
ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 91 ADM-37

TO: Commissioners of
 Social Services

DIVISION: Medical
 Assistance

DATE: September 24, 1991

SUBJECT: Amendments to Transfer of Resource Provisions Under the
 Medical Assistance Program

 SUGGESTED

DISTRIBUTION: | Medical Assistance Staff
 | Public Assistance Staff
 | Fair Hearing Staff
 | Legal Staff
 | Staff Development Coordinators

CONTACT

PERSON: | MA Eligibility County Representative: 1-800-342-3715,
 | extension 3-7581

| MA New York City Representative: (212) 417-4853

ATTACHMENTS:

| Attachment I - Effect of Transfers of Resources on
 | Medical Assistance Eligibility
 | (available on-line)
 |
 | Attachment II - Transfer Notices (not available
 | on-line)
 |
 | Attachment III - Transfer Notice: Spousal Refusal -
 | Community Cases (not available
 | on-line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
91 ADM-31		360-1.4	366.5		
90 ADM-36		360-4.4	367-c(6)		
90 ADM-35		360-4.6(a)	C. 558, Laws		
90 ADM-29			of 1989		
89 ADM-45			C.165, Laws		
85 ADM-27			of 1991		
82 ADM-26					

I. PURPOSE

This Administrative Directive (ADM) advises social services districts of the provisions of Chapter 165 of the Laws of 1991, which relate to transfer of resources under the Medical Assistance (MA) Program.

II. BACKGROUND

Section 303(b) of the Medicare Catastrophic Coverage Act (MCCA) of 1988 (P.L. 100-360) and the Family Support Act of 1988 (P.L. 100-485) amended Section 1917(c) of the Social Security Act (Act) to require a period of MA ineligibility (penalty period) for certain services for institutionalized persons who dispose of resources for less than fair market value (FMV) within or after the 30 month period immediately prior to institutionalization, or the date of application for MA while institutionalized, whichever is later. An institutionalized person is defined as a person who is in receipt of: nursing facility services; services provided in a hospital which are equivalent to nursing facility services; or care, services or supplies for which a waiver has been obtained under Section 1915(c) of the Act.

Under the MCCA and the Family Support Act amendments, a penalty period is not imposed when resources are transferred: (i) to or for the benefit of a community spouse, or, (ii) if transferred prior to the individual's institutionalization, to or for the benefit of the individual's spouse, provided such spouse does not re-transfer the resources to another person other than the spouse for less than FMV during the 30 month period immediately before the date the institutionalized person applies for MA. However, the resources owned solely by a community spouse could be transferred to another person at any time without any penalty to the institutionalized person. A community spouse is defined as the spouse of an institutionalized person.

Section 6411 of the Omnibus Budget Reconciliation Act (OBRA) of 1989 (P.L. 101-239) amended Section 1917(c) of the Act to require a penalty period for an institutionalized person when his or her spouse transfers resources for less than FMV within or after the 30 month period immediately prior to the person's institutionalization, or the date of the person's application for MA while institutionalized, whichever is later.

Chapter 165 of the Laws of 1991 amended Section 366.5 of the Social Services Law (SSL) to add this requirement to the New York State MA Program. The Department has filed regulations on an emergency basis, effective September 1, 1991, implementing the transfer-of-resources provisions of Chapter 165 of the Laws of 1991.

III. PROGRAM IMPLICATIONS

The amendments to Section 366.5 of the SSL provide that the uncompensated value (UV) of any countable resource transferred by an

individual or the spouse within or after the 30 months prior to the date of institutionalization, if the individual is in receipt of MA on such date, or the date of application for MA while an institutionalized person, if later, will be considered available to the institutionalized applicant/recipient (A/R), unless the exceptions outlined in 89 ADM-45, 90 ADM-29 and Department Regulation 360-4.4(c) apply.

Any transfer of a countable resource by the A/R or his or her spouse for less than FMV is presumed to have been made to qualify the A/R for: nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services or supplies furnished pursuant to a waiver under Section 1915(c) of the Act. Such a transfer results in a period of ineligibility for these services. However, if the A/R or the spouse establishes that the transfer was made exclusively for some other purpose, the UV of the resource must not be considered available in determining eligibility for MA.

The new provisions apply to transfers made by community spouses on or after September 1, 1991, and prior to the date MA eligibility is established for the institutionalized spouse. After the month in which the institutionalized spouse has been determined eligible for MA, no resources of the community spouse are considered available to the institutionalized spouse. Therefore, a transfer by the community spouse after the month in which eligibility is established does not result in a penalty period for the institutionalized spouse.

