

REPORT OF THE
BOARD OF HEALTH
TO EXAMINE THE MEDICAID ELIGIBILITY
POLICY REGARDING TRANSFER OF ASSETS
TO
THE GOVERNOR
AND
THE GENERAL ASSEMBLY OF VIRGINIA



SENATE DOCUMENT NO. 17

COMMONWEALTH OF VIRGINIA
Richmond
1981

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COMMONWEALTH of VIRGINIA

Department of Health
Richmond, Va. 23219

JAMES B. KENLEY, M.D.
COMMISSIONER

January 6, 1981

TO: The Honorable John N. Dalton
Governor of Virginia
and
The General Assembly of Virginia

In mid-December 1980, subsequent to the completion of this report, the Congress passed HR 8406, which included an amendment to the Social Security Act to specifically permit a state to promulgate a transfer of assets rule for its Medicaid program. The bill was signed by the President on December 28, 1980, and became P.L. 96-611.

This amendment permits a state to examine all transfers of assets within twenty-four months preceding the date of application for Medicaid eligibility, to determine whether any transfers for less than fair market value occurred. If one did occur, the state can find the person ineligible for Medicaid.

In addition, if the uncompensated value of the transferred property exceeds \$12,000 the state can provide for a period of ineligibility for Medicaid which exceeds twenty-four months, so long as the period of ineligibility bears a reasonable relationship to the uncompensated value of the property.

This new law will enable Virginia to strengthen its current transfer of assets rule by going beyond the current one-year limitation. As soon as the federal regulations are promulgated, reconsideration of the present rule can take place.

Respectfully submitted,

James B. Kenley, M.D.
State Health Commissioner

Report of the
Board of Health to Examine the Medicaid Eligibility
Policy Regarding Transfer of Assets

To

The Governor and the General Assembly of Virginia

Richmond, Virginia

September 22, 1980

To: Honorable John N. Dalton, Governor of Virginia

and

The General Assembly of Virginia

INTRODUCTION

The Board of Health was authorized to conduct this study by Senate Joint Resolution No. 85 agreed to by the Senate and the House of Delegates of Virginia during the 1980 Session. That resolution is as follows:

SENATE JOINT RESOLUTION NO. 85

WHEREAS, the Virginia Medical Assistance Program (Medicaid) will disburse nearly one billion dollars of the taxpayer's money in the 1980-82 biennium for the purpose of assuring that those Virginians who cannot afford proper medical care shall receive it without cost; and

WHEREAS, the purpose of this program requires that it be safeguarded against abuse; and that its reputation for sound administration be enhanced; and

WHEREAS, regulations adopted by the Board of Health, relating to eligibility requirements under Medicaid, specify that a person shall be eligible for assistance so long as that person has not transferred assets from their name within a period of twelve months prior to making application for such assistance; and

WHEREAS, such persons shall be eligible for assistance regardless of the fact that they may have transferred assets prior to that date; and regardless of the

value of such previously transferred assets, or the circumstances of such transfer; and

WHEREAS, even a person who in defiance of rules governing the program, is guilty of transferring assets during the year immediately preceeding his application for assistance, will still be eligible for benefits after the passage of one year from the date of the applications; and

WHEREAS, the General Assembly is, and of right ought to be, concerned about situations, however few in number, in which assets are transferred in anticipation of heavy medical expenses in order to avoid the utilization of those assets for the payment of such expenses; now, therefore, be it

RESOLVED by the Senate of Virginia, the House of Delegates concurring, That the Board of Health is hereby requested to examine the adequacy of existing rules governing the ownership and transfer of property as it relates to Medicaid eligibility for the purpose of advising the Governor and the General Assembly as to the adequacy of such existing policies to safeguard against abuses of the program; and, be it

RESOLVED FURTHER, that the Board of Health is hereby requested to consider the adoption of rules eliminating those incentives which may be present in the program that have the effect of permitting or encouraging assets to be transferred for the purpose of establishing Medicaid eligibility; and to avoid using the value of such property to meet medical expenses in a proper sequence of events.

The Board of Health is hereby requested to make a report to the Governor and to the General Assembly by December one, nineteen hundred eighty as to its findings; and what action it has taken, or intends to take, to address the expressed concern of the General Assembly in this regard; and, be it

RESOLVED FINALLY, That the Clerk of the Senate is directed to send a copy of this Resolution to the Commissioner of Health and to all the members of the Board of Health.

