

DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES

SECOND NOTICE OF PROPOSED RULEMAKING

- 1) Agency Name: Department of Healthcare and Family Services
- 2) Subject of Proposed Rulemaking: Changes Regarding Eligibility for Long-Term Care

Heading of the Part: Medical Assistance Programs

Code Citation: 89 Ill. Adm. Code 120

- 3) Date of Proposed Rulemaking: August 13, 2010

Illinois Register Citation: 34 Ill. Reg. 2631

Summary of Proposed Rulemaking: In conjunction with the rulemaking affecting Part 102 that also appears in this issue of the *Illinois Register*, these amendments implement the provisions of the Deficit Reduction Act of 2005 (PL 109-171, 2006 S 1932) (DRA) and other provisions of federal law relating to the medical assistance programs, financial eligibility for long term care and transfers of assets. The rulemaking also clarifies existing rules and cleans up outdated and redundant rules in Part 120.

In preparing this rule filing, the Department is mindful of its statutory mandate that the medical assistance program, funded with taxpayer dollars, is the payer of last resort for those individuals who have no other means to pay for the cost of their long term care services. Consequently and taking into account allowances to prevent spousal impoverishment and other specific exceptions, these proposed rules are predicated on the principle that individuals should use their own income and assets to pay for their care before turning to the state for that support.

- 4) Text and Location of Changes Made to the Proposed Rulemaking During the Public Comment Period: The following changes were made:

In subsection (d)(1) of Section 120.347 deleted “resources” and added “assets” after the words “transfer of”.

In subsection (d)(2) of Section 120.347 deleted the last sentence, “A non-profit association under this subsection (d)(2) shall mean an entity that is:”

In subsection (d)(2)(A) of Section 120.347 deleted all of subsection “(A)”.

In subsection (d)(2)(B) of Section 120.347 deleted all of subsection “(B)”.

In subsection (f)(3) of Section 120.347 deleted “resources” and added “assets”.

In subsection (g)(3) of Section 120.347 deleted “resources” and added “assets”.

In subsection (g)(4) of Section 120.347 deleted “resources” and added “assets”.

In subsection (i) of Section 120.347 added “are treated similar to trusts.” to the title “Annuities”

In subsection (i)(2) of Section 120.347, subsection “(2)” is renumbered to subsection “(3)”.

In subsection (i)(2) of Section 120.347 revised language to read : “(2) Any portion of an annuity from which payment to or for the benefit of the person or the person’s spouse could be made is an available resource. An annuity that may be surrendered to its issuing entity for a refund or payment of a specified amount or provides a lump-sum settlement option, is an available resource valued at the amount of any such refund, surrender or settlement less any applicable fees or charges.”

In subsection (i)(3) of Section 120.347 deleted all, “(3) An annuity owned by an institutionalized person or the community spouse of an institutionalized person that can be purchased by a willing and arm's length buyer shall be treated as an available resource, subject to the following:

A) Language in an annuity prohibiting transfer, assignment or revocation of the annuity shall not preclude the Department from treating such annuity as an available resource unless an assignment would materially change the duty of the issuer of the annuity (e.g., the financial institution or insurance carrier), or materially increase the burden or risk imposed on it under the annuity contract. A prohibition of assignment of an annuity is construed as barring only the delegation of duties of performance under the contract and not assignment of rights. (See UCC 2-210(3).) Assignment of an annuitant's rights to payment under an annuity shall not be considered a material change to the duty of, or risk to, the issuer. To the extent they cannot be assigned, annuities with retirement tax status (26 USC 401-409A), including those described in Section 120.388(o)(1) and (2), are not subject to this subsection.

B) The Department presumes that the value of an available annuity shall be based on the present value of its future payments, using a term of years based on life expectancy (as determined under current actuarial tables published by the Office of the Chief Actuary of the Social Security Administration <http://www.ssa.gov/OACT/STATS/table4c6.html>) and an interest rate based on IRS Section 7520 interest rates (26 USC 7520).

