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# Rulemaking Hearing Rule(s) Filing Form

*Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing. TCA Section 4-5-205*

<b>Agency/Board/Commission:</b>	Tennessee Department of Human Services
<b>Division:</b>	Medical Services
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**Revision Type (check all that apply):**

- Amendment  
 New  
 Repeal

**Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables. Please enter only ONE Rule Number/RuleTitle per row)**

Chapter Number	Chapter Title
1240-03-03	Technical and Financial Eligibility Requirements for Medicaid
Rule Number	Rule Title
1240-03-03-.03	Resource Limitations for Categorically Needy

Chapter Number	Chapter Title
Rule Number	Rule Title

Chapter Number	Chapter Title
Rule Number	Rule Title

Chapter 1240-03-03  
Technical and Financial Eligibility Requirements for Medicaid

Amendments

Rule 1240-03-03-.03, Resource Limitations for Categorically Needy, is amended by adding to paragraph (9) a new subparagraph (f), which shall read as follows:

- (f) Allocation of Additional Resources to the Community Spouse.
1. Additional resources may be allocated to the community spouse through the administrative appeals process, in accordance with the criteria specified below, in order to make up any shortfall between the allocation of income as specified in 1240-03-03-.04 and either the standard maintenance amount (SMA) or the maximum monthly income allowance (MMIA), as deemed appropriate.
  2. The amount of additional resources that are necessary to cover the shortfall in the SMA or MMIA shall be determined in reference to the purchase of a single premium annuity as follows:
    - (i) By calculating the shortfall in the SMA or MMIA and determining the amount of additional resources that must be invested in a single premium annuity in order to generate the income necessary to cover the shortfall.
    - (ii) The amount of resources needed to cover the shortfall shall be determined in reference to an annuity calculator as adopted by the Department in its TennCare / Medicaid Policy Manual.
  3. The additional allocation of resources to the community spouse does not require the actual purchase of the single premium annuity that is used for purposes of calculating the amount of the additional resource allocation.
  4. The amount of the community spouse's protected resources shall be excluded from this calculation.
  5. If a single premium annuity is actually purchased pursuant to these rules, the annuity must comply with all other relevant requirements of state and federal law.
  6. The amount of additional resources that are necessary to cover the shortfall in the SMA or MMIA shall not be determined in reference to any investment which contemplates the return of the entire principal at maturity.

Authority: T.C.A. §§ 4-5-201 et seq., 4-5-202, 4-5-209, 71-1-105(11) and (12), 71-5-102, 71-5-106, 71-5-111, and 71-5-121; 26 U.S.C. §§ 408 and 408A, 42 U.S.C. §§ 1396 et seq., 42 U.S.C. § 1396d(p) and (s), 42 U.S.C. § 1396p, 42 U.S.C. § 1396p(c)(1)(A), (B), (C), (D), (E), (E)(iv), (F), (G), (H), (I) and (J), 42 U.S.C. § 1396p(c)(2)(D), 42 U.S.C. § 1396p(d)(4)(B), 42 U.S.C. § 1396p(d)(5) and 42 U.S.C. § 1396p(e)(1),(2),(3) and (4), 42 U.S.C. § 1396p(f)(1), (2), (3) and (4), 42 U.S.C. § 1396p(g), 42 U.S.C. § 1396r-5(b), (c), (d), (f) and (g), and 42 U.S.C. § 1396r-5(d)(6) and (e); 20 C.F.R. §§ 416.1205(c), 416.1212, 416.1220, 416.1222 and 416.1224; 42 C.F.R. § 435.601 and 435.602, 42 C.F.R. §§ 435.700, 435.721(b), 435.725, 435.735, 435.831, 435.832, 435.840, 435.845, and 435.914 (b) and (c); 45 C.F.R. § 233.20; PL 97-248, PL 98-369 § 2611,

SS-7039 (July 2009)

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PL 99-509 § 9401(a)(3), PL 100-93 § 9; PL 101-239 Omnibus Reconciliation Act (OBRA) 1989 § 8014 and OBRA 1993, PL 104-193, and PL 109-171 §§ 6011, 6012, 6013, 6014, 6015, and 6016.

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Department of Human Services on 08/12/2009, and is in compliance with the provisions of TCA 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 04/27/09

Rulemaking Hearing(s) Conducted on: (add more dates). 06/16/09; 06/17/09; 06/18/09; 06/22/09; 06/23/09; 06/24/09



Date: 8/12/09

Signature: [Handwritten Signature]

Name of Officer: Kim Beals

Deputy General Counsel

Title of Officer: Department of Human Services

Subscribed and sworn to before me on: August 12, 2009

Notary Public Signature: [Handwritten Signature]

My commission expires on: May 22, 2010

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

[Handwritten Signature]  
Robert E. Cooper, Jr.  
Attorney General and Reporter  
11-28-09  
Date

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Filed with the Department of State on: 12/7/09

Effective on: 3/7/10

[Handwritten Signature]  
Tre Hargett  
Secretary of State

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## Public Hearing Comments

Following are summaries of comments received orally at the public hearing(s) concerning the above rules, together with the response of the Department.

### Comment One:

1240-03-03-.03(f)(2) and (3) refer to an annuity, but do not require the investment to be an annuity, thus placing no restriction on the type of investment. This lack of restriction tends to involve caseworkers in determining at a minimum the amount and types of investments needed. Thus, the caseworkers must make financial decisions for which they have no training, no license, and no insurance. It makes the caseworkers liable under federal securities law.

