

Notice of Proposed Rule

DEPARTMENT OF CHILDREN AND FAMILY SERVICES

Economic Self-Sufficiency Program

RULE NO: RULE TITLE

65A-1.712: SSI-Related Medicaid Resource Eligibility Criteria

PURPOSE AND EFFECT: Amendments to the proposed rule revise Medicaid policies in accordance with federal law, the Deficit Reduction Act (DRA) of 2005. The DRA provides for reform in the treatment of assets in the institutional Medicaid eligibility determination. It also adds policies for hearing officers on when and how they can adjust a community spouse resource allowance or a community spouse income allowance under spousal impoverishment provisions in subsection (4) of the rule.

SUMMARY: Proposed amendments revise the language to the rule to be consistent with federal requirements regarding transfer of assets provisions and the treatment of assets.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS: No Statement of Estimated Regulatory Cost was prepared.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

SPECIFIC AUTHORITY: 409.919 FS.

LAW IMPLEMENTED: 409.902, 409.903, 409.904, 409.906, 409.919 FS.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW (IF NOT REQUESTED, THIS HEARING WILL NOT BE HELD):

DATE AND TIME: March 20, 2007, 1:30 p.m.

PLACE: 1317 Winewood Boulevard, Building 3, Room 455, Tallahassee, FL 32399

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Pat Whitford, Economic Self-Sufficiency Services, Telephone (850)410-3479

THE FULL TEXT OF THE PROPOSED RULE IS:

65A-1.712 SSI-Related Medicaid Resource Eligibility Criteria.

(1) No change.

(a) through (e) No change.

(f) For a Home and Community Based Waiver Services ~~the Traumatic Brain Injury and Spinal Cord Injury Waiver~~ Program an individual cannot have countable resources that exceed \$2,000. If the individual's income falls within the MEDS-AD Demonstration ~~Demonstration~~ Waiver limit, the individual can have resources up to \$5,000. ~~No penalties apply to transfers of assets or resources made to spouses. But penalties may apply to transfers to others. Spousal Impoverishment policies do not apply.~~

(2) No change.

(a) No change.

~~(b) The value of a life estate interest in real property is excluded.~~

(c) through (f) renumbered (b) through (e) No change.

(f) An individual who is a beneficiary under a qualified state Long-Term Care Insurance Partnership Policy issued after (effective date) is given a resource disregard equal to the amount of the insurance benefit payments made to or on behalf of the individual for long term care services when determining if the individual's countable resources are within the program limits to qualify for Medicaid nursing home care.

(3) Transfer of Resources and Income. According to 42 U.S.C. § 1396p(c), if an individual, the spouse, or their legal representative, disposes of resources or income for less than fair market value on or after the look back date, the department must presume that the disposal of resources or income was to become Medicaid eligible and impose a period of ineligibility for nursing facility care services, institutional hospice or HCBS waiver services. The department will mail a notice to individuals who report a transfer without fair compensation (Form CF-ES 2264, PDF 04/2002, Notice of Determination of Resource/Income Transfer and Form CF-ES 2264A, Feb 2007, Rebuttal/Hardship Request, incorporated herein by reference), advising of the opportunity to rebut the presumption and of the opportunity to request and support a claim of undue hardship per subparagraph (c)5. below. The look back period is 36 months prior to the date of application, except in the case of a trust treated as a transfer in which case the look back period is 60 months prior to the date of application. ~~These transfer policies apply to actual transfers made by applicants for institutional Hospice services that occur on or after October 1, 1998.~~

(a) The department follows the policy for transfer of assets mandated by 42 U.S.C. §§1396p and 1396r. ~~For transfers prior to October 1, 1993, transfer policies apply only to transfers of resources. For transfers on or after October 1, 1993, T~~transfer policies apply to the transfer of income and resources.

(b) When funds are transferred to a retirement fund, including annuities, within the transfer look back period the department must determine if the individual will receive fair market compensation in their lifetime from the fund. If fair compensation will be received in their lifetime there has been no transfer without fair compensation. If not, the establishment of the fund must be regarded as a transfer without fair compensation. Fair compensation shall be calculated based on life expectancy tables published by the Office of the Actuary of the Social Security Administration. See Rule 65A-1.716, F.A.C.

1. Individuals and their spouses must disclose their ownership interest in any annuity, including annuities that are not subject to the transfer of assets provision, and if purchased after (effective date) must name the state as a remainder beneficiary (for applicants at the time of approval or for recipients at time of annual review) in the first position for no more than the total amount of medical assistance paid on behalf of the annuitant or in the second position after the community spouse and/or minor or disabled child unless the spouse, child or their representative disposes of the remainder for less than fair market value.

