

## **Don't Plan on Aging: The Kansas Supreme Court Reaffirms Its Hostility Toward Medicaid Planning [*Brewer v. Schalansky*, 102 P.3d 1145 (Kan. 2004)]**

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*Do not cast me away when I am old;  
Do not forsake me when my strength is gone.*<sup>1</sup>

### I. INTRODUCTION

When her husband passed away in 1991, eighty-three-year-old Regina Brewer was left struggling for care,<sup>2</sup> and she was forced to rely on her nieces for support.<sup>3</sup> In 1994, as compensation for their care, Regina added her nieces' names to her stock, creating a joint tenancy with rights of survivorship.<sup>4</sup> Seven years later, due to complicated changes in the market, Regina and her nieces sought assistance from an investment firm to manage the stock.<sup>5</sup> The women opened an account with Merrill Lynch as joint tenants with rights of survivorship.<sup>6</sup> Later that same year, Regina's health began to deteriorate, and she was admitted to a nursing home.<sup>7</sup> Regina's medical expenses were too great for her humble income.<sup>8</sup> Unable to afford her own care, Regina applied for Medicaid.<sup>9</sup>

To determine Regina's eligibility for Medicaid, the Kansas Department of Social and Rehabilitation Services (SRS) considered all Regina's "available assets," including the entire joint tenancy ac-

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\* B.A. 2004, Kansas State University; J.D. Candidate 2007, Washburn University School of Law. I thank Roarke Gordon, Molly Wood, and Professors David Pierce and Brad Borden for providing helpful insight and advice throughout this project. I also thank my friends and family for their faithful support in this project and so many others. I dedicate this work to the older people who have influenced my life, especially my grandparents.

1. *Psalms* 71:9.

2. *Brewer v. Schalansky*, 102 P.3d 1145, 1147 (Kan. 2004), *cert. denied*, 125 S. Ct. 2944 (2005); Petition for Writ of Certiorari at 4, *Brewer v. Schalansky*, 125 S. Ct. 2944 (No. 04-1444).

3. *Brewer*, 102 P.3d at 1147, 1151. Regina raised her nieces, Joan Wilson and Regina Hel-lebuyck. *Id.*

4. *Id.* at 1147. Regina's husband received stock as a benefit of his employment with South-western Bell, and upon his death, Regina inherited nearly \$33,000 in stock. *Id.* SRS presented evidence contradicting Regina's intent in placing her nieces' names on the stock. *Id.* at 1151.

5. *Id.* at 1147.

6. *Id.* The women opened their account with Merrill Lynch in 2001. *Id.* Their contract with the firm stipulated that the stock could not be sold or otherwise disposed of without the consent of each joint tenant. *Id.* at 1153.

7. Petition for Writ of Certiorari at 4, *Brewer*, 125 S. Ct. 2944 (No. 04-1444).

8. *Id.* Regina's only two sources of monthly income were a small pension and a social security check. *Id.*

9. *Id.* Each month, both Regina's pension and social security checks were paid directly to the nursing home. *Id.* By April 2005, Regina owed more than \$137,000 for the care and treatment provided to her since her application for Medicaid in December 2001. *Id.*

count.<sup>10</sup> SRS denied Regina's application, asserting that she had available resources that exceeded regulatory limits.<sup>11</sup> SRS decided that Regina unsuccessfully transferred the stock to her nieces, and because she failed to fully transfer it, the entire value was available to her.<sup>12</sup> After her rejection from Medicaid, the nursing home received a judgment against Regina and commenced an action to evict her as a result of her inability to pay for its services.<sup>13</sup>

Regina's struggle with the excessive costs of long-term care is not unique—many senior citizens face the rising cost of healthcare.<sup>14</sup> Despite the common presumption that Medicare covers all medical needs of senior citizens, in reality, it finances less than fifteen percent of all long-term care for the elderly.<sup>15</sup> Without adequate coverage from Medicare, elderly citizens apply for Medicaid benefits to survive.<sup>16</sup> Medicaid planning is the process by which seniors qualify for Medicaid benefits by rearranging their assets,<sup>17</sup> and that process is quickly becoming a method to finance the growing costs of long-term care.

In a recent case, *Brewer v. Schalansky*,<sup>18</sup> the Kansas Supreme Court attempted to deter Medicaid planning but incorrectly ruled that property held in joint tenancy is an "available resource" for determining Medicaid eligibility, even when the transfer occurred within the federal Medicaid guidelines. This decision significantly alters the rules governing estate planning and government-funded healthcare by creating a new approach to determine whether assets held in joint tenancy are available for purposes of Medicaid eligibility.<sup>19</sup> This approach ignores traditional rules of property and tax law and leaves the law uncertain for Kansas practitioners.

With the influx of elderly citizens applying for Medicaid as a method of funding healthcare, it is important to understand how the

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10. *Brewer*, 102 P.3d at 1147.

11. *Id.* SRS determined the full value of the stock should be attributed to Regina and included the \$33,000 in her list of available assets. *Id.*

12. Reply Brief of Appellant to Amicus Curiae Brief by Manorcare of Kansas, Inc. at 5, *Brewer*, 102 P.3d 1145 (No. 03-91044-S).

13. Petition for Writ of Certiorari at 4, *Brewer*, 125 S. Ct. 2944 (No. 04-1444).

14. Ellen O'Brien, *Medicaid's Coverage of Nursing Home Costs: Asset Shelter for the Wealthy or Essential Safety Net?*, ISSUE BRIEF (Georgetown Univ. Long-Term Care Fin. Project, Wash., D.C.), May 2005, at 4, available at <http://ltc.georgetown.edu/pdfs/nursinghomecosts.pdf>.

15. *Id.* at 1. Medicare only covers long-term care in limited circumstances and only for brief periods of time. Cynthia M. Brubaker, *Medicaid Eligibility: Planning for the Elderly Client*, 26 U. BALT. L.F. 15, 15 (1995).

16. Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can It Be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111, 118 (2002).

17. See Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUS. J. HEALTH L. & POL'Y 265, 267 (2003).

18. 102 P.3d 1145 (Kan. 2004).

19. See Lynn Etheredge & Judith Moore, *A New Medicaid Program*, HEALTH AFFAIRS, Aug. 27, 2003, at W3-430, <http://content.healthaffairs.org/cgi/reprint/hlthaff.w3.426v1>. Medicaid spend-down eligibility is state-regulated and complex. *Id.* The regulations often vary significantly from state to state. *Id.*

law of Medicaid will impact eligibility.<sup>20</sup> The court's hostility toward legal Medicaid planning negatively affects elderly citizens' ability to receive medical attention and creates uncertainty in the law. After Regina's Medicaid application was denied, she appealed her case in an attempt to acquire necessary medical resources. Ultimately, the Kansas Supreme Court denied Regina access to those resources.

## II. CASE DESCRIPTION

After SRS denied Regina's application, she requested a hearing with the Kansas Department of Administration.<sup>21</sup> She contended that the stock held in joint tenancy with her nieces should be considered an unavailable resource because her ability to convert the stock to cash was dependant on the other joint tenants' approval.<sup>22</sup> Regina's nieces refused to consent to the sale.<sup>23</sup> During the hearing, SRS acknowledged that the nature of Regina's ownership prevented her from selling the stock; however, the agency insisted that Regina had a duty to take reasonable steps to overcome the impediment by filing a partition action.<sup>24</sup> Both the hearing officer and the state appeals committee agreed with SRS and affirmed its decision to deny Regina benefits.<sup>25</sup>

Regina appealed to the District Court of Johnson County.<sup>26</sup> While SRS argued that the whole value of the stock should be attributed to Regina because her nieces did not add to its equity, the court emphasized that Kansas precedent establishes the presumption of equal ownership in joint tenancies.<sup>27</sup> Although the presumption is rebuttable with evidence of the owner's donative intent and relative contribution,<sup>28</sup> the district court determined SRS did not present sufficient evidence to rebut that presumption.<sup>29</sup> Therefore, the value of

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20. KAISER COMM'N ON MEDICAID FACTS, THE HENRY J. KAISER FAMILY FOUND., MEDICAID'S ROLE IN LONG-TERM CARE (2001), available at <http://www.kff.org/medicaid/upload/Medicaid-and-Long-Term-Care-2005-Fact-Sheet.pdf> [hereinafter MEDICAID FACTS].

21. *Brewer*, 102 P.3d at 1147 (citing KAN. STAT. ANN. § 75-3306 (Supp. 2003)).

22. *Id.* at 1151.

23. *Id.* at 1147.

24. *Id.* at 1151-52. SRS relied on section 30-6-106(c)(1) of the Kansas Administrative Regulations. *Id.* at 1152. That section provides that "[t]he applicant or recipient shall pursue reasonable steps to overcome [a] legal impediment unless it is determined that the cost of pursuing legal action would exceed the resource value of the property, or that it is unlikely the applicant or recipient would succeed in the legal action." KAN. ADMIN. REGS. § 30-6-106(c)(1) (Supp. 2005).

25. *Brewer*, 102 P.3d at 1147.

26. *Id.* at 1145, 1147. According to the Kansas Administrative Procedure Act, a trial court acting as an appellate court may review an administrative decision only after all administrative remedies have been exhausted. KAN. STAT. ANN. § 77-612 (Supp. 2005).

27. *Brewer*, 102 P.3d at 1150 (citing *Walnut Valley State Bank v. Stovall*, 574 P.2d 1382 (Kan. 1978)).

28. *Id.* (citing *Walnut Valley State Bank*, 574 P.2d at 1382).

29. *Id.*

the stock credited to Regina was approximately \$11,000, one-third of the stock's entire value.<sup>30</sup>

Regina contended that the requirement to file for partition was contrary to federal law.<sup>31</sup> She maintained that the stock should be exempt because federal law prohibits states from considering resources for Medicaid eligibility that would not be recognized when applying for Supplemental Security Income.<sup>32</sup> Regina cited the Social Security Administration's Program Operations Manual System (POMS) to support her argument.<sup>33</sup> Under POMS, an applicant is not required to "undertake litigation in order to accomplish sale or access" of property.<sup>34</sup>

Reversing the agency's decision, the district court determined that Regina was not obligated to file for partition because the lawsuit was unlikely to succeed, and if successful, the projected cost of such a suit would exceed her portion of the stock.<sup>35</sup> SRS appealed, and on its own motion, the Kansas Supreme Court ordered the case transferred from the court of appeals to its own docket for final review.<sup>36</sup> Holding that substantial evidence supported the agency's conclusion that Regina only transferred the stock to avoid probate, rather than intending to relinquish actual control, the Kansas Supreme Court reinstated the denial of Regina's Medicaid application.<sup>37</sup>

### III. BACKGROUND

Medicaid regulations have long been viewed as confusing and controversial.<sup>38</sup> Because of the voluminous Medicaid regulations and

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30. *Id.*

31. *Id.* at 1154.

32. *Id.*; Petition for Writ of Certiorari at 5, *Brewer v. Schalansky*, 125 S. Ct. 2944 (No. 04-1444).

33. *Brewer*, 102 P.3d at 1154.

34. U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § SI 01120.010 (1999), available at <http://policy.ssa.gov/poms.nsf/lnx/0501120010!opendocument>. POMS provides several examples of when property is not considered a resource. *Id.* In one example, an applicant owns stock in joint tenancy. *Id.* The joint tenants possess a legally binding agreement, which provides that no joint tenant will sell the stock without the consent of the other joint tenant. *Id.* In that instance, POMS does not consider the stock an available resource unless both joint tenants consent to the sale. *Id.*

35. *Brewer*, 102 P.3d at 1147. The district court did not address Regina's contention that federal law precluded SRS from treating the stock as an available resource because it determined Regina was not required to partition. *Id.* at 1147-48.

36. *Id.* at 1148. The transfer was pursuant to section 20-3018(c) of the Kansas Statutes Annotated and suggests that the court had a significant interest in addressing Medicaid planning. See KAN. STAT. ANN. § 20-3018(c) (1995).

37. *Brewer*, 102 P.3d at 1151, 1154.

