

# WHOSE BILL IS IT ANYWAY? ADULT CHILDREN’S RESPONSIBILITY TO CARE FOR PARENTS

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## I. INTRODUCTION

*In recent years, there has been growing discussion of filial responsibility statutes among legal scholars.<sup>1</sup> This article aims to provide an overview of filial responsibility laws and to explain how it factors into Medicaid estate planning.*

Over the next few decades, the elderly population of the United States will expand exponentially, as the Baby Boomer generation ages. Though Social Security and other government programs have aided in sustaining the financial stability of Americans for the better part of a century, the system now lacks resources.<sup>2</sup> As more of the work force retires, fewer tax dollars go into the system to maintain a population that will likely have a longer life expectancy than any generation before it.<sup>3</sup> Seeking a solution to this problem, some have proposed a return to utilization of filial responsibility statutes, which place a heightened level of responsibility for the welfare of the elderly on family members, rather than on the government.<sup>4</sup>

Filial responsibility statutes have been part of United States law since colonial times.<sup>5</sup> In fact, most states enforced these laws until the middle of the twentieth century, and thirty states still maintain them today.<sup>6</sup> Filial responsibility policies make younger relatives, with sufficient financial resources, responsible for the well being of their elderly family members.<sup>7</sup> Usually, this requires adult children to provide their family members sufficient food, shelter, medical care, and other basic necessities.<sup>8</sup> However, these statutes, though still included in many state codes, are no longer utilized or enforced, largely as a product of federal Medicaid regulations and the American social climate.<sup>9</sup>

In recent years, there has been growing discussion of filial responsibility statutes among legal scholars.<sup>10</sup> If such policies were effectively implemented, they could potentially ease the burden on government coffers.<sup>11</sup> However, these

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1. See discussion *infra* Part IV.

2. See Allison E. Ross, Note, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government's Assistance*, 16 ELDER L.J. 167, 181 (2008).

3. See *id.* at 178–83.

4. See discussion *infra* Part IV.

5. Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents be Effectively Enforced?*, 36 FAM. L.Q. 501, 502 (2002).

6. See *id.*; see also Howard Gleckman, *Will Adult Children Have to Pay Mom's Nursing Home Costs?*, FORBES (May 16, 2012, 7:27 PM), <http://www.forbes.com/sites/howardgleckman/2012/05/16/will-adult-children-have-to-pay-moms-nursing-home-costs>.

7. See Edelstone, *supra* note 5, at 502–03.

8. See *id.* at 501.

9. See Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 CAL. W. L. REV. 351, 353, 355 (1990).

10. See discussion *infra* Part IV.

11. Edelstone, *supra* note 5, at 504–05.

laws also come with the potential for a significant impact on Medicaid eligibility.<sup>12</sup> This paper aims to provide an overview of filial responsibility laws and the ways in which filial responsibility may factor into Medicaid estate planning.

## II. ORIGINS OF FILIAL RESPONSIBILITY STATUTES

Filial responsibility policies date back to Roman law.<sup>13</sup> These laws made supporting parents the duty of offspring, and the Judeo-Christian tradition carried this policy forward as a moral standard.<sup>14</sup> St. Thomas Aquinas wrote of the need for mutual responsibility between parents and children, and Aristotle noted as follows:

That is why it would seem that a son does not have the right to disown his father, whereas a father has the right to disown his son. A debtor must pay his debt, but nothing a son may have done (to repay his father) is a worthy return for everything the father has provided for him, and therefore he will always be in his debt.<sup>15</sup>

These ancient edicts were largely based on a theory of reciprocity, wherein a child who had relied on his parents until the age of adulthood then had the duty of supporting his parents once they were no longer able to provide for themselves.<sup>16</sup> This tradition carried forward into English law, as evidenced by the Elizabethan Poor Relief Act of 1601.<sup>17</sup> Under the system of “Poor Laws,” “the ‘father and grandfather and the mother and the grandmother, and the children of every poor, old, blind, lame, and impotent person’” were to support their family members in need to the best of their ability.<sup>18</sup> This principle came into law based on a theory that relatives were the first and primary source of aid to the indigent, and government assistance was merely a secondary source.<sup>19</sup>

Colonization brought these ideals to America, and states adopted filial responsibility statutes as early as 1705.<sup>20</sup> A Pennsylvania law from the early eighteenth century permitted authorities to levy taxes for the purpose of providing basic necessities to the needy, but the primary duty for support rested with “[t]he father and grandfather; mother and grandmother; [and] children and

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12. See discussion *infra* Part VI.

13. See Ross, *supra* note 2, at 172.

14. *Id.*

15. Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL’Y 709, 710–11 (2001).

16. See *id.*

17. See *id.* at 711.

18. *Id.* (quoting An Act for the Relief of the Poor, 1601, 43 Eliz., c. 2, § 7 (Eng.)).

19. See *id.*

20. See Edelstone, *supra* note 5, at 502.

grandchildren of every poor, old, blind, lame[,] and impotent or other person not able to work[.]”<sup>21</sup>

As is made clear by the mirrored language, early American filial responsibility laws followed the English tradition, and courts applied the law in much the same way.<sup>22</sup> Such laws were interpreted to mean that adult children had a duty to provide for the needs of their parents, and this ideal carried forward through the Great Depression.<sup>23</sup> It was at that point that the federal government underwent significant structural changes, and cultural expectations regarding support of the indigent were substantially altered.<sup>24</sup>

### III. MODERN APPLICATION OF FILIAL RESPONSIBILITY STATUTES

The majority of states continued to include filial responsibility laws in their respective codes through the beginning of the twentieth century.<sup>25</sup> It was the advent of the Great Depression and the subsequent New Deal programs that brought that tradition to an end.<sup>26</sup> In the 1930s, the federal government introduced Social Security, which altered the way in which elderly Americans planned for future support, shifting away from reliance on family.<sup>27</sup> Instead, those workers who paid into the federal system throughout their careers began focusing on retirement plans and Social Security as their primary means of support after retirement; as a result, filial responsibility laws were utilized less and less.<sup>28</sup>

The federal government’s introduction of Medicare and Medicaid during the 1960s further perpetuated this shift in attitude.<sup>29</sup> These programs allowed the elderly population to depend on the government for the provision of medical care, in addition to their basic financial needs.<sup>30</sup> Despite these factors, filial responsibility laws are still on the books, though they are not often enforced, as further discussed below.<sup>31</sup>

#### A. State Filial Responsibility Statutes

Though the vast majority of states have utilized filial responsibility statutes at some point during their history, only thirty state codes currently

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21. WILLIAM CLINTON HEFFNER, HISTORY OF POOR RELIEF LEGISLATION IN PENNSYLVANIA, 1682–1913, at 169 (Holzapfel Publ’g Co. 1913); *see also* Edelstone, *supra* note 5, at 502 (quoting Colonial Laws of Pennsylvania 1705-6, ch. CLIV, § 2, at 251–53).

22. *See supra* text accompanying notes 17–21.

23. Moskowitz, *supra* note 15, at 711–12.

24. *See* Ross, *supra* note 2, at 173.

25. *See id.* at 173–77.

26. *See id.* at 173.

27. *See id.* at 173, 177–78.

28. *See* Moskowitz, *supra* note 15, at 713–15.

29. *See id.*; *see also* Ross, *supra* note 2, at 173.

30. *See* Moskowitz, *supra* note 15, at 713–15; *see also* Ross, *supra* note 2, at 173.

31. *See infra* Part III.A–B.

include these laws.<sup>32</sup> In a few jurisdictions, the penalty for violating the duty to provide for one's elderly parent or for another relative ranges from civil monetary awards to criminal penalties.<sup>33</sup>

Depending on the jurisdiction, a number of different individuals or entities can bring filial responsibility cases.<sup>34</sup> Generally, most state laws allow elderly parents or their guardian ad litem to seek assistance from adult children, assuming that the children are financially able to contribute, given their own personal circumstances.<sup>35</sup> Standing to bring an action is even broader in other states, opening the door to lawsuits by hospitals, nursing homes, and other health care facilities.<sup>36</sup> When elderly patients face insolvency, or when they die before paying off their bills, these entities can bring suit against their adult children to recover the amounts owed.<sup>37</sup>

Other jurisdictions allow state or county agencies to seek remuneration for funds expended through government programs for the care of elderly individuals.<sup>38</sup> In these jurisdictions, if the state or the county finds that adult family members could have made monetary contributions for basic necessities or health care, the government entity may have standing to pursue reimbursement.<sup>39</sup> Finally, a minority of jurisdictions allow their district attorneys to bring charges against adult children who decline to provide financial support for their parents.<sup>40</sup> Penalties for violations of these laws can include fines, imprisonment for up to two years, or both.<sup>41</sup>

### *B. Enforcing Filial Responsibility Statutes*

Although thirty states still have filial responsibility statutes, currently, only a few states actively enforce them.<sup>42</sup> California, Pennsylvania, South Dakota, and Rhode Island are among the limited number of states that enforce these statutes in an active manner.<sup>43</sup> Of these four states, only California and Rhode Island impose criminal penalties for failure to abide by the terms of the law.<sup>44</sup>

California's provision allows indigent individuals or the county to bring suit, but they may only seek support from adult children.<sup>45</sup> They may not rely

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32. See Edelstone, *supra* note 5, at 502.

33. See Ross, *supra* note 2, at 168, 174.

34. See Edelstone, *supra* note 5, at 503; see also Moskowitz, *supra* note 15, at 716–17.

35. See Edelstone, *supra* note 5, at 503.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.* at 510; see also Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 200–01 (1992).