IV. REQUIRED ACTION

All initial applications for MA-Only by persons who are subject to federally participating treatment of resources must be evaluated to determine if the A/R, or the spouse, transferred countable resources for less than FMV within 30 months of the month of application. Likewise, all recertifications by such recipients must be evaluated to determine if the individual, or the spouse (other than a community spouse), has made a prohibited transfer of a homestead since the previous recertification.

If a prohibited transfer has occurred and the A/R or the spouse are unable to rebut the presumption that the transfer was made to qualify the A/R for nursing facility services, a level of care equivalent to that of nursing facility services provided in a hospital, or care, services or supplies for which a waiver has been obtained under Section 1915(c) of the Act, a penalty period must be imposed on the A/R, unless denial of eligibility will result in undue hardship, as defined in 90 ADM-29. Undue hardship exists if the institutionalized individual is:

- i. otherwise eligible for MA;
- ii. unable to obtain appropriate medical care without the provision of MA; and
- iii. despite best efforts, the A/R and the spouse are unable to have the transferred resources returned or to receive FMV for the resources. Best efforts include cooperating, as

deemed appropriate by the commissioner of the social services district, in the pursuit of the return of the resource.

If such conditions are met, MA must be authorized without restriction.

A. ESTABLISHING THE PENALTY PERIOD

The penalty period begins with the month the prohibited transfer was made. The procedures for determining the length of the penalty period and the appropriate regional rate, as outlined in 91 ADM-31 have not changed.

89 ADM-45 directed that in determining the UV of the transferred resources, the applicant is entitled to have amounts deducted for the applicable MA resource level and allowable burial funds, if not already taken into account by other countable resources. The applicable resource level is always the resource level for one. In addition, an SSI-related individual who has no other available resources designated for burial funds may be allowed an amount up to \$1500 each for him/herself and his/her spouse. Therefore, the maximum amount of burial funds that can be deducted from the UV is \$3000.

When determining the UV in a case involving an institutionalized spouse, no deduction is made from the value of the transferred resource to establish the maximum community spouse resource allowance, since the transferred resource no longer belongs to either member of the couple. However, if the couple makes a satisfactory showing that the resource was transferred exclusively for a purpose other than to qualify the A/R for: nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the Act, a penalty period must not be imposed.

When a non-institutionalized couple applies for MA and either spouse is determined to have made a prohibited transfer, both individuals, if otherwise eligible, must be authorized with restricted coverage for a penalty period based on the full UV of the transferred resources. If one member of the couple subsequently becomes institutionalized prior to the expiration of the penalty period, and undue hardship under transfer provisions does not exist for the institutionalized spouse, the penalty period must continue. If the other member of the couple subsequently applies for MA as an institutionalized individual, he/she must not be restricted unless the institutionalized spouse dies before the penalty period is over. In this situation, the surviving spouse will be subject to the remaining portion of the penalty period.

If MA is authorized for the institutionalized spouse because denial of eligibility would result in undue hardship and the community spouse remains MA eligible, the community spouse must

continue to be restricted for the duration of the penalty period.

B. DETERMINING ELIGIBILITY FOR RESTRICTED COVERAGE

When an institutionalized A/R or the spouse have made a prohibited transfer, a penalty period is established for the institutionalized spouse. During this period, the institutionalized spouse will not receive MA coverage for: nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the Act. However, if otherwise eligible, the individual may receive coverage for ancillary services not included in the facility's per diem rate, or if residing in the community, for care and services other than home and community-based waived services.

1. Resource Eligibility

In determining eligibility for such services, only those countable resources in excess of the community spouse resource allowance are attributed to the institutionalized spouse. If the institutionalized spouse is determined to have excess resources, eligibility will depend on other case circumstances (e.g., the availability of the excess resources to be applied to the institutionalized spouse's cost of care).

2. Income Eligibility

For purposes of income eligibility, the A/R's net monthly income (the income remaining after deducting appropriate disregards in accordance with 18 NYCRR 360-4.6(a)) is compared to the MA income standard for a one person household residing in the community (\$500 effective January 1, 1991). Household size is always one when an A/R is institutionalized.

If an otherwise eligible A/R's net monthly income is at or below the MA income standard, the individual must be authorized with restricted coverage (Coverage Code 10 - All Services Except Long Term Care).

If an otherwise eligible A/R's income exceeds the allowable MA income standard, and the individual resides in an institution, the case must be denied/discontinued. Should the individual subsequently require MA to cover the costs of acute care and/or ancillary services not prohibited due to a transfer of resources, a reapplication must be filed in accordance with existing application procedures, to determine if Excess Income Program requirements are met.

If an otherwise eligible A/R's income exceeds the allowable MA income standard, and the individual resides in the community, the individual must be authorized according to

existing procedures until Excess Income Program requirements are met. After appropriate medical expenses are verified, MA coverage is authorized for out-patient care only (Coverage Code 02) for one month excess, or for all care and services excluding long term care (Coverage Code 10) for six month excess.

