



# ELDER LAW ASSOCIATES PA

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## ELDER LAW IN FLORIDA

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## **I. BASIC MEDICAID RULES**

Medicaid is a joint Federal-state program established by Federal law in 1965.<sup>1</sup> Florida's Medicaid program is supervised by the Agency for Health Care Administration (AHCA) and administered by the Department of Children and Families (DCF) in each of the 66 counties in the State. The legal authority for the Medicaid program is Title XVI (SSI) and Title XIX (Medicaid) of the Social Security Act, Chapter 409 of the Florida Statutes and Chapters 65 A-1, 65A-2 and 65A-4 of the Florida Administrative Code.

### **ELIGIBILITY REQUIREMENTS**

Medicaid may be authorized for individuals who are over 65 years of age, blind or disabled according to the Social Security Administration who have a social security number or have applied for one, who have applied for all other government benefits they may be entitled to (e.g. veterans benefits) and who meet the requirements below:

#### **A. Medically Needy:**

In order to qualify for Medicaid, the applicant must be in need of institutionalized care as determined by CARES. CARES is the unit of the DCF assigned to make the medical assessment. The applicant must be unable to perform three out of the five basic components of daily living to require institutionalized care. The five basics are:

1. Feeding oneself
2. Dressing oneself
3. Bathing oneself
4. Toileting oneself
5. Ambulating from a bed to a chair

**Practice Tip:** There is a distinct difference between assisted living facility care and skilled nursing facility care and what constitutes medically needy. If the food is put in front of the applicant and the applicant can put fork to mouth, the applicant is considered able to feed oneself, even though he or she is unable to prepare and serve the food.

B. Categorically Needy

One who qualifies for SSI benefits automatically qualifies for Medicaid in Florida.

C. Florida Residents/U.S. Citizens

In order to prove citizenship, an applicant must sign and file CF-ES Form 2058, which is a statement of citizenship or proper alien status, and produce a U.S. birth certificate or a Certificate of Naturalization from the Immigration and Naturalization Service. Newly arrived qualified aliens are prohibited from receiving benefits until five years after entry into the United States except in emergency conditions.

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<sup>1</sup> 42 U.S.C. § 1396 et seq., 42 C.F.R. § 430 et seq.

D. Financially Needy

Medicaid is a means-tested program with limitations on income and resources established by the State. The income and resource levels are adjusted annually.

i. Income

Florida is an income cap state. The current monthly income limit for a single individual applying for Medicaid is \$1,809 per month. Income is broadly interpreted and includes earned and unearned income and most government benefits.<sup>2</sup> If an applicant's income is under \$1,809 per month, the applicant meets the income test. If the applicant's income is above \$1,809 per month, the applicant will not qualify without the creation and use of a Qualified Income Trust ("QIT"). 42 U.S.C. 1396p(d)(4)(b). See section on Trusts later in the outline for a detailed explanation of QITs. If the applicant has a spouse who will remain at home, the spouse's income is not subject to an income cap and may be unlimited. See section on Spousal

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<sup>2</sup> 65A-1.713(1)(d) Florida Administrative Code and ESS Program Policy Manual Chapter 1800 (MSSI)

Planning later in the outline for a more detailed explanation of Spousal Planning.

ii. Assets and Exemptions

A single individual is entitled to \$2,000 in assets.<sup>3</sup> The following assets are exempt from the \$2,000 limit:

- a. Pre-paid funeral and burial arrangements that are irrevocable;
- b. separate burial savings accounts of \$2,500 for each spouse;
- c. the homestead, up to an equity value of \$500,000 currently but which may be increased by the State of Florida to \$750,000;
- d. personal and household property; and
- e. one automobile.

## **II. MEDICAID APPLICATION PROCESS**

### **A. The Medicaid Application**

1. Florida Medicaid Application Form – Eligibility for Medicaid in Florida

is based on an application form which is sanctioned by the state (known as the “Request for Assistance”). This is the only form that the Department of

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<sup>3</sup> 65A-1.712(1) and 65A-1.716 Florida Administrative Code

Children and Families will accept. The RFA form, together with all of the ancillary documents that Medicaid requires, forms the basis for each county to determine Medicaid eligibility. A sample Medicaid application form is attached hereto as **Exhibit 1**.

2. Information Required on the Form

- a. Personal
- b. Income
- c. Citizenship
- d. Assets
- e. Transfers
- f. Household and Other Expenses
- g. Medical
- h. Employment
- i. Residency
- j. Signature

3. Medicaid Application Package

- a. Request for Assistance Form. (Exhibit 1 attached)
- b. Consent to Allow DCF to Obtain Information from Banks and financial Institutions.
- c. Medical Release Form - allows DCF to obtain medical records

- d. Form 3008 – Physician’s Statement Regarding Medically Needy Status
  - e. Specification of Type Benefits Being Applied For – ICP, Assisted Living Waiver, Home and Community Based Waiver, etc.
4. Required Documentation
- a. Social Security Card
  - b. Birth Certificate/Naturalization Papers/Legal Status
  - c. Marriage Certificate
  - d. Death Certificate of Spouse
  - e. Residency (rent, deed, mortgage receipts, tax bills)
  - f. Identity and Age (Florida Driver’s License, U.S. Passport, Voter Registration Card)
  - g. Income Documentation (SS Award Letter, Pensions, Interest, Dividends, Rental Income, etc.)
  - h. Support Payments (alimony, child support)
  - i. Income Tax Returns for the last 3 years
  - j. Asset Documentation (Financial Transactions – 5 years)(Securities, Bank Statements, Brokerage Statements, Annuities)
  - k. Life Insurance
  - l. Medicare Coverage

- m. Health Insurance
  - n. Long Term Care Insurance Policy
  - o. Burial Plot Information/Funeral Arrangements
  - p. Proof of Disability (Applicants between ages 21 and 65)
  - q. Proof of VA Benefits
  - r. Proof of Auto Ownership
  - s. Power of Attorney
  - t. Personal Service Contracts
5. Time Limitations – Once an application for Medicaid is submitted to the Department of Children and Families, the agency has 45 days within which to issue a determination of eligibility [more time if disability determination is needed]. DCF maintains strict adherence to this rule and rarely issues a determination subsequent to the 45 days permitted. However, if the DCF caseworker issues a Request for Information seeking additional documentation, the applicant will have 30 additional days within which to provide the requested documentation. If an applicant fails to provide the required documentation within 45 days from the filing date of the application (or the extended 30 days beyond that), DCF will issue a denial of the application.

6. Institutional Care Program Benefits (“ICP”) - an application for Medicaid Institutional Care Program Benefits may be submitted up to three months after the month in which Medicaid ICP benefits is being sought. Thus, an individual seeking ICP benefits in April 2006 may submit the Medicaid application as late as July 31, 2006 and have his/her eligibility determined as of April 1, 2006. An accepted application will be approved retroactive to April 1 although the application may have been submitted in July 2006.
7. Assisted Living Facility Waiver and Long Term Diversion Program Benefits – an application for Assisted Living Facility Program benefits will only be accepted prospectively. Accordingly, if an individual is admitted to an assisted living facility that participates in the ALF Waiver or Long Term Diversion program (meaning that Medicaid will cover the cost of care for such individual at the assisted living facility) on April 1, 2006, and applies for benefits before the 15<sup>th</sup> of any month following, they are eligible for benefits for the month after they applied. If the individual does not apply until after the 15<sup>th</sup> of the month, they are not eligible for benefits until the 2<sup>nd</sup> month following. However due to lack of staff and funding, the application may not be approved for as long as three or four months by the Program and as the benefits are not retroactive, the individual is responsible to the facility for full private payment unless the facility agrees

to a Medicaid pending status.

**B. The Interview**

Once the application package is filed with DCF, the applicant will receive a letter advising of the date of a personal interview with a DCF caseworker, known as a Program Eligibility Specialist. In most cases, the applicant him/herself will not be able to attend the personal interview. A family member or friend who is familiar with the applicant's finances and medical situation may attend the interview on behalf of the applicant. An attorney also may become the designated representative for the applicant (in which case an Affidavit for Designated Representative form should be completed and included with the Medicaid application package).

**C. Notice of Acceptance**

If Medicaid benefits are approved, a letter from DCF will be issued that indicates the effective date for when benefits will begin to be paid as well as the patient responsibility for nursing home care and the amount of the Community Spouse Income Allowance, if applicable.

**D. Denial Notice**

If Medicaid denies the application, a notice from DCF to that effect will be issued by DCF. In such a case, DCF will also advise the applicant of his/her

appeal rights through the fair hearing process. A fair hearing may be requested to challenge agency action within 90 days of the action or decision being challenged.

