authorize marriage).

86. *E.g.*, James L. Musselman, *What's Love Got to Do With it? A Proposal for Evaluating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37 (2009) (proposing alternative marriage options of traditional marriage and covenant marriage); Laura A. Rosenburry, *Marital Status and Privilege*, 16 GENDER RACE & JUST. 769 (2013) (questioning whether governments should extend privileges to marriage); Kerry Adams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012) (noting that marriage is employed in the context of many public benefits as a means of testing eligibility for those benefits).

87. It bears emphasis here that Wanda and Hagar and the other individuals portrayed in the next two case studies are not real people, nor based on real people, and are rather a construction based on perceived scenarios in the author's pre-academic law practice.

After Wanda and Hagar tied the knot in a quiet ceremony, they began their married life together and agreed that Hagar would move in with Wanda. Wanda lived frugally, relying on her social security benefits and modest pension for living expenses. Like many couples in their circumstances, they did not comingle their wealth; Hagar kept his bank account in his own name, and Wanda kept hers. His money was his and hers was hers, they both agreed, though they shared equally in expenses such as groceries, rent and monthly utility bills.

"Your stuff is yours, Wanda; mine is mine," Hagar once told her sweetly, and she agreed. Over time Wanda's wealth remained intact, but Hagar had a tendency to outspend his income and his savings was gradually depleted to almost nothing.

Fifteen years passed. Then one spring morning Wanda called to Hagar, who was tinkering with a birdhouse in the other room. When Hagar didn't answer, Wanda found him slumped over his workbench, unresponsive. Hagar had suffered a stroke, which left him severely impaired. After a few days' hospitalization he was discharged and Wanda, now seventy-eight years old, took on the role of caregiver. The strain on her was immense, but she bore it without complaint.

Wanda had retained her savings of $300,000. Hagar's savings were gone, however, and he consumed his income on a monthly basis. Hagar's stroke had rattled Wanda, and she began to think seriously about her own mortality. Downloading a simple will from the internet, she assembled a document which left her estate to her three daughters. Wanda arranged for witnesses and had the will notarized at her local bank one afternoon.

The will was consistent with Wand and Hagar's prior agreement that her property was hers and his was his. "Don't leave me nothing of yours," Hagar had once told her as they watched a sunset at the nearby pond. "Your savings are for your girls." Hagar was a proud man and Wanda loved him for it.

Before long, Wanda grew to accept that her husband would have to be moved to a nursing home. A caseworker at the nursing home instructed her to complete paperwork for Medicaid. At first, she insisted on listing only Hagar's limited assets, arguing that her savings had nothing to do with him. But when the caseworker explained that Medicaid requires a "snapshot" of all marital assets as of Hagar's first day in the nursing home, Wanda dutifully completed the paperwork.

A few weeks later, Wanda received a responsive letter from her local Medicaid agency identifying a spend-down calculation of approximately $120,000. The letter seemed to be saying that Medicaid benefits would be withheld until her savings had been depleted to that level. A bill from the nursing home arrived in the same day's mail. Upset, Wanda called the nursing home caseworker, who confirmed that she indeed would have to pay for Hagar's care until Medicaid eligibility was achieved.

Just over two years went by, during which time Wanda's savings account balance dropped to $120,000.[88] Hagar finally qualified for Medicaid long-term care assistance, so she stopped writing the huge monthly checks for his care and her account balance stabilized. She visited Hagar every day, even as her own health began to deteriorate.

Another two years passed. Then, one night, Hagar passed away in his sleep.[89] Wanda was devastated, but also in a sense relieved. Within a few weeks, she had begun to recover from the loss and make plans for her twilight years. But before she could entertain those plans, she too passed away. She was eighty-two years old.

After Wanda's funeral, her grieving daughters located her will and scheduled an appointment with an attorney to determine whether a probate proceeding was required. A simple probate was commenced and the daughters were shocked when the Medicaid Agency filed a claim in an amount equal to Wanda's estate of about $120,000.[90] Their probate attorney explained the concept of Medicaid's "estate recovery" program and that there was no way to avoid the claim. Certain administrative expenses were allowed, but the remainder of Wanda's estate was conveyed to the State in partial satisfaction of Hagar's Medicaid lien.

Wanda's daughters were left with bitter feelings associated with their mother's passing. They were less upset by the fact that they received no financial benefit from Wanda's estate, and rather felt that she should not have had to pay so dearly for the privilege of being married to Hagar. Perhaps, in hindsight, they wondered if Mom would have better off simply "shacking up" with Hagar. Hagar was a good companion for Wanda, at least before he had his stroke. But wouldn't he have been every bit as caring without formal wedding vows and a certificate from the county? Marriage, it seemed to them, only benefitted Hagar's creditors and healthcare providers.

2. Wendy and Herbie: *The Forced Forced Share*

Our second case study involves another couple, Wendy and Herbie.[91] Coincidentally, their history—and their financial data—precisely mirrors that of Wanda and Hagar, right up until Hagar's admission to a nursing home. Before she could obtain care for Herbie following his stroke,

88. Wanda's wealth loss of $180,000 (from $300,000 to $120,000) over twenty-eight months occurred with a monthly "burn rate" of approximately $6,430. Long-term care costs vary widely and the "burn rate" is ameliorated to the extent that current income from both spouses can be applied to the monthly nursing home bill. Any Medicare contribution towards the initial one hundred-day nursing home stay has been ignored.

89. Hagar's separate assets are limited to $2,000 or less according to Medicaid rules and his actual account balance at the time of his death is just $500. There are no estate proceedings for Hagar's estate and the $500 is consumed by expenses related to his death.

90. If Hagar received Medicaid benefits for two years and the Medicaid rate of payment was $5,000/month, a lien of $120,000 would have accrued.

91. Wendy and Hagar are fictitious characters. *See supra* note 87.

Wendy passed away from a heart attack—possibly brought on by the stress and strain of trying to care for Herbie at home—just one month after having made her will.

Following Wendy's death, Herbie's sons brought him to live with them. They planned to rotate their dad between their households and care for him as best they could, but they could see that nursing home care was not far off. Herbie's sons consulted with an attorney, who recommended a guardianship. Soon the sons were appointed as their father's co-guardians, with the power to manage his meager income.

In the hallway of the courthouse following an abbreviated appointment hearing, their attorney asked them what they knew about Wendy's estate. The sons knew nothing. The attorney pressed the issue, emphasizing that the sons, as guardians, had a fiduciary obligation to pursue inheritance rights for their father. The attorney also noted that failure to do so could have negative consequences for their father's eligibility for Medicaid assistance, should the boys become unable to continue to care for their father in their homes.

Shortly thereafter, with their attorney's assistance, Herbie's sons filed a timely petition for an elective share with the probate court. Their state law provided that Herbie was entitled to one-half of the combined net worth of the couple, less any amounts passing to Herbie under Wendy's will. Because Herbie was essentially penniless and Wendy's will left him nothing, the elective share entitled Herbie to one-half of Wendy's estate of $300,000.[92] Herbie received $150,000.[93] Wendy's daughters bitterly divided the remaining $150,000 amongst themselves, angry not about the depletion of their inheritance in itself, but about the irrational legal mechanisms by which that inheritance had been eroded, against their mother's clearly articulated wishes.

Scarcely a few months later, Herbie suffered a second, fatal stroke. Herbie passed away one year, to the day, after the death of his wife. Herbie was intestate. His estate (comprised solely of the $150,000 recovery from Wendy's estate) passed to his two sons in equal shares.

3. Gail and Lucy: *Imputed Gifts*

Our third case study involves a lesbian couple, Gail and Lucy. Gail and Lucy also married later in life, each with an adult son from prior relationships. Gail brought $300,000 to the marriage, and Lucy had $100,000, all of it liquid. They kept their accounts and financial affairs separate from one another. To that end, they executed simple wills by which they each left their estate to their

92. *See, e.g.*, IDAHO CODE ANN. § 15-2-203(a) (2014) (providing for a forced share right of one half of the "augmented estate").

93. Offsets for probate and funeral costs, administrative expenses and the like have been ignored. *See* IDAHO CODE ANN. § 15-2-203(b) (2014) (reducing the forced share right on account of "an allocable portion of general administration expenses").

own children, and durable powers of attorney naming their respective sons as their agents in the event of incapacity.

After they had been married nine years, their relationship soured. Gail, anticipating a divorce, secretly gifted her entire $300,000 investment account to her son Trey, leaving the couple with a marital net worth of just $100,000, all of it Lucy's.[94] Because the couple maintained separate financial spheres and did not discuss their personal financial details with one another, Lucy was not aware of the dramatic decline in her spouse's wealth. Gail, despite the large gift, continued to maintain her contribution to household expenses with her pension and social security income.

Two years passed and the couple somewhat reconciled. Then Lucy was diagnosed with Alzheimer's disease and was admitted to a local nursing home. Working with a caseworker, Lucy's son Axel completed the required Medicaid paperwork.[95] It was at this point that he and his mother first discovered that Gail had made the large gift to Trey. Furious, Axel contacted Gail's son and demanded that he return the money. Trey refused, and Gail declined to intervene.

With Axel acting as her agent, Lucy pursued a request for Medicaid assistance. The Medicaid agency informed her that she was being assessed a "penalty period" of more than three years on account of her spouse's gift.[96] Axel dutifully began paying for his mother's care from her own savings, which began to erode at an alarming rate. Six months later, Lucy died. Eventually, Axel's sense of loss was replaced by a lingering sense of the unfairness at the depletion in his mother's limited savings on account of her partner's gift to Trey, a gift, in fact, that had likely been motivated out of mistrust towards Lucy.

C. MEDICAID OVERVIEW

Long-term care costs represent perhaps the single most significant potential cause of catastrophic wealth loss for older middle income Americans.[97] Few things strike fear in the hearts of older Americans like

94. The transfer in anticipation of divorce may have been recoverable by Gail if a divorce was filed within the statute of limitations for fraudulent transfers (typically two years). *See* Bradford v. Bradford, 993 P.2d 887 (Utah App. 1999).

95. Lawfully married same-sex couples should be treated as spouses for purposes of Medicaid in any state. *See* Massachusetts v. U.S. Dept. of Health and Human Serv., 682 F.3d 1, 6 (1st Cir. 2012) ("By combining the income of individuals in same-sex marriages, Massachusetts' Medicaid program is noncompliant with DOMA."); U.S. v. Windsor, 133 S. Ct. 2675 (overturning provisions of "DOMA," the federal Defense of Marriage Act).

