



STATE OF DELAWARE  
**STATE COUNCIL FOR PERSONS WITH DISABILITIES**  
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**MEMORANDUM**

DATE: May 25, 2016

TO: Ms. Kimberly Xavier, DMMA  
Planning, Policy and Quality Unit

FROM: Daniese McMullin-Powell, Chairperson  
State Council for Persons with Disabilities

RE: 19 DE Reg. 987 [DMMA Proposed Spousal Impoverishment Undue Hardship  
Regulation (5/1/16)]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Medicaid and Medical Assistance's (DMMA's) proposal to adopt a provision that allows the spousal impoverishment regulation to be waived in instances of undue hardship. The proposed regulation was published as 19 DE Reg. 987 in the May 1, 2016 issue of the Register of Regulations.

Background on "spousal impoverishment" is summarized in the attached Medicaid.gov overview:

The expense of nursing home care - which ranges from \$5,000 to \$8,000 a month or more - can rapidly deplete the lifetime savings of elderly couples. In 1988, Congress enacted provisions to prevent what has come to be called "spousal impoverishment," leaving the spouse who is still living at home in the community with little or no income or resources. These provisions help ensure this situation will not occur and that community spouses are able to live out their lives with independence and dignity.

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. See attachments.

Federal law, 42 U.S.C. 1396r-5(c)(3) (attached) 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:

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.

16 DE Admin Code 20950. See also 19 DE Reg. at 989.

DMMA proposes to adopt the following definition of “undue hardship”:

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.

SCPD has the following observations.

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.

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 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.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

cc: Mr. Stephen Groff, DMMA  
Ms. Sheila Grant, AARP  
Mr. Brian Hartman, Esq.  
Governor's Advisory Council for Exceptional Citizens  
Developmental Disabilities Council  
19reg987 dmma-spousal impoverishment undue hardship 5-25-16



[Home](#) > [Medicaid](#) > [By Topic](#) > Eligibility

## Spousal Impoverishment

The expense of nursing home care — which ranges from \$5,000 to \$8,000 a month or more — can rapidly deplete the lifetime savings of elderly couples. In 1988, Congress enacted provisions to prevent what has come to be called "spousal impoverishment," leaving the spouse who is still living at home in the community with little or no income or resources. These provisions help ensure that this situation will not occur and that community spouses are able to live out their lives with independence and dignity.

Under the Medicaid spousal impoverishment provisions, a certain amount of the couple's combined resources is protected for the spouse living in the community. Depending on how much of his or her own income the community spouse actually has, a certain amount of income belonging to the spouse in the institution can also be set aside for the community spouse's use.

Following is the minimum and maximum amount of resources and income that can be protected for a spouse in the community in 2016:

- [2016 Spousal Impoverishment Standard \(/medicaid-chip-program-information/by-topics/eligibility/downloads/2016-ssi-and-spousal-impoverishment-standards.pdf\)](#)

### Post-Eligibility Treatment of Income

The post eligibility calculation is made to determine how much an individual in an institution (usually a nursing home) is able to contribute to cost of his/her own care. It applies only to individuals who are institutionalized (most commonly to those in nursing facilities) and to certain individuals receiving home and community-based waiver services. The process only applies to those with income and only after their Medicaid eligibility has been established.

The contribution is determined by first calculating the individual's total income and then deducting certain amounts from that income. Specifically, the individual's contribution is his or her total income less the following deductions (often referred to as "protected amounts"):

- A personal needs allowance of at least \$30;
- If there is a community spouse and the spousal impoverishment rules discussed above apply, a community spouse's monthly income allowance (at least \$1,939 but not exceeding \$2,931 for 2014), as long as the income is actually made available to the community spouse;
- A family monthly income allowance, if there are other family members living in the household;
- An amount for medical expenses incurred by the spouse who is in the medical facility.

Once the above items are deducted from the institutionalized individual's income, any remaining income is contributed toward the cost of his or her care in the institution.