C. REFUSAL OF THE COMMUNITY SPOUSE TO PROVIDE NECESSARY INFORMATION ABOUT RESOURCES

If the community spouse fails or refuses to cooperate in providing necessary information about resources, including information regarding transfer(s) of resources, such refusal is a reason to deny MA for the institutionalized spouse because eligibility cannot be determined. However, if undue hardship under spousal impoverishment rules exists, MA must be authorized. Undue hardship, as defined in 90 ADM-29, means a situation where:

1. a community spouse fails or refuses to cooperate in providing necessary information about resources; and
2. the institutionalized spouse is otherwise eligible for MA; and
3. the institutionalized spouse is unable to obtain appropriate medical care without the provision of MA; and
4. (a) the community spouse's whereabouts are unknown; or
(b) the community spouse is incapable of providing the required information due to illness or mental incapacity; or
(c) the community spouse lived apart from the institutionalized spouse immediately prior to institutionalization; or
(d) due to the action or inaction of the community spouse, other than the failure or refusal to cooperate in providing necessary information about resources, the institutionalized spouse will be in need of protection from actual or threatened harm, neglect, or hazardous conditions if discharged from an appropriate medical setting.

If denial of eligibility would result in undue hardship and an assignment of support is executed, or the institutionalized spouse is unable to execute such an assignment due to physical or mental impairment, MA must be authorized and the case referred to the social services district's legal staff for appropriate action.

D. REFUSAL OF THE NON-APPLYING SPOUSE (OTHER THAN A COMMUNITY SPOUSE) TO PROVIDE NECESSARY INFORMATION ABOUT RESOURCES

When a non-applying spouse, other than a community spouse, fails or refuses to provide information regarding resources, it cannot be determined if a transfer has been made exclusively to qualify the A/R for: nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the Act. If otherwise eligible, the individual must be authorized with Coverage Code 10. If the individual subsequently becomes in need of such services and the spouse continues to refuse to provide resource information, Coverage Code 10 must be removed only if the conditions of Section IV.C., of this ADM are met.

E. NOTICE REQUIREMENTS

The notice, "EFFECT OF TRANSFERS OF RESOURCES ON MA ELIGIBILITY," (Attachment I) has been revised to reflect these new provisions. This notice must be given to all persons who request such information. Social services districts must reproduce this notice without modification until it becomes available from this Department.

At the time of the personal interview, the A/R or the spouse must be given the opportunity to rebut the presumption that transfers were made to qualify for: nursing care and related services in a nursing facility; a level of care equivalent to nursing facility care provided in a hospital; and care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the Act.

A/Rs whose MA coverage is restricted based upon a finding that a transfer of resources was made for less than FMV by the A/R or the spouse to qualify the A/R for such services, are entitled to timely and adequate notice. The transfer notices, DSS 4144, DSS 4145, DSS 4146, and DSS 4147, are being revised to reflect the prohibition on transfer of resources by an institutionalized A/R's spouse. Until revised notices are available, in instances in which an A/R's spouse has been determined to have made a prohibited transfer, and a penalty period is to be imposed, pen and ink changes must be made to existing notices as shown in Attachment II(a.-d.). These revisions will be reflected in the next printing of these forms.

A new notice (Attachment III), must be provided to an individual whose non-applying spouse, who is not a community spouse, has failed or refused to provide information about resources. This notice must be reproduced locally until it is available through the usual forms ordering process.

F. TRANSFERS BY A COMMUNITY SPOUSE MADE ON OR AFTER OCTOBER 1, 1989 AND PRIOR TO SEPTEMBER 1, 1991

Although the community spouse was able to transfer his/her own resources prior to September 1, 1991, without a penalty period being imposed on the institutionalized spouse, the community spouse could not make a prohibited transfer of any resources which had been transferred to him/her by the spouse prior to the spouse's institutionalization. Thus, if an A/R transferred resources to his/her spouse on or after October 1, 1989, and the community spouse subsequently re-transferred the resources prior to MA eligibility being established, a penalty period is imposed. The penalty period begins with the month the spouse made the prohibited transfer.

If the resources were owned solely by the community spouse, a transfer by the community spouse prior to September 1, 1991, does not result in a penalty period for the institutionalized spouse.

V. SYSTEMS IMPLICATIONS

None.

VI. EFFECTIVE DATE

The provisions of this Directive regarding changes in the treatment of transfers made by the spouse of an A/R are effective September 1, 1991.

Jo-Ann A. Costantino
Deputy Commissioner
Division of Medical Assistance