96. Using a "divestment penalty divisor" of $7,500/month, a gift of $300,000 would generate a penalty period of forty months. *See infra* notes 142–46 and accompanying text for a discussion of the calculation of the Medicaid penalty period associated with gifts.

97. *See* Rochelle Bobroff, *Judicial Deference to Federal Government Erodes Medicaid Protections for Elderly Spouses Impoverished by the High Costs of Nursing Home Care*, 29 WM. MITCHELL L. REV. 159, 162 (2002) (stating that "[f]ew Americans can afford to spend more than a short period of time in a nursing home."); *see generally id.* at 161 (citing

ongoing care costs destroying their financial security.[98] The prospect of a monthly bill from a nursing home for any significant period of time might be more frightening than sickness or death for those without significant means.

To partially address these fears President Truman initiated policy objectives aimed at solutions in the 1940s, which eventually culminated in President Johnson's Medicaid and Medicare amendments to the Social Security Act in 1965.[99] An elderly President Truman attended the signing ceremony.[100] Given the historical relatedness, the overlapping objectives, and the phonetic similarities of Medicaid and Medicare, some degree of confusion among nonlawyers and the public at large was sure to result with regard to the coverage and eligibility distinctions between the programs. However, the programs markedly differ in terms of structure, implementation, funding, eligibility, and aim.[101]

JOSHUA M. WIENER ET AL., CATASTROPHIC COSTS OF LONG-TERM CARE FOR ELDERLY AMERICANS, IN PERSONS WITH DISABILITIES 196 (Joshua M. Wiener et al., eds., 1995)). The fear of long-term care costs is often utilized to financially exploit the elderly. *See, e.g.*, U.S. v. Rumsavich, 313 F.3d 407, 412 (7th Cir. 2002) (describing acts of mail fraud where defendant preyed on victims with a "presentation of pamphlets titled, 'The Cruel Cost of Long-Term Care,' 'Long-Term Health Care and Poverty: Price of Nursing Care Is Poverty, Survey Says,' and 'A Retiree's Biggest Poverty Trap: Nursing Homes.'"). Long-term care costs may very well represent one of the gravest concerns for state budgets as well as individual taxpayers. *See* Christopher Robertson, *The Split Benefit: The Painless Way to Put Skin Back in the Health Care Game*, 98 CORNELL L. REV. 921, 922 (2013) ("Last year, Medicaid spending was estimated to account for nearly a quarter of total state spending—the largest portion of their budgets—and it's getting only more expensive.") (quoting Ezekiel J. Emanuel, *What We Give Up for Health Care*, N.Y. TIMES (Jan. 21, 2012), http://opinionator.blogs.nytimes.com/2012/01/21/what-we-give-up-for-health-care/).

98. Roger A. McEowen & Neil E. Hart, *Estate Planning for the Elderly and Disabled: Organizing the Estate to Qualify for Federal Medical Extended Care Assistance*, 34 SOC. SEC. REP. SERV. 815, 815 (1991) ("Perhaps the greatest fear of elderly Americans is the fear of becoming impoverished as a result of paying for their health care needs.").

99. 79 Stat. 1432, Public Law 89–97; 42 U.S.C. §§ 1396 *et seq*. Medicaid was enacted as Title XIX to the Social Security Act (and is sometimes referred to as "Title 19"). *Id.* Initially, Medicaid was "almost an afterthought" to Medicare. Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging Into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 15 (2013) (citing ROBERT STEVENS & ROSEMARY STEVENS, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID 47–51 (1974)) (describing Medicaid as "ill-designed" compared to Medicare). "The location of the execution of the Medicare and Medicaid Acts was in deference to a speech regarding the need for Medicare and Medicaid made by Truman 20 years earlier and his role toward bringing these two great pieces of legislation to fruition." 51 TEX. PRAC., Elder Law § 1:1 (2014–2015 ed.).

100. On July 30, 1965, President Johnson signed the bill, in Independence, Missouri where President Truman lived. Molly Dear Abshire, H. Clyde Farrell, Patricia Flora Sitchler & Wesley E. Wright, 51 TEX. PRAC., Elder Law § 1:1 (2013–2014 ed.). Johnson credited Truman with "planting the seeds of compassion and duty which have today flowered into care for the sick and serenity for the fearful." Rebecca H. Hiers, *Leadership from the Heart: One Tribe's Example*, 26 J.L. & RELIGION 541, 543 (2010–2011).

101. *See* Meredith A. Devlin, Note, *When Policies Collide: Citizenship Documentation Requirements and Barriers to Obtaining Photo Identification—The New Medicaid Citizenship Requirement as a Case Illustration*, 41 IND. L. REV. 451, 452 (2008) (noting that

Medicare is primarily health insurance for Americans age 65 and older.[102] Eligible beneficiaries are responsible for co-pays and deductibles.[103] Four different components comprise Medicare: Medicare A (hospital insurance),[104] Medicare B (supplemental medical insurance),[105] Medicare C or "Medicare Advantage" (a managed care option),[106] and Medicare D (the prescription drug benefit).[107] Medigap "wraparound insurance," the Medicare Savings Program, and Extra Help programs further supplement the availability of benefits.[108] The United States Department of Health and Human Services (HHS), through its Centers for Medicare and Medicaid Services (or CMS), is responsible for administering the program, which is "exclusively federal."[109] Except in limited circumstances, Medicare benefits do not extend to long-term care costs.[110]

Medicaid, on the other hand, does cover long-term custodial care costs.[111] In fact, Medicaid is the primary payor of nursing home care in the

Medicare is often confused with Medicaid); *see also* Merle Lenihan & Laura D. Hermer, *On the Uneasy Relationship Between Medicaid and Charity Care*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 165, 172–73 (observing that Congress labeled patients "beneficiaries" under Medicare but "recipients" under Medicaid).

102. *See* Harris, *supra* note 21; *see also* 42 U.S.C. §§ 1395 *et seq.* (2012); 42 C.F.R. §§ 405 *et seq*. (2013).

103. RALPH C. BRASHIER, MASTERING ELDER LAW 287 (Carolina Academic Press, 2010).

104. 42 U.S.C. §§ 1395c *et seq*. (2012). Medicare Parts A and B were part of the original Medicare plan and the great majority of individuals choose coverage under Parts A and B rather than the alternative Part C. BRASHIER, *supra* note 103, at 286. Part A Medicare covers inpatient hospital care along with hospice care and, in limited circumstances, certain in-home health care services and skilled nursing facility (SNF) care. *Id.* Part A is financed through the FICA tax. *Id.* at 288.

105. 42 U.S.C. §§ 1395j *et seq*. (2012). Medicare Part B covers doctor's services, outpatient care, services furnished by rural health clinics and ambulatory surgical centers, ambulance charges, diagnostic tests and, in limited circumstances, certain preventative care. BRASHIER, *supra* note 103, at 286, 302. Part B is financed through insurance premiums and federal contributions. BRASHIER, *supra* note 103, at 303.

106. 42 U.S.C. §§ 1395w-21 *et seq*. (2012). The Medicare Advantage plans described in Medicare Part C's "Medicare + Choice" Program are privately managed, require approval by Medicare, and provide coverage under parts A and B. BRASHIER, *supra* note 103, at 286. Thus, Medicare C is a closely regulated private insurance alternative to Medicare A and B. A Medicare C plan may include extra benefits such as some drug coverage and routine dental, vision, or wellness programs, but provider network limitations may offset these benefits. *Id.* at 323.

107. 42 U.S.C. §§ 1395w-101 *et seq*. (2012).

108. *Id*.

109. DAVID A. PRATT, SOCIAL SECURITY AND MEDICARE ANSWER BOOK 1–2 (Aspen Publishers, 3rd ed. 2003).

110. Medicare Part A includes coverage for skilled nursing facility costs for up to one hundred days. 42 U.S.C. § 1395d(a)(2) (2012). During the first twenty days, Medicare covers the entire cost but thereafter a co-pay is required from the Medicare beneficiary. 42 U.S.C. §§ 1395d(a)(2), 1395e(a)(3) (2012).

111. Initially, Medicaid did not cover payments to nursing homes. Marc Gregory Cain, Comment, *The Effects of the Patient Protection and Affordable Care Act on Medicaid: Will Seniors Have More Long-Term Care Options and an Easier Application Process?*, 4 EST.

United States.[112] But Medicaid is emphatically the "payor of last resort."[113] Unlike Medicare, Medicaid is a means-tested program. The availability of Medicaid benefits is restricted to the financially needy and the impoverished.[114]

States may voluntarily elect to participate in Medicaid, and every state has done so.[115] Medicaid is jointly funded by federal and state governments, and is jointly administered as a federal-state partnership program.[116] Coverage and eligibility requirements vary significantly from state to state.[117] Even the name of the program varies: For example the state program is called Medi-Cal in California, MassHealth in Massachusetts, ForwardHealth in Wisconsin, and Sooner Care in Oklahoma.[118]

The reasons for the high degree of variability in state-specific Medicaid programs are fourfold: First, some federal Medicaid regulations expressly delegate options as to how states administer the program.[119] Second, states can apply for waivers from certain federal requirements.[120] Third, states differ in their interpretations of federal Medicaid rules which are often, on account of poor draftsmanship or otherwise, ripe for

PLAN. & COMMUNITY PROP. L.J. 127, 130 (2011). Later, the Boren Amendment required states to include long term care coverage under Medicaid. *Id*.

112. *See* BRASHIER, *supra* 103, at 346 (noting that '[i]n recent years, Medicaid has paid for nearly half of all nursing home care in the United States.").

113. James Square Nursing Home, Inc. v. Wing, 894 F.Supp. 682, 687 (N.D.N.Y. 1995).

114. *See* Atkins v. Rivera, 477 U.S. 154, 147 (1986) (noting that Medicaid "is designed to provide medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care and services.").

115. Huberfeld et al., *supra* note 99, at 15.

116. West Virginia Dep't of Health and Human Res. v. Sibelius, 649 F.3d 217, 218 (4th Cir. 2011).

117. To locate the website of a specific state Medicaid program, see http://www.nasmd.org /links/state_medicaid_links.asp.

