



Virginia  
Regulatory  
Town Hall

## Final Regulation Agency Background Document

<b>Agency Name:</b>	Dept. of Medical Assistance Services; 12 VAC 30
<b>VAC Chapter Number:</b>	12 VAC30-110
<b>Regulation Title:</b>	Married and Institutionalized Individuals Eligibility and Patient Pay
<b>Action Title:</b>	Hardship Rule
<b>Date:</b>	May 28, 2002; Effective August 1, 2002

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

### Summary

*Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.*

This action will establish a more precise definition of hardship to be used in determining Medicaid eligibility for institutionalized individuals who have spouses living in the community.

This regulation is essential to protect the health and welfare of citizens and for the efficient and economical performance of an important governmental function. This revision to existing regulations is necessary because the existing regulations were promulgated in 1990 and have not been revised since that time. During the last decade, a number of cases have arisen in which circumstances have pointed to the importance of a carefully crafted hardship provision.

Many elderly and disabled Virginians are unable to pay the high cost of long-term care services without assistance. In addition, when one spouse of a couple needs long-term care services, the

other spouse's financial security may be seriously threatened. These regulations specify how local department of social services' eligibility workers must evaluate the income and resources owned by couples when one spouse needs long-term care.

Federal and state laws require that a portion of the couple's resources be reserved for the support of the community spouse of an institutionalized individual. Failure to correctly allot a portion of the couple's resources to the community spouse could result in the impoverishment of the community spouse and prevent him or her from having sufficient income and resources to meet basic health and maintenance needs. Because individual circumstances may present unique and compelling situations which cannot be equitably addressed by regulations, the application of a hardship provision is needed to avoid suffering and deprivation of life sustaining medical care. Local social service agencies now have to consider hardship claims made by applicants for medical assistance and these regulations will provide clearer and more specific guidance toward that end.

### Changes Made Since the Proposed Stage

*Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.*

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As a result of comments received on the proposed regulation during the comment period, changes have been made in three sections of the proposed regulations.

12VAC 30-110-720, the proposed definition of undue hardship was limited to denials of Medicaid eligibility due to excess resources. The definition of "undue hardship" has been revised because the reasons an undue hardship can be claimed have been expanded and are not limited to denials due to excess resources.

12VAC 30-110-741, Resource assessment required. This section has been revised to allow an undue hardship claim to be filed in cases where the institutionalized individual is unable to establish his marital status, locate the separated spouse or when the community spouse does not provide information necessary to complete a resource assessment.

12VAC 30-110-831, sets forth the conditions under which undue hardship can be claimed. The proposed regulations did not allow undue hardship to be claimed when the institutionalized spouse failed to establish his marital status or when the community spouse refused or failed to verify the value of resources owned. These restrictive conditions have been removed and provisions added to allow an applicant to claim undue hardship when specific criteria are met. The criteria require that the applicant sign an affidavit stating that he has been unsuccessful, after taking all reasonable steps, in locating the spouse, obtaining relevant information about the resources of the spouse, and obtaining financial support from the spouse. The criteria also require the applicant to assign to DMAS all claims he may have to financial support from the

spouse and to agree to cooperate with DMAS in any effort to locate, obtain information about, and/or obtain financial support from the spouse.

**Statement of Final Agency Action**

*Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.*

I hereby approve the foregoing Regulatory Review Summary with the attached amended State Plan pages and adopt the action stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012, of the Administrative Process Act.

5/28/2002

/s/ Patrick W. Finnerty

Date

Patrick W. Finnerty, Director

Dept. of Medical Assistance Services

**Basis**

*Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.*

The Code of Virginia (1950) as amended, §32.1-325, grants to the Board of Medical Assistance Services (BMAS) the authority to administer and amend the Plan for Medical Assistance. The Code of Virginia (1950) as amended, §32.1-324, grants to the Director of the Department of Medical Assistance Services (DMAS) the authority to administer and amend the Plan for Medical Assistance in lieu of Board action pursuant to the Board's requirements. The Code also provides, in the Administrative Process Act (APA) §§ 2.2-4007 and 2.2-4013, for this agency's promulgation of proposed regulations subject to the Governor's review.

Federal law at §1924(c)(3)(C) provides that an institutionalized spouse shall not be ineligible for medical assistance because resources are available for the costs of care when the state determines that denial of eligibility would work an undue hardship.

The Governor approved the initiation of the Article 2 process for this issue on May 4, 2001. No comments were received during the comment period for the Notice of Intended Regulatory Action.