**E. Reconsideration Applications**

**F. Recertification**

**III. TEN MOST COMMON ERRORS MADE WHEN COMPLETING AN APPLICATION**

1. Failure to apply for Aids & Attendance benefits from the Veterans Administration and receiving receipt for same if applicant or spouse served in the military during war time.
2. Failure to arrange for and sign an Irrevocable Rider contract with the funeral home for any pre-paid funeral contracts.
3. Failure to provide documents showing all closed accounts and the deposit of the proceeds from the closed account for the last five (5) years.
4. Failure to provide the last three (3) months of all current financial accounts.
5. Failure to provide proof that each IRA, 401(k), and/or annuity is paying monthly distributions for both applicant and spouse.
6. Failure to provide information from each annuity showing the annuitized

- time period is within the purchaser's life expectancy.
7. Failure to create a Qualified Income Trust if the applicant's income is over the Medicaid income limit of \$1,809 (2006 amount).
  8. Failure to timely fund the Qualified Income Trust (i.e., failure to fund in the month of application).
  9. Failure to provide Form 3008 from the nursing home (must be completely filled out including the effective date and doctor's signature).
  10. Failure to provide statements for each life insurance policy showing the owner is not the applicant and the current "cash surrender value" of each policy or a statement that the policy is a "term" policy

#### **IV. ASSET TRANSFERS**

Any transfer of assets made by an individual or his/her spouse for less than fair market value ("FMV") within the sixty months immediately preceding the date the person applies for Medicaid are subject to the penalty period rules for nursing home care.<sup>4</sup>

##### **A. Definition of Assets**

"Assets," for purposes of the transfer penalty rules and asset limitation computations, includes income or resources that the individual or the individual's

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<sup>4</sup> Social Security Act § 1917, 42 U.S.C. § 1396p.

spouse own and have access to the cash value upon disposition and are entitled to, but do not receive because of any action or inaction by the following:

1. The individual or the individual's spouse;<sup>5</sup>
2. A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse;<sup>6</sup> or
3. Any person, including a court or administrative body, who acts at the direction of or upon the request of the individual or the individual's spouse.<sup>7</sup>

**Practice Note: Examples of actions that would cause income or resources not to be received are:**

- a. Irrevocably waiving pension income;
- b. Renouncing an inheritance or refusing to assert one's right of election against an inheritance;
- c. Not accepting or accessing personal injury settlements (although individuals are not required to initiate litigation);

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<sup>5</sup> State Medicaid Manual (HCFA Transmittal No. 64 - November 1994), Section 3257B3.

<sup>6</sup> Id.

<sup>7</sup> Id.

- d. Settling a tort (personal injury) action so as to have the defendant place settlement funds directly into a trust or similar device to be held for the benefit of the individual; or
- e. Refusing without good cause to take action to obtain a court-ordered payment that is not being paid, such as an alimony award or other judgment against an individual.

**B. Jointly-Held Property**

In cases where resources are held by an individual in common with others in a joint tenancy, tenancy in common, or similar arrangement, the individual is considered to have transferred resources or a portion thereof, as applicable, when action is taken by the individual or any other person authorized to access the resources that reduces or eliminates individual's ownership or control of such resource.<sup>8</sup>

1. Joint Ownership of Bank Accounts

Ownership of financial institution accounts (including savings, checking, and time deposit or certificates of deposit accounts) must be determined as indicated below. Absent evidence to the contrary, if an individual is a joint account holder, it is presumed that all of the funds in the account belong to the individual regardless of the source of the funds. Filing a written statement and presenting

corroborating evidence from the financial institution to substantiate may rebut this presumption by explaining:

- a. Any claims about ownership of the funds or interest from the funds;
- b. The reasons for establishing the joint account;
- c. Whose funds were deposited into the account;
- d. Who made withdrawals from the account;
- e. Information on how withdrawals were spent; and
- f. A written statement from the joint owner explaining his/her understanding of the ownership of the account. (i.e., claims of ownership, why the account was set up, who deposited funds, who withdrew funds and who used the account).<sup>9</sup>

2. Joint Ownership of Non-Bank Account Assets

An individual will be considered as a part owner of a non-bank account asset in proportion to his ownership interest in such asset. Only that portion which the individual owns is considered available for Medicaid eligibility purposes. The portion owned by the non-applying owner is not considered in the asset computation for the applicant and the joint owner may withdraw or dispose of his/her portion at any time without penalty to the

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<sup>8</sup> 65A-1.712(3)(d)2, Florida Administrative Code.  
<sup>9</sup> ESS Program Policy Manual Chapter 1600 (MSSI), 1640.0302.01, et seq.

applicant. However, if consent of the non-applying joint owner is required to liquidate the asset and such consent is withheld, the total asset will be unavailable to the applicant.

3. Conversion of Individual's Assets to Jointly Held Assets

When an asset belonging to an individual is jointly held in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset is considered to be transferred by the individual when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the asset. Merely placing another person's name on an account or asset as a joint owner does not necessarily constitute a transfer of assets. The individual may still possess ownership rights to the account or asset and have the right to withdraw all of the funds in the account at any time. However, actual withdrawal of funds from the account or removal of the asset by the other person would remove the funds or property from the control of the individual and so would constitute a transfer of assets. Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the asset (i.e., the addition of another person's name requires that the person agree to the sale or disposal of the asset, where no such agreement was necessary before), such

placement would constitute a transfer of assets.<sup>10</sup>

**C. The Look-back Period and the Penalty Period**

1. Look-back Period

- a. **Pre-DRA 2005 Law:** Under Federal law before the enactment of the Deficit Reduction Act of 2005, an individual who applied for Medicaid was subject to a look-back period of 36 months prior to the first day of the month in which the individual requested Medicaid nursing home coverage. If a Trust-related transfer was made the individual was subject to a 60-month look back period.<sup>11</sup> Under current Florida DCF practice, the look back period remains 36 months in some Counties, while other Counties are asking for 5years of statements. Once Florida formally adopts the DRA provisions, which requires a 60-month look back period on transfers, regardless of whether made outright or into a trust, we expect DCF practice throughout the State to be in conformity.
- b. **Post-DRA 2005 Law:** the look back period for all transfers is 60 months.

2. Penalty Period

The penalty period resulting from a transfer of assets is determined by a calculation based on the uncompensated value of the assets transferred.

a. Calculation of Penalty Period

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<sup>10</sup> State Medicaid Manual (HCFA Transmittal No. 64 - November 1994), Section 3258.7.

<sup>11</sup> 65 A-1.712(3), Florida Administrative Code.

To establish the penalty period, the total value of all uncompensated transfers is divided by the average monthly cost of nursing home care as established by the Department of Children and Families in Florida. Currently, the average cost of care is \$3,300 across the State of Florida. Due to the fact that this rate has not increased in over 10 years and that the realistic average cost of care is significantly higher than \$3,300, the Elder Law Section of the Florida Bar in conjunction with the Academy of Florida Elder Law Attorneys (AFELA) is working with DCF to increase that number. The number of months of ineligibility is determined by dividing the total uncompensated value of the assets and income transferred by the appropriate monthly figure. For example, a transfer of \$33,000 would result in a penalty period of ten months.<sup>12</sup> The penalty period for nursing home care following a transfer may be unlimited, and in such cases the applicant should not apply prior to the expiration of the look-back period.<sup>13</sup>

b. Transfers by a Spouse

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<sup>12</sup> Id at (3)(g)1.

<sup>13</sup> Id at (3)(g).

With married couples, a transfer by one spouse to a third person will affect the nursing home eligibility of the other spouse if the transfer was made prior to the spouse's application for benefits. Thus, if either spouse applies for nursing home care, transfers by the applicant *or* the non-applicant spouse will be applied to the applicant. However transfers between spouses are exempt.<sup>14</sup>

c. Partial Month Penalty

- i. **Pre-DRA Law** - Florida did not impose partial month penalties. For example, a transfer of \$100,000 divided by \$3,300 (the current divisor) mathematically creates a 30.3-month penalty period. However, under Florida law the period of ineligibility is rounded down to the nearest whole number.<sup>15</sup> Currently, Florida has yet to implement the partial month penalty provisions described below as mandated by the DRA.
- ii. **Post DRA Law** – A penalty period is imposed for a partial month. If the uncompensated value of the transferred assets is less than the divisor, or the penalty period results in a partial month penalty as stated above, a penalty period of weeks and days will be imposed. For example, if a transfer of \$2,000 is made, then the individual will not be eligible for

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<sup>14</sup> 42 U.S.C. §1396p(c)(2).

