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MEMORANDUM ON ELIGIBILITY FOR NURSING HOME MEDICAID

General Requirements

In order to qualify for nursing home Medicaid, an applicant must meet the "medical necessity" requirement, which generally requires a medical disorder or disease requiring attention by registered or licensed vocational nurses on a regular basis. The Director of Nursing in the nursing home or an applicant's medical doctor should be able to assess whether someone meets the medical necessity requirement.

Once it is determined that there is a medical necessity for nursing home care, the applicant must meet two financial tests: the income test and the resources test. The general rule is that in order to qualify for Medicaid nursing home care, an unmarried applicant cannot have more than $1,737.00 in monthly income (for the 2005 calendar year) and no more than $2,000.00 in resources or assets. If both spouses apply, the incomes are combined and the income cap is twice the cap for the individual. The resource limitations for a married couple, both of whom apply, is $3,000.00. However, the limitations are not as stringent when the applicant is married and his or her spouse is not institutionalized.

Income Limitations

For applicants who are married and the applicant's spouse is ineligible, the income cap is the same as for an unmarried applicant, but the income is allocated according to the person to whom the money is payable ("the name on the check" rule), so that if a check is made payable to the noneligible spouse, it is not counted in determining eligibility for the institutionalized spouse. In addition, if an applicant's income exceeds the cap, he or she may still qualify by reducing income through what is known as a "Miller Trust" or a "Qualified Income Trust" by making the applicant's income payable to a trust that meets certain requirements. In order to constitute a

"Miller Trust" or a "Qualified Income Trust" the trust must have the following features:

1. The trust is only funded with the income from the individual;

2. The trust is irrevocable;

3. The State will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid by Medicaid on behalf of the individual;

4. The trust must require that the trustee: (a) pay to the beneficiary a monthly personal needs allowance; (b) pay to the spouse of the beneficiary a sum sufficient to provide a minimum monthly maintenance needs allowance; and (c) pay from the funds remaining the cost of medical assistance provided to the beneficiary.

Resource Limitations

In determining whether an individual meets the Medicaid resource requirements, the cash, other liquid assets, or any real or personal property that could be converted to cash which are owned by the individual are counted as of 12:01 a.m. on the first day of each month. There are some assets that are excluded resources and are therefore not considered as resources for purposes of Medicaid eligibility. Some examples of excluded resources are:

1. Residence (only if there is an intent to return expressed by the applicant - if the spouse lives in the home, no intent to return is required);

2. Burial spaces, burial funds or prepaid burial contracts;

3. One automobile (limitation on value is $4,500.00, unless there is a noneligible spouse, then there is no limit on value);

4. Household and personal effects ($2,000.00 worth of household goods; no limit on value if there is a noneligible spouse);

5. Term life insurance (if the insurance has cash value, the cash value is counted as a resource, unless the total value is $1,500.00 or less).

Spousal Impoverishment Rules

The resource limitation for a married couple, with the ineligible spouse not living in an institution, is determined by figuring the couple's "protected resource amount." The protected resource amount is the *greater* of (1) one-half of the couple's countable resources, not to exceed the maximum set by federal law ($95,100.00 for 2005); or (2) the minimum set by federal law ($19,020.00 for 2005). Then within the first year of eligibility, all countable assets in excess of $2,000.00 must be transferred to the community spouse.

In addition, federal law provides for a "minimum monthly maintenance needs allowance" for the community spouse, which is currently $2,377.50.00 per month. If the community spouse's income is less than that amount, the community spouse is allowed to keep an allowance consisting of enough income of the institutionalized spouse to give the community spouse the full allowance. This rule is not taken into account in determining eligibility, however, once an individual meets the other eligibility requirements, the income will be paid to the spouse first, up to the amount necessary to increase the spouse's income to $2,377.50 per month, before the income is used for payment to the nursing home.