### Purpose

*Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.*

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This proposal amends the regulations governing Medicaid eligibility for married institutionalized individuals who have a community spouse to set forth the instances in which the Commonwealth will determine that a Medicaid applicant will be considered to face an undue hardship if Medicaid eligibility is denied. This revision to existing regulations is necessary because the existing hardship regulation is vague and difficult to apply.

### Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.*

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Many elderly and disabled Virginians are unable to pay the high cost of long-term care services without assistance. In addition, when one spouse of a couple needs long-term care services, the other spouse's financial security may be seriously threatened. These regulations specify how local department of social services' eligibility workers must evaluate the income and resources owned by couples when one spouse needs long-term care.

Federal and state laws require that a portion of the couple's resources be reserved for the support of the community spouse of an institutionalized individual. Failure to correctly allot a portion of the couple's resources to the community spouse could result in the impoverishment of the community spouse and prevent him or her from having sufficient income and resources to meet basic health and maintenance needs. Because individual circumstances may present unique and compelling situations which cannot be equitably addressed by other regulations, the application of a hardship provision is needed to avoid suffering and deprivation of life sustaining medical care.

Local social service agencies now have to consider hardship claims made by applicants for medical assistance and these regulations will provide clearer and more specific guidance toward that end.

The regulations are not expected to have a fiscal impact. The clarifications are intended to avoid costs, which would be incurred if the present vague regulations were to be misapplied. There are no localities that are uniquely affected by these regulations as they apply statewide.

The Department of Medical Assistance Services is established under the authority of Title 32.1, Chapter 10, of the Code of Virginia and submits, amends and implements the State Plan for Medical Assistance under the authority of Title XIX of the Social Security Act (42 U.S.C. §§ 1396 through 1396v). The Virginia Medicaid Program is funded with both federal and state funds. The current federal funding participation (FFP) for medical assistance expenditures is 51.85% effective October 1, 2000.

This regulation clarifies requirements already in effect. Therefore, no new costs are anticipated. There is no expected impact on local entities.

### Issues

*Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.*

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Since the Medicaid eligibility regulations governing determinations of eligibility of married institutionalized individuals first became effective in 1990, the Department has been reviewing the performance of local eligibility workers in processing applications for Medicaid. Local agencies have referred cases of unusual complexity or cases in which hardship is alleged to the Department for review and consultation. During this time, it has become apparent that there is a need for a specific rule by which allegations of undue hardship can be measured.

The Department desires to provide relief in instances in which genuine hardship may occur but not make the Medicaid program subject to manipulation or abuse by frivolous or unsubstantiated claims of hardship by individuals who desire to shift responsibility for the cost of expensive long-term care from private payment to public assistance. This suggested final regulation is the result of careful evaluation of the Department's experience over the past ten years.

### Public Comment

*Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.*

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DMAS' proposed regulations were published in the October 8, 2001, *Virginia Register* for their public comment period from October 8 through December 7, 2001. Comments, including

endorsements from 20 individuals or organizations, were received from The Virginia Poverty Law Center. A summary of the received comments with the agency's response follows.

The commenter stated that the proposed regulations address the "undue hardship" provision where DMAS evaluates the resource eligibility of an institutionalized individual who has a community spouse. The commenter further stated that the definition narrowly limits undue hardship to several specific circumstances. Furthermore, the commenter stated that the narrow definition precluded a finding of undue hardship where the institutionalized spouse failed to establish his marital status or the community spouse refused or failed to disclose or verify the value of possessed resources.

This commenter stated that the narrow DMAS definition and the restrictions on the availability of the undue hardship exception were inconsistent with federal law. The commenter further discussed federal law provisions that require the consideration of all resources that are held by the institutionalized spouse and the community spouse to determine the Medicaid eligibility of the institutionalized spouse. This commenter asserted that DMAS had totally ignored or improperly restricted important exceptions to 42 USC § 1396r-5(c)(3).

The commenter stated that the DMAS regulations and policies were inconsistent with federal law in these respects:

1. There are no regulations or policies allowing an institutionalized spouse to obtain Medicaid after assigning to the state any rights to support from the community spouse;
2. There are no regulations or policies allowing an incompetent institutionalized individual to obtain Medicaid where the state can bring a support proceeding against the community spouse without such assignment;
3. The regulations prohibit a hardship evaluation unless resources are disclosed/established.
4. The definition of undue hardship is so narrow and limited that many otherwise eligible people will be denied Medicaid coverage of long term care services contrary to the cited federal law. DMAS' regulations preclude an undue hardship finding where the institutionalized spouse cannot locate the community spouse, cannot verify marital status, or the community spouse refuses to cooperatively provide information about own resources.

