

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).

Law Review and Journal Commentaries

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