

# DEPARTMENT OF HEALTH AND SOCIAL SERVICES

## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512  
(31 Del.C. §512)

### FINAL

### ORDER

#### Long Term Care Medicaid

#### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend existing rules in the Division of Social Services Manual (DSSM) to comply with the transfer of assets provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171). The Department's proceedings to amend its regulations were initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the February 2007 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 2, 2007 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

#### SUMMARY OF PROPOSED AMENDMENT

##### Statutory Authority

Deficit Reduction Act of 2005 (Public Law 109-171), enacted on February 8, 2006

##### Background

On February 8, 2006, the Deficit Reduction Act (DRA) of 2005 was signed into law. The DRA made changes to certain Medicaid eligibility provisions in Section 1917(c)(1)(B)(i) of Social Security Act affecting Long Term Care services and supports.

##### Summary of Proposal

The DRA contains a number of provisions necessitating changes to Delaware rules. This regulatory action incorporates the mandatory provisions as it relates to: 1) *Purchase of Promissory Notes, Loans, or Mortgages*; and, 2) *Purchase of Life Estates*.

##### 1) *Purchase of Promissory Notes, Loans, or Mortgages*

Section 6016(c) of the DRA requires that when the long-term care Medicaid applicant/recipient holds the promissory notes, loans and mortgages, that they be actuarially sound, make payments in equal amounts with no deferral or balloon payments and prohibit cancellation of the balance at the death of the lender. Otherwise, the note, loan or mortgage may be considered a transfer of assets and the applicant/recipient will not be eligible for long-term care Medicaid services.

If the above criteria are not met, the purchase of the promissory note, loan or mortgage will be treated as a transfer of assets and the applicant/recipient will not be eligible for long-term care Medicaid services.

##### 2) *Purchase of Life Estates*

Section 6016(d) of the DRA provides that a life estate in a home property may be an excluded resource providing the purchaser reside in the home for a period of at least one (1) year after the date of purchase. The

Division of Social Services Manual (DSSM) was using the terms “Life Time Rights” and “Life Estates” interchangeably. The updated rules show the differentiation between these two terms.

The provisions of the DRA discussed above are effective for payments made under Title XIX of the Act for calendar quarters beginning on April 1, 2006, and thereafter.

## **SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES**

The State Council for Persons with Disabilities (SCPD) and Attorneys-at-Law, Thomas Herlihy, III and Laurence I. Levinson offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows.

### **SCPD**

First, in Section 20320.2.2.2, the last sentence should include after “addition”, the words and punctuation “effective 4/1/06”. See similar caveat in Section 20320.2.2 and DRA Section 6016(e).

**Agency Response:** DMMA agrees and have made this change.

Second, in Section 20320.2.2, last sentence, DMMA may wish to substitute “provided” for “providing”.

**Agency Response:** DMMA agrees and have made this change.

Third, in Section 20330.3, second bullet, substitute “of” for “or” after the word “deferral”.

**Agency Response:** DMMA agrees and have made this change.

Fourth, Section 20330.3, third paragraph, is structurally flawed. It recites that “DMMA will use the outstanding principal balance in determining resources unless the individual submits within 30 days the following information.” The “following information section is then deleted in its entirety. Council recommends retention of the current Pars. “a” and “b” and retention of the “strike out” language in the second paragraph. For example, an applicant may hold a note for an individual or firm that has filed bankruptcy or have a mortgage on real estate which has been condemned or been destroyed. The applicant should be allowed to demonstrate that the “principal balance” is not an accurate reflection of the true value of the note, mortgage, or other instrument.

**Agency Response:** Although, the comment is accurate, the applicant’s opportunity to rebut exists in §20320.2.2.6, *Rebuttal*. No change will be made to the regulation as a result of this comment.

### **Mr. Herlihy**

#### 20320.2.2 Life Estates

The last sentence of the proposed rule provides that: “As per the Deficit Reduction Act of 2005 (DRA), effective 4/1/06, a life estate in a home property may be an excluded resource providing the purchaser resides in the home for a period of at least 1 year after the date of purchase and continues to live in the property.” There is no requirement in the language of the DRA or elsewhere that requires the purchaser of a life estate to “continue(s) to live in the property.” The proposed rule goes beyond the federal statute, which is not permitted.

