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WE WOULDN'T BE HERE IF IT WEREN'T FOR THEM: ENCOURAGING FAMILY CAREGIVING OF INDIGENT PARENTS THROUGH FILIAL RESPONSIBILITY LAWS

*Katie Sisaket*¹

I. INTRODUCTION

John Pittas' mother (hereinafter referred to as "Patient") was transferred to a Health Care and Retirement facility (hereinafter referred to as "HCR") for skilled nursing care and treatment in September 2007, after completing rehabilitation for injuries she sustained in a car accident.² Patient resided at HCR and received treatment until March of 2008, when she withdrew from the facility and fled to Greece.³ Patient incurred a large portion of bills, owed to HCR for her residency and treatment, that went unpaid after her relocation.⁴

HCR sought to hold John Pittas (hereinafter referred to as "Pittas") personally liable for Patient's outstanding debt by instituting a filial support action under Pennsylvania's Relatives' Liability statute.⁵ In 2012, the Superior Court of Pennsylvania found in favor of HCR in the amount of \$93,943.41.⁶ As part of their decision, the court found that Pittas was able to sufficiently support his indigent mother financially.⁷

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Finally, the author would like to dedicate this article to her grandmother Thong Phengphetsomboune. Thong has truly been an inspiration to the author with her continuous love, and encouragement.

² Health Care & Retirement Corp. of Am. v. Pittas, 46 A.3d 719, 720 (2012).

³ *Id.*

⁴ *Id.*

⁵ *Id.*; see also 23 Pa. C.S.A. §4603 (holding an adult child responsible to care for or provide financial assistance to an indigent person).

⁶ The case was submitted to arbitration where a three-member arbitration panel found in favor of Pittas. HCR appealed and the trial court reversed and entered a verdict against Pittas. 46 A.3d at 720.

⁷ HCR sufficiently provided evidence of Pitta's ability to financially support his indigent other based on his net income in excess of \$85,000 and his recent pay-off of making monthly payments of \$1,100.00 of a tax lien. *Id.* at 722.

States with filial responsibility laws have often ignored the enforcement of such laws, but the Pittas decision has some states reconsidering their filial statutes and enforcement. Generally, filial responsibility laws create a duty on the part of adult children to provide necessary support for an indigent parent when the parent is unable to afford to pay for their own support;⁸ however, these laws are different among states and are unclear as to the extent of how much support and maintenance the children must provide.⁹ For example, states that have filial responsibility laws do not provide a precise definition of “indigent” for purposes of determining when a parent is unable to provide their own support,¹⁰ In addition, no general time limit is placed on a child’s duty to provide support.

The question of who will care for our elders has become even more important as the Baby Boomer generation reaches its golden years, the life expectancies of those aged 65 and older grows, the costs of long-term care continue to rise, and the funding sources for care remain under pressure. Nearly thirty states have filial responsibility laws in place, and nursing homes and health care providers in these states may have increasing incentives to seek to use the statutes to compel adult children to either financially support their parent’s inability to support themselves or risk the cost themselves.¹¹ Minnesota is one of the remaining states that does not have a filial responsibility law in place; this must change. With the

⁸ Seymour Moskowitz, *Filial Responsibility Statutes: Legal & Policy Considerations*, 9 J.L. & POL’Y 709, 714 (2001).

⁹ Donna Harkness, *What are Families for? Re-Evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 323; *see also* IND. CODE ANN. §31-16-17 (West 2012) (referring to a duty to furnish support for parents if individual is able to provide financially when either parent is unable to financially support their “necessary food, clothing, shelter, and medical attention); *see also* TENN. CODE ANN. §71-5-115 (West 2012) (imposing liability on responsible parties of recipients of medical assistance).

¹⁰ Donna Harkness, *What are Families for? Re-Evaluating Return to Filial Responsibility Laws*, 21 ELDER L.J. 305, 323.

¹¹ Katherine Pearson, *Family (Filial) Responsibility Support Statutes in the United States*, PA. STATE LAW (Mar 5, 2012), https://pennstatelaw.psu.edu/_file/Pearson/FilialResponsibilityStatutes.pdf?_sm_au_=isVnJnDqDRn06Vfs.

uncertainty of how elders will receive proper care once they have reached their senior years, the state needs to relieve the burden of elders and government funding programs by splitting the responsibility among the indigent elder's adult children. This is a natural solution to the growing problem; after all, adult children would not have been able to grow without the early support (both emotionally and financially) from their elderly parents.

This article will encourage Minnesota to adopt a filial responsibility law that compels adult children to financially support their indigent elderly parent who can no longer afford the basic necessities. Part II of this article will briefly describe the historical background of filial responsibility laws and will demonstrate how Minnesota imposes liability on adult children without filial statutes. Part III will discuss the cost of elder care and the different resources elders may utilize in seeking funds through government programs. Part IV will analyze reasons as to why Minnesota should consider adopting a filial duty statute, and Part V will discuss proper methods to ensure a workable filial responsibility law in Minnesota. Lastly, Part VI will conclude by summarizing all the points previously mentioned and further encouraging adoption of filial responsibility laws in Minnesota.

II. FILIAL RESPONSIBILITY LAWS: HISTORICAL BACKGROUND

While it comes as no surprise that a parent has financial responsibility for his or her child, the idea of requiring an adult child to support an indigent parent has also been around for thousands of years. This section will briefly discuss the background of filial responsibility laws across the world. Then, this section will briefly look at Minnesota's preexisting ability to impose liability on adult children despite the lack of a filial statute in place.

A. The History of Filial Responsibility Laws

As mentioned, requiring support of adult children for an indigent parent has been around for thousands of years. Although the

duty to support one's elderly parents can be traced back as early as Roman law, the precursor of modern American filial statutes emanated from the Elizabethan Poor Relief Act of 1601.¹² The law held that the "father and grandfather and the mother and grandmother, and the children of every poor, old, lame, and impotent person" would be responsible for supporting poor family members.¹³ The law created a national poverty law system with the dual purposes of relieving general public support of indigent persons and reducing public expenditures through placing responsibility on financially secure relatives to provide such support.¹⁴

Mirroring the English model, most states in the United States had a basic program of poor relief by the twentieth century and, up until the 1960s, courts often enforced such laws.¹⁵ Since the 1930s' adoption of numerous government programs created to assist the elderly, many relatives have been relieved of his or her statutory responsibility to support indigent persons.¹⁶ For example, the enactment of the Social Security Act of 1935 sought to eliminate the indigent elderly by providing monthly cash benefits.¹⁷ In 1961, President Kennedy's administration, under the New Frontier era, initiated the pilot Food Stamp program.¹⁸ To assist with medical costs, President Johnson's Great Society added Medicare and Medicaid in 1965. Years later, in 1972, President Nixon's administration implemented Supplemental Security Income by

¹² Elizabethan Poor Relief Act, 1601, 43 Eliz. 1, c. 2 (Eng.); *see also* Robin M. Jacobson, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. REV. 518, 527-28 (1995) (discussing the history of the Elizabethan Poor Relief Act of 1601).

¹³ Moskowitz, *supra* note 7, at 711.

¹⁴ Jacobson, *supra* note 11, at 527.

¹⁵ Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 198 (1992).

¹⁶ *Id.* at 199.

¹⁷ *Id.*; *see also* 42 U.S.C.A. §401 (West 2014).

¹⁸ 7 U.S.C.A. §2011 (West 2014) (alleviating hunger and malnutrition of low-income households); *see also* *Supplemental Nutrition Assistance Program*, UNITED STATES DEP'T OF AGRIC. FOOD & NUTRITION SERV. (Nov. 20, 2014), <http://www.fns.usda.gov/snap/short-history-snap>.

providing monthly cash benefits to elders who were not qualified to receive regular social security payments.¹⁹

With the numerous government funding programs available to the United States' elderly, there has been very little need for enforcement and/or adoption of filial responsibility laws.²⁰ This decline of filial responsibility laws can be greatly contributed to the establishment of the Medicaid program in 1965.²¹ Several states quickly repealed or amended their filial responsibility laws shortly after the enactment of this program for fear of not being able to conform to Medicaid regulations or losing federal funds altogether.²² States were prohibited from considering "the financial responsibility of any individual for any applicant or recipient of assistance under the [Medicaid] plan unless such applicant or recipient is such individual's spouse or such individual's child who is under age 21 . . ." ²³ According to the Senate Finance Committee, the enforcement of filial responsibility laws were "often destructive and harmful to the relationships among members of the family group."²⁴

At the same time, however, the Health Care Financing Administration (hereinafter referred to as "HCFA") allowed state Medicaid administrators to require support of adult relatives from adult family members without violation of the Medicaid statute.²⁵ Although there have been states that have considered enforcement of filial responsibility laws after the 1983 HCFA Transmittal, the idea quickly dropped and no state has sought enforcement of such statutes

¹⁹ 42 U.S.C.A. §1382 (West 2014); *see also* Kline, *supra* note 14, at 199.