### Eligibility Content

- [Populations \(/medicaid-chip-program-information/by-population/by-population.html\)](#)
- [Spousal Impoverishment \(/medicaid-chip-program-information/by-topics/eligibility/spousal-impoverishment-page.html\)](#)
- [Estate Recovery \(/medicaid-chip-program-information/by-topics/eligibility/estate-recovery.html\)](#)
- [TPL/COB \(/medicaid-chip-program-information/by-topics/eligibility/tpl-cob-page.html\)](#)

### Related Resources

- [SMD: Affordable Care Act's Amendments to the Spousal Impoverishment Statute \(/federal-policy-guidance/downloads/smd050715.pdf\)](#)
- [42 CFR 435.725 - Post-eligibility treatment of income of institutionalized individuals in SSI States \(http://www.gpo.gov/fdsys/pkg/CFR-2010-title42-vol4/pdf/CFR-2010-title42-vol4-sec435-725.pdf\)](#)
- [42 CFR 435.733 - Post-eligibility treatment of income of institutionalized individuals in States using more restrictive requirements than SSI \(http://www.gpo.gov/fdsys/search/page/details.action?na=&se=&sm=&flr=&ercode=&dateBrowse=&collection=&historical=false&st=42+CFR+435.733&=42+CFR+435.725&psh=&sbj=&tfh=&originalSearch=&sb=red2010-title42-vol4-sec435-733&packageId=CFR-2010-title42-vol4\)](#)
- [435.735 Post-eligibility treatment of income and resources of individuals receiving home and community-based services furnished under a waiver \(http://www.gpo.gov/fdsys/pkg/CFR-2010-title42-vol4/pdf/CFR-2010-title42-vol4-sec435-735.pdf\)](#)
- [435.832 Post-eligibility treatment of income of institutionalized individuals \(http://www.gpo.gov/fdsys/pkg/CFR-2010-title42-vol4/pdf/CFR-2010-title42-vol4-sec435-832.pdf\)](#)

[Previous Page](#)[Next Page](#)

## CHAPTER 88

## FORMERLY

## SENATE BILL NO. 99

AN ACT AUTHORIZING AND DIRECTING THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF THE STATE OF DELAWARE TO AMEND THE SPOUSAL IMPOVERISHMENT PROVISIONS OF THE STATE PLAN UNDER TITLE XIX (MEDICAID) OF THE SOCIAL SECURITY ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. The Department of Health and Social Services of the State of Delaware is hereby authorized and directed to amend the spousal impoverishment provisions of the State Plan under Title XIX (Medicaid) of the Social Security Act to reflect the following minimum resources eligibility limitation:

"Minimum Resource Standard: \$25,000".

Approved July 6, 1993.



STATE OF DELAWARE  
DELAWARE HEALTH AND SOCIAL SERVICES  
DIVISION OF MEDICAID & MEDICAL ASSISTANCE  
POLICY, PLANNING AND QUALITY UNIT

MEMORANDUM

REPLY TO  
ATTN. OF: Administrative Notice DMMA -03-2016

TO: All DMMA Staff

DATE: November 20, 2015

SUBJECT: 2016 Spousal Impoverishment Standards

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BACKGROUND

Under Section 1924(g) of the Social Security Act, the minimum and maximum resource allowances and the cap on the community spouse's minimum monthly maintenance needs standards are updated annually. The figures are increased by the same percentage as the percentage increase in the Consumer Price Index (CPI).

DISCUSSION

The CPI will not increase in 2016. Therefore, the Spousal Impoverishment Standards will remain the same for 2016.

Effective January 1, 2016 the standards will remain as follows:

Minimum Community Spouse Resource Allowance - \$23,844.00 (federal)

Delaware's Minimum Community Spouse Resource Allowance - \$25,000.00

NOTE: Effective October 1, 1993 the minimum resource allowance in Delaware increased to \$25,000.00. Any federal annual increase in the minimum resource allowance will have no effect on Delaware's minimum until it exceeds \$25,000.00

Maximum Community Spouse Resource Allowance - \$119,220.00

Maximum Monthly Maintenance Needs Allowance - \$2,980.50

ACTION REQUIRED

The eligibility system will retain these standards for 2016.