<sup>15</sup> 65 A-1.712 (3)(g), Florida Administrative Code.

nursing home Medicaid for about 19 days ( $\$2,000/\$3,300 = .60 \times 31 \text{ days} = 18.78$ ).

d. Commencement Date of Penalty Period

- i. **Pre-DRA Law** - The penalty period begins on the first day of the month in which the transfer was made.<sup>16</sup>
- ii. **Post-DRA Law** – The penalty period will commence on the later to occur of the first day of the month in which the transfer was made or the date on which an individual is eligible for Medicaid benefits and would otherwise be receiving institutional level of care but for the imposition of a penalty period.

e. Continuation of Penalty Period

- i. **Pre-DRA Law** - A penalty period imposed for a transfer of assets runs continuously from the first date of the penalty period regardless of whether the individual continues to receive nursing facility services. Thus, if an individual leaves a nursing facility, the penalty period nevertheless continues until the end of the calculated period.

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<sup>16</sup> Id.

- ii. **Post- DRA Law** - An applicant must be eligible for Medicaid under Florida rules and would be otherwise receiving institutional level care based on an approved application for such care but for the penalty period.<sup>17</sup> It is thus unclear whether the penalty period will continue to run once the Medicaid recipient is no longer institutionalized.

**Practice Note:** Practitioners also should be aware that after the submission of a written application the applicant may withdraw his or her request for Medicaid at any time without affecting his/her right to reapply at any time.<sup>18</sup>

- f. **Multiple Transfers**

For multiple transfers made during the look-back period in which assets have been transferred in amounts and/or frequency that would make the calculated penalty periods overlap, the penalty period is calculated by adding together the uncompensated value of all assets transferred, and dividing this total by the Medicaid divisor.

- i. **Pre-DRA Law** -The period of ineligibility would begin with the first day of the month in which the

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<sup>17</sup> The Deficit Reduction Act of 2005, Public Law No. 109-171, Section 6011.

<sup>18</sup> 65 A-1.205 (1), Florida Administrative Code.

ii. first transfer occurred. When a penalty period ends at any time during a month and a subsequent transfer occurs at any time during that same month, the subsequent transfer is considered to have occurred in an overlapping penalty period and will be treated as a multiple transfer. When multiple transfers are made in such a way that the penalty periods for each do *not* overlap, each transfer is treated as a separate event with its own penalty period.

ii. **Post-DRA Law**

Partial month penalty periods may now be imposed in Florida, therefore there will be a greater instance of transfers overlapping unless a transfer is less than the current monthly divisor.

**D. Annuities**

When funds are used to purchase annuities within the lookback period, DCF must determine if the individual will receive fair market compensation in his/her lifetime from the fund. If fair compensation will be received in the individual's lifetime there has not been a transfer for less than fair market value. If not, a penalty period will be imposed. Fair compensation is determined based on life

expectancy tables published by the Office of the Actuary of the Social Security Administration.<sup>19</sup>

**Post-DRA Law** -The new law states that the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant; or The State is named as a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or child disposes of any remainder for less than fair market value.<sup>20</sup>

Other annuity provisions added by the DRA pertain to disclosure by the Medicaid applicant on an application for Medicaid, balloon annuities and annuities contained within a retirement accounts.

**E. Life Estates**

2. Definitions

a. Life Estate

A life estate is a limited interest in real property. A life estate holder does not have full title to the property, but has the use of the property for his or her lifetime, or for a specified period.

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<sup>19</sup> Id at 1.712

Sometimes, life estates are in the form of a life lease on property that the person is using, or has used, for a homestead.

b. Value of a Life Estate

DCF uses a table of life estate values, based on the current fair market value of the property and the age of the person. A life estate and remainder interest table is published by DCF. The tables set forth percentages of fair market value corresponding to the values of the life estate and the remainder interest, based on the age of the person possessing the life estate.<sup>21</sup>

c. Value of the Remainder Interest

The value of the remainder interest is the current market value of the property less the value of the life estate.

d. Remainderperson

A remainderperson is an individual who has the right to possession or ownership of the property after the life estate holder dies or surrenders the life estate.

e. Ladybird Deeds

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<sup>20</sup> DRA Section 6012(b).

A deed that retains a life estate with full power to the life tenant to convey, transfer or encumber the property is called a ladybird deed. Due to the retention of the powers specified above, this deed does not represent a transfer of assets of the remainder interest. The life tenant in this deed holds the property in a similar manner to a warranty deed and does not require the joining of the remainder interests for any action on the property. Upon the life tenant's death the title automatically vests in the remainder interest. A death certificate must be filed in the county where the property is located for clear title.

2. Transfers Involving Life Estates

Transferring property within the lookback period, while retaining a life estate, constitutes a partial uncompensated transfer. The uncompensated value of the transfer is the value of the remainder interest at the time the life estate is created according to the tables mentioned above. If the remainderperson of a life estate is an individual to whom the property could be transferred without penalty as specified under the exceptions to transfer penalty rules (see Paragraph G of this outline below), the establishment of the life estate is not a prohibited transfer.

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<sup>21</sup> ESS Program Policy Manual Appendices A-14 and A-17 and State Medicaid Manual, HCFA Transmittal No. 64 (November 1994), Section 3258.

There is no penalty for transfer of a life estate.<sup>22</sup>

**F. Homestead**

Florida is a homestead property state. There are 2 major benefits to Florida's homestead law. The first is creditor protection. A homestead property is protected against the claims of creditors and passes to one's heirs free and clear of claims (with certain limited exceptions). Secondly, homestead property is entitled to a tax credit. Due to the homestead protection, a home may not be considered an available resource under any circumstances or be subject to any Medicaid claims. For eligibility purposes only, under the DRA, a home may not have an equity value of more than \$500,000 (an amount which may be increased by the State of Florida to \$750,000).

**G. Exceptions to the Transfer Penalty Rules**

Exceptions to the application of the transfer of asset penalty rules are:

1. The asset transferred is the individual's home, and title to the home is transferred to:
  - a. The spouse of the individual;<sup>23</sup>
  - b. A child of the individual who is under age 21;<sup>24</sup>

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<sup>22</sup> ESS Program Policy Manual 1640.0551 (MSSI).

<sup>23</sup> State Medicaid Manual (HCFA Transmittal No.64 -November 1994), Section 3258.10

<sup>24</sup> Id.

- c. A child of the individual who is certified blind or certified disabled, regardless of age;<sup>25</sup>
- d. The sibling of the individual who has an equity interest in the home, and who has been residing in the home and using it as his or her primary lawful residence for a period of at least one year immediately before the date the individual becomes institutionalized;<sup>26</sup> or
- e. A son or daughter of the individual (other than a child as described above) who was residing in the homestead, using it as his or her primary lawful residence for a period of at least two years immediately before the date the individual becomes institutionalized, and who provided care to the individual, which permitted the individual to reside at home rather than an institution or facility.<sup>27</sup>

2. An asset other than the individual's homestead was transferred:

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<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

- a. To the individual's spouse, or to another for the sole benefit of the individual's spouse;<sup>28</sup>
  - b. From the individual's spouse to another for the sole benefit of the individual's spouse;<sup>29</sup>
  - c. To the individual's child who is certified blind or certified disabled;<sup>30</sup> or
  - d. To a trust established solely for the benefit of an individual under 65 years of age who is disabled.<sup>31</sup>
3. Except for allowable transfers outlined above and in 42 U.S.C. §1396p(c)(2), the DCF must presume the transfer occurred to become Medicaid eligible unless the individual can prove otherwise. Each individual shall be given an opportunity to rebut the presumption in circumstances below:
- a.. No period of ineligibility results if the individual or spouse intended to dispose of the assets either at FMV or for other valuable consideration.<sup>32</sup> The individual must provide a

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> ESS Program Policy Manual 1640.0606 (MSSI)

written statement of convincing evidence including the purpose of the transfer, attempts to dispose of the asset for FMV, reasons for accepting less than FMV, means of supporting oneself after the transfer, relationship to the persons to whom the assets was transferred and a belief that FMV was received under the circumstances. Evidence is required to support the argument. The individual should be assisted by the DCF when necessary. The burden of proof rests with the individual.<sup>33</sup>

- b. No period of ineligibility results if the assets were transferred exclusively for a purpose other than to qualify for Medicaid.<sup>34</sup> Factual circumstances supporting a contention that the assets were transferred for a purpose other than to qualify include, but are not limited to: total assets were below asset limits even if the transferred asset had been retained, the unexpected onset of a serious medical condition subsequent to the transfer; exploitation.<sup>35</sup>

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<sup>33</sup> Id. at 1640.0616.