1240-03-03-.03(f)(2)(ii)(II) seems to skip blithely over estate recoveries. It does not require that the State be the first death payee up to the amount it had expended for Medicaid funds. And in effect it allows "some sort of stockbroker" to make investments that would bring up the community spouse's income and then skip right over estate recovery and allow resources to go to beneficiaries who are not defined under this rule.

1240-03-03-.03(f)(4) does not require the investment to be irrevocable. It says nothing about anything between initial purchase and maturity. Federal rules, regulations, and statute requires an actuarially-sound annuity (irrevocable, with the State as the first death beneficiary up to the amount expended for services), and that the investment be an acceptable spenddown vehicle. These proposed rules do not comply with these federal requirements.

These proposed rules appear to have no benefit to the State and to the community spouse; and without coming under proper investment regulations, appear to be of greater benefit to unnamed beneficiaries.

### Comment Two:

It appears you are attempting to limit the community spouse's income. It appears you have to change several other existing rules in order to allow for these – yet there has been no public display or hearings saying what those rules would be that you're going to change. The meaning of beneficiary seems to be opposite that in the DRA, thus allowing children back into the picture.

Main concern: liability issue concerning the handling of securities since the investment is not required to be an annuity. You are putting much power into caseworkers' hands, thus opening yourself up to huge litigation.

### Comment Three:

1240-03-03-.03(f)(2)(i) refers to generating income. The annuity that the proposed rule contemplates not only generates income, it also results in a return of principle to the prospective purchaser. Thus, this rule does not comport with the federal statute. The federal statute refers strictly to a sufficient amount of allocation of additional resources to generate income. It does not refer to generating income as well as a return on principle. It is my opinion that the proposed rule is unconstitutional (because an annuity exhausts the principle).

At the very least, there should be some reference database for obtaining the information about the annuity - to which we all have some certainty in the calculation of this amount. Do you go online to bankrates.com? Do you go to immediateannuities.com? Do you get two annuity quotes from local banks? I believe there's an ambiguity in there that is likely to result in disagreement between the Department and applicants.

I think we have to look at the underlying purpose for the [federal] statute, which is to eliminate or to minimize the risk of impoverishment to the community spouse that the institutionalized spouse's nursing home costs will produce. If we're looking at just allocating additional resources to the community spouse based upon a formula that results in an exhaustion of principle, then that is more likely in certain cases to result in impoverishment to a community spouse than to have a rule which says it is strictly the amount of additional resources that would generate basically interest income.

### Department Response to above three comments:

Changes have been made to these rules to make the following clarifications: no annuity must actually be purchased, eliminating the concern that the caseworker will be making financial decisions for the applicant; community spouse's protected resources are not included in this allocation; a standard will be provided for the annuity calculation; any purchase of an annuity will need to comply with applicable federal and state laws.

SS-7039 (July 2009)

The concern regarding the return of principle used to purchase an annuity pertains to the policy decision made by TennCare, which is sanctioned by the Centers for Medicare & Medicaid Services, as to the appropriate methodology for allocating additional resources.

**Regulatory Flexibility Addendum**

Pursuant to T.C.A. § 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

For purposes of Acts 2007, Chapter 464, the Regulatory Flexibility Act, the Department of Human Services certifies that these rulemaking hearing rules do not appear to affect small businesses as defined in the Act. These rules do not regulate or attempt to regulate businesses.

## Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to TCA 4-5-226(i)(1).

- (A)** A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

State Rule 1240-03-03-.03 "Limitations to the Categorically Needy" was amended to add a new rule to address the process to be used for allocating additional resources to the community spouse through the administrative appeals process, in accordance with the criteria specified below, in order to make up any shortfall between the allocation of income as specified in 1240-03-03-.04 and either the standard maintenance amount (SMA) or the maximum monthly income allowance (MMIA), as deemed appropriate.

- (B)** A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

The Deficit Reduction Act of 2005, in the income first statute, required the states to set up a method in which additional resources may be allocated to the community spouse if there is a shortfall in income sufficient to meet the needs of the community spouse. The Act sanctions the process adopted by the State in these rules.

- (C)** Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

The agencies that may be affected by this rule are the Nursing home Association and the Department of Finance and Administration (Bureau of TennCare).

- (D)** Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

N/A

- (E)** An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

Fiscal Impact will be minimal as the appeal process to make a determination on additional allocation of resources already exists. The only change to be implemented by this rule is specifying the process to be used for the allocation.

- (F)** Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

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Tennessee Department of Human Services  
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400 Deaderick Street  
Nashville, TN 37243  
(615) 313-4873

**(G)** Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

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Kim Beals, Deputy General Counsel  
Department of Human Services, Citizens Plaza, 2nd Floor  
400 Deaderick Street  
Nashville, Tennessee 37243  
(615) 313-4731

**(H)** Office address and telephone number of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

Marcia Garner, Director, Medicaid/TennCare Policy  
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**(I)** Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A