DIRECT INQUIRIES TO

Kathleen J. Mahoney  
(302) 424-7214

November 20, 2015  
DATE

Glyne Williams  
Glyne Williams, Chief  
Policy, Planning and Quality  
Division of Medicaid & Medical Assistance

# 2016 SSI and Spousal Impoverishment Standards

## Supplemental Security Income (SSI) Effective 7-1-16

	SSI Federal Benefit Benefit Rate (FBR)	SSI Resource Standard	Income Cap Limit (300%)	Earned Income Break Even Point	Unearned Income Break Even Point
Individual	733.00	2,000.00	2,199.00	1,551.00	753.00
Couple	1,100.00	3,000.00	N/A	2,285.00	1,120.00
Substantial Gainful Activity (SGA) Limit: 1,130.00 (Blind SGA: 1,820.00)					
CPI Increase for 2016: 0%					
CPI Increase, Since September 1988: 98.6%					

## Spousal Impoverishment Effective 7-1-16 Unless Otherwise Noted

**Minimum Monthly Maintenance Needs Allowance (MMMMNA):**  
(Effective 7-1-15)

1,991.25	All States (Except Alaska and Hawaii)
2,490.00	Alaska
2,291.25	Hawaii

**Maximum Monthly Maintenance Needs Allowance:**

2,980.50

**Community Spouse Monthly Housing Allowance:**

597.38	All States (Except Alaska and Hawaii)
747.00	Alaska
687.38	Hawaii

**Community Spouse Resources:**

Minimum Resource Standard:	23,844.00
Maximum Resource Standard	119,220.00

**Home Equity Limits:**

Minimum:	552,000.00
Maximum:	828,000.00



## TREATMENT OF INCOME AND RESOURCES FOR CERTAIN INSTITUTIONALIZED SPOUSES

### SEC. 1924. [42 U.S.C. 1396r-5] (a) SPECIAL TREATMENT FOR INSTITUTIONALIZED SPOUSES.—

(1) **SUPERSEDES OTHER PROVISIONS.**—In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), the provisions of this section supersede any other provision of this title (including sections 1902(a)(17) and 1902(f)) which is inconsistent with them.

(2) **NO COMPARABLE TREATMENT REQUIRED.**—Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1902(a), require such treatment for other individuals.

(3) **DOES NOT AFFECT CERTAIN DETERMINATIONS.**—Except as this section specifically provides, this section does not apply to—

(A) the determination of what constitutes income or resources, or

(B) the methodology and standards for determining and evaluating income and resources.

(4) **APPLICATION IN CERTAIN STATES AND TERRITORIES.**—

(A) **APPLICATION IN STATES OPERATING UNDER DEMONSTRATION PROJECTS.**—In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1115, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this title.

(B) **NO APPLICATION IN COMMONWEALTHS AND TERRITORIES.**—This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) **APPLICATION TO INDIVIDUALS RECEIVING SERVICES UNDER PACE PROGRAMS.**—This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1934(a)(7)) or under a PACE program under section 1934 or 1894.

(b) **RULES FOR TREATMENT OF INCOME.**—

(1) **SEPARATE TREATMENT OF INCOME.**—During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) **ATTRIBUTION OF INCOME.**—In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d), except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) **NON-TRUST PROPERTY.**—Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides—

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) TRUST PROPERTY.—In the case of a trust—

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this title (including sections 1902(a)(17) and 1917(d)), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust—

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) PROPERTY WITH NO INSTRUMENT.—In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) REBUTTING OWNERSHIP.—The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) RULES FOR TREATMENT OF RESOURCES.—

(1) COMPUTATION OF SPOUSAL SHARE AT TIME OF INSTITUTIONALIZATION.—

(A) TOTAL JOINT RESOURCES.—There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)—

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to 1/2 of such total value.

(B) ASSESSMENT.—At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this title, the State may, at its

option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2).

(2) **ATTRIBUTION OF RESOURCES AT TIME OF INITIAL ELIGIBILITY DETERMINATION.**—In determining the resources of an institutionalized spouse at the time of application for benefits under this title, regardless of any State laws relating to community property or the division of marital property—

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) (as of the time of application for benefits).

(3) **ASSIGNMENT OF SUPPORT RIGHTS.**—The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) **SEPARATE TREATMENT OF RESOURCES AFTER ELIGIBILITY FOR BENEFITS ESTABLISHED.**—During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this title, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) **RESOURCES DEFINED.**—In this section, the term “resources” does not include—

(A) resources excluded under subsection (a) or (d) of section 1613, and

(B) resources that would be excluded under section 1613(a)(2)(A) but for the limitation on total value described in such section.