~~published monthly by the IRS. This presumption may be rebutted by documented evidence of quotes of viatical or other structured settlements showing that only a lesser value for an annuity can be obtained. To determine the credibility of a rebutted value, the Department may obtain its own valuations of an annuity based on quotes received from private entities. If the Department determines that an annuity cannot be sold for its present value, then the greatest value that can be obtained in an arm's length transaction on the open marketplace shall be the amount treated as an available resource.~~

- 4) ~~The fact that a transaction involving an annuity is determined an allowable transfer under Section 120.388 does not exempt the annuity from the provisions of this subsection. An annuity considered an available resource under this subsection shall not also be subject to penalty under Section 120.388. The appropriate treatment of an annuity, whether under this subsection or Section 120.388, shall be based on the terms of the annuity, facts related to any transactions involving the annuity (as described in Section 120.388(e)(2)), and application and choice of law under the particular circumstances.~~
- 5) ~~Only annuities purchased on or after the effective date of this rulemaking may be considered available resources under this Section.”~~

In subsection (e)(i)(1)(A) of Section 120.379 changed all references of “2009” to “2011”

In subsection (i) of Section 120.379, deleted all “i) If a community spouse refuses or fails to cooperate in providing information about available income or resources, the institutionalized spouse shall be ineligible for medical assistance unless the institutionalized spouse can demonstrate undue hardship or assigns to the Department any rights to support he or she may have from the community spouse. If the Department grants a hardship waiver under this subsection (i) or the institutionalized spouse has assigned any rights to support to the Department, eligibility for medical assistance may be approved if the institutionalized spouse is otherwise eligible. The transfers of resources or income from the institutionalized spouse to the community spouse provided for under this Section shall not be permitted if the institutionalized spouse is found eligible under this subsection. A hardship waiver may be granted under this subsection if:

- 1) ~~the community spouse fails, refuses or is incapable, due to illness or mental incapacity, to cooperate in providing necessary financial information required under this Section, or the institutionalized spouse is unable, due to illness or incapacity, to execute an assignment of support rights; and~~

- 2) ~~the institutionalized spouse is otherwise eligible for medical assistance but for the information withheld by the community spouse; and~~
- 3) ~~the institutionalized spouse is unable to obtain appropriate medical care without the provision of medical assistance or the institutionalized spouse needs protection from actual or threatened harm, neglect or hazardous conditions if he or she were discharged from a facility providing long term care services.”~~

In subsection (j) of Section 120.379, changed subsection “~~(j)~~” to “(i)” deleted “~~If an institutionalized person is found eligible as provided in subsection (i) of this Section,~~” and changed “~~the~~” to “The”.

In subsection (a) of Section 120.380 changed “~~42 USC 382b~~” to “42 USC 1382b”

In subsection (a)(4)(A)(v) of Section 120.381, changed “~~Asset~~” to “Resource”.

In subsection (d)(3) of Section 120.381, revised to read as follows:

“A prepaid, guaranteed price funeral/burial contract funded by an irrevocable assignment of a person’s life insurance policy to a trust, the seller of a pre-need contract or the provider of the funeral or the burial services is exempt if the seller’s or provider’s nominal ownership in the policy is immediately transferred into a trust as provided under 225 ILCS 45/2a(cd), is exempt. The trust is responsible for ensuring that the provider of funeral services under contract receives the proceeds of the policy when it provides the funeral goods and services specified under the contract (see 225 ILCS 45/1a-1(a)). The irrevocable assignment of ownership of the insurance policy must be acknowledged by the insurance company.”

In subsection (f) of Section 120.381, deleted “~~2005~~” and added “2009”.

In subsection “~~(l)(k)~~” of Section 120.381, revised to read as follows:

“For disabled persons who have lost eligibility under Section 120.510 and who are only requesting services other than those described in subsection 120.61(a) (except that subsection’s reference to services provided through a Community Integrated Living Facility (CILA)), the following additional exemptions shall apply:”

Added a new (m) to Section 120.381 with the following language: “The amount of damages recovered by a resident of a nursing home for any act which injures the resident pursuant to 210 ILCS 45/3-605.” And re-lettered “m” to “n”, “n” to “o” and “o” to “p”.

In subsection (e) of Section 120.382 deleted “countable assets exceed disregard described in this Section” and replaced it with “resources exceed the disregard amounts described in this subsection”.

In subsection (b)(1) of Section 120.385 at the beginning of the sentence, deleted “Effective on the date of this rulemaking” and added, “Effective the date of adoption”.

In subsection (c)(1) of Section 120.385 deleted “Effective on the date of this rulemaking”, added “Effective the date of adoption” and deleted “\$500,000” and added “\$750,000”.

In the title of Section 120.387, deleted “February 8, 2006” and added “Effective the date three years prior to the date of adoption”.

In subsection (a) of Section 120.387, deleted “February 8, 2006” and added “before the date three years prior to the date of adoption or to persons who applied for or whose application for long term care assistance was filed or approved prior to the date of adoption.”.

In the title of Section 120.388, deleted “February 8, 2006” and added “the date three years prior to the date of adoption”.

In subsection (a) of Section 120.388, deleted “February 8, 2006” and added “the date three years prior to the date of adoption”.

In subsection (d)(3)(F) of Section 120.388, deleted “spousal” and added “statutory”.