REDLINE

**“REDLINE VERSION-RULE 1240-03-03-.03 DATED AUGUST 11, 2009”**

**RULES  
OF  
TENNESSEE DEPARTMENT OF HUMAN SERVICES  
DIVISION OF MEDICAL SERVICES**

**CHAPTER 1240-03-03  
TECHNICAL AND FINANCIAL ELIGIBILITY  
REQUIREMENTS FOR MEDICAID**

**1240-03-03-.03 RESOURCE LIMITATIONS FOR CATEGORICALLY NEEDY.**

- (1) Applicants for medical assistance as Categorically Needy in an AFDC related coverage group are permitted to retain resources as described in rule 1240-1-50-.02 pertaining to the Families First/AFDC cash assistance program. Excluded resources are those excluded in the Families First/AFDC cash assistance program as reflected in rule 1240-1-50-.05 and countable resources are determined by using the Families First/AFDC policy reflected in rule 1240-1-50-.06. Lump sum payments are treated as income in the month of receipt and a resource if retained thereafter.
- (2) Applicants for medical assistance as Categorically Needy in an SSI-related category are permitted to retain resources in an amount not to exceed SSI limits except for Qualified Medicare Beneficiaries (QMBs), Specified Low-Income Medicare Beneficiaries (SLMBs), Specified Low-Income Beneficiaries (SLIBs) Qualifying Individuals 1 (QI1), and Qualified Disabled Working Individuals who are permitted to retain resources in an amount not to exceed two hundred percent (200%) of the SSI limits.
  - (a) Resources excluded from consideration in determination of eligibility for medical assistance are:
    - 1. For SSI related cases (aged, blind, and disabled individuals):
      - (i) A homestead may be exempt if used as a home by the applicant/recipient, spouse, and/or dependent/relative. If absent from the home with intent to return, an individual may retain a homestead for an unlimited period of time. Based on current market values, individuals with an equity interest in their home greater than five hundred thousand dollars (\$500,000) are ineligible for Medical assistance for either institutional care or Home and Community-Based Services (HCBS). Beginning in the year 2011, the five hundred thousand dollar (\$500,000) limit on home equity will increase each year. The increase will be based on the percentage increase in the Consumer Price Index (CPI) for all urban consumers, rounded to the nearest one thousand dollars (\$1,000).
      - (ii) All life insurance, if the total face of all policies does not exceed fifteen hundred dollars (\$1500) per owner.
      - (iii) One motor vehicle of unlimited value is excluded in its entirety, if it meets any one of the following conditions:
        - (I) It is necessary for employment; or
        - (II) It is necessary to obtain medical treatment of a specific or regular medical problem; or

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- (III) It has been modified for operation by or transportation of a handicapped person; or
- (IV) It is necessary because of climate, terrain, distance, or similar factors to provide transportation to perform essential daily activities.
  - I. If no motor vehicle is excluded under the above provisions, one motor vehicle is excluded to the extent equity value does not exceed forty-six hundred dollars (\$4,600). If the equity value exceeds forty-six hundred dollars (\$4,600), the excess is counted against the resource limit.
  - II. The equity value of any other motor vehicle is counted unless also excludable under 1240-03-03-.03(2)(a)1(iii) above or qualified as property under an approved plan for self-support or necessary for self-support in a business or non-business income producing activity. If no motor vehicle is excluded under the above provisions, one motor vehicle is excluded to the extent equity value does not exceed forty-six hundred dollars (\$4,600). If the equity value exceeds forty-six hundred dollars (\$4,600), the excess is counted against the resource limit.
  - III. The equity value of any other motor vehicle is counted unless qualified as property under an approved plan for self-support or necessary for self-support, in a business or non-business income producing activity, or fifteen hundred dollars (\$1,500) of the equity value is set aside for burial reserve.
- (iv) Personal effects and household goods of two thousand dollars (\$2,000) or less equity value.
- (v) Property essential to self-support can include real and personal property (for example, land, buildings, equipment and supplies, motor vehicles, and tools etc.) used in a trade or business; nonbusiness income-producing property (such as, houses or apartments for rent, land other than home property, etc.); and property used to produce goods or services essential to an individual's daily activities. Liquid resources other than those used as a part of a trade or business are not property essential to self-support. If the individual's principal place of residence qualified under the home exclusion (1240-03-03-.03(2)(a)1(i) above), it is not considered in evaluating property essential to self-support.
  - (I) Property used in a trade or business or nonbusiness income-producing activity.
    - I. When property is used in a trade or business or nonbusiness income-producing activity, only the individual's (or spouse, if any) equity in the property is counted. Exclude as essential for self-support up to six thousand dollars (\$6,000) in equity and count only the amount that exceeds six thousand dollars (\$6,000), if the net income totals at least six percent (6%) of the equity.

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- II. If the work activity produces less than a six percent (6%) rate of return due to circumstances beyond the individual's control such as due to illness or crop failure and the individual is expected to resume the activity, the equity up to six thousand dollars (\$6,000) continues to be excluded. If the individual's total equity in the property is producing six percent (6%) income but is over the six thousand dollars (\$6,000) equity limit, the amount of equity exceeding the six thousand dollars (\$6,000) is counted as a resource.
- III. If the individual owns more than one (1) piece of property and each produces income, each is looked at to see if the six percent (6%) rule is met and then the amounts of the individual's equity in all of those properties producing six percent (6%) are totaled to see if the total equity is six thousand dollars (\$6,000) or less. The equity in those properties that do not meet the six percent (6%) rule is counted toward the allowable resource limit of two thousand dollars (\$2,000) for an individual. If the total equity in the properties producing six percent (6 %) income is over the six thousand dollars (\$6,000) equity limit, the amount of equity exceeding six thousand dollars (\$6,000) is counted as a resource toward the allowable resource limit.

Example: Charlotte operates a farm. She owns 3 acres of land on which her home is located. She also owns 10 acres of farm land not connected to her home. There are 2 tool sheds and 2 animal shelters located on the 10 acres. She has various pieces of farm equipment that are necessary for her farming activities. We exclude the house and the 3 acres under the home exclusion (20 C.F.R. § 416.1212). However, we look at the other 10 acres of land, the buildings and equipment separately to see if her total equity in them is no more than \$6,000 and if the annual rate of return is 6 percent of her equity. In this case, the 10 acres and buildings are valued at \$4,000 and the few items of farm equipment and other inventory are valued at \$1,500. Charlotte sells produce which nets her more than 6 percent for this year. The 10 acres and other items are excluded as essential to her self-support and they continue to be excluded as long as she meets the 6-percent annual return requirement and the equity value of the 10 acres and other items remains less than \$6,000.