38. Trish Riley, Executive Dir., Nat'l Acad. Estate Health Policy, Reimagining Medicaid: The Evolving Federal Role in Medicaid 3 (Sept. 20, 2002) (transcript available at [http://www.kaisernetwork.org/health\\_cast/uploaded\\_files/21084AZCK.doc.pdf](http://www.kaisernetwork.org/health_cast/uploaded_files/21084AZCK.doc.pdf)). The federal and state Medicaid guidelines have been characterized as "almost unintelligible to the uninitiated." *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976). These laws and regulations have also been described as an "aggravated assault on the English language, resistant to attempts to understand

rules, applying for state-assisted medical care can be a daunting task.<sup>39</sup> The process is further complicated when an applicant has a complex list of assets that includes jointly owned property.<sup>40</sup> Joint tenancy is one form of ownership that affects eligibility for government-assisted medical programs.<sup>41</sup> All assets must be acknowledged and disclosed; any jointly held property between spouses, as well as property owned with other parties, must be included on Medicaid applications.<sup>42</sup> Through planning, the country's middle-class seniors use the Medicaid program as a valuable source of funding for long-term care.<sup>43</sup>

Recently, Kansas courts have addressed Medicaid planning and its legality.<sup>44</sup> The Kansas Supreme Court has taken a strict approach to Medicaid planning;<sup>45</sup> however, the Kansas Court of Appeals and other jurisdictions have taken a more accommodating approach.<sup>46</sup> Although courts disagree on the legality of Medicaid planning, the need to understand the implications of the court's decision in *Brewer* is vital for Kansas practitioners and Medicaid applicants.

#### A. Joint Tenancy

Joint tenancy is a form of property ownership between two or more individuals.<sup>47</sup> It is distinguishable from other types of co-ownership because, upon the death of one joint tenant, the surviving joint

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it." *Friedman v. Berger*, 409 F. Supp. 1225, 1226 (S.D.N.Y. 1976). Another court described the laws as "labyrinthian." *Roloff v. Sullivan*, 975 F.2d 333, 340 n.12 (7th Cir. 1992).

39. ElderLawAnswers.com, *The Top Eight Mistakes People Make with Medicaid*, <http://www.elderlawanswers.com/resources/article.asp?id=4570&section=4> (last visited Feb. 3, 2006).

40. See Barbara Carlin, *Medicaid Planning for Nursing Home Care*, <http://www.elderlawmaine.com/Medicaid%20Planning%20for%20Nursing%20Home%20Care%20by%20Barbara%20Carlin.pdf> (last visited Feb. 3, 2006).

41. *Id.*

42. *Id.*

43. See *The Economic Downturn & Its Impact on Seniors: Stretching Limited Dollars in Medicaid, Health, and Senior Services: Hearing Before the S. Spec. Comm. on Aging*, 107th Cong. 1 (2002) (statement of Sen. Larry Craig, Member S. Spec. Comm. on Aging), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_senate\\_hearing&docid=f:78784.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearing&docid=f:78784.pdf) [hereinafter *Economic Downturn*].

44. See, e.g., *Brewer v. Schalansky*, 102 P.3d 1145, 1146 (Kan. 2004), *cert. denied*, 125 S. Ct. 2944 (2005) (ruling that stock held in joint tenancy is considered an available resource for determining Medicaid eligibility); *Miller v. Kan. Dep't of Soc. & Rehab. Servs.*, 64 P.3d 395, 405 (Kan. 2003) (holding that the principle of a discretionary trust is an available resource for Medicaid eligibility); *In re Estate of Lasater*, 54 P.3d 511, 514 (Kan. Ct. App. 2002) (allowing joint tenancy ownership between two unequal shares when determining Medicaid eligibility).

45. See, e.g., *Brewer*, 102 P.3d at 1147; *Miller*, 64 P.3d at 397.

46. See, e.g., *In re Lasater*, 54 P.3d at 513; *In re John XX*, 226 N.Y.S.2d 329, 331 (App. Div. 1996); *In re Daniels*, 618 N.Y.S.2d 499, 502 (Sup. Ct. 1994).

47. *Johnson v. Capitol Fed. Sav. & Loan Assoc.*, 524 P.2d 1127, 1132 (Kan. 1974) (quoting *Winsor v. Powell*, 497 P.2d 292, 299 (Kan. 1972)). The concept of joint tenancy dates back to the thirteenth century and was the preferred form of common ownership in early English law. Anne L. Spitzer, *Joint Tenancy with Right of Survivorship: A Legacy from Thirteenth Century England*, 16 TEX. TECH. L. REV. 629, 637-38 (1985). Joint tenancy was established to ensure that land remained within the family instead of reverting back to the crown. See generally *id.* (discussing the history of joint tenancy). Today, state law controls the creation of joint tenancies in both real and personal property. *In re Fast's Estate*, 218 P.2d 184, 187 (Kan. 1950) (citing *Bouska v. Bouska*, 153 P.2d 923 (Kan. 1944)).

tenant immediately becomes the sole owner of the entire property.<sup>48</sup> A joint tenancy is created when two or more co-owners take identical, undivided interests in property, and each tenant has a right of survivorship to the other's share.<sup>49</sup> At common law, a conveyance that satisfied the four unities was presumed to create a valid joint tenancy.<sup>50</sup> Most states have since reversed that presumption, and a conveyance now creates a tenancy in common unless the grantor clearly expresses an intent to create a joint tenancy.<sup>51</sup>

Joint tenancy has been recognized in Kansas for many years.<sup>52</sup> Although Kansas law no longer presumes that ownership between two or more people creates a joint tenancy, this method of co-ownership remains popular and is valid if created according to statute.<sup>53</sup> The Kansas joint tenancy statute, adopted in 1939, does not explicitly require the four common-law unities, but courts continually note the requirement that a conveyance must comply with both the statute and the four unities.<sup>54</sup> Absence of the four unities, however, does not automatically invalidate a joint tenancy conveyance.<sup>55</sup> Under the Kansas statute, intent to create a joint tenancy is the most important factor.<sup>56</sup> The joint tenancy statute establishes the presumption that jointly owned property will be recognized as a tenancy in common, and a joint tenancy will only be created when the intent to do so is

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48. *Johnson*, 524 P.2d at 1132.

49. BLACK'S LAW DICTIONARY 1505 (8th ed. 2004).

50. 2 AMERICAN LAW OF PROPERTY § 6.1 (A. Casner ed., 1952 & Supp. 1977). At common law, there were four basic rules for establishing a joint tenancy: (1) all joint tenants must receive their interests simultaneously; (2) all must obtain a right to possession in unison; (3) each interest must be an equal part of the whole; and (4) the co-owners must receive their interests in the property from the same instrument. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 55 (2d ed. 1984).

51. 2 AMERICAN LAW OF PROPERTY, *supra* note 50, § 6.3. Ownership by tenancy in common does not include the right of survivorship. See *In re Estate of Laue*, 589 P.2d 558, 565 (Kan. 1979). Kansas addresses the intent requirement of joint tenancy by statute. See KAN. STAT. ANN. § 58-501 (1994). Unlike other co-tenancies, joint tenancy may only occur through a grant and never by way of descent or other act of law. 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 9 (2004). To create a joint tenancy, the conveyance must satisfy the statutory requirements and the parties must be able to establish intent. See KAN. STAT. ANN. § 58-501.

52. See *Malone v. Sullivan*, 14 P.2d 647, 649 (Kan. 1932); *Withers v. Barnes*, 149 P. 691, 692 (Kan. 1915). By definition,

[a] joint tenancy exists where a single estate in property, real or personal, is owned by two or more persons, under one instrument or act of the parties. The grand incident of joint tenancy is survivorship, by which the entire tenancy on the decease of any joint tenant remains to the survivors, and at length to the last survivor.

*Edwards v. United States*, 215 F. Supp. 382, 385 (D. Kan. 1963) (quoting *Bouska*, 153 P.2d at 925).

53. See, e.g., John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1114-15 (1984) (discussing the common use of joint tenancies as imperfect will substitutes).

54. See KAN. STAT. ANN. § 58-501; *Simonich v. Wilt*, 417 P.2d 139, 143 (Kan. 1966); *Hutchinson Nat'l Bank & Trust Co. v. Brown*, 753 P.2d 1299, 1300 (Kan. Ct. App. 1988).

55. See, e.g., *In re Estate of Lasater*, 54 P.3d 511, 514 (Kan. Ct. App. 2002) (holding that a joint tenancy was valid when created with unequal interests).

56. See *Winsor v. Powell*, 497 P.2d 292, 299 (Kan. 1972).

clearly expressed.<sup>57</sup> The Kansas Supreme Court has acknowledged “that the all-important factor in the establishment of a valid joint tenancy relationship is the clarity with which the grantor’s intent is expressed at the time the transaction is initiated.”<sup>58</sup> Generally, when a conveyance includes the language “as joint tenants with rights of survivorship,” the grantor’s intention is clearly stated, and a valid joint tenancy is created.<sup>59</sup>

While easy to create, joint tenancies possess some disadvantages.<sup>60</sup> Making necessary decisions about property and taxes becomes complicated for assets held in joint tenancy.<sup>61</sup> For example, owning property in joint tenancy often creates complexity for estate tax purposes.<sup>62</sup> A conveyance in joint tenancy may also be subject to income and gift taxes.<sup>63</sup> Additionally, co-ownership in joint tenancy can be difficult to dissolve.<sup>64</sup> A joint tenant may sever the relationship

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57. KAN. STAT. ANN. § 58-501. “Real or personal property granted or devised to two or more persons . . . shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created.” *Id.*

58. *Winsor*, 497 P.2d at 299.

59. *Id.*

60. See The Missouri Bar, What Is a Joint Tenancy?, <http://www.mobar.org/pamphlet/joint.htm> (last visited Feb. 3, 2006).

61. Kansas Bar Association, Joint Tenancy, [http://www.ksbar.org/public/public\\_resources/pamphlets/joint\\_tenancy.shtml](http://www.ksbar.org/public/public_resources/pamphlets/joint_tenancy.shtml) (last visited Feb. 3, 2006) [hereinafter KBA]. Many contracts require the consent of all joint tenants before a sale. See *Hall v. Hamilton*, 667 P.2d 350, 354 (Kan. 1983) (quoting WILLIAM L. BURDICK, LAW OF REAL PROPERTY 274 (1914)).

62. Dennis R. Lassila, *Joint Tenancy Ownership—Advantages and Pitfalls*, CPA J., Feb. 1989, available at <http://www.nysscpa.org/cpajournal/old/07133074.htm>. The full value of any jointly owned property held with anyone other than a spouse will be included in the estate unless the surviving joint tenant can prove that she contributed to the value of the property. KBA, *supra* note 61. If the extent of the contribution cannot be established, the entire value of the jointly held property may be subject to both federal and state estate taxes even though the parties contributed equally to the value of the property. Lassila, *supra*. This rule emphasizes that joint owners should maintain thorough records to prove that each joint tenant furnished consideration. *Id.*

63. Lassila, *supra* note 62. A gift, for tax purposes, includes any transfer of property for less than its fair market value. There is an annual gift tax exclusion limit; if a gift exceeds the annual exclusion amount, then some portion of the property will be taxed. See The Missouri Bar, *supra* note 60. When one joint tenant provides all the consideration for the purchase of property, the creation of a joint tenancy is deemed a gift to the non-contributing joint tenant. Lassila, *supra* note 62. For example, if a parent adds a child’s name to a deed, then the parent has most likely made a gift that exceeds the annual gift exclusion, and depending on the value of the property, might also exceed the applicable estate credit. Similarly, the termination of a joint tenancy will result in a taxable gift when the property is not divided in accordance with the joint tenants’ interests. *Id.* For example, if a child co-tenant agrees to sell property with a parent and allows that parent to keep the proceeds, the income will constitute another gift from the child back to the parent. Finally, joint tenancies may also affect personal income tax. KBA, *supra* note 61. Each joint tenant is liable for the tax on the amount of income the joint tenant is entitled to receive. *Id.*

64. See KBA, *supra* note 61. While Kansas law allows a joint tenant to eliminate the survivorship element as to each individual interest by merely conveying that interest to a third party, the survivorship element cannot be eliminated by the unilateral action of one joint tenant. *Hall*, 667 P.2d at 354-55; *Hutchinson Nat’l Bank & Trust Co. v. Brown*, 753 P.2d 1299, 1301 (Kan. Ct. App. 1988). Like Regina and her nieces’ contract with Merrill Lynch, parties may restrict ownership by requiring all joint tenants to consent to a transfer. *Hall*, 667 P.2d at 354 (quoting BURDICK, *supra* note 61).

with other tenants through an action for partition.<sup>65</sup> Due to complicated court proceedings, partition actions often involve substantial delay and costs before property is successfully divided.<sup>66</sup>

### B. *Healthcare and the Elderly*

America's healthcare system struggles to adequately meet the requirements of the nation's elderly.<sup>67</sup> The healthcare system operates on the principle that competition will increase societal wealth.<sup>68</sup> While this concept is true for the nation as a whole, in reality, "persons *with* financial means have greater access to health care, while those *without* financial means enjoy only limited access."<sup>69</sup>

Obtaining long-term care is expensive and stressful and can place financial and emotional hardships on both the elderly and their families.<sup>70</sup> This type of healthcare includes a wide array of services, such as nursing home and hospice care, assisted living facilities, adult day-care, and transportation services.<sup>71</sup> The amount of money expended on long-term care each year is "on an upward spiral, and there is no ceiling in sight."<sup>72</sup> Many elderly Americans cannot afford the long-term care necessary to maintain their health and standard of living.<sup>73</sup>

65. *Hall*, 667 P.2d at 353 (quoting *Miller v. Miller*, 564 P.2d 524 (Kan. 1977)). There are two types of partition actions: partition in kind and partition through sale. *Id.* A partition in kind "results in a physical division of the property [with] each [parcel] held separately by the former joint tenants." Patricia A. DeBenedictis, *Death and Taxes: With Section 2518 One May Be More Certain than the Other*, 69 B.U. L. REV. 877, 884 (1989). Alternatively, a partition through sale results in a court order to sell the property and divide the proceeds equally between all co-tenants. *See Hall*, 667 P.2d at 353 (quoting *Miller*, 564 P.2d at 527).