41. See *id.* at 201–02.

42. See Edelstone, *supra* note 5, at 502; see also Ross *supra* note 2, at 168, 174.

43. See Ross *supra* note 2, at 174–77.

44. See *id.*

45. CAL. FAM. CODE § 4403(a)(1) (West 2012).

on any other family members.<sup>46</sup> In Pennsylvania, the responsibility to care for an indigent individual extends to an indigent individual's adult children, spouse, and parents.<sup>47</sup> Though most filial responsibility statutes leave the method of calculating support to the courts, Pennsylvania law directs that the amount awarded "shall, during any [twelve]-month period, be the lesser of . . . six times the excess of the liable individual's average monthly income . . . or . . . the cost of the medical assistance for the aged."<sup>48</sup> South Dakota's statute opens standing to any person or entity with an interest in the elderly individual's financial status.<sup>49</sup>

One commonality among nearly all filial responsibility statutes is an exemption for those adult children who were neglected or abandoned as minors by the parent now seeking assistance.<sup>50</sup> For instance, Pennsylvania law provides that "[a] child shall not be liable for the support of a parent who abandoned the child and persisted in the abandonment for a period of ten years during the child's minority."<sup>51</sup> This recurring notion indicates that state legislatures have persisted in maintaining these laws based on a theory of reciprocity.<sup>52</sup> Therefore, if the parent did not provide for the child during the child's years of minority, then, upon reaching majority, the child is not responsible for the care of the elderly parent.<sup>53</sup>

In a recent state appellate court case in Pennsylvania, the court applied the state's filial responsibility statute and determined that the adult son of an elderly woman, who resided in a nursing home for six months following a car accident, was responsible for her outstanding bill, which was approximately \$93,000.<sup>54</sup> Although the man's mother had social security income and a small pension, which, together, totaled around one thousand dollars per month, she was unable to cover the full cost of her care.<sup>55</sup> While the court was deciding the case, the elderly mother had a separate appeal in progress regarding her denial of

46. *Id.*; see also CAL. WELF. & INST. CODE § 12350 (West 2012).

47. 23 PA. CONS. STAT. ANN. § 4603(a)(1) (West 2005).

48. *Id.* § 4603(b)(2)(i).

49. S.D. CODIFIED LAWS §§ 25-7-27, -28, 28-13-1.1 (2004).

50. See Edelstone, *supra* note 5, at 504; Ross, *supra* note 2, at 170; see also Priscilla Day, *The Abandonment Defense to a Claim for Parental Support*, 11 J. CONTEMP. LEGAL ISSUES 380, 380-81 (2000); Robin M. Jacobson, Note, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. REV. 518, 532-37 (1995). For example, in *Gluckman v. Gaines*, the court stated as follows:

Love, respect, loyalty, devotion and the natural and inevitable desire of a child to recompense a parent for the love, service, support and sacrifice usually lavished by a parent upon a child, cannot be legislated nor should the law force a child to make recompense for an assumed standard of upbringing, when a trial court finds on credible evidence that it never existed.

*Gluckman v. Gaines*, 71 Cal. Rptr. 795, 797 (Cal. Ct. App. 1968) (quoting *Radich v. Kruly*, 38 Cal. Rptr. 340, 343 (Cal. Ct. App. 1964)).

51. 23 PA. CONS. STAT. ANN. § 4603(a)(2)(ii).

52. See *id.*; see also Edelstone, *supra* note 5, at 504; Ross, *supra* note 2, at 187.

53. See 23 PA. CONS. STAT. ANN. § 4603(a)(2)(ii); see also Edelstone, *supra* note 5, at 504; Ross, *supra* note 2, at 187.

54. *Health Care & Ret. Corp. of Am. v. Pittas*, 2012 Pa. Super. 96, 46 A.3d 719, 720-21.

55. *Id.* at 724.

Medicaid.<sup>56</sup> The court denied the son's request to stay the proceedings until the mother's medical assistance appeal was resolved.<sup>57</sup> The son argued that the nursing facility should not be able to single him out as the only source of payment because his mother's husband and his other siblings were presumably equally responsible.<sup>58</sup> However, the court disagreed and stated that, "if [he] had desired to share his support-burden, he was permitted to do so by joining those individuals in th[e] case[.]" but he failed to take such action.<sup>59</sup> Thus, this case indicates that Pennsylvania law currently allows nursing homes to file suits against any family members that they deem financially able to cover an outstanding bill.<sup>60</sup>

In determining whether adult children are responsible for providing their elderly parents with financial assistance, courts may consider a number of different factors; such factors include, but are not limited to, the following:

- (1) [A]mount of income, (2) number of dependents, (3) reasonable living expenses, (4) job related expenses, (5) taxes, (6) previously incurred liabilities, (7) educational expenses, (8) medical expenses, (9) age of the contributor, (10) value and nature of the contributor's assets, (11) need for savings, (12) earning capacity, and (13) unusual circumstances.<sup>61</sup>

Other considerations include "past treatment of the child . . . and whether the parent paid child support while the child was a minor."<sup>62</sup> Courts have demonstrated a precedent for considering the future needs of adult children, taking into account whether adult children will be financing their own children's college education, as well as considering what adult children have put aside for retirement.<sup>63</sup> Even though courts are concerned about elderly individuals' well beings, they will not burden adult children in a way that will cause them to face personal destitution later in life.<sup>64</sup>

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56. *Id.* at 723.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.*

61. Edelstone, *supra* note 5, at 503 n.10 (citing Jacobson *supra* note 50, at 537; W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 801 (1979)).

62. Ross, *supra* note 2, at 171.

63. Edelstone, *supra* note 5, at 503.

64. *See id.*

### C. Filial Responsibility in Texas

#### 1. Background

Although it was repealed in 1993, the Texas Probate Code once included a filial responsibility statute.<sup>65</sup> In 1955, the Texas legislature, during its regular session, enacted Chapter IX, of the Texas Revised Civil Statutes—Chapter IX was entitled Specific Provisions Relating to Persons of Unsound Mind and Habitual Drunkards.<sup>66</sup>

Texas's filial responsibility laws, like similar state laws, date back to 1876.<sup>67</sup> The legislature revised the laws in 1895 and 1911 and codified them, as amended, in the Texas Probate Code, §§ 415–426—these sections pertained to the determination of need for guardianship, maintenance of that guardianship, and liability for the needs of the ward.<sup>68</sup> The requirements of these sections only applied in the context of guardianships.<sup>69</sup> For purposes of this article, the relevant provisions of the Texas Probate Code, as they pertain to filial responsibility in Texas, read as follows:

#### § 423. LIABILITY FOR MAINTENANCE

Where an incompetent has no estate of his own, he shall be maintained:

- (a) By the husband or wife of such person, if able to do so; or, if not,
- (b) By the father or mother of such person, if able to do so; or, if not,
- (c) By the children and grandchildren of such person, respectively, if able to do so; or, if not,
- (d) By the county in which said person has his residence.<sup>70</sup>

#### § 424. EXPENSES OF CONFINEMENT

The expenses attending the confinement of an incompetent shall be paid by the guardian out of the estate of the ward, if he has an estate; and, if he has none, such expenses shall be paid by the person bound to provide for and support such incompetent; and, if not so paid, the county shall pay the same.<sup>71</sup>

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65. Act of Apr. 4, 1955, 54th Leg. R.S., ch. 55, §§ 415–426, 1955 Tex. Gen. Laws 88, 210–12, *repealed by* Act of June 19, 1993, 73rd Leg., R.S., ch. 905, § 17, 1993 Tex. Gen. Laws 3781, 3809; Act of June 19, 1993, 73rd Leg., R.S., ch. 957, 75(5), 1993 Tex. Gen. Laws 4081, 4182. The Texas Probate Code was later repealed and recodified as amended in the Texas Estates Code, which took effect on January 1, 2014 (current version at TEX. ESTATES CODE ANN. (West 2014)).

66. *Id.*

67. Act of Aug. 18, 1876, 15th Leg., R.S., ch. CXII, §§ 1–208, 1876 Tex. Gen. Laws 187, *reprinted in* 8 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 1011, 1011–29 (Austin, Gammel Book Co. 1898).

68. *See id.*, *amended by* 1895 TEX. REV. CIV. STAT. arts. 2735–43, 2745–52; 1911 TEX. REV. CIV. STAT. arts. 4238–46, 4248–55 (codified as amended at TEX. PROB. CODE ANN. §§ 415–426, *repealed by* Act of June 19, 1993, 73d Leg., R.S., ch. 905, § 17, 1993 Tex. Gen. Laws 3781, 3809 (effective Sept. 1, 1993)).

69. *See* TEX. PROB. CODE ANN. §§ 415–426, *repealed by* Act of June 19, 1993, 73d Leg., R.S., ch. 905, § 17, 1993 Tex. Gen. Laws 3781, 3809 (effective Sept. 1, 1993).

70. *Id.* § 423.

71. *Id.* § 424.

## § 425. RECOVERY BY COUNTY OF SUMS PAID BY IT

In all cases of appropriation out of the county treasury for the support and confinement of any incompetent, the amount thereof may be recovered by the county from the estate of such person, or from any person who by law is bound to provide for the support of such incompetent, if there be any person able to pay for the same.<sup>72</sup>

The plain language of these sections indicates that family members were responsible for the costs associated with caring for the wards, even though their responsibility seems limited to supporting the mentally retarded and those suffering from mental illness.<sup>73</sup> In fact, a duty to financially support an adult child or a parent only arose if a guardianship was established, so from a legal standpoint, those who were simply indigent could not seek assistance.<sup>74</sup> Nevertheless, the county was merely a last resort for financial assistance, and counties were permitted to seek remuneration from families of patients who were unable to pay for their own care.<sup>75</sup>

## 2. Case Law

In the years following its enactment, Texas's filial responsibility statute generated a substantial amount of case law.<sup>76</sup> For example, in the case of *State v. Stone*, the State instituted a suit against a former Austin State Hospital patient's deceased father's estate, as well as the former patient's two sisters, "for the cost of supporting, maintaining and treating [the former patient, the] adult son of the dece[ased]" father, for mental illness.<sup>77</sup> The former patient's two sisters argued that they were not liable for the cost of their adult brother's hospital treatment and that their deceased father could not be held liable for debts incurred under a contract in which he held no privity.<sup>78</sup> Nevertheless, relying on the language of the predecessor to the 1955 statute, the court decided that it was inconsequential that the deceased father of the former patient had never signed any agreement with the hospital to make himself a guarantor for payment of any care provided.<sup>79</sup> Rather, the court referred to the circumstances as a quasi-contract, which was enforceable even after the death of the patient.<sup>80</sup>

In *Stone*, the court also rejected the argument of the former patient's two sisters that their deceased father should not be held liable for expenses incurred because his adult son had reached the age of majority before entering the

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72. *Id.* § 425.