<u>Transfer Penalties</u>

Finally, to avoid a person becoming eligible for Medicaid simply by giving all of his or her resources away, there are transfer penalties for transfers for less than fair market value. The basic rule is that a person making a transfer for less than fair market value is ineligible for Medicaid for one month for every $2,908.00 gifted. Only transfers within the "lookback period" are subject to penalty. The lookback period ends on the date the Medicaid application is filed (or, if later, the date of entry into a nursing home or other medical institution) and begins sixty (60) months earlier, for transfers to or from most trusts, or thirty-six (36) months earlier for all other transfers. This means that an unlimited amount can be transferred by gift as long as the individual waits 36 months before applying. For transfers made which are less than $104,688.00 (36 months X $2,908.00), there is less than a 36 month penalty period. To determine the penalty period for these transfers, simply divide the amount of the transfer by $2,908.00. For example, if the individual transfers $40,000.00, the penalty period is 14 months ($40,000.00 ÷ $2,908.00 = 14). If a transfer has been made in excess of $104,688.00, the applicant needs to be certain that he or she waits the full 36 month penalty period before applying, because if the application is filed within the lookback period, the possible limitation on penalties offered by the limited lookback period is lost. For example, if an individual transfers $200,000.00 and then applies for Medicaid 35 months later, the total penalty period will be 68 months. If the individual had waited one more month to apply, the transfer would have been made outside of the lookback period and would therefore have been disregarded.

These are certain transfers that are expected from the transfer penalty rules. Some examples are: transfers of a home to a spouse or a relative meeting certain requirements (i.e., a minor or disabled child); transfers to the individual's spouse or to another for the sole benefit of the spouse; transfers to a trust established solely for the individual's disabled child under age 21; any transfers to a trust established solely for the benefit of an individual under 65 who is disabled; transfers of income to a Miller Trust; transfers in which the individual intended to dispose of the property at fair market value (even if the actual consideration turned out to be less); and any transfers made exclusively for a purpose other than to qualify for Medicaid. If transfers are made for any of these purposes, the penalty period will be avoided.

In addition, effective January 1, 1997, it is a crime to knowingly and willfully dispose of assets in order for an individual to become eligible for Medicaid, if disposing of the assets results in the imposition of a period of ineligibility. The penalty is a maximum fine of $10,000 and/or imprisonment for one year. Because this is a relatively new statute, it is unclear exactly how strictly it will be enforced, but it is certainly an issue that must be considered carefully before making any transfers.

In summary, the rules for becoming eligible for Medicaid nursing home care are quite complex and sometimes confusing. This memorandum is intended to help you understand the basic rules of eligibility, but it is of course not an exhaustive reference on the subject. In addition, since these rules have their basis in federal law, they are always subject to change by Congress.

Medicaid Estate Recovery

In the 2003 legislative session, Texas legislators passed a measure calling for the State of Texas to implement a Medicaid Estate Recovery Program (MERP), which is required of every state by the federal government. When a person who has been receiving Medicaid assistance dies, the Medicaid Estate Recovery Program will enable the State to apply as a creditor of the estate of the deceased to be paid back for the assistance that person received in the past. The Texas program is still in the planning stages and has not yet gone into effect. Thus, it is impossible to say with complete certainty how the rules will affect any particular situation. We can look to other Texas laws, as well as proposed rules that will probably become part of the final Medicaid estate recovery program, to predict its likely effects. The program will only apply to benefits received after the date of the promulgation of the rules.

Under MERP, the State would be able to collect repayment from the sale of the decedent's home. However, there are exceptions already in our laws. Under federal law, if a spouse, dependent child, or adult disabled child still lives in the home of a deceased Medicaid recipient, Medicaid estate recovery program cannot seek to recover against that home. Similarly, Texas homestead laws prohibit a Medicaid estate recovery program to recover against a home if the decedent is survived by a spouse, a minor child, or an adult child living with the family. The commission planning Texas' program indicates that it will promulgate a rule that the program cannot attempt to recover from the proceeds of a home if at the time of the Medicaid recipient's death, there is a surviving spouse, child under 21, child who is blind or permanently disabled, or an adult child living in the home.

The commission's proposed rules include another caveat: the value of a property up to a certain "cut-off" amount will also be excluded from Medicaid estate recovery. The proposed rules set this cut-off at $50,000 of the appraised value of the home. Under the current version of the rules, this exclusion is not automatic, and will only be granted upon application by the decedent's estate.

Remember, these rules have not yet been finalized and are subject to change. The information above is based on the proposed rules published in the Texas Register on April 30, 2004 (29 Tex Reg 4041).