(d) **PROTECTING INCOME FOR COMMUNITY SPOUSE.**—

(1) **ALLOWANCES TO BE OFFSET FROM INCOME OF INSTITUTIONALIZED SPOUSE.**—After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1902(q)(1)), in an amount not less than the amount specified in section 1902(q)(2).

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1902(r)).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) COMMUNITY SPOUSE MONTHLY INCOME ALLOWANCE DEFINED.—In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which—

(A) except as provided in subsection (e), the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) ESTABLISHMENT OF MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.—

(A) IN GENERAL.—Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds—

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981<sup>(188)</sup>) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) APPLICABLE PERCENT.—For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of—

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) CAP ON MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.—The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed \$1,500 (subject to adjustment under subsections (e) and (g)).

(4) EXCESS SHELTER ALLOWANCE DEFINED.—In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of—

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 5(e) of the Food and Nutrition Act of 2008<sup>(189)</sup>) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(i), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) COURT ORDERED SUPPORT.—If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(6) APPLICATION OF "INCOME FIRST" RULE TO REVISION OF COMMUNITY SPOUSE RESOURCE ALLOWANCE.—For purposes of this subsection and subsections (c) and (e), a State must consider that all income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance under this subsection, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.

(e) NOTICE AND FAIR HEARING.—

(1) NOTICE.—Upon—

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B)), of the amount of any family allowances (described in subsection (d)(1)(C)), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f), and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) FAIR HEARING.—

(A) IN GENERAL.—If either the institutionalized spouse or the community spouse is dissatisfied with a determination of—

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B));

(iii) the computation of the spousal share of resources under subsection (c)(1);

(iv) the attribution of resources under subsection (c)(2); or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2));

such spouse is entitled to a fair hearing described in section 1902(a)(3) with respect to such determination if an application for benefits under this title has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) REVISION OF MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.—If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

(C) REVISION OF COMMUNITY SPOUSE RESOURCE ALLOWANCE.—If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource

allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE.—

(1) IN GENERAL.—An institutionalized spouse may, without regard to section 1917(c)(1), transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) COMMUNITY SPOUSE RESOURCE ALLOWANCE DEFINED.—In paragraph (1), the “community spouse resource allowance” for a community spouse is an amount (if any) by which—

(A) the greatest of—

(i) \$12,000 (subject to adjustment under subsection (g)), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1), or

(II) \$60,000 (subject to adjustment under subsection (g)),

(iii) the amount established under subsection (e)(2); or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) TRANSFERS UNDER COURT ORDERS.—If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1917 shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

(g) INDEXING DOLLAR AMOUNTS.—For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) DEFINITIONS.—In this section:

(1) The term “institutionalized spouse” means an individual who—

(A)[190] is in a medical institution or nursing facility or who (at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI), and

(B) is married to a spouse who is not in a medical institution or nursing facility; but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term “community spouse” means the spouse of an institutionalized spouse.

[188] See Vol. II, P.L. 97-35, §673(2).

[189] See Vol. II, P.L. 88-525, §5(e).

[190] See Vol. II, P.L. 111-148, §2404, with respect to protection for recipients of home and community-based services against spousal impoverishment.

(<http://www.usinflationcalculator.com/>)

The US Inflation Calculator measures the buying power of the dollar over time. Just enter any two dates between 1913 and 2016, an amount, and click 'Calculate'.

## Inflation Calculator

If in  (enter year)

I purchased an item for \$

then in  (enter year)

that same item would cost: **\$41,199.31**

Cumulative rate of inflation: **64.8%**

\*Learn how this calculator works (<http://www.usinflationcalculator.com/frequently-asked-questions-faqs/#HowInflationCalculatorWorks>). This US Inflation Calculator uses the latest US government CPI data (<http://www.usinflationcalculator.com/inflation-calculator-information/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/>) published on April 14, 2016 to adjust for inflation and calculate the cumulative inflation rate through March 2016. The Consumer Price Index (CPI) and inflation for April 2016 is scheduled for release by the United States government on May 17, 2016. (See a chart of recent Inflation rates (<http://www.usinflationcalculator.com/inflation/current-inflation-rates/>).