Additional Example: At redetermination, Mr. Jones (the community spouse) states he now lives in an apartment and has rented the couple's formerly excluded homestead which has an equity value of \$10,000. Although, the property produces a 6% rate of return, \$4,000 of its equity cannot be excluded under this subpart (v).

- (II) Property that represents government authority to engage in an income-producing activity.
  - I. Property that represents the authority granted by a governmental agency to engage in an income-producing

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activity is excluded as property essential to self-support if it is used in a trade or business or nonbusiness income-producing activity or not used due to circumstances beyond the individual's control and there is a reasonable expectation that the use will resume.

Example: John owns a commercial fishing permit granted by the State Commerce Commission, a boat and fishing tackle. The boat and tackle have an equity value of \$6,500. Last year, John earned \$2,000 from his fishing business. The value of the fishing permit is not determined because the permit is excluded under the exception. The boat and tackle are producing in excess of a 6 percent return on the excluded equity value, so they are excluded up to \$6,000. The \$500 excess value is counted toward the allowable resource limit of \$2,000 for an individual.

(III) Property required by employer.

- I. Personal property required by the individual's employer for work is not counted regardless of value, while the individual is employed. Examples of this type of personal property include tools, safety equipment, uniforms and similar items.

(IV) Property used to produce goods or services essential to daily activities.

- I. Nonbusiness property is considered to be essential for an individual's (and spouse, if any) self-support if it is used to produce goods or services necessary for his or her daily activities. This type of property includes real property such as land which is used to produce vegetables or livestock only for personal consumption in the individual's household (for example, corn, tomatoes, chicken, cattle). Property used to produce goods or services or property necessary to perform daily functions is excluded if the individual's equity in the property does not exceed six thousand dollars (\$6,000).

For example: Bill owns a small unimproved lot several blocks from his home. He uses the lot, which is valued at \$4,800, to grow vegetables and fruit only for his own consumption. Since his equity in the property is less than \$6,000, the property is excluded as necessary to self-support.

(vi) Burial space for self, spouse and immediate family members.

- (I) Burial space is defined to include conventional grave sites, crypts, mausoleums, urns, or other repositories which are customarily and traditionally used for the remains of deceased persons.
- (II) Immediate family includes the applicant's or recipient's minor and adult children, step-children, adopted children, brothers, sisters, parents, adoptive parents, and spouses of these persons.

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- (vii) Funds used to purchase a promissory note, loan or mortgage, if the repayment terms are actuarially sound, provide for payments to be made in equal amounts during the term of the loan with no deferrals or balloon payments, and the balance is not cancelled upon the death of the lender.
  - (viii) Funds used to purchase a promissory note, loan or mortgage, if the repayment terms are actuarially sound, provide for payments to be made in equal amounts during the term of the loan with no deferrals or balloon payments, and the balance is not cancelled upon the death of the lender.
  - (ix) Funds, which are not commingled, are subject to the limits specified below, which are designated as set aside for expenses connected with the individual's burial, cremation or other funeral arrangements.
    - (I) The maximum revocable amount which may be set aside is fifteen hundred dollars (\$1,500) for the applicant/recipient and fifteen hundred dollars (\$1,500) for his/her spouse.
    - (II) The maximum revocable amount is reduced by an amount equal to funds held in an irrevocable burial trust, contract or agreement.
    - (III) The maximum irrevocable burial fund, agreement or contract established by the individual is six thousand dollars (\$6,000) plus cost of transporting the body.
    - (IV) Irrevocable burial contract or agreements established by a funeral home/director for an individual must be a reasonable amount and must have an itemized list of costs, goods and services that reflect fair market value.
  - (x) Other resources determined to be unavailable to the applicant/recipient due to circumstance beyond his/her control.
- (b) In SSI related cases all other resources such as, but not limited to bank accounts, money on hand, stocks, bonds, cash value of life insurance on which the total face value exceed fifteen hundred dollars (\$1,500), real property, other than income-producing and homestead property (including cemetery plots) not exempt in 1240-03-03-.03(2)(a)1(i) and (v), non-excluded motor vehicles and revocable burial agreements, unless exempt as in 1240-03-03-.03(2)(a)1(iii) and (viii) shall be counted toward the resource limit per family size.
- (c) Resource eligibility will exist for the entire month, if the applicant/recipient's total countable resources are at or below the resource limit at any time during the month in question.
- (3) Transfer of Assets.
- (a) Countable assets under this paragraph (3) include all real and personal property except a home and title transferred to the individual's--
    - 1. Spouse;
    - 2. Minor child under age twenty-one (21) or adult disabled or blind child;

