

Public Necessity Rules
of
The Tennessee Department of Human Services
Division of Medical Services

Chapter 1240-03-03
Technical And Financial Eligibility
Requirements For Medicaid

Resource Limitations For Categorically Needy

Statement of Necessity Requiring Public Necessity Rules

These amendments to the rules of the Tennessee Department of Human Services are being submitted for promulgation pursuant to the provisions of the Uniform Administrative Procedures Act, T.C.A. § 4-5-209 in order to re-insert a provision to the rules that was inadvertently deleted by the Department's most recent permanent rule filing of unrelated amendments to Chapters 1240-3-1, 1240-3-2 and 1240-03-03.

Prior to the Department's most recent filing of amendments to Chapters 1240-3-1, 3-2 and 3-3 on April 22, 2008 for effective date of July 6, 2008, State Rule 1240-03-03-.03(8) of the Department of Human Services' rules contained the Qualified Income Trust (QIT) rule provision. The QIT rule provision, also known as "Miller Trusts", was promulgated as public necessity rules on September 30, 2005 and as permanent rules effective March 7, 2006 to recognize properly established Qualified Income Trusts pursuant to 42 U.S.C. § 1396p(d)(4)(B) and pursuant to direction from the federal Centers for Medicare and Medicaid Services (CMS).

In order to immediately return the Qualified Income Trust rule provisions to the Department's rules, the use of public necessity rules is necessary. The amendments are required by an agency of the federal government and adoption of the amendments through ordinary rulemaking procedures might jeopardize the loss of federal funds.

For a complete copy of these public necessity rules, contact: Phyllis Simpson, Assistant General Counsel, Tennessee Department of Human Services, Citizens Plaza Building, 400 Deaderick Street, 10th Floor, Nashville, TN 37243-1403, telephone number (615) 313-4731.

Virginia T. Lodge
Commissioner
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Amendments

Rule 1240-03-03-.03 Resource Limitations for Categorically Needy, is amended by deleting paragraphs (8), (9) and (10) in their entirety and by substituting the following language, so that, as amended, paragraphs (8) and (9) shall read as follows:

(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 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 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.

Authority: T.C.A. §§ 4-5-201 et seq., 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), 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, 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.

The public necessity rules set out herein were properly filed in the Department of State on the 6th day of August, 2008, and will be effective from the date of filing for a period of 165 days. These public necessity rules will remain in effect through the 18th day of January, 2009. (FS 08-04-08; DBID 2929)