

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Statutory Authority: 31 Delaware Code, Ch. 5, Section 512 (31 Del.C. §512)

FINAL

ORDER

20330.4 Retirement Funds

Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend the Division of Social Services Manual (DSSM) regarding the Medicaid Long Term Care Program. The proposal amends a rule in the Division of used to determine eligibility for medical assistance regarding retirement funds. 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 November 2006 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2006 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposed Change

Statutory Authority

20 CFR §416.1202, *Deeming of Resources*

Summary of Proposed Change

The purpose of this amendment is to provide guidance on when and how to count pension plans such as IRAs for the purposes of determining eligibility for Long Term Care Medicaid. This guidance is based on (1) Social Security Policy Brief No. 2006-01, dated March 2006 and, (2) POMS SI 01330.120.

Key points of amended DSSM 20330.4 include:

- Defined Contribution Plans will be counted as a resource in the eligibility process.
- Defined Benefit Plans will be excluded as a resource until the recipient achieves a certain pre-determined age. At that point, the funds become a countable resource.
- Neither Defined Contribution nor Defined Benefit Plans owned by an ineligible spouse are a countable resource.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

The Delaware Health Care Facilities Association (DHCFA), Attorney-at-Law, Jerry A. Hyman, the Governor's Advisory Council for Exceptional Citizens (GACEC) and, 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:

DHCFA

First, we note that the changes being proposed to amend a rule in the Division of Social Services Manual (DSSM) used to determine eligibility for Medicaid do not appear to be related to the Deficit Reduction Act [DRA] of 2005, and in fact no reference is made to the DRA in the summary of the proposed change. DHCFA writes seeking confirmation that our interpretation is correct.

Agency Response: Your interpretation is correct. These changes are not related to the DRA.

Secondly, DHCFA would like to receive clarification on the following points [see, “*Summary of Proposed Change*”]: a) What defines a “certain pre-determined age”? What age will you use to determine this change? B) What is the definition of an “ineligible spouse”? Does this mean the “community spouse”?

Agency Response: The pre-determined age will be specified in each individual's retirement contract. In §20330.4, the first sentence of the fourth paragraph has been revised for clarification. An ineligible spouse is a legally married husband or wife who is not eligible for Medicaid benefits. This definition has been added to §20330.4, par. 4.

Finally, due to the fact that the following, highlighted [Section 20330.2, paragraph 3] proposed changes by the DHSS/Division of Medicaid and Medical Assistance (DMMA) will affect hundreds of Delaware Citizens and Providers of Medicaid Services we believe that a Public Hearing should be held so that those who will be affected can be aware of the changes. At a minimum, we respectfully suggest/request that a roundtable discussion be held for all parties that submit comments and questions with the goal of avoiding future confusion, litigation, etc.

Agency Response: Section 20330.2 is not the subject of the proposed regulation. Section 20330 and its subsections were published for context. Changes were only made to section 20330.4. Last year, the Policy, Planning and Development Unit (PPDU) reviewed pension/retirement funds for only three (3) individuals.

Mr. Hyman

With respect to *Retirement Funds*, the proposed regulations at §20330.4 could be improved with the inclusion of some clarification.

First, the newly-added last paragraph refers to “an ineligible spouse, but provides no definition of that term, nor a reference to a definition elsewhere in the DMMA. If this is a reference to “the community spouse,” perhaps that language could be used, instead.

Agency Response: as stated above, an ineligible spouse is a legally married husband or wife who is not eligible for Medicaid benefits. The definition has been added to §20330.4, par. 4.

Second, the proposed last sentence exempts the “ineligible spouse's” Defined Contribution Plans and Defined Benefit Plans. Presumably, based on the first sentence of §20330.4 – “Retirement funds are annuities or work-related plans ...” – a Defined Contribution Plan owned by the spouse which he or she annuitizes would also not be counted as a resource. This is certainly a reasonable interpretation of the regulation, as newly proposed. However, it conflicts with the proposed annuity regulations (specifically §§20330.4.1.B and 20330.4.1.B.3). Since these proposed annuity regulations are in violation of Delaware law, the conflict should be resolved by dropping the offending annuity regulations and retaining (with the clarification noted above) newly proposed §20330.4.

Agency Response: Thank you for your comment. Your input will be considered as DMMA reexamines the annuity rule.

SCPD and GACEC

First, in §20330.4, second paragraph, second sentence, DMMA may wish to substitute “withdrawals” for “withdraws”.

Agency Response: DMMA accepts and changes “withdraws” to “withdrawals”.

Second, in §20330.4, last paragraph, second sentence, the introductory word “these” should be capitalized.

Agency Response: This was a publication error. “These” was capitalized.

Third, in §20330.4, last paragraph, the first two sentences are not entirely accurate. They refer to “age” as the sole criteria for eligibility under a defined benefit plan. As the SSA Policy Brief notes (p. 2), eligibility under a defined benefit plan may be subject to multiple requirements “such as being retired from firm and being the required age”. It would be preferable to amend the second sentence as follows:

These plans are not considered a countable resource until the individual *meets eligibility criteria for receipt of plan benefits (e.g. actual retirement and reaching a pre-determined age)*.