118. NINA A. KOHN, ELDER LAW: PRACTICE, POLICY, AND PROBLEMS 277 (2014). In Arizona, Medicaid is called the Arizona Health Care Cost Containment System; in Kansas, Medicaid is called the Kansas Medical Assistance Program; in Maine, it is MaineCare; in Minnesota it is Medical Assistance; in Oregon, it is the Oregon Health Plan; in Pennsylvania, it is Medical Assistance; and in Tennessee, it is TennCare. *Id*. In most states, Medicaid at the state level is simply referred to as Medicaid.

119. *E.g.*, Seatoma Convalescent Ctr. v. Dept. of Soc. and Health Serv. 919 P.2d 602, 605 (Wash. App. 1996) (noting that under Medicaid, "the federal government delegates authority to the states to administer Medicaid and to devise their own reimbursement systems, provided the systems comply with certain federal guidelines."); *see also* E.B. v. Div. of Med. Assistance and Health Serv., 67 A.3d 671, 676 (N.J. Ct. App. 2013) (noting that the state Medicaid agencies have "broad authority to administer the State Medicaid programs and plans, to ensure that those plans 'provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients.'") (quoting 42 U.S.C. § 1396a(a)(19)).

120. *E.g.*, Hyde v. Dept. of Mental Health, 200 S.W.3d 73 (Mo. Ct. App. 2006) (involving a Medicaid waiver program for in-home healthcare services).

divergent readings.[121] And fourth, although the doctrine of preemption bars states from restricting Medicaid eligibility or narrowing coverage from federal parameters, many state restrictions of Medicaid simply go unchallenged, especially in view of the fact that Medicaid recipients are, by definition, lacking in financial resources and therefore often without the means to mount a legal preemption challenge to a given state Medicaid rule.[122]

Given the central importance of Medicaid benefits for individuals requiring long-term care, the degree of nonuniformity, ambiguity, and opaqueness is astonishing.[123] A program of last resort for impoverished Americans facing nursing home care should not consist of indecipherable rules with uncertain outcomes and interpretations. Frustrated judges embarking on a reading of Medicaid rules have described them as "Byzantine" and "an aggravated assault on the English language."[124] Moreover, most Medicaid issues require a nuanced reading of at least two sets of often unmatched rules, both federal and state, along with implementing regulations (both federal and state), the Medicaid Manual, case law, and holdings from one state which may not carry weight in a neighboring state.[125] Relevant authority can be contained in agency

121. *E.g.*, Hickey v. Waldman, 28 Mass.L.Rptr. 391, at *6 n.11 (Mass. Super. Ct. 2011) (observing that "the question of whether naturopathic, homeopathic, and other treatment . . . are reimbursable by a Medicaid-funded program" is a judgment "that the Medicaid Act commits to the states, which have taken divergent paths.").

122. *E.g.*, Martin *ex rel.* Hoff v. City of Rochester, 642 N.W.2d 1, 27 (Minn. 2002) (holding that a state medical assistance subrogation statute was preempted by federal Medicaid law).

123. *See* Dep't of Health & Human Serv., Office of Assistant Sec'y for Policy & Evaluation, Medicaid Estate Recovery 1 (2005), *available at* http://1.usa.gov/17b5xoV (noting that Medicaid "pays nearly half of the total amount spent on nursing homes").

124. The Third Circuit Court of Appeals, in an opinion authored by Judge D. Brooks Smith, stated:

> The Supreme Court has noted, echoing Judge Friendly, that Medicaid's "Byzantine construction . . . makes the Act 'almost unintelligible to the uninitiated.'" The District Court, in *Friedman*, which the Supreme Court quoted, was even more direct: "The Medicaid statute . . . is an aggravated assault on the English language, resistant to attempts to understand it."

Lewis v. Alexander, 685 F.3d 325, 331 n.1 (3rd Cir. 2012) (internal citations omitted). *See also* Yel Fig Rehabilitation Ass'n of Virginia, Inc. v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994) *cert. den.*, 516 U.S. 811 (1995) (superseded by statute in other respects as noted in Stohler v. Menke, 998 F.Supp. 836, 838–39 (E.D. Tenn. 1997)) ("There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase.").

125. *See, e.g.*, Hobbs *ex rel.* Hobbs v. Zenderman, 579 F.3d 1171, 1186 (10th Cir. 2012) (relying on the State Medicaid Manual to construe the Medicaid eligibility impact of an interest in a trust).

transmittals.[126] Cross-referencing Social Security rules and regulations may also be required.[127] Despite the efforts of organizations like the National Academy of Elder Law Attorneys (NAELA) and state bar elder law committees, the number of attorneys truly versed and capable in their state's Medicaid law is relatively few.[128] Medicaid applicants or recipients face a dauntingly complex and often adversarial system, with qualified legal advocacy and assistance often a rarity.[129]

Medicaid is a broad-based program whose recipients include children and young parents, but for purposes of this article, attention is directed to the long-term care benefits. There are two basic tests for Medicaid eligibility: the "categorically needy" and the "medically needy" tests.[130] Two subsets of categorically needy exist depending on the state in question: SSI states and 209(b) states.[131] In an "SSI state," an individual is eligible under the categorically needy test as long as he or she is eligible for Supplemental Security Income (SSI), a means-tested benefit administered by the Social Security Administration.[132] Most states are SSI states, and in most SSI states no separate application for Medicaid is required since eligibility automatically follows SSI eligibility.[133] Conversely, in a 209(b) state eligibility requirements may be more stringent than SSI standards.[134]

126. CMS program transmittals are available at http://www.cms.hhs.gov/home/regs guidance.asp.

127. *See, e.g.*, Ramey v. Reinertson, 268 F.3d 955, 964 (10th Cir. 2001) (relying on the Social Security Program Operations Manual System, or "POMS" to assess a trust interest for Medicaid eligibility).

128. *Cf.* Steven H. Stern, *Case Study: Medicaid Crisis Planning for Spouses*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 71, 71 (1998) (noting that "too few families take appropriate steps to plan for" long term care issues). "The federal Medicaid statute is extremely complex and contains many traps for the uninitiated planner." McEowen & Hart, *supra* note 98, at 862.

129. "States are often criticized for the level of difficulty and inconvenience involved in the Medicaid application process." Anna Wermuth, Comment, *Kidcare and the Uninsured Child: Options for an Illinois Health Insurance Plan*, 29 LOY. U. CHI. L.J. 465, 469 (1998).

130. *See* Atkins v. Rivera, 477 U.S. 154, 157 (1986) (explaining: "States participating in the Medicaid program must provide coverage to the 'categorically needy' [and] may elect to provide medical benefits to the 'medically needy,' that is, persons who meet the nonfinancial eligibility requirements for cash assistance under AFDC or SSI, but whose income or resources exceed the financial eligibility standards of those programs.") (citations omitted).

131. 42 U.S.C. § 1396a(a)(10)(A)(i) (2012).

132. *See generally*, Sarah H. Bohr, *Overview of Social Security Insurance Benefits and Supplemental Security Income (SSI)*, 40 SOC. SEC. REP. SERV. 685, 696–704 (1993) (providing an overview of the SSI program).

133. BRASHIER, *supra* note 103, at 352. "SSI states are not required to cover the medically needy, but they may choose to do so." *Id.* at 353.

134. Roger A. McGowan and Neil E. Harl, *Estate Planning for the Elderly and Disabled: Organizing the Estate to Qualify for Federal Medical Extended Care Assistance*, 24 IND. L. REV. 1379, 1386 (1991) (concluding that "the overall effect . . . in section 209(b) states, is to reduce the number of Medicaid eligible persons and the amount of assistance paid to qualified applicants."). "The 209(b) states include Connecticut, Hawaii, Illinois, Indiana, Minnesota, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma and

Generally speaking, "medically needy" individuals are those who cannot qualify as "categorically needy" on account of excess resources, yet still have insufficient funds to pay for their medical care.[135] The medically needy category extends coverage on a more generous basis than the categorically needy category, and states are barred from using any methodology more restrictive than that used in the SSI program for aged individuals.[136] Two subsets of medically needy tests exist. In some states, an individual is eligible under the medically needy Medicaid test by meeting the same income and resource requirements of the categorically needy after taking account of qualified out-of-pocket health care expenses.[137] Thus, certain out-of-pocket health care costs are deductible in order to meet the income and resource requirements. In other states, out-of-pocket health care costs are not deductible, but monthly income limits are typically increased to 300 percent of the SSI level.[138]

In any case, the thresholds of countable Medicaid assets are $2,000 for a single person and $3,000 for a married couple.[139] The amounts are not indexed for inflation. Certain assets are "exempt" or non-countable:[140] One transportation vehicle;[141] certain burial funds;[142]

Virginia." BRASHIER, *supra* note 103, at 352. A 209(b) state must provide coverage for the medically needy. *Id*. at 353.

135. 42 U.S.C. § 1396a(a)(10)(A)(ii) (2012); BRASHIER, *supra* note 103, at 347.

136. 42 U.S.C. § 1396a(a)(10)(C)(i) (2012).

137. 42 C.F.R. § 435.725 (2013).

138. *See, e.g., 2014 SSI and Spousal Impoverishment Standards*, MEDICAID.GOV (Jan. 1, 2014), http://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/downloads/spousal-impoverishment-2014.pdf. *See also*, Kenneth Hubbard, *The Medicaid Cost Crisis: Are There Solutions to the Financial Problems Facing Middle-Class Americans Who Require Long-Term Health Care?*, 43 CLEV. ST. L. REV. 627, 638 (1995) (explaining that "if the income of an applicant is even one dollar higher than the limit set by the state, that individual cannot receive Medicaid benefits regardless of the cost of his care.").

> A Miller trust exempts the individual's income (including SSI and pension income) from calculations of income and resources if the state is reimbursed from the trust for Medicaid expenses. An individual could use this trust if the individual's income exceeds the income cap but is still lower than the average cost of a nursing home in the region where the individual will receive care. The individual assigns all nonexempt income to the trust, the trust directly pays the nursing home the maximum allowable amount, and Medicaid pays the nursing home the remainder of the bill.

Richard Stebbins, *Jacob's Ladder to a Higher Quality of Life: Special Needs Financial Planning for Practitioners and Caregivers*, 4 EST. PLAN. & CMTY. PROP. L.J. 305, 317 (2012).