**Agency Response:** The language of the regulation is intended to be synonymous with the federal statute. CMS has given States considerable flexibility to define the parameters in creating regulations. Please, for clarification, see §§20320.2.2.1 and 20320.3. No change will be made to the regulation as a result of this comment.

### **Mr. Levinson**

#### 1) Purchase of Promissory Notes, Loans, or Mortgages

The summary of the proposed accurately reflects the language of the DRA. However, the proposed regulation goes beyond the mandate of the DRA and contains provisions that are more restrictive than Federal law and thus cannot be implemented by regulation. The only problem with the additional language at 20330.3 is that it states it will be effective 4/1/2006. That is retroactive and thus unconstitutional. This provision should only apply to promissory notes dated after the effective date of the regulation.

**Agency Response:** The transfer provisions of the DRA are effective April 1, 2006. Implementation is effective upon the Secretary’s signature. Once implementation begins, DMMA must apply the new rules to all applications filed on or after the effective date to be fully compliant with federal law.

The problem with the proposed regulation is that eliminates the language of 20330.3 that provided that if

the individual furnishes reliable evidence that the note has no market value it will not be counted as a resource. The DRA does not mandate that now all promissory notes are now countable resources. In reality it is the opposite, the DRA now has established guidelines for which type of promissory notes will not be considered a resource. The DRA did not mandate any changes in the law as to what is considered a countable resource. In addition, the CMS letter dated July 27, 2006 nowhere states that promissory notes that meet all the criteria outline by the DRA will not be considered a transfer of assets but may be counted as a resource. Just as in the DRA annuity rule it makes no sense to pass legislation stating what will not be counted as a transfer penalty, but even of all the criteria are met, it will be nevertheless considered a resource. Congress had an opportunity to do just that but did not. The regulation cannot legislate.

**Agency Response:** DMMA has always counted Promissory Notes. This is not a change in whether we count promissory notes as a resource or not, but what makes it a transfer of asset and that determines whether it is subject to a penalty or not.

## 2) Purchase of Life Estates

The summary of the proposed amendment regarding life estates incorrectly cites the DRA. The summary states as follows:

Section 6016(d) of the DRA provides that a life estate in a home property may be an excluded resource providing the purchaser reside in the home for a period of at least one (1) year after the date of purchase.

The following is the complete and only section of the DRA that deals with the purchase of a life estate.

(J) For purposes of this paragraph with respect to a transfer of assets, the term 'assets' includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase."

The DRA only deals with transfer of assets, not whether the asset is considered an excludable resource.

First, the state proposes to comply with this mandate by amending 20320.2.2 by inserting the above language but by adding the phrase "and continues to live in the property" this language is not contained in the DRA. The summary does not contain this phrase either. This would make it meaningless to have a one year requirement because if someone goes into a nursing home, they will not continue to live in the property and they would not file an application for assistance if they were not in a nursing home except in the limited situation of the home and community based waiver.

**Agency Response:** The "summary" offers a general orientation of the change(s) made. This level of detail is contained in the regulation. The language of the regulation is intended to be synonymous with the federal statute. CMS has given States considerable flexibility to define the parameters in creating regulations. Please, for clarification, see §§20320.2.2.1 and 20320.3. No change will be made to the regulation as a result of this comment.

Second, the proposed regulation seeks to amend 20320.2.2.1 by deleting the language "A life estate in home property may be an excluded resource." The elimination of that phrase is not mandated by DRA.

Although, the DRA did mandate that purchase of life estates will be considered transfers unless the purchaser lives in the home for at least a year, it is silent on the other life estate situations. That is the retention of a life estate and the transfer of a remainder interest. It is clear that the DRA did not change the law with regard to transfers if remainder interests-they are transfers that may incur a penalty. The DRA did not change the law concerning the *retention* of a life estate as opposed to a purchase of a life estate. In fact the CMS letter dated July 27, 2006 states as follows:

The DRA provision pertaining to life estates does not apply to the retention or reservation of life estates by individuals transferring real property. In such cases, the value of the remainder interest, not the life estate, would be used in determining whether a transfer of assets has occurred and in calculating the period of ineligibility.

**Agency Response:** The reference to *section 20320.3 - Principal Place of Residence Section* satisfies this

inquiry.

The present policy has been to exclude life estates in "home property" as a countable resource. The proposed regulation appears to be a change in that policy. The DRA does not mandate such a change. If a change in policy is intended towards retained life estates, the Division does not give any reason for such a change, not does it seem like there should be a change in policy.