This amendment would achieve consistency with §20330.4, second paragraph, which recites as follows: "A retirement fund is not a resource if an individual must terminate employment in order to obtain any payment." Age alone does not determine whether a defined benefit plan is a countable resource. See also attached excerpt (pp. 25-26) from The Retirement Security Project, "Protecting Low-income Families' Savings: How Retirement Accounts Are Treated in Means-Tested Program and Steps to Remove Barriers to Retirement Saving (2005)":

Defined benefit pension plans, as well as a particular type of defined contribution plan known as a "monetary purchase plan," do not count as assets as long as individuals are employed by the firm that sponsors the plan because such individuals cannot access the plans and make withdrawals. (SSA does not require an individual to terminate employment in order to access a retirement plan.

Agency Response: §20330.4, last paragraph, has been revised.

Findings of Fact:

The Department finds that the proposed changes as set forth in the November 2006 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual regarding retirement funds in determining eligibility for the Medicaid Long Term Care Program is adopted and shall be final effective March 10, 2007.

Vincent P. Meconi, Secretary, DHSS, February 15, 2007

DMMA FINAL ORDER REGULATION #07-12 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. Loan proceeds are not income to the 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 retained into the month following the month of receipt.

If the Medicaid applicant is the owner of a promissory note, loan, or property agreement (mortgage), assume the value of the agreement is its outstanding principal balance unless the individual furnishes reliable evidence that it has a current market value of less than that or no current market value at all. If the note, loan or mortgage is not salable, it has no current market value.

If the outstanding principal balance plus other countable resources exceeds the resource limit, inform the individual that DSS/Medicaid will use the outstanding principal balance in determining resources unless the individual submits within 30 days the following information.

- a. evidence of a legal bar to the sale of the agreement
- b. an estimate from a knowledgeable source (financial institution, bank, real estate broker)

showing the current market value of the agreement is less than its outstanding principal balance. The estimate must show the name, title and address of the source.

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.

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 ~~[withdraws 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 ~~[becomes a certain age]~~ 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 [reaches a pre-determined age 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) (Final)

20330.4.1 Annuities

An annuity is a financial device that conveys a right to receive periodic payments for life or a fixed number of months or years. While the annuity itself may or may not be an available resource, the stream of income generated by the annuity is a countable asset. DSS will determine if there is a market to purchase the annuity stream of income. If there is a market, DSS will consider it to be available for the applicant's or spouse's support and maintenance. See 20 CFR 416.1201 (a).

To calculate the value of the annuity's stream of income, DSS will use the amount at which the annuity was originally purchased and subtract all payments received to date. The remainder is the value of the annuity's income stream. DSS will require the annuity income stream be sold at Fair Market Value as a condition of eligibility. See DSSM 20350.1.7.

DSS will not count the value of an annuity purchased by a third party, e.g., the applicant's employer, as a retirement benefit to the applicant. However, DSS will count the value of the income generated from a third party annuity.

An annuity that is revocable is always a countable resource. Revocable annuities are able to be converted to cash.

Spouses that claim the income allowance is inadequate to meet the needs of the Community Spouse may request additional resources be set aside to bring their income up to the minimum maintenance needs allowance. These requests MUST go through the fair hearing process in order to retain excess resources for their protected income share. See DSSM 20970 and 42 USC 1396r-5(e). In these cases, at the death of the annuity's owner, the beneficiary of the annuity must be the estate of the Medicaid recipient.

8 DE Reg. 1617 (5/01/05)

20330.5 Stocks

Shares of stock represent ownership in a business corporation. Their value shifts with demand and may fluctuate widely. If the stock has co-owners, assume that each owner owns an equal share of the value of the stock and that the owner can sell them at current value. Broker fees do not reduce the value that stocks have as resources. Obtain a copy of the stock certificate or most recent statement of account from the firm that issued or is holding the stock.

The value of a stock as a resource is its current market value. The current market value of a stock is its closing price on any given day and can usually be found in a regular or financial newspaper. A closing price of 22 3/4 equals \$22.75. The values of over-the-counter stocks are shown on a "bid" and "asked" basis. For example, "18, bid, 19 asked." Use the bid price as the current market value. The "par value" or "stated value" shown on some stock certificates is not the market value.

The stock of some corporations is held within close groups and traded very infrequently. The sale of such stock is often handled privately and is subject to restrictions. The evidence for this kind of stock can be a written statement from the firm's accountants giving their best estimate of the stock's value and the basis for the estimate, such as most recent sale, most recent offer from outsiders, current market value of assets less any debts on them, etc.

A stock option is the right to sell or buy stock at a specified price by a specified date. A stock option controls 100 shares of stock, but options are quoted on the price per share. Options come due and are quoted for each January, April, July and October. A closing price of 1/4 equals \$25.00.