73. *Id.* §§ 415, 423–425.

74. *Id.* §§ 415–426.

75. *Id.* §§ 423–425.

76. See discussion *infra* notes 78–91 and accompanying text.

77. *State v. Stone*, 271 S.W.2d 741, 744 (Tex. Civ. App.—Beaumont 1954, no writ).

78. *Id.* at 744–46.

79. *Id.* at 751–54.

80. *Id.* at 748–51.

facility.<sup>81</sup> The court did, however, limit the father's liability for expenses incurred by his son.<sup>82</sup> In determining whether the father had adequate resources to reimburse the hospital for his adult son's care, the hospital could only look to the father's assets during the time treatment was rendered—his resources before his adult son was admitted to the hospital, as well as those after his death, would not be available.<sup>83</sup>

In *California v. Copus*, the Supreme Court of Texas faced a slightly more complicated issue: how to treat the State of California in its attempts to recover funds expended on the treatment of an elderly and indigent woman from her adult son, who moved to Texas during her hospitalization.<sup>84</sup> The defendant, adult son argued that no remedy was available because California was reaching beyond its jurisdiction to recover funds from a Texas resident.<sup>85</sup> However, the court ruled that California could recover monies expended during the time the adult son was a California resident.<sup>86</sup> The adult son's assets would only be considered unavailable once he removed himself from the state's jurisdiction.<sup>87</sup>

The court also disagreed with the adult son's argument that holding an adult child liable for debts incurred by a parent ran against Texas public policy.<sup>88</sup> Though the Texas legislature had not enacted precisely the same provisions as those present in California, the court determined that Texas had other statutes that supported allowing recovery from family members with adequate means.<sup>89</sup> As pointed out by Justice Greenhill in his dissenting opinion, the legislature had enacted a similar provision just three years prior to the issuance of this opinion.<sup>90</sup>

The filial responsibility law, as adopted in 1955, was never revised, and the legislature repealed the laws during the 1993 legislative session, without comment.<sup>91</sup> As such, it appears that filial responsibility, as a policy, has been eradicated in Texas.<sup>92</sup> It seems likely that, as in many other states, the Medicaid regulatory prohibition on considering familial assets in determining eligibility for benefits rendered the law virtually inoperable; thus, the legislature saw fit to remove these provisions from the Probate Code.

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81. *Id.* at 751.

82. *Id.* at 751–54.

83. *Id.*

84. *California v. Copus*, 309 S.W.2d 227, 229 (Tex. 1958).

85. *Id.*

86. *Id.* at 230.

87. *Id.*

88. *Id.* at 232.

89. *Id.*

90. *Id.* at 233–38 (Greenhill, J., dissenting).

91. Act of Apr. 4, 1955, 54th Leg. R.S., ch. 55, §§ 415–426, 1955 Tex. Gen. Laws 88, 210–12, *repealed* by Act of June 19, 1993, 73rd Leg., R.S., ch. 905, § 17, 1993 Tex. Gen. Laws 3781, 3809; Act of June 19, 1993, 73rd Leg., R.S., ch. 957, 75(5), 1993 Tex. Gen. Laws 4081, 4182 (repealed and recodified as amended in scattered sections of TEX. ESTATES CODE ANN. (West 2014)).

92. *See id.*

### D. Constitutional Challenges

As might be expected, filial responsibility statutes have faced a number of constitutional challenges, ranging from violations of the Equal Protection Clause to illegal takings of property.<sup>93</sup> However, with the exception of one case, filial responsibility laws have consistently been able to withstand constitutional challenges, premised on a number of different theories.<sup>94</sup>

In the California case of *Swoap v. Superior Court*, the plaintiffs argued that filial responsibility law violated the Equal Protection Clause because it unfairly applied to suspect classes based on wealth (people with parents in need of financial assistance) and ancestry (one requirement to support an elderly parent was based on lineage).<sup>95</sup> However, the court concluded that wealth and ancestry were not suspect classes as applied to these circumstances.<sup>96</sup> Although the law's aim was to provide aid to the needy, as a class, the court determined that the state was only taking action to ensure that children provided for their parents' basic needs and health care.<sup>97</sup> Furthermore, the court explained that there was no suspect class based on ancestry.<sup>98</sup> The *Swoap* court also pointed out that when the Supreme Court decided the case of *Hirabayashi v. United States*, "the [C]ourt used ancestry to denote racial classification and not in the general sense of parentage."<sup>99</sup>

Having concluded that there were not any suspect classes targeted by the language of the filial responsibility statute, the court applied the rational basis test to determine whether there was a rational relationship between the statute's requirements and some legitimate state goal.<sup>100</sup> Ultimately, the court found that the state had a legitimate interest in ensuring that the basic needs of the indigent and elderly were provided for, and the court deemed the state's answer to this problem rational, when viewed from a standpoint of reciprocity.<sup>101</sup>

A similar result was reached in a South Dakota case, *Americana Healthcare Center v. Randall*, in which a woman's adult son was sued to cover the cost of hospital bills following his mother's death.<sup>102</sup> After hearing arguments based on similar constitutional challenges as those raised in *Swoap*, the court explained that economic-based discrimination was not unconstitutional, so long as it was not invidious.<sup>103</sup> The court concluded as follows:

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93. See discussion *infra* notes 96–111 and accompanying text.

94. See discussion *infra* notes 96–111 and accompanying text.

95. *Swoap v. Superior Court*, 516 P.2d 840, 849–50 (Cal. 1973).

96. *Id.* at 850–51.

97. *Id.*

98. *Id.*

99. *Id.* at 851 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

100. *Id.*

101. *Id.* at 851–52.

102. *Americana Healthcare Ctr. v. Randall*, 513 N.W.2d 566, 569–70 (S.D. 1994).

103. *Id.* at 572–73.

It is certainly reasonable to place a duty to support an indigent parent on that parent's adult child because they are direct lineal descendants who have received the support, care, comfort[,] and guidance of that parent during their minority. If a parent does not qualify for public assistance, who is best suited to meet that parent's needs?<sup>104</sup>

The only notable case that was unable to withstand a constitutional challenge based on the Equal Protection Clause is a 1964 California case, a case in which an elderly woman who was mentally ill was committed to a state hospital, and subsequently, the hospital attempted to bill her daughter's estate.<sup>105</sup> After the daughter's estate refused to pay the bill, the hospital brought suit under the state's filial responsibility law.<sup>106</sup> The court distinguished the case from other, similar cases based on the fact that the elderly woman was placed in a state institution.<sup>107</sup> The court also pointed out the fact that, under state law, taxpayer dollars funded this particular institution, primarily because the purpose of a state hospital is to provide care to those who otherwise cannot afford it.<sup>108</sup> Because the hospital was funded under this policy, it would be unfair to impose costs associated with patient care on a patient's relatives.<sup>109</sup> Ultimately, the court determined that the state's filial responsibility law violated the Equal Protection Clause; according to the court, to decide otherwise would be to impose a tax on "one particular class of persons for a species of taxation and no rational basis supports such classification. Such a concept for the state's taking of a free man's property manifestly denies him equal protection of the law."<sup>110</sup>

#### *E. Filial Responsibility at the Federal Level*

Although filial responsibility statutes primarily appear at the state level, residents of states without filial responsibility laws must sometimes look to the federal law for protection, particularly when issues of nursing home placement and payment are at play.<sup>111</sup>

Federal law prohibits a nursing home from requiring, as a condition to admitting a new patient, a guarantee of payment from a third party, including a family member.<sup>112</sup> However, nursing homes discretely continue this practice

104. *Id.* at 573.

105. *Dep't of Mental Hygiene v. Kirchner*, 388 P.2d 720, 720–21 (Cal. 1964).

106. *Id.* at 721.

107. *Id.* at 722–23.

108. *Id.* at 723–24.

109. *Id.* at 724.

110. *Id.* (citation omitted).

111. See generally Katherine C. Pearson, *The Responsible Thing to do About "Responsible Party" Provisions in Nursing Home Agreements: A Proposal for Change on Three Fronts*, 37 U. MICH. J.L. REFORM 757 (2004) (noting various federal law applications).

112. See 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii) (2012); see also 42 C.F.R. § 483.12(d)(2) (2012) (noting the prohibition of a guaranteed third party payment).

anyway, by asking a family member or friend of new patients to sign the standard admission paperwork, as a payor.<sup>113</sup> When the patient no longer has the funds to pay, the nursing home looks to the third party for payment.<sup>114</sup>

Frequently, families begin the admission paperwork for a nursing home soon after a loved one has suffered from a life-threatening illness or injury.<sup>115</sup> When an elderly family member is admitted to a hospital, oftentimes, the hospital will later discharge the individual to a nursing home for rehabilitative treatment, without much advance notice.<sup>116</sup> During the discharge process, families have very little time to explore options and discuss the documents they are signing with nursing home staff.<sup>117</sup> Additionally, they may believe that a third party guarantee is standard.<sup>118</sup> Typically, during the admission process, the admission attendant will simply put an "X" in areas where signatures are needed.<sup>119</sup> Rarely, if ever, is there time left to discuss any of this with an attorney because hospitals are often eager to discharge patients when those assuming responsibility may not understand the documents they signed.<sup>120</sup>

In 1987, Congress passed the Nursing Home Reform Law, which banned nursing facility guarantees.<sup>121</sup> The Nursing Home Reform Law stated that a "nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility."<sup>122</sup> Thus, when considering the issue of filial responsibility in a nursing home, Congress intended to side with the consumer.<sup>123</sup> However, despite this clear mandate, which Congress put in place over two decades ago, nursing facilities continue to use third party guarantees in their standard admission paperwork.<sup>124</sup> The guarantees most commonly used by nursing facilities usually take one of the following two forms: "(1) a guarantee required for the admission of any nursing facility resident who is not eligible for the Medicaid Program or (2) a guarantee obtained by deceiving a resident's family member or friend into signing an admission agreement as a '[financially]

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113. See Eric Carlson, *Illegal Guarantees in Nursing Homes: A Nursing Facility Cannot Force a Resident's Family Members and Friends to Become Financially Responsible for Nursing Facility Expenses*, 30 CLEARINGHOUSE REV. 33, 33–35 (May 1996).