**Agency Response:** There has been no change in policy. This is just a clarification to explain the difference between "life estates" and "life time rights". The DRA does not replace current and existing rules on how states treat life estates.

In short, the proposed 20320.2.2 makes no sense as written. It is impossible to have a situation where an applicant is applying for long term care and be able to "continue to live in the property". Again, the DRA only says a person has to live there for at least a year, but not "continue to live in the property." That language seems to have been crafted out of thin air. The proposed regulation is meaningless and makes it unclear what the policy is as to retained life estates as opposed to purchased life estates

**Agency Response:** The DRA makes no distinction between "retained life estates" and "purchased life estates".

Third, the regulation cannot be made retroactive and needs an effective date that does not conflict with the present regulations.

**Agency Response:** The transfer provisions of the DRA are effective April 1, 2006. Implementation is effective upon the Secretary's signature. Once implementation begins, DMMA must apply the new rules to all applications filed on or after the effective date to be fully compliant with federal law.

The purpose of regulations is to make clear the policy, not the opposite. It is important to the public that the rules regarding qualification are clear and unambiguous. The Division has a duty to the public to promulgate regulations that are consistent with the law and clearly stated.

**Agency Response:** Although many of the provisions of the DRA were effective upon passage on February 8, 2006, DMMA anticipated that Delaware would be given a reasonable amount of time to implement these changes. Due to the significance of the DRA mandates, DMMA pursued formal rulemaking in advance of implementation. DMMA prepared its draft proposed regulations based on formal guidance from CMS on July 27, 2006, which has been incorporated in the regulations. As part of the public notice/comment process from interested parties, DMMA garners feedback which may result in revisions/modifications in the final order regulation. DMMA appreciates the fact that you are fully engaged in this process. Thank you for your thoughtful input.

#### **FINDINGS OF FACT:**

The Department finds that the proposed changes as set forth in the February 2007 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual regarding the life estate and promissory note provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171) is adopted and shall be final effective April 10, 2007.

Vincent P. Meconi, Secretary, DHSS, March 15, 2007

#### **DMMA FINAL ORDER REGULATION #07-19 REVISIONS:**

##### **20320.1.5 Lifetime Rights**

In the case of lifetime rights the individual may live in or use the property during their lifetime, but ~~cannot sell without the consent of the heirs~~ has no ownership rights. The individual merely has the right to live in the property.

***(Break in Continuity of Sections)***

**20320.2.2.6 Rebuttal**

The applicant may be given an opportunity to rebut the value placed on the life estate. The rebuttal must include an estimate from a disinterested, knowledgeable source (such as a broker or appraiser) showing that the value is less than our determination or that the property has no marketable value.

**20320.3 Principal Place of Residence**

An individual's home is property in which he or she has an ownership interest and that serves as his or her principal place of residence. An individual's principal place of residence is the dwelling the individual considers his or her established or principal home and to which, if absent, he or she intends to return. A dwelling cannot be considered as an individual's principal place of residence until the individual has actually lived in it and used it as such. The principal place of residence includes the plot of land on which the home is located and any land that adjoins it. The land adjoins the home if it is not completely separated by land in which the individual has no ownership interest. Easements and public rights of way (utility lines, roads, etc.) do not separate the other land from the home. The home includes all related buildings on the adjoining land.

**20320.4 Principal Place of Residence Exclusions**

20320.4.1 Intent to Return

20320.4.1.1 Sale of House or Mental Condition Change

20320.4.1.2 Purchase of House After Nursing Facility Admission

20320.4.1.3 Use of Residence by Relative

**20320.4.1 Intent to Return**

The individual intends to return home. The applicant must be able to express the desire to return home. The record must include a written statement of intent to return to the home. If applicant gives intent verbally to DSS social worker this should be noted as part of the case record. If the statement is written by someone other than applicant, there must be an indication that this is in fact the intent of the applicant (i.e. signature or mark of applicant). If an institutionalized applicant/recipient is mentally capable of indicating that he intends to return to his principal place of residence (even if medical evidence indicates that he will never recover sufficiently to return home), then the home may be excluded as a resource. In no case can the family declare this intent for the applicant/recipient.

