

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 Eligibility; Spousal Impoverishment Undue Hardship

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend the Delaware Social Services Manual (DSSM) by adding a provision regarding long-term care eligibility, specifically, *to add language that allows the spousal impoverishment regulation to be waived in instances of undue hardship*. 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 May 2016 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by May 31, 2016 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend the Delaware Social Services Manual (DSSM) by adding a provision regarding long-term care eligibility, specifically, *to add language that allows the spousal impoverishment regulation to be waived in instances of undue hardship*.

Statutory Authority

- §1924(a)(3)(b) of the Social Security Act, *Methodology and standards for determining and evaluating income and resources for institutionalized spouses*
- §1924(c)(3)(c) of the Social Security Act, *Assignment of support rights*
- 42 CFR 435.602(c), *Financial responsibility of relatives and other individuals*

Background

Section 303 of the Medicare Catastrophic Act contains provisions that significantly change the way in which income and resources of a couple are calculated when one spouse is institutionalized or likely to be institutionalized for continuous periods in a nursing facility, and who has a spouse residing in the community. The revisions are intended to prevent the spouse who remains in the community from becoming impoverished either before or after the institutionalized spouse becomes eligible for Medicaid.

Effective July 1, 1993, Delaware elected the option to apply the Spousal Impoverishment rules to persons who are likely to receive services under Section 1915(c) the Home and Community Based Waivers. All references to institutionalized spouses and continuous periods of institutionalization include spouses receiving Home and Community Based Waiver services in lieu of institutional services. Individuals receiving a combination of institutional and waiver services are subject to these rules.

Generally, the Bill counts income as Medicaid policy has always counted income (i.e., income owned by only one spouse is considered available solely to that spouse). One change is that income in both their names is divided evenly between the two spouses. The most drastic change occurs in the calculation of resources. Medicaid has always viewed the resources held solely by the non-institutionalized spouse as not available to the institutionalized spouse.

Under the Spousal Impoverishment provisions, all assets/resources held by either or both spouses are considered available equally to both spouses as of the beginning of the first continuous period of institutionalization (beginning on or after 9/30/89). The couple's house, car, and personal goods are excluded from countable resources.

Resource rules described in this section apply only to persons first institutionalized for continuous periods on or after September 30, 1989. Persons first institutionalized before that date are subject to prior Medicaid plan policies as long as they remain in an institution.

The spousal impoverishment regulations must be applied to any couple who is legally married unless the couple is separated and maintains two separate residences for at least 12 months prior to admission to a medical institution (hospital, nursing facility, etc.) AND the community spouse is uncooperative or his/her whereabouts are unknown. These

rules apply regardless of State laws relating to community property or to the division of marital property. For example, resources listed in a prenuptial agreement are not excluded.

Summary of Proposal

Rationale and Justification

There are extreme circumstances in which the application of the spousal impoverishment regulations would deprive an individual of medical care such that his/her life would be endangered causing an undue hardship. An undue hardship also exists when application of the spousal impoverishment regulations would deprive the individual of food, clothing, shelter, or other necessities of life and there are no state facilities to care for the individual in the absence of Medicaid eligibility. Allowing for the spousal impoverishment provisions to be waived, when such undue hardships occur, will ensure that long-term care applicants are protected and may receive the services they require.

Purpose

To add language to the Delaware Social Services Manual (DSSM) that allows the spousal impoverishment regulations to be waived in instances of undue hardship, so as to provide additional protection for vulnerable long-term care applicants in extreme circumstances.

Summary of Proposed Regulation

If implemented as proposed, this regulation will accomplish the following, effective July 11, 2016:

Provide a provision that allows for the spousal impoverishment regulations to be waived in the event that implementing the regulations would cause an undue hardship on a long-term care applicant.

Public Notice

In accordance with the *federal* public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the *state* public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the undue hardship provision. Comments were to be received by 4:30 p.m. on May 31, 2016.

Provider Manuals Update

Applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding manual updates. DMAP provider manuals and official notices are available on the DMAP website: <http://www.dmap.state.de.us/home/index.html>

Fiscal Impact Statement

There are currently undue hardship provisions in place for several sections of Long-Term Care (LTC) eligibility policy, such as DSSM 20350.11, DSSM 20400.12.1, DSSM 20400.12.2, and DSSM 20500.7. Undue hardship provisions are only used in very rare and exceptional circumstances when application of the related LTC eligibility policy would deprive the individual of food, clothing, shelter or other necessities of life AND there are no state facilities available to care for the individual in the absence of Medicaid eligibility. Therefore, no fiscal impact is anticipated as the result of adding undue hardship protection to an additional section of LTC eligibility policy.