HISTORY

The Medical Assistance Program, as authorized by Title XIX of the Social Security Act (Public Law 89-97), provides Federal and State funding for a single, uniform and comprehensive program of medical and health care for poor and needy persons. At the 1966 Session of the General Assembly, the Virginia Department of Health was designated to administer the State's Medical Assistance Program.

The Federal regulations to administer the program are found in 42 CFR Part 430 and require the submission of a State Plan which describes the nature and scope of the program and gives assurance that it will be administered in conformity with the specific requirements stipulated in Title XIX of the Social Security Act, all applicable Federal Regulations and any other official issuances of the Department of Health and Human Services (HHS), formerly the Department of Health, Education and Welfare.

Federal regulations allow certain defined options to States in administering medical assistance, including the coverage of certain groups of recipients, provision of certain services and selective eligibility criteria. Under the regulations, coverage of some groups of individuals is mandatory; coverage of other groups is optional. Recipients are divided into two major classifications by Federal definition: Categorically Needy and Medically Needy. "Categorically Needy" describes aged, blind or disabled individuals or families with dependent children who meet the financial eligibility requirements to receive a cash assistance grant under the Federal public assistance programs of Aid to Families with Dependent Children, Supplemental Security Income or an Optional State Supplement. "Medically Needy" describes aged, blind or disabled individuals or families with dependent children whose income and resources are above the limits prescribed for the categorically needy but are within limits set under the Medicaid State Plan.

The Medical Assistance Program for the Categorically Needy was based upon State Plans for public assistance in existence in 1969. The programs, except for Aid to Families with Dependent Children, prohibited eligibility for individuals who within twelve months of application for assistance transferred or gave away property in order to become or remain eligible for assistance. The program had a similar provision for the Medically Needy. The purpose of this provision was to protect the fiscal integrity of these programs since they were designed to help those individuals in financial need who required public assistance in order to meet their basic needs of shelter, food and medical care.

The nature of the Medical Assistance Program changed in 1974, with the establishment of the Supplemental Security Income Program. Public Law 92-603 abolished the old cash assistance programs for the aged, blind and disabled, and combined all cash assistance in Federally administered public assistance program under Title XVI of the Social Security Act. This program prescribed nationally uniform eligibility criteria and payment levels.

The new eligibility criteria of the Federal program were made more liberal in many ways than the provisions of many state programs. Since Medicaid programs in all states were closely tied to the cash assistance programs, a provision was added to the law to temper the impact on the states of coverage of additional individuals under the medical assistance program because of the expansion of coverage of the aged, blind and disabled under Supplemental Security Income (SSI).

This feature under section 209(b) of Public Law 92-603 permitted a state to establish more restrictive eligibility criteria for the aged, blind and disabled for medical assistance than those under Supplemental

Security Income. This provision found in section 1902(f) of the Social Security Act provides also that no state shall impose an eligibility requirement on the aged, blind or disabled which is more restrictive than it required in its state plan for medical assistance on January 1, 1972.

On January 1, 1974, the Virginia State Plan for Medical Assistance included coverage of all SSI eligible individuals. Virginia was advised that it could not retain any medical assistance eligibility criteria which were more restrictive than that imposed for SSI eligibility, Thus, the eligibility requirement excluding individuals for twelve months who had transferred or given away property in order to become or remain eligible for Medical Assistance could no longer be imposed unless the State elected to exercise its option under 1902(f) to impose more restrictive criteria and change its State Plan accordingly.

Faced with the loss of this essential eligibility provision, the State adopted its option under section 1902(f) of the Social Security Act by changing the State Plan for medical assistance on July 1, 1976. In addition to the transfer of assets provision the State also adopted other more restrictive criteria in response to action taken by the Federal government in continuing to establish more liberal criteria for eligibility for Supplemental Security Income.

The following individuals are excluded from coverage by Medicaid in Virginia because of the more restrictive eligibility criteria for medical assistance following adoption of the 209(b) option:

1. Conditionally eligible SSI recipients (pending disposition of excess resources),
2. Presumptively blind or disabled SSI recipients,
3. Presumptively eligible SSI recipients,
4. SSI recipients who have transferred property or resources within past twelve months to become or remain eligible for SSI and/or Medicaid,
5. SSI recipients who have real property contiguous to their residence (house and lot), when the contiguous property does not meet the definition of income-producing property and its value, when added to other liquidable assets, exceeds the resource level for the family unit.

