

10:71-4.9 Resource assessment

(a) At the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989), the institutionalized spouse or the community spouse (or a representative of either spouse) may request an assessment of the couple's total countable resources. The purpose of the assessment is to establish the community spouse's share of the couple's total countable resources (see N.J.A.C. 10:71-4.8(a)).

(b) The county board of social services shall, upon a request for a resource assessment, advise the requesting parties of the documentation and verification necessary to make the assessment. When the necessary documentation and verification is not submitted to the county board of social services in a timely manner, the requesting parties shall be advised that the resource assessment cannot be completed. Upon receipt of all relevant documentation of resources from the couple the county board of social services shall establish the total countable resources of the couple. The county board of social services shall notify both members of the couple of the total value assigned to their combined countable resources and the community spouse's share of those resources. A copy of the notice shall be retained at the county board of social services.

1. The county shall complete the resource assessment and notify the requesting parties of its results within 45 calendar days of the request unless third party verification has not been received by the county board of social services or the requesting parties request a delay.

(c) At the time of providing the couple with a copy of the resource assessment, the county board of social services shall advise the couple that there is no immediate right to a fair hearing on the county's resource assessment, but that there will be an opportunity to appeal the findings of the assessment when and if the institutionalized spouse applies for Medicaid.

New Rule, R.1991 d.32, effective January 22, 1991.
 See: 22 N.J.R. 7(a), 23 N.J.R. 215(b).
 Amended by R.2000 d.415, effective October 16, 2000.
 See: 32 N.J.R. 2565(a), 32 N.J.R. 3844(a).

In (b) and (c), substituted "board of social services" for "welfare agency" throughout.

10:71-4.10 Transfer of assets

(a) The provisions of this section shall apply, effective June 18, 2001, only to persons who are receiving an institutional level of services, including individuals who are receiving services under a 42 U.S.C. § 1915(c) home and community care waiver under Medicaid, or who are seeking that level of service, and who have transferred assets on or after August 11, 1993. An individual shall be ineligible for institutional level services through the Medicaid program if he or she (or his or her spouse) has disposed of assets at less than fair market value at any time during or after the 36 month

period, or the 60 month period in the case of a transfer to a trust, immediately before:

1. In the case of an individual who is already eligible for Medicaid benefits, the date the individual becomes an institutionalized individual; or
2. In the case of an individual not already eligible for Medicaid benefits, the date the individual applies for Medicaid as an institutionalized individual.

(b) The following definitions shall apply to the transfer of assets:

1. Individual means:
 - i. The individual him or herself who is applying for benefits;
 - ii. The individual's spouse;
 - iii. A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse;
 - iv. Any person including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

2. An institutionalized individual, for the purposes of this chapter, is a person who is receiving care in a Medicaid certified nursing facility, intermediate care facility for the mentally retarded (ICFMR), or a licensed special hospital (Class C) or Title XIX psychiatric hospital (if under the age of 21 or age 65 and over). For purposes of this chapter, an institutionalized individual shall also include a person seeking benefits under a home or community care waiver program. An institutionalized individual shall not include a person who is receiving care in an acute care general hospital.

3. Assets shall include all income and resources of the individual and of the individual's spouse. Assets shall also include income and resources which the individual or the individual's spouse is entitled to but does not receive because of action or inaction by the individual or the individual's spouse; or by any person, including a court or administrative body with the legal authority to act in place of or on behalf of the individual or the individual's spouse; or any person, including a court or administrative body, acting at the direction of or upon the request of the individual or the individual's spouse. Examples of actions that would cause income or resources not to be received shall include, but shall not be limited to:

- i. Irrevocably waiving pension income;
- ii. Waiving the right to receive an inheritance, including spousal elective share pursuant to N.J.S.A. 3B:8-10;

- iii. Not accepting or accessing injury settlements;
 - iv. Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of an individual who is a plaintiff; and
 - v. Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.
4. Resources, for the purpose of asset transfer, shall include all resources, both included and excluded, in accordance with the provisions of this chapter. For example, the transfer of a home, even if it is serving as the individual's principal place of residence, shall be subject to the transfer of assets provisions.
5. Income, for the purposes of this section, shall have the same definition as found in N.J.A.C. 10:71-5. In determining whether a transfer of assets involves countable income, the income disregards in N.J.A.C. 10:71-5 shall be applied.
6. Fair-market value shall be an estimate of the value of an asset, based on generally available market information, if sold at the prevailing price at the time it was actually transferred. Value shall be based on the criteria for evaluating assets as found in N.J.A.C. 10:71-4.1(d).
- i. In determining whether or not an asset was transferred for fair-market value, only tangible compensation, with intrinsic value shall be considered. For example, a transfer for "love and affection" shall not be considered a transfer for fair market value.
 - ii. In regard to transfers intended to compensate a friend or relative for care or services provided in the past, care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation. In regard to transfers allegedly intended to compensate a friend or a relative for care or services that were provided in the past, care and services provided for free at the time they were delivered shall be presumed to have been intended to be delivered without compensation. Thus, a transfer of assets to a friend or relative for the alleged purpose of compensating for care or services provided free in the past shall be presumed to have been transferred for no compensation. This presumption may be rebutted by the presentation of credible documentary evidence preexisting the delivery of the care or services indicating the type and terms of compensation. Further, the amount of compensation or the fair market value of the transferred asset shall not be greater than the prevailing rates for similar care or services in the community. That portion of compensation in excess of the prevailing rate shall be considered to be uncompensated value.