Summary of Comments Received with Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following summarized observations:

There is a federal minimum resource standard which is updated annually. In 2016, it is \$23,844. States can exceed the federal minimum. Delaware adopted a standard of \$25,000 in 1993.

Federal law, 42 U.S.C. 1396r-5(c)(3) directs states to disregard otherwise countable spousal resources if "the State determines that denial of eligibility would work an undue hardship." DMMA's current regulations implement this law.

First, DMMA should consider an increase in the \$25,000 resource cap adopted in 1993. Consistent with the attachment, \$25,000 in 1993 is equivalent to \$41,199 in 2016. If raised, there would be less need to consider a waiver.

Agency Response: DMMA thanks the Council for its comment. However DMMA has an Undue Hardship provision in place to protect against a finding of ineligibility for long-term care (LTC) as a result of the calculation of a couple's countable resources at DSSM 20950, which states the following:

An institutionalized spouse who (or whose spouse) has excess resources shall not be found ineligible per

Section 1924 (c)(3)(C) of the Social Security Act where the state determines that denial of eligibility on the basis of having excess resources would work an undue hardship.

In addition, the Community Spouse Resource Allowance (CSRA) is the amount of resources equal to whichever is greater: \$25,000 OR ½ the value of the couple's combined countable resources as of the beginning of the first continuous period of institutionalization on or after 09/30/89, but no more than the current maximum resource allowance determined by Federal law. The current maximum resource allowance for 2016 is \$119,220.00. Therefore, \$25,000 is not the maximum amount of resources allowable for a couple applying for LTC.

This proposed change in LTC eligibility policy would exempt an applicant who is legally married from having spousal impoverishment regulations applied in his or her request for LTC services. Current policy requires that spousal impoverishment regulations be applied to all legally married couples unless the couple is separated and maintains two separate residences for at least 12 months prior to admission to a medical institution AND the community spouse is uncooperative or his/her whereabouts are unknown. This proposed change in eligibility policy provides additional protection for married individuals in unique situations, who do not meet the current exemptions to the application of spousal impoverishment regulations, and who would be unfairly penalized for the non-cooperation of a spouse.

There was no change made to the regulation as a result of this comment.

Second, the proposed standard is unduly limiting. Medical expenses can qualify for consideration in the "undue hardship" determination only if the individual would die without the medical care. CMS is more expansive, authorizing an "undue hardship" waiver if the person's health would be endangered. See, e.g, the attached CMS Deficit Reduction Act (DRA) summary and conforming Pennsylvania policy. Thus, if the loss of medical care would result in excessive pain; loss of a limb; partial paralysis; exacerbation of a diagnosed mental health condition (e.g. depression; schizophrenia); or other deterioration in health, the DMMA workers should be able to consider such effects. Moreover, it would be preferable to modify the third sentence as follows: "Without limitation, undue hardship also exists when application....life." There should be some recognition that genuine hardship may be presented by factors beyond a short list. For example, a blind individual with an aging seeing-eye dog may need funds for dog food and expensive veterinary care.

Agency Response: DMMA thanks the Council for its comment. However, DMMA respectfully disagrees with the statement that the undue hardship eligibility policy provisions are unduly limiting. DMMA believes that this proposed eligibility policy provides additional protections for married individuals in difficult situations. This policy provides additional protections to this population that did not previously exist under prior spousal impoverishment regulations. DMMA believes that this proposed change in eligibility policy will prevent this group of individuals from being determined ineligible for LTC services due to circumstances beyond their control.

There was no change made to the regulation as a result of this comment.

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the May 2016 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Delaware Social Services Manual (DSSM) by adding a provision regarding long-term care eligibility, specifically, *to add language that allows the spousal impoverishment regulation to be waived in instances of undue hardship*, is adopted and shall be final effective July 11, 2016.

Rita M. Landgraf, Secretary, DHSS
June 16, 2016

DMMA FINAL ORDER #16-017

NEW

20900.1 Undue Hardship

Spousal Impoverishment rules may be waived if the application of the rules would cause an undue hardship. Undue hardship exists when application of the spousal impoverishment provisions would deprive the individual of medical care such that his/her life would be endangered. Undue hardship also exists when application of the spousal impoverishment provisions would deprive the individual of food, clothing, shelter or other necessities of life.

20 DE Reg. 52 (07/01/16) (Final)