DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

PROPOSED

PUBLIC NOTICE

Long Term Care Medicaid

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing 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).

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Policy and Program Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 (new fax number) by March 2, 2007.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

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.

DMMA PROPOSED REGULATION #07-02
REVISIONS:

20320 Ownership of Real Property by Institutionalized Individuals

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~~ <u>has no ownership rights. The individual merely has the right to live in the property.</u>

(Break in Continuity of Sections)

20320.2.2 ~~Lifetime Rights~~ <u>Life Estates</u>

~~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.~~ <u>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 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.</u>

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. <u>In addition, 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.</u>

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

20320.2.2.4Life 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).

20320.2.2.5Remainder 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 Reminder Interest Table

20320.2.2.6Rebuttal

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.

20330.3Promissory 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 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.

10 DE Reg. 1216 (02/01/07) (Prop.)