iii. Under a life estate, an individual who owns property transfers the ownership of that property to another individual, while retaining for the rest of his or her life, or the life of another person, certain rights to that property. A life estate entitles the owner of the life estate to possess, use, and obtain profits from the property as long as he or she lives, although actual ownership of the property has passed to another individual. In a transaction involving a life estate, a transfer of assets is involved. In determining whether a penalty shall be assessed in the case of a transfer involving a life estate, the value of the asset transferred and the value of the life estate shall be computed. The value of the asset transferred is computed by determining the fair market value. The value of the life estate is calculated in accordance with the life estate table published by the Health Care Financing Administration (HCFA) at 49 FR Vol. 49 No. 93, 5-11-84 and 26 C.F.R. 20.2031-7. The value of the life estate is determined by multiplying the current market value of the property by the life estate factor that corresponds to the grantor's age. The value of the life estate is then subtracted from the value of the asset transferred to determine the portion of the asset that was transferred for less than fair market value. If only the value of the transferred portion is needed, the current market value of the asset is multiplied by the remainder factor. The transfer in which a life estate is retained shall be considered a transfer for less than fair market value whenever the value of the asset transferred is greater than the value of the rights conferred by the life estate.

7. Uncompensated value (UV) shall be the difference between the fair market value at the time of the transfer (less any outstanding loans, mortgages or other encumbrances on the asset) and the amount of consideration received for the asset. If the asset was jointly owned before disposal, the UV considered shall be only the individual's share of that value (see N.J.A.C. 10:71-4.1(d)). If the individual is seeking institutional services or applying for an institutional level of services and has a spouse residing in the community, the UV considered shall be either spouse's share of that value (see N.J.A.C. 10:71-4.8).

8. In order for a transfer of assets to be considered to be for the sole benefit of a spouse, disabled child, or disabled individual under the age of 65, for the purposes of this subchapter, the transfer shall have been arranged in such a way that no individual except the spouse, disabled child, or disabled individual under age 65 can, in any way, benefit from the assets transferred either at the time of the transfer, or at any time in the future. For the purpose of this subchapter, the person administering the funds shall only be compensated for the reasonable costs that can be directly attributable to the administration of the funds and for compensation for that administration. In no event shall such compensation exceed the amounts allowed by law for the administration of trusts. The transfer of asset penalty exemption for transfers made for the sole benefit of the spouse, disabled child or disabled individual under the age of 65 does not impact the treatment of trust pursuant to N.J.A.C. 10:71-4.11.

i. If the transfer instrument provides that there are beneficiaries other than a blind or disabled child, or a disabled individual under the age of 65, the sole benefit requirement shall not have been met if the instrument fails to provide that the State shall be the first remaining beneficiary of residual funds prior to disbursement to any other beneficiary.

9. The look-back period shall be either 36 or 60 months, in accordance with the following:

i. In the case of an individual who is already eligible for Medicaid benefits, the 36-month period prior to the date the individual becomes institutionalized.

ii. In the case of an individual not already eligible for Medicaid benefits, the 36-month period prior to the date the individual applied for Medicaid as an institutionalized individual.

iii. When a portion of a trust is treated as a transfer, the look-back period shall be extended to 60 months from the date the individual applied for Medicaid as an institutionalized individual, or for a non-institutionalized individual, the date the individual applied for Medicaid, or, if the date the transfer was made is later, then the date the transfer was made (see N.J.A.C. 10:71-4.11(e)1iii).

iv. Penalties of ineligibility shall be assessed for transfers which take place during or after the look-back period. Periods of ineligibility cannot be imposed for resource transfers which take place prior to the look-back period.

(c) If an individual or his or her spouse described in (a) above (including any person acting with power of attorney or as a guardian for such individual) has sold, given away, or otherwise transferred any assets (including any interest in an asset or future rights to an asset) within the look-back period, the following steps shall be taken and shall be fully documented in the case record:

1. The fair market value (FMV) of the asset shall be ascertained;

2. The amount of compensation received by the individual for the transfer shall be determined. The uncompensated value (UV), if any, shall be determined by subtracting the FMV from the amount of compensation received;

3. The amount of the UV, if any, shall be added to the amount of the other countable resources;

4. The period of ineligibility for institutional level services that would result from the asset transfer shall be determined (see N.J.A.C. 10:71-4.10(l));

5. In all cases where the amount of uncompensated value would result in a period of ineligibility, the applicant shall be notified of the determination via Form PA-13. The Form PA-13 shall advise the applicant that he or she may rebut the presumption that an asset was transferred at less than fair market value in order to qualify for Medicaid coverage for institutional level care (see (i) below).

(d) The provisions of this section shall apply whether or not the asset would have been considered excluded or exempt at the time of its disposal or transfer. However, an individual shall not be ineligible for an institutional level of care because of the transfer of his or her equity interest in a home which serves (or served immediately prior to entry into institutional care) as the individual's principal place of residence and the title to the home was transferred to:

1. The legally married spouse of the individual;

2. A child of the institutionalized individual who is under the age of 21 or a child of any age who is blind or totally and permanently disabled. In the event that the child does not have a determination from the Social Security Administration of blindness or disability, the blindness or disability shall be evaluated by the Disability Review Team of the Division of Medical Assistance and Health Services, in accordance with N.J.A.C. 10:71-3.13;

3. A brother or sister of the institutionalized individual who already had an equity interest in the home prior to the transfer and who was residing in the home for a period of at least one year immediately before the individual becomes an institutionalized individual; or

4. A son or daughter of the institutionalized individual (other than described in (d)2 above) who was residing in the individual's home for a period of at least two years immediately before the date the individual becomes an institutionalized individual and who has provided care to such individual which permitted the individual to reside at home rather than in an institution or facility.

i. The care provided by the individual's son or daughter for the purposes of this subchapter shall have exceeded normal personal support activities (for example, routine transportation and shopping). The individu-

al's physical or mental condition shall have been such as to require special attention and care. The care provided by the son or daughter shall have been essential to the health and safety of the individual and shall have consisted of activities such as, but not limited to, supervision of medication, monitoring of nutritional status, and insuring the safety of the individual.

