

# 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 Medicaid Program

#### 20330 Countable Resources Computation

#### Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Division of Social Services Manual (DSSM) used to determine eligibility to comply with the transfer of assets provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171) related to promissory notes, loans and property agreements. 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 July 2007 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by July 31, 2007 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

#### Summary of Proposal

##### 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)(I) of Social Security Act affecting Long Term Care services and supports.

As a result of the DRA, DMMA proposed regulatory changes that appeared in the February 1, 2007 issue of the *Delaware Register of Regulations* related to promissory notes, loans and mortgages. The final order regulations were published as 10 DE Reg. 1596 in the April 1, 2007 issue of the *Delaware Register*. The State Council for Persons with Disabilities (SCPD) and two estate planning attorneys commented on the proposed version of these regulations in February, 2007. The SCPD has since commented on the final regulations encouraging reconsideration of the regulatory change that deleted Pars. "a" and "b" of Section 20330.3. The deleted subsection allowed a note holder to demonstrate that its true worth is less than its outstanding principal value. The Council objected to deletion of this subsection since a note could lose value based on a promisor's bankruptcy or destruction of mortgaged premises. One of the estate planning attorneys offered the same objection.

After careful reflection and staff analysis, DMMA has reconsidered and revised section 20330.3.

##### Summary of Proposal

DSSM 20330.3, Promissory Notes, Loans and Property Agreements: This revision clarifies that the value DMMA places on an available resource may be rebutted. A new subsection, 20330.3.1, has been added to show the information the applicant must submit to successfully rebut the value.

#### Summary of Comments Received with Agency Response and Explanation of Changes

The State Council for Persons with Disabilities (SCPD) offered the following observations and

recommendations summarized below. DMMA has considered each comment and responds as follows.

The SCPD reviewed the final regulations published in [DE Reg. 1596 (April 1, 2007)], which incorporated all of the Council's suggestions with one exception, i.e., the regulation deleted an authorization for a note holder to demonstrate that the note's value was less than its outstanding principal balance. Although, the regulations were final, SCPD solicited reconsideration. DMMA has now issued a proposed regulation authorizing a note holder to present proof of devaluation of a note.

SCPD would like to share two suggested amendments to §20330.3.1 as follows:

First, the word "or" should be inserted between "loan" and "mortgage".

Second, the word "instrument" should be substituted for "agreement". The word "instrument" is a legal term of art for a formal document and is commonly used to refer to mortgages, loans, and notes. It is more apt term than agreement in this context.

**Agency Response:** DMMA agrees. The final order regulation text shows the suggested amendments.

To strengthen the proposed regulation, further analysis by Division staff resulted in the following changes in the final order regulation text indicated by [bracketed bold type]. Specific changes include: 1) using the active rather than passive voice where appropriate; and, 2) revising language to increase clarity.

#### **Findings of Fact:**

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

THEREFORE, IT IS ORDERED, that the proposed regulation to the Division of Social Services Manual regarding the promissory notes, loans and property agreements provisions mandated by the Deficit Reduction Act (DRA) of 2005 (Public Law 109-171) is adopted and shall be final effective September 10, 2007.

Vincent P. Meconi, Secretary, DHSS, 8/14/07

### **DMMA FINAL ORDER REGULATION #07-40**

#### **REVISIONS:**

#### **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.

### 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. ~~[DMMA does not count loan] proceeds [are not as] income to [the a] 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 ~~[it is]~~ retained into the month following the month of receipt.

If ~~[the a]~~ Medicaid applicant is the owner of a promissory note, loan, or property agreement (mortgage), ~~[DMMA will]~~ assume ~~[that]~~ the value of the agreement is its outstanding principal balance.

If the outstanding principal balance plus other countable resources exceeds the resource limit, ~~[we will]~~ inform the individual that DMMA will use the outstanding principal balance ~~[in determining to determine the value of]~~ resources unless the individual ~~submits within 30 days the following information successfully rebuts the value. See 20330.3.1.~~

~~[As per the Deficit Reduction Act of 2005 (DRA), effective 4/1/06, DMMA will consider the value of a the a] promissory note, loan, or mortgage [will be considered as 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 ~~for~~ of 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~~[red, DMMA looks at]~~ the value ~~[of the outstanding~~

**balance]** 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)**

### **20330.3.1 Rebutting the Value**

~~[DMMA will give the] applicant [may be given] an opportunity to rebut the value placed on the promissory note, loan [ or] mortgage. The rebuttal must include a [a written] estimate from a disinterested, knowledgeable source (such as a broker or appraiser) showing that the value is less than our [determined value. determination or evidence of An applicant may also assert that there is] a legal bar to the sale of the [agreement instrument by offering documentary or other evidence of a bar or impediment to the sale of the instrument].~~

### **20330.4 Retirement Funds**

Retirement funds are annuities or work-related plans for providing income when employment ends, such as pensions, individual retirement accounts (IRA), disability, Keogh plans and some profit sharing plans.

The value of a retirement fund is the amount of money that an individual can currently withdraw. Pension plans that allow withdrawals are known as Defined Contribution Plans. If there is a penalty for early withdrawal, the fund's value is the amount available after the penalty deduction. Any taxes due are not deductible in determining the fund's value. A retirement fund is not a resource if an individual must terminate employment in order to obtain any payment.

If an individual is eligible for periodic retirement benefits, the individual must apply and accept the periodic benefit. If the individual has a choice between periodic benefits and a lump sum, the individual must choose the periodic benefits.

Defined Benefit Plans are retirement funds that are not accessible until the recipient meets eligibility criteria outlined in the retirement plan contract (e.g. actual retirement and reaching a predetermined age). These plans are not considered a countable resource until the individual is eligible to begin receiving benefits as outlined in the retirement plan. Defined Contribution Plans and Defined Benefit Plans are not considered countable resources when owned by an ineligible spouse. An ineligible spouse is a legally married husband or wife who is not eligible for Medicaid benefits.

**10 DE Reg. 1436 (03/01/07)**

**11 DE Reg. 314 (09/01/07) (Final)**