LEGAL BASIS FOR A TRANSFER OF ASSETS PROVISION

Section 1902(f) of the Social Security Act permits a state to impose more restrictive eligibility criteria for medical assistance than is imposed for Supplemental Security Income if these criteria are not more restrictive than eligibility criteria contained in the approved State Plan for medical assistance in effect on January 1, 1972.

On January 1, 1972, the State Plan for medical assistance granted medical assistance as Categorically Needy to individuals eligible to receive Old Age Assistance, Aid to the Blind and Aid to the Permanently and Totally Disabled and Aid to Families with Dependent Children (AFDC). The State Plans for these public assistance programs, except for Aid to Families with Dependent Children, excluded individuals who had transferred assets within twenty-four months in order to become or remain eligible for public assistance. The State Plan for Medical Assistance excluded from Medically Needy coverage individuals who had transferred assets within twelve months in order to become or remain eligible for medical assistance. The present Medical Assistance Program may be no more restrictive than this limit.

The legal status of transfer provisions is uncertain in light of recent Federal court decisions resulting from suits in various states. Most transfer of assets provisions overturned in Federal court, however, have been declared illegal because the state plan for medical assistance did not reflect the adoption of the 209 (b) option but only reflected the state's desire to "add on" an additional requirement for medical assistance for the Categorically Needy while purporting to cover all other Supplemental Security Income requirements. This represented an administrative expedient to a state who wanted to minimize the administrative burden of eligibility determination. Two states have had transfer of asset rules overturned on this basis: New York (Caldwell v. Blum) and Maryland (Fabula v. Buck).

On the other hand, the United States Court of Appeals for the Ninth Circuit has held that the California transfer of assets regulation, which is applicable to the Medically Needy but not the Categorically Needy, has a rational basis and does not conflict with the Federal statute. This decision upholds a state's right to distinguish between categorical requirements such as age, disability or blindness, and financial requirements of income and resources.

Complicating the legal milieu of transfer of asset provisions is the status of a policy interpretation of the Department of Health and Human Services intended for internal distribution only. This document (PIQ-77-14) interprets Federal statute and regulations to require that no state may impose a transfer of property provision on the Medically Needy unless it imposes an identical provision on the Categorically Needy. It advised that all recipients must be treated identically in all categories of assistance: aged, blind, disabled, and families with dependent children. The PIQ contains several policy and legal inaccuracies deriving from faulty reasoning. Although intended for internal distribution of regional office staff, it has become widely disseminated and regarded with the force of law. In spite of acknowledging the inaccuracies contained in the memorandum, the Department of Health and Human Services has been slow to withdraw the interpretation. Its continued use is affecting, presently, the legal status of Virginia's transfer of assets policy.

On April 24, 1980, attorneys for the Charlottesville-Albermarle Legal Aid Society filed suit against the State Departments of Health and Welfare in the United States District Court for the Western District of

Virginia on behalf of four individuals adversely affected by the transfer of assets policy. The plaintiffs allege that this policy is illegal and violates the Social Security Act. The basis of the allegation is highly technical and is based upon the requirement that resources which may be held by Medicaid recipients must be at the higher of the resource levels in the State Plan for Aid to Families with Dependent Children or Supplemental Security Income. Since in January, 1972, there was no transfer of assets policy in Aid to Families with Dependent Children, the suit alleges that the State Plan in 1972 violated Federal law, therefore, any present policy based upon that plan is also illegal. The policy memorandum (PIQ-77-14) forms the basis for the plaintiffs' complaint that Virginia policy is illegal. Governor John Dalton has requested that Secretary of Health and Human Services Patricia Harris assure that the errors in the policy memorandum be corrected as soon as possible to prevent adverse effect upon the suit pending in Federal court. The hearing before the court is scheduled for November 19, 1980.

THE PRESENT POLICY

"Property Transfer - An applicant for or recipient of Medicaid as a recipient of SSI or a category-related medically needy individual is ineligible for a period of one year if he transfers or otherwise disposes of his legal or equitable interest in real or personal property within one year prior to application or during receipt of such assistance to become or remain eligible for Medicaid. Transfer or disposal of such property to become or remain eligible for SSI is considered as if the transfer or disposal is to become or remain eligible for Medicaid.