139. *See* 42 U.S.C. § 1396a(m)(1)(C) (2012) (incorporating the resource tests under the Supplemental Security Income (SSI) program at 42 U.S.C. § 1382b).

140. The terms "exempt" and "non-countable" may be used interchangeably in relevant state Medicaid rules. *See, e.g.*, 22 CAL. CODE REGS. 22, § 50418(a) (2015) ("Certain real and personal property is exempt and shall not be included in determining eligibility"); 130 MASS. CODE REGS. 520.008 (2015) ("Noncountable assets are those assets exempt from consideration when determining the value of assets.").

141. 42 U.S.C. § 1382b(a)(2)(A) (2012); 20 C.F.R. § 416.1218 (2013).

142. 42 U.S.C. § 1382b(a)(2)(B) (2012). Excluded from resources are "the value of any burial space or agreement (including any interest accumulated thereon) representing the

personal effects and household goods;[143] and very small life insurance policies[144] are exempt. A house up to a certain value may be exempt depending on the applicable state rules and the circumstances of the applicant,[145] and nonmarketable assets are non-countable.[146] The remaining exempt resource categories are relatively few.[147]

In addition to satisfying the resource requirements for Medicaid eligibility, applicants must also satisfy income requirements.[148] Generally,

purchase of a burial space (subject to such limits as to size or value as the Commissioner of Social Security may by regulation prescribe) held for the purpose of providing a place for the burial of the individual, his spouse, or any other member of his immediate family." *Id.*

143. 42 U.S.C. § 1382b(a)(2)(A) (2012); 20 C.F.R. § 416.1216 (2013). "[I]tems that we acquired or are held for their value or as an investment" such as "[g]ems, jewelry that is not worn or held for family significance, or collectibles" are not excluded as personal effects. 20 C.F.R. § 416.1216(b)(2) (2013).

144. 42 U.S.C. § 1382b(a) (2012). A life insurance policy "shall be taken into account only to the extent of its cash surrender value; except that if the total face value of all life insurance policies on any person is $1,500 or less, no part of the value of any such policy shall be taken into account." *Id.*; *see also* Miller v. State Dep't of Human Serv., 2001 WL 278001 at *4 (Tenn. Ct. App. 2001) (holding that four life insurance policies with face values ranging from $2,500 to $6,000 were all non-countable resources where none had any cash surrender value). Term policies are excluded assets since they have no cash value. *See id.* (citing 20 C.F.R. §§ 416.1230(a), 416.1230(b)(5)). Medicaid applicants have difficulty retaining term policies, however, given the ongoing need to maintain the policy with premium payments.

145. *See* 42 U.S.C. § 1382b(a)(1) (2012) (excluding from countable resources the value of "the home (including the land that appertain thereto"); 42 U.S.C. § 1396p(f) (2012) (capping the non-countable home equity at $500,000, with inflationary adjustments). The home is a non-countable resource and the equity cap does not apply if a spouse is residing in the home. 42 U.S.C. § 1396p(f)(2)(A) (2012). For various states' treatment of the home exclusion rule, compare IDAHO ADMIN. CODE IDAPA 16.03.05.871.01(d) (2014) (providing that the home loses its non-countable character if held in a revocable trust and "is excluded again if removed from the trust."); Stafford v. Idaho Dep't of Health & Welfare, 181 P.3d 456 (Idaho 2008) (construing this rule) with OHIO ADMIN. CODE OAC 5160:1-3-05.13(D)(1)–(2) (2015) (providing that the home loses its exempt treatment when the owner has continuously lived in a nursing facility for thirteen months); N.J.A.C. 10:71-4.4(b)(1)(i) (2014) (providing that the home loses its exempt character if the owner has been absent from it for more than six months); N.Y. SOC. SERV. LAW § 366 subdiv. 2(a)(1)(i) (2014) (excluding a "homestead which is essential and appropriate to the needs of the household" without regards to occupancy of the home); *see also* Moffett v. Blum, 74 A.D.2d 625, 626 (N.Y. App. Div. 1980) (construing this rule and overturning a determination that funds expended on the installation of essential services in a home in order to make it habitable such as heating, plumbing, septic systems and a waterwell could be considered countable resources as "not reasonable and humane").

146. 20 C.F.R. § 418.3415 (2015).

147. *See, e.g.*, 42 U.S.C. § 1382b(a)(3) (2012); 416 C.F.R. §§ 416.1220–1224 (2013) (property essential to self-support such as tools, machinery, livestock or an unimproved lot on which vegetables are grown for one's own consumption); 42 U.S.C. § 1382b(a)(5) (2012) (an Alaskan Native's shares of stock in a village corporation during the period in which the stock is inalienable); 42 U.S.C. § 1382b(a)(17) (2012) (payments for participating in a clinical trial involving the testing of treatments for a rare disease).

148. Medicaid recipients must also be U.S. citizens or permanent resident aliens. 42 U.S.C. § 1396b(v) (2012). In addition, an applicant must demonstrate residence of the state in which they are applying for Medicaid benefits. 42 U.S.C. § 1396a(b) (2012).

SSI rules apply in the characterization and counting of income.[149] Income is defined as "anything you receive in cash or in kind that you can use to meet your needs for food and shelter."[150] Income tax refunds, however, are specifically designated as non-countable income.[151] Payment received on the sale or exchange of an asset is not considered income, but rather "resources that have changed their form."[152] Most social service benefits are non-countable income.[153] Medicaid does consider the income of one spouse to be the separate income of that spouse.[154]

After satisfying the income and resource requirements as of the date of application, Medicaid applicants must also demonstrate that they did not voluntarily impoverish themselves as a means to qualify.[155] Thus, Medicaid penalizes gifts or transfers for less than fair market value within five years of an application—the five-year "look back."[156] An applicant is required to truthfully report any gifts as part of the application itself.[157] A Medicaid application requires disclosure of gifts by both the applicant as well as the applicant's spouse.[158] The penalty for a gift by either spouse is

149. *See* 20 C.F.R. § 416.1100 *et seq*. (2013).

150. 20 C.F.R. § 416.1102 (2013).

151. 20 C.F.R. § 416.1103(d) (2013).

152. 20 C.F.R. § 416.1103(c) (2013). "If you sell your automobile, the money you receive is not income; it is another form of a resource." *Id.*

153. 20 C.F.R. § 416.1103(b) (2013).

154. *See infra* p. 310 for discussion regarding the separate treatment of spousal income.

155. *See* 42 U.S.C. § 1396p(c)(1)(A) (2012) ("[T]he State plan must provide that if an institutionalized individual or the spouse of such an individual (or, at the option of a State, a noninstitutionalized individual or the spouse of such an individual) disposes of assets or less than fair market value on or after the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance. . . .").

156. 42 U.S.C. § 1396p(c)(1)(B)(i) (2012). The sixty-month look-back is made from the date that the Medicaid applicant is both institutionalized and has applied for Medicaid benefits. 42 U.S.C. § 1396p(c)(1)(B)(ii)(I) (2012). An "institutionalized individual" is defined as a person who is (1) an inpatient in a nursing facility; (2) "an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility"; or (3) is eligible for SSI. 42 U.S.C. § 1396p(h)(3) (2012). In the event of a noninstitutionalized Medicaid applicant, the 60-month look-back is conducted from the date (1) that the individual has applied for Medicaid; or (2) that the individual has disposed of assets or less than fair market value, whichever is later. 42 U.S.C. § 1396p(c)(1)(B)(ii)(II) (2012).

157. *See, e.g.*, E.B. v. Div. of Medical Assistance and Health Serv., 67 A.3d 671, 677 (N.J. App. 2013) (explaining that "[i]ndividuals seeking Medicaid must submit an application to their local County Welfare Agency (CWA) for review") (internal footnote deleted).

158. *See* 42 U.S.C. § 1396p(c)(1)(A) (2012) (providing "that if an institutionalized individual *or the spouse of such an individual* . . . disposes of assets for less than fair market value on or before the look-back date specified in subparagraph (B)(i), the individual is ineligible for medical assistance. . . ." (emphasis added); *see also* 42 U.S.C. § 1396p(c)(4) (2013) (requiring, where the spouse of a Medicaid applicant has made a disqualifying transfer, states "using a reasonable methodology (as specified by the Secretary), apportion such period of ineligibility (or any portion of such period) among the individual and the individual's spouse if the spouse otherwise becomes eligible for medical assistance"). By its terms, subsection (c)(4) only requires apportionment when both spouses are Medicaid

a period of ineligibility for Medicaid benefits based on the size of the gift (or the cumulative size of more than one reportable gift).[159]

The length of a penalty period for a gift within the five-year "look back" period is derived from a formula linked to the average monthly cost of long term care in a given state.[160] The larger the gift is, the longer the period of ineligibility. If the average cost of nursing home care is $7,000, a gift of $7,000 within the look back period will result in a period of Medicaid ineligibility of one month; a gift of $70,000 within the look back period would trigger Medicaid ineligibility for a term of ten months.[161]

The penalty period incurred by a gift within the look back period begins to run on the date the Medicaid applicant is otherwise eligible for Medicaid benefits.[162] In other words, the transfer penalty does not begin to run until the applicant qualifies for Medicaid under both the income and resource tests. This starting date for transfer penalty was enacted as part of the Deficit Reduction Act (DRA) of 2005; previously, the starting date was the same date as the gift itself.[163] Because the starting date for a transfer penalty is now deferred, because of gifts within the five-year look-back period an individual Medicaid applicant may find herself impoverished (i.e., with less than $2,000 in countable resources) yet ineligible for nursing home cost coverage through Medicaid for a significant period of time.[164]

eligible. *See* Matter of Woytisek v. Novello, 309 A.D.2d 869, 869 (N.Y. App. Div. 2003) (Slip Op.) (holding that the statute and state administrative rule "clearly contemplate that before the penalty period may be apportioned between spouses, both spouses must be eligible for Medicaid.").

159. *Compare* McDonald v. Illinois Dept. Human Services, 952 N.E.2d 21, 783, 804 (Ill. App. 2010) (affirming seventeen-month penalty period for a $125,000 gift) *with* Frerichs v. State, 960 N.E.2d 603, 606 (Ill. App. 2011) (discussing a mere one-month penalty that would be imposed in the event of a single $10,000 gift).