²⁰ These government-funding programs provide indigent elders benefits such as free transportation, free prescription drugs, property tax assistance, etc. Kline, *supra* note 14, at 199.

²¹ *Id.*

²² Andrea Rickles-Jordan, *Filial Responsibility: A Survey Across Time and Oceans*, 9 MARQ. ELDER'S ADVISOR 183, 198 (2007).

²³ 42 U.S.C.A. §1396a(a)(17)(D) (West 2014).

²⁴ S. Rep. No. 89-404, pt. 1, at 78 (1965), *reprinted* in 1965 U.S.C.C.A.N. 1943, 2986.

²⁵ Usha Narayanan, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to ... What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369, 385-86 (1996).

for medical expenses of an indigent parent since these changes in government programming.²⁶

Once largely ignored due to the government's lifting financial burdens to support an indigent parent from adult children, the *Pittas* decision and the increase in elder populations may spark a renewed interest in enforcing filial responsibility laws. Admittedly, the idea of holding adult children responsible for an indigent parent may seem farfetched; however, a trend towards strengthened filial responsibility policies is a real possibility across the country, and this issue has commentators chiming in from both perspectives.

B. Imposing Liability on Adult Children in Minnesota for Failing to Support an Indigent Parent through Means Other than Filial Statutes

Currently, thirty states that have filial responsibility laws, with the courts enforcing these laws through a cause of action that is civil, criminal, or both.²⁷ Twenty-one states currently impose a civil cause of action, although standing requirements to bring a cause of action under the state's statutes vary.²⁸ Additionally, some states

²⁶ Enforcement of filial responsibility laws by Idaho and New York dropped quickly after 1983 HCFA Transmittal. Kline, *supra* note 14, at 200.

²⁷ Allison E. Ross, *Taking Care of our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government's Assistance*, 16 ELDER L.J. 167, 173-77 (2008).

²⁸ These states include Alaska (*see* ALASKA STAT. §25.29.030 (West 2014)); Arkansas (*see* ARK. CODE ANN. §20-47-106 (West 2014)); California (*see* CAL. FAM. CODE §§ 4400, 4401, 4403, 4410-14 (West 2014), and CAL. WELF. & INST. CODE § 2350 (West 2014)); Delaware (*see* DEL. CODE ANN. tit. 13, § 503 (West 2014)); Georgia (*see* GA. CODE ANN. §36-12-3 (West 2014)); Idaho (*see* IDAHO CODE §32-1008A (2007)); Mississippi (*see* MISS. CODE ANN. §43-31-25 (West 2014)); Montana (*see* MONT. CODE ANN. §40-6-214 (West 2014)); Nevada (*see* NEV. REV. STAT. ANN. §428.070 (West 2014)); New Hampshire (*see* N.H. REV. STAT. ANN. §167.2 (West 2014)); North Dakota (*see* N.D. CENT. CODE §14-09-10 (West 2014)); Oregon (*see* OR. REV. STAT. ANN. § 109.010 (West 2014)); Pennsylvania (*see* 62 PA. CONS. STAT. ANN. §1973 (West 2014)); South Dakota (*see* S.D. CODIFIED LAWS §25-7-27 (West 2014)); Tennessee (*see* TENN. CODE ANN. §§71-5-115,103 (West 2014)); Utah (*see* UTAH CODE ANN. §17-14-2 (West

impose criminal penalties after an adult child fails to comply with mandated filial responsibility laws.²⁹

Although Minnesota repealed its filial duty statute, nursing homes and health care providers are permitted to seek payment of medical expenses from adult children, so long as they are named a “responsible party.”³⁰ Under Minnesota state statute, a responsible party is a person “who has access to the resident’s income and assets and who agrees to apply [the] resident’s income and assets to pay for the resident’s care or who agrees to make and complete an application for medical assistance on behalf of the resident.”³¹ Although the responsible party does not assume personal financial liability for another’s medical expenses, the courts may impose personal liability may if misapplication of the resident’s income or assets occurs.³² Therefore, applying personal liability to responsible parties requires: (1) access to resident’s assets, and; (2) the party’s agreement to apply those assets to pay for the resident’s care or the

2014)); West Virginia (*see* W. VA. CODE ANN. §9-5-9 (West 2014)); *see* Rickles-Jordan, *supra* note 21, at 199.

²⁹ These states include California (*see* CAL. PENAL CODE §270c (West 2014)); Connecticut (*see* CONN. GEN. STAT. ANN. §53a-4 (West 2014)); Indiana (*see* IND. CODE ANN. § 35-46-1-7 (West 2014)); Kentucky (*see* KY. REV. STAT. ANN. §530.050 (West 2014)); Maryland (*see* MD. CODE FAM. LAW §§13-101, 13-102, 13-103 (West 2014)); Massachusetts (*see* MASS. GEN. LAWS ch. 273, §20 (West 2014)); Montana (*see* MONT. CODE ANN. §40-6-301 (West 2014)); North Carolina (*see* N.C. GEN. STAT. ANN. §14-326.1 (West 2014)); Ohio (*see* OHIO REV. CODE §2919.21 (West 2014)); Rhode Island (*see* R.I. GEN. LAWS §§15-1-1, 15-10-7 (West 2014), R.I. GEN. LAWS §40-5-13 (West 2014)); Vermont (*see* VT. STAT. ANN. tit. 14 §§202, 203 (West 2014)); Virginia (*see* VA. CODE ANN. §20-88 (West 2014)). *Id.* at 199-200.

³⁰ MINN. STAT. §144.6501 (2014); *see also* MINN. STAT. §261.01. Repealed by Laws 1973, c. 650, art. 21, §33 (abolishing former filial responsibility laws in Minnesota).

³¹ MINN. STAT. §144.6501, subd. 1(d) (2014).

³² MINN. STAT. §144.6501, subd. 4(d) (2014); *see also* *Northfield Care Center, Inc. v. Anderson*, 707 N.W.2d 731 (Minn. 2006) (bringing action against deceased resident’s son for nursing home bill of approximately \$3,800 due. Although the son voluntarily signed the admission agreement as a responsible party, the Court held that the son would only be personally liable if he had misapplied the resident’s income or assets).

party's agreement to apply for medical assistance on the resident's behalf.³³

In addition, courts can hold Minnesota's adult children responsible for their parent's debts if the parents name the children as the financial power of attorney(s).³⁴ A power of attorney is a document used when a person decides that they want another adult making decisions in regards to their financial or property matters.³⁵ As part of this document, individuals designate a specific individual (and alternates) as the financial power of attorney who will make financial decisions on the individual's behalf when the individual cannot. Nursing homes and health care providers may utilize this designation by seeking unpaid bills of the deceased resident from the named financial power of attorney;³⁶ however, mismanaging of the resident's fund by the named financial power of attorney must be shown in order to recover.³⁷

III. ESTIMATING THE COST OF RETIREMENT

In the 2013 issue of AARP's "Health Newsletter," Fidelity Investments estimated that the cost for a 65-year-old couple to retire in the year 2013 would be \$240,000.³⁸ This rough estimate, however,

³³ See *Extendicare Health Services, Inc. v. Henderson*, 2007 WL 968896 (Minn. App. 2007) (unpublished) (avoided responsible party and fiduciary liability because Minnesota requires liability on responsible party only if the party has access to the resident's assets and agrees to apply those assets to pay for the resident's care or agree to apply for medical assistance on the resident's behalf).

³⁴ Chuck Roulet, *Filial Responsibility Laws can create Surprising Problems*, ROULET LAW FIRM (last visited Dec. 29, 2014), <http://www.rouletlaw.com/library/maple-grove-lawyer-warns-that-you-could-be-held-responsible-for-your-parent-s-nursing-home-bill.cfm>; see also MINN. STAT. §523.23 (2014).