**20320.4.1.1 Sale of House or Mental Condition Change**

Statements of intent to remain valid until the home is sold. If the home is sold, the proceeds then become a countable resource. If the applicant becomes incompetent after a valid statement of intent is signed, it does not invalidate the statement. The home remains excluded as long as the applicant owns it regardless of changes in mental conditions.

**20320.4.1.2 Purchase of House After Nursing Facility Admission**

For an individual with no spouse or other dependents, the value of a home purchased after admission to a medical institution cannot be excluded with an intent to return home statement. This is because the individual has not actually lived in the home.

**20320.4.1.3 Use of Residence by Relative**

The applicant/recipient's home is used by a spouse and/or dependent relative during the absence. Relatives are: child, stepchild, grandchild, parent, stepparent, grandparent, aunt, uncle, niece, nephew, brother, sister, stepbrother, stepsister, half brother, half sister, cousin or an in-law of any of these.

The record must show contact with the spouse or dependent relative indicating that she/he continues to reside in the house, the relationships between the individuals, and the basis of dependency (financial, medical, etc.). In addition, the applicant/recipient's statement of what he considers his principal place of residence to be should be obtained and placed in the case record.

### **20320.5 Property Essential to Self-Support**

The Social Security Act provides for the exclusion from resources property that is essential to an individual's means of self-support. Property excluded under this provision generally falls into 3 categories.

#### **20320.5.1 Property Excluded Regardless of Value or Rate or Return**

The following conditions need to be met to exclude the essential to self-support property regardless of value of rate or return.

- a. the property (including liquid resources used in the operation) is used in a trade or business
- b. the property requires a government permit to engage in an income producing activity (i.e. commercial fishing permit granted by the State Commerce Commission)
- c. the personal property is used by an individual to perform his/her work such as tools, uniforms, etc.
- d. the property is required by an employer for work

#### **20320.5.2 Property Excluded Up To \$6,000 Equity, Regardless Of Rate Of Return**

Property can be excluded up to \$6,000 equity regardless of rate of return if it is a nonbusiness property used to produce goods or services essential to daily activities. For example, land used to produce vegetables or livestock solely for consumption by the individual's household.

#### **20320.5.3 Property Excluded Up To \$6000 Equity If It Produces a 6% Rate of Return**

The property essential to self-support may be excluded up to \$6,000 if it produces a 6% rate of return and meets the following two conditions.

- a. The property is used in a trade or business in the period before 5/1/90
- b. The property is nonbusiness income-producing property, for example rental property. Up to \$6,000 of the equity value can be excluded from resources if the property produces a net annual return equal to at least 6% of the excluded equity. Any portion of the property's equity value in excess of \$6,000 is not excluded. If the property produces less than a 6% return, the exclusion can apply only if the lower return is for reasons beyond the individual's control and there is a reasonable expectation that the property will again produce a 6% return.

##### **20320.5.3.1 Equity Determination**

Equity is the current market value less legal debts such as mortgages, liens, etc. Document the file with a copy of the appraisal of the fair market value. Determine rate of return based on income and value figures shown on the individual's Schedule E of Form 1040 for the prior year. If no tax return is available, obtain other appropriate evidence, for example a copy of the lease agreement. In addition obtain the estimated net and gross income from the property for the current tax year.

#### **20320.5.4 Current Use of Property**

The property excluded under the above categories (20320.5.1, 20320.5.2, 20320.5.3) must be in current use in the type of activity described. If not in current use, there must be a reasonable expectation that the required use will resume within 12 months of last use. The 12-month period can be extended for an additional 12 months if nonuse is due to a disabling condition.

## **20320.6 Non-Home Real Property**

Non-home real property consists of land and buildings or immovable objects that are attached permanently to the land and that do not meet the definition of home or principal place of residence.

### **20320.6.1 Non-Home Real Property Current Market Value (CMV) Documentation**

Obtain the current market value (CMV) of the real property. The (CMV) may be determined by an estimate of the property's CMV from a knowledgeable source. The estimate must show:

- a. the name of the person providing the estimate;
- b. the name, address and telephone number of the business or agency for whom the person providing the estimate works;
- c. the basis for the estimate, including a description of the property and its condition and the value of similar property in the same area; and
- d. the period for which the estimate applies.

Knowledgeable sources include but are not limited to real estate brokers, mortgage companies, banks, savings and loan associations, or similar lending institutions, or an official of the local property tax jurisdiction.