114. See *id.*

115. See *id.* at 33.

116. See *id.*

117. See *id.* at 33–34.

118. See *id.* at 37–44.

119. See *id.* at 38, 43; see also Marilyn G. Miller, *Contracting for Long Term Care in Texas*, ST. B. TEX., ADVANCED ELDER LAW COURSE (Mar. 5, 2009), at 16.

120. See Carlson, *supra* note 113, at 39–44.

121. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (amending 42 U.S.C. § 1395i-3(a)–(h) (Medicare) and 42 U.S.C. § 1396r (Medicaid)).

122. 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii) (2012); see also 42 C.F.R. § 483.12(d)(2) (noting that the statutes are restated in this regulation). "Section 1395i-3 applies to any nursing facility certified for participation in the Medicare program; section 1396r applies to any facility certified for participation in the Medicaid program." Carlson, *supra* note 113, at 34 n.6.

123. See 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii); see also 42 C.F.R. § 483.12(d)(2).

124. See Carlson, *supra* note 113, at 33, 35.

Responsible Party.”<sup>125</sup> When signing these forms, many individuals interpret the term “responsible party” as meaning a contact person for the resident.<sup>126</sup> If this issue arises, the signing party should note that such a written guarantee is not likely to hold up in a court of law.<sup>127</sup>

Some believe that Congress intended for 42 U.S.C. § 1395i-3(c)(5)(A)(ii) to apply to all facilities, not just those accepting Medicaid-eligible residents, because the term “Medicaid eligible” is not used in this particular provision.<sup>128</sup> The argument is that Congress intentionally left it out.<sup>129</sup> However, because Congress did not specifically indicate to whom the federal law’s guarantee prohibition does or does not apply, “the federal guarantee prohibition applies to the admission of any and all nursing facility residents in a facility which accepts federal reimbursement (either Medicare or Medicaid).”<sup>130</sup>

A strong argument against nursing homes is that they continue to use responsible party provisions to obtain guarantees, in violation of the statute.<sup>131</sup> Specifically, by requiring a new patient, or a third party, signature as a condition for admission is a violation of the Nursing Home Reform Law, on its face, because the statute clearly prohibits this practice.<sup>132</sup>

Another argument against responsible party provisions is that they are deceptive under consumer protection laws.<sup>133</sup> While nursing facilities argue that responsible party provisions do not make admission conditional, but rather, these provisions simply ask for family members or friends to volunteer to become financially responsible, given new residents’ sensitive conditions, their expedited need for admission, and the tactics employed during the admissions process, most individuals are not aware that they are assuming financial liability.<sup>134</sup> Furthermore, not only do nursing homes typically not bring this information to the attention of those signing the admission paperwork, but also, the admission paperwork usually does not state that, when one signs as responsible party, financial responsibility attaches to such signature.<sup>135</sup>

Additionally, responsible party provisions are often deemed unenforceable because they do not provide consideration to new residents or to third parties,

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125. *Id.* at 35.

126. *See id.* at 37, 42.

127. *See id.* at 35–44.

128. *See* 42 U.S.C. § 1395i-3(c)(5)(A)(ii); *see also* Carlson, *supra* note 113, at 36.

129. Carlson, *supra* note 113, at 36.

130. *Id.*

131. *See id.* at 35, 37–38, 40–41.

132. *See id.* at 34, 38.

133. *See id.* at 41–44.

134. *See id.*

135. *See id.*

such a new resident's family member or friend.<sup>136</sup> Some courts have stated that such contracts are void because they are without consideration.<sup>137</sup>

Several courts are also unfamiliar with the amended statutes, leaving the door open for uncertainty on how challenges to these provisions will stand in court.<sup>138</sup> Most cases interpreting responsible party provisions have applied to fiduciary agents who are accused of misappropriating funds or to situations where agents had access to a resident's assets or income.<sup>139</sup> A few other cases that have justified nursing facility suits against family members have relied on state filial responsibility laws.<sup>140</sup> Currently, Texas does not have any cases interpreting the statutory provisions.

The best way to try and avoid this unexpected liability is to not sign the responsible party provision or to ask for more time to review it before signing.<sup>141</sup> People acting pursuant to a power of attorney need to make sure it is clear that they are signing under the power of attorney and not individually.<sup>142</sup> Additionally, any bills sent by the nursing facility or a creditor should remain unpaid.<sup>143</sup> Otherwise, the nursing facility may argue that the individual implicitly assumed responsibility by paying, even if the responsible party provision is unsigned.<sup>144</sup> If, however, a party mistakenly signs a responsible party provision, such party should promptly inform the creditor that the provision is wholly unenforceable.<sup>145</sup>

#### IV. JUSTIFICATIONS AND CRITICISMS

Proponents and critics alike have offered a number of reasons to support their positions regarding filial responsibility statutes.<sup>146</sup> Though legal scholars have yet to reach a consensus, it is beneficial to have a basic understanding of

136. See *id.* at 38–39.

137. See *id.* One California court found responsible party provision synonymous with a third party payer guarantor, deeming the contract invalid on grounds of no consideration because the third party payer receives no benefit from the responsible party signature. See Miller, *supra* note 119, at 5.

138. See Carlson, *supra* note 113, at 41–44; see also discussion *infra* notes 141–42.

139. See Miller *supra* note 119, at 19–21.

140. See *id.* at 21.

141. See, e.g., Susan T. Peterson, *Liability and Responsibility for Nursing Home Expenses*, 66 BENCH & B. MINN. 24, 28 (2009).

142. See *id.*

143. See, e.g., Cynthia Barrett, *Family Member Liability for Nursing Home Costs*, NAELA E-BULLETIN, Apr. 4, 2006, at 6–7, available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.naela.org%2FCMDownload.aspx%3FContentKey%3Dca395d2b-2059-44fb-908e-bf32be27b6b7%26ContentItemKey%3D5028e71c-c261-443e-98c1-310f5a1ad9be&ei=7Dd9U63LBqrX8AGx7IGgDQ&usq=AFQjCNGG03-f4Rb\\_scxv6Vimu-dAr4SMSQ&sig2=bdeQRd8FsSWcVNJ58D6xSA&bvm=bv.67229260,d.b2U](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.naela.org%2FCMDownload.aspx%3FContentKey%3Dca395d2b-2059-44fb-908e-bf32be27b6b7%26ContentItemKey%3D5028e71c-c261-443e-98c1-310f5a1ad9be&ei=7Dd9U63LBqrX8AGx7IGgDQ&usq=AFQjCNGG03-f4Rb_scxv6Vimu-dAr4SMSQ&sig2=bdeQRd8FsSWcVNJ58D6xSA&bvm=bv.67229260,d.b2U).

144. See *id.*

145. See Miller *supra* note 119, at 22.

146. See Ross, *supra* note 2, at 185–93; Edelstone, *supra* note 5, at 504–07.

these positions to better discern the implications of filial responsibility for Medicaid estate planning.<sup>147</sup>

### A. Justifications

Those who favor the enactment and enforcement of filial responsibility laws rely on one of two theories to justify their stance.<sup>148</sup> First, they focus on the idea of reciprocity, theorizing that utilization of filial responsibility statutes will result in stronger family bonds.<sup>149</sup> If adult children become legally responsible for the financial well being of their parents, it is posited that this will spark discussions about family resources and how best to handle aging and retirement.<sup>150</sup> Proponents of this position frequently advocate an administrative organization modeled after the child support system.<sup>151</sup> Because parents are responsible for supporting their minor children, those children, upon reaching the age of the majority, should be equally responsible for their impoverished parents.<sup>152</sup> As such, advocates would place adult children on a regular payment schedule through the courts, enforceable by threat of contempt, if they fail to meet their payment obligation.<sup>153</sup>

A second widely raised justification for the implementation of filial responsibility statutes is to relieve the governmental burden of funding and providing basic necessities for the elderly.<sup>154</sup> Scholars point out that Congress originally intended Social Security to provide only 45% of any individual's income after retirement; however, a majority of Americans rely on Social Security as their primary or sole source of income.<sup>155</sup>

As a result, the system is overburdened—collectively, states spend more than 20% of their budgets just to fund the Medicaid program, and analysts expect this number to continue to increase in the future.<sup>156</sup> Researchers project that the institution of filial responsibility laws could reduce spending on social programs, like welfare, by as much as 30%, all while reducing the administrative costs to determine eligibility for such programs.<sup>157</sup> If the law made families responsible for financially supporting their elderly loved ones, the government could allocate its resources elsewhere.<sup>158</sup>

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147. See discussion *infra* Parts IV.A–B, V–VI.