2. A purchase of an annuity (and other transactions that change the course of an annuity payment or treatment of income or principal) made after (effective date) will be considered a transfer of assets without fair compensation unless the annuity meets all of the following criteria for applicants at the time of approval and recipients at the time of annual review: (a) the state is named as the primary beneficiary (or secondary as appropriate pursuant to subparagraph (b)1. above); (b) the annuity is irrevocable and non-assignable; (c) the annuity pays principal and interest in equal amounts during the term of the annuity, with no balloon or deferred payments; and (d) the annuity is actuarially sound based on standards published by the Office of the Chief Actuary of the Social Security Administration called the Period of Life Table as set forth in Rule 65A-1.716, F.A.C. (Life Expectancy Tables). Annuities purchased for the community spouse after (effective date) must name the state as primary (or secondary) beneficiary pursuant to subparagraph (b)1. above and must be actuarially sound based on the community spouse's age and the life expectancy tables.

3. Individual Retirement Accounts (IRAs) or annuities (as described in Section 408 of the Internal Revenue Code) established by an employee or employer are not considered under the transfer of assets provision but must still name the state as the primary remainder beneficiary in accordance with (b)1. above.

(c) No change.

1. through 4. No change.

5. A transfer penalty shall not be imposed if the department determines that the denial of eligibility due to transferred resources or income would work an undue hardship on the individual. Undue hardship exists when imposing a period of ineligibility would deprive an individual of food, clothing, shelter or medical care such that their life or health would be endangered. All efforts to access the resources or income must be exhausted before this exception applies. The facility in which the institutionalized individual is residing may request an undue hardship waiver on behalf of the individual with their consent or the consent of the personal representative.

(d) No change.

1. through 2. No change.

3. Promissory notes, loans and mortgages signed after (effective date) will be considered transfers of assets without fair compensation to become Medicaid eligible unless the promissory notes, loans or mortgages meet all of the following criteria:

(a) the repayment term is actuarially sound in accordance with the Life Expectancy Tables as referenced in paragraph (b) 2.; (b) payments must be made in equal amounts during the term of the loan, with no deferral and no balloon payments being possible; and (c) debt forgiveness is not allowed. If these criteria are not met, for purposes of transfer of assets, the value of the promissory notes, loans or mortgages will be the outstanding balance due as of the date of application for long-term care services.

4. A life estate interest purchased in another individual's home after (effective date) is considered a transfer of assets without fair compensation. If the individual has not lived in the home for at least one year, the full amount of the purchase price paid for the life estate will be considered an uncompensated transfer without considering the value of the life estate. If the individual has resided in the home for at least one continuous year, the value of the life estate will be considered compensation and will be calculated by multiplying the current market value of the property by the life estate factor that corresponds to the individual's age. The life estate tables are incorporated by reference from the Social Security Administration's online Program Operations Manual System (SI 01140.120) as found in Appendix A-17 of the Department's online manual located at www.dcf.state.fl.us/ess/. Brief absences from the life estate property due to stays in a rehabilitation facility or vacations may not disrupt the client's residency in the home but the facts of each absence will be evaluated.

(e) through (f) No change.

(g) For transfers prior to (effective date), periods of ineligibility based on transfer policies are calculated beginning with the month in which the transfer occurred and the period of ineligibility cannot exceed 30 months if the transfer occurred prior to October 1, 1993. If the transfer occurred on or after October 1, 1993, the period of ineligibility shall be equal to the actual computed period of ineligibility, rounded down to the nearest whole number. For transfers made after (effective date), periods of ineligibility begin with the later of the following dates: (1) the day the individual meets all other factors of eligibility (including appropriate placement in a Medicaid nursing facility, enrollment in a Medicaid waiver or election of Hospice care) except for the transfer of assets without fair compensation after applying for institutional care services; or (2) the first day of the month in which the individual transfers the asset; or (3) the first day following the end of an existing penalty period. The department shall not round down, or otherwise disregard, any fractional period of ineligibility of the penalty period but will calculate the period down to the day. There is no limit on the period of ineligibility for transfers which occur on or after October 1, 1993. Once the penalty period is imposed, it will continue although the individual may no longer meet all factors of eligibility and may no longer qualify for Medicaid non-institutional care benefits.