The value of the property as a resource is its CMV minus the outstanding principal balance on any loan or mortgage unless there is a legal bar to the sale of the property. (See Section 20300.3 Resource Ownership)

## **20330 Countable Resources Computation**

### **20330.1 Vehicles**

Vehicles are defined as automobiles, boats, travel trailers, motorcycles etc. The current market value of a vehicle is the average price that it will sell for (based on year, make, model and condition) on the open market in a certain geographic area. Current market value can be determined by using the NADA book (trade in value) or a written appraisal from a disinterested, knowledgeable source. One vehicle may be excluded under Section 20310.5. Only one vehicle may be excluded for a married couple.

If NO vehicle is excluded per Section 20310.5, up to \$4650 of the CMV of ONE vehicle is excluded. If the CMV exceeds \$4650, the excess counts as a resource, unless the vehicle can be excluded under some other provision (i.e., co-owner refuses to sell). It is unlikely the \$4650 exclusion will be used. This is because most vehicles are used for either a medical problem or for essential daily activities and can be excluded per Section 20310.5.

Any vehicle an individual owns in addition to the vehicle that was totally or partly excluded (up to \$4650), is a resource in the amount of its equity value. The equity value is the CMV minus amount owed on the vehicle. The exclusion is applied in the manner most advantageous to the individual. If one of two vehicles can be excluded as necessary for medical treatment, the exclusion is applied to the vehicle with the greater equity value regardless of which vehicle is used to obtain medical treatment.

### **20330.2 Financial Institutions Accounts**

Financial institution accounts which include savings accounts, checking accounts, certificates of deposit, etc., are an individual's resource if the individual owns the account and can use the funds for his or her support and maintenance. We determine whether an individual owns the account and can access the funds by looking at how the account is titled.

If an individual is designated as sole owner by the account title, all of the funds are that individual's resource unless legal restrictions preclude the owner from using the funds for his or her support and maintenance. We do not provide an opportunity for the owner of an individually-held account to rebut the presumption of 100% ownership.

If the account is in the name of a Medicaid applicant/recipient and another Medicaid applicant/recipient, assume all account funds belong to each individual in equal shares. If the account is in the name of a Medicaid applicant/recipient and another individual who is not applying for Medicaid or who is not a Medicaid recipient, then assume all of the funds belong to the Medicaid applicant/recipient.

If the applicant or recipient disagrees with the ownership presumption on jointly-held accounts, we give the individual the opportunity to rebut the presumption. Rebuttal is a procedure which permits an individual to furnish evidence and establish that some or all of the funds in a jointly-held account do not belong to him or her. Obtain the individual's statement on a form containing the penalty clause regarding who owns the funds, why there is a joint account, who has made deposits to and withdrawals from the account, and how withdrawals have been spent. Inform the individual that he or she must submit the following evidence within 30 days:

a corroborating statement from the other account holder(s). If the other account holder is incompetent or a minor, have the individual submit a corroborating statement from anyone aware of the circumstances surrounding establishment of the account; account records showing deposits, withdrawals and interest paid for the months that ownership is an issue; if the individual owns none of the funds, evidence showing that he or she can no longer withdraw funds from the account; if the individual owns only a portion of the funds, evidence showing removal from the account of the individual's funds or removal of the funds owned by the other account holder(s) and redesignation of the account.

Any funds that the evidence establishes were owned by the other account holder(s) are not and were not the individual's resources. The effect of a successful rebuttal is retroactive as well as prospective.

***(Break in Continuity of Sections)***

**20320 Ownership of Real Property by Institutionalized Individuals**

**20320.2.2 ~~Lifetime Rights~~ Life Estates**

~~Lifetime rights (life estates) Life Estates conveys to the individual certain property rights for the duration of his or her life, or someone else's life. A life estate is a form of legal ownership and is usually created through a deed or will. Generally, a life estate entitles the owner of the life estate to possess, use, and obtain profits from the property as long as he or she lives. However, actual ownership of the property has passed to another individual. The owner of a life estate can sell the life estate but does not have title to the property. Document ownership of a life estate with a copy of the deed or will. Life Estate is an ownership interest in real property. The right of ownership exists for the lifetime of an individual(s). Upon the death of the individual(s) the ownership passes to the "remainderman." A life estate may be sold or otherwise transferred. As per the Deficit Reduction Act of 2005 (DRA), effective 4/1/06, a life estate in a home property may be an excluded resource [providing provided] the purchaser resides in the home for a period of at least 1 year after the date of purchase and continues to live in the property.~~

**20320.2.2.1 Non-Home Property**

A life estate in nonhome property must be counted as a resource. ~~A life estate in home property may be an excluded resource~~ See section 20320.3 - Principal Place of Residence Section.