148. See Edelstone, *supra* note 5, at 504.

149. See *id.*; see also Ross, *supra* note 2, at 187–88.

150. See Ross, *supra* note 2, at 188–89.

151. See Edelstone, *supra* note 5, at 501, 508–10, 512–13.

152. See *id.* at 504; see also Ross, *supra* note 2, at 187–88.

153. See Edelstone, *supra* note 5, at 509.

154. See *id.* at 504; see also Ross, *supra* note 2, at 185–86.

155. See Ross, *supra* note 2, at 178.

156. See *id.* at 182.

157. See *id.* at 185–86.

158. See *id.*

Filial responsibility also has the potential for improving the overall quality of life for elderly Americans.<sup>159</sup> Family members are better able to meet the individual needs of an aging relative, as compared to the government, and enforcement may serve to raise the elderly population above subsistence living, on a fixed income.<sup>160</sup> Additionally, if the Medicaid program considered family resources when determining eligibility, the government could remove a large number of individuals from its payrolls.<sup>161</sup>

Generally, proponents of filial responsibility statutes conceptualize utilization of these provisions as legal enforcement of a moral duty—one that is fair and that should be expected by society.<sup>162</sup>

### B. Criticisms

Scholars opposed to the renewed implementation of filial responsibility statutes raise a number of concerns, most of which directly counter the reasons why proponents urge increased usage of these laws.<sup>163</sup>

First, critics point out that, although filial responsibility may spark conversations among family members about addressing the needs of an elderly parent or a grandparent, it could cause more tension within the family.<sup>164</sup> For instance, if adult children agree to provide assistance to their parents, then, most likely, there will not be any problems, and family ties might actually improve; however, if adult children decide not to provide the assistance requested, or if they cite an inability to contribute, then their elderly parents could end up filing a lawsuit against them.<sup>165</sup> The adversarial nature of such an action could cause a divide in the family structure.<sup>166</sup>

Generally, the number of elderly indigent who are altogether neglected by family members is a very small minority—most elderly indigents already receive some form of assistance from their children, though it is often in-kind support, rather than cash gifts.<sup>167</sup> However, if states begin enforcing filial responsibility laws, it could lead to a decline in the amount of in-kind support that adult children are willing to give their parents.<sup>168</sup> Moreover, according to one researcher, individuals who rely solely on a family member for their financial support typically have a distinctly lower standard of living than their counterparts, those who have qualified for welfare and other forms of

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159. See *id.* at 186–87; see also Kline, *supra* note 40, at 207–08.

160. See Ross, *supra* note 2, at 186–87; Kline, *supra* note 40, at 207–08.

161. See Ross, *supra* note 2, at 185–87; Kline, *supra* note 40, at 203–04.

162. Ross, *supra* note 2, at 187–88; Kline, *supra* note 40, at 205–07.

163. See Edelstone, *supra* note 5, at 505–07; Ross, *supra* note 2, at 188–93.

164. See Edelstone, *supra* note 5, at 506; Ross, *supra* note 2, at 188.

165. See Edelstone, *supra* note 5, at 506; Ross, *supra* note 2, at 188.

166. See Moskowitz, *supra* note 15, at 726–27.

167. See Britton, *supra* note 9, at 367.

168. See *id.*

government assistance.<sup>169</sup> Though the help of one's family members is certainly desirable, total reliance on family members will likely not be in an indigent individual's best interest.<sup>170</sup>

Further, imposing filial responsibility in the same manner as child support ignores some of the key differences between support of a minor and support of a parent.<sup>171</sup> For example, parents are only required to provide child support while the child is a minor, meaning their support, at a maximum, lasts for eighteen years.<sup>172</sup> When it comes to adult children supporting their elderly parents, however, there is not a prescribed age cutoff, so support has the potential to last significantly longer.<sup>173</sup> Family dynamics also separate filial responsibility from child support.<sup>174</sup> The former requires an adult parent to sue his or her own child, even if there is an ongoing relationship, whereas the latter is enforced between two individuals after a prior relationship ends.<sup>175</sup> Furthermore, in certain jurisdictions, third-party creditors have used filial responsibility statutes to enforce the duty of adult children to financially support their elderly parents, despite any parental objections.<sup>176</sup> Therefore, enforcement of filial responsibility statutes can lead to resentment and cause strain on parent-child relationships.<sup>177</sup>

While proponents of filial responsibility statutes argue that these laws are advantageous because they could reduce government spending, this position has noted flaws.<sup>178</sup> Though fewer people will qualify for Medicaid and other government aid programs, every state will need to create an additional, separate system to deal with filial responsibility claims.<sup>179</sup> Despite the fact that many courts already have overloaded dockets, the influx of suits from family members seeking financial assistance and from third parties seeking remuneration for debts will only add to their preexisting burdens.<sup>180</sup> In evaluating and determining eligibility for benefits, Medicaid caseworkers will be forced to confront a larger task because they will not only have to analyze

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169. David C. Baldus, *Welfare as a Loan: An Empirical Study of the Recovery of Public Assistance Payments in the United States*, 25 STAN. L. REV. 123, 156 (1973).

170. See *id.*

171. See *infra* notes 174–75 and accompanying text.

172. Compare TEX. FAM. CODE ANN. § 154.001(a) (West 2011) (discussing support of a child), with TEX. PROB. CODE ANN. § 423, *repealed by* Act of June 19, 1993, 73d Leg., R.S., ch. 905, § 17, 1993 Tex. Gen. Laws 3781, 3809 (effective Sept. 1, 1993) (discussing maintenance and support of an incompetent); see also Moskowitz, *supra* note 15, at 723.

173. See Moskowitz, *supra* note 15, at 723; Edelstone, *supra* note 5, at 512–13.

174. See *infra* notes 177–79 and accompanying text.

175. See Edelstone, *supra* note 5, at 506, 508–10.

176. See Katherine C. Pearson, *Filial Support Laws in the Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 Elder L.J. 269, 273, 296 (2013).

177. See Edelstone, *supra* note 5, at 506; Jacobson *supra* note 50, at 539.

178. See Ross, *supra* note 2, at 185–86; see also *infra* notes 181–84.

179. See Ross, *supra* note 2, at 189–90; Michael Rosenbaum, *Are Family Responsibility Laws Constitutional?*, 1 FAM. L.Q. 55, 59 (1967).

180. See Ross, *supra* note 2, at 189–90.

the applicant's resources, but they will also have to analyze the resources of all of the applicant's adult children.<sup>181</sup> When all of these considerations are factored together, filial responsibility statutes may not actually alleviate the government's financial burden as much as proponents of filial responsibility laws might presume.<sup>182</sup>

Before committing to filial responsibility, certain societal factors must also be considered.<sup>183</sup> While these filial responsibility laws were familiar to American culture in the early part of the twentieth century, the introduction of social programs has altered the way people think about retirement and financial assistance for the elderly.<sup>184</sup> Americans possess an innate sense of individualism and self-sufficiency; therefore, many Americans harbor an inherent aversion to accepting handouts.<sup>185</sup> Citizens who have worked all of their lives and paid into the government system expect to receive needed financial assistance after retiring.<sup>186</sup> American culture also emphasizes a separation between parent and child once the child leaves the home, especially regarding financial reliance, which may make elderly parents reluctant to ask for help.<sup>187</sup> In essence, social norms may dictate perceptions of filial responsibility.<sup>188</sup> Actively enforcing these policies may require a reshaping of the way Americans think about family relationships.<sup>189</sup>

States that have implemented criminal liability for failure to provide support have faced criticism because the concept is self-defeating.<sup>190</sup> Elderly parents are unlikely to report a failure to provide financial support if doing so will subject their children to criminal charges.<sup>191</sup> Those children will only be further inhibited from providing financial support if they are incarcerated or if they are fined.<sup>192</sup> Additionally, district attorneys are unlikely to enforce these laws by prosecuting adult children, especially if they are unpopular in the community.<sup>193</sup>

Finally, there are jurisdictional issues to consider.<sup>194</sup> The *Copus* case, discussed previously, illustrates that, quite frequently, elderly parents live in different states than their adult children.<sup>195</sup> Without personal jurisdiction, a state may have difficulty enforcing its policies when a child lives beyond the

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181. See *id.*; see also Jacobson *supra* note 50, at 539–40.

182. See *supra* text accompanying notes 181–83.

183. See *infra* notes 186–91 and accompanying text.

184. See Jacobson *supra* note 50, at 538–39.

185. See *id.* at 539; see also Ross, *supra* note 2, at 192–93.

186. Ross, *supra* note 2, at 177.

187. Ross, *supra* note 2, at 192–93.

188. See *id.*

189. See *id.*

190. See *id.* at 193.

191. See *id.*; see also Edelstone, *supra* note 5, at 506.

192. See Ross, *supra* note 2, at 193.

193. See *id.*; see also Jacobson *supra* note 50, at 540.

194. See Moskowitz, *supra* note 15, at 728.

195. *California v. Copus*, 309 S.W.2d 227, 228–29 (Tex. 1958).

reach of its state's courts.<sup>196</sup> Elderly parents could be left without any source of assistance if government benefits are denied because their adult children have extensive resources, yet they have no recourse because their children live out of state.<sup>197</sup> Establishment of any filial responsibility system would have to address this issue to remain a viable option.

## V. IMPACT OF MEDICAID REGULATIONS

The regulations pertaining to Medicaid delivered what some people characterize as the fatal blow to filial responsibility statutes.<sup>198</sup> Though states administer Medicaid, federal regulations control the standards for determining eligibility, and the restrictions specifically prohibit consideration of financial resources "of any individual for any applicant or recipient of assistance under the [Medicaid] plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age [twenty-one]."<sup>199</sup> Now that state Medicaid administrators cannot consider a family member's financial resources in determining eligibility for benefits, these restrictions have all but eradicated filial responsibility laws.<sup>200</sup>

Upon deliberating the passage of Medicaid and its attendant regulations, the Senate Finance Committee was charged with the task of deciding how to fund Medicaid and the necessary requirements to qualify.<sup>201</sup> The Committee determined that the Medicaid regulations should not allow states to consider family resources when reviewing applications for benefits.<sup>202</sup> The Committee made the following comment about filial responsibility laws and similar policies: "[R]equirements imposed are often destructive and harmful to the relationships among members of the family group. Thus, States may not include among plans provisions for requiring contributions from relatives other than a spouse or the parent of a minor child[.]"<sup>203</sup>

Based on this determination, the Committee decided that federal funding would be unavailable to any state that persisted in looking to adult children to pay medical expenses of their parents.<sup>204</sup> Almost immediately, courts stopped

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196. *See id.*; *see also* Moskowitz, *supra* note 15, at 728.