(e) The application of a transfer penalty as set forth in this section shall not apply when:

1. The assets were transferred to a trust established for the sole benefit of an individual under 65 years of age who is disabled as defined by the Social Security Administration;

2. The assets were transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;

3. The assets were transferred from the individual's spouse to another for the sole benefit of the individual's spouse (see N.J.A.C. 10:71-4.10(b)7);

4. The assets were transferred to the community spouse subsequent to the application for Medicaid in accordance with N.J.A.C. 10:71-4.8(a)3; or

5. The assets were transferred from the individual or individual's spouse to the individual's child who is blind or permanently and totally disabled.

i. In the event that the child does not have a determination from the Social Security Administration of blindness or disability, the blindness or disability will be evaluated by the Disability Review Unit of the Division of Medical Assistance and Health Services in accordance with the provisions of N.J.A.C. 10:71-3.13.

(f) In determining whether an asset was transferred for the sole benefit of a spouse, child or disabled individual as defined in N.J.A.C. 10:71-4.10(b)8, the transfer shall be accomplished via a written instrument of transfer, such as a trust document, which legally binds the parties to a specific course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. Moreover, the written instrument shall state that the State of New Jersey shall be the first remaining beneficiary. A transfer without such a document shall not be considered to have been made for the sole benefit of the spouse, child or disabled individual.

(g) When the asset was transferred at fair market value, the application shall be processed as usual. No special procedure shall be required.

(h) When the uncompensated value of transferred assets would result in no period of ineligibility for long-term care level services, the application shall be processed as usual.

(i) When the uncompensated value of transferred assets results in a period of ineligibility for long-term care level services, eligibility for long-term care services shall be denied and the procedures below shall be followed:

1. The applicant shall be notified via Form PA-13 that there has been a transfer of assets for less than fair market value, the amount of the uncompensated value and the length of the penalty period. The Form PA-13 shall state that the law presumes that a transfer of assets at less than fair market value is for the purpose of establishing Medicaid eligibility for long-term level care services.

2. The applicant shall be advised that he or she may rebut the presumption that the transfer of assets was for the purpose of establishing Medicaid eligibility (see (j) below).

(j) Any applicant or beneficiary may rebut the presumption that assets were transferred to establish Medicaid eligibility by presenting convincing evidence that the assets were transferred exclusively (that is, solely) for some other purpose. The applicant shall be assisted in obtaining information when necessary. However, the burden of proof shall rest with the applicant. When the applicant expresses the desire to rebut the presumption that he or she transferred assets to establish Medicaid eligibility, the procedures below shall be followed.

1. The applicant's statement concerning the circumstances of the transfer shall be included in the case record. The statement shall include, but need not be limited to, the following:

i. The applicant's stated purpose for transferring the asset;

ii. The applicant's attempt to dispose of the asset at fair market value;

iii. The applicant's reasons for accepting less than the fair market value for the asset;

iv. The applicant's means of and plans for, supporting himself or herself after the transfer; and

v. The applicant's relationship, if any, to the person(s) to whom the asset was transferred.

2. The applicant shall be asked to submit any pertinent evidence (for example, legal documents, realtor agreements, and relevant correspondence) with regard to the transfer.

3. Statements shall be taken from other individuals, if such statements are material to the decision. The statement shall indicate if such individual has or had a relationship with the applicant and the extent of the relationship (that is, related by blood or marriage, friendship).

(k) The presence of one or more of the following factors, while not conclusive, may indicate that the assets were transferred exclusively for some purpose other than establishing Medicaid eligibility for long term care services:

1. The occurrence after transfer of the asset of:
 - i. Traumatic onset of disability;
 - ii. Unexpected loss of other assets which would have precluded Medicaid eligibility; or
 - iii. Unexpected loss of income which would have precluded Medicaid eligibility;
2. Court-ordered transfer (when the court is not acting on behalf of, or at the direction of, the individual or the individual's spouse); or
3. Evidence of good faith effort to transfer the asset at fair market value.

(l) Agency determination pursuant to client rebuttal shall be as follows:

1. The presumption that assets were transferred to establish Medicaid eligibility shall be considered successfully rebutted only if the applicant demonstrates that the asset was transferred exclusively for some other purpose.
2. If the applicant had some other purpose for transferring the asset, but establishing Medicaid eligibility appears to have been a factor in his or her decision to transfer, the presumption shall not be considered successfully rebutted.
3. The agency's determination shall not include an evaluation of the merits of the applicant's stated purpose of transferring assets. The determination shall only deal with whether or not the applicant has proven that the transfer was solely for some purpose other than establishing Medicaid eligibility.
4. The final determination regarding the purpose of the transfer shall be made at a supervisory level at the county board of social services and shall be documented in the case record.
5. The applicant shall be sent a notice of the decision, which shall include information on his or her right to a fair hearing in accordance with N.J.A.C. 10:49-10.

(m) For the purposes of this subchapter, the penalty period shall be the period of time during which payment for long-term care level services is denied. An institutionalized individual who is ineligible for payment of long-term care services as a result of an asset transfer shall be precluded from eligibility, but shall be entitled to ancillary services if otherwise eligible.

1. In accordance with 42 U.S.C. § 1396p(c)(1)(E), the penalty period for asset transfer shall be the number of months equal to the total, cumulative uncompensated value of all assets transferred by the individual, on or

after the look-back date, divided by the average monthly cost of nursing home services in the State of New Jersey. As of May 2000, the average cost is \$5,540. The result of this division shall be rounded down. The penalty period shall begin with the month of the resource transfer. There shall be no limit on the length of the penalty period.

- i. For the purpose of determining a penalty period, the transfer of real property shall be considered to have occurred the date the title is recorded or registered with the appropriate office.