INFLATION ([HTTP://WWW.USINFLATIONCALCULATOR.COM/CATEGORY/INFLATION/](http://www.usinflationcalculator.com/category/inflation/))

## US Inflation Climbs in March, Annual Inflation Rate Eases Again

(<http://www.usinflationcalculator.com/inflation/us-inflation-climbs-in-march-annual-inflation-rate-eases-again/10001967/>)

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The cost of living in the United States increased in March for the first time in four months, according to a government report released on Thursday, April 14. At the same time, underlying inflation rose less than forecast after rising more than expected in February.

Consumers spent less at grocery and clothing stores but more for healthcare, transportation and shelter. In addition and for the first time since November, drivers paid more to fill up their tanks.

# Important Facts for State Policymakers Deficit Reduction Act

January 8, 2008

## Transfer of Assets in the Medicaid Program

The Deficit Reduction Act of 2005 introduced new rules that discourage the improper transfer of assets to gain Medicaid eligibility and receive long-term care services.

### **Background**

The Medicaid program provides coverage for long-term care services for individuals who are unable to afford it. Some individuals, with assistance from financial planners and attorneys, have found ways of arranging assets so that they are preserved for the individual and/or family members, but are not countable when Medicaid eligibility is determined. In order to ensure the availability of long-term care services for people that truly need them, the Deficit Reduction Act of 2005 (DRA) addresses key areas related to transfers of assets for less than fair market value. Tightening Medicaid asset transfer rules discourages the use of such "Medicaid planning" techniques and makes it more difficult for individuals with the resources to pay for their own long-term care services to inappropriately transfer assets in order to qualify for Medicaid. These key areas are: asset review "look-back" periods; asset transfer penalty periods; the treatment of annuities; life estates; notes and loans; the "income first" rule; excluded coverage for substantial home equity; and Continuing Care Retirement Community deposits.

### **Key Transfer of Asset Provisions in the DRA**

#### **Extension of Look-Back Period and Beginning Date of Penalty Period**

When an individual applies for Medicaid coverage for long-term care, States conduct a review, or "look-back," to determine whether the individual (or his or her spouse) transferred assets (e.g., cash gifts to children, transferring home ownership) to another person or party for less than fair market value (FMV). The DRA lengthened the "look-back period" to 60 months (five years) prior to the date the individual applied for Medicaid.

When individuals transfer assets at less than FMV they are subject to a penalty that delays the date they can qualify to receive Medicaid long-term care services. Previously the penalty period began with the month the assets were transferred. This provided an opportunity for individuals to avoid part or all of a penalty by transferring assets months or years before they actually entered a nursing home. Under the DRA, the penalty period, for transfers made on or after February 8, 2006, now begins on either the date of the asset transfer, or the date the individual enters a nursing home and is found eligible for coverage of institutional level services that Medicaid would pay for were it not for the imposition of a transfer penalty—whichever is later.

#### **Treatment of Annuities**

Prior to the DRA, annuities were often used to shelter assets, especially in situations where one member of a couple entered a nursing home. To discourage the use of annuities to shelter funds for heirs while qualifying for Medicaid long-term care services, the DRA changed the treatment of annuities. As a condition of eligibility for coverage of long-term care services, Medicaid applicants are now required to

disclose any interest in an annuity. Also, annuities must name the State as the primary remainder beneficiary (or as the second remainder beneficiary after a community-based spouse or minor or disabled child) for at least the value of the Medicaid assistance provided. If the annuity does not name the State as a remainder beneficiary in the proper position, the annuity must be treated as a transfer of assets for less than fair market value. The full purchase price of the annuity is the amount that is subject to penalty.

Annuities purchased by or on the behalf of an individual who applied for Medicaid coverage for long-term care shall be treated as an asset transfer for less than FMV unless the annuity meets certain requirements pertaining to retire plans as set forth in the Internal Revenue Service code, or unless the annuity is irrevocable, non-assignable, actuarially sound, and provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments.