In subsection (e)(1) of 120.388, added an “(i)” to Section “120.380” and an “(e)” to Section “113.140”.

In subsection (f)(1) of Section 120.388, deleted the word “tables” and replaced with the word “methodologies” and after “University of Illinois” added “College of Agricultural, Consumer and Environmental Sciences.” Deleted “Farm Bureau”.

In subsection (g) of Section 120.388, deleted “February 8, 2006” and added “the date three years prior to the date of adoption”.

In subsection (m) of Section 120.388, deleted all language and replaced with the following language:

“m) A person shall not be subject to a penalty period under this Section to the extent that:”

- 1) homestead property was transferred to:
  - A) the person's spouse;
  - B) the person's child who is under age 21;
  - C) the person's child who is determined blind (as described in Section 120.313) or determined disabled (as described in Section 120.314);
  - D) the person's brother or sister who has an equity interest in the homestead property and who was residing in the home for at least one year immediately prior to the date the person became institutionalized; or
  - E) the person's son or daughter who provided care for the person and who resided in the homestead property for the two years immediately prior to the date the person became institutionalized provided credible tangible evidence is presented that:
    - i) shows the person was in need of care that would have otherwise required an institutional level of care. Such evidence may consist of a physician's statement or an evaluation conducted by a medical professional showing the need for an institutional level of care. A diagnosis of Alzheimer's or other dementia related illness shall be prima facie evidence of a need for an institutional level of care; and
    - ii) shows the son or daughter resided with the person for two years immediately prior to the person's institutionalization and provided care that prevented institutionalization. Such evidence may consist of tax returns, driver's license, cancelled checks or other documentation demonstrating residence in the home for at least two years prior to the parent's institutionalization; and
    - iii) shows the son or daughter provided care to the person. Such evidence may consist of a sworn affidavit or statement signed by the son or daughter.
- 2) the transfer by the institutionalized person was to:

- A) the person's spouse or to another person for the sole benefit of the person's spouse;
- B) the person's child or to a trust (including a trust described in Section 120.347(d)) established solely for the benefit of the person's child or to another person for the sole benefit of the institutionalized person's child. To qualify under this subsection, the child must be determined blind (as described in Section 120.313) or determined disabled (as described in Section 120.314);
- C) a trust (including trusts described in Section 120.347(d)(1) and (2)) established solely for the benefit of a person who is determined disabled (as described in Section 120.314);
- D) For purposes of this Section, a transfer is considered to be for the "sole benefit of" a person if:
  - i) The transfer is arranged in such a way that no person or entity except the specified beneficiary can benefit from the property transferred in any way, whether at the time of the transfer or at any time in the future.
  - ii) The transfer to a trust benefits no one but the person, whether at the time the trust is established or at any time in the future.
  - iii) The transfer instrument or document provides for the spending of the funds involved for the benefit of the person on a basis that is actuarially sound, based on the life expectancy of the person involved (as determined under current actuarial tables published by the Office of the Chief Actuary of the Social Security Administration <http://www.ssa.gov/OACT/STATS/table4c6.html> ). This subsection 120.388(m)(2)(D)(iii) does not apply to trusts described in subsection 120.347(d) because those trusts provide for a "payback" to the State upon the death of the beneficiary.
  - iv) The transfer was accomplished via a written instrument of transfer (e.g., a trust document) that legally binds the parties to a specified course of action and clearly sets out the conditions under which the transfer was made, as well

as who can benefit from the transfer. A transfer without such a document may not be said to have been made for the sole benefit of the person since there is no way to establish, without the document, that only the specified person will benefit from the transfer.

- 3) The person intended to transfer the property for fair market value (FMV). When a transfer is made for less than FMV, a person is presumed to have done so intentionally. This presumption may be rebutted by objective tangible evidence showing:
- A) initial and continuing reasonable, good faith efforts to sell the property on the open market were made and that the compensation received was the best value offered;
  - B) a legally binding contract was executed that provided for adequate compensation in a specified form (e.g., goods, services, cash) in exchange for the transferred asset;
  - C) the person acted in good faith that he or she was receiving FMV or the best price for the item or property, and the item or property was transferred to a person other than a related party (e.g., a person related by blood, marriage or friendship);
  - D) the person had other adequate means or plans for support, including medical care, at the time of the transfer; and
  - E) the transfer was made for reasons exclusive of qualifying or remaining eligible for medical assistance.
- 4) The transfer was made exclusively for a reason other than to qualify or remain eligible for medical assistance. A transfer for less than FMV is presumed to have been made to qualify for assistance. This presumption may be rebutted by credible tangible evidence that the person or spouse had no reason to believe that Medicaid payment of long-term care services might be needed. The sudden loss of income or assets, the sudden onset of a disabling condition, such as a stroke or Alzheimer's disease, or a personal injury may provide convincing evidence. A subjective statement of intent or claim of ignorance of the asset transfer provision is not sufficient. Other examples of credible evidence showing a reason for transferring assets for reasons exclusively other than qualifying for medical assistance include, but are not limited to:

- A) police reports, other related law or regulatory enforcement, documentation from the Department on Aging ,or like credible evidence that assets were misappropriated as a result of elder or other abuse and cannot be recovered;
- B) evidence that the transfer was made by a person lacking the mental capacity to make the transfer and who was not represented by a guardian, family member or other legal representative at the time of the transfer;
- C) evidence that the transfers were for everyday living expenses, incidental gifts to family members, or contributions to charities or religious organizations made on a consistent basis over a period of time (not only in close proximity to applying for assistance) may evince reasons for transfers exclusive of qualifying for assistance. Such expenses shall be reviewed taking into account the individual circumstances of a particular transfer and applying an objective standard based on whether a reasonable person would have made the transfer unmotivated by an intent to qualify for assistance; and
- D) other evidence pertinent to the person's circumstances at the time of the transfer relating to:
  - i) the person's physical and mental condition;
  - ii) the person's financial situation;
  - iii) the need for medical assistance;
  - iv) any changes in living arrangements;
  - v) the length of time between the transfer and application for medical assistance; or
  - vi) whether unexpected events occurred between the transfer and application.
- 5) The person transfers property disregarded as a result of payments made by a qualified long term care insurance policy approved by the Director of the Illinois Department of Insurance under the Qualified Long Term Care Insurance Partnership (QLTCIP) program [50 Ill. Adm. Code 2012];

- 6) All of the assets transferred for less than FMV have been returned to the person. Full or partial returns occurring prior to imposition of a penalty reduce the uncompensated portion of the transfer by the amount returned. Once a penalty is imposed it may only be eliminated if all assets transferred for less than FMV are returned. When all transferred assets are returned, the assets are treated as returned on the date the penalty was imposed; the penalty is erased and the returned assets are treated as available as of the date the penalty was imposed. For the time period between imposition of the penalty and return of the assets, the Department will treat the assets as available to meet the spenddown obligation for that time period only (see Section 120.384). At the point in time that assets are in fact returned, they are treated as available assets that may be reduced by a spenddown obligation or otherwise. Returned assets that are transferred for less than fair market value may be subject to penalty; or
- 7) the Department determines that the denial of eligibility would cause an undue hardship as provided under subsection (r) of this Section.”

In subsection (r)(1) of Section 120.388, after the word “Department” changed “may” to “shall” and deleted “may” after the word “penalty”; changed “create” to “creates”.

In subsection (r)(2) of Section 120.388, deleted the following language: “Undue hardship does not exist when a person transfers or gifts property away for the primary purpose of qualifying for long term care services (see subsection (m)(4)), notwithstanding legal, financial or other professional advice the person may have received from third parties.”

In subsection (r)(4)(A) of Section 120.388, after the word “person” added “, in good faith and to the best of their ability”.

In subsection (r)(4)(B) of Section 120.388, deleted all of subsection “(B)” and renumbered “(C)” to “(B)” and deleted “and the person’s ability to pursue recovery”, renumbered “(D)” to “(C)” and renumbered “(E)” to “(D)”.

In subsection (r)(6) of Section 120.388, deleted “has appropriated legal authority to provide such consent.” and added “may include the person who signed the application for medical assistance on behalf of the resident (see 89 Ill. Adm. Code 110.10(c)).”

- 5) Response to Recommendations Made by the Administrative Code Division: N/A
- 6) Incorporation by Reference: This proposed rulemaking does not include any incorporation by reference.

7) Final Regulatory Flexibility Analysis:

- A) The Department did not receive any comments from small businesses or local governmental units regarding this proposed rulemaking.
- B) No alternatives to the proposed rulemaking were suggested by small businesses or local governmental units.