<sup>34</sup> Id. at 1640.0606.

<sup>35</sup> Id. at 1640.0617.

- c. All or part of the assets transferred for less than FMV have been returned to the individual.<sup>36</sup> If all transferred assets are returned to the individual prior to the Medicaid eligibility determination, no transfer penalty is imposed. If a portion of the transferred assets is returned prior to the Medicaid eligibility determination, the uncompensated value of the transfer is reduced by the amount of assets returned. If all transferred assets are returned after the Medicaid eligibility determination, the existing penalty period is rescinded and the individual's eligibility for Medicaid during such period must be re-determined as though the assets were never transferred. If a portion of the transferred assets is returned after Medicaid eligibility determination, the existing penalty period is recalculated, reducing the uncompensated value of the transfer(s) by the amount of assets returned. If the recalculated penalty period has already elapsed, the individual's eligibility for Medicaid subsequent to the penalty period must be re-determined as though the returned assets were never transferred. For

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<sup>36</sup> Id. at 1640.0620.

purposes of these rules, transferred assets are considered to be returned if the person to whom they were transferred uses them to pay for nursing facility services for the Medicaid applicant/recipient or provides the Medicaid applicant/recipient with an equivalent amount of cash or other liquid assets.

4. The imposition of a penalty would place an undue hardship on the individual.<sup>37</sup> Undue hardship exists when the penalty would deprive an individual of food, clothing, shelter or medical care such that his/her life or health would be endangered. All efforts to reverse the transfer must be exhausted before this exception applies. A district program specialist must review all undue hardship decisions.

**H. Requirements of the DCF for Processing Transfers.**

The DCF caseworker must explain the presumption and the individual must be given the opportunity to rebut the presumption. DCF must not take any adverse

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<sup>37</sup> Id. at 1640.0613.

action on an application without first advising the client in writing and giving an opportunity to present a written rebuttal. The applicant has 15 days to respond.<sup>38</sup>

## V. SPOUSAL PLANNING

### A. Rules Protecting the Community Spouse

#### 1. Rules Regarding Income

Under the Medicare Catastrophic Coverage Act (“MCAA”), states are given the discretion to establish an income allowance for the community spouse to be adjusted every year for inflation.<sup>39</sup>

#### a. MMMNA AND CSRA

Specifically, the community spouse may retain the institutionalized spouse’s income if his/her income is under the Minimum Monthly Maintenance Needs Allowance (“MMMNA”), which is currently \$1,604. The maximum MMMNA in 2006 is \$2,489. If with the institutionalized spouse’s income there is still a shortfall, the applicant may ask for an increase in assets over the allowed Community Spouse Resource Allowance (“CSRA”), currently \$99,540. The CSRA is equal to the maximum resource allocation standard allowed under 42 U.S.C. § 1396r-5 or any court-ordered

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<sup>38</sup> Id. at 1640.0615.

support, whichever is larger.<sup>40</sup> The additional assets must be income producing.

If the community spouse is seeking to achieve a Monthly Maintenance Needs Allowance greater than the Minimum of \$1,604 up to or anywhere in between the maximum of \$2,489, he/she must show excess shelter expenses. When basic shelter expenses including mortgage, taxes, insurance, basic phone and electric are greater than 30% of the Minimum, currently \$481.20, a showing of excess shelter expenses is made.

The DCF caseworker then adds all the above shelter expenses and subtracts \$481.20 to arrive at the “Excess Shelter Cost”. The community spouse’s income is then subtracted from the maximum MMMNA amount to determine the unmet need of expenses. Any unmet need must first be met from the institutionalized spouse’s income and if insufficient may be met from the retention of income-producing assets over the CSRA.

b. Exceptional Circumstances

Furthermore, either spouse may appeal the amount of the income allowance through the fair hearing process and the allowance may

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<sup>39</sup> 42 U.S.C. § 1396r-5(d).

be adjusted by the hearing officer if the couple presents proof that exceptional circumstances resulting in significant inadequacy of the allowance to meet their needs exist.<sup>41</sup> Exceptional circumstances may include expenses for mortgages, taxes, auto insurance, health insurance, basic phone and food allowance. If the officer finds these expenses constitute proof of exceptional circumstances, the officer may award more income or assets over the maximum allowed amount.

c. Court-Ordered Support

If the community spouse requires income in excess of the MMMNA, and if a state court orders such support, the MMMNA will be increased up to the amount set by the court.<sup>42</sup> The standard for court-ordered support is the same as the standard used at a fair hearing.

At a fair hearing, the community spouse must show that he or she needs income above the MMMNA because of “exceptional

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<sup>40</sup> 65A-1.712(4)(c)F.A.C., F.S. 409.919

<sup>41</sup> 65A-1.712(4)(f) Florida Administrative Code, F.S. 409.919

<sup>42</sup> 42 U.S.C. § 1396r-5(d)(5), 65A-1.712(4) (c) Florida Administrative Code.

circumstances resulting in significant inadequacy of the allowance to meet their needs.”<sup>43</sup>

d. Excluded Income

The following items are not included as income for Medicaid budgeting purposes:

- i. German war reparation payments and other Federal restitution programs are not counted as income.<sup>44</sup>
- ii. In-kind support and maintenance.
- iii. Irregular or infrequent income.
- iv. Income placed into a Qualified Income Trust.
- v. Income tax refunds are assets in the month after they are received but not income in the month received.
- vi. Veterans’ Aid and Attendance payments.
- vii. Reverse mortgages and home equity loans, however these items may be counted as an asset in the months following the payment.

e. Allowable Deductions

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<sup>43</sup> 42 U.S.C. § 1396r-5(e)(2)(B), , 65A-1.712(4) (f) Florida Administrative Code.

<sup>44</sup> 65A-1.713(2) Florida Administrative Code, 20 C.F.R. 416.1100, et. seq., 42 U.S.C. § 1396a(r).

Besides providing protections for the community spouse, Congress has also provided for allocations of the institutionalized person's income by deducting the following amounts:

- i. Personal Needs Allowance of \$35 per month;<sup>45</sup>
- ii. Monthly income allowance for a community spouse to reach the MMMNA;<sup>46</sup>
- iii. Family Allowance for each "family member" (i.e., minor or dependent parents, or dependent siblings of either spouse who reside with the community spouse); and
- iii. Medical expenses and health insurance premiums for the institutionalized person.<sup>47</sup>

f. Apportionment of Income

Except as provided in the following paragraph, any income received by the community spouse is not considered available to the institutionalized spouse for purposes of Medicaid eligibility.<sup>48</sup>

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<sup>45</sup> 42 U.S.C. § 1396r-5(d)(1)(A),

<sup>46</sup> 42 U.S.C. § 1396r-5(d)(1)(B),

<sup>47</sup> 42 U.S.C. § 1396r-5(d)(1)(D),

<sup>48</sup> 42 U.S.C. § 1396r-5(b)(1), ESS Program Policy Manual 1840.0109.01

Congress has established certain rules to determine how income is apportioned between the community spouse and the institutionalized spouse.<sup>49</sup>

g. Income from non-trust Property

If income is paid solely in the name of the institutionalized spouse or solely in the name of the community spouse, the income is deemed available only to that particular spouse.<sup>50</sup>

If income is paid in the names of the institutionalized spouse and the community spouse, one-half of the income is deemed available to each of them.<sup>51</sup>

If income is paid or distributed in the names of the institutionalized spouse or the community spouse, or both, and to a third party or parties, the income is deemed available to each spouse in proportion to the spouse's interest (or, if income is paid with respect to both

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<sup>49</sup> These rules apply except as otherwise provided in 42 U.S.C. § 1396r-5(b)(2)(A)(iii) and are applicable notwithstanding any state laws regarding community property or the division of marital property. 42 U.S.C. § 1396r-5(b)(2).