Exceptions to this provision are: (1) when property has been transferred that would have no effect on eligibility except a residence when an individual is in a nursing home for a temporary period; (2) when payment has been made approximating the tax value of the property; (3) when payment has been made on the cost of medical care approximating the tax value of the property; or (4) when the property owner has been a victim of actions on the part of another person who for any reason obtained property without the applicant's/recipient's full understanding of the action."

It is estimated that 35,000 applicants are denied Medicaid eligibility per year; 2,836 are denied because of ownership of property which exceeds the allowed level and 0.7 percent (222 individuals) of these were found ineligible because they transferred or disposed of assets in violation of the eligibility policy.* Also, if Virginia had no transfer

*Based on data from Medicaid Eligibility Quality Control provided by the Department of Welfare

of assets rule, any individual found ineligible because of excess resources could transfer ownership with impunity and would have an incentive to do so. Without the transfer of asset rule, it is estimated that the Virginia Medical Assistance Program would expend an additional \$17,391,340 in Federal Fiscal Year 1981, on individuals who transferred property in order to become or remain eligible for medical assistance.

A review of cases sampled for Medicaid Eligibility Quality Control revealed that 30% of the applicants transferred less than \$3,000 in excess resources, 38% transferred \$3,000-\$6,000, 24% transferred \$6,000-\$15,000, and 8% transferred over \$15,000.

CONCLUSION

The Commonwealth of Virginia, has prohibited individuals from receiving public assistance when it is found that within twenty-four months preceding application the individual transferred legal ownership of property valued in excess of the limits established for eligibility for public assistance if the intent of the individual was to become or remain eligible for public assistance. This provision was a part of the State Plans for Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled. The State Plan for Medical Assistance established in 1969, contained a similar provision which found a Medically Needy applicant ineligible if he had transferred assets within twelve months of application for medical assistance. (There was no transfer of assets provision in Aid to Families with Dependent Children until October 1, 1979).

After the establishment of Supplemental Security Income on January 1, 1974, Virginia could not continue to impose a transfer of assets policy unless the State Plan for medical assistance reflected the choice to exercise its option under section 209(b) of Public Law 92-603 to impose more restrictive eligibility criteria on all aged, blind and disabled individuals. On July 1, 1976, the State Plan for medical assistance was changed to adopt the 209(b) option.

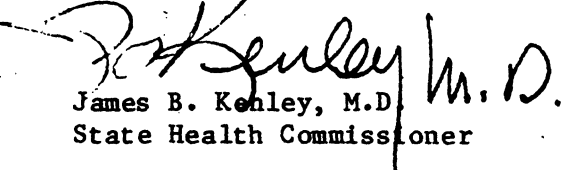
The legal requirements contained in Federal statute and regulation provides that a state may impose more restrictive eligibility criteria for aged, blind and disabled recipients of medical assistance than required for eligibility for Supplemental Security Income as long as these criteria are not more restrictive than those imposed in the State Plan for medical assistance in effect on January 1, 1972.

Since Virginia now has a transfer of asset provision as restrictive as that which was imposed in its State Plan for medical assistance on January 1, 1972, no more restrictive criteria can be imposed without violating Federal statute. Virginia, however, may impose on recipients of Medical Assistance, who are eligible under the category of Aid to Dependent Children, a transfer of property policy as restrictive as that imposed for eligibility for public assistance in the State Plan for Aid to Families with Dependent Children (AFDC). This policy provides for periods of ineligibility of increasing lengths based upon the amount of property transferred. The period of ineligibility under the AFDC policy

will exceed the present twelve month period in Medical Assistance policy if the amount of property transferred exceeds \$6800.

The Board of Health and the Department staff acknowledge that this report does not represent a definitive study of this issue because of the complex legal issues still to be resolved. The Department will continue to research all available alternatives to amend the transfer of property policy to strengthen its effect as a deterrent to individuals who intend to take advantage of the generosity of the Commonwealth by deliberately impoverishing themselves. If an alternative is discovered, the Board of Health will amend the present policy.