8) Compliance with Small Business Flexibility Requirements:

9) Agency's Evaluation of Submissions by Interested Persons During the Public Comment Period

A) List of individuals and groups submitting comments:

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- B) Specific criticisms, suggestions, and comments raised: See Attachment Four
  - C) Changes made as a result of public comments: See Attachment Four
  - D) Public hearings: Public hearings were held on September 13, 2010 in Chicago, Illinois and September 28, 2010 in Springfield, Illinois.
- 10) Justification and Rationale for the Proposed Rulemaking
- A) Changes in Illinois laws, which require the rulemaking: None
  - B) Changes in agency policies and procedures, which require the rulemaking: None
  - C) Federal laws, rules or funding requirements, which require the rulemaking: Deficit Reduction Act of 2005 (PL 109-171, 2006 S 1932) (DRA) and other provisions of federal law relating to the medical assistance programs, financial eligibility for long term care and transfers of assets.
  - D) Court orders or decisions, which require the rulemaking: None
  - E) Any other reasons for the rulemaking: None
- 11) Agency Personnel Who Will Respond to Joint Committee Questions Regarding the Proposed Rulemaking: Please address any questions to:

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General Counsel  
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- 12) State Mandates Act Questionnaire: See Attachment Two.
- 13) Analysis of Economic and Budgetary Effects of the Proposed Rulemaking: See Attachment Three.
- 14) Impact Statement from Department of Commerce and Economic Opportunity: The Department of Commerce and Economic Opportunity has indicated that these proposed amendments will not adversely affect small businesses.

ATTACHMENT ONE

FIRST NOTICE CHANGES

CHANGES IN THE TEXT OF THE PROPOSED AMENDMENTS  
DURING THE FIRST NOTICE PERIOD

Agency: Department of Healthcare and Family Services

Heading of the Part: Medical Assistance Programs (89 Ill. Adm. Code 120)

Illinois Register Citation: 34 Ill. Reg. 11664

Changes: The following changes were made:

1. In line 1478, deleted “resources” and added “assets”
2. In lines 1501-1510, deleted “A non-profit association under this subsection (d)(2) shall mean an entity that is: (A) organized and operated exclusively for other than profitmaking purposes and distributes no part of the entity’s income to its members; and (B) qualified to receive charitable donations for which a taxpayer may lawfully claim a deduction under the provisions of section 501(a) of the Internal Revenue Code (26 USC 501(a)).”
3. In lines 1504 – 1510, deleted all
4. In line 1529, deleted “resources” and added “assets”
5. In line 1541, deleted “resources” and added “assets”
6. In line 1545, deleted “resources” and added “assets”
7. In line 1568, added “are treated similar to trusts” after the title “Annuities”.
8. In lines 1572-1576, subsection “(2)” changed to “(3)” and added new language at subsection “(2)” to read as follows:  
  
“(2) Any portion of an annuity from which payment to or for the benefit of the person or the person’s spouse could be made is an available resource. An annuity that may be surrendered to its issuing entity for a refund or payment of a specified amount or provides a lump-sum settlement option, is an available resource valued at the amount of any such refund, surrender or settlement.”
9. In lines 1578-1627, all language deleted and added language to read as follows:

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- “(4) An annuity that fails to name the State of Illinois as a remainder beneficiary as required under Section 120.385(b) shall result in denial or termination of eligibility for long term care services.”
10. In lines 1808 & 1810, changed “2009” to “2011”.
  11. In lines 1946-1972, deleted “(j)” and all language.
  12. In lines 1974-1975, “(j)” changed to “(i)” deleted “If an institutionalized person is found eligible as provided in subsection (i) of this Section,” and changed “the” to “The”
  13. In line 1986, changed “42 USC 382b,” to “42 USC 1382b,”
  14. In line 2157, inserted “under this subsection” after the word “exempt”.
  15. In line 2178, deleted “Asset” and added “Resource”
  16. In line 2234, added “per person” at the end of the sentence.
  17. In lines 2247-2256, revised to read as follows: “(3) A prepaid, guaranteed price funeral/burial contract funded by an irrevocable assignment of a person’s life insurance policy to a trust, as provided under 225 ILCS 45/2a(c), is exempt. The trust is responsible for ensuring that the provider of funeral services under contract receives the proceeds of the policy when it provides the funeral goods and services specified under the contract (see 225 ILCS 45/1a-9(a)). The irrevocable assignment of ownership of the insurance policy must be acknowledged by the insurance company.”
  18. In line 2269, changed “(2005)” to “(2009)”
  19. In lines 2291-2292, deleted “89 Ill. Adm. Code” added “subsection” and “(except that subsection’s reference to services provided through a Community Integrated Living Facility (CILA))” after “120.31(a)”
  20. In line 2301, added new “(m)” and language to read as follow: “The amount of damages recovered by a resident of a nursing home for any act which injures the resident pursuant to 210 ILCS 45/3-605.”
  21. In line 2301, “(m)” changed to “(n)”
  22. In line 2310, “(n)” changed to “(o)”
  23. In line 2318, “(o)” changed to “(p)”