197. Moskowitz, *supra* note 15, at 728.

198. *See, e.g.*, Kline, *supra* note 40, at 199.

199. 42 U.S.C. § 1396a(a)(17)(D) (Supp. IV 2006).

200. *See, e.g.*, Kline, *supra* note 40, at 199.

201. *See* George F. Indest III, *Legal Aspects of HCFA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act*, 15 S.U. L. REV. 225, 242-43 (1988).

202. *See id.* at 243 (concluding that requiring contributions from family relatives did not extend past a spouse or parent of a minor child or a parent of any disabled child; however, contributions actually made by relatives could be considered in deciding whether assistance was needed).

203. *Id.* (emphasis omitted); *see also* S. REP. NO. 89-404, at 78 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2018 (containing the original language).

204. Indest III, *supra* note 201, at 243.

enforcing filial responsibility laws, and state legislatures began repealing the provisions.<sup>205</sup>

In the years following the Congressional mandate, the Department of Health and Human Services (HHS) issued a number of different opinions conforming to Congress's intent.<sup>206</sup> The HHS prohibited states Medicaid administrators from reviewing family resources when determining eligibility for benefits.<sup>207</sup> In 1977, the HHS rewrote the regulations.<sup>208</sup> In November 1977, the HHS rejected Massachusetts's request for a waiver, which would have allowed it recover funds from the children of Medicaid beneficiaries; in rejecting the state's request, the HHS stated the following:

In 1967, at the express insistence of the Senate Finance Committee . . . this Department issued regulations to ban the practice of "supplementation" [allowing states to recoup Medicaid expenditures from family members]. In 1972, with the enactment of P.L. 92-603, Congress eliminated retroactive recoupment from adult children as a feature of adult cash assistance for the new SSI program.<sup>209</sup>

The threat of losing funding for state programs was enough to maintain compliance, so many states repealed their filial responsibility provisions altogether.<sup>210</sup>

However, in the early 1980s, the HHS began to change its position on filial responsibility.<sup>211</sup> In 1983, in an attempt by the HHS to encourage expanded use of filial responsibility laws, "the Health Care Financing Administration (HCFA), the agency within [the] HHS [that] oversees and promulgates guidelines for each state's Medicaid program, issued a Medicaid Manual Transmittal[.]"<sup>212</sup> The Transmittal, which completely reversed the HHS's previous stance on the issue, read as follows:

The law and regulations permit States to require adult family members to support adult relatives without violating the Medicaid statute . . . .  
 . . . This means that the law cannot limit provisions requiring contributions from relatives . . . . Within these guidelines, the State may

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205. See generally *id.* at 233–42 (discussing actions taken by different courts and state legislatures in the aftermath of the Senate Finance Committee's decision).

206. See *id.* at 244–51.

207. See *id.* at 248–49.

208. See *id.* at 247–49.

209. *Id.* at 245 (quoting Clifton Gaus, the Acting Director of the Office of Policy, Planning and Research of HCFA); see also Joanne P. Acford, *Reducing Medicaid Expenditures Through Family Responsibility: Critique of a Recent Proposal*, 5 AM. J.L. & MED. 59, 65 n.30 (1979).

210. See *Indest III*, *supra* note 201, at 233–42 (discussing the trend among states moving toward non-enforcement of filial responsibility laws, with some states even repealing their filial responsibility statutes outright).

211. See *id.* at 251.

212. *Id.* at 226.

determine who is a relative, how much relatives must contribute under the statute of general applicability, and the methods of enforcement.<sup>213</sup>

Though it had followed Congress's lead for nearly two decades, suddenly, the HCFA was willing to allow state Medicaid administrators to require adult children to provide financial support to their parents without overstepping the boundaries of the Medicaid regulations.<sup>214</sup> Immediately thereafter, various state legislatures and attorney generals responded to the 1983 Transmittal, interpreting it as inconsequential and ineffective, despite Congress's clear intent.<sup>215</sup> For example, the Hawaii legislature adopted a resolution, which noted that it previously repealed its filial responsibility statute "due to 'a conflict with anticipated federal regulations, the potential financial burden on the adult relative of the indigent, and the potential for trauma in the relationship between the adult relative and the indigent.'"<sup>216</sup> Idaho, Maine, and Tennessee issued similar responses.<sup>217</sup>

Controversy continues to loom over the 1983 Transmittal because critics question whether its contradiction to the regulations adopted by Congress is valid.<sup>218</sup> From the lack of enforcement of filial responsibility laws, it appears that many states are hesitant to consider family resources or to seek remuneration for Medicaid expenditures from adult children.<sup>219</sup> To do so might put states at risk for legal challenges and cause them to lose their funding from the federal government.<sup>220</sup>

Legal scholars have deemed the 1983 Transmittal invalid for two reasons.<sup>221</sup> First, the 1983 Transmittal appears to be a complete reversal of congressional intent.<sup>222</sup> As evidenced by the language of the Medicaid statute, Congress quite clearly expressed the desire to end the use of filial responsibility laws to hold children liable for the medical expenses of their parents.<sup>223</sup>

Second, it has been suggested that, because the HCFA and the HHS issued the Transmittal without going through the proper Administrative Procedure Act (APA) rulemaking procedures, the Transmittal is ineffective.<sup>224</sup> Though it is titled a "transmittal," its language indicates a reversal of the original regulations

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213. *Id.* at 251–52 (quoting Medicaid Manual Transmittal No. 2, HCFA Pub. 45-3, no. 3812 [New Developments 1983 Transfer Binder], 3 Medicare & Medicaid Guide (CCH) ¶32,457 (Feb. 1983)); *see also id.* at app. 1, at 303–04 (containing a copy of the Transmittal).

214. *See id.* at 252.

215. *See id.* at 233–42.

216. *Id.* at 237 (quoting 81 *Nursing Home L. Letter* 6 (Feb. 1984) (on file with author)).

217. *See id.* at 238–40.

218. *See id.* at 252–53; *see also id.* at 253 n.100 ("The Transmittal has been criticized as directly contradicting long-standing, carefully thought out federal policy." (citing Robert Whitman & Diane Whitney, *Are Children Legally Responsible for the Support of Their Parents?*, 123 TR. & EST. 43, 46 (1984))).

219. *See id.* at 233–42.

220. *See id.* at 233–42, 253–63.

221. *See infra* notes 224–29 and accompanying text.

222. *See* Indest III, *supra* note 201, at 253–63.

223. *See id.* at 243.

224. *See id.* at 264–80.

promulgated by Congress, a decision that requires official rulemaking under the APA.<sup>225</sup> The HCFA issued the 1983 Transmittal without first adhering to the APA's requirements for agency rulemaking: (1) providing notice of the proposed rulemaking; (2) giving the public an opportunity to review and make comments on the proposed rule; and (3) issuing a general statement of the basis and the purpose for the final rule, along with its publication.<sup>226</sup> Because the HCFA did not comply with these proscribed steps, the 1983 Transmittal is likely to be deemed inoperable under federal procedural law.<sup>227</sup>

To date, there have not been any cases challenging the 1983 Transmittal, especially since most states have either stopped enforcing filial responsibility laws or repealed them altogether.<sup>228</sup> "It is highly unlikely that a state would prevail in any serious challenge . . . to its attempts to collect reimbursement from a Medicaid recipient's child."<sup>229</sup> That being said, however, filial responsibility has gained renewed attention in recent years. Because neither Congress nor the courts have declared the 1983 Transmittal invalid, the door is always open to consideration of family resources for Medicaid applicants; thus, practitioners practicing in jurisdictions where filial responsibility laws are still on the books must be prepared for the possibility that these provisions will be used.

## VI. IMPACT ON MEDICAID ESTATE PLANNING

Though filial responsibility statutes are no longer in place in Texas, recent changes to the Medicaid eligibility rules may be viewed as filial responsibility regulations imposed at the federal level.<sup>230</sup> With the passage of the Deficit Reduction Act and the implementation of certain regulations through the Texas Medicaid Administration, those who lack financial resources to provide their own care must now look more to family assistance because of the reduced aid available from the government.<sup>231</sup>

### A. *The Deficit Reduction Act*

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 into law, trimming the costs of government spending, including both the

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225. *See id.* at 268–70.

226. *Id.* at 265, 268.

227. *Id.* at 265–66 ("The principal purpose of 5 U.S.C. § 553 was to 'provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice.'" (quoting S. DOC. NO. 79-248, at 257 (2d Sess. 1946))).

228. *See id.* at 233–42, 302.

229. *Id.* at 302.

230. *See* discussion *infra* Part VI.A–B.

231. *See* discussion *infra* Part VI.A–B.

Medicaid and Medicare programs.<sup>232</sup> On October 1, 2006, the program became effective in Texas.<sup>233</sup> The Deficit Reduction Act was “expected to generate \$39 billion in federal entitlement reductions over the 2006 to 2010 period[.]”<sup>234</sup> For attorneys with elderly and disabled clients, the most drastic cutbacks concerned the changes in the penalty period for transfers prior to Medicaid qualification, as well as changes pertaining to annuities.<sup>235</sup>

### 1. Changes in the Penalty Period

One of the major changes involved the time of transfers and the look-back period.<sup>236</sup> A recent change in the Texas Medicaid rules eliminated the rounding down of partial months, and instead, ineligibility is now counted in whole number of days.<sup>237</sup> The transfer “penalty period is determined by dividing the uncompensated value of all assets transferred by the average monthly cost of nursing facility care for a private-pay patient.”<sup>238</sup> This change applies to all transfers made after November 1, 2005.<sup>239</sup>

### 2. Changes in Rules Relating to Transfer

The Deficit Reduction Act extended the look-back period from three to five years, which, in turn, impacted Medicaid’s required disclosure of uncompensated transfers.<sup>240</sup> The Texas Medicaid rules changed the penalty start date from the first day of the month in which the transfer transaction was made to the first day of the month in which the transferor would have otherwise been eligible to receive Medicaid benefits, subject to the transfer penalty.<sup>241</sup> Thus, the penalty period begins to run only after applicants are transferred to a Medicaid nursing home, are placed in a Medicaid bed, have met the medical

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

233. See 1 TEX. ADMIN. CODE § 358.401 (2013) (Tex. Health & Human Servs. Comm’n, Transfer of Assets on or after February 8, 2006).