160. 42 U.S.C. § 1396p(c)(1)(E) (2012).

161. *See, e.g.*, Evans *ex rel*. Durbin v. State *ex rel*. Dep't of Human Serv., 2013 WL 6823089 (Ill. App. Ct. 2013). There, a nursing home resident transferred $16,000 in assets and was assessed a four-month period of Medicaid ineligibility. *Id.* at ¶ 7. The State Medicaid Agency utilized a private payrate of $120/day (or $3,600/month) in effect at the date of the application to calculate the period of ineligibility (as opposed to a $4,050 per month rate in effect not at the time of the date of the agency's decision). *Id*. at ¶ 8. The court affirmed, holding that "the divisor is determined by the pay rate at the time of application." *Id.* at ¶ 30.

162. 42 U.S.C. § 1396p(c)(1)(D)(ii) (2012).

163. Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 6044(a), 120 Stat. 4, 88-2 (2006); *see* 42 U.S.C. § 1396p(c)(1)(D)(i) (2012) (preserving the commencement date for penalty periods as of the date of the transfer when the transfer was made before February 8, 2006).

164. *See* Charles A. LeFebyre & Martin W. Siemer, *Survey of Illinois Law: Elder Law*, 32 S. ILL. U. L.J. 865, 869–70 (2008). The DRA thus eliminated the "half a loaf" planning strategy whereby an individual would make a gift to intentionally trigger the imposition of a penalty period, retaining sufficient assets so as to have spent down to Medicaid eligibility levels at about the time the penalty period would run. *Id*. *See also* Gene V. Coffey et al., *Analysis of Changes to Federal Medicaid Laws under the Deficit Reduction Act of 2005*, 2 NAELA J. 189, 198 (2006).

Medicaid rules cast a broad definition over the word "gift." Gifts include outright gifts, bargain sales, purchases of life estates and certain types of annuities;[165] transfers to individuals or to irrevocable trusts;[166] and qualified disclaimers, even though a qualified disclaimer is construed as a non-gift for purposes of the federal gift tax.[167] Gifts also include a Medicaid applicant's failure to avail him or herself of all available resources.[168] Thus, the failure to sue a third party can be treated as a gift, as can the failure to timely file a petition for an elective share against a decedent spouse's estate.[169] The broad definition of a gift comports with the Medicaid program's underlying objective of closing any perceived loopholes that would permit individuals to voluntarily impoverish themselves as a means to accelerate eligibility for Medicaid benefits.[170]

There are certain limited exceptions to the Medicaid "no gift" rule. Transfers of assets to a disabled child in trust, or the transfer of one's personal residence to an adult child who has resided in the house and provided care for at least two years do not trigger transfer penalties.[171] A transfer of one's personal residence to a sibling who has resided in the home for at least one year is permissible.[172] Transfers to a spouse do not result in Medicaid transfer penalties, but rarely advance Medicaid eligibility on account of the way in which Medicaid considers marital wealth as a joint enterprise regardless of title.[173]

165. 42 U.S.C. § 1396p(c)(1)(F), (G), (I), (J) (2012).

166. 42 U.S.C. § 1396p(d)(3)(B) (2012).

167. *E.g.*, *In re* Molloy v. Bane, 214 A.D.2d 171, 177 (N.Y. 1995) (holding that Medicaid recipient's disclaimer of inheritance from daughter constitutes disqualifying transfer); *cf.* 26 U.S.C. § 2518 (2011) (outlining qualified disclaimers in the context of federal transfer taxes).

168. 42 U.S.C. § 1396p(h)(1) (2012).

169. *See infra* notes 198–99 and accompanying text for the interplay between the no gift rules of Medicaid and the availability of an elective share claim against a decedent spouse's estate.

170. *See* Landy v. Velez, 958 F.Supp. 2d 545, 552–53 (D.N.J. 2013) (outlining Congressional attempts to "close that loophole" relative to trusts, promissory notes, or the "crude and straightforward" method of "the transfer of an asset as a gift."); Gillmore v. Illinois Dept. of Human Serv., 843 N.E.2d 336, 349 (Ill. 2006) (discussing the "loophole" of purchasing an annuity when not characterized as a gift).

171. *See* 42 U.S.C. § 1396p(c)(2)(B)(iii) (2012) (allowing transfers of assets to a trust established for a disabled child); 42 U.S.C. § 1396p(c)(A)(iv) (2012) (allowing transfers of a home to an adult child who resided in the home "at least two years immediately before the date the individual becomes an institutionalized individual and who (as determined by the State) provided care to such individual which permitted such individual to reside in the home rather than in such an institution"); *see also* 42 U.S.C. § 1396p(c)(2)(B)(iv) (2012) (allowing transfers of assets to a trust for a disabled individual under the age of sixty-five years of age, whether or not related to the transferor).

172. 42 U.S.C. § 1396p(c)(2)(A)(iii) (2012) (allowing the transfer of a home to a sibling "who has an equity interest in such home and who was residing in such individual's home for a period of at least one year").

173. 42 U.S.C. §§ 1396p(c)(2)(A)(i), 1396p(c)(2)(B)(i), (ii) (2012); *see also* Hal Fliegelman & Deborah C. Fliegelman, *Giving the Guardians the Power to do Medicaid Planning*, 32 WAKE FOREST L. REV. 341, 361–62 (1997) (noting that "transferring assets from a spouse living in, or about to be living in, a nursing home—the 'institutionalized' spouse—to the other

Unless a gift or transfer for less than full value falls under a delineated exception, the three sole means of avoiding a transfer penalty associated with the gift are (1) under the rubric of "undue hardship,"[174] (2) by establishing that at the time of the gift the donor intended the gift exclusively for some reason other than accelerating or establishing eligibility for Medicaid,[175] or (3) by proving that the transferor simply made a "bad bargain."[176] The burden is on the applicant to rebut the presumption that all transfers were made with Medicaid in mind, and the evidence must be "convincing."[177] This proves difficult or impossible for the great majority of Medicaid applicants faced with a transfer penalty, since it is not uncommon for a donor to have diminished capacity at the time Medicaid eligibility issues arise, and be therefore unable to testify convincingly—if at all—to the reasons behind a gift. An "undue hardship" showing will also avoid the imposition of a transfer penalty but is notoriously difficult to establish.[178] Gifted assets can be returned to the applicant to cure or partially cure a transfer penalty, assuming cooperation on the part of the donee.[179]

Medicaid requires a showing of impoverishment to establish eligibility. When a married individual requires ongoing long-term care, the healthier spouse may be capable of remaining noninstitutionalized (as a "community

spouse—the 'community' spouse—is not an effective strategy for achieving Medicaid eligibility since "Medicaid considers all available, non-exempt assets of the couple-his, hers, and theirs-in determining resource eligibility.").

174. 42 U.S.C. § 1396p(c)(2)(D) (2012).

175. 42 U.S.C. § 1396p(c)(2)(C)(ii) (2012). The Medicaid applicant must show that "the assets were transferred exclusively for a purpose other than to qualify for medical assistance. . . ." *Id.*

176. 42 U.S.C. § 1396p(c)(2)(C)(i) (2012). The applicant must show that he or she "intended to dispose of assets either at fair market value, or for some other valuable consideration." *Id.*

177. 20 C.F.R. § 416.1246(e) (2013). The transfer of an asset for less than fair value is presumed to have been made for the purpose of establishing Medicaid eligibility. *Id.* "The burden of rebutting the presumption . . . rests with the individual (or eligible spouse)." *Id.*

178. *See* A. Kimberly Dalton, *Hardship Waivers After the Deficit Reduction Act of 2006*, 185 ELDER LAW ADVISORY 1 (2006) (observing that "some states appear simply to have ignored the federal mandate to develop policy and procedures for evaluating hardship" and "that anecdotal evidence suggests that relatively few applications for hardship waivers are made respecting asset transfer penalties and estate recovery, and that such waivers are 'rarely granted.'").

179. 42 U.S.C. § 1396p(c)(2)(C)(iii) (2012). Some states permit "partial cures" of a penalty period when some, but not all, of the transferred assets are returned. The federal Medicaid statute, however, suggests that partial cures are impermissible, and that "*all* assets transferred for less than fair market value" must be returned for the penalty period to be waived. 42 U.S.C. 1396p(c)(2)(C)(iii) (2012) (emphasis added); *accord*, Tjaden *ex rel*. Tjaden v. State, 2013 WL 6822752 ¶ 45 (Ill. App. Ct. 2013) (noting the parties' agreement that "federal law leaves it to individual states to decide whether to accept partial returns."); *see, e.g.*, Commonwealth of Massachusetts, Executive Office of Health and Human Services Office of Medicaid, *MassHeath Eligibility Letter 174* (Feb. 15, 2008), *available at* http://www.mass.gov/eohhs/docs/masshealth/el2008/el-174.txt (providing that "[i]n the case of a partial cure, the MassHealth agency recalculates the period of ineligibility based on the transferred amount remaining after deducting the cured portion").

spouse") and live independently.[180] But if Medicaid requires both spouses to spend down to only $3,000 in countable resources, the community spouse may be so financially devastated by care costs that she loses the ability to maintain even a modest lifestyle. To protect the community spouse from total impoverishment, Congress enacted the Medicare Catastrophic Coverage Act of 1988 (the "MCCA").[181] The Tenth Circuit Court of Appeals concisely summarized the intent and operation of the MCCA in *Morris v. Oklahoma Department of Human Services*:

> Because spouses typically possess assets and income jointly and bear financial responsibility for each other, Medicaid eligibility determinations for married applicants have resisted simple solutions. Jointly held resources to which a spouse had unrestricted assets were considered available to that spouse for eligibility purposes, but assets solely held by the community spouse were treated as unavailable to the institutionalized spouse. This system produced many unintended consequences as many community spouses were left destitute by the drain on the couple's assets necessary to qualify the institutionalized spouse for Medicaid, whereas couples with ample means could qualify for assistance when their assets were held solely in the community spouse's name.
>
> By passing the MCCA, Congress intended to protect community spouses from pauperization, while preventing financially secure couples from obtaining Medicaid assistance. The current version of the statute no longer looks to the nominal ownership of resources or to any State laws relating to community property or the division of marital property. Instead, after subtracting the CSRA, Medicaid administrators must count all remaining resources held by either the institutionalized spouse, community spouse, or both as available to the institutionalized spouse.[182]

The MCCA introduced the concept of the CSRA. In a community spouse/institutionalized spouse context, the MCAA allows the community spouse to retain an amount (or "share") known as the community spouse resource allowance ("CSRA").[183] The CSRA is calculated and marital

180. An "institutionalized spouse" means an individual who is in a medical institution or nursing facility and is likely to remain there at least 30 days; a "community spouse" means the spouse of such an individual. 42 U.S.C. § 1396r-5(h)(1), (2) (2012).