Respectfully submitted,


James B. Kenley, M.D.
State Health Commissioner

Appendix

The Board of Health sought information for this study from the following agencies and organizations:

Virginia Department of Health
Virginia Department of Welfare
The League of Social Welfare Executives
The Virginia Poverty Law Center
The Virginia Health Care Association
The Virginia Funeral Directors Association

The Board expresses its appreciation to the Virginia Health Care Association and the Virginia Funeral Directors Association for their ~~com~~ments which are attached.



Suite 429-B, 2015 Staples Mill Road
Richmond, Virginia 23230 Telephone: (804) 353-9101

August 27, 1980

President:

PAUL J. KASERAS
Health Care Management, Inc.
3007 Pacific Avenue
Virginia Beach, VA 23451

Ms. Ann E. Cook, ACSW
Director of Medical Social Services
Medical Assistance Program
Virginia State Department of Health
109 Governor Street
Richmond, Virginia 23219

Vice-President:

JACOB W. MAST
Shawnee Springs Nursing Home
Winchester

Dear Ms. Cook:

This is to acknowledge receipt of your letter requesting information relative to the transfer of assets by nursing home patients

Secretary:

SANDRA C. DARNELL
Orange County Nursing Home
Orange

I cannot give you a comprehensive comment on this important issue on such short notice without doing an actual survey of nursing homes. I note that you have a meeting on September 1 and I trust your committee will consider doing a survey so that you can present some factual information to the Virginia General Assembly.

Treasurer:

H. TUD RUSSELL
McVitty House
Salem

Our Association has been concerned about this important issue for many years and a number of administrators have given graphic accounts of transfer of assets that have taken place just prior to or shortly after patients entered their facilities.

AMCA Governing Council:

JAMES T. WILLIAMS
Medical Investments Corp.
Ivy

In 1975, our Association went on record asking both the Governor and the Congress to take steps as necessary to cut down on the continuing transfer of assets. Specifically, we recommended three steps as outlined in the attached letter to Governor Godwin.

Executive Vice-President:

ROBERT S. SEILER

Specifically, our Association would like to see a prohibition of at least three years before Medicaid recipients become eligible if they have made significant transfer of assets. A bill is currently pending

Immediate Past President:

JAMES K. MENARG, JR.
Goodwin House
Alexandria

Trustee-at-Large (HFA):

BRUCE C. CARTER
Green Hill Health Care Centers
Dryden

DISTRICT PRESIDENTS:

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Ashland Convalescent Center
Ashland

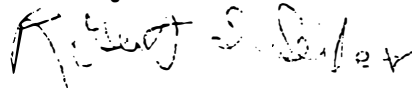
WILLIAM VanTHIEL, JR.
Medic Home Health Center
Newport News

Ms. Ann E. Cook
August 27, 1980
Page 2

before Congress which will limit transfer of assets across the country to a two-year period and this would certainly be a step in the right direction.

If I can provide you with any additional information, please don't hesitate to let me know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert S. Seiler".

Robert S. Seiler
Executive Vice-President

RSS:cms
Attachment



VIRGINIA NURSING HOME ASSOCIATION

Incorporated
A Non-Profit Service Organization



SUITE 216 COMMONWEALTH BUILDING, 4615 WEST BROAD STREET
RICHMOND, VIRGINIA 23230 TELEPHONE: (804) 353-9101

December 22, 1975

BOARD OF DIRECTORS

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Governor Mills E. Godwin, Jr.
State Capitol
Richmond, Virginia 23219

Dear Governor Godwin:

In past meetings with you and members of the general assembly, we have been asked to suggest ways to contain the cost of long term care, both to the citizens of our Commonwealth and to our state government. In the past few months we have made three specific suggestions:

- (1) an amendment to the Social Security Act to require adult children to share in the cost of their parent's long term care;
- (2) a prohibition on transferring one's assets to one's adult children for the apparent purpose of becoming eligible under Medicare.
- (3) a new Medicaid reimbursement formula with cost containment incentive features.

Nevertheless, because the number of Virginians seeking Medicare coverage for long term care is increasing in almost geometric proportion, the cost to the state, as you well know, is skyrocketing. In fiscal 1973, Medicaid paid for 1.6 million patient days in Intermediate Care Facilities in Virginia. By 1975 that figure had jumped to 2.6 million days, and the cost of the ICF program alone for fiscal year 1975 had risen to \$44.9 million.