<sup>50</sup> 42 U.S.C. § 1396r-5(b)(2)(A)(i), ESS Program Policy Manual 1840.0109.01

<sup>51</sup> 42 U.S.C. § 1396r-5(b)(2)(A)(ii), ESS Program Policy Manual 1840.0109.01

spouse's and no such interest is specified, one-half of the joint interest is deemed available to each spouse.<sup>52</sup>

h. Income from Trust Property

Income is deemed available to each spouse as indicated in the trust agreement<sup>53</sup> or if there are no specific provisions in the trust agreement regarding allocation of income, the following rules apply:

If income is paid solely to the institutionalized spouse or solely to the community spouse, the income shall be deemed available only to that particular spouse;

If income is paid to both the institutionalized spouse and the community spouse, one-half of the income shall be deemed available to each of them;<sup>54</sup> or

If income is paid to the institutionalized spouse or the community spouse, or both, and to a third party or parties, the income is deemed available to each spouse in proportion to the particular spouse's interest (or, if income is paid with respect to both spouses

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<sup>52</sup> 42 U.S.C. § 1396r-5(b), ESS Program Policy Manual 1840.0109.01

<sup>53</sup> 42 U.S.C. § 1396r-5(b)(2)(B)(ii)(I), ESS Program Policy Manual 1840.0109.01

and no such interest is specified, one-half of the joint interest is deemed available to each spouse.<sup>55</sup>

In the situation where income is not paid from a trust and where no instrument exists to establish ownership interest, subject to the following paragraph, one-half of the income is deemed available to the institutionalized spouse and one-half to the community spouse.<sup>56</sup>

The rules regarding non-trust property and the rules regarding property not held pursuant to an instrument are superseded to the extent that the institutionalized spouse can establish, by a preponderance of the evidence that the ownership interests in income are other than as provided herein.<sup>57</sup>

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<sup>54</sup> 42 U.S.C. § 1396r-5(b)(2)(B)(ii)(II),

<sup>55</sup> 42 U.S.C. § 1396r-5(b)(2)(B)(ii)(III),

<sup>56</sup> 42 U.S.C. § 1396r-5(b)(2)(C),

<sup>57</sup> 42 U.S.C. § 1396r-5(b)(2)(D), ESS Program Policy Manual 1840.0109.01

2. Rules Regarding Resources

Florida law provides that the community spouse is entitled to a Community Spouse Resource Allowance (“CSRA”) equal to the maximum resource allocation standard allowed under Federal law or ordered by a court.

All countable resources owned solely or jointly by husband and wife are considered when determining eligibility. At the time of application, only those resources, which exceed the CSRA, are considered available to the institutionalized spouse.<sup>58</sup>

**B. Enhancing the Resource Allowance**

42 U.S.C. § 1396r-5(e)(2)(C) provides:

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) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

Post DRA 2005, the community spouse must first increase their income by diverting the income from the institutionalized spouse. If there is still an income deficiency, the community spouse may seek an increase in the CSRA.

**C. Exempt Interspousal Transfers**

1. It may be possible for the institutionalized spouse to transfer resources to the community spouse to become Medicaid eligible if the institutionalized spouse has resources in excess of the allowable amounts. The transfer of assets rules provides that *any* amount of resources may be transferred between spouses without resulting in the imposition of a penalty period.<sup>59</sup> Notwithstanding the above paragraph indicating that any amount of resources may be transferred between spouses, once a Medicaid application is submitted on behalf of the institutionalized spouse, Federal law provides that an institutionalized spouse may only transfer to a community spouse an amount equal to the Community Spouse Resource Allowance (“CSRA”), which in 2006 is a maximum of \$99,540, but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse.
2. Practice Issue (Post-Eligibility Transfers): May a community spouse transfer assets out of his or her name once the institutionalized spouse’s nursing home Medicaid application is approved? Both Federal and state law expressly exempt transfers made “exclusively for a purpose other than

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<sup>58</sup> 66A-1.712(4), Florida Administrative Code.

<sup>59</sup> 42 U.S.C. § 1396p(c)(2)(A)(i).

to qualify for Medical Assistance.”<sup>60</sup> Thus, where the Medicaid application is already approved and, thereafter, the community spouse transfers assets for a purpose other than to qualify the applicant spouse for benefits, the transfer should not result in a period of ineligibility with respect to the institutional spouse’s Medicaid eligibility (however, see discussion below). However, such post-eligibility transfers by the community spouse are subject to the transfer penalty rules with respect to the community spouse’s *own* Medicaid eligibility.

Prior to *Wisconsin v. Blumer*, No. 00-952 WL 23700 (U.S. Supreme Court, February 20, 2002), the Center for Medicare and Medicaid Services had an established policy that once eligibility was determined for the institutionalized spouse, assets belonging to the community spouse would no longer be considered available to the institutionalized spouse. Thus, the community spouse could transfer those resources to a third party without a transfer penalty being incurred by the spouse in the institution.

CMS re-examined the issue subsequent to *Wisconsin v. Blumer* and now believes the applicable federal statute (Sections 1917 and 1924 of the

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<sup>60</sup> 42 U.S.C. § 1396p(c)(2)(C)(ii).

Social Security Act) can be interpreted to support both the previously expressed policy as described above and a second alternative. Section 1924(c)(4) states that, during the continuous period in which an institutionalized individual is in an institution and after the month in which he or she is determined to be eligible, no resources of the community spouse “shall be deemed available” to the institutionalized spouse. However, according to CMS, the statute does not specify what “deemed available” means in this context.

The longstanding CMS policy on post-eligibility transfers by a community spouses had been based on an interpretation of “deemed available”, that holds that penalizing a transfer of resources by a community spouse has the effect of treating those resources as being constructively available to the institutionalized spouse since that spouse could be deprived of coverage for nursing home care if the community spouse transfers the resources in question for less than fair market value. Thus, penalizing a post-eligibility transfer by a community spouse would violate the requirement that the community spouse’s resources are not “deemed available” to the institutionalized spouse once eligibility has been determined.

While the above policy remains a supportable interpretation of “deemed available”, and can be adopted by States if they so choose, there is another, equally supportable in CMS’s eyes, interpretation. The second interpretation of this term exists under Section 1917(c)(1) of the Social Security Act, which requires states to impose a penalty period if an institutionalized individual or the individual’s spouse transfers assets for less than fair market value. Under Section 1917(e)(1), “assets” include all income and resources belonging to the individual or the individual’s spouse. Thus, a community spouse’s transfer of resources, whether the resources belong to the spouse or the institutionalized individual, can be imputed to the institutionalized individual, and can be subject to penalty.

According to CMS, in the context of a post-eligibility transfer by a community spouse, these provisions taken together would allow a State to impose a penalty without making a determination that the transferred resources were actually “available” to the spouse in the institution. Rather, imposition of a transfer penalty would be based on section 1917(e)(1) language requiring States to impose a penalty when assets (as defined in Section 1917(e)(1)) are transferred by the individual or the individual’s

spouse.<sup>61</sup>

In Florida, under Section 1640.0611 of the ESS Program Manual, after an institutionalized spouse has been determined eligible for Medicaid nursing facility services, transfers of assets owned by the community spouse will not affect eligibility of the institutionalized spouse provided included assets were within the applicable limit at the time of application disposition.

**D. Spousal Refusal**

In addition to the right to retain a fixed income and resource allowance, under Federal law, the community spouse may also exercise a right of “spousal refusal”<sup>62</sup> and retain amounts in excess of the CSRA or the MMMNA without jeopardizing the institutionalized spouse’s Medicaid eligibility, provided that:

1. The institutionalized spouse assigns to the state any right of support from the community spouse by submitting an Assignment of Support Rights form signed by the institutionalized spouse or his/her representative\*.<sup>63</sup>
2. The institutionalized spouse would be eligible if the only resources he/she has access to are counted; and

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<sup>61</sup> This section of the outline regarding post-eligibility transfers and CMS policy with respect thereto is based upon comments submitted to the New York State Bar Association Elder Law Section on October 21, 2004 by Barbara J. Collins, Esq., Center for Medicare and Medicaid Services, Baltimore, Maryland.

<sup>62</sup> 42 U.S.C. § 1396k(a)(1)(A), 65A-1.712(4)(g)

3. The institutionalized spouse has no other means to pay for the nursing home care.

\*If the institutionalized spouse lacks the ability to execute an assignment of support due to physical or mental problems, the State has the right to bring a support proceeding against the community spouse without such assignment.<sup>64</sup>

**E. The Right of Recovery From a Community Spouse During Lifetime**

A community spouse who executes a spousal refusal must be made aware of Medicaid's potential right to seek recovery against the refusing spouse for benefits paid on behalf of the institutionalized spouse. This right of recovery is not clearly defined in Florida and may not exist at all. Although such a recovery right would seem to exist under Fla. Sta. § 409.910 (Responsibility for Payments on Behalf of Medicaid-Eligible Persons When Other Parties are Liable), it is questionable whether a community spouse is a "third-party" responsible for the cost of care of a spouse under this statute. Furthermore, since 1996, Florida has no common law support obligation between husband and wife.<sup>65</sup>

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<sup>63</sup> 42 U.S.C. § 1396r-5(c)(3)(A), 65A-1.712(4)(g)

<sup>64</sup> 42 U.S.C. §1396r-5(c)(3)(B).