66. The Missouri Bar, *supra* note 60. This action can cause delays if joint tenants attempt to sell, convey, or register the property. *See id.* Severing a joint tenancy is typically costly because it often requires legal services and court proceedings. *Id.*

67. *See* George P. Smith II, *Allocating Health Care Resources to the Elderly*, 1 ELDER. L. REV. 21 (2002), available at [http://www.uws.edu.au/download.php?file\\_id=961&filename=smith.pdf&mimetype=application/pdf](http://www.uws.edu.au/download.php?file_id=961&filename=smith.pdf&mimetype=application/pdf). "The way we treat our older citizens in this country is like certain ancient tribal societies, where a person who became too old for hunting and warfare was placed ceremonially on a raft and allowed to float down a river." Morris K. Udall, Public Policy and the Future of Aging, Address Given Before the National Council on the Aging (Sept. 30, 1975) (transcript available at <http://dizzy.library.arizona.edu/branches/spc/udall/aging.pdf>).

68. Takacs & McGuffey, *supra* note 16.

69. *Id.* at 118-19.

70. *See, e.g., In re Shah*, 694 N.Y.S.2d 82, 86 (App. Div. 1999) (stating that healthcare costs are "astronomical"), *aff'd*, 733 N.E.2d 1093, 1101 (N.Y. 2000) (describing medical treatment as "ruinously expensive"); *In re Tyler*, 2002 WL 1274125, at \*10 (D.C. Super. Ct. May 30, 2002) (recognizing the devastating costs of long-term care).

71. U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010 1-41 (2d ed. 2000), available at [http://www.healthypeople.gov/document/HTML/Volume1/01Access.htm#\\_Toc489432806](http://www.healthypeople.gov/document/HTML/Volume1/01Access.htm#_Toc489432806).

72. Takacs & McGuffey, *supra* note 16, at 124. Annual nursing home expenses increased from \$28 billion to \$70 billion from 1987 to 1996. JEFFREY A. RHOADES & JOHN P. SOMMERS, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, NURSING HOME EXPENSES, 1987 AND 1996 6 (2001), available at [http://www.meps.ahrq.gov/papers/cb6\\_01-0029/cb6.pdf](http://www.meps.ahrq.gov/papers/cb6_01-0029/cb6.pdf).

73. Barbara Lyons, Deputy Dir., Kaiser Comm'n of Medicaid & the Uninsured, Medicaid's Role for Seniors: Challenges in a Fiscally Constrained Environment 2 (Mar. 14, 2002) (transcript available at <http://www.kff.org/medicaid/upload/medicaid-s-Role-for-Seniors-Challenges-in-a-Fiscally-constrained-Environment-Testimony.pdf>). "Most elderly people live on limited incomes and few can afford the high cost of long-term care. Medicaid is the safety net because no other practical options exist to meet these seniors [sic] long-term care needs." *Id.*

Given the great expense of long-term healthcare, many elderly are impoverished within months of entering long-term care facilities.<sup>74</sup> Most middle-class seniors requiring an extended nursing home stay recognize the likelihood of depleting their savings to pay for care.<sup>75</sup>

Today, Medicaid is a valuable resource for the nation's middle-class seniors and is no longer viewed only as a "safety net" for the poor.<sup>76</sup> Medicaid planning allows the elderly to qualify for Medicaid benefits by reorganizing their assets.<sup>77</sup> This process places assets outside the boundaries of Medicaid regulations, and often out of the legal grasp of the applicant, while allowing the elderly to receive medical attention funded by Medicaid.<sup>78</sup>

### 1. Medicaid: A Strained System

Medicaid began in 1965 as a joint effort among state and federal governments.<sup>79</sup> Its purpose is to furnish medical assistance to persons unable to pay for care, specifically focusing on dependent children, the disabled, and the elderly.<sup>80</sup> Medicaid functions as the country's largest source of healthcare funding for the poor.<sup>81</sup> Its long-term care program is increasingly important as the nation's population ages.<sup>82</sup> Last year, nearly 4.8 million elderly citizens received assistance from

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74. Takacs & McGuffey, *supra* note 16, at 121.

75. *Id.* at 122.

76. *Economic Downturn*, *supra* note 43 (statement of Sen. Larry Craig, Member S. Spec. Comm. on Aging); Lyons, *supra* note 73.

Contrary to the perception of some, Medicaid is not just a lifeline for America's poorest citizens, but rather, for America's seniors, Medicaid is now also very much a middle class program. Funded jointly by [s]tates and the [f]ederal [g]overnment, Medicaid today pays nearly two-thirds of all nursing home and long-term care bills. So when Medicaid is in trouble, so too is middle America.

*Economic Downturn*, *supra* note 43 (statement of Sen. Larry Craig, Member S. Spec. Comm. on Aging). Medicaid has become a major resource for funding the long-term care needs of the elderly. MEDICAID FACTS, *supra* note 20.

77. Barnes, *supra* note 17; *see* Takacs & McGuffey, *supra* note 16, at 122.

78. Takacs & McGuffey, *supra* note 16, at 122.

79. CENTERS FOR MEDICARE AND MEDICAID SERVICES, DEP'T OF HEALTH AND HUMAN SERVS., BRIEF SUMMARIES OF MEDICARE & MEDICAID 15 (2005), *available at* <http://www.cms.hhs.gov/MedicareProgramRatesStats/downloads/MedicareMedicaidSummaries2005.pdf> [hereinafter MEDICAID BRIEF SUMMARY].

80. *Id.* at 16.

81. *Id.* at 15. In 2002, Medicaid supported a record 51.6 million citizens. *Id.* at 22. Medicaid has been described as "one of the pillars that holds up the American health care system." ACAD. FOR HEALTH SERVS. RESEARCH AND HEALTH POLICY, STATE COVERAGE INITIATIVES, STATE OF THE STATES 5 (2002), *available at* <http://statecoverage.net/pdf/stateofstates2002.pdf> (quoting Sara Rosenbaum).

82. MEDICAID BRIEF SUMMARY, *supra* note 79, at 22. From 1977 through 1987, healthcare costs for America's elderly rose three times faster than the consumer price index. Mark P. Doescher et al., *Supplemental Insurance and Mortality in Elderly Americans*, 9 ARCHIVES OF FAM. MED. 251, 251 (2000), *available at* <http://archfami.ama-assn.org/cgi/reprint/9/3/251.pdf>. By 1996, "Medicare beneficiaries spent an average of \$2,600 out-of-pocket on health care costs above what Medicare and private insurers paid. This represented twenty-one percent of household income for elderly individuals, up from fifteen percent in 1987." *Id.* (footnote omitted). That number *excludes* money spent on nursing home care. *Id.*

Medicaid.<sup>83</sup> In 2001, payments for nursing facility services totaled over \$39.3 billion.<sup>84</sup> As the country's elderly population increases more rapidly than younger groups, the strain on Medicaid long-term care is expected to multiply.<sup>85</sup>

Participation in the federally-sponsored Medicaid program is voluntary; however, states choosing to participate must abide by specific federally-mandated requirements.<sup>86</sup> Generally, to become eligible for nursing home benefits, an applicant must establish that she is: (i) age sixty-five or older;<sup>87</sup> (ii) a United States citizen;<sup>88</sup> (iii) a resident of the state where the Medicaid application is filed;<sup>89</sup> and (iv) continuously confined to a medical institution for at least thirty days prior to attaining Medicaid eligibility.<sup>90</sup> State Medicaid programs are "required to follow the same [eligibility] rules and processes used by the most closely related cash assistance program" existing within the state.<sup>91</sup> In Kansas, the federal program most closely related to Medicaid is the Supplemental Security Income (SSI) program.<sup>92</sup>

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83. MEDICAID BRIEF SUMMARY, *supra* note 79, at 22. Medicaid beneficiaries are included in the "aged" category, if in addition to being sixty-five or older, they satisfy certain income and resource requirements or incur medical expenses for healthcare that, when deducted from income, meet the qualifications for Medicaid. KAISER COMM'N ON MEDICAID AND THE UNINSURED, HENRY J. KAISER FAMILY FOUND., MEDICAID ENROLLMENT AND SPENDING BY "MANDATORY" AND "OPTIONAL" ELIGIBILITY AND BENEFIT CATEGORIES at tbl.n.1 (2005), available at <http://www.kff.org/medicaid/upload/Medicaid-Enrollment-and-Spending-by-Mandatory-and-Optional-Eligibility-and-Benefit-Categories-Report.pdf>.

84. MEDICAID BRIEF SUMMARY, *supra* note 79, at 22. In 2001, the national average monthly cost for nursing home care was over \$4,500. AARP, THE COSTS OF LONG-TERM CARE: PUBLIC PERCEPTIONS VERSUS REALITY 24 (2001), available at [http://assets.aarp.org/rgcenter/health/ltc\\_costs.pdf](http://assets.aarp.org/rgcenter/health/ltc_costs.pdf). By contrast, the median monthly income for households headed by someone sixty-five or older was approximately \$2,828. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2002 10 (2002), available at <http://www.aoa.gov/prof/statistics/profile/2002profile.pdf>.

85. MEDICAID BRIEF SUMMARY, *supra* note 79, at 22. In 2000, 281.4 million persons resided in the United States. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, U.S. SUMMARY: 2000 2 (2002), available at <http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf>. Of that number, approximately 35 million people, twelve percent of the total population, were sixty-five or older. *Id.* The United States is not alone; one in ten persons world-wide is sixty years of age or older. Press Release, United Nations, United Nations Releases New Statistics on Population Ageing 1, U.N. Note No. 5713 (Feb. 28, 2002), available at <http://www.un.org/ageing/note5713.doc.htm>.

86. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). The program is "basically administered by each state within certain broad requirements and guidelines." *W. Va. Univ. Hosps. v. Casey*, 885 F.2d 11, 15 (3d Cir. 1989).

87. 42 U.S.C. § 1396a(b)(1) (2000); 42 C.F.R. § 435.520 (2005).

88. 42 C.F.R. § 435.406(a)(1) (2005). Lawfully admitted aliens and aliens permanently residing in the United States under color of law are also eligible for Medicaid. *Id.* § 435.406(a)(2)-(4).

89. *Id.* § 435.403.

90. 42 U.S.C. § 1396a(a)(10)(A)(ii)(V).

91. CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICAID ELIGIBILITY GROUPS AND LESS RESTRICTIVE METHODS OF DETERMINING COUNTABLE INCOME AND RESOURCES 1 (2001), available at <http://new.cms.hhs.gov/MedicaidEligibility/downloads/DefinitionElig1902r2.pdf> [hereinafter MEDICAID ELIGIBILITY GROUPS].

92. See 42 U.S.C. § 1396a(a)(17)(B). Supplemental Security Income (SSI) is a federally-sponsored program funded by the U.S. Treasury. SOC. SEC. ADMIN., PUBL'N NO. 05-11000, SUPPLEMENTAL SECURITY INCOME 2 (Aug. 2005), available at <http://www.ssa.gov/pubs/11000.pdf>. The program was established to provide monthly assistance to low-income senior citizens, the blind, and the disabled. *Id.* The federal government provides a base rate to each qualifying

## 2. Kansas Medicaid Resource Provisions

Medicaid and SSI regulations divide assets into two categories: countable and exempt.<sup>93</sup> Eligibility in Kansas requires that applicants possess less than \$2,000 of nonexempt available resources.<sup>94</sup> A resource is considered available if the applicant retains a legal interest in the asset and “the legal ability to make [it] available.”<sup>95</sup> Any resource with a “legal impediment that precludes [its] disposal” is considered unavailable for Medicaid purposes.<sup>96</sup>

Each applicant attempting to demonstrate an existing legal impediment for purposes of Medicaid eligibility must: (i) verify the status of the property through documents such as deeds, wills, or court orders; and (ii) make an attempt to overcome the impediment.<sup>97</sup> A resource is considered unavailable, however, if “the cost of overcoming the impediment would exceed the gain to the individual.”<sup>98</sup> Generally, only the applicant’s pro rata share of jointly owned real property is considered in determining Medicaid eligibility.<sup>99</sup> The applicant, however, is attributed the full value of jointly owned personal property.<sup>100</sup> Kansas Medicaid eligibility rules dismiss joint ownership as a legal impediment, providing that “[t]he refusal of a joint owner to sell property does not constitute a legal impediment, as the remaining owner has the right to sell [his] share.”<sup>101</sup>

## 3. Medicaid Transfer Rules

Transfers by Medicaid applicants are governed by federal law, which places limits on voluntary impoverishment for Medicaid eligibility.<sup>102</sup> “A transfer of assets is an act, contract, or lease which partially or totally passes the use, control and/or ownership of assets to

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person; however, many states choose to supplement the federal funds, increasing the rate paid to qualifying citizens. *Id.* Typically, individuals who qualify for SSI are also eligible for Medicaid. MEDICAID ELIGIBILITY GROUPS, *supra* note 91.