³⁵ *Power of Attorney*, MINNESOTA JUDICIAL BRANCH (last visited Dec. 29, 2014), <http://www.mncourts.gov/selfhelp/?page=406>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Fidelity's cost estimate includes costs of deductibles and copayments, premiums for optional coverage for doctor visits and prescription drugs, out-of-pocket expenses for prescription drugs, and other expenses not covered by

does not take into account the cost of long-term care or additional costs incurred before one is eligible for Medicare if there was a need to take an early retirement.³⁹ The reason why retirement costs are so high is that the Baby Boomer generation can enjoy the improved technology and medical care that has allowed them to live longer.⁴⁰ Unfortunately, the perks of living longer also come with additional burdens, such as multiple health conditions.⁴¹

A. Cost of Living for Elders

The total national health care spending in 2010 reached \$2.6 trillion,⁴² with Minnesota's health care spending reaching \$37.7 billion in 2010.⁴³ Although the cost of healthcare spending is since slowly declining on a national level, the average state's health care spending was still 12.9 percent higher than Minnesota's per capita spending.⁴⁴ While the average health spending increases throughout adulthood and varies between men and women and by age,⁴⁵ it is

Medicare (i.e. hearing aids, eyeglasses). See Martha M. Hamilton, *What Health Care Will Cost you*, AARP BULLETIN (Jan./Feb. 2013), <http://www.aarp.org/health/medicare-insurance/info-12-2012/health-care-costs.html>.

³⁹ *Id.*

⁴⁰ Lynda Yamamoto, *Overcrowded Prisons and Filial Responsibility: Will States Utilize "Support of the Indigent" Statutes to Solve the Baby Boomer and Prison Crises?*, 41 RUTGERS L.J. 435, 437 (2009).

⁴¹ *Id.* at 437-38.

⁴² Marilyn Werber Serafini, *National Health Spending Grew Slowly in 2010*, KAISER HEALTH NEWS (Jan. 9, 2012), <http://kaiserhealthnews.org/news/2010-health-care-spending/>.

⁴³ *Minnesota Health care Spending and Projections, 2010*, MN DEP'T OF HEALTH (July 2012), <http://www.health.state.mn.us/divs/hpsc/hep/publications/costs/healthspending2012.pdf>.

⁴⁴ *Id.*

⁴⁵ Gary Claxton et al., *How Health Spending Patterns Vary by Demographics in the U.S.*, KAISER FAMILY FOUNDATION (last visited Dec. 29, 2014), <http://www.healthsystemtracker.org/2014/12/how-health-spending-patterns-vary-by-demographics-in-the-u-s/>.

documented that people ages 55 and over produced just over half of the health spending in 2012.⁴⁶

Based on a 2014 study, at least 70% of those over the age of 65 will need long term care services and/or support at some point of their lives.⁴⁷ The annual cost of home care for persons is \$52,624 for homemaker services and \$58,916 for a home health aide,⁴⁸ while the annual cost of adult day health care in 2014 is estimated at \$18,720.⁴⁹ Alternatively, the annual cost for a private, one bedroom assisted living facility is about \$40,830,⁵⁰ and nursing home costs range between an annual cost of \$83,264 for a semi-private room and \$88,542 for a private room.⁵¹

The cost of caregiving must also be taken into consideration. According to Caring.com's September 2014 "Yearly Usage and Attitude Survey," nearly half of family caregivers spent more than \$5,000 annually in caregiving costs.⁵² These costs include medications, medical bills, in-home care, and nursing home care.⁵³

⁴⁶ Persons fifty-five and over made up twenty-six percent of the population in 2012. *Id.*

⁴⁷ *Long Term Care Costs Across the United States*, GENWORTH (last visited Dec. 29, 2014), <https://www.genworth.com/corporate/about-genworth/industry-expertise/cost-of-care.html>.

⁴⁸ Homemaker Services make it possible for people to live in their own homes or to return to their homes by helping them complete household tasks that they cannot manage alone (i.e. clean houses, cook meals, or run errands.) Home Health Aides makes it possible for people who are elderly disabled, or too ill to live either in their own homes or residential care facilities. *Id.*

⁴⁹ Provides care during the day for elders at a community-based center for adults who do not need around the clock care but only care or supervision during the day. *Id.*

⁵⁰ Allows adults to live independently but may still require personal care and health services with assistance of activities of daily living. *Id.*

⁵¹ Provides 24-hour care for adults who need higher level of supervision and care. Nursing homes provide services such as personal care, room and board, supervision, medication, therapies and rehabilitation, and skilled nursing care. *Id.*

⁵² *Senior care Costs Index 2014*, CARING.COM (Sept. 2014), <https://www.caring.com/research/senior-care-cost-index-2014>.

⁵³ *Id.*

Nearly half of Caring.com users spent more than \$500 in pharmacy costs alone.⁵⁴

B. Government Assistance Programs for Elders

Fortunately, there are resources available for older persons in assisting them with retirement costs. Most of these resources come from the government assistance programs that resulted in the decline of use of filial responsibility laws. This subsection will discuss the three most common sources of income for elders: Medicare, Medicaid, and Supplemental Security Income.

i. Medicare

Medicare is the primary source of health care insurance for persons 65 years of age and older.⁵⁵ It is available to older adults regardless of their financial status and is primarily an age-based program.⁵⁶ However, Medicare does not pay all health care costs and beneficiaries are typically responsible for a variety of co-payments and deductibles.⁵⁷ ;⁵⁸ Overall, Medicare provides minimal assistance for medical care in that it only covers short-term care and those needing long-term care are either barely covered or not covered at all.⁵⁹ For example, Medicare only partially covers skilled nursing facility care excludes many services administered in the home

⁵⁴ Items include prescription or over the counter medications, personal care products, and home healthcare products. *Id.*

⁵⁵ NINA A. KOHN, ELDER LAW: PRACTICE, POLICY, AND PROBLEMS 246 (Vicki Been et al. eds., 1st ed. 2014).

⁵⁶ *Id.*

⁵⁸ Forms of care that are not covered include experimental treatments, treatments that Medicare program determines are not reasonable and necessary, and long-term care. *Id.*

⁵⁹ Katie Wise, *Caring for our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U.J. LEGIS. & PUB. POL'Y 563, 582 (2001-2002).

altogether.⁶⁰ Further, medical home health care coverage is limited and the “recipient must be homebound, require skilled nursing care, and need services on an intermittent, rather than continuous, basis” in order to receive coverage.⁶¹

ii. *Medicaid*

Unlike Medicare, Medicaid is not an age-based program, and the purpose of the program was intended as part of the government’s “safety net” for poor people.⁶² In addition, Medicaid differs from Medicare in that it covers long-term care.⁶³ The program coverage gives states discretion as to how the program is administered and even what they call their “Medicaid programs.”⁶⁴

Medicaid is only available to persons with limited income and resources.⁶⁵ To determine whether a person is eligible, two types of tests are used: the “categorically needy” test and the “medically needy” test.⁶⁶ A person is categorically needy if he or she is eligible for Supplemental Security Income (SSI);⁶⁷ however, not all income and resources are counted in determining Medicaid eligibility,⁶⁸ and only countable income is taken into consideration for Medicaid eligibility purposes.⁶⁹

⁶⁰ Services excluded include full-time nursing care, housekeeping services, drugs, or other therapies. *Id.*

⁶¹ *Id.*

⁶² Kohn, *supra* note 54, at 246.

⁶³ *Id.* at 276.

⁶⁴ States are given options ranging from whether the program covers particular types of individuals, whether it covers particular services, even how eligibility of services are determined. *Id.* at 276-77.

⁶⁵ *Id.* at 277.