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3. Sibling who has equity interest in the property and has resided in the home for at least one (1) year prior to the individual's institutionalization;
  4. Child [other than those in part 2 above] who resided in the home at least two (2) years immediately preceding the individual's institutionalization and who provided care that permitted the individual to stay in the home rather than a medical or nursing facility; or
  5. To another for the sole benefit of the community spouse or the individual's child who is blind or permanently and totally disabled, or under age twenty-one (21).
- (b) The period of ineligibility for nursing home vendor or waived services under HCBS for assets transferred within sixty (60) months of application for long term care nursing services or HCBS will be determined by dividing the uncompensated value of the transferred asset by the average monthly nursing home private pay rate. In determining the penalty for a transfer a State may not round down or disregard any fractional period of ineligibility. There is no limit on the maximum months of ineligibility. The penalty continues until expired unless hardship is considered to exist and the institutionalized individual has no available resources (other than the uncompensated value) in excess of the resource limitations and the application of the penalty will result in loss of essential nursing care, which is not available from any other source.
- (c) If an asset has been found to be transferred for less than fair market value within the sixty (60) month look-back period, the penalty period begins the month the individual becomes eligible for institutional care or Home and Community Based Services (HCBS) or the month of the transfer, whichever is later. The penalty period runs consecutively even if the individual leaves the nursing home for a period of time and later returns. If a penalty period is imposed for new applicants, Medicaid requires a denial notice. If a penalty period is imposed on an individual who is already receiving Medicaid, a ten (10) day adverse action notice is required.
- (d) Any multiple transfers made within the look-back period will be treated as a single transfer and calculated as a single period of ineligibility, which would begin on the date the individual is eligible for medical assistance and would otherwise be receiving institutional level care if not for the imposition of the penalty period, or the date of transfer, whichever is later. For example, if an individual's spouse makes an uncompensated transfer of assets of one thousand dollars (\$1,000) in each of the sixty (60) months of the look-back period, the State would add the transfers together to arrive at a total amount of sixty thousand dollars (\$60,000), divide that by the average private pay rate, and impose one continuous period of ineligibility. The penalty period would start with the earliest date specified under Tennessee's Medicaid plan.
- (e) The transfers indicated below, if occurring on or after February 8, 2006, may be considered a transfer of assets for less than fair market value with respect to an individual applying for Medicaid based on institutionalization:
1. If the transfer of assets occurs within sixty (60) months of application for institutional care.
  2. If the institutionalized individual, his/her spouse, or any person, court or administrative body with authority to act on behalf of, or at the direction or request of, the individual or his/her spouse, establishes a trust or similar device, which includes the individual's assets and cannot be used by or for the individual's benefit, if it occurred within sixty (60) months of application for institutional care.

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3. If an asset is held jointly by the institutionalized individual with another person and the individual or other owner reduces or eliminates the institutionalized individual's ownership or control of the asset.
4. Penalty.
  - (i) The institutionalized individual may be subject to penalty if the transfer was completed by himself/herself; the individual's spouse; a person (including a court) or administrative body with legal authority to act in place of, or on behalf of, or at the direction or request of the institutionalized individual or his/her spouse.
  - (ii) The transfer of assets will be subject to a penalty period of ineligibility for nursing home vendor or waived services under HCBS (Medicaid eligibility continues for other services) determined by dividing uncompensated value of the transferred asset by the average monthly nursing home charge at the private pay rate unless satisfactory proof is provided that the individual intended to dispose of assets for fair market value; or assets were transferred exclusively for a purpose other than to qualify for Medicaid; or transferred assets have been returned to the individual; or if it is determined that the penalty period would work an undue hardship as defined in (3)(b) above.
  - (iii) Assets include all income and resources, including the home, unless transferred as indicated in (a) above, of the institutionalized individual and his/her spouse (including income and/or resources the individual is entitled to, but does not receive because of any action by the individual or his/her spouse, or a person (including a court) or administrative body with legal authority to represent the individual, his/her spouse, or who acts at the direction or request of the individual and his/her spouse).
- (f) Any contractual provision requiring the resident to deposit entrance fees must take into account the required allocation of resources or income to the community spouse before determining the resident's cost of care. In addition the entrance fee paid to the Continuing Care Retirement Community (CCRC) or life care community is treated as a resource to an individual for purposes of determining Medicaid eligibility. The following three (3) conditions must all be met in order for the entrance fee to be considered an available resource:
  1. Any portion of the entrance fee is refunded or used to pay for care under the terms of the entrance contract should other resources of the individual be insufficient; and
  2. The entrance fee, or any portion thereof, is refundable under the terms of the contract when the individual dies or terminates the contract and leaves the CCRC or life care community, whether or not any amount is actually refunded; and
  3. The entrance fee does not confer an ownership interest in the community.
- (g) Funds used to purchase a loan, mortgage or promissory note must be treated as a transfer of assets unless it has a repayment term that is actuarially sound, provides for payments to be made in equal amounts during the term of the loan with no deferral or balloon payment, and prohibits cancellation of the balance upon the death of the lender. If an individual purchases a home from a nursing home applicant and the purchase

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agreement does not meet the criteria of this subparagraph (g), the value of the home will be the outstanding balance due as of the date of the application for Medicaid.

- (h) A life estate interest purchased by a nursing home applicant in another individual's home shall be treated as a transfer of assets unless the nursing home applicant resides in the home for a period of at least one (1) year after the date of the purchase.
- (4) Funds paid into irrevocable burial agreements that are in compliance with *T.C.A. §62-5-401 et seq.* are not counted as a resource. The agreement must be irrevocable as provided in *T.C.A. §62-5-403(a)(2)*.
- (5) Medicaid Qualifying Trust.
  - (a) Funds from a Medicaid qualifying trust, as defined below, are deemed to be available to the applicant/recipient as provided below when an application for Medicaid is filed on or after June 1, 1986 and a countable resource to that applicant/recipient.
  - (b) For purposes of this rule, a “Medicaid qualifying trust” is a trust, or similar legal device, established prior to August 11, 1993 (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.
  - (c) The amounts from the trust deemed available to an applicant/recipient is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the applicant/recipient, assuming full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the applicant recipient.
  - (d) The provisions of this paragraph shall apply without regard to:
    - 1. Whether or not the Medicaid qualifying trust is irrevocable or is established for purposes other than to enable an applicant/recipient to qualify for Medicaid; or
    - 2. Whether or not the discretion described in subparagraphs (b) and (c) is actually exercised.
- (6) Undue hardship shall exist when an application of a transfer of assets provision would deprive the individual of medical care such that the individual's health or life would be endangered or of loss of food, clothing, shelter, or other necessities of life.
  - (a) The individual, the individual's responsible party, or the facility in which an institutionalized individual resides may file an undue hardship claim on behalf of the applicant/recipient. DHS will determine whether a hardship exists and notify the applicant/recipient within thirty (30) days of filing.
  - (b) If undue hardship is determined not to exist, the denial of undue hardship may be appealed within forty (40) days.
  - (c) While an application is pending for an undue hardship waiver and the applicant meets the criteria in 1240-03-03-.03 (6) above, the state will provide for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of ten (10) days.
- (7) Annuities.