181. Pub. L. No. 100-360, § 303, 102 Stat. 683, 754–64, *codified as amended* at 42 U.S.C. § 1396r-5 (2012).

182. Morris v. Oklahoma Dep't of Human Serv., 685 F.3d 925, 928–29 (10th Cir. 2012) (internal quotations and citations omitted).

183. 42 U.S.C. § 1396r-5(c)(1)(A) (2012). The computation of the spousal share is computed as of the beginning of the first continuous period of institutionalization of the institutionalized spouse. *Id.* This date is known as the "snapshot date." BRASHIER, *supra* note 103, at 364.

wealth is assessed on what is known as the "snapshot date"—the institutionalized spouse's first continuous day of institutionalization.[184] Federal Medicaid law sets a minimum resource allowance ($23,448 in 2014), and a maximum ($117,240), in addition to the institutionalized spouse's ability to retain an additional $2,000.[185] States may set their resource level at the ceiling or the floor or somewhere in between.[186] While some states have simply adopted the maximum figure as the CSRA, most "permit the community spouse to own up to one-half of the couple's resources up to a maximum of $117,240 (in 2014)."[187] Three brief examples illustrate this approach:

> *Example 1*. Initial countable marital net worth of $400,000. Divide by 2. Because $200,000 exceeds the ceiling of $117,240, spend down to $117,240 is required. (The institutionalized spouse may also retain $2,000.) Thus, consumption (or "spend down") of a total of $280,760 is required before Medicaid eligibility is achieved.
>
> *Example 2*. Initial countable marital net worth of $200,000. Divide by 2. Because $100,000 falls between the ceiling and floor, spend down to $100,000 is required. (Again, the institutionalized spouse may retain an additional $2,000). Thus, the couple must consume $98,000 prior to Medicaid eligibility.
>
> *Example 3*. Initial countable martial net worth of $20,000. Because $20,000 is less than the floor of $23,448, eligibility is immediate.

Because the majority of community spouse Medicaid scenarios involve a marital net worth of less than $234,480, it is common to hear the CRSA calculations expressed in shorthand as requiring the couple to spend half their initial wealth on care to achieve Medicaid eligibility.[188] For some couples, such as in the first example above, the spend down involves a loss of more than one-half of the couple's combined wealth. For others, the spend down may be less than one-half. For the majority, however, the spend down will be approximately one-half. For the sake of brevity, the remainder of this article will utilize the shorthand CRSA description of requiring a spend down of one-half of the net marital estate.

184. Thomas D. Begley, Jr. & Jo-Anne Herina Jeffreys, *Medicaid Planning for Married Couples*, 17 NAELA Q. 19, 29 (Spring 2004).

185. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 129 (6th ed. 2014).

186. L. RUSH HUNT, PATRICIA DAY, & MICHAEL MCCAULEY, UNDERSTANDING ELDER LAW 189 (2002).

187. FROLIK & KAPLAN, *supra* note 185, at 129.

188. *See* United States Census Bureau, *supra* note 17 (indicating a median net worth excluding home equity for married couples age 65 and older of $92,238).

The MCCA provides that the community spouse's income is unavailable to the institutionalized spouse for purposes of assessing Medicaid eligibility.[189] Thus, except in a case where the community spouse's income is so great that it results in the accumulation of excess resources, there is no limit on the level of the community spouse's separate income. The community spouse's income is irrelevant for purposes of Medicaid eligibility for their institutionalized spouse.

Moreover, the MCCA recognizes that the community spouse's separate income is typically not excessive, and may even be inadequate for their basic needs if all of the institutionalized spouse's income is diverted to care costs. Thus, post-Medicaid eligibility, the community spouse may be entitled to a monthly income allowance (or "MIA") payable from the income of the institutionalized spouse. The community spouse's MIA is computed by deducting her income from a minimum monthly maintenance needs allowance (or "MMMNA").[190] If a court enters an order awarding the community spouse a portion of the institutionalized spouse's income for her support, this ordered amount constitutes the community spouse's MIA.[191] The MMMNA may also be increased at an administrative hearing.[192]

D. MEDICAID AS CONTEMPORARY *COVERTURE*

With this background in mind, and recalling the case studies introduced above, it becomes evident that the eligibility rules of Medicaid embody and evoke the archaic doctrine of *coverture*. Medicaid ignores the separate legal existence and property rights of each spouse as a means to limit benefits to the truly needy.[193] Granted, a public benefit such as Medicaid, given its scale, necessitates a "one size fits all" approach to eligibility determinations. As noted above, significant variation among states' approaches to the finer points of Medicaid eligibility rules exist.[194] Yet

189. 42 U.S.C. § 1396r-5(b) (2012).

190. 42 U.S.C. § 1396r-5(d) (2012). The MMMNA is comprised of two separate amounts, a basic allowance computed by reference to federal poverty guideline figures and an excess shelter allowance (or ESA). 42 U.S.C. §§ 1396r-5(d)(3)(A), 1396r-5(d)(4) (2012). The poverty guideline figure is capped at $1,500 and indexed for inflation. 42 U.S.C. § 1396r-5(d)(3)(C) (2012).

191. 42 U.S.C. § 1396r-5(d)(5) (2012).

192. 42 U.S.C. § 1396r-5(e)(2)(A) (2012). Additional income from the institutionalized spouse may be awarded "due to exceptional circumstances resulting in significant financial duress." 42 U.S.C. § 1396r-5(e)(2)(B) (2012).

193. *E.g.*, Cherry by Cherry v. Magnant, 832 F.Supp. 1271, 1279 (S.D. Ind. 1993) (asserting that states have legitimate interests in crafting their Medicaid programs to recognize "the marital relationship for what it is, a relationship of interdependence wherein it is neither unfair nor unrealistic to require one spouse to support the other, in particular to help meet the obligation to pay for family medical bills.").

194. *See* Laurence Lavin, *AIDS, Medicaid, and Women*, 5 DUKE J. GENDER L. & POL'Y 193, 198 (1988) (noting that "states set their own financial eligibility criteria and have flexibility to design the benefit package, however, there is variation among states in

there is no variation in Medicaid's basic assumptions about the availability of separate marital wealth to both spouses, the liability of both spouses for either one's Medicaid debt, and gift penalties imposed regardless of which spouse made the gift.[195] When a married woman is confronted by her spouse's need for long term care, the Medicaid eligibility rules in effect suspend marital separateness, partaking of the Blackstonian values which denied the legal existence of a married woman.

For many traditional couples in long-term marriages that see their wealth in a partnership context, Medicaid's treatment of spousal wealth may very well be consistent with their views of treating assets and liabilities as one.[196] Some couples are even surprised to learn that the separate liability of one spouse is generally not recoverable from the separate assets of the other spouse, or that they lack inherent agency authority to bind one another. Medicaid eligibility determinations may thus align with traditional couples' views.[197] "[S]pouses typically possess assets and income jointly and bear financial responsibility for each other," noted the Supreme Court in a 2002 Medicaid decision.[198] But for couples who married later in

eligibility and services covered under their programs."). "Assuming the federal [Medicaid] requirements are met, states have '*substantial discretion* to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients." Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dept. Health, 699 F.3d 962, 969 (7th Cir. 2012), *quoting* Alexander v. Choate, 469 U.S. 287, 303 (1985) (quoting 42 U.S.C. § 1396a(a)(19)) (emphasis supplied); *see also, e.g.*, Eleanor D. Kinney, *Rule and Policy Making for the Medicaid Program: A Challenge for Federalism*, 15 OHIO ST. L.J. 855, 857 (1990) (observing: "Because states have great flexibility in structuring eligibility, benefits, coverage, and payment policies, the Medicaid program is really 50 very different programs serving different populations and providing different benefits.").

195. *See* Frerichs v. State, 960 N.E.2d 603, 608 (Ill. App. 2011) (stating, "[t]he federal statute imposes a penalty when an applicant or his or her spouse 'disposes of assets for less than fair market value' within a certain period leading up to the applicant's request of benefits" and that "[t]his result is mandated on all states that participate in the Medicaid program."), *quoting* McDonald v. Illinois Dept. of Human Services, 952 N.E.2d 21, 27 (Ill. App. 2010) (citing 42 U.S.C. § 1396p(c)(1)(A) (emphasis in original)); State-by-state variation on finer points regarding gifts still exists. *See* Marvin Rachlin, *Do Implied Contract Principles or Fraud Theories Support Medicaid Suits Against Community Spouses?*, 73 N.Y. ST. B.J. 32, 36 (2001) (noting: "New York State has taken the position that transfers by a community spouse after the institutional spouse has been on Medicaid in a nursing home for one month or longer will not affect the eligibility of the institutional spouse.").

196. *See* Lisa Mahle, *A Purse of Her Own: The Case Against Joint Bank Accounts*, 16 TEX. J. WOMEN & L. 45, 47 (2007) (citing a comprehensive study which found "a large majority of married Americans believe that married couples 'should pool all their property and financial assets.'").

197. *See* Am. Law Inst., Principles of the Law of Family Dissolution: Analysis and Recommendations § 4.12 cmt. 1 (2000) (asserting that "[a]fter many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical rules."); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 113 (2004) (arguing that "spouses should be expected to share the benefits and burdens of their life together.").