93. Compare 20 C.F.R. § 416.1201 (2005) (listing countable resources), with 20 C.F.R. § 416.1210 (listing exempt resources).

94. KAN. ADMIN. REGS. § 30-6-107 (2003).

95. KAN. DEP’T OF SOC. & REHAB. SERVS., KANSAS ECONOMIC AND EMPLOYMENT SUPPORT MANUAL § 5200(3), available at <http://www.srskansas.org/KEESM/keesm5200.htm#5200> (last visited Feb. 3, 2006) [hereinafter KEESM].

96. *Id.* § 5200(3)(a).

97. *Id.* § 5200(3)(a)(i)-(ii).

98. *Id.* § 5200(3)(a)(ii).

99. *Id.* § 5200(6)(a).

100. *Id.* For Medicaid purposes, personal property includes any value in bank accounts, life insurance policies, trust funds, and stocks or bonds. *Id.* § 5410. All other personal property, such as vehicles, livestock, household furnishings, and personal effects are considered resources subject to specific exemption rules. See *id.* § 5430.

101. *Id.* § 5200(3)(a).

102. See Ctrs. for Medicare & Medicaid Servs., Transfer of Assets, [http://new.cms.hhs.gov/MedicaidEligibility/10\\_TransferofAssets.asp](http://new.cms.hhs.gov/MedicaidEligibility/10_TransferofAssets.asp) (last visited Feb. 3, 2006); see also 42 U.S.C. § 1396p(c)(1) (2000) (limiting Medicaid eligibility when an applicant transfers property in anticipation of Medicaid benefits).

another person or corporation.”<sup>103</sup> An applicant may be penalized for transferring nonexempt resources in anticipation of Medicaid eligibility when the transfer occurs within the established look-back period of three years before the date of filing.<sup>104</sup> Typically, any transfer of non-exempt assets within three years of filing an application is reviewed for disqualification, while transfers that occur more than three years of filing do not affect eligibility.<sup>105</sup> Additionally, the transfer of non-exempt assets for less than fair market value within the look-back period may affect long-term coverage.<sup>106</sup> SRS evaluates transfers in “light of the circumstances [that] exist[ed] at the time the transfer was made,” rather than at the time the application was filed.<sup>107</sup> If a transfer occurred outside of the look-back period, then any evidence that it was for a purpose not connected to eligibility is given more weight.<sup>108</sup>

Congress has created numerous exceptions to the transfer rules.<sup>109</sup> For example, any resource transferred to a spouse or a third party for the sole benefit of the spouse is not penalized.<sup>110</sup> The federal regulations also allow, without penalty, a transfer for a purpose other than to qualify for Medicaid.<sup>111</sup> No ineligibility period is imposed when such penalty would cause undue hardship,<sup>112</sup> or when the transferred assets are returned to the applicant.<sup>113</sup>

Upon the death of any Medicaid recipient age fifty-five or older, states are required to seek recovery of Medicaid payments from the estate of the deceased recipient.<sup>114</sup> Under an estate recovery program, each state is required to seek recovery for “nursing facility services, home and community-based services, and related hospital and

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103. KEESM, *supra* note 95, § 5720.

104. *Id.* § 5720(2).

105. *Id.* § 5720. For transfers to or from certain trusts, the look-back period is five years. 42 U.S.C. § 1396p(c)(1)(B)(i). Section 1396p(d) addresses how trusts are examined with respect to a transfer under the provisions in subsection (c). *Id.* § 1396p(d).

106. KEESM, *supra* note 95, § 5720. Section 1396p(c)(1) requires all states to impose periods of ineligibility for transfers made without consideration or for less than the fair market value during the look-back period. 42 U.S.C. § 1396p(c)(1).

107. KEESM, *supra* note 95, § 5724(1).

108. *Id.* § 5724(2).

109. *See* 42 U.S.C. § 1396p(c)(2).

110. *Id.* § 1396p(c)(2)(B)(i); *see also* *Pacente v. Jindal*, 751 So. 2d 343, 344-46 (La. Ct. App. 1999) (stating that a transfer of an annuity to “[wife], but if she dies to [son]” was a transfer for the sole benefit of the spouse).

111. 42 U.S.C. § 1396p(c)(2)(C)(ii); *see also* *Pentuik v. Fla. Dep’t of Health & Rehab. Servs.*, 584 So. 2d 1098, 1099-101 (Fla. Dist. Ct. App. 1991) (allowing a Medicaid applicant to transfer assets the day before undergoing surgery because he believed the operation might kill him).

112. 42 U.S.C. § 1396p(c)(2)(D). An applicant who owns a home, even one of significant value, may still qualify for Medicaid if the other eligibility requirements are satisfied. *Takacs & McGuffey, supra* note 16, at 129. The statute provides that an applicant “should have a home to return to” when his health improves. *Id.* Regardless, it is often difficult to pay for the many expenses for a home such as upkeep, property taxes, insurance, and utilities because Medicaid limits the assets and income that an applicant may retain. *See id.*

113. 42 U.S.C. § 1396p(c)(2)(C)(iii).

114. *Id.* § 1396p(b)(1)(B).

prescription drug services.”<sup>115</sup> Additionally, states may seek recovery for other Medicaid benefits.<sup>116</sup> These recovery statutes have been the topic of debate by many courts and commentators.<sup>117</sup>

### C. *The Great Divide: The Debate on Medicaid Planning*

Applicants cannot qualify for Medicaid benefits until they expend sufficient personal resources to satisfy the requirements established by the government.<sup>118</sup> Because Medicaid does not cover all healthcare services,<sup>119</sup> many applicants seek a Medicaid planning program to create a pool of assets that can be used “to pay for goods and services” not available under Medicaid.<sup>120</sup> While legal, Medicaid planning is highly controversial.<sup>121</sup> Congress has taken steps to deter Medicaid applicants from transferring assets to qualify for healthcare benefits.<sup>122</sup> In 1996, Congress enacted statutes criminalizing the transfer of assets for the purpose of qualifying for Medicaid.<sup>123</sup> Less than a year later, the law changed, making it a crime to advise any person to transfer assets for the purpose of becoming eligible for Medicaid.<sup>124</sup> The

115. *Id.* § 1396p(b)(1)(B)(i).

116. *See* Ctrs. for Medicare & Medicaid Servs., Estate Recovery Provision, [http://new.cms.hhs.gov/MedicaidEligibility/08\\_Estate\\_Recovery.asp](http://new.cms.hhs.gov/MedicaidEligibility/08_Estate_Recovery.asp) (last visited Feb. 3, 2006).

117. *See, e.g.,* *Kizer v. Hanna*, 767 P.2d 679, 681 (Cal. 1989). The California Supreme Court observed that the recovery statutes prevent heirs of the recipient “from unfairly benefiting from the program,” and other courts have agreed. *Id.*; *see, e.g., In re Estate of Turner*, 391 N.W.2d 767, 770 (Minn. 1986). However, critics of estate recovery have characterized the process as “the real ‘death tax.’” 147 CONG. REC. S5406 (daily ed. May 22, 2001) (statement of Sen. Feingold). U.S. Senator Russell Feingold proposed an amendment to federal Medicaid statutes that would have eliminated estate recovery; however, the amendment was defeated. 147 CONG. REC. S5229 (daily ed. May 21, 2001) (statement of Sen. Feingold). West Virginia refused to participate in the federal estate recovery efforts. *See* *W. Va. ex rel. McGraw v. U.S. Dep’t of Health & Human Servs.*, 132 F. Supp. 2d 437, 439 (S.D. W. Va. 2001). On May 7, 2002, the Fourth Circuit held that West Virginia must follow the federal estate recovery statutes. *W. Va. ex rel. McGraw v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d 281, 284 (4th Cir. 2002).

118. Ctrs. for Medicare & Medicaid Servs., Medicaid Eligibility, <http://www.cms.hhs.gov/MedicaidEligibility/> (last visited Feb. 3, 2006).

119. *See, e.g.,* 42 C.F.R. § 483.12(d)(3)(i) (2005).

120. Takacs & McGuffey, *supra* note 16, at 131.

121. Lisa Schreiber Joire, *After New York State Bar Association v. Reno: Ethical Problems in Limiting Medicaid Estate Planning*, 12 GEO. J. LEGAL ETHICS 789, 814 (1999). The process by which individuals seek to minimize their assets to attain eligibility for Medicaid benefits has been criticized as “the manipulation of Medicaid eligibility rules by non-poor elderly persons, their heirs, and their attorneys to obtain Medicaid coverage for nursing home care while protecting significant amounts of wealth.” *Id.* at 796 (quoting Ira Stewart Wiesner, *OBRA '93 and Medicaid; Asset Transfers, Trust Availability, and Estate Recovery Statutory Analysis in Context*, 19 NOVA L. REV. 679, 690 (1995)).

122. *Id.* at 801. Twice, the government enacted additional penalties for transferring assets, while at the same time requiring states to commence estate recovery programs. Takacs & McGuffey, *supra* note 16, at 132-33.

123. Joire, *supra* note 121, at 801.

124. *Id.* at 802. The “Granny’s Lawyer Goes to Jail Act” provides:

Whoever [ ] for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under subchapter XIX of this chapter, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1396p(c) of this title, shall . . . be guilty of a misdemeanor and upon conviction thereof fined not more than \$10,000 or imprisoned for not more than one year, or both.

provision, however, was held by one court to be an unconstitutional limit on free speech and the Department of Justice has never enforced the statute.<sup>125</sup>

Kansas courts have addressed Medicaid planning prior to the decision in *Brewer*.<sup>126</sup> The Kansas Supreme Court addressed the effects of a discretionary trust on Medicaid eligibility<sup>127</sup> and has taken a strict view of Medicaid eligibility, similar to its approach in *Brewer*.<sup>128</sup> The Kansas Court of Appeals, however, seemingly broadened Medicaid eligibility in the context of joint tenancy in recent years.<sup>129</sup>

### 1. *In re Estate of Lasater*<sup>130</sup>

In contrast to *Brewer*, the Kansas Court of Appeals took an accommodating approach to joint tenancy in the context of Medicaid estate recovery in *In re Estate of Lasater*.<sup>131</sup> Ruth Lasater, a Medicaid recipient, transferred the title of her home to herself and her son in September 2000.<sup>132</sup> Ruth's son paid approximately one percent of the property value at the time of the transfer.<sup>133</sup> In the grant, Ruth stipulated that, although she and her son intended to be joint tenants, she would retain ninety-nine percent of the interest in the property, and her son would be entitled to the remaining one percent.<sup>134</sup>

When Ruth passed away later that year, her house was transferred to her son outside of probate because of his status as a joint tenant.<sup>135</sup> SRS claimed Ruth's interest in her home should have been subject to the claims of creditors.<sup>136</sup> The agency maintained that

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42 U.S.C. § 1320a-7b(a)(6) (Supp. 2003).

125. See *N.Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710, 716 (N.D.N.Y. 1998). In March 1998, Attorney General Janet Reno notified the public that the Department of Justice would not enforce the statute because "the counseling prohibition . . . is plainly unconstitutional under the First Amendment . . ." Letter from Janet Reno, U.S. Attorney Gen., to Newt Gingrich, Speaker of the U.S. House of Representatives (Mar. 11, 1998), available at <http://seniorlaw.com/reno.htm>.

126. See, e.g., *Miller v. Kan. Dep't of Soc. & Rehab. Servs.*, 64 P.3d 395, 397 (Kan. 2003); *In re Estate of Lasater*, 54 P.3d 511, 513 (Kan. Ct. App. 2002).