2. In the case of an asset transfer which occurs during an existing asset transfer penalty period, the penalty for the subsequent transfer shall not begin until the expiration of the previous penalty period.

3. When assets have been transferred in amounts and/or frequencies that would make the calculated penalty periods overlap or structured to run consecutively, the uncompensated value of all the asset transfers shall be added together and divided by the average cost of nursing home care. This will result in a single penalty period, beginning on the first day of the month in which the first transfer was made. For example: An individual transfers \$15,000 in January, \$15,000 in February, and \$15,000 in March. Calculated individually, the penalty periods would overlap. Because the three penalty periods overlap, each of the asset transfers shall be added together and divided by the average cost of nursing home care creating a single penalty period beginning on January 1.

4. When assets have been transferred in such a way that the penalty periods would not overlap, or are not structured to run consecutively, each asset transfer shall be treated as a separate event, each with its own penalty period. For example: An individual transfers \$12,000 in January, \$12,000 in November and \$12,000 in March of the following year. The penalty period for the January transfer would be January and February. The penalty for the November transfer would be November and December. The penalty period for the March transfer would be March and April of the following year.

(n) When an individual's income is given or assigned in some manner, such gift or assignment shall be considered an asset transfer. The following standards shall be used to determine the penalty period:

1. Income, in order to be considered transferred, shall have been irrevocably assigned or otherwise unavailable to the individual. If income has been waived or deferred and that waiver or deferral can be reversed, the waived or deferred income shall be considered available to the individual, regardless of whether the income is actually received, and shall be counted in the determination of eligibility.

2. In the event an individual gives up his or her rights to receive a lump sum payment or transfers a lump sum payment in the month it is received, the period of ineligibility shall be based on the amount of the lump sum payment to which he or she was otherwise entitled.

3. In the event a stream of income (that is, income received on a regular basis), such as a pension, is transferred, the county board of social services shall make a determination of the total projected amount of income that has been transferred, based on the individual's life expectancy. This determination shall be based on the most recent life expectancy tables published by the Health Care Financing Administration. In determining the projected amount, the county board of social services shall strictly adhere to the life expectancy tables without adjustment for the individual's medical condition or other factors. The projection shall be based on the value of the income at the time of transfer and there shall be no attempt to account for future cost-of-living adjustments over the life expectancy of the individual.

4. In determining if there has been a transfer of income, the county board of social services need not ascertain the individual's spending habits over the appropriate look-back period. Unless there is a reason to believe otherwise, the county board of social services shall assume that the individual's income was legitimately spent on the normal costs of living. The county board of social services may ask questions of the applicant and/or the applicant's representative concerning past and present sources and levels of income and whether the individual has transferred income to others.

(o) When an asset is held by an individual in common with another person or persons via joint tenancy, tenancy in common, joint ownership, or similar arrangements, the asset (or the affected share of the asset) shall be considered to be transferred by the individual when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the asset.

1. If the addition of another name to the ownership of an asset does not change the individual's ownership interest, the action does not constitute a resource transfer. For instance, if another name is added to an individual's account with the term "or," the individual shall not be considered to have transferred assets since he or she continues to have unrestricted access to the funds. In the event the newly added owner subsequently withdraws the funds from the account, that action shall be considered to be a transfer by the individual. The transfer shall be considered to have occurred on the date that the funds are withdrawn from the account.

2. If the addition of another name to the ownership of an asset restricts the individual's access, right to sell or otherwise dispose of the asset (for example, the addition of another name requires that the new co-owner(s) agree to the sale or disposal of the asset where no such agreement was necessary before), the addition of the name shall constitute a transfer of assets. The transfer shall be considered to have occurred on the date that the additional name was added to the account. In the case of real property for the purpose of this chapter, if another name is added to a deed, the transfer shall be considered to have occurred the date the new deed is recorded.

3. N.J.A.C. 10:71-4.1 shall apply to determine what portion of a jointly owned resource is presumed to belong to the individual. Any portion belonging to the individual that is withdrawn by another owner shall be considered a transfer of assets. If the individual can satisfactorily establish that the withdrawn funds were, in fact, the sole property of, and were contributed to the account by the other owner, and thus never belonged to the individual, the withdrawal of those funds shall not result in the imposition of an asset transfer penalty.

(p) Annuity provisions shall be as follows:

1. Any annuity purchase in which the entity issuing the annuity is not a commercial financial institution shall be considered to be a transfer of an asset in order to qualify for Medicaid benefits, regardless of the terms of the annuity payout. The entire amount transferred into such an annuity shall be the amount considered in determining eligibility.

2. Any commercial annuity purchased which is not actuarially sound, based on the life expectancy of the individual (as set forth in life expectancy tables published by the Health Care Financing Administration) or term certain (the length of payout is specified and payment does not terminate upon the death of the annuitant) shall be considered to be a transfer of an asset in order to qualify for Medicaid benefits. In the event that an annuity is not actuarially sound at the time of purchase, the amount that shall be considered to have been transferred at less than fair market value shall be that proportion of the annuity purchase price which is not actuarially sound. This shall be the same proportion as the amount by which the pay-out period exceeds the life expectancy of the individual at the time of the annuity purchase. (Life expectancy divided by the pay-out period of the annuity multiplied by the purchase amount of the annuity is subtracted from the total amount of the annuity to determine the uncompensated value.)

i. If an annuity is purchased for a community spouse with any portion of the couple's funds and the annuity purchase price exceeds the amount of the protective share of the community spouse, as determined in accordance with the procedures specified at N.J.A.C. 10:71-4.8(a), the amount in excess of the community spouse's protected share shall be counted in determining the applicant's eligibility.