198. Wisconsin Dep't of Health & Family Serv. v. Blumer, 534 U.S. 473, 479 (2002).

life, having previously fully established their separate identities, individual resources, and personal preferences, joining in marriage often rests on a shared vision of non-union when it comes to financial matters. As Hagar once told his wife, "Your stuff is yours, Wanda; mine is mine."[199] Medicaid makes no allowance for couples with this approach to married life.[200] Medicaid's views are rooted in the days of Blackstone.[201]

1. Medicaid's Disregard of Separate Marital Property

Prior to 1988, "each spouse was treated as a separate household" for Medicaid eligibility purposes, just as Wanda, Wendy, Gail and their spouses intended.[202] Now, however, the separation of wealth and intent of the spouses is irrelevant. Title or control between spouses is similarly of no weight. The MCCA specifically directs state Medicaid agencies to "ignore 'State laws relating to community property or the division of marital property.'"[203] All marital assets, whether titled in the community spouse's name, the institutionalized spouse's name, or jointly, are simply deemed available resources for Medicaid eligibility purposes.[204]

To be sure, the MCCA was based on a liberalization of Medicaid eligibility rules, and was motivated by the desire to protect community spouses from pauperization.[205] At the same time, the MCCA intended to prevent financial secure couples from qualifying for Medicaid.[206] Prior to the MCCA, "couples with ample means could qualify for assistance when their assets were held solely in the community spouse's name."[207] After the enactment of the MCCA, the community spouse's permitted resource allocation was reset at no more than half of the couple's initial marital net worth; the other half (presumably, the institutionalized spouse's share of

199. *See supra* p. 292.

200. States, however, are beginning to make allowances for different views on marriage, especially for older couples. *See, e.g.*, WASH. REV. CODE § 26.60.030(6)(b) (2014) (permitting domestic partnerships for elderly couples where at least one member of the couple is over sixty-two years old); Courtney Thomas-Dusing, Note, *The Marriage Alternative: Civil Unions, Domestic Partnerships, or Designated Beneficiary Agreements*, 17 J. GENDER RACE & JUST. 161, 179–80 (2014) (assessing Washington's domestic partnership scheme for older couples).

201. To be fair, marriage has always offered little variation or customization to fit the parties' individual needs or objectives; most marital rules are not modifiable by the spouses. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1492 (2001) (noting, "the legal norms governing marriage are quite limited."). Perhaps "marriage will ultimately be reshaped into a more fluid and multi-factored form, more responsive to the needs of an ever-more diverse population." James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 32 (2003).

202. Morris v. Okla. Dep't of Human Serv., 685 F.3d 925, 928 (10th Cir. 2012) (quoting Johnson v. Guhl, 91 F.Supp.2d 754, 761 (D.N.J. 2000)).

203. *Morris*, 685 F.3d at 936 (quoting 42 U.S.C. § 1396r-5(b)(2)).

204. *Id*. (quoting 42 U.S.C. § 1396r-5(c)(2)(A)).

205. H.R. Rep. No. 100–105, pt. 2, at 65 (1987).

206. *Id.*

207. Wisconsin Dep't of Health & Family Serv. v. Blumer, 534 U.S. 473, 480 (2002).

the marital pie) must be spent down.[208] Even in a situation where the marital net worth is comprised entirely of the community spouse's assets, like the first two case studies involving Wanda and Wendy, and regardless of the length of the marriage, the MCCA deems the spouse needing care to own half. That half must be consumed—typically on their care—prior to Medicaid eligibility, in what is referred to as the "spend down."[209] The spend-down process encountered by Wanda might be more accurately described as seeing her modest net worth in free fall.

Wanda's case study illustrates how MCCA's view of spousal wealth is reminiscent of the fictional marital unity of *coverture*. The marital "pot" of assets and liabilities is deemed a unified singularity regardless of source and of title. The institutionalized spouse applying for Medicaid is presumed to have full equitable and legal rights to half of the marital wealth as of the first continuous day of institutionalization, and Medicaid eligibility will be deferred until that half has been consumed by means of care costs or living expenses. It matters not that the institutionalized spouse had no marital wealth of their own; it matters not that the community spouse has already spent half the marital wealth in caring for the ill spouse at home before a nursing home placement became unavoidable. Beginning on the "snapshot date," half the marital wealth will be vaporized prior to Medicaid eligibility being achieved. While it is true that the total amount of protected wealth is greater under a CSRA calculation than the single person countable asset threshold of just $2,000, Wanda would not have had to lose *any* of her property to Hagar's care needs had they remained single.

2. Imputed Gifts

Recall Axel's distress at learning of his mother's wife's gifts to her son Trey. The imputed gift rule is a particularly harsh rule when applied to situations in which one spouse was unaware of the other's gift.[210] Lucy faced a substantial transfer penalty on account of Gail's

208. Or approximately half. *See supra* text accompanying notes 187–88. The term "spend down" is also used to describe the process by which some states allow deducting medical expenses against income to reach Medicaid eligible income levels. *E.g.*, J.B. v. Div. of Medical Assistance and Health Serv., 2002 WL 1999002 at *2 (N.J. Adm. 2002) (employing "spend down" to describe the "process whereby a person may apply incurred medical expenses to offset income above the medical income level") (citation omitted).

209. *See Morris*, 685 F.3d at 938. "Rather than applying the pre-MCCA system in which the ownership of a couple's resources depended upon the vagaries of nominal ownership and state law, the relevant question is whether given resources are available to the applicant. An institutionalized applicant need not spend down her spousal share; rather, the *couple* must spend down any excess resources beyond the CSRA." *Id.* (internal citation omitted) (emphasis in original). "[R]esources held by either spouse are considered available to the institutionalized spouse." *Id.*

210. *See, e.g.*, Lancashire Hall Nursing & Rehabilitation Ctr. v. Dep't of Public Welfare, 995 A.2d 540 (Pa. Commw. Ct. 2010). In that case, Charles and Dora Sherr were married

gift within the five-year look-back, and it would have been pointless to argue that Lucy had no *mens rea*, no participation in, and no foreknowledge of the gift. In fact, Gail's intent when making the gift was likely linked to fears of a pending divorce, and suffused with the objective of hindering Lucy's potential divorce rights to Gail's property. And yet Lucy ultimately bore the ineligibility penalty for Medicaid assistance.

Medicaid's treatment of spousal gifts is sound insofar as it applies to traditional marital relationships. A gift represents a depletion of spousal resources, which runs counter to the Medicaid precept of reserving benefits for the truly needy and penalizing those who attempt to qualify by intentionally impoverishing themselves within a certain defined period prior to applying for benefits.[211] Imputing gifts made by one spouse to the Medicaid eligibility of the other spouse closes a potential loophole in Medicaid planning. In closing this loophole, Medicaid law invokes its recurring tendency to treat the spouses as one, with consequences that resonate with particular tragedy for someone like Lucy.[212]

3. Estate Recovery

Estate recovery in the Medicaid context is a relatively unique concept in means-tested benefits.[213] No one expects that they will be asked to repay

but estranged. *Lancashire Hall*, 995 A.2d at 541. Charles became "totally incapacitated" and was placed in a nursing home. *Id.* Dora received an inheritance and purchased an annuity, but the annuity did not comply with the specific Medicaid requirements governing annuities and so it was treated as a gift. *Id.*; 42 U.S.C. § 1396p(c)(1)(F) (2012). The Medicaid agency assessed Charles a transfer penalty of 415 days. *Lancashire*, 995 A.2d at 541. The Pennsylvania Commonwealth Court affirmed, noting that Medicaid law requires the Medicaid agency to "count the combined resources of the Sherrs regardless of whether those resources were actually made available to [Charles] Sherr. . . ." *Id.* at 545.

211. *See In re* Molloy v. Bane, 214 A.2d 171, 174 (N.Y. App. Div. 1995) ("Underlying all eligibility determinations is a basic premise that aid is to be furnished only to the truly needy and the Legislature enjoys great discretion to exclude from aid programs those individuals who have purposely created their own need"); Tannler v. Wisconsin Dep't of Health and Soc. Serv., 557 N.W.2d 434, 437 (Wis. Ct. App. 1996) (observing that "[t]he divestment provisions of [the Medicaid] program are an attempt to prevent the government, and therefore the taxpayers, from having to subsidize the medical care of individuals who are, but for the divestment, able to pay the cost of their own care.").

212. A gift by one spouse could have ineligibility consequences for both spouses. Had Gail herself applied for Medicaid assistance within five years of her gift to Trey, she also would have faced a transfer penalty. However, apportionment would have been available. *See supra* note 158.

213. Estate recovery has been permissible since Medicaid's inception but became mandatory in 1993; only twelve states had enacted Medicaid estate recovery programs prior to it becoming mandatory. Katie L. Summers, Comment, *Medicaid Estate Recovery: To Expand or Not to Expand, That is the Question*, 118 PENN. ST. L. REV. 465, 468–69 (2013), *citing* Dep't of Health & Human Servs., Office of Assistant Sec'y for Policy & Evaluation, *Medicaid Estate Recovery* 2 (2005), *available at* http://1.usa.gov/17b5xoV.

the Social Security or the Medicare program. But Medicaid does demand repayment—even from a spouse who herself never received any Medicaid benefits.[214] After a Medicaid recipient dies, the state Medicaid agency is typically entitled to recover the costs of Medicaid benefits from the deceased recipient's estate.[215] Estate recovery must be deferred if the Medicaid recipient leaves a surviving spouse.[216] But at the death of the surviving spouse, the Medicaid agency will pursue the assets of the spouse's estate.[217] We saw how Wanda herself never received benefits from the Medicaid program; her estate was subject to the Medicaid agency's lien on account of the benefits it had provided to her spouse, Hagar.

With estate recovery, the Medicaid benefits received by one spouse are recoverable from the nonrecipient spouse's estate, even after the decedent spouse "spends down" to reach CSRA levels.[218] After spending some $180,000 of her own savings on her husband's care to finally reach Medicaid eligibility, Wanda's remaining property was subject to confiscation at her death to repay the state for the period in which it paid for Hagar's care. Estate recovery against the community spouse who has already witnessed their separate property significantly eroded in the spend-down process demonstrates Medicaid's assumptions about the separate existence and independent liabilities of the spouses. That is, there is none.[219] The Medicaid lien recovery reaches both spouses' estates even where only one has incurred the debt.[220] Liability, it could be said, is joint and several.

214. *See* Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1, 2–8 (Ind. 1993) (outlining the mutual spousal duty of support for medical creditors).