1. Monthly periods of ineligibility due to transferred resources or income are determined by dividing the total cumulative uncompensation value of all transferred resources or income computed in accordance with paragraph

65A-1.712(3)(f), F.A.C., by the average monthly private pay nursing facility rate at the time of application as determined by the department. (refer to paragraph 65A-1.716(5)(d), F.A.C.).

a. For transfers prior to (effective date), where resources or income have been transferred in amounts or frequency or both that would make the calculated penalty periods overlap, the value of all transferred resources or income is added together and divided by the average cost of private nursing home care.

b. For transfers prior to (effective date), where multiple transfers are made in such a way that the penalty for each would not overlap, each transfer is treated as a separate event with its own penalty period.

c. For transfers after (effective date), the uncompensated value of all transfers will be added together to arrive at one total value with a penalty period assigned.

2. through 3. No change.

(4) Spousal Impoverishment. The department follows 42 U.S.C. § 1396r-5 for resource allocation and income attribution and protection when an institutionalized individual, including a hospice recipient residing in a nursing facility, has a community spouse. Spousal impoverishment policies are not applied to individuals applying for, or receiving, HCBS waiver services, except for individuals in the Long-Term Care Community Diversion Program, the Assisted Living Facility waiver or the Cystic Fibrosis waiver.

(a) through (d) no change.

(e) If either spouse can verify that the community spouse resource allowance provides income that does not raise the community spouse's income to the State's MMMIA, the resource allowance may be revised through the fair hearing process to an amount adequate to provide such additional income as determined by the hearing officer. Effective (effective date) the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. The hearing officers will base the revised community spouse resource allowance on the amount necessary to purchase a single lifetime annuity that would generate a monthly payment that would bring the spouse's income up to the MMMIA (adjusted to include any excess shelter costs). The community spouse does not have to actually purchase the annuity. The community spouse will have the opportunity to present convincing evidence to the hearing officer that a single lifetime annuity is not a viable method of protecting the necessary resources for the community spouse's income to be raised to the State's MMMIA. If the community spouse requests that the revised allowance not be based on the earnings of a single lifetime annuity, the community spouse must offer an alternative method for the hearing officer's consideration that will provide for protecting the minimum amount of assets required to raise the community spouse's income to the State's MMMIA during their lifetime.

(f) Either spouse may appeal the post-eligibility amount of the community spouse income allowance through the fair hearing process and the allowance may be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet the community spouse's needs exists. Exceptional circumstances that result in extreme financial duress include circumstances other than those taken into account in establishing maintenance standards for spouses. An example is when a community spouse incurs unavoidable expenses for medical, remedial and other support services which impact the community spouse's ability to maintain themselves in the community and in amounts that they could not be expected to be paid from amounts already recognized for maintenance and/or amounts held in resources. Effective (effective date), the hearing officers must consider all of the community spouse's income and all of the institutionalized spouse's income that could be made available to a community spouse. If the expense causing exceptional circumstances is a temporary expense, the increased income allowance must be adjusted to remove the expenses when no longer needed.

(g) No change.

(5) Other Resource Policies.

(a) Individuals shall not be eligible for long-term care services after (effective date), if the individual's equity interest in the individual's home exceeds \$500,000.

1. The individual's equity interest is based on the current market value of the home (including all contiguous property), minus any encumbrances such as a mortgage or other associated loans. Long-term care services include Medicaid services authorized under the Institutional Care Program, institutional hospice, home and community based waiver services and the Program of All Inclusive Care for the Elderly (PACE).

2. Paragraph (5)(a) does not apply if the individual's spouse, individual's child under age 21 or the individual's blind or disabled child (based on the federal definitions of "blindness" and "disability" in 20 CFR 416) of any age are residing in the institutionalized individual's home.

3. The home equity provision may be waived when denial of long-term care services would result in demonstrated hardship to the institutionalized individual.

4. The department will mail a notice to individuals whose home equity interest exceeds \$500,000 (Form CF-ES 2354, Feb 2007, Notice of Home Equity Interest Greater Than \$500,000 and Form CF-ES 2354A, Feb 2007, Request for Waiver of Home Equity Limit, incorporated herein by reference), advising of the opportunity to have the home equity interest policy waived.

(b) An individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual after (effective date), regardless of whether a refund is actually received, if the individual has the ability to use the entrance fee or the contract indicates the entrance fee may be used for care when the individual's income and assets are insufficient to pay for their care; the individual is eligible for a refund of any remaining entrance fee upon death or termination of the contract; and the entrance fee does not confer an ownership interest in the retirement community.

Specific Authority 409.919 FS. Law Implemented 409.902, 409.903, 409.904, 409.906, 409.919 FS. History--New 10-8-97, Amended 1-27-99, 4-1-03, 9-28-04, 8-10-06(1), 8-10-06(2)(4), 8-10-06(3),_____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Nathan Lewis

NAME OF SUPERVISOR OR PERSON WHO APPROVED THE PROPOSED RULE: Jennifer Lange

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: September 5, 2006

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: November 17, 2006