## VI. PARTNERSHIP FOR LONG TERM CARE

Partnership policies are currently available in four states: California, Connecticut, Indiana and New York.

Under the New York State Partnership for Long Term Care, resources are exempt for Medicaid eligibility purposes. Therefore, a transfer of resources by those individuals who have purchased long-term care insurance policies under this program (and have received three years of nursing home coverage, or six years of home care services, or a combination of nursing home care and home care services where one nursing home day equals 2 home care days) will have no effect on their eligibility for nursing facility services. As income is not exempt, however, a transfer of income will be treated as specified in Administrative Directive 96 ADM-8. However, when an exempt resource that generates income is transferred, no transfer penalty is imposed.

A new type of Partnership policy (similar to the program that already exists in Connecticut) is now set forth in the New York statute, providing for dollar-for-dollar asset protection (so called “dollar-for-dollar” policies). These types of policies may be offered with a minimum of 12 months of benefits as opposed to 36 months for conventional Partnership policies. The new 12-month minimum duration does not apply to non dollar-for-dollar Partnership policies.

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<sup>65</sup> See *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So. 2d 175 (Fla. 1996), wherein the Florida Supreme Court abolished the common law doctrine of necessities.

Under the Deficit Reduction Act of 2005, Partnership policies may now be offered in all 50 states. The Florida legislature has introduced a bill (S.B. 1208) which, if enacted, would create Section 409.9102 Florida Statutes, Florida's version of a Long Term Care Partnership Program. Under the bill, the Agency for Health Care Administration is directed to establish the Partnership Program, which must:

- a. Provide incentives for an individual to obtain insurance to cover the costs of long term care:
- b. Establish standards for long-term care insurance policies for designation as approved long-term care partnership program policies in consultation with the Office of Insurance Regulation;
- c. Provide a mechanism to qualify for coverage of the costs of long-term care needs under Medicaid without first being required to substantially exhaust his or her resources, including a reduction of the individual's asset valuation by \$1 for each \$1 of benefits paid out under the individual's approved long-term care partnership program policy as a determination of Medicaid eligibility;
- d. Provide and approve long-term care partnership plan information distributed to individuals through insurance companies offering approved partnership policies; and

- e. Alleviate the financial burden on the state's medical assistance program by encouraging the pursuit of private initiatives

The Agency for Health Care Administration is required under the bill to develop a plan for implementation of the Florida Long-term Care Partnership Program and must present its plan in the form of recommended legislation to the President of the Senate and the Speaker of the House of Representatives prior to the commencement of the 2007 legislative session.

## **VII. DEFICIT REDUCTION ACT OF 2005**

On February 8 2006, the President signed the DRA 2005 bill into law.

The DRA contains three major changes to Medicaid eligibility rules, along with many other significant changes to existing Federal Medicaid laws.

1. The look-back period will be increased from 36-months to 60-months for all transfers.
2. The penalty period for uncompensated transfers will not begin until the later of (1) the month following the month in which the asset transfer is made or (2) the date on which an individual is both receiving institutional level of care (i.e., in a nursing home or pursuant to a waived home care program) and whose application for Medicaid would be approved but for the imposition of a penalty period at that time. Thus, the individual must

be otherwise eligible (i.e., have less than \$2,000 in non-exempt resources at that time).

3. The equity in a Medicaid applicant's otherwise exempt home will be countable to the extent it exceeds \$500,000 (or, \$750,000 at the state's option). The home equity cap does not apply if there is a spouse or a child who is under twenty-one, blind or disabled living in the home.

One section of the DRA states that it applies to all transfers occurring on or after the date of enactment. However, a different section of the DRA states that it applies to all transfers after the date of enactment. It is unclear how this discrepancy will be resolved. Moreover, states have a grace period during which they are not required to apply the new laws if enabling legislation is required in that state to bring their state Medicaid plans into compliance. In that case, the effective date could be as late as the first day of the first calendar quarter beginning after the close of the regular session of the state legislature, which is May 2, 2006, if the legislation has been introduced and passed. The governor may also convene a Special Session in order to bring Florida into compliance.

At this time, it is unclear when this law will become effective in Florida. It is also not clear how the law will be applied to transfers occurring after the Federal effective date but before Florida adopts enabling legislation. The ultimate treatment may depend upon when

the Medicaid application was filed or when a determination is made by the Medicaid agency.

States are required to have a hardship waiver procedure in place if a hardship is imposed on the Medicaid applicant as a result of the transfer of asset provisions. In order to apply, the individual must be deprived of medical care, which would endanger his health or life, or he must be deprived of food, clothing, shelter or other necessities of life. There also is a provision pursuant to which a facility in which someone is institutionalized may file a hardship waiver on that person's behalf. While the hardship application is pending, the state may pay for up to thirty days of the cost of the individual's care.

Other significant provisions in the DRA include the following:

1. Annuities - Balloon annuities will be considered a countable asset. The State is required to be the remainder beneficiary on all annuities otherwise the transfer will be penalized.
2. The income-first rule is mandatory in all states.
3. No rounding down of penalty periods
4. Aggregation of multiple transfers.
5. Notes and loans would have to be actuarially sound. No balloon payments or self-canceling notes are permitted
6. The purchase of a life estate would be considered a transfer of assets unless the purchaser lives in the premises for at least one year after the purchase.

7. Certain entrance fee deposits of CCRCs would be considered available resources for Medicaid eligibility purposes.
8. The long-term care insurance partnership program will now be available to the remaining 46 states that currently do not offer it as discussed above.

## **VIII. TRUSTS**

### **A. Definition of a Trust**

A trust is any arrangement in which a grantor transfers property to a Trustee with the intention that it be held, managed, or administered by the trustee for the benefit of the grantor or certain designated individuals (beneficiaries). The trust must be valid under State law and must be in writing.

1. The term "trust" also includes any legal instrument or other device created on or after August 11, 1993 that is similar to a trust.
2. The trust provisions do not apply to trusts established by will. Neither the principal of a testamentary trust nor any in-kind benefits received by the Medicaid applicant as a result of distributions from such a trust are counted as an

available resource for purposes of determining the recipient's Medicaid eligibility.

3. A legal instrument or device is similar to a trust if, attendant upon its creation, assets are put under the control of an individual or entity with fiduciary obligations to manage such assets for the benefit of a designated beneficiary. For example, legal instruments or other devices similar to a trust may include, but are not limited to, escrow accounts, investment accounts, and pension funds.

**B. Establishment of a Trust as it Relates to Medicaid**

1. The trust rules apply to any individual who "establishes" a trust and who is an applicant for, or recipient of, Medicaid. An individual is considered to have established a trust if his assets were used to form all or part of the corpus of the trust and if certain individuals "establish" the trust.
2. The trust must be established, other than by will, by any of the following persons:
  - a. the individual;
  - b. the individual's spouse;

- c. a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
  - d. a person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.
- 3. If a trust contains the assets of an individual and of other persons, the above rules apply to the portion of the trust's assets that are attributable to the individual.
- 4. Subject to the exempt trusts discussed below, the trust rules apply without regard to:
  - a. The purposes for which the trust is established;
  - b. Whether the trustees have or exercise any discretion under the trust;
  - c. Any restrictions on when or whether distributions may be made from the trust; or
  - d. Any restrictions on the use of distributions from the trust.

## **IX. TYPES OF TRUSTS**

### **A. Revocable Trust**

A trust that may be revoked by the grantor under applicable State law.

1. the trust principal and the income generated by the trust are considered an available resource to the individual.
2. Payments made from the trust to or for the benefit of the Medicaid applicant are considered available income in the month paid.
3. Any other payments from the trust (e.g., payments to third parties) are considered assets transferred without fair compensation by the Medicaid applicant for purposes of the transfer of asset rules and his/her Medicaid eligibility.<sup>66</sup>

**B. Irrevocable Trust**

1. A trust that may not, in any way, be revoked by the grantor.
  - a. The availability of assets to a Medicaid applicant which are held in an irrevocable trust depends on the trustee's authority, under the specific terms of the trust agreement, to make payments to or for the benefit of the Medicaid applicant.<sup>67</sup>
  - b. The beneficial interest of the grantor or grantor's spouse includes any income or principal amounts to which the grantor or grantor's spouse would be entitled under the terms of the trust, by right or in

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<sup>66</sup> ESS Program Policy Manual 1640.0576.07.