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24. In lines 2364-2365, deleted “countable assets exceed disregard described in this Section” and added “resources exceed the disregard amounts described in this subsection (e).”
25. In line 2519, deleted “Effective on the date of this rulemaking” and added “Effective the date of adoption”.
26. In line 2544, deleted “on the date of this rulemaking” and added “Effective the date of adoption”.
27. In line 2546, deleted “\$500,000” and added “\$750,000”.
28. In line 2628, changed “February 8, 2006” to “Effective the date three years prior to the date of adoption”
29. In line 2632, deleted “February 8, 2006” and added “the date three years prior to the date of adoption or to persons who applied for or whose application for long term care assistance was filed or approved prior to the date of adoption.”
30. In line 2784, deleted “February 8, 2006” and added “the date three years prior to the date of adoption”.
31. In line 2792, deleted “February 8, 2006” and added “the date three years prior to the date of adoption”.
32. In line 2859, changed “spousal” to “statutory”.
33. In line 2873, deleted “120.380” and “113.140” and added “120.380(i)” and “113.140(e)”.
34. In line 2904, deleted “tables” and added “methodologies”
35. In line 2905, after the word “Illinois” added “College of Agricultural, Consumer and Environmental Sciences” and deleted “Farm Bureau”.
36. In line 2952, deleted “February 8, 2006” and added “the date three years prior to the date of adoption”.
37. In lines 3000-3169 deleted all and replaced with the following language to read as follows:  
  
“m) A person shall not be subject to a penalty period under this Section to the extent that:  
1) homestead property was transferred to:

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- A) the person's spouse;
  - B) the person's child who is under age 21;
  - C) the person's child who is determined blind (as described in Section 120.313) or determined disabled (as described in Section 120.314);
  - D) the person's brother or sister who has an equity interest in the homestead property and who was residing in the home for at least one year immediately prior to the date the person became institutionalized; or
  - E) the person's son or daughter who provided care for the person and who resided in the homestead property for the two years immediately prior to the date the person became institutionalized provided credible tangible evidence is presented that:
    - i) shows the person was in need of care that would have otherwise required an institutional level of care. Such evidence may consist of a physician's statement or an evaluation conducted by a medical professional showing the need for an institutional level of care. A diagnosis of Alzheimer's or other dementia related illness shall be prima facie evidence of a need for an institutional level of care; and
    - ii) shows the son or daughter resided with the person for two years immediately prior to the person's institutionalization and provided care that prevented institutionalization. Such evidence may consist of tax returns, driver's license, cancelled checks or other documentation demonstrating residence in the home for at least two years prior to the parent's institutionalization; and
    - iii) shows the son or daughter provided care to the person. Such evidence may consist of sworn affidavit or statement signed by the son or daughter.
- 2) the transfer by the institutionalized person was to:

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- A) the person's spouse or to another person for the sole benefit of the person's spouse;
- B) the person's child or to a trust (including a trust described in Section 120.347(d)) established solely for the benefit of the person's child or to another person for the sole benefit of the institutionalized person's child. To qualify under this subsection, the child must be determined blind (as described in Section 120.313) or determined disabled (as described in Section 120.314);
- C) a trust (including trusts described in Section 120.347(d)(1) and (2)) established solely for the benefit of a person who is determined disabled (as described in Section 120.314);
- D) For purposes of this Section, a transfer is considered to be for the "sole benefit of" a person if:
  - i) The transfer is arranged in such a way that no person or entity except the specified beneficiary can benefit from the property transferred in any way, whether at the time of the transfer or at any time in the future.
  - ii) The transfer to a trust benefits no one but the person, whether at the time the trust is established or at any time in the future.
  - iii) The transfer instrument or document provides for the spending of the funds involved for the benefit of the person on a basis that is actuarially sound, based on the life expectancy of the person involved (as determined under current actuarial tables published by the Office of the Chief Actuary of the Social Security Administration <http://www.ssa.gov/OACT/STATS/table4c6.html> ). This subsection 120.388(m)(2)(D)(iii) does not apply to trusts described in subsection 120.347(d) because those trusts provide for a "payback" to the State upon the death of the beneficiary.
  - iv) The transfer was accomplished via a written instrument of transfer (e.g., a trust document) that legally binds the parties to a specified course of action and clearly sets out the conditions under which the transfer was made, as well

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as who can benefit from the transfer. A transfer without such a document may not be said to have been made for the sole benefit of the person since there is no way to establish, without the document, that only the specified person will benefit from the transfer.