127. See *Miller*, 64 P.3d at 397.

128. See *Brewer v. Schalansky*, 102 P.3d 1145, 1146 (Kan. 2004), *cert. denied*, 125 S. Ct. 2944 (2005) (holding that property held in joint tenancy is considered an available resource for determining Medicaid eligibility); *Miller*, 64 P.3d at 405 (holding that the principle of a discretionary trust is an available resource for Medicaid eligibility).

129. See, e.g., *In re Lasater*, 54 P.3d at 514.

130. 54 P.3d 511 (Kan. Ct. App. 2002).

131. *Id.* at 514.

132. *Id.* at 512.

133. *Id.* Ruth's son paid \$680 for his one-percent interest. *Id.*

134. *Id.* at 513. Ruth's quit claim deed stated the ownership interests as follows:  
Ruth I. Lasater, shall be ninety-nine percent (99%) and the ownership interest [sic] in the above-described property of the other grantee . . . shall be one percent (1%). Such ownership interests shall govern all aspect [sic] of the joint tenancy . . . including but not limited to, right to income and ownership rights upon any later sale . . .

*Id.* (quoting Ruth's quit claim deed).

135. *Id.*

136. *Id.*

Ruth's intent did not sufficiently establish a joint tenancy under Kansas law and that the unequal interests held by Ruth and her son violated the four unities, thus creating a tenancy in common.<sup>137</sup>

The court concluded that Ruth's intention was clear, as evidenced by her repeated use of the words "joint tenancy."<sup>138</sup> While Ruth and her son held unequal interests, the court determined that doing so did not violate any one of the four unities because the unity of interest only referred to the necessity that all tenants maintain interests for the same duration.<sup>139</sup> The court held SRS was not entitled to seek recovery from the estate because Ruth properly conveyed the property to her son as a joint tenant.<sup>140</sup>

## 2. *Miller v. Kansas Department of Social and Rehabilitation Services*<sup>141</sup>

The Kansas Supreme Court has addressed an applicant's use of a trust to shield assets for purposes of becoming Medicaid eligible.<sup>142</sup> The court ruled that a discretionary trust should be considered an available resource for Medicaid eligibility, and as a result, denied Medicaid benefits to an elderly woman who required long-term care.<sup>143</sup> Mary Miller's husband created a testamentary trust in her favor.<sup>144</sup> Upon the creation of her husband's will, Mary signed a consent form and accepted the rights established by the trust, rather than her spousal entitlements under Kansas statute.<sup>145</sup>

Mary's health deteriorated, and in 2000, she applied for Medicaid to fund her nursing home expenses.<sup>146</sup> SRS determined Mary was ineligible for Medicaid because the full amount of the trust was an "available resource."<sup>147</sup> Mary appealed, arguing that the trust was discretionary and that the entire principal was unavailable.<sup>148</sup>

Citing the federal statutes that discourage Medicaid planning, the court noted that "public assistance is available to the destitute and

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137. *Id.* In Kansas, there is a rebuttable presumption of equal ownership between owners of joint tenancy property. *Walnut Valley State Bank v. Stovall*, 574 P.2d 1382, 1386 (Kan. 1978).

138. *In re Lasater*, 54 P.3d at 514.

139. *Id.* (quoting 2 *TIFFANY REAL PROP.* § 418 (3d ed. 2001)). The court's opinion is contrary to the common law doctrine of the four unities; however, the court reasoned that Kansas law emphasizes the importance of intent and held that Ruth satisfied that requirement. *Id.* at 513-14; see *KAN. STAT. ANN.* § 58-501 (1994).

140. *In re Lasater*, 54 P.3d at 514.

141. 64 P.3d 395 (Kan. 2003).

142. See *id.* at 397. Like *Brewer*, the Kansas Supreme Court transferred *Miller* on its own motion pursuant to section 20-3018(c) of the Kansas Statutes Annotated. *Id.*

143. *Id.*

144. *Id.* at 397-98. The trust required that the trustee distribute the net income of the trust to Mary but also allowed the trustee to use discretion when distributing the principal funds. *Id.* at 398.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

truly needy and is not intended to provide subsistence to those with other resources.”<sup>149</sup> Because a trustee maintains complete authority over the funds placed in a discretionary trust, such trusts are not typically considered an available resource for Medicaid eligibility.<sup>150</sup> The court recognized that Mary’s trust was discretionary and that she had no right, as a matter of law, to *require* the trustee to turn over the funds.<sup>151</sup> The court, however, determined the principal should still be considered available because the trust contained Mary’s own funds.<sup>152</sup> It noted that her consent to the terms of her husband’s will in 1978 effectively placed her spousal share of the marital estate in the trust.<sup>153</sup> Accordingly, the court held that the trust contained, at least in part, Mary’s own assets.<sup>154</sup> It further determined that her agreement with the terms of her husband’s will and her decision not to make a claim against his probate estate resulted in her spousal elective share partially funding the trust.<sup>155</sup> Agreeing with the SRS decision, the Kansas Supreme Court held that Mary was ineligible for Medicaid until her “contribution” was exhausted.<sup>156</sup>

#### IV. COURT’S DECISION

In *Brewer v. Schalansky*,<sup>157</sup> the Kansas Supreme Court held that the entirety of property owned in joint tenancy should be considered an available resource for determining Medicaid eligibility.<sup>158</sup> The court reversed the district court’s decision, explaining that it did not apply the correct standard of review.<sup>159</sup> The court denied Regina Medicaid benefits because she failed to attempt a partition action for stock that she owned in joint tenancy.<sup>160</sup>

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149. *Id.* at 399 (citing *State ex rel Sec’y of SRS v. Jackson*, 822 P.2d 1033 (Kan. 1991)).

150. *Id.* at 400. By contrast, a support trust, in which the trustee is *required* to provide for the basic needs of the beneficiary, is usually considered available to a Medicaid applicant. *Id.* Miller did not object to the income of the trust being considered available because “the trustee [was required to] distribute the net income of the trust.” *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 400-03.

156. *Id.* at 403 (citing 42 U.S.C. § 1396p(d)(2)(C) (2000); KAN. ADMIN. REGS. § 30-6-109(c)(2)-(5) (2003)).

157. 102 P.3d 1145 (Kan. 2004).

158. *Id.* at 1154.

159. *Id.* at 1151. The court “may not overturn an agency decision if the agency ‘demonstrates that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonable based on that consideration.’” *Jones v. Glickman*, 42 F. App’x 292, 294 (10th Cir. 2002) (quoting *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1453 (10th Cir. 1994)).

160. *Brewer*, 102 P.3d at 1153-54.

### A. *Majority Opinion*

The majority found compelling SRS's evidence of Regina's intent and concluded that the entire value of the stock should be attributed to Regina.<sup>161</sup> Although Regina presented evidence that she added her nieces to the stock as compensation for the care and support that they provided,<sup>162</sup> SRS suggested that, rather than intending to give up actual possession of the stock, she placed the stock in joint tenancy to avoid probate.<sup>163</sup> The court held that substantial evidence supported the agency's conclusion that the transfer was not intended to relinquish actual control; it reinstated the denial of Regina's Medicaid application.<sup>164</sup>

The court emphasized three factors that caused Regina to be ineligible.<sup>165</sup> First, the partial transfer of the stock, even though it occurred outside the three-year look-back period, did not prevent the stock from being considered an available asset because of Regina's continued ownership interest.<sup>166</sup> While the Medicaid regulations require penalties for any transfer of assets for less than adequate consideration within three years of an application for benefits,<sup>167</sup> Regina noted the 1994 transfer was well beyond this look-back period.<sup>168</sup> SRS maintained that in 1994, when Regina added the names of her nieces to the stock, she had not effectively transferred it from her possession.<sup>169</sup> In support, SRS cited the State Medicaid Manual (SMM) and claimed that simply placing another's name on an asset, if doing so does not limit an individual's right to sell or dispose of the asset, does not constitute a transfer.<sup>170</sup> If an applicant retains an ownership interest and the authority or power to liquidate the property, then the property is considered a resource regardless of when the transfer occurred.<sup>171</sup> The agency argued that the entire stock should be considered because there was undisputed evidence that the entire stock value originated from Regina.<sup>172</sup> The court determined that Regina did not transfer the property when she added her nieces' names to the stock in 1994 because her interest was not limited by the addition of

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161. *Id.* at 1151.

162. *Id.*

163. *Id.* Regina placed her nieces' names on the stock seven years prior to her Medicaid application. *Id.* at 1149. The time between her original transfer and her Medicaid application could support her assertion that she conveyed the property as payment for the care provided by her nieces, rather than for eligibility purposes.

164. *Id.* at 1151, 1154.

165. *Id.* at 1149-51.

166. *Id.* at 1150.

167. KAN. ADMIN. REGS. § 30-6-56(3)(C)(b)(2) (2003).

168. *Brewer*, 102 P.3d at 1149.

169. Reply Brief of Appellant to Amicus Curiae Brief by Manorcare of Kansas, Inc. at 5, *Brewer*, 102 P.3d 1145 (No. 03-91044-S).

170. *Id.* at 6-7.

171. *Brewer*, 102 P.3d at 1149.

172. *Id.* at 1150-51.

the names.<sup>173</sup> Holding that Regina's interest was not restricted until she and her nieces opened the account with Merrill Lynch, the majority noted that even after the 2001 transfer, Regina maintained authority over her one-third interest.<sup>174</sup>

Second, the court held Regina's interest was not limited by the Merrill Lynch contract.<sup>175</sup> Regina maintained that she limited her rights as sole owner because she was precluded from selling the stock without her nieces' consent.<sup>176</sup> Because joint tenants are presumed to hold property in equal ownership,<sup>177</sup> she asserted her interest was limited by her nieces' interests in the stock.<sup>178</sup> While SRS admitted that there is a presumption of equal ownership in joint tenancies, it contended that unequal contributions to the value rebutted that presumption.<sup>179</sup> SRS insisted that the entire value should be attributed to Regina because her nieces never represented that they had earned their interest in the stock.<sup>180</sup> The court acknowledged that "the presumption of equal ownership can be rebutted with evidence regarding the owner's relative contribution . . . [and] donative intent."<sup>181</sup> There was not equal ownership because Regina was the sole owner of the stock, and SRS presented evidence that Regina added her nieces solely to avoid probate.<sup>182</sup>

Third, the court noted Regina did not take "reasonable steps" to overcome legal impediments.<sup>183</sup> Regina contended that any partition action was likely to be unsuccessful because of the complexity of the joint tenancy, her nieces' refusal to sell, and the agreement with Merrill Lynch.<sup>184</sup> Regina insisted that the cost of a successful partition action would likely exceed her interest in the stock and that forcing her to file a partition was contrary to SRS regulations.<sup>185</sup> She maintained that Kansas law only requires an applicant to take reasonable steps to partition the property.<sup>186</sup> Moreover, Regina noted that she was precluded from taking such action because she contractually agreed not to partition in the Merrill Lynch agreement.<sup>187</sup> SRS

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173. *Id.*

174. *Id.* at 1150.

175. *Id.* at 1152.

176. *Id.* Regina's argument supports an inference that she intended to give up her rights in the stock.

177. *Id.* (citing *Walnut Valley State Bank v. Stovall*, 574 P.2d 1382 (Kan. 1978)).

178. *Id.*

179. See Reply Brief of Appellant to Amicus Curiae Brief by Manorcure of Kansas, Inc. at 11, *Brewer*, 102 P.3d 1145 (No. 03-91044-S).

180. *Id.* at 10.

181. *Brewer*, 102 P.3d at 1150.

182. *Id.* at 1150-51.

183. *Id.* at 1151.

184. *Id.*

185. *Id.* at 1153.

186. See KAN. ADMIN. REGS. § 30-6-106(c)(1) (2003).

187. *Brewer*, 102 P.3d at 1152.

claimed Regina did not satisfy her evidentiary burden because she failed to file for partition or present evidence that the costs of such a partition would exceed her interest in the stock.<sup>188</sup> Following SRS's rationale, the court ruled that, while the agreement could be used as a defense to a partition by Regina's nieces, it was reasonable to require Regina to attempt the action because she failed to establish that the costs would be economically inefficient.<sup>189</sup> Relying on *Fischer v. Kansas Department of Social Rehabilitation Services*,<sup>190</sup> the majority reaffirmed that applicants have the burden of proving Medicaid eligibility and held that Regina failed to establish such eligibility.<sup>191</sup>

Additionally, Regina claimed that requiring her to file for partition was contrary to federal law.<sup>192</sup> Citing the Social Security Administration's Program Operations Manual System (POMS), she argued that her jointly owned stock would not be considered an available asset for Supplemental Security Income (SSI) eligibility purposes.<sup>193</sup> Under POMS, an applicant is not required to "undertake litigation in order to accomplish sale or access" of property.<sup>194</sup> Although SRS agreed that POMS does not require litigation, it asserted that the Kansas regulations requiring reasonable steps to overcome legal impediments were consistent with POMS.<sup>195</sup> The Kansas Supreme Court recognized that federal law prohibits states from including resources that would not be deemed available under SSI and acknowledged that Regina's stock would not be incorporated under SSI and other similar programs.<sup>196</sup> The court, however, gave deference to SRS's interpretation and held that Regina was obligated to attempt partition.<sup>197</sup> The Kansas Supreme Court determined that the entire

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188. *Id.* at 1154; Reply Brief of Appellant to Amicus Curiae Brief By Manorcare of Kansas, Inc. at 9-10, *Brewer*, 102 P.3d 1145 (No. 03-91044-S).