<sup>67</sup> Id.

the discretion of the trustee, assuming the full exercise of discretion by the trustee.

2. Any portion of the trust principal, and of the income generated by the trust principal, from which no payments may be made to the Medicaid applicant under any circumstances, are considered to be assets transferred by the Medicaid applicant for purposes of the transfer of asset rules and that individual's Medicaid eligibility.
3. Any portion of the trust principal, and of the income generated from the trust, which can be paid to or for the benefit of the Medicaid applicant, under any circumstances, is considered an available resource of the Medicaid applicant.<sup>68</sup>
4. Payments from the trust:
  - a. to or for the benefit of the Medicaid applicant, are considered available income in the month received.<sup>69</sup>
  - b. for any other purpose (e.g., payments to third parties) are considered assets transferred by the Medicaid applicant for

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<sup>68</sup> Id.

<sup>69</sup> Id.

purposes of the transfer of asset rules and his/her Medicaid eligibility.<sup>70</sup>

c. Limited Powers of Appointment

A limited power of appointment exists when the grantor reserves the right to change the beneficiaries of the trust, but limits the parties to persons other than himself, his spouse, creditors of the grantor or his spouse, the estate of the grantor or his spouse, or creditors of either estate.

**X. EXEMPT TRUSTS**

Funding an exempt trust does not create a transfer penalty period;<sup>71</sup> nor is the corpus of an exempt trust considered an available resource to an individual when determining his/her Medicaid eligibility.<sup>72</sup>

**A. Special Needs Trust**

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<sup>70</sup> Id.

<sup>71</sup> ESS Program and Policy Manual 1640.0576.08.

1. A trust containing the assets of a disabled individual if:
  - a. the trust was created for the benefit of the disabled individual when the disabled individual was under the age of 65;
  - b. the trust was established by:
    - (i.) the individual's parent;
    - (ii.) the individual's grandparent;
    - (iii.) the individual's legal guardian; or
    - (iv.) a court of competent jurisdiction; and
    - (v.) the trust agreement provides that upon the death of the individual the State receives all amounts remaining in the trust up to the total value of Medicaid paid on behalf of the individual.
2. When a trust is established for a disabled individual under age 65, the trust maintains its exempt status after the individual attains age 65.
3. Once established, additional funds can be added to the trust until the individual attains age 65.
4. Assets added to a disability trust after an individual attains age 65 should not disqualify the entire trust; rather, the transfer of additional assets to the trust would not be eligible for the disability trust exemption to the transfer of asset provisions.

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<sup>72</sup> Id.

**B. Pooled Trust**

A trust containing the assets of a disabled individual if:

1. The trust is established and managed by a non-profit association which maintains separate accounts for the benefit of disabled individuals, but for purposes of investment and management of trust funds, pools the accounts;
2. Each account in the trust is established solely for the benefit of a disabled individual by:
  - i. the individual;
  - ii. the individual's parent;
  - iii. the individual's grandparent;
  - iv. the legal guardian of the individual; or
  - v. a court of competent jurisdiction; AND
  - vi. upon the individual's death, amounts remaining in the individual's account which are not retained by the trust are paid to the State up to the total value of all Medicaid paid on behalf of the individual.

**C. Review, Approval and Reporting Requirements**

Under ESS Program and Policy Manual § 1640.0576.08, all special trusts must be forwarded to the District Program Office for review and to receive District Legal Counsel's approval. A lack of response is deemed an approval in practice.

**XI. ESTATE RECOVERY**

**A. Definition of Estate**

1. The term "estate" includes all real and personal property and other assets included within the individual's estate, as determined under applicable State probate law.<sup>73</sup>
2. The State, at its option, may include any other real or personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including property passing by joint tenancy, tenancy in common, survivorship, life estate, living trust or other arrangement.<sup>74</sup>

**B. Age Requirement**

1. OBRA '93 reduced from 65 to 55 the age of individuals from which an estate claim may be made by the State.<sup>75</sup>

**C. Florida's Medicaid Estate Recovery Act (Fla. Stat. § 409.9101).**

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<sup>73</sup> 42 U.S.C. § 1396p(b)(4)(A).

<sup>74</sup> 42 U.S.C. §1396p(b)(4)(B).

<sup>75</sup> 42 U.S.C. § 1396p(b)(1)(B).

1. The Department of Children and Families in Florida is authorized to recover funds belonging to the estate of a Medicaid recipient by filing a claim against the estate of the deceased Medicaid recipient pursuant to federal authority contained in section 13612 of OBRA '93, which amends section 1917(b)(1) of the Social Security Act (42 USC 1396p(b)(1)).
2. The acceptance of medical assistance benefits creates a debt to the Department of Children and Families in the total amount paid to or for the benefit of the recipient for medical assistance after the recipient reached 55 years of age. In accordance with federal law (described above), payment of benefits to a person under the age of 55 years does not create a debt.
3. The Department of Children and Families may amend the claim as a matter of right up to one year after the last date medical services were rendered to the decedent.
4. Exceptions to Estate Recovery – estate recovery of benefits paid to a deceased Medicaid recipient cannot be enforced if the recipient is survived by:
  - a. A spouse;
  - b. A child or children under 21 years of age; or

- c. A child or children who are blind or permanently and totally disabled pursuant to the eligibility requirements of Title XIX of the Social Security Act.
  
5. Homestead Property – no estate recovery exists with respect to property that is determined to be exempt from the claims of creditors under the constitution or laws of the State of Florida.
  
6. Undue Hardship – The Department of Children and Families may not recover against an estate if doing so would cause undue hardship for the qualified heirs, as defined in Fla. Stat. § 731.201. The personal representative of an estate and any heir may request that the Department of Children and Families waive recovery of any or all of the debt when recovery would create a hardship. A hardship does not exist solely because recovery will prevent any heirs from receiving an anticipated inheritance. The following criteria must be considered by the Department of Children and Families in reviewing a hardship request:
  - a. The heir:

- i. Currently resides in the residence of the decedent;
  - ii. Resided in the residence of the decedent at the time of death of the decedent;
  - iii. Has made the residence his or her primary residence for the 12 months immediately preceding the death of the decedent; and
  - iv. Owns no other residence.
- b. The heir would be deprived of food, clothing, shelter, or medical care necessary for the maintenance of life or health;
- c. The heir can document that he or she provided full-time care to the recipient which delayed the recipient's entry into a nursing home. The heir must be either the decedent's sibling or the son or daughter of the decedent and must have resided with the recipient for at least one year prior to the recipient's death; or
- d. The cost involved in the sale of the property would be equal to or greater than the value of the property.

7. In instances where there are no liquid assets to satisfy the Medicaid estate recovery claim, if there is non-exempt personal property or real property which is not protected homestead and the costs of sale will not exceed the proceeds, the property shall be sold to satisfy the Medicaid estate recovery claim. Real property is not permitted to be transferred to the Department of Children and Families in any instance.

## **XII. SUPPLEMENTAL NEEDS TRUSTS (“SNTs”)**

- A. A supplemental needs trust is a trust established for the benefit of an individual of any age with a severe and chronic or persistent impairment. The trust is designed to supplement, rather than supplant, government benefits for which the individual is otherwise eligible. Under the terms of such a trust:
  1. The beneficiary does not have the power to assign, encumber, direct, distribute, or authorize distributions from the trust; and

2. The trust document generally proscribes the trustee from expending funds in any way that would diminish the beneficiary's eligibility for or receipt of any type of government benefit.
- B. A Third Party SNT is funded with the assets of a third party, not those of the Medicaid applicant/disabled individual. Unlike the provisions of a Special Needs Trust, there is no pay back requirement for a Third Party SNT.

### **XIII. TAX CONSEQUENCES OF TRUSTS**

#### **A. Grantor Trust Rules**

1. The grantor trust rules are set forth in sections 671 through 678 of the Internal Revenue Code of 1986, as amended (the "Code"). A grantor who transfers property to a trust and retains certain powers or interests over the trust is treated as the owner of all or a portion of the trust for income tax purposes.
2. Section 671 of the Code provides that a grantor includes in computing his taxable income those items of income and deduction that are attributable to or included in any portion of a trust of which the grantor is treated as the owner. If Section 671 of the Code applies, income and deductions are

treated as if they had been received or paid directly to the grantor for income tax purposes.