### **Life Estates**

Under a typical life estate, an individual transfers ownership of his or her own home or other property to another person; for example a son or daughter, but retains a right to live in the home for the remainder of the individual's life. However, some individuals have used this planning mechanism to purchase a life estate in another person's home, but without intending to ever reside in that home. This type of life estate transaction is really just an attempt to transfer assets for less than fair market value to someone else. To prevent this, the DRA requires that the purchase of a life estate interest in another person's home be treated as a transfer of assets for less than FMV unless the purchaser actually lives in the home for at least one year after the date of purchase. Additionally, even if the individual lives in the home for at least one year, if the purchase amount of the life estate is greater than the computed value of the life estate's interest, the difference is considered a transfer for less than fair market value that may be subject to penalty.

### **Note and Loans**

The DRA requires that States now consider the purchase of a promissory note, loan or mortgage as a transfer of assets for less than fair market value, and thus subject to penalty, unless the following conditions are met: (1) the repayment terms are actuarially sound; (2) payments are made in equal amounts with no balloon payments; and, (3) the note, loan or mortgage prohibits cancellation of the debt upon the death of the lender.

### **\* Waiver of Imposition of Transfers of Assets Penalties in Cases of Undue Hardship**

The DRA established a hardship waiver that permits States to make an exception to a transfer of assets penalty in cases where imposition of a penalty would threaten the health or life of an individual, or when the application of a penalty would deprive the individual of food, clothing, shelter or other necessities of life. The DRA also allows a long-term care facility to apply for an undue hardship waiver on behalf of a resident, provided the facility has the resident's consent. Finally, the DRA provides an option under which States can elect to pay for a person's nursing home care for up to 30 days pending the outcome of a request for an undue hardship waiver.

## Mandatory "Income First" Rule

The "income first rule" applies when determining whether to allocate additional resources to the community spouse to bring that spouse's income up to the minimum monthly maintenance needs allowance under the Medicaid spousal impoverishment provisions. The DRA requires States to first assume that all income that could be allocated from the institutionalized spouse to the community spouse has been allocated to that spouse before allocating any additional resources. More than half of the States already applied this rule before enactment of the DRA.

## Excluded Coverage for Substantial Home Equity

The DRA requires States not to pay for Medicaid long-term care services for an individual whose equity interest in his or her home exceeds a certain level. The home equity cut-off is \$500,000, but States can elect to increase that amount up to \$750,000. There is an exception to this requirement for individuals with a spouse or a minor or blind or disabled child residing in the home. Also, States can elect not to apply this provision in cases of documented hardship.

## Deposits with Continuing Care Retirement Communities

Continuing Care Retirement Communities, or CCRCs, typically provide a continuum of care ranging from independent residential living to nursing home care. Often CCRCs require an entrance deposit, which can be substantial. These entrance deposits typically are placed in an escrow account. Previously, these funds or deposits were excluded from a person's countable resources when determining Medicaid eligibility because they could not be accessed by the applicant. The DRA requires States to consider these funds as countable resources when determining eligibility for Medicaid, provided (1) the funds can be used to pay for care under the terms of the individual's contract with the facility should other resources of the individual be insufficient; (2) the entrance fee (or remaining portion) is refundable when the individual dies or elects to leave the CCRC; and (3) the entrance fee confers no ownership interest in the community.

## State Action

In order to comply with the updated and new provisions relating to the transfer of asset review prior to the determination of an individual's eligibility to receiving Medicaid long-term care service, States must make the necessary changes to their existing Medicaid State Plan.

## Important Links

State Medicaid Directors Letter and Enclosure on DRA § 6011 - 6016

<http://www.cms.hhs.gov/smdl/downloads/SMD072706b.pdf>

<http://www.cms.hhs.gov/smdl/downloads/TOAEnclosure.pdf>

## Appeals vs. Undue Hardship Waivers

### Appeals:

- An applicant/recipient has the fundamental right to appeal the Department's decision to deny, suspend or discontinue benefits.
- An appeal exists when there is disagreement surrounding establishment of the penalty period; whether fair consideration was received or the monetary amount of assets transferred without receiving fair consideration.

### Undue Hardship Waivers:

- Individuals determined ineligible for payment of LTC due to asset transfers or excess home equity may choose to apply for an undue hardship waiver.
- An undue hardship exists when denial of payment of LTC would:
  - deprive the individual of medical care, endangering the person's health or life; or
  - Deprive the individual of food, shelter or other basic necessities of life.

Tom Corbett, Governor  
Beverly Mackereth, Secretary