234. *Deficit Reduction Act of 2005: Implications for Medicaid*, HENRY J. KAISER FAMILY FOUND., at 1 (Feb. 2006), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7465.pdf>.

235. See discussion *infra* Part IV.A.1–2.

236. See 1 TEX. ADMIN. CODE § 358.401(d).

237. See *id.* § (d)(1)(E)(iv); see also TEX, DEP’T OF AGING & DISABILITY SERVS., TEX. HEALTH & HUMAN SERVS. COMM’N, MEDICAID FOR THE ELDERLY AND PEOPLE WITH DISABILITIES HANDBOOK, at ch. I-5100 (2013) [hereinafter MEDICAID HANDBOOK], available at <http://www.dads.state.tx.us/handbooks/mepd/I-I-5000.htm#secI-5000>.

238. MEDICAID HANDBOOK, *supra* note 237, at ch. I-5000. In determining the number of ineligible days, the transfer penalty is calculated by dividing the amount transferred by the transfer of assets divisor, which, as of September 1, 2013, is \$156.34. See *id.* at ch. I-5100.

239. See *id.* at ch. I-5100.

240. See 1 TEX. ADMIN. CODE § 358.401(d)(1)(B)(i); see also generally MEDICAID HANDBOOK, *supra* note 237, at ch. I-1000 to I-6000 (discussing various aspects related to the transfer of assets).

241. See 1 TEX. ADMIN. CODE § 358.401(d)(1)(D); see also MEDICAID HANDBOOK, *supra* note 237, at ch. I-5200 (explaining the specific nuances and details of the penalty start date).

necessity requirement, and have satisfied the income and resource requirements.<sup>242</sup>

*a. Calculation of Transfer Period*

The following information not only highlights important considerations that impact the calculation of the transfer period, but it also explains how the transfer period is calculated when transfers are made by the applicant.<sup>243</sup>

- *Is there an exception to the transfer penalty?* If the transfer was made to the client's disabled children, or if evidence proves that the transfer was made for a purpose other than Medicaid eligibility, then there is no penalty for making the transfer.<sup>244</sup>
- *Is the transfer within the look-back period?* If the transfer was made before February 8, 2006 and more than three years—the look-back period under the pre-Deficit Reduction Act transfer of assets policy—have passed, then the penalty period has expired and no penalties can be assessed.<sup>245</sup>
- *What is the uncompensated amount?* The uncompensated amount “is the fair market value of [the asset] at the time of transfer minus the amount of compensation received by the person in exchange for the asset.”<sup>246</sup>
- *Determine the number of penalty days.* This is determined by dividing the value of all uncompensated transfers by \$156.34 and rounding down to the nearest whole number of days.<sup>247</sup> If the transfer was made before September 1, 2005, however, then a monthly rate of \$2,908 must be applied.<sup>248</sup>
- *Determine the start date.* If the transfer was made prior to February 8, 2006, the start date for the penalty was the first day of the month in which the transfer transaction was made.<sup>249</sup> If the gift or the transfer transaction was made after this date, the penalty start date is the first day of the month in which the transferor would have otherwise been eligible for Medicaid benefits, subject to the transfer penalty.<sup>250</sup>
- *Determine the end date.* Add the number of penalty days to the start date to determine when the penalty period ends.<sup>251</sup>

242. See 1 TEX. ADMIN. CODE § 358.401(d)(1)(D)(ii).

243. See *infra* notes 246–55 and accompanying text.

244. See MEDICAID HANDBOOK, *supra* note 237, at ch. I-3200.

245. See *id.* at ch. I-2000 (noting that the date of the transfer, as well as the type of recipient of the transfer, affects which look-back period applies).

246. *Id.* at ch. I-4000.

247. See *id.* at ch. I-5100 (indicating that, effective September 1, 2013, the daily rate is \$156.34, but listing the prior daily rates and indicating when they were effective).

248. See *id.*

249. See *id.* at ch. I-5200.

250. See *id.*

251. See *id.* at ch. I-5000 (explaining how to calculate when the penalty period ends).

### 3. Medicaid Estate Recovery

During the 2003 Texas legislative session, the state legislature passed legislation that required the Department of Human Services to recoup monies spent on Medicaid beneficiaries after they die.<sup>252</sup> The rules were initially published on April 30, 2004, later withdrawn on November 19, 2004, subsequently revised on December 3, 2004, and the final rules became effective on March 1, 2005.<sup>253</sup> The applicable regulations state as follows:

- (a) A Medicaid Estate Recovery claim may be filed against the estate of a deceased Medicaid recipient for covered Medicaid services if the recipient:
  - (1) Was age 55 years or older at the time the services were received; and
  - (2) Initially applied for covered Medicaid long-term care services on or after March 1, 2005, the effective date of these rules.

....

- (c) Covered Medicaid long-term care services include the following services provided to a recipient age 55 years or older under the State of Texas Medicaid plan under Title XIX of the Social Security Act (SSA):

- (1) Nursing facility services;
- (2) Intermediate Care Facilities for the Mentally Retarded (ICF-MR);
- (3) Home and Community-Based Services (§ 1915(c), SSA) and Community Attendant Services (§ 1929(b), SSA); and
- (4) Related costs of hospital and prescription drug services.
- (d) For the purposes of this chapter, covered services do not include services provided before the effective date of these rules.<sup>254</sup>

The estate of a deceased Medicaid recipient is subject to an estate recovery claim if the recipient was 55 years of age or older and initially applied for Medicaid care services either on, or at any point after, March 1, 2005.<sup>255</sup> If the Medicaid application was, or will be, certified are considered “grandfathered” and are not subject to estate recovery.<sup>256</sup> Applications that are denied are not eligible for the grandfather protection, even if services are later established.<sup>257</sup>

The term “initially” was added after the comment period, and it “may be read as securing protection for individuals who initially applied before March 1, 2005, and were certified but lost eligibility . . . and later reapplied.”<sup>258</sup> For example, if nursing home residents who are eligible for Medicaid care leave their nursing homes and return to their own homes, will disqualify their

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252. Tex. H.B. 2292, 78th Leg., R.S. (2003).

253. See 30 Tex. Reg. 830 (Mar. 1, 2005) (codified at 1 TEX. ADMIN. CODE § 373 (2013)). A complete copy of the final rules is available online. See 1 TEX. ADMIN. CODE § 373.

254. 1 TEX. ADMIN. CODE § 373.103.

255. See *id.* § 373.103(a).

256. See Randy Drewett, *Handling a MERP Claim in Texas 2010*, ST. B. TEX., ADVANCED ELDER LAW COURSE (Apr. 15, 2010), [http://www.randydrewett.com/pdfs/Drewett\\_EL10\\_Full%20Article.pdf](http://www.randydrewett.com/pdfs/Drewett_EL10_Full%20Article.pdf).

257. See *id.*

258. *Id.* (emphasis omitted).

services; however, if they later reapply and re-qualify for services, they will be protected.<sup>259</sup> Additionally, protection is afforded to individuals who are initially certified under a particular Medicaid program but later transfer to another type of program.<sup>260</sup>

*a. Important Definitions*

The current version of the statute provides as follows:

§ 373.105. DEFINITIONS

For the purposes of this chapter, the following words and terms have the following meanings, unless the context clearly indicates otherwise:

- (1) Applied for Covered Medicaid Long-Term Care Services—An individual or his or her representative files an application, a nursing facility submits an admission notice and medical necessity determination, or an individual elects Medicaid waiver services, which results in a covered service being approved under Medicaid.
- (2) Claim—A right to recover the total amount of Medicaid assistance paid for the following services: nursing facility; Intermediate Care Facility for the Mentally Retarded (ICF-MR); Home and Community-Based Services (§ 1915(c), SSA) and Community Attendant Services (§ 1929(b), SSA); and all related hospital and prescription drug services, provided from the time the decedent was 55 years of age or older.
- (3) Cost-effective—Economical to the extent that the amount reasonably expected to be recovered by the Medicaid Estate Recovery Program exceeds the cost of recovery by the program as provided in this chapter.
- (4) Decedent—A deceased individual who was 55 years of age or older at the time that covered Medicaid long-term care assistance was received.
- (5) Effective date—March 1, 2005, the date on which these rules take effect under § 2001.036, Government Code.
- (6) Estate—The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in § 3(1), Definitions and Use of Terms, Texas Probate Code.
- (7) Federal Poverty Level—Income guidelines established annually by the federal government.
- (8) Heirs—Those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate, as defined in § 3(o), Definitions and Use of Terms, Texas Probate Code.

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259. *See id.*

260. *See id.*

- (9) Intestate—To die without leaving a valid will.
- (10) Legatee—Any person entitled to a legacy under a will, as defined in § 3(s), Definitions and Use of Terms, Texas Probate Code.
- (11) MERP—The Medicaid Estate Recovery Program.
- (12) Personal Representative—Includes executor, independent executor, administrator, temporary administrator, together with their successors, as defined in § 3(aa), Definitions and Use of Terms, Texas Probate Code.
- (13) Recipient—An individual who received covered long-term care Medicaid services on or after the effective date of these rules.
- (14) Value of real property—Property value determined by current year tax appraisal district.<sup>261</sup>

The definition of the term “estate” is a key definition because it limits the assets that are subject to Medicaid estate recovery; specifically, it limits estate recovery to those items included in the Texas Probate Code’s definition of a probate estate.<sup>262</sup> For now, assets subject to estate recovery do not include non-probate assets, such as payable-on-death accounts, accounts with beneficiary designations, and life insurance policies.<sup>263</sup> It also “appears to preclude recovery against property held by remainder beneficiaries of trusts[.]”<sup>264</sup> Texas Probate Code Section 450(a) states that property passing through trust is deemed non-testamentary, meaning it is not within the definition of estate under § 3(l) of the Texas Probate Code.<sup>265</sup> “[T]he interests of survivors in multiple-party accounts can be reached by compliance with [the] statutory requirements” set forth in § 442 of the Texas Probate Code.<sup>266</sup> It appears that Medicaid beneficiaries, at least for now, can avoid estate recovery by structuring their assets in such a way that they avoid falling within the Texas Probate Code’s definition of estate.<sup>267</sup>

## *B. Texas Medicaid Rules*

### *1. “Covert” Filial Responsibility*

An analysis of the history and current status of filial responsibility in Texas may lead one to believe that a filial responsibility policy does not exist for residents of this state; however, upon analyzing the rules and regulations pertaining to Medicaid in Texas, it becomes readily evident that filial

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261. 1 TEX. ADMIN. CODE § 373.105 (2013).