20330.6 Mutual Fund Shares

"Mutual Fund" is a term that encompasses a wide range of investments. It is a pool of assets (stocks, bonds, etc.) managed by an investment company. A mutual fund share represents ownership interest in this pool as opposed to a particular stock or bond. The documentation guidelines for stocks also apply to mutual funds. Many newspapers contain a separate table showing the values of funds not traded on an exchange.

20330.7 U.S. Savings Bonds

U.S. Savings Bonds are obligations of the Federal Government. They are not transferable and can only be sold back to the Federal Government. Normally, they cannot be redeemed for six months after the issue date specified on the face of the bond. For Series EE, and I Savings Bonds, the redemption period has been extended to 12 months. They are not resources during the retention period. They become resources (not income) as of the 7th or 13th month. A bond may not roll over or renew in order to prolong the minimum retention period. Actual redemption (converting to cash) of one bond is required before purchasing a new bond. However, the U.S. Treasury regulation authorizes the Commission of Public Debt to waive the regulatory provisions pertaining to U.S. Savings bonds including the redemption period in order to "relieve any person or persons of unnecessary hardship". A request for a refund because the person now requires Nursing Home care and so needs the funds used to purchase the bonds may constitute hardship. A written request to the Commissioner of Public Debt requesting a waiver to the redemption period is all that is required. The bondholder may simultaneously tender the bond(s) for redemption. If the Treasury receives the bond(s) and grants the waiver, it will issue the individual a check. At that point, the individual would have a countable resource in the amount of the check.

The individual in whose name a U.S. Savings Bond is registered owns it. The Social Security Number shown on a bond is not proof of ownership. The co-owners of a bond (bond titled AND/OR) own equal (50%) shares of the redemption value of the bond. The bond may show an owner followed by POD (proof of death) and another name. This is a survivorship type of bond. The name of the first individual owns 100% of the bond. The second individual will own 100% of the bond upon the death of the first individual.

Physical possession of a U.S. Savings Bond is a requirement for redeeming it. This is true for sole or joint ownership. If an individual alleges that he or she cannot submit a bond because a co-owner or other individual will not relinquish physical possession of the bond, obtain a signed statement from the co-owner or the other individual that he or she: has physical possession of the bond; will not allow the applicant to cash the bond; and if co-owner, will not cash the bond and give the applicant his or her share.

The Table of Redemption Values for U.S. Savings Bonds is used to determine the value of a bond. These are available from a local bank. The bank will need the series, denomination, date of purchase or issue date. After the mandatory 6-month retention period, the value of a series H or HH bond is its face value.

8 DE Reg. 1313 (3/1/05)

20330.8 Municipal, Corporate and Government Bonds

A bond is a written obligation to pay a sum of money at a specified future date.

A municipal bond is the obligation of a State or a locality (county, city, town, village, or special purpose authority such as a school district).

A corporate bond is the obligation of a private corporation. Corporations sell corporate bonds to raise capital. Corporate bonds are issued in two forms: registered, which pay interest to their registered owner; and bearer or coupon bonds, which pay interest to whomever holds the bond. Zero coupon bonds do not pay current interest. The accrued interest is paid at maturity.

A government bond, distinct from a U.S. Savings Bond, is a transferable obligation issued or backed by the Federal Government. They include Treasury bills, notes and bonds, and Federal agency securities, such as Federal Home Loan Mortgage Corporation (FREDDIE MAC) and Government National Mortgage Association (GINNIE MAC).

Bonds are negotiable and transferable. Their value as a resource is their current market value. The redemption value, which is available only at maturity, is immaterial. The documentation for these bonds is similar to stocks.

20330.9 Uniform Gifts to Minors Act

Delaware has adopted the Uniform Gifts to Minors Act (UGMA) which permits making gifts to minors that are free of tax burdens. The UGMA is sometimes called the Uniform Transfers to Minors Act (UTMA).

Under Delaware UGMA law:

- An individual may make an irrevocable gift of money or other property to a minor. If such a gift is made, then;
- The gift, plus any earnings it generates, is under the control of a custodian until the child reaches the age of majority established by State law;

- The custodian has discretion to provide to the minor or spend for the minor's support, maintenance, benefit or education as much of the assets as he/she deems equitable; and
- The child automatically receives control of the assets upon reaching the age of majority (his/her 18th birthday). At this time, the UGMA property becomes a countable asset for the purpose of program eligibility.

UGMA property including any additions or earnings is not income to the minor. However, any disbursements from the UGMA account to the minor will be considered income to the minor.

Verification

DSS will verify all allegations of existence of a UGMA gift by obtaining a copy of the document of ownership (e.g., deed, certificate of deposit, savings account, etc.) or other written document from the issuing source. If there is no document designating a UGMA gift, then the asset will be considered a countable resource.

8 DE Reg. 1712 (6/1/05)