(q) Upon imposition of a period of ineligibility for long-term care level services because of an asset transfer, the county board of social services shall notify the applicant/beneficiary of his or her right to request an undue hardship exception. An applicant/beneficiary may apply for an exception to the transfer of asset penalty if he or she can show that the penalty will cause an undue hardship to him or herself. The applicant/beneficiary shall provide sufficient documentation to support the request for an undue hardship waiver to the county board of social services within 20 days of notification of the transfer penalty.

1. For the purposes of this chapter, undue hardship shall be considered to exist when:

i. The application of the transfer of assets provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and

ii. The applicant/beneficiary can irrefutably demonstrate the transferred assets are beyond his or her control and that the assets cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets transferred.

2. Undue hardship shall not exist when the application of a transfer penalty merely causes the applicant/beneficiary an inconvenience or restricts his or her lifestyle.

3. In the event that a waiver of undue hardship is denied, neither the Department of Human Services, the Department of Health and Senior Services, nor the county boards of social services shall have any obligation to take any action to assure that payment of services is provided during the penalty period.

4. If the request for undue hardship consideration is denied by the CBOSS, the CBOSS shall notify the applicant of the denial and that the applicant may request a fair hearing in accordance with the provisions of N.J.A.C. 10:49-10.

New Rule, R.2001 d.199, effective June 18, 2001.
 See: 32 N.J.R. 2021(a), 33 N.J.R. 2195(a).
 Petition for Rulemaking.
 See: 35 N.J.R. 1456(a), 2532(b).

Law Review and Journal Commentaries

Saving the family home. Harold L. Grodberg, 164 N.J.L.J. 1166 (2001).

10:71-4.11 Trusts

(a) For purposes of this subchapter, effective June 18, 2001, a trust is any legal instrument, device, or arrangement which is similar to a trust, in which a grantor transfers property to an individual or entity with fiduciary obligations (considered to be a trustee for purposes of this section). The grantor transfers the property with the intention that it be held, managed, or administered by the trustee for the benefit of the grantor or others. For the purposes of this chapter, a trust shall include, but not be limited to, escrow accounts, annuities, investment accounts, and other similar devices managed by an individual or entity with fiduciary obligations.

(b) The standards set forth in this section shall apply to trusts without regard to:

1. The purposes for which the trust is established;
2. Whether the trustee(s) has discretion or exercises such discretion under the trust;
3. Any restrictions on when or whether distribution can be made from the trust; or
4. Any restrictions on the use of distributions from the trust.

(c) Definitions, for the purposes of this section, shall be as follows:

1. A grantor shall be any individual who creates a trust. This section shall apply only to situations in which the grantor is:
 - i. The individual;
 - ii. The individual's spouse;
 - iii. A person, including a court or administrative body, with legal authority to act in place of, or on behalf of, the individual or the individual's spouse; or
 - iv. A person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

2. A revocable trust is a trust which can, under State law, be revoked by the grantor. A trust, which provides that the trust can be only modified or terminated by a court, is considered to be a revocable trust, since the grantor (or his or her representative) can petition the court to terminate the trust. Also, a trust that declares itself to be irrevocable, but which terminates upon conditions relating to the grantor during his or her lifetime, shall be, for the purposes of this section, considered to be revocable. For example, a trust may require a trustee to terminate a trust and disburse the funds to the grantor if the grantor leaves a nursing facility. Such a trust shall be considered to be revocable.

3. An irrevocable trust is a trust which cannot, in any way, be revoked by the grantor.

4. A beneficiary is any individual or individuals designated in the trust instrument as benefiting in some way from the trust. The term "beneficiary" shall not include the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust. The beneficiary can be the grantor, another individual, or individuals, or any combination of any of these parties.

5. For purposes of this chapter, a payment from a trust shall be any disbursement from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use or occupy real property.

(d) Individuals to whom the trust provisions apply shall include any individual who establishes a trust and who is an applicant or beneficiary of Medicaid. An individual shall be considered to have established a trust if any of his or her assets, regardless of the amount, were used to form part or all of the corpus of the trust and if any of the parties described as a grantor in (c)1 above established the trust, other than by will.

1. When the corpus of a trust includes assets of another person or persons not described in (c)1 above, as well as assets of the individual, the rules apply only to the portion of the trust attributable to the assets of the individual. Thus, in determining countable income and resources in the trust for eligibility and post-eligibility purposes, the county board of social services shall prorate any amounts of income and resources, based on the proportion of the individual's assets in the trust to those of other persons.

2. When the corpus of a trust includes assets of either an institutionalized spouse as defined in N.J.A.C. 10:71-4.7(b)3 or a community spouse, this section shall apply to the portion of the trust attributable to either spouse for the purposes of determining eligibility for the institutionalized spouse.

(e) Treatment of trusts, for purposes of determining Medicaid eligibility, shall be dependent on the characteristics of the trust. The look-back period for evaluation of resource transfer shall be 60 months. The following are the rules for consideration of various kinds of trusts:

1. In the case of a revocable trust:
 - i. The entire corpus of the trust shall be counted as a resource available to the individual;
 - ii. Any payments from the trust made to or for the benefit of the individual shall be counted as income (unless otherwise excludable, see N.J.A.C. 10:71-5.3); and
 - iii. Any payments from the trust which are not made to or for the benefit of the individual shall be

considered assets disposed of for less than fair market value (see N.J.A.C. 10:71-4.10).

2. In an irrevocable trust from which payment can be made under the terms of the trust to or for the benefit of the individual from all or a portion of the trust, the following shall apply to that trust or that portion of the trust:

i. Payments from income or from the corpus made to or for the benefit of the individual shall be treated as income to the individual unless otherwise excludable (see N.J.A.C. 10:71-5.3);

ii. Income on the corpus of the trust which could be paid to or for the benefit of the individual shall be counted as a resource available to the individual;

iii. The portion of the corpus that could be paid to or for the benefit of the individual shall be treated as a resource available to the individual; and

iv. Payments from income or from the corpus that are made, but not to or for the benefit of the individual, shall be treated as a transfer of assets for less than fair market value (see N.J.A.C. 10:71-4.10).