3. Sections 673 through 678 of the Code set forth the rules for determining when the grantor or another person is treated as the owner of any portion of a trust.
4. The income generated by the assets of a grantor trust is taxable to the grantor. All items of income and deduction flow through to the individual grantor's tax return.
5. If the grantor is not a trustee or co-trustee, then the trust will have its own taxpayer identification number. Although a separate information return will be filed by the trust, no tax will generally be payable by the trust. A separate statement is merely attached to Form 1041, the fiduciary income tax return.
6. If the same individual is both grantor and trustee or co-trustee and the grantor trust rules apply, Form 1041 need not be filed. All items of income and deduction are reported on the individual grantor's Form 1040. In this instance, the trust is not required to obtain a separate taxpayer identification number.

7. Generally, the maximum income tax rate of 35% applies to trust taxable income over \$10,050; whereas, the 35% bracket does not begin until an individual has more than \$336,550 in taxable income.

**B. Revocable Trusts**

1. Income Taxation

- a. A trust in which the grantor reserves the right to revoke or amend the trust, will cause the trust assets to remain the grantor's for tax purposes.
- b. Section 676 of the Code provides that a trust will be considered a grantor trust for income tax purposes if the grantor retains the right to revoke the trust.

2. Gift Taxation

- a. Under section 2511 of the Code and section 25-2511-2 of the Treasury Regulation, gift tax is generally due upon transfer of a completed gift.

- b. A completed gift does not occur unless the donor parts with dominion and control of the asset. There should be no gift tax due upon funding of a revocable trust since the grantor retains the power to revoke the trust and, thus, has not parted with dominion and control of the asset.
  - c. Under section 25.2511-2(f) of the Treasury Regulation, any distribution of income or corpus from a revocable trust by the trustee to an individual other than the grantor is treated as a completed gift by the grantor at the time of distribution to the third party.
3. Estate Taxation
- a. The property of a revocable trust is includable in the Grantor's estate under section 2038 of the Code.

**C. Irrevocable Living Trusts**

1. Income Taxation
- a. A trust in which the grantor has no power to revoke or amend the trust may, nonetheless, be considered a grantor trust for income tax purposes.
  - b. If the grantor retains the right under section 674 of the Code to control the beneficial enjoyment of the trust property or retains the

right to receive trust income under section 677 of the Code, the trust is a grantor trust.

- c. Under section 671 of the Code, income generated by trust assets is taxable to the trust, the grantor or other beneficiaries of the trust, depending upon the terms of the trust. A trust is a separate taxable entity or a conduit through which income is passed to the beneficiaries.
- d. Under sections 671 and 672 of the Code, it is possible for a grantor of an irrevocable trust to be treated as the owner with respect to trust income without being treated as the owner of trust principal. This may become an important issue if trust assets are sold, especially if the trust is the owner of the grantor's principal residence. For example, the grantor must be treated as the owner of the trust principal, if capital gains are allocable to principal under local law, in order for a sale of the residence by the trustee to be eligible for the section 121 exclusion.
- e. Trusts other than grantor trusts are taxed as separate taxpayers on any income that is not distributed to beneficiaries during the taxable year

- i. The trust can be set up so that part of the income is taxable to the trust and part to the beneficiaries.
  - ii. Income is taxable to the trust if it is accumulated by the trust.
  - iii. Income is generally taxable to the beneficiaries to the extent that the trust actually distributes the income to them or makes it available to them.
- f. The grantor may be taxed on trust income in accordance with any of the grantor trust rules of sections 671 through 677 of the Code.
- i. Section 673 of the Code (Reversionary Interests) taxes the income to the grantor if he retains a reversionary interest in either trust principal or income with a present value of more than 5% of the value of the trust.
  - ii. Section 674 of the Code (Power to Control Beneficial Enjoyment) taxes the income to the grantor if he retains the right to control the beneficial enjoyment of the trust property or its income.
  - iii. Section 675 of the Code (Administrative Powers) taxes the income to the grantor if he retains possession of certain administrative powers.

- iv. Section 676 of the Code (Power to Revoke) does not apply to irrevocable trusts, since it deals only with the power to revoke a trust.
- v. Section 677 of the Code (Income for Benefit of Grantor) taxes the income to the grantor if trust income is or may be payable to or for the benefit of the grantor or his spouse, accumulated for them, or applied to the payment of premiums on insurance on the life of the grantor or his spouse.
- g. Under sections 674 and 677 of the Code, if a power is exercisable by someone who is described as a non-adverse party, the rules are the same as if the power were exercisable by the grantor.
  - i. The same rule applies under section 676 of the Code as to revocable trusts.
  - ii. A non-adverse party is any person who does not have a substantial beneficial interest, which would be adversely affected by the exercise or non-exercise of that power which he possesses.

## 2. Gift Taxation

- a. Funding the Trust
  - i. Upon funding of an irrevocable trust, there may be a taxable gift under section 2501 of the Code, depending upon the terms of the trust. If a taxable gift is deemed to occur, the trust beneficiaries, rather than the trust or trustee, are the donees.
  - ii. The essential elements of an inter-vivos gift are: (1) an intention on the part of the donor to make the gift; (2) delivery by the donor of the subject-matter of the gift; and (3) acceptance of the gift by the donee.
  - iii. There must be a donor competent to make the gift, a clear and unmistakable intention on his part to make it, a donee capable of taking the gift, a conveyance, assignment, or transfer sufficient to vest the legal title in the donee, without power of revocation at the will of the donor, and a relinquishment of dominion and control of the subject matter by delivery to the donee.<sup>76</sup>

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<sup>76</sup> Edson v. Lucas, 40 F.2d 398, 404 (1930).

iv. If a transfer of any interest is not complete, it becomes a completed gift when and if, during the lifetime of the grantor, the property ceases to be subject to such power.

(a.) This can occur if the grantor releases the retained power, or, if the grantor holds the power as trustee and resigns from office.

(b.) It can also occur if another person exercises a power of appointment that distributes or vests the property in such a way that the grantor's retained powers are negated or canceled.

(c.) Furthermore, a distribution from the trust to a beneficiary will place the distributed property beyond the control of the grantor.

b. Completed Gift

i. Once the grantor has parted with dominion and control over the property so that the grantor cannot change its disposition, the gift is deemed complete pursuant to section 25.2511-2(b) of the Treasury Regulation.

- ii. A gift is incomplete in every instance in which donor reserves the power to revest the beneficial title to the property himself.
- iii. Under section 25.2511-2(c) of the Treasury Regulation, if the grantor retains a power over the disposition of the assets, such as a testamentary power of appointment over the remainder upon death, then no portion of the transfer is considered a completed gift. A special power of appointment allows someone at a later date to alter the disposition planned under the trust agreement. Therefore, gift taxes can be avoided upon funding of the trust or at the time a revocable trust becomes irrevocable, although a gift tax return asserting that no tax is due may be required (Regulation § 25.2511-2(j)).
  - (a.) If the grantor is physically or mentally incapable of exercising the limited power of appointment, “possession” at death (rather than the exercise or non-exercise of the power) of the power would likely cause the funding of the trust to be

an incomplete gift.<sup>77</sup>

- (b.) From a Medicaid eligibility and estate recovery context, the testamentary power of appointment should be limited to a class of beneficiaries, excluding the grantor, grantor's estate and creditors of the grantor or grantor's estate.

iv. Distributions from the Trust

- (a.) If the transfers funding the trust are considered "completed gifts" subject to gift tax, then the distributions from the trust are not taxable gifts.
- (b.) If the transfers funding the trust are considered

"incomplete gifts" and thus not subject to gift tax, then the distributions from the trust to individuals other than the

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<sup>77</sup> See Revenue Ruling 55-518, 1955-2 C.B. 384, Boevig v. U.S., 493 F. Supp. 665 (E.D. Mo. 1980) *rev'd* 650 F.2d 493 (8<sup>th</sup> Cir. 1981), and Alperstein v. C.I.R., 613 F.2d 1213 (2d Cir. 1979), *cert. denied*, 446 US 981, 100 S.Ct. 1852, 64 L.E.2d 272 (1980), which holds that the possession of the limited power causes estate tax inclusion under section 2042 of the Code.

grantor are taxable gifts under section 25.2511-2(f) of the Treasury Regulation.

3. Estate Taxation

- a. If the gift is incomplete or if the grantor has retained powers over the transferred property under sections 2035 through 2038 of the Code, such property will be included in the grantor's estate at death.
- b. For example, if the grantor is the recipient of some part or all of the trust income and/or principal, the trust will be includable in the grantor's gross estate for estate tax purposes because the grantor has retained an income interest from the trust created by the grantor (Code §§ 2036, 2037 and 2038).
- c. If the trust assets are includable in the grantor's estate, then the beneficiaries will receive the property with a tax basis equal to the property's FMV at date of death or alternate valuation date under section 1014 of the Code.