The commenter stated that the federal statute addressed these types of situations. The commenter recognized that DMAS could not promulgate a criterion that was so loose or easily manipulated by individuals intent on improperly using Medicaid for expensive long-term care services. The commenter stated that DMAS' very tight standard undermined the intent of the federal law and conflicted with mandatory provisions of 42 U.S.C. § 1396r-5(c)(3).

This commenter provided information about other states' Medicaid undue hardship regulations: Maryland; North Carolina; Massachusetts; Delaware; Utah; New York; and, Connecticut. The commenter suggested alternative regulatory language for DMAS' consideration. With the use of the commenter's suggested alternative language, appropriate modification would be required in other related sections of the Virginia Administrative Code.

The commenter also submitted a petition for the agency to amend final regulations published at VA.R. 17:13 (March 12, 2001) pursuant to the *Code of Virginia* § 9-6.14:4.1(C) (now codified at § 2.2-4007 COV).

*Agency Response:*

*DMAS has reviewed the comments that were submitted during the public comment period and, in addition, has reviewed numerous situations that have been brought to the attention of the Attorney General's office where individuals have alleged hardships that were not contemplated in the proposed regulations. As a result of that review, DMAS has determined that the original language in the proposed regulations is problematic and would result in eligibility being denied in circumstances where genuine hardship would be clearly present. In order to avoid this problem, DMAS is amending the regulation at 12VAC30-110-831 to set forth additional procedures wherein an applicant can claim undue hardship. Changes in 12 VAC 30-110-720 and 110-741 were necessary to conform to the new language in 12 VAC 30-110-831.*

## Detail of Changes

*Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.*

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12VAC30-110-720 The definition of undue hardship is amended to remove the requirement that an applicant must have exhausted all legal means to access a resource. This requirement is confusing and difficult to apply. The definition is amended solely to define when an applicant's circumstances can be said to reach the level of undue hardship.

12VAC30-110-831 A regulation is added to provide an alternative approach that may be followed when for some reason beyond the couple's control, the actual value of the resources the couple owned on the first day of the first continuous period of institutionalization cannot be verified because the records no longer exist or because they cannot be obtained. For example, during bank mergers, old records of deposits and balances in the far past may no longer be maintained by the new banking entity. This regulation permits the substitution of the spousal resource standard for the spousal share. This approach ensures that an amount of the couple's resources may be protected for the support of the community spouse even though a resource

assessment cannot be completed. It prevents ineligibility due to circumstances over which the couple has no control.

A regulation is added to clarify that an applicant may not claim that he has an undue hardship simply because he does not know the current status of his marriage. It should be the responsibility of any individual who knows that he has been married to determine his marital status rather than ask the Commonwealth to grant him public assistance as if he had no spouse.

A regulation has been added to clarify that an applicant cannot claim undue hardship in instances in which his community spouse cannot be located or when his community spouse fails or refuses to disclose or verify the value of resources he owns. An individual spouse has legal recourse through family and domestic relations court to seek support from his spouse. It is the applicant's responsibility to avail himself of such legal recourse before requesting public assistance. In cases in which a spouse has abandoned him and cannot be located, an individual still has legal recourse to resolve the status of his marriage. These legal recourses should be utilized before public assistance is sought.

### Family Impact Statement

*Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

Many elderly and disabled Virginians are unable to pay the high cost of long-term care services without assistance. In addition, when one spouse of a couple needs long-term care services, the other spouse's financial security may be seriously threatened. These regulations specify how local eligibility workers must evaluate the income and resources owned by couples when one spouse needs long-term care.

In developing these regulations the DMAS has reviewed the impact that the regulations will have on families and their ability to remain self-sufficient and maintain personal responsibility. The regulations will encourage self-sufficiency and personal responsibility by ensuring that individuals use their resources to support themselves in their old age rather than shifting to the Commonwealth the responsibility to provide long-term care services.

On the other hand, the regulations will ensure that spouses are not reduced to poverty by the illness or incapacity of the institutionalized individuals. Sometimes, couples have been forced to consider divorce in order to avoid impoverishment when a spouse's health fails and he or she requires expensive long-term care. This regulation will reduce the hardship experienced by the community spouse and prevent the desperation that could erode the marital commitment. The regulations will protect a portion of the couple's income and resources for support of the community spouse.