3. In the case of an irrevocable trust from which payments from all or a portion of the trust cannot, under any circumstances, be made to or for the benefit of the individual, all of the trust, or any such portion or income thereof, shall be treated as a transfer of assets for less than fair market value (see N.J.A.C. 10:71-4.10).

i. In treating these portions as a transfer of assets, the date of transfer shall be considered to be the date the trust was established, or, if later, the date on which the right of payment to the individual was foreclosed.

ii. For transfer of assets purposes, in determining the value of the portion of the trust which cannot be paid to the individual, amounts that have been paid, for whatever purpose, shall not be subtracted from the value of the trust on the date the trust was created or, if later, the date that payment to the individual was foreclosed. The value of the transferred amount shall be no less than the value on the date the trust is established or on the date that payment is foreclosed. If additional funds are added to this portion of the trust, those funds shall be treated as a new transfer of assets or less than fair market value.

4. Payments made from a revocable or irrevocable trust to or on behalf of the individual shall include payments of any sort, including an amount from the corpus or income produced by the corpus, paid to another person or entity such that the individual derives some benefit from the payment. For example, such payments may include purchase of clothing or other items, such as a radio or television, for the individual. Such payments may also include payment for services the individual may require, or care, whether medical or personal, that the individual may need. Payments to maintain a home shall also be considered payments for the benefit of the individual.

i. When a payment to or for the benefit of the individual is made which would not be considered income in the eligibility process, then the payment shall not be counted as income to the individual under this section. For example, payments made on behalf of an individual for medical care are not counted in determining income eligibility for Medicaid, and are therefore not counted as income under these trust provisions.

5. In determining whether payments can or cannot be made from a trust to or for an individual, the county board of social services shall take into account any restrictions on payments, such as use restrictions, exculpatory clauses, or limits on trustee discretion that may be included in the trust. Any amount in a trust for which payment can be made, no matter how unlikely the circumstance of payment might be or how distant in the future, shall be considered a payment that can be made under some circumstances.

i. For example, if an irrevocable trust provides that the trustee can disburse only \$1,000 to or for the individual out of a \$20,000 trust, only the \$1,000 is treated as a payment that could be made. The remaining \$19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual and may be subject to a transfer penalty. On the other hand, if a trust contains \$50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances and the funds are included.

6. Placement of excluded assets in trust, with the exception of a home, shall not result in a penalty of ineligibility because the transferred asset is not an asset for transfer purposes. However, a home, whether excluded or not, when transferred into a trust shall be presumed to have been transferred for the purposes of qualifying for Medicaid.

(f) Transfer to a trust (or similar instrument, including an annuitized trust) for the sole benefit of a community spouse shall be treated in accordance with the provisions of (e) above. If the trust is established by either member of the couple (using at least some of the couple's assets), the trust shall be reviewed by the county board of social services for availability of resources, in accordance with (e) above. If the payment from such a trust shall be considered an available resource to either spouse, the trust shall be included as a countable resource in determining Medicaid eligibility for the institutionalized spouse pursuant to N.J.A.C. 10:71-4.8.

(g) The trust provisions shall not apply to the following trusts so long as the trust document meets all the requirements set forth in this chapter:

1. A special needs trust, that is, a trust containing the assets of a disabled individual and which is established prior to the time the disabled individual reaches the age of 65 and which is established for the sole benefit of the disabled individual by a parent, grandparent, legal guardian of the disabled individual, or a court, may be excluded from the rules regarding the treatment of a trust. To qualify for the exclusion, the trust shall contain the following provisions:

i. The trust shall be identified as an OBRA '93 trust established pursuant to 42 U.S.C. § 1396p(d)(4)(A).

(1) The trust shall not contain any provisions intended to give anyone or a Court the power to alter the form of the trust from an individual trust to a "pooled trust" under 42 U.S.C. § 1396p(d)(4)(C). Similarly, there shall be no provisions permitting the trust to be altered for any other reasons.

ii. The trust shall specifically state that the trust is for the sole benefit of the trust beneficiary.

(1) Only trusts which are intended for the sole benefit of the disabled individual are special needs trusts. Any trust which provides benefits to other persons shall not be considered an individual special needs trust. If expenditures are made from the trust which shall also incidentally provide an ongoing and continuing benefit to other persons, those other persons who also benefit shall contribute a prorata share to the trust for the subsequent expenses associated with their use of the acquisition,

(A) For example, if the trust acquires housing for the benefit of the trust beneficiary, and other family members also live in that house, the trust document shall provide that the trustee shall require and collect a pro rata contribution for the expenses of uses incurred, and shall return such contribution to the trust. Such collections shall be reflected in the annual required trust accounting. Any property acquired by the trust shall be titled solely in the trust's name. In addition, unless the trust is given equity in any improvements to real property, the trust shall not pay for upkeep, property taxes or other expenses associated with the property or any additions to the existing property.

iii. The trust shall specifically state that its purpose is to permit the use of trust assets to supplement, and not to supplant, impair or diminish, any benefits or assistance of any Federal, State or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

(1) If the trust provides for food, clothing or shelter, such expenditures shall be considered income under Social Security and Medicaid eligibility rules.

(2) It may be permissible for the trust to acquire property which is used to provide shelter for the trust beneficiary, but the trustee shall take care to ensure that such acquisitions do not create unintended problems (such as disqualifying someone for Federal benefits). Additionally, parents shall not be relieved of their duty to support their minor child, if they are capable of doing so. A minor's funds in a trust shall not be expended on routine support, unless the parents' income is insufficient for these expenses. N.J.S.A. 3B:12-43.

iv. The trust shall specifically state the age of the trust beneficiary, that the trust beneficiary is disabled within the definition of 42 U.S.C. § 1382c(a)(3), and whether the trust beneficiary is competent at the time the trust is established.