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- (a) For any new application or recertification for medical assistance for long-term care services, the applicant must include a description and disclosure of any interest the applicant or the community spouse may have in an annuity.
- (b) The annuity must be treated as a transfer of assets unless it is irrevocable and non-assignable, actuarially sound, and provides payments in equal amounts during the term of the annuity, with no deferral or balloon payments.
- (c) The purchase of an annuity will be treated as a transfer of assets for less than fair market value unless:
  - 1. The State of Tennessee 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. This provision applies to annuities purchased by an applicant or by a spouse, or transactions made by the applicant or spouse.
  - 2. If there is a community spouse and/or a minor or disabled child, the State is named in the next position after those individuals.
    - (i) If the State has been named after a community spouse and/or a minor or disabled child, and any of those individuals or their representatives dispose of any of the remainder of the annuity for less than fair market value, the State may then be named in the first position.
    - (ii) A child is considered disabled if he or she meets the definition of disability found at Section 1614(a)(3) of the Social Security Act (42 U.S.C. § 1382c(a)(3)).
- (d) In addition to the provisions in (c)1 or 2 above, an annuity purchased by or on behalf of the annuitant who has applied for medical assistance will not be treated as a transfer of assets if the annuity meets any of the following conditions in part 1 or part 2 or all of the conditions in part 3 below.
  - 1. The annuity is –
    - (i) An individual retirement annuity according to section 408(b) of the Internal Revenue Code of 1986 (IRC) (26 U.S.C. § 408(b)), or
    - (ii) Deemed Individual Retirement Account (IRA) under a qualified employer plan according to section 408(q) of the IRC (26 U.S.C. § 408(q)), or
  - 2. The annuity is purchased with proceeds from –
    - (i) A traditional IRA (IRC § 408(a) (26 U.S.C. § 408(a)), or
    - (ii) Certain accounts or trusts which are treated as traditional IRAs (IRC § 408 (c)) (26 U.S.C. § 408(c)), or
    - (iii) Simplified retirement account (IRC § 408 (p)) (26 U.S.C. § 408(p)), or
    - (iv) A simplified employee pension (IRC § 408 (k)) (26 U.S.C. § 408(k)), or
    - (v) A Roth IRA (IRC § 408 A) (26 U.S.C. § 408(A)), or

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3. The annuity meets all of the following—
    - (i) The annuity is irrevocable and non-assignable,
    - (ii) The annuity is actuarially sound, and
    - (iii) The annuity provides payments in equal amounts, with no deferred or balloon payments.
  4. If an annuity is absent of such proof as outlined in this subparagraph (d), the purchase of the annuity will be considered a transfer for less than fair market value which is subject to a penalty. The burden is on the institutionalized individual, or his or her representative, to produce the necessary documentation.
- (e) The issuer of the annuity must notify the State when there is a change in the disbursement of income or principal from the annuity.
  - (f) The application for assistance, including the application for recertification, must include for long-term care services the required disclosure under Section 1917(e)(1) and (2) of the Social Security Act (42 U.S.C. § 1396p(e)(1) and (2) ) as provided in subparagraph (a) above. Failure to complete an application form that meets these requirements will not affect the individual's eligibility for Medicaid; however, the individual will not be eligible for coverage of long-term care services unless the appropriate form is completed and signed.
  - (g) If the annuity is not subject to penalty as transferred assets, it must still be evaluated as income or resources, including spousal income or resources, and in the post-eligibility calculation, as appropriate.
    1. A revocable annuity can be canceled and the funds used to purchase the annuity can be refunded to the purchaser. If the owner or payee may be changed, the annuity is assignable and can be sold on the secondary market.
      - (i) If an annuity meets one or both of the criteria of revocable or assignable, it is a countable resource. If the annuity is revocable, the resource value is the amount that the purchaser would receive if the annuity is canceled. If the annuity is assignable, the resource value is the amount the annuity can be sold for on the secondary market.
      - (ii) If an annuity purchased by or for an individual who has applied for medical assistance with respect to nursing facility or other long-term care services is a countable resource, it is not treated as a presumptive transfer of assets for less than fair market value. However, assessing an annuity as a countable resource does not preclude an evaluation of the purchase of the annuity as a transfer of assets for less than fair market value if an assessment is warranted based on the circumstances. For example, if an assignable annuity is sold on the secondary market for less than its fair market value, a transfer of assets for less than fair market value may have occurred.
  - (h) The provisions of this paragraph (7) shall apply to all transactions occurring on or after February 8, 2006, including the purchase of an annuity and any other transaction that changes the course of payments to be made or the treatment of income and principal under an existing annuity, such as additions of principal, elective withdrawals, request

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to change the distribution of the annuity, elections to annuitize the contract and other similar actions.