- 3) The person intended to transfer the property for fair market value (FMV). When a transfer is made for less than FMV, a person is presumed to have done so intentionally. This presumption may be rebutted by objective tangible evidence showing:
- A) initial and continuing reasonable, good faith efforts to sell the property on the open market were made and that the compensation received was the best value offered;
  - B) a legally binding contract was executed that provided for adequate compensation in a specified form (e.g., goods, services, cash) in exchange for the transferred asset;
  - C) the person acted in good faith that he or she was receiving FMV or the best price for the item or property, and the item or property was transferred to a person other than a related party (e.g., a person related by blood, marriage or friendship);
  - D) the person had other adequate means or plans for support, including medical care, at the time of the transfer; and
  - E) the transfer was made for reasons exclusive of qualifying or remaining eligible for medical assistance.
- 4) The transfer was made exclusively for a reason other than to qualify or remain eligible for medical assistance. A transfer for less than FMV is presumed to have been made to qualify for assistance. This presumption may be rebutted by credible tangible evidence that the person or spouse had no reason to believe that Medicaid payment of long-term care services might be needed. The sudden loss of income or assets, the sudden onset of a disabling condition, such as a stroke or Alzheimer's disease, or a personal injury may provide convincing evidence. A subjective statement of intent or claim of ignorance of the asset transfer provision is not sufficient. Other examples of credible evidence showing a reason for transferring assets for reasons exclusively other than qualifying for medical assistance include, but are not limited to:

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- A) police reports, other related law or regulatory enforcement, documentation from the Department on Aging ,or like credible evidence that assets were misappropriated as a result of elder or other abuse and cannot be recovered;
- B) evidence that the transfer was made by a person lacking the mental capacity to make the transfer and who was not represented by a guardian, family member or other legal representative at the time of the transfer;
- C) evidence that the transfers were for everyday living expenses, incidental gifts to family members, or contributions to charities or religious organizations made on a consistent basis over a period of time (not only in close proximity to applying for assistance) may evince reasons for transfers exclusive of qualifying for assistance. Such expenses shall be reviewed taking into account the individual circumstances of a particular transfer and applying an objective standard based on whether a reasonable person would have made the transfer unmotivated by an intent to qualify for assistance; and
- D) other evidence pertinent to the person's circumstances at the time of the transfer relating to:
  - i) the person's physical and mental condition;
  - ii) the person's financial situation;
  - iii) the need for medical assistance;
  - iv) any changes in living arrangements;
  - v) the length of time between the transfer and application for medical assistance; or
  - vi) whether unexpected events occurred between the transfer and application.
- 5) The person transfers property disregarded as a result of payments made by a qualified long term care insurance policy approved by the Director of the Illinois Department of Insurance under the Qualified Long Term Care Insurance Partnership (QLTCIP) program [50 Ill. Adm. Code 2012];

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- 6) All of the assets transferred for less than FMV have been returned to the person. Full or partial returns occurring prior to imposition of a penalty reduce the uncompensated portion of the transfer by the amount returned. Once a penalty is imposed it may only be eliminated if all assets transferred for less than FMV are returned. When all transferred assets are returned, the assets are treated as returned on the date the penalty was imposed; the penalty is erased and the returned assets are treated as available as of the date the penalty was imposed. For the time period between imposition of the penalty and return of the assets, the Department will treat the assets as available to meet the spenddown obligation for that time period only (see Section 120.384). At the point in time that assets are in fact returned, they are treated as available assets that may be reduced by a spenddown obligation or otherwise. Returned assets that are transferred for less than fair market value may be subject to penalty; or
- 7) the Department determines that the denial of eligibility would cause an undue hardship as provided under subsection (r) of this Section.

38. In line 3263, deleted "~~may~~" and added "shall".
39. In line 3264, deleted "~~may~~" and added an "s" to the word "create".
40. In lines 3279-3282 deleted all language.
41. In line 3295, deleted "~~must~~" and added "may".
42. In line 3303, after the word "person" added "in good faith and to the best of their ability,"
43. In lines 3313-3317, deleted subsection "~~(B)~~" and all language.
44. In line 3319, subsection "~~(C)~~" is changed to subsection "(B)".
45. In lines 3321-3322, deleted "~~and the person's ability to pursue recovery~~".
46. In line 3324, subsection "~~(D)~~" changed to subsection "(C)" and added "the denial of assistance would force the person to move; or".
47. In line 3326, deleted all.
48. In line 3328, deleted subsection "~~(ii)~~" and added subsection "(D)".

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49. In lines 3339-3340, deleted “has appropriate legal authority to provide such consent.” and added “may include the person who signed the application for medical assistance on behalf of the resident (see 89 Ill. Adm. Code 110.0(c)).”

ATTACHMENT TWO

STATE MANDATES ACT QUESTIONNAIRE

Agency: Department of Healthcare and Family Services

Heading of the Part: Medical Assistance Programs (89 Ill. Adm. Code 120)

Illinois Register Citation: 34 Ill. Reg. 11664

1. Does this rulemaking affect a municipality, county, township, other unit of local government, school district or community college district?