215. *See* Idaho Dept. of Health & Welfare v. McCormick, 283 P.3d 785, 790 (Idaho 2012) (authorizing estate recovery from a Medicaid recipient's spouse's estate); In re Estate of Barg, 752 N.W.2d 52, 66–67 (Minn. 2000) (citing and analyzing cases which have decided against allowing recovery from a Medicaid recipient's spouse's estate and those that have allowed it and holding that federal law does permit states to recover from a recipient's spouse's estate); *see also, e.g.*, WEST'S ANN. CAL. WELF. & INST. CODE § 14009.5(b)(2)(A) (directing the state Medicaid agency to "make a claim against the estate of the surviving spouse, or against any recipient of property from the surviving spouse obtained by distribution or survival, for either the amount paid for the medical assistance given to the decedent or the value of any of the decedent's property received by the surviving spouse through distribution or survival, whichever is less.").

216. 42 U.S.C. § 1396p(b)(2) (2012). OBRA also bars estate recovery while a surviving child is under 21 and during the lifetime of a surviving blind or permanently disabled child. 42 U.S.C. § 1396p(b)(2)(A) (2012).

217. 42 U.S.C. § 1396p(b)(1) (2012).

218. S*ee* 42 U.S.C. § 1396p(b)(4)(A)–(B) (2012) (allowing estate recovery against "all and personal property and other assets included within the individual's estate" as well as joint tenancies and revocable living trusts).

219. *Compare* SCHOULER, *supra* note 1, at 9 (explaining under *coverture* how upon entering a married state the woman "cannot earn for herself, nor, in general, contract, sue, or be sued in her own right; and this, because she is not in legal contemplation a person.").

220. *Compare id*. at 121 (noting that under *coverture* the husband became liable for all of his wife's premarital debts but that "if the obligation be not enforced in the lifetime of the wife, the surviving husband retains her fortune (if any) in his hands, and cannot be charted further with her debts either at law or in equity.").

The case study of Wanda and Hagar demonstrates estate recovery in action. Although the MCCA's community spouse resource allowance calculations permit the community spouse to retain a certain basic level of wealth in order to maintain an existence outside of institutional care, there is no analogous protection at death. Wanda had already lost more than one-half her property to her husband's care needs before he attained Medicaid eligibility, and the Medicaid lien that accumulated after that point was such that her remaining property was subject to estate recovery at her death. In the end, not just half of Wanda's wealth—but all of her wealth—was devoted to Hagar's care costs. The separate legal existence of Wanda's property, her testamentary rights to dispose of her wealth at her death, and her preferences gave way to the *coverture* of Medicaid's spend down and estate recovery mandates.

4. How Medicaid Forces the Forced Share

The case study of Herbie and Wendy illustrates how the Medicaid rules can operate to force a surviving spouse who is—or may soon be—receiving Medicaid benefits to take legal action against family members in order to avail themselves of all available resources. The Medicaid definition of "assets" includes "all income and resources of the individual and of the individual's spouse."[221] It also includes all income and resources "which the individual or such individual's spouse is entitled to but does not receive" on account of the action, or inaction, of the individual, his spouse, or an agent on their behalf.[222] Thus, failing to pursue a legal right or cause of action can be deemed a disqualifying transfer. This rule extends to the failure to timely pursue an elective or forced share claim.[223]

Once again, Medicaid rules can contradict the expectations of many nontraditional married couples who view each spouse's property rights as separate and distinct, who respect each other's testamentary objectives, and would never dream of seeking to overturn their spouse's will. Yet due to the availability of a forced-share right, a surviving spouse with Medicaid eligibility as a concern must choose between making an elective share claim and suffering the consequences of ineligibility for long-term care benefits. By failing to file and pursue an elective-share right, a surviving spouse would face a Medicaid ineligibility penalty as a "deemed gift."[224]

221. 42 U.S.C. § 1396p(h)(1) (2012).

222. *Id*.

223. Matter of Mattei, 647 N.Y.S.2d 415, 416 (N.Y. 1996).

224. *See* I.G. v. Dep't of Human Serv., 900 A.2d 840, 844 (N.J. 2006); *In re* Molloy v. Bane, 214 A.D.2d 171, 177 (N.Y. App. Div. 1995); Estate of Wyinegar, 711 A.2d 492, 495 (Pa. Super. Ct. 1998); Estate of Shipman, 832 N.W.2d 335, 338 n.3 (S.D. 2013); Tannler v. Wisconsin Dept. of Health and Social Serv., 557 N.W.2d 434, 437–38 (Wis. Ct. App. 1996); *see also, e.g.*, N.J.A.C. § 10:71-4.10(b)(3)(ii) (terminating Medicaid eligibility when a community spouse does not leave the surviving spouse an amount equal to or greater than the elective share amount).

As in the case study of Wendy and Herbie, the fiduciary obligations imposed on conservators or other surrogate decision-makers may also suggest that filing an elective share claim is not optional if a claim has any potential for recovery. Fiduciaries are expected to follow both objective and subjective standards when substituting their judgment for that of the person for whom they are acting, especially when that person has diminished capacity.[225] The objective standard is an abstract "best interests" standard.[226] The subjective standard grants deference to the impaired individual's personal preferences, to the extent that those preferences can be ascertained.[227]

Under the current version of the Uniform Probate Code, a conservator may pursue a right to an elective share in the estate of the protected person's deceased spouse with express authorization from the court.[228] In granting (or declining to grant) the exercise of such a power, the court is directed to "consider primarily the decision that the protected person would have made, to the extent that the decision can be ascertained."[229] The court must also consider the protected person's financial needs, their life expectancy, and also their "eligibility for governmental assistance" (e.g., Medicaid).[230]

225. *Contrast* UNIF. PROBATE CODE § 5-418(a) ("A conservator … is a fiduciary and shall observe the standards of care applicable to a trustee.") *with* UNIF. PROBATE CODE § 5-418(b) ("A conservator may exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, shall encourage the person to participate in decisions."). "This section reflects the dual role of the conservator." Uniform Probate Code § 5-418 cmt. "On the one hand, a conservator is a fiduciary charged with management of another's property." *Id.* "On the other hand, a conservator, like a guardian, also owes obligations directly to the protected person. . . ." *Id. See* Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 758–59 (2012) (highlighting the Uniform Health-Care Decisions Act which elevates subjective standards over objective best interests); Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16–55 (1990) (tracing the history of the "legal fiction" of substituted judgment). The tension between these two opposing standards is especially defined in connection with end-of-life decision making. *See also* Mark Strasser, *Incompetents and the Right to Die: In Search of Consistent Meaningful Standards*, 83 KY. L.J. 733 (1994–1995); Kristen L. Beebee, Comment, *The Right to Die: Who Really Makes the Decision?*, 96 DICK. L. REV. 649 (1992).

226. *E.g.*, N.H. REV. STAT. ANN. § 464-A:28 (2011) (requiring an oath from a guardian of the estate that confirms the guardian "will act in the best interests of my ward"); UTAH CODE ANN. § 75-5-417(1) ("A conservator shall act as a fiduciary.").

227. *E.g.*, UTAH CODE ANN. § 75-5-425(2) (2014) (permitting a conservator to make gifts "as the protected person might have been expected to make").

228. UNIF. PROBATE CODE § 5-411(a)(6).

229. UNIF. PROBATE CODE § 5-411(c). "The protected person's personal values and expressed desires, past and present, are to be considered when making decisions." UNIF. PROBATE CODE § 5-411 cmt. "Carrying out the protected person's intent or probable intent is a major theme of this article [of the Uniform Probate Code]." *Id.*

230. UNIF. PROBATE CODE § 5-411(c)(1), (3), (6).

Conservators are charged with balancing a protected person's subjective preferences against what may be objectively best for them—with a bias towards the subjective approach—when it comes to a decision like claiming an elective share against a decedent spouse's estate.[231] But Medicaid eligibility rules take no account of a Medicaid applicant or recipient's personal preferences. The ability to assert an elective share right is tantamount to a countable resource in connection with determining eligibility for Medicaid.[232] Failing to timely exercise an elective share claim can result in an imputed gift with a resulting penalty period of benefit ineligibility. In this way, Medicaid forces a surviving spouse to act against their deceased spouse's will, ignoring either spouse's intentions regarding their testamentary choices over their separate estates.

III. CONCLUSION

Medicaid is, by definition, a program reserved for financially impoverished individuals. Medicaid eligibility rules must, as a consequence, delineate between those who are needy and those who are not. Medicaid rules properly discourage individuals from intentionally impoverishing themselves in order to qualify for a benefit reserved for those who are truly in need. Long-term care costs are typically catastrophic for average Americans. Few individuals would intentionally deplete their net worth through transfers to other family members in order to qualify for food stamps or subsidized housing, but many would—and do—shed assets in order to qualify for Medicaid assistance with long term care costs.

Given the breadth of the Medicaid program, it is not feasible to develop nuanced rules that take account of the true complexity and variability of marital relationships. Accordingly, the one-size-fits-all approach of Medicaid's eligibility and estate recovery was framed out of both efficiency and predictability. Creating rules that accounted for the length of a marriage, the original source of wealth, or the underlying value systems of the couple would be unworkable. All couples, therefore, are treated the same and without regard to how assets are titled. The Medicaid program is complex enough without attempting to accommodate differences among couples.

Still, given the fact that the possibility of ongoing long term care costs continues to represent the single most likely contributor to wealth erosion for older individuals, and that Medicaid is the primary source of funding

231. "Even in the absence of a statute, the conservator should consider the protected person's probable wishes" with regards to the exercise of court-authorized powers like making gifts. UNIF. PROBATE CODE § 5-411 cmt.

232. *See* Transmittal Number 64, State Medicaid Manual § 3257B.3 (emphasizing that "the term 'assets an individual or spouse is entitled to' includes assets to which the individual is entitled or would be entitled if action had not been taken to avoid receiving the assets"), *cited in* I.G. v. Dep't of Human Serv., 900 A.2d 840, 844 (N.J. 2006).

for these costs, Medicaid's disregard of the separate assets of spouses and their separate liabilities reinstates *coverture* in important and even disturbing ways for couples who had hoped to live a shared life in marriage, but with respect, autonomy, and separation with regards to financial matters. Medicaid's rejection of separate spousal property or individualized consequences for gifts assumes a complete spousal unity. Medicaid's "joint and several liability" approach to estate recovery similarly turns a blind eye to any suggestion that one spouse's liability could be treated as the liability of a separate person in a marital relationship. Medicaid *coverture* thus imposes the status of *feme covert* on both spouses, dialing back the framework for marital separateness two hundred and fifty years.