189. *Brewer*, 102 P.3d at 1153. Section 30-6-106(c)(1) of Kansas Administrative Regulations provides that a Medicaid "applicant . . . shall pursue reasonable steps to overcome [any] legal impediment" on any otherwise available asset "unless it is determined that the cost of pursuing legal action would exceed the resource value of the property, or that it is unlikely the applicant . . . would succeed in the legal action." KAN. ADMIN. REGS. § 30-6-106(c)(1) (2003).

190. 21 P.3d 509 (Kan. 2001).

191. *Brewer*, 102 P.3d at 1153.

192. *Id.*

193. Petition for Writ of Certiorari at 6, *Brewer*, 125 S. Ct. 2944 (No. 04-1444).

194. *Id.* (quoting U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § 01120.010). POMS provides several examples when property would not be considered a resource. U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § 01120.010, *available at* <http://policy.ssa.gov/poms.nsf/lnx/0501120010!opendocument> (last visited Feb. 3, 2006). In one example, an applicant owned stock in joint tenancy with another person. *Id.* The joint tenants were subject to a binding agreement that one would not sell without the consent of the other—POMS does not consider the stock an available resource unless the applicant could convince the other tenant to sell. *Id.*

195. *Brewer*, 102 P.3d at 1154.

196. Petition for Writ of Certiorari at 6, *Brewer*, 125 S. Ct. 2944 (No. 04-1444).

197. *Id.*

value of the stock was an available resource to Regina, and it re-instated SRS's denial of Medicaid benefits.<sup>198</sup>

### B. *Dissenting Opinion*

Justice Robert Davis dissented, reasoning that Regina's transfer of stock vested an undivided one-third interest in Regina and each of her nieces.<sup>199</sup> He admitted that the concepts of transfer and availability of assets are not mutually exclusive but concluded that attributing the full value of the stock to Regina was contrary to both federal and state law.<sup>200</sup> Regina's ability to realize her interest was dependent upon her nieces' agreement to sell the stock.<sup>201</sup> Justice Davis recognized that, pursuant to established joint tenancy law, Regina's interest in the stock was an undivided one-third interest and that partition would likely consume her interest.<sup>202</sup> He determined that Regina's stock should have been unavailable to her for purposes of Medicaid eligibility.<sup>203</sup>

## V. COMMENTARY

The Kansas Supreme Court's decision in *Brewer* significantly alters the rules governing estate planning and government-funded healthcare by creating a new approach to determine whether assets held in joint tenancy are available for purposes of Medicaid eligibility. This approach ignores traditional rules of property and tax law. The court incorrectly ruled that property held in joint tenancy is an "available resource" for determining Medicaid eligibility, even when the transfer occurred within the federal Medicaid guidelines. Failing to define what constitutes "reasonable steps" to overcome a legal impediment for a Medicaid applicant who holds property in joint tenancy, the court left the state of the law uncertain for Kansas practitioners.

By effectively limiting the number of elderly citizens eligible for Medicaid, *Brewer* is the most recent decision in a line of cases that demonstrates the court's disapproval of Medicaid planning. This hostility toward *legal* Medicaid planning negatively affects elderly individuals' ability to receive greatly needed medical attention. With the influx of elderly citizens applying for Medicaid as a method of funding healthcare, it is imperative to understand how the law of Medicaid will impact eligibility. Kansas should follow the well-reasoned approach

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198. *Brewer*, 102 P.3d at 1154.

199. *Id.* at 1155 (Davis, J., dissenting).

200. *Id.*

201. *Id.*

202. *Id.* at 1156.

203. *Id.* at 1158.

of other jurisdictions that recognize the legitimacy of Medicaid planning.

### A. *Implications of Brewer v. Schalansky*

The court violated federal Medicaid eligibility requirements when it failed to consider Regina's 1994 transfer valid and included assets that would not be considered for SSI eligibility. With the court's reliance on state interpretation of eligibility rules, the federal Medicaid statute loses significance, thereby undermining the federal government's influence on Medicaid. The holding in *Brewer* contradicts traditional rules of joint tenancy by effectively creating a new test for determining a Medicaid applicant's interest in co-owned property and by failing to provide future applicants with guidance on how to satisfy the requirements for Medicaid eligibility.

#### 1. Improperly Extending the Federal Look-Back Period Creates Ambiguity

Federal Medicaid eligibility requirements exclude any valid transfer that occurs three years prior to an application.<sup>204</sup> Because the Kansas Supreme Court invalidated Regina's 1994 transfer that occurred outside the look-back period, it circumvented this federal requirement. Regina transferred the stock long before she applied for Medicaid and well before the three-year look-back period.<sup>205</sup> The court should have considered Regina's 1994 transfer valid because she satisfied all of the property transfer requirements under Kansas law. Therefore, Regina's transfer should not have affected her Medicaid eligibility.

When it invalidated Regina's 1994 transfer, the court avoided a federal Medicaid requirement. Federal law is only concerned with transfers that occur within three years of the Medicaid application.<sup>206</sup> This limit indicates that any transfer prior to the look-back period does not compromise Medicaid eligibility.<sup>207</sup> If Congress intended to prohibit *all* Medicaid planning, then it could have made the look-back period unlimited or prohibited any transfer in anticipation of long-term care. By only extending the look-back period to three years from the date of application, it is reasonable to assume that Congress is not opposed to Medicaid planning under all circumstances.

SRS and the Kansas Supreme Court incorrectly determined that Regina's 1994 transfer failed to meet Kansas joint tenancy require-

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204. 42 U.S.C. § 1396p(c)(1) (2000).

205. *Brewer*, 102 P.3d at 1149.

206. See 42 U.S.C. § 1396p(c)(1).

207. Jason A. Frank, *The Necessity of Medicaid Planning*, 30 U. BALT. L.F. 29, 36 (1999).

ments. Kansas courts have acknowledged that the most important element of the state's joint tenancy statute is the intent requirement.<sup>208</sup> SRS questioned the intent of Regina's original transfer by suggesting that she only added her nieces' names to avoid probate; however, Regina stated her intent was not to make a fraudulent transfer but to repay her nieces for the care provided to her.<sup>209</sup> Concerned that Regina's transfer was the product of careful Medicaid planning, the court attacked the validity of her original transfer.<sup>210</sup> Regina's 1994 transfer, however, met the statutory requirements regarding intent. She included the names of her nieces on the stock and specifically stated that she intended to transfer the stock "as joint tenants with rights of survivorship."<sup>211</sup> This language establishes her intent to create a joint tenancy.<sup>212</sup> After Regina's 1994 transfer, her interest in the stock was significantly altered—she no longer had complete control over the entire value.<sup>213</sup> The court's conclusion that Regina retained an ownership interest in the stock and the authority to liquidate the property after the 1994 transfer is in conflict with Kansas law.

Under *Brewer*, future applicants may be exposed to ineligibility even if asset transfers were made within the established federal rules. The court circumvented the look-back period when it reasoned that Regina's original intent was only to avoid probate and when it considered her 1994 transfer in determining her Medicaid eligibility. Because the court considered Regina's original transfer, future Medicaid applicants in Kansas will no longer be able to rely on the three-year look-back period. Like Regina, applicants who transfer assets prior to the look-back period may still be ineligible for Medicaid because SRS can deny benefits by demonstrating that the applicant did not possess the requisite intent to transfer property.

## 2. The Kansas Supreme Court Created a New Test for Jointly Held Property

The Kansas Supreme Court erred when it considered the entire value of Regina's stock "available" for purposes of Medicaid eligibility. The stock should have been excluded under Medicaid eligibility rules because Regina's contract with Merrill Lynch prohibited the sale of the stock without the consent of all the joint tenants; thus, the agreement was a legal impediment on Regina's interest. Additionally, by ignoring traditional property and tax law, the court effectively cre-

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208. *Winsor v. Powell*, 497 P.2d 292, 299 (Kan. 1972).

209. *Brewer*, 102 P.3d at 1151.

210. *Id.* at 1149.

211. *Id.* at 1147.

212. *See Winsor*, 497 P.2d at 299.

213. *Brewer*, 102 P.3d at 1149.

ated a new test for determining interests in co-owned property for Medicaid eligibility purposes. The court's reasoning, if applied to other areas of the law, would cause substantial harm to individuals owning property as joint tenants by requiring all tenants to be responsible for the entire value of the jointly owned property.

By concluding Regina's 1994 transfer was invalid, the court had to address the value of Regina's interest in the stock for her Medicaid eligibility. The court considered the implications of Regina's agreement with Merrill Lynch and its impact on her ability to dispose of the stock because the agreement was formed within the penalty period.<sup>214</sup> Regina's agreement with Merrill Lynch prohibited her from transferring the stock without the consent of the other joint-owners.<sup>215</sup> By requiring a new stock certificate every time ownership changed, Merrill Lynch ensured that the parties acted jointly.<sup>216</sup> Unlike a bank account held in joint tenancy, in which the addition of names to an account does not necessarily limit the transferor's control over the whole account, Regina's agreement prohibited her from realizing anything but one-third of the proceeds, and she was unable to sell the stock alone.<sup>217</sup>

The Kansas Supreme Court's decision is contrary to the Kansas Economic and Employment Support Manual (KEESM). KEESM, designed by SRS to provide guidance for the state Medicaid program, lists examples of legal impediments that would preclude an asset's availability.<sup>218</sup> The manual defines legal impediment as property that "is inaccessible pending the disposition of divorce proceedings, *jointly owned property [that] cannot be disposed of due to the refusal of the other owners to agree to a sale, or inability to obtain clear title.*"<sup>219</sup> Similarly, the State Medicaid Manual for the Centers for Medicare and Medicaid Services (CMS) is the official interpretation of the law and regulations and is binding on Medicaid state agencies.<sup>220</sup> This manual, like the state regulations, provides that if placing another's name on the asset limits the individual's right to sell or dispose of it, then such placement constitutes a transfer of assets.<sup>221</sup> The Kansas Supreme Court ignored the possible ramifications that Regina would

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214. *Id.* at 1153.

215. *Id.*

216. *See id.*

217. *Id.*

218. KEESM, *supra* note 95.

219. *Brewer*, 102 P.3d at 1152 (quoting KEESM, *supra* note 95). Since the decision in *Brewer*, KEESM has been revised, and joint ownership is no longer considered a legal impediment. *See* KEESM, *supra* note 95, § 5200(3).

220. CTRS. FOR MEDICARE & MEDICAID SERVS., STATE MEDICAID MANUAL, *Forward*, available at <http://www.cms.hhs.gov/manuals/PBM/itemdetail.asp?filterType=none&filterByDID=0&sortByDID=1&sortOrder=ascending&itemID=CMS021927> (last visited Feb. 3, 2006).

221. *Id.* § 3258.7 ("[T]he addition of another person's name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before . . .").

face had the contract with Merrill Lynch been breached. If Regina successfully divested her interest, then she would have been liable to the remaining joint tenants and Merrill Lynch under breach of contract because the agreement required the consent of all joint tenants for the sale of stock.<sup>222</sup> Regina's contract with Merrill Lynch placed a legal impediment on her interest in the stock under KEESM and federal law; therefore, the stock should have been considered transferred under the eligibility requirements, and Regina only should have been attributed one-third of the entire value.

In addition to refusing to recognize the Merrill Lynch agreement as a legal impediment, the court erred when it refused to follow the traditional rules governing joint tenancies. The court denied Regina Medicaid benefits because it attributed to her the entire value of the jointly owned stock.<sup>223</sup> Kansas law provides for a rebuttable presumption of equal ownership among joint tenants.<sup>224</sup> Generally, in property and tax law, joint tenancy allows all co-tenants an equal right to the use and enjoyment of the property.<sup>225</sup> The presumption of equal ownership allows equal allocation of expenses and taxes among joint tenants.<sup>226</sup> However, if joint tenancies are no longer presumed to be equally owned, the rights of co-tenants are undeterminable until ownership can be established. Thus, taxes on jointly held property and proceeds of the sale of such property would require an inquiry into each joint tenant's interest before proceeds and responsibilities may be distributed. Requiring complicated legal action to determine ownership interests of joint tenants would likely increase cost and substantially delay the Medicaid application process.<sup>227</sup>

Under the court's rule, each joint tenant may be attributed the full value of jointly owned property without any court proceeding to determine ownership interest.<sup>228</sup> This rule would require all tenants to pay property tax and expenses for the entirety of jointly owned property.<sup>229</sup> The court's creation of a new standard for judging joint tenancies for Medicaid eligibility purposes creates complexity within joint-tenancy law and, if extended beyond Medicaid eligibility, could cause substantial harm to owners of property held in joint tenancy. If the court's new standard is applied to other areas of the law, then its implications may extend far beyond Medicaid and into the areas of

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222. *Brewer*, 102 P.3d at 1152.