- (i) Routine changes which occur, based on the terms of an annuity which existed prior to February 8, 2006, and which do not require a decision, election, or action to take effect are not considered a transaction. Routine changes would also include an address change or death or divorce of a remainder beneficiary and other similar circumstances.
  - 1. For example, if an annuity purchased in June 2001 included terms which require distribution to begin five years from the date of purchase, and payouts consequently begin, as scheduled, in June 2006, this will not be considered a transaction since no action was required to initiate the change.
  - 2. Changes which are beyond the control of the individual, such as changes in law, a change in the policies of the issuer, or a change in terms based on other factors, such as the issuer's economic conditions, are not considered transactions.
- (8) Qualified Income Trust (QIT).
  - (a) Effective July 1, 2005, individuals who are receiving or will receive nursing facility services or home and community based services (HCBS) and whose income exceeds the Medicaid Income Cap (MIC) may establish an income trust, referred to as a Qualified Income Trust (QIT) or “Miller Trust”. Funds placed in a QIT that meets the standards set forth in paragraph (8) are not treated as available resources or income for purposes of determining the individual's Medicaid eligibility.
  - (b) A QIT is a trust consisting only of the individual's pension income, Social Security Income, and other monthly income that is created for the purpose of establishing income eligibility for Medicaid coverage when an individual is or soon will be confined to a nursing facility, HCBS or ICF/MR waiver program.
  - (c) An individual is eligible to establish a QIT if his or her income is above the level at which he or she would be financially eligible for nursing facility, HCBS, or ICF/MR care under Medicaid.
    - 1. The amount of income that an applicant/recipient places in a QIT cannot be limited nor can it be counted when testing income against the Medicaid Income Cap (MIC). If the applicant/recipient's income that is not placed in a QIT is over the MIC, the individual is not financially eligible for nursing home Medicaid.
    - 2. This Department of Human Services State Rule 1240-03-03-.03(8) shall apply to an income trust established on or after July 1, 2005 and with the undue hardship provision in Section 1613(e) of the Social Security Act. Hardship may be considered to exist when the institutionalized spouse and/or his/her spouse would have resources in excess of the resource limit, is otherwise eligible and for whom Medicaid ineligibility would result in loss of essential nursing care, which is not available.
  - (d) A QIT must meet the following criteria:
    - 1. The trust must be irrevocable and cannot be modified or amended in whole or in part by the Grantor at any time. However, the Trustee or a court of competent jurisdiction shall have the right and jurisdiction to modify any provision of the trust

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to the extent necessary to maintain the eligibility of the Grantor for medical assistance.

2. Other than disbursements under Part 3 below, each month the Trustee may only make disbursements from the trust for:
    - (i) A personal needs allowance up to the amount recognized under Tennessee Medicaid policies. As of January 1, 2005, this amount is Forty Dollars (\$40) per month;
    - (ii) Up to Twenty Dollars (\$20) in necessary expenses for management of the trust (i.e., bank charges);
    - (iii) A spousal income allocation in the amount permitted under Tennessee Medicaid policies;
    - (iv) Expenses for health insurance premiums for health insurance coverage of the Grantor other than Medicaid; and
    - (v) Expenses for qualifying medical or remedial care received by the Grantor, to the extent such care is recognized under Tennessee law as provided in Department of Human Services State Rule 1240-03-03-.04(2)(d) but not covered as medical assistance under the State's Medicaid program.
  3. Each month the Trustee shall distribute the entire amount of income remaining in the trust after any disbursements made under Part 2 above to the State of Tennessee, Bureau of TennCare (or directly to the nursing facility or HCBS provider, as directed by the Bureau of TennCare), up to the total amount of expenditures for medical assistance for the Grantor.
  4. The sole beneficiaries of the trust are the Grantor for whose benefit the trust is established and the State of Tennessee (Bureau of TennCare). The trust terminates upon the death of the Grantor, or if the trust is no longer required to establish Medicaid eligibility in the State of Tennessee, if nursing facility or HCBS is no longer medically necessary for the Grantor, or if the Grantor is no longer receiving such services.
  5. The trust must provide that upon the death of the Grantor or termination of the trust, whichever occurs sooner, the State of Tennessee (Bureau of TennCare) shall receive all amounts remaining in the trust up to the total amount of medical assistance paid by the State on behalf of the individual.
  6. Amounts remaining in the trust that are owed to the State must be paid to the Bureau of TennCare within three (3) months after the death of the individual or termination of the trust, whichever is sooner, along with an accounting of the disbursements from the trust. The Bureau of TennCare may grant an extension if a written request is submitted within two months of the termination of the trust.
- (9) Assessment of Resources and Community Spouse Resource Allowance.
- (a) Resources owned by either spouse, or by both spouses together, are considered equally available to both spouses at the beginning of a continuous period of institutionalization (i.e., 30 consecutive days in nursing care) for persons institutionalized after September 30, 1989. If an assessment of resources is requested by the institutionalized or community spouse or by either spouse's authorized

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representative, an assessment will be made within thirty (30) days of receipt of all relevant documentation from the requesting party(ies). If either spouse is dissatisfied with the Department’s assessment of the community spouse’s resource allowance at the point an application for Medicaid has been filed, either spouse has a right to a fair hearing with respect to the determination, which shall be held within thirty (30) days of the date a request for hearing is made.