262. See *id.* § 373.105(6) (citing TEX. PROB. CODE ANN. § 3(l) (redesignated as amended in TEX. ESTATES CODE ANN. § 22.012 (West 2014))).

263. See Drewett, *supra* note 256.

264. *Id.* (emphasis omitted).

265. See *id.* (citing TEX. PROB. CODE ANN. § 450(a) (redesignated as amended in TEX. ESTATES CODE ANN. §§ 111.051–.052)).

266. *Id.* (emphasis omitted) (noting that § 442 of the Texas Probate Code was repealed in 2009 and explaining that chapter 113 of the Texas Estates Code contains the current laws for multiple-party accounts).

267. See *supra* notes 264–68 and accompanying text.

responsibility is already unofficially in place—one might call this “covert” filial responsibility.<sup>268</sup>

Under the Texas Medicaid rules, a client cannot pay a family member for certain items and services; however, the rules allow a client to pay a third party to provide for those same needs.<sup>269</sup>

If a client makes a payment to family members for services they provide, or agree to provide, “that would normally be provided by a family member,” the payment is treated as a transfer without consideration.<sup>270</sup> Examples of such services that are never compensated when rendered by family members include “house painting or repairs, mowing lawns, grocery shopping, cleaning, laundry, preparing meals, [and] transportation to medical care.”<sup>271</sup> However, if a third party is hired to provide these same services, there is no transfer.<sup>272</sup>

Since most adult children are readily willing to cook, clean, and shop for their elderly parents, family support is often already in place; unfortunately, however, the Medicaid rules decline to allow payment for this type of support.<sup>273</sup> Even though Texas law does not mandate financial input from children, it is covertly required by the Medicaid regulations.<sup>274</sup>

The Deficit Reduction Act (DRA) has also greatly reduced the ability of families to transfer or gift certain items or monies to qualify for Medicaid benefits.<sup>275</sup> Gifts to grandchildren, for the purposes of funding things like education, may be viewed as uncompensated, ultimately resulting in a transfer penalty and loss of benefits.<sup>276</sup> It is also possible for clients to make a gift inadvertently, not realizing the implications for qualifying for public benefits that they may not have thought they would ever need.<sup>277</sup>

To make matters more difficult, if clients make gifts to their children or grandchildren and find that, within five years of making these gifts, they need Medicaid assistance, clients will have the burden of proving they did not make the gift or transfer the asset for the purpose of qualifying for Medicaid.<sup>278</sup> The question then becomes: “How does the client prove a negative?” Is it even possible to prove there was no intent to defraud or deceive the system when the

268. See *infra* notes 271–81 and accompanying text.

269. See generally MEDICAID HANDBOOK, *supra* note 237, at ch. I-4140 to I-4150 (discussing compensation from services and cash compensation as they relate to family members and third parties); the items and services for which a client cannot pay a family member but can pay a third party).

270. *Id.* at ch. I-4140.

271. *Id.*

272. See *id.* at ch. I-4150.

273. See *id.* at ch. F-4222.

274. See discussion *supra* Part V.

275. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) (noting that the Medicaid transfer of asset provisions are codified in scattered sections of title VI, chapter 2 of the Deficit Reduction Act).

276. See MEDICAID HANDBOOK, *supra* note 237, at ch. E-1000 to E-9000 (discussing contributions that may be viewed as uncompensated).

277. See *id.* at ch. I-1000 to I-6000.

278. See Bernard A. Krooks, *How Gifts Can Affect Medicaid Eligibility*, FORBES (Dec. 17, 2012, 12:30 PM), <http://www.forbes.com/sites/bernardkrooks/2012/12/17/how-gifts-can-affect-medicaid-eligibility>.

only evidence available is the client's word or the word of the client's family, both of whom are interested parties?

## 2. *The Sandwich Generation*

The family dynamics of the baby boomer generation will only compound the issues surrounding the Medicaid rules and covert filial responsibility policies.<sup>279</sup> The current generation of middle-aged Americans is often referred to as the "Sandwich Generation" because they are caring for both their elderly parents and their own children, finding themselves sandwiched between two sets of loved ones.<sup>280</sup>

Because the Medicaid rules do not allow transfers to family members for most care services, adult children frequently find their resources stretched because they are attempting to find funds to not only care for their parents but to also care for their own families.<sup>281</sup>

Many adult children already care for their elderly parents, but as a result of the new Deficit Reduction Act regulations, they cannot be paid for such work.<sup>282</sup> Ultimately, because the regulations do not allow adult children to do the work on their own, without running out of financial resources, adult children and their families are essentially forced to hire third parties to provide care for their elderly parents.<sup>283</sup> This is particularly troublesome because, in most situations, family involvement in caretaking is much more preferable than introducing someone from outside of the home.<sup>284</sup> As long as family members are capable of caring for their elderly parents, it seems that necessitating the introduction of paid caregivers may be inappropriate.<sup>285</sup>

For an adult child who decides to take on the responsibility of serving as the caregiver instead of bringing in an outside party who could be compensated under the Deficit Reduction Act, the prospects for long-term financial security are grave.<sup>286</sup> As the baby boomers struggle to pay for the living and health care needs of their parents, their home mortgages, and the rising costs of living and education for their children, their familial resources are stretched thin.<sup>287</sup>

As a result, members of the Sandwich Generation may not be able to retire as early as their parents because all of their available resources will likely be

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279. See Suzanne R. Kunkel & Robert A. Applebaum, *Long-Term Care for the Boomers: A Public Policy Challenge for the Twenty-First Century*, OFFICE OF ASSISTANT SEC. FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 1991), <http://aspe.hhs.gov/daltcp/reports/boomers.pdf>.

280. See, e.g., *The "Sandwich Generation"*, DUKE UNIV. PERS. ASSISTANCE SERV., <http://www.hr.duke.edu/pas/sandwich1.html> (last visited May 14, 2014).

281. Moskowitz, *supra* note 15, at 724–25.

282. See discussion *supra* Part IV.B.1.

283. See discussion *supra* Part IV.B.1.

284. See Kunkel & Applebaum, *supra* note 279.

285. See *id.*

286. See *id.*; see Moskowitz, *supra* note 15, at 724–25.

287. See Moskowitz, *supra* note 15, at 724–25.

needed to fund their parents' retirements.<sup>288</sup> Coupled with the recent downturn in the economy, over the next few decades, these conditions promise to become the plight of the middle class.<sup>289</sup>

The inherent difficulty and net effect of all of this may be an increased number of Americans applying for, and relying on, Medicaid and other public benefits.<sup>290</sup> When we take into consideration the new regulations under the Deficit Reduction Act, the result is a cyclical and self-perpetuating struggle, wherein adult children are required to pay for partial support of their elderly parents, but later, they find themselves in need of public benefits, after any of their savings and retirement benefits have been exhausted.<sup>291</sup>

### C. Ultimate Impact

As Congress continues to tighten the reins on Medicare and Medicaid benefits and payments, families of elderly Americans are finding themselves increasingly responsible for the care of their loved ones.<sup>292</sup> Because Medicaid will not allow for compensation to adult children who provide care, filial responsibility policies are already in place though they are not formally acknowledged.<sup>293</sup> Texas may have officially abandoned its filial responsibility statutes, but the adult children of Medicaid clients and beneficiaries would readily attest that a support obligation is nevertheless in place.<sup>294</sup>

The legal landscape surrounding this issue is ever changing, but given the circumstances of the baby boomer generation, it is apparent that policy changes are necessary.<sup>295</sup> From the practitioner's vantage point, one who serves these families on a daily basis, the best possible outcome is to strike a balance with a combination of family and governmental support.<sup>296</sup> The vast majority of adult children caring for their elderly parents are very much willing, and indeed often prefer, to provide basic services to their parents, rather than having to rely on third parties.<sup>297</sup> That being said, however, in determining whether an individual is eligible to make transfers to adult children, Medicaid regulations should recognize the amount of support that these family members have contributed.

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288. See Bob Mauterstock, *No Nursing Homes for Baby Boomers!*, CARING FOR AGING PARENTS (Jan. 28, 2014), <http://parentcareplanning.wordpress.com/2014/01>.

289. See Ross, *supra* note 2, at 192.

290. See *id.* at 189–90.

291. See discussion *supra* Part VI.A–B.I; see also *supra* notes 281–92 and accompanying text.

292. See Kunkel & Applebaum, *supra* note 279.

293. See *supra* Part VI.B.1.

294. See *supra* Part VI.B.1.

295. See *supra* Part IV.B.

296. See *supra* Part III.B.

297. See *supra* Part VI.B.1.

## VII. CONCLUSION

Family involvement in the lives of elderly parents strengthens familial bonds, which is ultimately a benefit to our society.<sup>298</sup> However, when determining eligibility for Medicaid and other public benefit programs, the government should take into account financial limitations and current economic constraints.<sup>299</sup> By creating a dynamic that allows the elderly and disabled to rely on both family and government sources for assistance, it ensures the highest possible quality of care and standard of living for our aging generation.<sup>300</sup>

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298. See *supra* Part IV.A.

299. See *supra* Part III.C.

300. See *supra* Part IV.A.