Yes  No

If yes, please check the type of entity or entities that are affected.

Municipality   
County   
Township   
Other Unit of Local Government   
School District   
Community College District

2. Does this rule require a unit of local government, a school district, or a community college district to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues?

Yes  No

Total number of units affected:

If yes, please estimate the amount of additional expenditures necessitated by this rulemaking per unit of government:

NOTE: If the dollar amount, or total number of units affected is unknown, please outline and attach to this form a specific and detailed explanation of the steps taken by the agency to determine the approximate expense of the rulemaking, and the number of units affected.

If no, please explain why the rule does not necessitate such additional expenditures.

These proposed amendments do not require additional expenditures by any units of local government because they do not regulate or impose any responsibilities on units of local government.

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3. Were any alternatives to the rule, which did not necessitate additional expenditures considered?

Yes  No

If yes, please list these alternatives and explain why these alternatives were rejected.

4. What is the policy objective(s) of the rulemaking? (Please be specific)

The policy objectives of these proposed amendments are fully explained in the Notice of Proposed Amendments.

5. Please explain, in detail, why the policy objective(s) of this rule cannot be achieved in the absence of the rule.

This rulemaking, implements the provisions of the Deficit Reduction Act of 2005 (PL 109-171, 2006 S 1932) (DRA) and other provisions of federal law relating to the medical assistance programs, financial eligibility for long term care and transfers of assets.

## ATTACHMENT THREE

### AGENCY ANALYSIS OF ECONOMIC AND BUDGETARY EFFECTS OF PROPOSED RULEMAKING

Agency: Department of Healthcare and Family Services

Heading of the Part: Medical Assistance Programs (89 Ill. Adm. Code 120)

Illinois Register Citation: 34 Ill. Reg. 11664

Please attempt to provide as dollar-specific responses as possible and feel free to add any relevant narrative explanation.

1. Anticipated effect on State expenditures and revenues.
  - (a) Current cost to the agency for this program/activity. HFS spends more than \$1.5 billion annually on long term care services.
  - (b) If this rulemaking will result in an increase or decrease in cost, specify the fiscal year in which this change will first occur and the dollar amount of the effect.

HFS anticipates that the rulemaking will slow the growth in long term care costs to the State by requiring long term care residents to use more of their own resources before relying on the State to pay the cost of their care. The only direct effect that can be calculated at this time is an anticipated increase in the amount of assets anticipated to be found through HFS's Long Term Care Asset Discovery Initiative (LTC-ADI). HFS anticipates that an additional \$3.2 million in assets will be identified in FY2012 as available to new applicants under the provisions of the proposed rulemaking. This will bring the total value of costs avoided by the State through LTC-ADI to \$6 million in FY2012.

- (c) Indicate the funding source, including Fund and appropriation lines for this program/activity. Funding sources include state, federal and provider assessment revenues. Appropriation lines include GRF Long Term Care Services and Nursing Home IMD Services and the Nursing Home Provider Assessment Long Term Care Services.
- (d) If an increase or decrease in the costs of another State agency is anticipated, specify the fiscal year in which this change will first occur and the estimated dollar amount of the effect.

There is no increase or decrease anticipated in the costs of another State agency as a result of this rulemaking.

- (e) Will this rulemaking have any effect on State revenues or expenditures not already indicated above? Specify effects and amounts.

There will be no effect on State revenues not already indicated.

2. Economic effect on entities regulated by the rulemaking.

- (a) Indicate the economic effect and specify the entities affected:

Positive  Negative  No effect

Entities Affected: N/A

Dollar amount per entity: N/A

Total Statewide cost: Best estimate is that \$3.2 million in private assets that would have been given away will now be used toward the cost of long term care.

- (b) If an economic effect is predicted, please briefly describe how the effect will occur. (Example: Additional continuing education courses will require expenditures for course fees.) Applicants for coverage of long term care services will be less able to transfer assets as a means of obtaining State payment of the cost of their long term care.

- (c) Will the rulemaking have an indirect effect that may result in increased administrative costs? Will there be any change in requirements such as filing, documentation, reporting or completion of forms? Compare to current requirements.

The proposed rulemaking will result in additional administrative work, however, in the current fiscal environment, HFS does not anticipate being able to add additional personnel to handle the increased workload. The Department of Human Services, which handles most of the work related to eligibility processing for long term care, is in a similar situation. For that reason, the rulemaking is expected to lengthen the time it takes the State to make determinations of eligibility for long term care. Because the "look back" period for reviewing asset transfers will be increasing from three to five years, applicants will eventually be required to provide financial records for the five year period prior to application.