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HOUSE BILL NO. 2601

AMENDMENT IN THE NATURE OF A SUBSTITUTE
 (Proposed by the Senate Committee on Education and Health
 on February 17, 2005)

(Patron Prior to Substitute—Delegate Landes)

A BILL to permit the Department of Medical Assistance Services to seek a waiver regarding limits on asset transfer, recovery of subsequent assets, and recovery from estates.

Whereas, the Virginia Medicaid program is the largest of the Commonwealth's health care programs for persons who are poor; and

Whereas, it is the policy of the Commonwealth that persons who participate in the Medicaid program use their own assets to pay their share of the total cost of their care during or after their enrollment in the program in accordance with state and federal law; and

Whereas, there is growing concern that a number of persons seeking Medicaid eligibility are using provisions in federal and state laws or regulations to transfer assets in order to gain access to the program's benefits, thus preserving resources for their heirs; and

Whereas, stricter rules governing the transfer of assets for less than fair market value will discourage and deter voluntary impoverishment or, alternatively, result in payment penalties for these activities, thereby reducing medical assistance expenditures, including those for long-term care; and

Whereas, more thorough pursuit of resources that become available subsequent to Medicaid eligibility and more aggressive recovery from estates of deceased Medicaid recipients will also result in reduced medical assistance expenditures; now therefore

Be it enacted by the General Assembly of Virginia:

1. § 1. Medical assistance services; asset transfer limit waiver.

The Department of Medical Assistance Services may, when appropriate and practicable, seek a waiver pursuant to § 1115 of the Social Security Act (42 U.S.C. § 1315) from the Centers for Medicare and Medicaid Services to establish asset transfer limits that are more restrictive than those currently permitted under federal Medicaid law or regulations. This waiver application may provide, insofar as it is not already included in the state plan for medical assistance services pursuant to § 32.1-325, that (i) transfer prohibitions would affect the transfer of all assets, including certain excluded assets set forth in § 1613 of the Social Security Act (42 U.S.C. § 1382b), such as vehicles and valuable jewelry, excluding any wedding and engagement rings and each personal item valued less than \$100; (ii) eligibility for all medical assistance services shall be subject to penalty periods for a calculated period for transfers of assets for less than fair market value; (iii) all transfers of assets for less than fair market value be subject to a 36-month look-back period; (iv) the transfer penalty period for applicants shall commence at the beginning of the month in which a person applies for medical assistance services or is otherwise eligible, or when the Department of Medical Assistance Services becomes aware of the transfer, whichever is later; (v) the transfer penalty period for recipients shall commence at the beginning of the month in which the Department of Medical Assistance Services becomes aware of the transfer and can give proper notice, or the month following a period of ineligibility existing when the transfer was made; (vi) the divisor used to calculate a penalty period shall be the statewide average nursing facility payment made by the Department of Medical Assistance Services in effect at the time the penalty is determined and the penalty period begins, a figure that takes into consideration the income that would otherwise be applied to cost of care in the post-eligibility process; (vii) transfers to spouses for less than fair market value after eligibility for medical assistance services is established will be permitted only to an amount allowed under spousal impoverishment asset provisions, so that assets acquired by or made available to the institutionalized spouse after medical assistance services are obtained would first be spent on the institutionalized spouse's medical costs; (viii) permissible transfers of assets to a disabled child would be limited to transfers into a trust for the child's sole benefit that reverts to the Commonwealth after the death of the disabled child, to recover medical assistance services payments made on behalf of either the grantor or the beneficiary of the trust, or both; (ix) the Commonwealth would have discretion to designate some trust purposes as invalid under § 1917 (c) or (d) of the Social Security Act, such as care for a pet; and (x) an exemption would be provided for any individual who has exhausted a long-term care insurance policy for a minimum of three years. Such individuals would automatically qualify for Medicaid.

The Commonwealth shall be authorized to recover medical assistance payments for covered services provided on behalf of an individual during a period of ineligibility determined in accordance with this section from the following persons: (i) the individual determined ineligible for medical assistance benefits because of an improper asset transfer; (ii) such individual's estate; or (iii) the person to whom the asset was transferred in violation of this section. In no case shall the Department of Medical

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60 *Assistance Services withhold Medicaid reimbursement from a Medicaid-participating health care*
61 *provider for services provided to an individual found to have improperly transferred assets under this*
62 *section.*

63 2. That, upon the approval by the Centers for Medicare and Medicaid Services of any application
64 for the asset transfer limit waiver submitted by the Department of Medical Assistance Services
65 pursuant to this act, expeditious implementation of any asset transfer limits shall be deemed to be
66 an emergency situation pursuant to § 2.2-4002 of the Administrative Process Act; therefore, to
67 meet this emergency situation, the Board shall adopt emergency regulations to implement the
68 provisions of this act.

69 3. That, in order to avoid the costs as much as possible during the regulatory process, the Board
70 of Medical Assistance Services shall, when in compliance with the Administrative Process Act
71 (§ 2.2-4000 et seq.), notify, distribute, and provide public access and opportunity for comment via
72 electronic media, including, but not limited to, posting documents to and receiving comments via
73 the Department's website, by e-mail and fax. The Board shall, however, continue to provide public
74 notice and participation to those persons who do not have access to the Internet or to other forms
75 of electronic media.

76 4. That, prior to submitting any application for the asset transfer limit waiver, the Director of the
77 Department of Medical Assistance Services shall report on the limits on asset transfers in the
78 proposed waiver to the Chairmen of the House Committees on Appropriations and Health,
79 Welfare and Institutions, and the Senate Committees on Finance and Education and Health.

80 5. That the provisions of this act shall not become effective unless reenacted by the 2006 Session
81 of the General Assembly.