(1) If the trust beneficiary is a minor, the trustee shall execute a bond to protect the child's funds or shall get a court's permission not to do so.

(2) If there is some question about the trust beneficiary's disability, independent proof may be required.

(3) If the trust beneficiary is a minor, the trust shall state whether the trust beneficiary is expected to be competent at his or her majority.

v. The trust shall specifically identify, in an attached schedule, the source of the initial trust property and all assets of the trust. If the trust is being established with funds from the proceeds of a settlement or judgement subsequent to the bringing of a legal cause of action, Medicaid's claim for its expenditures that are related to the cause of action shall be repaid immediately upon the receipt of such proceeds and prior to the establishment of the trust.

(1) Subsequent additions made to the trust corpus shall be reported to the appropriate eligibility determination agency. Subsequent additions to the trust (other than interest on the corpus) shall cease when the trust beneficiary reaches age 65, or shall be subject to transfer provisions.

(2) If subsequent additions are to be made to the trust corpus with funds not belonging to the trust beneficiary, it shall be understood that those funds are a gift to the trust beneficiary and cannot be reclaimed by the donor.

vi. If the trust makes provisions which are intended to limit invasion by creditors or to insulate the trust from liens or encumbrances, the trust shall state that such provisions are not intended to limit the State's right to reimbursement or to recoup incorrectly paid benefits.

vii. The special needs trust shall state that it is established by a parent, grandparent, or legal guardian of the trust beneficiary, or by a court.

(1) The trust shall identify the grantor/settlor by name and as the parent, grandparent, legal guardian, or court. A court can be named as the grantor, if the trust is established pursuant to a settlement of a case before it, or if the court is otherwise involved in the creation of the trust.

viii. The trust shall specifically state that it is irrevocable. Neither the grantor, the trustee(s), nor the beneficiary shall have any right or power, whether alone or in conjunction with others, in whatever capacity, to alter, amend, revoke, or terminate the trust or any of its terms or to designate the persons who shall possess or enjoy the trust estate during his/her lifetime.

(1) Notwithstanding the irrevocability provision above, the trust can state that "the trust shall be irrevocable except that the trust may be amended as necessary to conform with the requirements of 42 U.S.C. 1396p and/or state law."

ix. The trustee shall be specifically identified by name and address. The trust shall state that the original trust beneficiary cannot be the trustee. The trust shall make provisions for naming a successor trustee in the event that any trustee is unable or unwilling to serve. The Bureau of Administrative Control, Division of Medical Assistance and Health Services, as well as the trust beneficiary and/or guardian, shall be given prior notice if there is a change in the trustee.

x. The trust shall specifically state that the trustee shall fully comply with all State laws, including the Prudent Investor Act, N.J.S.A. 3B:20-11.1 et seq. The trust shall provide that the trustee cannot take any actions not authorized by, or without regard to, State laws. If the trust gives the trustee authorization or power not provided for in the Prudent Investor Act, an accompanying letter shall provide an explanation for each such authorization or power.

xi. The trust shall specifically state that the trustee shall be compensated only as provided by law (N.J.S.A. 3B:18-1 et seq.) If the trust identifies a guardian, the trust shall specifically identify him or her by name. A guardian shall be compensated only as provided by law. The parent of a minor child shall not be compensated from the trust as the child's guardian.

(1) If an adult beneficiary is not competent, the trust shall specifically state that the "guardianship protections for the incompetent's funds which are required by New Jersey law and Court rules are incorporated by reference into this trust." The trustee shall either file a bond or shall get the Court's permission not to do so.

xii. The trust shall specifically state that, upon the death of the primary beneficiary, the State will be notified, and shall be paid all amounts remaining in the trust up to the total value of all medical assistance paid on behalf of the beneficiary. The trust shall comply fully with this obligation under the statute to first repay the State, without requiring the State to take any action except to establish the amount to be repaid. Repayment shall be made to the Treasurer, State of New Jersey, and shall be sent to the Division of Medical Assistance and Health Services, to the attention of the Bureau of Administrative Control, PO Box 712, Trenton, New Jersey 08625-0712, or to any successor agency.

xiii. If there is a provision for repayment of other assistance programs, the trust shall specifically state that the Medicaid Program shall be repaid prior to making repayment to any other assistance programs.

xiv. The trust shall specifically state that if the beneficiary has received Medicaid benefits in more than one state, each state that provided Medicaid benefits shall be repaid. If there is an insufficient amount left to cover all benefits paid, then each state shall be paid its proportionate share of the amount left in the trust, based upon the amount of support provided to the beneficiary.

xv. No provisions in the trust shall permit the estate's representative to first repay other persons or creditors at the death of the beneficiary. Only what remains in the trust after the repayments specified in (g)lxii, xiii and xiv above have been made shall be considered available for other expenses or beneficiaries of the estate. The trust may provide for a prepaid burial plan, but shall not state that it will pay for reasonable burial expenses after the death of the trust beneficiary.

xvi. The trust shall specify that a formal or informal accounting of all expenditures made by the trust shall be submitted to the appropriate eligibility determination agency on an annual basis.

xvii. The State shall be given advance notice of any expenditure in excess of \$5,000, and of any amount which would substantially deplete the principal of the trust. Notice shall be given to the Division of Medical Assistance and Health Services, Bureau of Administrative Control, PO Box 712, Mail Code 6, Trenton, New Jersey 08625-0712, or any successor agency, 45 days prior to the expenditures.

xviii. New Jersey rules and laws do not permit a trust to create a will for an incompetent or a minor. The money creating the trust, any additions and/or interest accumulated, cannot be left to other parties, but shall pass by intestacy. The trust shall not create other trusts within it.