⁶⁶ *Id.*

⁶⁷ SSI is only available to persons who have limited income and assets and who are either blind, disabled, or at least sixty-five years old. *Id.*

⁶⁸ *Id.*

⁶⁹ Countable income is any cash or in-kind income that can be used to meet an individual’s need for food or shelter. A person was eligible for SSI in 2013 was limited to countable monthly income of less than \$710 for an individual or \$1,066

After the state takes monthly cost of a person's qualified, out-of-pocket health care expenses into account, the state deems a person as medically needy through their meeting the same income and asset requirements as persons who are categorically needy.⁷⁰ At the same time, however, some states limit those who qualify as medically needy to persons below a certain income level,⁷¹ creating a "Medicaid gap" group.⁷²

iii. Supplemental Security Income

Approximately two million persons ages 65 and older receive Supplemental Security Income (hereinafter referred to as "SSI") in the United States, and many more are eligible but do not receive due to their failure to apply.⁷³ SSI provides monthly payments for persons with low income and few available resources who are also 65 years or older, blind, or disabled.⁷⁴ In order to qualify for SSI, an elder must meet both an income and resource test.⁷⁵

Eligibility for SSI is important; not only does it provide persons with extra income, but it may also lead to qualification for other benefits.⁷⁶ As discussed above, eligibility of SSI may deem a person categorically needy and allow that person to qualify for Medicaid.

IV. ANALYZING THE BENEFITS OF FILIAL RESPONSIBILITY LAWS IN MINNESOTA

for a couple, and countable resources of no more than \$2,000 for individuals or \$3,000 for couples. *Id.*

⁷⁰ *Id.* at 278.

⁷¹ Kohn, *supra* note 54, at 278.

⁷² Group consisting of persons who are ineligible for Medicaid but are impoverished because of their medical expenses. *Id.*

⁷³ *Id.* at 242.

⁷⁴ *Supplemental Security Income (SSI)*, SOCIAL SECURITY ADMINISTRATION (Aug. 2012), <http://www.ssa.gov/pubs/EN-05-11000.pdf>.

⁷⁵ Income is money a person receives (i.e. wages, Social Security benefits, food, and shelter). Resources are things that are things a person owns (i.e. real estate, bank accounts, cash, stocks, and bonds). *See* Kohn, *supra* note 54, at 242.

⁷⁶ *Id.* at 243.

Critics can be found on both ends of the spectrum, in opposition and support, of filial responsibility laws. While the idea of compelling adult children to support an indigent parent has spurred a hot debate on laws that have recently been ignored and unenforced, such laws are constitutional.⁷⁷ There have been numerous cases questioning the constitutionality of such laws, but those claims have proven unsuccessful.⁷⁸ Other arguments have been made for not adopting these laws, but this negative perspective is refuted by the further need to find alternative means to care for the growing population of elders.

A. Reduction Of Public Expenditures And Relieving The Government's Burden Of Being The Main Source Of Support For Elders

Those opposing adoption of filial responsibility laws argue that such laws will not reduce public expenditures and that any money saved would be outweighed by administrative costs to enforce

⁷⁷ California Supreme Court struck down the argument that the [law] violated the Equal Protection Clause in that it created a classification of a suspect class. The general duty of the adult child to support his or her indigent parent did not draw a distinction between children based on wealth but based on a child's ability to support his or her parents "to the extent of [his or her] ability." In addition, the laws met the rational basis test in that the state's purposes for such laws was to "relieve the public treasury of part of the burden cast upon it by the public assumption of responsibility to maintain the destitute." Because children reaped the benefits from the support of his or her parents, choosing adult children to support indigent parents to the extent of his or her ability was rational choice. *See Swoap v. Superior Court*, 10 Cal.3d 490, 504-506 (1973).

⁷⁸ Yamamoto, *supra* note 39, at 441; see also *Americana Healthcare Center. v. Randall*, 513 N.W.2d 566 (2009) (finding none of the claims in violated constitutional protections by ordering son to pay reasonable costs of mother's nursing home residency); *see also Groover v. Essex County Welfare Bd.*, 264 A.2d 143 (D.C. 1970) (finding no denial of equal protection for son charged under filial duty statute for support of indigent mother living in New Jersey while his non-D.C. resident siblings were not also forced to contribute).

these statutes.⁷⁹ For example, those opposed argue that enforcement of these laws would require the creation of new bureaucracies.⁸⁰ In 1983, the Health Care Financing Agency estimated that enforcement of these statutes could annually reduce government Medicaid spending by as much as \$25 million.⁸¹ Unfortunately, the actual amounts collected by states that chose to enforce its filial statute were lower than expected.⁸² This argument should receive a renewed view due to current circumstances, as, with the expectation of a longer life expectancy for the upcoming Baby Boomer generation, the estimated cost of Medicaid spending is expected to be even higher than before.⁸³

By adopting such laws and requiring adult children to provide support of an indigent parent to the extent of their ability, the government will be able to save millions of dollars annually.⁸⁴ Currently, the government is faced with a rapid increase in expenditures due to the growing population of elderly and insufficient revenue in government programs.⁸⁵ According to the United State Census Bureau, the population of Americans aged 65 to 84 is expected to increase by 205.2% from 2015 to 2060.⁸⁶ For American elders aged 85 to 99, the population of individuals in that age group is projected to increase by 312.9% from 2015 to 2060.⁸⁷

⁷⁹ Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support our Parents be Effectively Enforced?*, 36 FAM. L.Q. 501, 506 (2002).

⁸⁰ *Id.* at 506-07.

⁸¹ *Id.* at 507.

⁸² Idaho only collected \$30,000 of the expected \$1.5 million in 1984 when it chose to enforce its filial responsibility law. *Id.*

⁸³ Ross, *supra* note 26, at 182.

⁸⁴ *Id.* at 185.

⁸⁵ *Id.* at 184.

⁸⁶ Table 3. *Projections of the Population by sex and Selected age Groups for the United States: 2014 to 2060*, UNITED STATES CENSUS BUREAU (last visited Feb. 09, 2015), <https://www.census.gov/population/projections/data/national/2014/summarytables.html>.

⁸⁷ *Id.*

In 2012, the population of persons 65 or older was roughly 43.1 million, representing 13.7% of the U.S. population.⁸⁸ Statisticians believe that, by 2030, the population of this group will grow to about 72 million,⁸⁹ and further to 85 million by 2050.⁹⁰ Shifting the burden to provide for elderly parents to children will allow the government to use the saved expenses in Medicaid spending to provide public assistance to those elderly who are unable to rely on family support.⁹¹

In addition to reducing government expenditures, filial responsibility laws are needed to assist in elder support due to the uncertainty of government funding programs in the future. As the population grows older and lives longer, it is quickly becoming apparent that government funding programs did not anticipate a massive generational shift.⁹² Although the purpose of government programs is to assist older and poorer persons, it will need to expend more resources to sustain an already expensive system for support and care of the growing elder population.⁹³

In 2012, the Medicare program alone cost an estimated \$555 billion, covering more than 49 million elderly and disabled persons.⁹⁴ The Government Accountability Office (GAO) predicts that without some sort of program reform, Medicare's growth will be unsustainable over time, and, by 2034, the costs will represent 7.3%

⁸⁸ *A Profile of Older Americans: 2013*, ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., (last visited Feb. 09, 2015), http://www.agingresources.com/cms/wp-content/uploads/2014/07/Profile-of-Older-Americans_2013_Profile.pdf.

⁸⁹ Baby Boomer generation following World War II will turn sixty-five years old. See *Projected Future Growth of the Older Population: By Age: 1900-2050 Persons 65 and Older*, ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.aoa.acl.gov/Aging_Statistics/future_growth/future_growth.aspxhttp://www.aoa.acl.gov/Aging_Statistics/future_growth/future_growth.aspx.

⁹⁰ *Id.*

⁹¹ Ross, *supra* note 26, at 182.

⁹² Matthew Boehringer, *Intestate Succession for Indigent Parents: A Modest Proposal for Reform*, 45 U. TOL. L. REV. 121, 124 (2013).

⁹³ Ross, *supra* note 26, at 183.

