

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 Eligibility; Spousal Impoverishment Undue Hardship

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code), 42 CFR §447.205, 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 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.*

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, Planning, Policy and Quality 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 by May 31, 2016. Please identify in the subject line: Long-Term Care Eligibility; Spousal Impoverishment Undue Hardship

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 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*
- 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 must 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.

DMMA PROPOSED REGULATION #16-010

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.

19 DE Reg. 987 (05/01/16) (Prop.)