### **20320.2.2.2 Transfer of Assets**

In a life estate transaction, a transfer of assets is involved when the applicant or spouse, as owner of the property, transfers ownership of that property to another individual while retaining lifetime rights. This transfer is for less than fair market value whenever the value of the transferred asset (i.e. ownership of the property) is greater than the value of the life estate. See Section 20350 - Transfer of Assets to determine whether a penalty is assessed because of a life estate transaction. In addition, [effective 4/1/06,] a transfer of assets has occurred when an individual purchases a life estate in another individual's home when the purchaser has not lived there for at least 1 year.

### **20320.2.2.3 Calculations of Life Estate Value**

To calculate the value of the life estate, use the life estate table. Determine the value of the life estate by multiplying the current market value of the property by the life estate decimal that corresponds to the life estate owner's age.

See ~~PROCEDURES FOR IMPLEMENTATION OF ELIGIBILITY RULES~~ 20350 Life Estate and Remainder Interest Table 20350

### **20320.2.2.4 Life Estate with Powers**

Under a life estate with powers, the owner of the property creates a life estate for himself or herself, retaining the power to sell the property, with a remainder interest to someone else such as a child. Since the life estate holder retains the power to sell the property, its value as a resource is the property's full equity value (unless it is an otherwise excludable resource).

### **20320.2.2.5 Remainder Interest**

When the owner of property gives it to one party in the form of a life estate, and designates a second party to inherit it upon the death of the life estate holder, the second party has a remainder interest in the property. Determine the value of a remainder interest by multiplying the current market value of the property by the remainder interest decimal that corresponds to the individual's age.

See ~~PROCEDURES FOR IMPLEMENTATION OF ELIGIBILITY RULES~~ 20350 Life Estate and Remainder Interest Table

### **20320.2.2.6 Rebuttal**

The applicant may be given an opportunity to rebut the value placed on the life estate. The rebuttal must include an estimate from a disinterested, knowledgeable source (such as a broker or appraiser) showing that the value is less than our determination or that the property has no marketable value.

## **20330.3 Promissory Notes, Loans and Property Agreements**

A loan is an advance from a lender to a borrower that the borrower must repay, with or without interest. Loan proceeds are not income to the borrower because of the borrower's obligation to repay. Any portion of the borrowed funds that the borrower does not spend is a countable resource if retained into the month following the month of receipt.

If the Medicaid applicant is the owner of a promissory note, loan, or property agreement (mortgage), assume the value of the agreement is its outstanding principal balance, ~~unless the individual furnishes reliable evidence that it has a current market value of less than that or no current market value at all.~~ If the note, loan or mortgage is not salable, it has no current market value.

If the outstanding principal balance plus other countable resources exceeds the resource limit, inform the individual that ~~DSS/Medicaid~~ DMMA will use the outstanding principal balance in determining resources unless the individual submits within 30 days the following information.

a. ~~evidence of a legal bar to the sale of the agreement~~

b. ~~an estimate from a knowledgeable source (financial institution, bank, real estate broker) showing the current market value of the agreement is less than its outstanding principal balance. The estimate must show the name, title and address of the source.~~

As per the Deficit Reduction Act of 2005 (DRA), effective 4/1/06, the promissory note, loan, or mortgage will be considered a transfer for less than fair market value unless-

- The repayment term is actuarially sound;
- Payments are made in equal amounts during the term of the loan with no deferral ~~[or for]~~ payments and no balloon payments; and
- The promissory note, loan or mortgage prohibits the cancellation of the balance upon the death of the lender.

In determining the amount of the asset transfer, the value of the note, loan or mortgage is the outstanding balance due at the date of the individual's application for Medicaid coverage of services listed in section 1917(c)(1)(C) of the Act.

Payments received against the principal balance are not income. They are conversion of a resource. The portion of the payment which represents interest is unearned income.

The SSA Life Expectancy Table can be found at [www.ssa.gov/OACT/STATS/table4c6.html](http://www.ssa.gov/OACT/STATS/table4c6.html).

**10 DE Reg. 1596 (04/01/07) (Final)**