⁹⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-283, HIGH RISK SERIES: AN UPDATE (2013), available at <http://www.gao.gov/assets/660/652133.pdf>.

of the gross domestic product.⁹⁵ The Medicare program has led to “serious management challenges” due to its size, complexity, and susceptibility to improper payments.⁹⁶ With Medicare spending growing more quickly than the growth in the economy for many years, the federal government will be faced with increasing challenges due to the continued growth of Medicare beneficiaries and program spending.⁹⁷

In addition, Medicaid is also an expensive program to maintain. Medicaid provides one of the largest sources of funding for medical and health-related services, costing the federal and state governments \$436 billion in expenditures.⁹⁸ The Medicaid program “accounts for more than twenty percent of state’s expenditures.”⁹⁹ With longer life expectancy and the continued aging of the Baby Boomer generation, Medicare and Medicaid costs are likely to continue to increase, thus leaving state governments to figure out how to provide necessary medical care on a respectable budget.¹⁰⁰

Due to increasing costs, elders may have limited access to necessary medical care as programs are being forced to scale back on the types of services offered.¹⁰¹ Limiting access to services through medical programs will likely hit the elder population the hardest. By alleviating the burden and requiring adult children to contribute financially, important health care and other basic necessities can be made available the elderly generation.¹⁰² In comparison to the rest of the population, the elder population in the United States spends twice

⁹⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-310, HIGH RISK SERIES: AN UPDATE (2007) *available at* <http://www.gao.gov/new.items/d07310.pdf>.

⁹⁶ Improper payments in 2005 were approximately \$11 billion. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-283, HIGH RISK SERIES: AN UPDATE (2013), *available at* <http://www.gao.gov/assets/660/652133.pdf>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-310, HIGH RISK SERIES: AN UPDATE (2007), *available at* <http://www.gao.gov/new.items/d07310.pdf>.

¹⁰⁰ Ross, *supra* note 26, at 182.

¹⁰¹ *Id.* at 182-83.

as much on health care.¹⁰³ Unfortunately, although Medicare covers a majority of the elderly, recipients are still required to contribute financially toward medical costs, and “nearly half of all medical care costs come from [a] non-Medicare source.”¹⁰⁴ This can also be a concern. While the elderly may have other sources of support available, such as Social Security benefits,, Social Security serves as the only pension plan for retirement for nearly half of all Americans.¹⁰⁵ The benefits are modest and those who have private pensions may find coverage insufficient.¹⁰⁶

Additionally, the Social Security program itself may also see a decline in available resources in the future, as the Baby Boomer generation did not have as many children as previous generations.¹⁰⁷ As the generation reaches their golden years, the decline of childbearing means that there will be a lack of workers contributing financially to the Social Security program.¹⁰⁸ In fact, statisticians expect that the program will have a revenue shortage and be unable to meet its promised obligations by 2032, leaving older Americans to seek other ways of support.¹⁰⁹ By adopting filial responsibility laws, the revenue shortage will not have a drastic impact on the elder population because they can be assured that they can seek other means of support through their adult children for basic necessities.

B. Strengthening Family Ties Through Moral Obligations

Many of those in favor of filial responsibility laws believe that an adult child has a primary obligation to provide support to their

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Seymour Moskowitz, *Still Part of the Clan: Representing Elders in the Family Law Practice*, 38 FAM. L.Q. 214, 216 (2004).

¹⁰⁶ Seymour Moskowitz, *Adult Children & Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 401, 414 (2002).

¹⁰⁷ Boehringer, *supra* note 90, at 121.

¹⁰⁸ *Id.*

¹⁰⁹ Moskowitz, *supra* note 7, at 715.

parents through a reciprocal contract theory.¹¹⁰ This theory is based on the notion that the child has reaped many benefits in their upbringing due to their parent's support from the child's birth until well into adulthood.¹¹¹ Therefore, it is rational to return the favor when a parent is struggling to financially provide for themselves of the basic necessities (such as food, shelter, clothing and medical care) that the parent provided to the adult child as they grew.¹¹²

Opponents of enforcement of filial responsibility laws argue that children did not ask to be born, but that it was the parents' conscious decision to bear children.¹¹³ In addition, opponents fear that an adult child may be forced to support an indigent parent indefinitely,¹¹⁴ whereas parents, except for rare instances, only have a legal obligation to support children up until they are eighteen years of age.¹¹⁵

i. Building communication

Regardless of one's point of view in the morality debate, there will be some adult children who do feel some sort of indebtedness to those who raised them.¹¹⁶ In fact, some elderly parents are not always willing to accept help from those they once cared for and may feel a sense of shame.¹¹⁷ According to a survey, 10% of elder parents believed that adult children should provide support and 33% believed that the parents should provide their own support.¹¹⁸

Filial responsibility laws are not meant to create any sort of strained relationship based on indebtedness or shame, but are rather meant to encourage family relationships. With the shift away from a

¹¹⁰ Edelstone, *supra* note 77, at 504.

¹¹¹ *Id.*

¹¹² *Id.* at 501.

¹¹³ Yamamoto, *supra* note 39, at 468.

¹¹⁴ Edelstone, *supra* note 77, at 506.

¹¹⁵ *Id.*

¹¹⁶ Wise, *supra* note 57, at 569.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

rural and agrarian society, coupled with the structural changes in the organization of American families, the number of “elder orphans” is expected to grow.¹¹⁹ Elder orphans are those elder persons who lack assistance from family, either because they are not nearby or alive.¹²⁰

With parents and children living further apart, the ability to assist elder parents, or even to stay in frequent contact, is challenging. According to research, social isolation and loneliness are said to cause “depression, deterioration, and erosion of health and quality of life among elder Americans.”¹²¹ The absence of any “caring, interpersonal, committed relationship” will also affect an elderly person emotionally, psychologically and physiologically.¹²² Adoption of filial responsibility laws will all but force families to talk more with one another.¹²³ Whether this communication involves a phone call to check in on the elder parent or more in-depth planning of the elder parent’s needs in the future, the overall incentive is to improve family communication. Also, discussing filial duties and limitations “can clarify the respective positions of the family members by allowing the adult child and elder parent to maintain their autonomy while they are cultivating a healthy relationship.”¹²⁴ In these ways, filial responsibility laws will not only serve as financial support to elder parents but will also serve to enhance quality of life.¹²⁵

ii. *Building Values*

Lastly, encouraging members of the family to care for one another will create values for the younger generation. This familial relationship will instill within children the proper ways of treating

¹¹⁹ Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 869 (2005).

¹²⁰ *Id.*

¹²¹ Harkness, *supra* note 8, at 329.

¹²² *Id.*

¹²³ Edelstone, *supra* note 76, at 504.

¹²⁴ *Id.*

¹²⁵ *Id.*

those around them.¹²⁶ Children learn by example; by seeing how one human being treats another human being, children will have a sense of obligation as to how they should and should not treat others.

Even if one does not have the sense of a moral obligation to care for their elderly parents, adult children should think about themselves in the same situation.¹²⁷ Although young and healthy members of society today, even good health deteriorates and is not promised forever. Contributing their income and resources to provide medical care and necessities to the current elder population may foreshadow what is yet to come in the future in that “they may need to call on the next generation of younger members do the same for them.”¹²⁸ Filial responsibility laws may allow adult children assurance of necessary care needed when they are older and avoidance of poverty and need to seek other avenues of medical care support.¹²⁹

C. Ensuring Minimal Living Standards For The Continuing Elder Population Living Under The Poverty Line

As mentioned above, the elder population has various financial resources available. Even with the numerous resources, the obstacle for some is actually being eligible to receive the benefits. A majority of the elder population relies on Social Security benefits as their main source of income and these benefits are exclusively relied on by one-third of this population.¹³⁰ At the same time, however, government programs for the elderly have not been successful in eliminating poverty. Poverty among the elder population continues although there is extensive government aid.¹³¹ According to the United States Census Bureau, the poverty rate for people 65 years

¹²⁶ Wise, *supra* note 57, at 568.

¹²⁷ Harkness, *supra* note 8, at 329.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Ross, *supra* note 26, at 183.

¹³¹ Wise, *supra* note 57, at 568.

and older increased from 3.9 million in 2012 to 4.2 million in 2013.¹³² Poverty rates nearly doubled for women between 2001 and 2009.¹³³ It is expected that 7% of Depression-era babies are likely to live in poverty at the age of 67.¹³⁴

The driving forces of increasing poverty with the older population are aging and the spending down of their savings.¹³⁵ Aging often leads to medical complications, and the association of failing health and medical costs are big contributors to poverty in old age.¹³⁶ In addition, many individuals spend down their savings too quickly and therefore have to rely solely on their remaining source of income, such as Social Security.¹³⁷

In connection with quickly spending down savings, much of the Baby Boomer generation lacks a savings and retirement plan.¹³⁸ They have not saved enough for “sufficient resources for retirement.”¹³⁹ 1/3 of those surveyed did not believe they had saved enough in their retirement savings.¹⁴⁰ In addition, many retirement plans were devastated during the recession, which began in 2007, thus hurting those who had not saved enough initially.¹⁴¹

Not only are filial responsibility laws focused on helping those who are living near or under the poverty line, but they also

¹³² Carmen DeNavas-Walt & Bernadette D. Proctor, *Income & Poverty in the United States: 2013: Current Population Reports*, U.S. CENSUS BUREAU (Sept. 16, 2014), <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

¹³³ Emily Brandon, *Poverty Increasing Among Retirees*, U.S. NEWS & WORLD REPORT (May 21, 2012), <http://money.usnews.com/money/retirement/articles/2012/05/21/poverty-increasing-among-retirees>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Boehringer, *supra* note 90, at 124.