2. A pooled trust is a special needs trust, containing the assets of a disabled individual, which meets the following conditions:

- i. The trust shall be established and managed by a non-profit association;
- ii. A separate account shall be maintained for each beneficiary of the trust, but for purposes of investment and management of the funds, the trust may pool the funds from those accounts;
- iii. Accounts in the trust shall be established solely for the benefit of the disabled individual by the individual, by a parent, grandparent, or legal guardian of the individual, or by a court;
- iv. To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust shall pay to the State of New Jersey the amount remaining in the account, up to an amount equal to the total amount of medical assistance paid under Title XIX of the Social Security Act on behalf of the individual. To meet this requirement, the trust shall include a provision specifically providing for such payment; and
- v. Funds of an individual 65 or older which are transferred to a pooled trust shall be subject to the transfer penalty provisions contained in N.J.A.C. 10:71-4.7.

(h) Title XIX of the Social Security Act (42 U.S.C. § 1917(d)(4)(B)) provides for an exemption from the trust provisions for qualified income trusts (also known as Miller trusts). Special provisions for this form of trust apply, under the law, only in those states which do not provide medically needy coverage for nursing facility services. Because New Jersey does cover services in nursing facilities under the medically needy component of the Medicaid program, the establishment of a qualified income trust shall be presumed to be an asset transfer for the purposes of qualifying for Medicaid. This presumption shall apply whether the individual is seeking nursing facility services or home and community based services under one of the waiver programs.

(i) Upon the denial of eligibility or the termination of long-term care level services due to the application of these trust provisions, the county board of social services shall notify the applicant/beneficiary of his or her right to request an undue hardship exception. An applicant/beneficiary may apply for an exception to these trust provisions if he or she can show that the transfer will cause an undue hardship to him or herself. The applicant/beneficiary shall provide sufficient documentation to support the request for an undue hardship waiver to the county board of social services within 20 days of notification of the denial of eligibility or termination of benefits due to these trust provisions.

1. For the purposes of this chapter, undue hardship shall be considered to exist when:

i. The application of the trust provisions would deprive the applicant/beneficiary of medical care such that his or her health or his or her life would be endangered. Undue hardship may also exist when application of the trust provisions would deprive the individual of food, clothing, shelter, or other necessities of life; and

ii. The applicant/beneficiary can irrefutably demonstrate the assets placed in trust are beyond his or her control and that the asset cannot be recovered. The applicant/beneficiary shall demonstrate that he or she made good faith efforts, including exhaustion of remedies available at law or in equity, to recover the assets placed in trust.

2. In the event that a waiver of undue hardship is denied, neither the Department of Human Services, the Department of Health and Senior Services, nor the county boards of social services shall have any obligation to take any action to assure that payment of services is provided during the penalty period.

3. If the request for undue hardship consideration is denied by the county board of social services, the county board of social services shall notify the applicant of the denial and that the applicant may request a fair hearing in accordance with the provisions of N.J.A.C. 10:49-10.

New Rule, R.2001 d.199, effective June 18, 2001.
See: 32 N.J.R. 2021(a), 33 N.J.R. 2195(a).

SUBCHAPTER 5. INCOME

Law Review and Journal Commentaries

Marital Status and 60+ Crowd. Elizabeth Brody, 164 N.J.Law. 39 (Mag.) (Oct. 1994).
Medicaid—Pension Benefits, Judith Nallin, 135 N.J.L.J. No. 17, 53 (1993).
Protecting the Home in Government Benefits Planning. Gary Mazar, 164 N.J.Law. 34 (Mag.) (Oct. 1994).

10:71-5.1 Income; financial eligibility standards

(a) As a condition of eligibility for the Medicaid Only Program, applicants must comply with the income standards set forth in this subchapter (see N.J.A.C. 10:71-5.6).

(b) Income defined: For the purpose of this program, income shall be defined as receipt, by the individual, of any property or service which he/she can apply, either directly or by sale or conversion, to meet his/her basic needs for food, shelter, or clothing. All income, whether in cash or in-kind, shall be considered in the determination of eligibility, unless such income is specifically exempt under the provisions of N.J.A.C. 10:71-5.3

1. Availability of income: In order to be considered in the determination of eligibility, income must be "available." Income shall be considered available to an individual when:

i. With the exception of income from self-employment, the individual actually receives the income;

ii. With the exception of income from self-employment, the income becomes payable but is not received by the individual due to his/her preference for voluntary deferment;

iii. Income has been deemed available to the applicant (see N.J.A.C. 10:71-5.5 regarding the deeming of income);

iv. Net earnings from self-employment have been determined in accordance with N.J.A.C. 10:71-5.4(a)2.

2. Earned income: Earned income shall be defined as payment received by an individual for services performed as an employee, or the net earnings as the result of self-employment. When the individual is both employed as self-employed, earned income shall consist of gross wages (or salary, etc.) plus any net earnings from self-employment.

3. Unearned income: Unearned income shall be defined as any income which is not coincident with the provisions of (b)2 above. This definition includes deemed income (see N.J.A.C. 10:71-5.5).

(c) The grandfather clause: An individual (including an essential person) meeting the criteria delineated in N.J.A.C. 10:71-4.5(e) may have his/her income eligibility determined in accordance with the procedures formerly used in New Jersey's OAA, AB, and DA programs if it is more advantageous (see Financial Assistance Manual, Chapter 300, for regulations in effect prior to January 1, 1974).

Law Review and Journal Commentaries

Medicaid. P.R. Chenoweth, 136 N.J.L.J. No. 14, 56 (1994).