223. *Id.* at 1151. Regina likely would have been eligible for Medicaid if the court followed the general principle of joint ownership and attributed only one-third of the stock's value to her. *Id.* at 1156 (Davis, J., dissenting).

224. *Walnut Valley State Bank v. Stovall*, 574 P.2d 1382, 1386 (Kan. 1978).

225. *See supra* text accompanying note 49.

226. *See supra* Part III.A.

227. *See The Missouri Bar, supra* note 60.

228. *See Brewer*, 102 P.3d at 1151.

229. *See Lassila, supra* note 62.

tax, securities, and contracts.<sup>230</sup> Thus, the court should have followed the rules established for joint tenancies and only considered one-third of the stock's value.<sup>231</sup>

### 3. The Unclear Standard of "Reasonable Steps"

Denying Regina's Medicaid application, the court concluded that she did not take "reasonable steps" to overcome the legal impediment on her stock. The Kansas Supreme Court erred when it left the state of the law uncertain for Medicaid applicants who possess assets with legal impediments.<sup>232</sup> Without guidance about what constitutes reasonable steps, applicants are left to "experiment" with their Medicaid eligibility.

To become eligible for Medicaid, Kansas Administrative Regulations and KEESM generally require applicants to pursue reasonable steps to overcome legal impediments on their assets.<sup>233</sup> The regulations further provide that an applicant is not required to pursue such action when the cost would exceed what the applicant would gain, or when the likelihood of a favorable outcome is remote.<sup>234</sup> It is clear that a partition action is not *required* when a Medicaid applicant can establish that the action would likely be unsuccessful; however, it remains unclear how to satisfy the reasonable steps test to receive Medicaid benefits.<sup>235</sup> The court stopped short of stating that an applicant must file for partition but did not address whether considering the action, hiring an attorney, or notifying co-tenants would sufficiently establish that the applicant took reasonable steps.<sup>236</sup>

In *Brewer*, SRS concluded that even though the Merrill Lynch contract prohibited Regina from selling her interest in the stock without the consent of the other joint tenants, she had a duty to seek a partition.<sup>237</sup> Without further analysis, the Kansas Supreme Court upheld SRS's decision, leaving it unclear to future applicants what rea-

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230. If the court allows each joint tenant to be accredited with the entire value of jointly owned property, then each joint tenant would be subjected to taxes, not just over the individual interest, but over the entire value. See KBA, *supra* note 61. This allocation would permit the government to overlap tax collection. Accrediting each joint tenant the entire value of the property may also affect an owner's ability to secure a loan with the property. If one tenant has offered the collateral as security, and she is attributed the full value, then other co-tenants may be prevented from using the property to secure loans, substantially impairing their right to contract.

231. See *Brewer*, 102 P.3d at 1154 (Davis, J., dissenting).

232. *Id.* at 1151 (majority opinion).

233. KAN. ADMIN. REG. § 30-6-106(c)(1) (2003) ("The applicant . . . shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would exceed the resource value . . . or that it is unlikely the applicant or recipient would succeed in the legal action"); KEESM, *supra* note 95, § 5200(3)(a)(ii).

234. KEESM, *supra* note 95, § 5200(3)(a)(ii).

235. See KAN. ADMIN. REGS. § 30-6-106(c)(1).

236. See *Brewer*, 102 P.3d at 1151-54.

237. *Id.* at 1152.

sonable steps are necessary to overcome any legal impediment and receive care under Medicaid. This decision does not clarify the law; it only adds greater confusion to the already complex Medicaid regulations.

B. *The Kansas Supreme Court's Continued Hostility Toward Medicaid Planning*

Although the court does not expressly address the use of Medicaid planning as a means of obtaining Medicaid eligibility, *Brewer* is not the court's first attempt to deter Medicaid planning. The Kansas Supreme Court's hostility toward Medicaid planning is also apparent in its decision in *Miller v. Kansas Department of Social and Rehabilitation Services*.<sup>238</sup> Changes in the Medicaid regulations should be made by legislators, not by judges. The court's hostility toward Medicaid planning may negatively affect other areas of the law. The court should have followed the reasoning of the Kansas Court of Appeals in *In re Estate of Lasater*,<sup>239</sup> or allowed the legislative process to correct perceived defects in the Medicaid law.

*Brewer* is not the first case in which the Kansas Supreme Court has questioned the legality of Medicaid planning.<sup>240</sup> One year prior to *Brewer*, the court limited Medicaid eligibility by disregarding federal Medicaid regulations.<sup>241</sup> In *Miller*, the court held that the entire value of a testamentary trust was "available" for Medicaid eligibility purposes.<sup>242</sup> This position, however, was contrary to established Medicaid law.<sup>243</sup> Expressly declaring its objections to Medicaid planning, the court's reasoning demonstrates its intent to prohibit future planning in anticipation of long-term care.<sup>244</sup>

This hostility, although not expressly stated, is also apparent in *Brewer*. Both *Miller* and *Brewer* were transferred from the district court to the Kansas Supreme Court on its own motion, rather than on appeal from the court of appeals.<sup>245</sup> It is reasonable to infer from these transfers that the court is concerned with the validity of Medicaid planning. Unlike *Miller* and *Brewer*, the Kansas Court of Appeals previously accommodated Medicaid planning in *In re Lasater*.<sup>246</sup>

238. See *Miller v. Kan. Dep't of Soc. & Rehab. Servs.*, 64 P.3d 395, 397 (Kan. 2003).

239. 54 P.3d 511 (Kan. Ct. App. 2002).

240. See, e.g., *Miller*, 64 P.3d at 397.

241. See generally *id.* (holding that Medicaid was "not intended to provide subsistence to those with other resources").

242. *Id.*

243. *Myers v. Kan. Dep't of Soc. & Rehab. Servs.*, 866 P.2d 1052, 1055 (Kan. 1994) (holding that a discretionary trust is not an available asset for Medicaid eligibility).

244. *Miller*, 64 P.3d at 399.

245. *Brewer v. Schalansky*, 102 P.3d 1145, 1146 (Kan. 2004), *cert. denied*, 125 S. Ct. 2944 (2005); *Miller*, 64 P.3d at 397.

246. *In re Estate of Lasater*, 54 P.3d 511, 514 (Kan. Ct. App. 2002).

The court of appeals determined property held in joint tenancy passed outside of the Medicaid beneficiary's estate at death and was not subject to Medicaid estate recovery rules.<sup>247</sup> The Kansas Supreme Court took an interest in Medicaid cases after the court of appeals' approach in *Lasater*. The supreme court's motions to transfer *Miller* and *Brewer* are evidence of the court's hesitance to recognize Medicaid planning as legitimate.

The court's interest in deterring Medicaid planning, even if valid, should not occur at the expense of the elderly. Until Medicare satisfies the long-term care needs of elderly citizens, the court should allow Medicaid planning because it is both legal and necessary. The Kansas Supreme Court's hostility negatively affects future applicants by limiting eligibility and complicating the law outside of Medicaid regulations. Although the court's concerns about Medicaid planning are shared by other members of the legal community,<sup>248</sup> it erred when it established new tests for Medicaid eligibility and ignored existing regulations in its effort to deter Medicaid planning.

### C. Medicaid Planning: A Necessity for the Elderly

The court's hesitance to accept Medicaid planning will likely become a great concern as the demand for Medicaid increases.<sup>249</sup> The court's solution only results in confusion for Medicaid applicants. Medicaid provides minimum care for impoverished elder Americans, creating a significant problem. Medicaid planning, however, offers some elderly the opportunity to supplement their care and increase their standard of living. Additionally, Medicaid planning is similar to tax planning, a well-established means of preserving assets, and should be given the same credence. Although objections to Medicaid planning may be valid, this planning remains the only viable solution so long as access to long-term healthcare continues to be cost prohibitive.<sup>250</sup>

#### 1. Medicaid Planning Provides an Increased Standard of Care

Advocates for the elderly argue in favor of Medicaid planning because it preserves private funds to be used for healthcare expenses that are deemed "not medically necessary" under the current Medi-

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247. *Id.*

248. See Takacs & McGuffey, *supra* note 16, at 132-35 (listing the common objections to Medicaid planning).

249. See *supra* Part III.

250. The government set the Medicaid "poverty" level at approximately \$2,000 and that number does not correspond with the increasing costs of long-term care, making eligibility requirements difficult. Lisa W. Foderaro, *For a Comfortable Old Age, Plan for Care, Experts Advise*, N.Y. TIMES, Mar. 30, 1990, at A1. The result is that middle-class seniors are ineligible for public healthcare assistance but do not have the income to pay for nursing home expenses. *Id.*

caid plan.<sup>251</sup> Because Medicaid does not cover the cost of items that make living in a nursing home more comfortable, such as clothing and even dentures, elder Americans must pay for these items themselves.<sup>252</sup> A Medicaid recipient, relying solely upon the Medicaid allowance, can rarely afford privacy or choice when faced with decisions for long-term care.<sup>253</sup> Medicaid benefits provide only a minimum standard of care.<sup>254</sup> Long-term care is often subsidized by passing assets to a trusted friend or relative under a Medicaid-planning strategy.<sup>255</sup> Those assets can then be used to purchase additional services, improving the elder's quality of care, and in the process, her quality of life.<sup>256</sup>

There are other practical reasons for a Medicaid applicant to preserve assets. If a nursing home patient must be admitted to a hospital, then Medicaid will only hold that individual's place in the long-term care facility for a few weeks.<sup>257</sup> Medicaid planning allows a trusted person access to funds that will reserve a nursing home space. The process allows some elderly to plan for the future and does so within the bounds established by the federal and state Medicaid laws.<sup>258</sup> Until the healthcare system can satisfy the requirements of the elderly, Medicaid planning provides an option for preserving funds to cover outside expenses.<sup>259</sup> While *Medicare* covers home health visits and nursing home stays under limited circumstances, Medicaid's coverage is more extensive.<sup>260</sup> As a result, the elderly who rely on Medicare to

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251. Takacs & McGuffey, *supra* note 16, at 122. A common objection to Medicaid planning is that those who can afford to pay for private care have a duty to do so because the Medicaid system was established to provide care for only the truly needy, not to enable taxpayers to subsidize their care and keep assets to pay for benefits not covered by Medicaid. Some commentators argue that Medicaid planning will lead to a deprivation of care for those for whom Medicaid was intended. *Id.* at 133-34.

252. *Id.* at 138.

253. The Code of Federal Regulations provides a list of services that a nursing home patient may be required to pay from her monthly personal expenditure fund. 42 C.F.R. § 483.10(c)(8)(ii) (2005). Medicaid fails to cover necessities such as eyeglasses and dentures. See Elder Law Practice of Timothy L. Takacs, *Is Medicaid Planning Ethical?*, <http://www.tn-elderlaw.com/medicaidethics.html> (last visited Feb. 3, 2006) [hereinafter *Elder Law Practice*].

254. Joseph S. Karp & Sara I. Gershbein, *Poor on Paper: An Overview of the Ethics and Morality of Medicaid Planning*, 79 FLA. BAR J. 9, 61 (Oct. 2005), available at <http://www.florida-bar.org/DIVCOM/JN/JNJournal01.nsf/0/3ec0e68f0210448685257088006f81c6?OpenDocument>.

255. *Id.*

256. *Id.* This type of Medicaid planning presents negative consequences by leaving the elder vulnerable to financial abuse from those entrusted with the elder's care. *Id.* If the person in charge of the assets is not obligated to use the transferred assets to enhance the Medicaid beneficiary's quality of life, then he "may do with the money as [he] please[s]." *Id.*

257. Cynthia M. Brubaker, *Medicaid Eligibility: Planning for the Elderly Client*, 26 U. BALT. L.F. 15, 23 (1995). If a patient forfeits her room in the nursing home, then she likely will have problems locating a new long-term care facility upon her discharge from the hospital. *Id.*

258. Takacs & McGuffey, *supra* note 16, at 131-32.

259. *Id.* Takacs notes that "[w]ithin [the current] system, Medicaid planning is not only ethically justified, it is imperative to the individual's survival." Elder Law Practice, *supra* note 253.