¹³⁹ *Id.*

¹⁴⁰ Those surveyed expected to work after they turned 65 either because they wanted to (31%) or because they felt they needed to in order to pay necessary expenses (38%). *Id.*

¹⁴¹ *Id.*

ensure that as people are growing older, they are going to be provided with a minimal standard of living. It is the right of elder persons to have access to the basic necessities of life such as food, clothing, medical care and shelter.¹⁴² With states under tight enough budgets, states are less likely to find ways to alleviate poverty by including additional benefits.¹⁴³ In a political environment favoring budget cuts over increases, it may seem as though the government has its hands tied.¹⁴⁴ Without the ability to do more, the other alternative to ensuring the needs of our elder population is to impose financial obligations to care for indigent parents.

V. MAKING FILIAL RESPONSIBILITY LAWS MORE APPEALING

Modern enforcement of filial responsibility laws is minimal. With the growing elder population surpassing the government's ability to meet this population's needs in the near future, however, conflicting views on financial support of indigent parents should be revisited in order to allocate public and private responsibility to meet these needs. While a majority of children in the United States already provide their parents with some sort of emotional and/or financial support without the need for filial responsibility laws, others believe that such laws will discourage family caregiving due to the fear that adult children will be sanctioned either criminally or civilly for not meeting caregiving standards imposed by the statutes. This does not have to be the case. Below are some recommendations proposed to encourage family support to indigent elders and alleviate the burdens of both state and the elder population to be able to seek the necessary care.

A. Clearing Ambiguities

¹⁴² Kline, *supra* note 14, at 207.

¹⁴³ *Id.* at 203.

¹⁴⁴ *Id.*

Before enforcing the statute to compel a child to support his or her parent, it is first important to determine if an elderly parent is considered “indigent.” As Matthew Pakula proposes, being considered poor under filial responsibility laws should not require an elderly person to lack all means of resources.¹⁴⁵ Although not limited to persons who are helpless or destitute, indigent persons should be defined to include persons who do not have sufficient means to provide for “their own care or maintenance.”¹⁴⁶ In addition, it is crucial to define the extent of an adult child’s responsibility in providing for his or her parent’s care or maintenance as providing for a parent’s basic necessities. Necessities are defined as “basic requirements of life.”¹⁴⁷ Therefore, Minnesota should include in its filial statute a definition of necessities to include such things as food, clothing, shelter, and medical care.¹⁴⁸

Lastly, there should be both a minimum age restriction and a durational cap regarding when, and for how long, an adult child should be responsible for an indigent parent. One of the main arguments for those opposing enforcement of filial statutes is that there is a cutoff age in which parents are no longer responsible for supporting their child, but an adult child may be held responsible for their indigent parents up until their death. Including provisions regarding time will ease concerns of having to provide endless support.

In the United States, a child is considered an adult at the age of eighteen. In a changing society, the age of maturity is not the best indicator as to the ability of an adult child to provide support for their indigent parent, let alone themselves. Matthew Pakula proposes that the minimum age at which to create a duty amongst an adult child is either at the age of 21 or six months after graduating college.¹⁴⁹ Unfortunately, the reality is that not every recent graduate will land

¹⁴⁵ Pakula, *supra* note 117, at 873.

¹⁴⁶ Verna v. Verna, 432 A.2d 630, 633 (1981).

¹⁴⁷ *Necessaries*, OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/us/definition/american_english/necessary?q=necessaries&searchDictCode=all#necessary__10 (last visited Feb. 11, 2015).

¹⁴⁸ Pakula, *supra* note 117, at 873 (citing CAL. PENAL CODE §270c (1999)).

¹⁴⁹ *Id.* at 874.

a job and become financially stable, nor will a majority of 21 year old young adults land a job in which they will be making enough to support both their own household and their indigent parent.

Therefore, the minimum age to enforce a filial statute on an adult child should be at the age of 25. In addition, if the adult child is still enrolled in a higher education, they should be able to defer such payments until six months post graduation. This minimum age is most appropriate because most adults at 25 have had the chance to create a greater earning capacity. In addition, individuals at this age will be able to understand and value their role as caretaker through educating him or herself.

Also, it is necessary for Minnesota to impose a cap on the amount of time that an adult child must provide for an indigent parent, because there may be limits on where the resource is coming from. For example, a majority of adults have the financial responsibility of supporting their own household, which may include things such as the house mortgage, basic necessities of their minor children, car payments, saving for their own retirement, etc. Having the earning capacity to provide for their own lifestyle may be straining on some families more than others. To have to include an additional burden, such as supporting an indigent parent, could cause even more stress.

Therefore, the adult child should be responsible for their indigent parent up until the adult child's age of retirement. The current issue with the need for filial responsibility laws is that the elder population is living longer than recent years. Relieving adult children of financially providing for their indigent parent when they reach their own retirement age will avoid one elderly population taking care of the next group of elderly. Also, the cost of retirement continues to skyrocket and it may be the case that by the age of their own retirement, the adult child may have only saved enough to support him/herself. At the same time, however, age should only be the starting point as to whether or not to enforce filial statutes to compel adult children to provide support for an indigent parent.

B. Determining Eligibility of an Adult Child to Support Indigent Parent

As mentioned above, other factors should be considered before compelling an adult child to provide support. It is important to reiterate that an adult child should be held liable for financial support of his or her indigent parent only to the extent of his or her ability. Therefore, important factors in determining eligibility are discussed further below.

First, the court should consider the adult child's financial ability. In determining whether an adult child can provide support and to what extent they can pay, the court should consider the individual's income. For a proper guideline to determine the adult child's financial ability, Minnesota should utilize its child support guidelines as a reference; like child support, basic necessities should be included.¹⁵⁰ Additionally, the court should consider medical support calculations in determining the adult child's ability to support his or her indigent parent. In contrast to medical support in child support, an elder parent's out of pocket medical costs should be considered, even after insurance coverage. Lastly, the number of children the elder parent has should also be considered. By considering the ability of multiple adult children, the court can alleviate some burden by allowing the children to seek support from each other in caring for their parents.

In addition to financial ability, the court should consider the adult child's ability to self-support. This determination would include an adult child's responsibility to his or her own family, including their overall financial obligation.¹⁵¹ When requiring an adult child to provide support for an indigent parent would deprive the individual of the ability to provide for their own necessities, courts are hesitant to compel support from the adult child.¹⁵² In considering self-support, the child support guidelines would once again be helpful for courts to consider. As is the case in determining

¹⁵⁰ Basic support is calculated in child support for expenses that include food, clothing and transportation. See *Basics on Child Support*, MN Judicial Branch <http://www.mncourts.gov/selfhelp/?page=1171> (last visited Feb. 11, 2015),.

¹⁵¹ Robin M. Jacobson, *Americana Healthcare Center v. Randall: The Renaissance of Filial Responsibility*, 40 S.D. L. REV. 518, 5 37-38 (1995).

¹⁵² Ross, *supra* note 26, at 169.

the amount of child support, 120% would be subtracted from the adult child's income, based on the Federal Poverty Guidelines, to allow money for self-support.¹⁵³ However, if the adult child's income is less than 120% of the Federal Poverty Guidelines, then the court has discretion to order the adult child to provide for the minimum basic support amount or nothing at all where it would leave them almost destitute.¹⁵⁴

C. Avoiding Liability

Even if the court determines that the adult child has the ability to provide support, critics are concerned about having to provide support for parents who did not provide such support for their children growing up. In addition to financial inability, adult children should be able to raise defenses in circumstances such as this in order to avoid having to provide support. Fortunately, most states with filial responsibility laws provide children with exceptions and defenses to their duty to provide support.