- (b) The community spouse resource allowance is equal to the greater of:
  - 1. Effective January 1, 2008 one-half (1/2) of the total resources owned by both spouses not to be less than twenty thousand eight hundred eighty dollars (\$20,880) nor greater than one hundred four thousand four hundred dollars (\$104,400) and adjusted annually per federal law;
  - 2. The amount established after a fair hearing by the Department of Human Services; or
  - 3. The amount transferred under a court order against the institutionalized spouse for the support of the community spouse, using Tennessee’s Medicaid eligibility standards, regardless of any other state laws relating to community property or the division of marital property.
- (c) The maximum amount of income of the institutionalized spouse must be allocated to the community spouse before increasing the resource allocation.
- (d) Spouses must be legally married pursuant to the laws of the State of Tennessee; and
- (e) The community spouse resource allowance determined by the assessment will be deducted from the value of all available resources owned by both spouses as of the first month for which assistance is requested. After the initial month of eligibility, no resources of the community spouse will be considered available to the institutionalized spouse.

(f) Allocation of Additional Resources to the Community Spouse.

- 1. Additional resources may be allocated to the community spouse through the administrative appeals process, in accordance with the criteria specified below, in order to make up any shortfall between the allocation of income as specified in 1240-03-03-.04 and either the standard maintenance amount (SMA) or the maximum monthly income allowance (MMIA), as deemed appropriate.
- 2. The amount of additional resources that are necessary to cover the shortfall in the SMA or MMIA shall be determined in reference to the purchase of a single premium annuity as follows:
  - (i) By calculating the shortfall in the SMA or MMIA and determining the amount of additional resources that must be invested in a single premium annuity in order to generate the income necessary to cover the shortfall.
  - (ii) The amount of resources needed to cover the shortfall shall be determined in reference to an annuity calculator as adopted by the Department in its TennCare / Medicaid Policy Manual.
- 3. The additional allocation of resources to the community spouse does not require the actual purchase of the single premium annuity that is used for purposes of

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calculating the amount of the additional resource allocation.

4. The amount of the community spouse’s protected resources shall be excluded from this calculation.
5. If a single premium annuity is actually purchased pursuant to these rules, the annuity must comply with all other relevant requirements of state and federal law.
6. The amount of additional resources that are necessary to cover the shortfall in the SMA or MMIA shall not be determined in reference to any investment which contemplates the return of the entire principal at maturity.

**Authority:** T.C.A. §§ 4-5-201 et seq., 4-5-202, 71-1-105(11) and (12), 71-5-102, 71-5-106, 71-5-111, and 71-5-121; 26 U.S.C. §§ 408 and 408A, 42 U.S.C. § 1382(a)(1)(B), 42 U.S.C. § 1382b, 42 U.S.C. §§ 1396 et seq., 42 U.S.C. § 1396d(p) and (s), 42 U.S.C. § 1396p, 42 U.S.C. § 1396p(c)(1)(A), (B), (C), (D), (E), (E)(iv), (F), (G), (H), (I) and (J), 42 U.S.C. § 1396p(c)(2)(D), 42 U.S.C. § 1396p(d)(4)(B), 42 U.S.C. § 1396p(d)(5) and 42 U.S.C. § 1396p(e)(1),(2),(3) and (4), 42 U.S.C. § 1396p(f)(1), (2), (3) and (4), 42 U.S.C. § 1396p(g), 42 U.S.C. § 1396r-5(b), (c), (d), (f) and (g), and 42 U.S.C. § 1396r-5(d)(6) and (e); 20 C.F.R. §§ 416.1205(c), 416.1212, 416.1220, 416.1222 and 416.1224; 42 C.F.R. § 435.601 and 435.602, 42 C.F.R. §§ 435.700, 435.725, 435.735, 435.831, 435.832, 435.840, 435.845, and 435.914 (b) and (c); 45 C.F.R. § 233.20; PL 97-248, PL 98-369 § 2611, PL 99-509 § 9401(a)(3), PL 101-239 Omnibus Reconciliation Act (OBRA) 1989 § 8014 and PL 103-66 OBRA 1993, Title XIII, Chapter 2, Subchapter B, Part II, § 13611, PL 104-193, and PL 109-171 §§ 6011, 6012, 6013, 6014, 6015, and 6016.

**Administrative History:** Repeal and new rule filed June 14, 1976; effective July 14, 1976. Amendment filed September 15, 1977; effective October 14, 1977. Amendment filed July 27, 1978; effective October 30, 1978. Amendment filed June 9, 1981; effective October 5, 1981. Repeal and new rule filed August 17, 1982; effective September 16, 1982. Amendment filed February 28, 1983; effective March 30, 1983. Amendment filed January 30, 1985; effective March 1, 1985. Amendment filed February 26, 1985; effective March 28, 1985. Amendment filed March 31, 1986; effective April 30, 1986. Amendment filed April 15, 1986; effective July 14, 1986. Amendment filed August 20, 1986; effective October 4, 1986. Amendment filed May 8, 1987; effective August 29, 1987. Amendment filed July 31, 1987; effective September 13, 1987. Amendment filed February 26, 1988; effective May 29, 1988. Amendment filed March 7, 1988; effective June 29, 1988. Amendment filed April 8, 1988; effective July 27, 1988. Amendment filed August 9, 1989; effective September 23, 1989. Amendment filed January 31, 1990; effective March 17, 1990. Amendment filed May 1, 1991; effective June 15, 1991. Amendment filed December 30, 1993; effective March 15, 1994. Amendment filed April 23, 1997; effective July 7, 1997. Amendment filed October 26, 2001; effective January 9, 2002. Amendment filed May 1, 2003; effective July 15, 2003. Public necessity rule filed September 30, 2005; effective through March 14, 2005. Amendment filed December 22, 2005, effective March 7, 2006. Public necessity rule filed June 1, 2007; expired November 13, 2007. Amendment filed August 30, 2007; effective November 13, 2007. Amendments filed April 22, 2008; effective July 6, 2008. Public necessity rule filed August 6, 2008; effective through January 18, 2009. Amendment filed October 31, 2008; effective January 14, 2009.