260. Compare 42 U.S.C. § 1396 (2000) and 42 C.F.R. § 409.31(b) (2005) (providing Medicaid coverage for long-term care, including chronic conditions such as Alzheimer's disease), with 42 U.S.C. § 1395-1395ccc (2000) and 42 U.S.C. § 1395f(a)(2)(B) (providing limited Medicare coverage for long-term care in nursing home stays when the beneficiary can satisfy strict prerequi-

subsidize their healthcare costs face substantial financial exposure when forced to enter a long-term care facility.<sup>261</sup> For these reasons, Medicaid planning is a legitimate tool for elder Americans to overcome deficiencies in the current system.

## 2. Medicaid Planning: A Legitimate Method for Preserving Resources

Medicaid planning involves many types of asset transfers that are similar to those used in tax planning.<sup>262</sup> Tax avoidance techniques, such as gifting funds, re-titling assets, and creating trusts, are often the same tools used in Medicaid planning.<sup>263</sup> Although the methods of transfer are similar, tax planning is widely accepted as a legitimate method of wealth protection while Medicaid planning is often condemned.<sup>264</sup> As Judge Learned Hand once wrote,

We agree with the . . . taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one chooses, to evade, taxation. Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.<sup>265</sup>

The same principle applies to Medicaid planning.<sup>266</sup> An individual has no duty to deplete all of her assets when there are legal means by which to protect assets and still qualify for Medicaid benefits. Medicaid planning allows individuals to receive long-term care while tax planning simply deprives the government of revenue.<sup>267</sup> The distinction between practices that allow citizens of any age to conserve per-

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sites). Medicare provides benefits to people who suffer acute illnesses but leaves individuals with chronic illnesses to drain their assets to fund long-term care. See Takacs & McGuffey, *supra* note 16, at 152. The distinction disadvantages individuals who require long-term care by forcing them to expend their assets on treatment, while the same distinction assists individuals who suffer from an acute illness by providing benefits under Medicare. It is astonishing that Medicare, the government's healthcare plan for elderly citizens, does not cover the increasingly common medical necessity of long-term care.

261. Brubaker, *supra* note 257, at 15. When an older person enters a hospital for medical reasons, the government covers nearly all expenses through Medicare, without questioning the Medicare beneficiary's financial resources. *Id.* If an individual must enter a nursing home for medical reasons, the government requires individuals to fund their nursing home care until they satisfy the Medicaid regulations and have few remaining assets.

262. Frank, *supra* note 207, at 38. Federal gift and estate tax laws allow individuals to give away up to \$1.5 million without incurring any tax liability. See I.R.C. § 2010(c) (2002) (allowing tax credits for estate tax purposes). In 2006, that exclusion amount will increase to \$2 million. *Id.*

263. See Brent A. Mitchell, *Medicaid Planning for the Elderly: Using Supplemental Discretionary Trusts to Pay the Costs of Long-Term Care*, 31 WASHBURN L.J. 80, 94-95 (1992).

264. See John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81, 99 (2003).

265. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934).

266. Critics to Medicaid planning note that citizens, if financially able, have a civic duty to pay for their own care, even if the transfer rules permit them to legally shift the cost to the Medicaid system. Takacs & McGuffey, *supra* note 16, at 133-34.

267. See Miller, *supra* note 264.

sonal wealth and practices that allow senior citizens with limited assets to receive critical healthcare is illusory.

Critics often distinguish Medicaid planning from tax planning by arguing that Congress intended Medicaid to supply healthcare for only the “truly impoverished,” while taxes are imposed on everyone.<sup>268</sup> However, Medicaid eligibility rules imply otherwise.<sup>269</sup> Although Congress has never expressly stated that Medicaid should provide long-term care for the elderly, it has instituted a number of rules that implicitly expand the program to assist the elderly.<sup>270</sup> Seemingly, Medicaid is, or should be, available to anyone who meets the requirements. The statutory framework implies that Medicaid should provide healthcare to anyone who can satisfy the requirements—whether that person is “truly impoverished” or engaged in Medicaid planning.<sup>271</sup> In fact, the Medicaid policies established by the federal government often cause individuals in need of long-term care to engage in Medicaid planning.<sup>272</sup> It is a legal way to balance the problems created by Medicare, a system that provides limited healthcare to senior citizens, with the problems created by Medicaid, a system that provides limited healthcare to the medically needy.

If the Medicaid eligibility requirements remain stagnant and the Kansas Supreme Court continues to erode Medicaid planning strategies, then individuals may reduce their savings or spend personal funds earlier to avoid later depleting their assets on long-term healthcare.<sup>273</sup> Medicaid planning enables some elderly citizens to receive long-term care and maintain a healthy standard of living by providing resources for services not covered by Medicaid.

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268. See Frank, *supra* note 207, at 39.

269. See *id.* Presumably, the medically needy lack the types of resources that require regulations involving property exemptions and the transfer of assets addressed by Medicaid.

270. The regulations and policies regarding transfers, exemptions, and the formulas for calculating penalties all require effective planning to qualify for benefits. See 42 U.S.C. § 1396p (2000). Even unauthorized transfers do not prohibit benefits altogether; such transfers only limit an individual's eligibility. See generally *id.* § 1396a (requiring penalties and fines for transfers that do not satisfy the specified requirements).

271. See *id.* § 1396p.

272. Barnes, *supra* note 17 (asserting that Medicaid rules are complex “because Congress intended them to apply to people who were not always poor”). Barnes cites *Wisconsin Department of Health & Family Services v. Blumer*, 534 U.S. 473 (2002), in which the Supreme Court recognized that Medicaid is not only a welfare program but also an entitlement for the middle class. Barnes, *supra* note 17, at 268. “[T]he Court recognize[d] the fact that many elders who plan and apply for Medicaid are not destitute . . . [and] acknowledged that people who are not poor are the intended beneficiaries.” *Id.* at 297. Medicaid's means-testing approach to eligibility contradicts values that are firmly embedded in American culture: hard work and saving. Miller, *supra* note 264. The social value inherent in the process of passing property at death “seem[s] to occupy a special place in the hearts of many Americans, even those who cannot realistically expect to inherit anything of significance.” Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 75 (1990). Many elderly individuals diligently work for years to preserve assets for loved ones but deplete those assets on the costs of long-term care. Miller, *supra* note 264, at 101.

273. When presented with the option to either spend their entire savings on long-term care or provide for their families, the elderly will likely choose the latter.

#### D. Future Trends

Kansas is not alone in the battle over Medicaid planning; other states have joined the debate.<sup>274</sup> While courts generally agree that Medicaid planning sometimes diverts government-funded healthcare from the truly poor to middle-class Americans, most recognize its value.<sup>275</sup> For example, a New York court noted that federal law did not penalize transfers made prior to the look-back period.<sup>276</sup> The court stated the following: “[T]he simple fact is that current law rewards prudent ‘Medicaid planning.’”<sup>277</sup> Thus Kansas should have followed the well-reasoned approach of other states that recognize Medicaid planning as a legitimate means to finance the costs of long-term care.

Similarly, other courts recognize the lawfulness of Medicaid planning and acknowledge it as a valuable tool for preserving personal wealth for future generations and for protecting one’s inheritance.<sup>278</sup> One court noted that “a competent, reasonable individual . . . would prefer that his property pass to his child rather than serve as a source of payment for Medicaid and nursing home care bills where a choice is available.”<sup>279</sup> These courts recognize that the average income of the elderly, when coupled with the rising costs of long-term care, require the government to provide some form of public assistance.<sup>280</sup> Unfortunately, Medicaid, the only program available to date, bases eligibility on overly restrictive income tests.<sup>281</sup>

Critics of Medicaid planning argue that the abuses of the public healthcare system result in a depletion of the overall financial resources available to the truly impoverished.<sup>282</sup> For some critics, the

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274. See, e.g., *In re John XX*, 652 N.Y.S.2d 329, 331 (App. Div. 1996) (holding that Medicaid planning on behalf of an incapacitated individual was legal); *In re Daniels*, 618 N.Y.S.2d 499, 502 (Sup. Ct. 1994) (holding that Medicaid planning was consistent with state law).

275. See generally *Blumer*, 534 U.S. at 473 (recognizing Medicaid as a tool for the middle class to receive healthcare); *In re Keri*, 853 A.2d 909 (N.J. App. Div. 2002) (allowing a daughter to transfer assets to hasten her mother’s Medicaid eligibility); *In re Daniels*, 618 N.Y.S.2d at 502 (holding that Medicaid planning was consistent with state law).

276. *In re John XX*, 652 N.Y.S.2d at 331. In the court’s decision in *In re John XX*, an elderly man suffered a stroke and was later transferred to a nursing home. *Id.* His guardian petitioned the court for approval to transfer a large sum of the man’s assets to his children. *Id.* The transfers were “intended as a Medicaid and estate planning device to shield the bulk of . . . assets from a potential Medicaid lien for the cost of nursing facility services . . .” *Id.* The court noted that “it cannot be reasonably contended that a competent, reasonable individual in his position would not engage in the estate and Medicaid planning proposed in the petition.” *Id.*

277. *Id.*

278. See, e.g., *In re Daniels*, 618 N.Y.S.2d at 504. The court acknowledged the legality of Medicaid planning when it stated that “it appears that . . . the law provides a manner for her to preserve a portion of her estate for the benefit of her daughter and the issue of her other daughter.” *Id.* at 504.

279. *Id.*

280. See *supra* note 275.

281. See Frank, *supra* note 207, at 41.

282. See Michael A. Glueck & Robert J. Cihak, *Medicaid for the Wealthy*, NEWSMAX.COM, Jan. 20, 2004, <http://www.newsmax.com/archives/articles/2004/1/20/33701.shtml>.

distribution of financial responsibility and public healthcare raises concerns about who is, and who should be, paying for long-term care.<sup>283</sup> Medicaid planning is a valuable tool for the elderly who require long-term care; however, evidence demonstrates that a small number of elderly actually transfer assets for the sole purpose of Medicaid eligibility.<sup>284</sup>

When deciding *Brewer*, the Kansas Supreme Court ignored traditional joint tenancy and Medicaid law in an effort to deter Medicaid planning. The effects of its decision extend beyond Medicaid regulations. The elderly in states like New York, that recognize the validity and legitimacy of Medicaid planning, have an improved ability to finance long-term care. The Kansas Supreme Court should have considered the ramifications of its hostility toward Medicaid planning and followed the reasoning of states such as New York.

## V. CONCLUSION

Medicaid is one of the most complex federally-sponsored programs.<sup>285</sup> Deficiencies in the program stem not only from the practical application of the provisions, but also from its narrow scope of coverage and unrealistic eligibility requirements. The Medicaid program has failed to respond to the changing needs of society, specifically the increased number of elderly requiring long-term care. The dramatic rise in nursing home costs has forced many elderly Americans into poverty in an effort to qualify for government assistance. Medicaid planning provides a legal alternative that allows an individual to receive medical attention, reducing her exposure to financial harm.

The Kansas Supreme Court erred when it held that property owned in joint tenancy is an “available resource” for Medicaid eligibility. Because the court incorrectly held that the full value of property held in joint tenancy is an “available asset” for Medicaid purposes, it has effectively limited access to medical care for society’s most vulnerable. The Kansas Supreme Court’s hostility toward legal Medicaid planning impairs the ability of elderly Kansans to receive long-term

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283. See *supra* Part III.A. In 2003, Medicaid paid nearly fifty percent of the nation’s nursing home costs, individuals funded just over twenty-five percent, and private insurance companies paid less than ten percent. CTRS. FOR MEDICARE & MEDICAID SERVS., NATIONAL HEALTH EXPENDITURES BY TYPE OF SERVICE AND SOURCE OF FUNDS, tbl.7, available at <http://cms.hhs.gov/NationalHealthExpendData/downloads/nhetables.pdf> (last visited Jan. 3, 2006).

284. O’Brien, *supra* note 14, at 7. Research shows that approximately four out of ten elderly citizens would be eligible for Medicaid if they created a trust but less than one in ten had done so. *Id.* at 6.

285. See *Friedman v. Berger*, 547 F.2d 724, 727 n.7 (2d Cir. 1976) (stating public assistance provisions and regulations are “almost unintelligible to the uninitiated”); see also *Herweg v. Ray*, 455 U.S. 265, 279 (1982) (Burger, C.J., dissenting) (describing Medicaid as “a morass of bureaucratic complexity”).

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care. Kansas Medicaid applicants can no longer rely on the eligibility rules established by federal and state agencies. Instead, the elderly are at the mercy of the court to determine whether they will receive benefits for long-term care. Finally, the court has created changes that extend far beyond Medicaid, and the ramifications of *Brewer v. Schalansky* will endure for years to come.