The most common defense used by adult children is abandonment. It would be against public policy for parents, who abandoned or deserted their minor children, to expect the law to compel any type of support of them (in their old age) by those children that they had abandoned.¹⁵⁵ It is important to note that this defense is only applicable to the parent-child relationship when the parent abandons the child during the child's minority. In order to properly raise an abandonment defense, Minnesota should consider California's abandonment criteria.¹⁵⁶

¹⁵³ Lynn Aves, Minnesota's Child Support Laws, MN House of Representatives (Aug. 2014), <http://www.house.leg.state.mn.us/hrd/pubs/chldsuff.pdf>; *see also* *Child Support Guidelines*, MN DEP'T OF HUMAN SERV., http://www.dhs.state.mn.us/main/idcplg?IdcService=GET_DYNAMIC_CONVERSION&RevisionSelectionMethod=LatestReleased&dDocName=id_000758#P67_2804 (last visited Feb. 11, 2015).

¹⁵⁴ *Id.*

¹⁵⁵ Boehringer, *supra* note 90, at 135.

¹⁵⁶ The California criteria states that the court must relieve an adult child from providing support for his or her parent if: (1) the parent abandoned the child when

Realistically, establishment of the abandonment defense may be difficult to prove.¹⁵⁷ If a parent had good cause to abandon the child, then there would be no abandonment defense. The court in the *Chryst v. Chryst* rejected the children's abandonment argument after their parents had left them in the care of their aunt for two and half years with no form of communication.¹⁵⁸ In order to raise a successful abandonment defense, the court required "actual desertion, accompanied with an intention to entirely sever . . . the parental relation and throw off all obligations . . ."¹⁵⁹ It was determined that the parents' relinquishment of parental rights was in the best interest of the children because of their inability to provide basic necessities.¹⁶⁰

Also, what constitutes abandonment may also be difficult to prove. The court in *Petition of Stark* rejected Stark's abandonment defense and found that a duty of financial support was owed to her mother even after the mother relinquished all parental rights to the father.¹⁶¹ The court found that Stark lacked evidence that her mother intended to sever the parental relationship entirely.¹⁶² In addition,

the child was a minor, (2) abandonment continued for two or more years before the child reached the age of eighteen years, and (3) the parent was physically and mentally able to support the child during the period of abandonment. See CAL. FAM. CODE §4411 (West 2014).

¹⁵⁷ Priscilla Day, *The Abandonment Defense to a Claim for Parental Support*, 11 J. CONTEMP. LEGAL ISSUES 380, 382 (2000).

¹⁵⁸ *Chryst v. Chryst*, 204 Cal. App. 2d 620 (1962).

¹⁵⁹ *Id.* at 623.

¹⁶⁰ The parents were farmers who were near destitute after a year of record crop failure resulted in their inability to provide for their children. The parents quickly resumed physical custody of their children after the aunt fell ill and was no longer able to care for the children. Based on whom the parents chose to care for their children, lack of evidence of the parent's ability to provide support for the children, and the quick resumption of custody, the court concluded that there was no intent to sever neither the parental relationship nor obligations to the children. *Id.*

¹⁶¹ Stark's mother gave up her parental rights after she was "mentally and physically" unable to care for Stark and her brother as a result of an undisclosed "terrible illness." See *Petition of Stark*, 182 Cal. App. 2d 20 (1960).

¹⁶² The mother visited Stark and her brother three or four times a year and never allowed more than two years to lapse between visits nor did she forget the children during the holidays. *Id.* at 26.

Stark failed to prove that her mother intentionally disrupted their relationship, which would have been manifested by an “actual desertion of the child, concomitant with an express declaration to abandon the child or by conduct which exhibits intentional disruption of the relationship.”¹⁶³

Even when an abandonment defense does not prove to be fruitful and the law does not provide an applicable defense, the adult child should be able to reduce the amount of support by seeking a partial order. Under the doctrine of unclean hands, taking into consideration a parent’s prior conduct would be a relevant factor in determining how much support a child is responsible for.¹⁶⁴ Important factors to consider in determining how much support the child owes are: 1). whether the parent paid child support while the child was a minor; 2). past treatment of the child¹⁶⁵, and; 3). whether the parent resumed physical custody and care of a child who was previously abandoned.¹⁶⁶

D. Imposing Civil, Not Criminal, Liability

Enforcement of filial responsibility laws differs among states. In addition, an adult child can be held liable for failing to provide support required under these laws. The extent of the liability depends on which state the statute is enforceable. At least 21 states impose civil liability for failure to adhere to the statute,¹⁶⁷ while 12 states

¹⁶³ The mother remarried and found herself “mentally and physically” able to bear and raise three more children but the fact that she never sought anything more than the occasional visitation was not enough for the court to find abandonment. *Id.*

¹⁶⁴ *Radich v. Kruly*, 226 Cal. App. 2d 683, 687 (1964).

¹⁶⁵ Daughter was liable for support of her father, but limited to support the minimum, after she was mentally and physically abused by her father. *Id.* at 683.

¹⁶⁶ Court determined that child was responsible for the amount of support equivalent to the percentage of time the father was present in the son’s childhood after the father abandoned his son for half of the child’s minority years but eventually returned. *See Gierkont v. Gierkont*, 134 A.2d 10 (1957).

¹⁶⁷ *Filial Responsibility*, THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM, http://theconsumervoice.org/uploads/files/issues/Filial_Responsibility_Memoran

allow criminal actions against adult children for failure to provide support.¹⁶⁸ However, only three states allow both civil and criminal actions.¹⁶⁹

The purpose of encouraging family caregiving is threatened by criminal sanctions because imposing a fine or prison sentence ultimately fails to provide elder persons the necessary care. By requiring an adult child to pay a fine or confining them to jail for failure to meet the statute, the individuals are less able to provide financial support. Therefore, failure to provide support under filial responsibility laws should only result civil actions and not criminal.

Rather than directing the remedy to the state, civil laws will allow the remedy to be directed at the parent or the institution that provided care. In addition, fines in criminal sanctions are not tailored to the particular situation, nor are they tailored towards the needs of the parent; therefore, the remedy should be determined in line with the amount of support needed. This will serve the purpose of filial responsibility laws in that it allows adult children to provide basic support to their indigent parents.

E. Rewarding Family Caregiving

As stated throughout this article, the purpose of filial responsibility laws is to encourage family support and strengthen family relationships. The negativity stems from critics who fear that the positive purpose will actually interfere with family relationships, causing tension and strains among families due to the additional burden. Creating a reward system for family caregivers will enable states to more easily enforce these statutes and will encourage more voluntary support from adult children rather than compelling support through statute.

dum.pdf, CARE (last visited Jan. 29, 2015); *see also* TENN. CODE ANN. §71-5-115 (West 2014).

¹⁶⁸ *Id.*; *see also* MASS. GEN. LAWS ch. 273 §20 (2014)(imposing a fine of up to two hundred dollars or imprisonment of less than a year or both for failure to provide support).

¹⁶⁹ *Id.*; *see also* CAL. FAM. CODE §4400 (West 2014)(imposing duty on adult child to support parent to extent of his or ability under its civil statute); CAL. PENAL CODE§270c (West 2014) (failing to provide basic necessities to an indigent parent is a misdemeanor).

i. Tax benefits

One effective method that has been used by some international countries to enforce its filial responsibility laws is the encouragement of financial support of indigent parents in exchange for tax deductions. Current tax provisions in the United States deny an adult child's ability to share their financial resources with their elder parent unless the care was so extensive that the elder parent would qualify as dependent. The purpose behind these tax provisions is not to encourage support of families, but instead the "need to generate income and to assist competing taxpayer groups . . ." ¹⁷⁰ As a result, an adult child's cost of care provided for their elder parents is affected by the tax policy. ¹⁷¹

Japan has effectively used the method of providing tax benefits.. Its health insurance coverage extends to nearly all of its residents; ¹⁷² however, tax benefits are used to reduce medical costs to those individuals providing home care who need to either rent or buy products necessary for the care. ¹⁷³ In addition, government loans are made available for remodeling or building extensions to the home to provide extra space for parents. ¹⁷⁴ Tax benefits are not only provided to individual caregivers, but are also given to agencies that promote family care. ¹⁷⁵ Thereby, Japan encourages home care of over hospitalization.

