Department of State
Division of Publications
312 Rosa L. Parks Avenue, 8th Floor Tennessee Tower
Nashville, TN 37243
Phone: 615-741-2650
Fax: 615-741-5133
Email: register.information@tn.gov

For Department of State Use Only

Sequence Number: 12-06-09
Rule ID(s): 45446
File Date: 12/07/2009
Effective Date: 03/07/2010

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

Agency/Board/Commission:	Tennessee Department of Human Services
Division:	Medical Services
Contact Person:	Kim Beals
Address:	Office of General Counsel Citizens Plaza Building, 2nd Floor 400 Deaderick Street Nashville, Tennessee
Zip:	37243-1403
Phone:	615-313-4731
Email:	Kim.Beals@tn.gov

Revision Type (check all that apply):

X 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,

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: D K Beals

Name of Officer: Kim Beals

Title of Officer: Deputy General Counsel
Department of Human Services

DEBRA E BATTS
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY
My Commission Expires May 22, 2010

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

Notary Public Signature: Debra E. Batts

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.

R E Cooper Jr

Robert E. Cooper, Jr.
Attorney General and Reporter

11-24-09
Date

Department of State Use Only

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

Effective on: 3/7/10

Tre Hargett by Nora Hart, PCA
Tre Hargett
Secretary of State

RECEIVED
2009 DEC -7 PM 12:41
SECRETARY OF STATE
PUBLICATIONS

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.

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;

Marcia Garner, Director, Medicaid/TennCare Policy
Tennessee Department of Human Services
Citizens Plaza Bldg., 12th Floor
400 Deaderick Street
Nashville, TN 37243
(615) 313-5465

Marla Taylor, Program Manager, Medicaid/TennCare Policy
Tennessee Department of Human Services
Citizens Plaza Bldg., 12th Floor
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;

Marcia Garner, Director, Medicaid/TennCare Policy Tennessee Department of Human Services Citizens Plaza Bldg., 12th Floor 400 Deaderick Street Nashville, TN 37243 (615) 313-5465 Marla Taylor, Program Manager, Medicaid/TennCare Policy Tennessee Department of Human Services Citizens Plaza Bldg., 12th Floor 400 Deaderick Street Nashville, TN 37243 (615) 313-4873 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 Tennessee Department of Human Services Citizens Plaza Bldg., 12th Floor 400 Deaderick Street Nashville, TN 37243 (615) 313-5465 Marla Taylor, Program Manager, Medicaid/TennCare Policy Tennessee Department of Human Services Citizens Plaza Bldg., 12th Floor 400 Deaderick Street Nashville, TN 37243 (615) 313-4873 Kim Beals, Deputy General Counsel Department of Human Services, Citizens Plaza, 2nd Floor 400 Deaderick Street Nashville, Tennessee 37243 (615) 313-4731

(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

N/A