In view of the rapidly rising cost of health care for the sick and elderly in Virginia, we feel that a far-sighted solution to the funding of long term care should be explored. We foresee the real possibility in a few years of the Commonwealth's simply being unable to bear the cost of the Medicaid program under its present structure if the current mushrooming utilization continues. We owe far too much to the sick and elderly of the Commonwealth to allow this to happen.

Governor Godwin
page 2
December 22, 1975

We, therefore, respectfully call on you as Governor to take whatever action you deem appropriate to convene a special study commission to examine the entire long range service needs of the sick and elderly and the providing of necessary funding under the Medicaid program.

As always, the Virginia Nursing Home Association is at the complete disposal of the Governor of Virginia in helping meet the needs of both the state government and the sick and elderly among us.

Sincerely,

Herbert L. Seal
President

cc: Honorable Otis L. Brown
Dr. Mack I. Shanholtz



VIRGINIA NURSING HOME ASSOCIATION

Incorporated
A Non-Profit Service Organization



Affiliated

SUITE 216 COMMONWEALTH BUILDING, 4615 WEST BROAD STREET
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Whereas, we believe in both the social and economic value of involving families in a direct and meaningful way in the care of their loved ones, and

Whereas, we believe that we cannot delegate total responsibility to government for guaranteeing the well-being of our infirm senior citizens, and

Whereas, we believe that a Responsible Relative Provision should be included in the Social Security Act to assure that relatives might have an opportunity to share the costs of long term health care provided under the Title XIX (Medicaid) program, and

Whereas, officials of the Godwin administration have solicited our suggestions in meeting the costs of long term health care within the restrictions of the State budget and sound fiscal responsibility,

Therefore, be it resolved that the Twenty-Second Annual Convention of the Virginia Nursing Home Association calls upon our Virginia Congressional Delegation to press for enactment of the following changes in the Social Security Law:

1. The Title XIX (Medicaid), Section 1902 prohibit eligibility to a person who has transferred assets for the apparent purpose of becoming eligible.
2. That Title XIX, Section 1902 direct the states to develop reasonable and just standards by which adult children's income would be taken into consideration when eligibility is established and adult children should be required to participate in the payment based on just income scales.
3. That Title XVI (S.S.I.) of the Social Security Act be amended to prevent new applicants from becoming eligible if they transferred assets for the apparent purpose of becoming eligible.

Be it further resolved that we call on Governor Mills E. Godwin, those who will be elected to the General Assembly in November, and our Congressional Delegation to work for the passage of these amendments and to take all other necessary or appropriate action at both the federal and state levels to implement the principles of family participation in meeting the costs of long term health.

Adopted October 7, 1975

MALONEY, YEATTS, BALFOUR, BARR & REPP

ATTORNEYS AT LAW

600 ROSS BUILDING

RICHMOND, VIRGINIA 23219

804-644-0313

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 KEVIN R. HUENNEKENS

August 25, 1980

Ms. Ann E. Cook, ACSW, Director
 Medical Social Services
 Medical Assistance Program
 Virginia State Department of Health
 109 Governor Street
 Richmond, Virginia 23219

Dear Ms. Cook:

Thank you for your letter of August 15, 1980 which arrived while I was on vacation. As you state in that letter, I am counsel for the Virginia Funeral Directors Association and in that capacity I followed the progress of Senate Joint Resolution 85 considering changes in the Medicaid eligibility policy regarding transfer of assets.

Local funeral directors are apparently coming into contact more and more in the past few years with the effects of the rules on Medicaid eligibility in the area of pre-paid funeral arrangements. My concern relates not so much to the rules of eligibility themselves but to the varied interpretations of those rules which apparently are taking place around the state. It is my opinion that confusion exists concerning what purchases a potential applicant can make to reduce his cash assets to the magic \$1,500 figure. While it is clear that local funeral directors should not involve themselves in these decisions, families whom they have served for many years have a natural tendency to look to the funeral director for advice in many areas.

I am simply requesting that there be clarification of the rules and regulations affecting eligibility for Medicaid and that there be a wider dissemination of information concerning Medicaid and Medicaid eligibility. I would appreciate your

Ms. Ann E. Cook, ACSW, Director
August 25, 1980
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continuing to include me on your mailing list so that we can
keep the members of VFDA advised of the matter.

Yours truly,


Archer L. Yeatts, III

ALY:lzc

cc: Mr. Bayne Hawkins
Mr. Harry A. Pollard