Minnesota should consider using these tax benefits in encouraging family care. Tax deductions should be determined by a percentage of voluntary support by the adult child prior to the parent becoming indigent and eligible for financial support through statute. Not only will this encourage support from adult children, but it will also give children incentive to provide necessary care voluntarily rather than being compelled through statute. In addition, deducting

¹⁷⁰ Narayanan, *supra* note 24, at 397.

¹⁷¹ *Id.*

¹⁷² Ross, *supra* note 26, at 204.

¹⁷³ *Id.*

¹⁷⁴ Moskowitz, *supra* note 103, at 440-41.

¹⁷⁵ *Id.* at 441.

the percentage of support from taxable income would not significantly affect the government's funds, because only a percentage of what is being deducted comes from the child's earnings.¹⁷⁶

ii. *Work leave programs*

The first time Congress considered elder-caregiving was in 1993 through the Family Medical Leave Act.¹⁷⁷ The Act extends leave to an employee to care for a "spouse, child, or parent" with a "serious health condition."¹⁷⁸ It guarantees the employee protection of his or her job "as if the employee had not taken leave" and continuation of health insurance coverage.¹⁷⁹ In addition, the Act takes into account the desire and need of many men to take an active role in caring for their parent by discouraging sex discrimination and including men in its definition of "caregiver."¹⁸⁰

Although this is a first step in facilitating care of elder parents by their adult child, Congress needs to amend the Act in order for it to appeal to adult children and encourage family care. For example, the Act only allows an employee twelve weeks of leave.¹⁸¹ This amount of time allotted for an authorized leave does not take into account long-term care needs of elder parents and is therefore not long enough. In addition, the Act only provides for three basic protections: restoration into the same position prior to the leave,

¹⁷⁶ Ross, *supra* note 26, at 209.

¹⁷⁷ Leave is allowed to provide care for a seriously ill family member. *See* Family Medical Leave Act, H.R. 925, 100th Cong. §103 (a)(1)(C) (1993).

¹⁷⁸ *Family & Medical Leave Act*, U.S. DEP'T OF LABOR <http://www.dol.gov/whd/fmla/> (last visited Feb. 11, 2015).

¹⁷⁹ *Fact Sheet #28: The Family & Medical Leave Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf> (last visited Feb. 11, 2015).

¹⁸⁰ Donna R. Lenhoff & Sylvia M. Becker, *Family & Medical Leave Legislation in the States: Toward a Comprehensive Approach*, 26 HARV. J. ON LEGIS. 403, 418 (1989).

¹⁸¹ *Fact Sheet #28: The Family & Medical Leave Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf> (last visited Feb. 11, 2015).

continuation of benefits throughout leave, and no penalization for taking authorized leave.¹⁸² These leave provisions are not feasible and impractical for most employees, because the Act does not provide money but only time.

Other countries in the world have enacted leave provisions that better allow adult children to care for their parents. Employees in Sweden are guaranteed up to 75% of his or her salary within the leave period.¹⁸³ At the same time, however, this paid leave is limited to 60 days in the lifetime of the person receiving care.¹⁸⁴ Fortunately, Sweden's family leave policy provides an incentive of employees of all socioeconomic classes to provide care for their family members, because the care leave reimbursement depends on the caregiver's income.¹⁸⁵

In addition, Japan has a somewhat similar family leave policy as in the United States. Japan's law also requires employers to grant employees up to twelve weeks of leave for care of family members, but employees are entitled up to 25% percent of their salary during the leave period.¹⁸⁶ Although only allowed to take the leave once, employers must still allow employees to work shorter days to care for family members who are in need of continual assistance.¹⁸⁷ In addition, Japan has been working to restructure its pensions plans. Restructuring has been specifically geared towards women to ensure they do not suffer inadequate pension due to gap of employment time caused by necessary work leave.¹⁸⁸

What can be taken away from the leave policies in other countries shows the possibility of enacting a more expansive leave policy in the United States. Making time and compensation available for those needing to take leave to provide care will allow leave to be more practical and feasible. Also, the infeasibility and

¹⁸² Joanna L. Grossman, *Job Security Without Equality: The Family & Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 20 (2004).

¹⁸³ Wise, *supra* note 57, at 593.

¹⁸⁴ *Id.* at 582.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Ross, *supra* note 26, at 205.

impracticability of the current Family Medical Leave Act only limits the incentive of family care of elder parents by punishing adult children in taking away compensation to those who choose to care for their elderly parent.

iii. Caregiver programs

The Older Americans Act of 1965 was established to provide funding for comprehensive services for older adults, such as family caregiving.¹⁸⁹ The purpose of the Act was to provide funding for a wide range of financial support to family members providing at home care for family members for as long as possible.¹⁹⁰ Unfortunately, compensation from these state programs to caregivers is limited to jurisdictions that recognize the importance of family caregiving.¹⁹¹

In contrast to caregiver payment programs of the United States, Sweden's law bases a caregiver's "salary" on the needs of the elderly person and how many hours are spent providing the care.¹⁹² In addition, the caregiver receives benefits, social insurance and pension credits as if they would in any other job and the payment the caregiver receives is subject to taxation (since Sweden considers the payment to be income.)¹⁹³ Concurrently, the caregiver must reduce

¹⁸⁹ OLDER AMERICAN ACT OF 1965, Pub. L. No. 89-73, 79 Stat. 218 (1965); *see also* OLDER AMERICANS ACT AMENDMENTS OF 2006, Pub. L. No. 109-365, 120 Stat. 2522 (2006); *see also* *National Family Caregiver Support Program (OAA Title III E)*, ADMIN. FOR CMTY. LIVING, http://www.aoa.acl.gov/AoA_Programs/HCLTC/Caregiver/#purpose (last visited Feb. 11, 2015) (discussing the purpose and eligibility of participant in under the Older American Act of 1965).

¹⁹⁰ Provides family caregivers services such as: respite care, information of caregivers about available services, assistance to caregivers in gaining accessing to the services, individual counseling, organization of support groups and caregiver training, and supplemental services on a limited basis. OLDER AMERICAN ACT OF 1965, Pub. L. No. 89-73, 79 Stat. 218 (1965).

¹⁹¹ Caregiver payments are only made available to residents of states with caregiver payment programs and to family members who provide care to elderly veterans. *See* Wise, *supra* note 56, at 592.

¹⁹² *Id.*

¹⁹³ *Id.*

or eliminate hours devoted to other employment in order to qualify for compensation.¹⁹⁴

Under Germany's caregiver payment program, the government contributes to the caregiver's pension fund so long as they devote at least fourteen hours per week to providing care and the caregiver is either unemployed or works less than 30 hours per week.¹⁹⁵ The government also gives elderly persons the option of two insurance benefit plans that allow them to maintain their dignity and independence.¹⁹⁶ The "benefits in kind" allows the adult child to provide home care and still being employed while the elder parent receives professional care services.¹⁹⁷ The "benefits in cash" allow the elder person to monetarily compensate their family caregivers.¹⁹⁸ In addition to compensation and added pension, caregivers are given up to one month of paid vacation and social insurance benefits.¹⁹⁹ These direct government payments allow at-home care through family caregivers and expand resources for community-based services.²⁰⁰

The Older Americans Act of 1965 shows that the United States is one step in the right direction when it comes to encouraging elder care. There is no doubt that caring for an elder parent can cause strain, not only emotionally, but also financially. By considering the experiences of other societies' ability to balance both the needs of the elder parent and the adult child, changes to the caregiver programs can help reduce or eliminate some of those strains.

VI. CONCLUSION

The advancement of technology has allowed people to live longer than before, but with more health problems. With the government's programs not anticipating this growth in elder

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Wise, *supra* note 57, at 592.

¹⁹⁸ *Id.*

¹⁹⁹ Moskowitz, *supra* note 103, at 444.

²⁰⁰ *Id.*

population, the lack of funds will limit an elder person access to the necessary basic care. Filial statutes compelling adult children to provide support to an indigent parent have been around for thousands of years. With proper drafting of a well-defined statute, a filial responsibility law will appeal to family caregivers and further its purpose of encouraging stronger family ties. Therefore, Minnesota should consider adopting its own filial responsibility laws to relieve elder persons with the worry of not being able to access the necessary medical and basic care required. Only by splitting the government's burden by imposing some duty on adult children will this be possible.