

2012 Addendum
The Intersection Between Family Law and Elder Law
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Domestic Relations Code Sections Specifically Relating to Medicaid

a. 20-88.02:1 Spousal Support orders where community spouse is requesting additional resources to create needed income

Under Virginia law, whenever a community spouse is petitioning a court for additional resources which will bring his total resources to an amount in excess of the federally established maximum spousal resource allowance, under circumstances that will have the effect of rendering either spouse eligible for medical assistance services or of accelerating eligibility for medical assistance circumstances, a court may award a community spouse the right to keep additional assets to meet income needs in two situations:

(1) to bring the community spouse's income up to the federally established Minimum Monthly Maintenance Needs Allowance ,or

(2) to bring the community spouse's income up above the Minimum Monthly Maintenance Needs allowance where circumstances warrant it. Before awarding excess resources, the court must first order the institutionalized spouse to make available the maximum income contribution to the community spouse. If that does not raise the community spouse's income to an acceptable level, then the court can consider allowing additional resources. The amount allowed shall be the greater of either (1) the amount necessary to increase the community spouse's income to the applicable monthly needs or income allowance *when based on the current earnings of such resources*, or (2) the amount necessary, *at the time of the court's deliberations*, to purchase a single premium annuity that would generate monthly income to the community spouse in an amount sufficient to increase the community spouse's income to the applicable monthly needs or income allowance, as the case may be.

b. Transfer of Assets to Qualify for Assistance and Liability of Transferees

Section 20-88.02 permits an agency head to petition the circuit court for an order requiring repayment of uncompensated transfers in excess of \$25,000 made within thirty months prior to the date on which any person receives benefits. The order shall continue in effect, as the court may determine, for so long as the transferor receives public assistance or until the uncompensated value is completely repaid. The code section spells out certain presumptions and exceptions.

c. Support of Parents by Children

Section 20-88 creates a general duty for children to support parents in necessitous circumstances. It spells out when and how that duty arises in Virginia and grants Juvenile courts the exclusive original non-criminal jurisdiction over cases arising under this section. The statute gives the court the power in an appropriate case to weigh and balance the child's ability to pay against the parent's need and make an award that is just. However, the law provides that this section shall not apply, except as provided for in this section, if a parent is otherwise eligible for and is receiving public assistance or services under a federal or state program. The section then proceeds to state, "To the extent that the financial responsibility of children for any part of the costs incurred in providing medical assistance to their parents pursuant to pursuant to the plan provided for in Sec. 32.1-325 [i.e, the state plan for medical assistance services] is not restricted

by that plan and to the extent that the financial responsibility of children for any part of the costs incurred in providing to their parents services rendered, administered, or funded by the Department of Behavioral Health and Development Services is not restricted by federal law, the provisions of this section shall apply.” In other words, provided that and so long as the State Medicaid Plan says that there is no duty of children to support their parents who are on Medicaid, the section does not apply.
