

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 Section of the Division of Medical Assistance and Health Services in accordance with the provisions of N.J.A.C. 10:71-3.13.

(f) Resource transferred at fair market value: When the resource was transferred at FMV, the application shall be processed as usual. No special procedure is required.

(g) Resource transferred, resource limit not exceeded: When the UV of a transferred resource, combined with other countable resources does not exceed the applicable resource limit, the application shall be processed as usual.

(h) Resource transferred, resource limit exceeded: When the UV of a transferred resource, combined with other countable resources, exceeds the resource limit, eligibility for institutional level services shall be denied and the procedures below followed:

1. Notify the applicant via Form PA-13 that he or she has transferred a resource at less than FMV, the amount of the UV and the length of the penalty period. Explain that the law states that transfer of a resource at less than FMV is presumed to be for the purpose of establishing Medicaid eligibility for institutional services.

2. Advise the applicant that he or she may rebut the presumption (see (i) below).

3. Prepare a list of such cases for control purposes. The control list shall include the case number, client's name, Social Security number, date of resource disposal, FMV of the resource, amount of UV, and the start and end dates of the period of ineligibility for institutional level services.

(i) Rebuttal of presumption that the resource was transferred to establish eligibility: All applicants or beneficiaries may rebut the presumption that a resource was transferred to establish Medicaid eligibility. If the individual wishes to rebut such presumption, explain that it will be his or her responsibility to present convincing evidence that the resource was transferred exclusively (that is, solely) for some other purpose. The applicant should be assisted in obtaining information when necessary. However, the burden of proof rests with the applicant. Accordingly, when the applicant expresses the desire to rebut the agency's presumption that he or she transferred a nonexcludable resource to establish Medicaid eligibility, the procedures below shall be followed.

1. The applicant's statement concerning the circumstances of the transfer shall be recorded. The statement should include, but need not be limited to, the following:

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

ii. The applicant's attempt to dispose of the resource at FMV;

iii. The applicant's reasons for accepting less than FMV for the resource;

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

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

2. Request the applicant to submit any pertinent documentary evidence (for example, legal documents, realtor agreements, relevant correspondence).

3. Take statements from other individuals if material to the decision.

(j) Factors which may indicate that the transfer was for some other purpose: The presence of one or more of the following factors, while not conclusive, may indicate that resources were transferred exclusively for some purpose other than establishing Medicaid eligibility.

1. The occurrence after transfer of the resource of:

i. Traumatic onset of disability;

ii. Unexpected loss of other resources which would have precluded Medicaid eligibility;

iii. Unexpected loss of income which would have precluded Medicaid eligibility.

2. Resources that would have been below the resource limit during each of the preceding 30 months if the transferred resource has been retained.

3. Court-ordered transfer.

4. Evidence of good faith effort to transfer the resource at FMV.

(k) Agency determination pursuant to client rebuttal:

1. The presumption that a resource was transferred to establish Medicaid eligibility is successfully rebutted only if the applicant demonstrates that the resource was transferred exclusively for some other purpose.

2. If the applicant had some other purpose for transferring the resource, but establishing Medicaid eligibility seems to have been a factor in his or her decision to transfer, the presumption is not successfully rebutted.

3. The determination will not include an evaluation of the merits of the applicant's stated purpose of transferring a resource. The determination will 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 and documented in the case record.

5. The applicant shall be sent a notice of the decision which shall include his or her right to a fair hearing.

(l) In the case of any resource transfer which occurred between April 1, 1990 and August 20, 1990 and which would otherwise be subject to the provisions of this section, the period of ineligibility for institutional services shall be the lesser of:

1. 24 months; or
2. The number of months resulting from the application of the calculation at N.J.A.C. 10:71-4.7(b)4ii.

R.1983 d.373, effective September 6, 1983.

See: 15 N.J.R. 999(b), 15 N.J.R. 1477(a).

Amended by R.1985 d.474, effective September 16, 1985.

See: 17 N.J.R. 1525(a), 17 N.J.R. 2274(a).

Other resources changed from "\$600.00" to "\$1,100" and the total changed from "\$1,600" to "\$2,100."

Emergency amendment, R.1990 d.424, effective July 30, 1990 (expires September 28, 1990).

See: 22 N.J.R. 2604(a).

Revised resource transfer provisions based on Medicare Catastrophic Coverage Act of 1988. Added new (a), recodifying (a)-(c) as (b)-(d), and deleting old (c) on "excluded resources". Added new (e), recodifying old (d)-(i) as (f)-(k). Added new (l).

Adopted concurrent proposal, R.1990 d.524, effective September 27, 1990.

See: 22 N.J.R. 2604(a), 22 N.J.R. 3372(b).

Provisions of emergency amendment R.1990 d.424 readopted without change.

Amended by R.2000 d.415, effective October 16, 2000.

See: 32 N.J.R. 2565(a), 32 N.J.R. 3844(a).

In (d)2, substituted "Medical Review Team" for "Disability Review Section"; in (i), substituted "beneficiaries" for "recipients".

Amended by R.2001 d.199, effective June 18, 2001.

See: 32 N.J.R. 2021(a), 33 N.J.R. 2195(a).

In (a), rewrote the introductory paragraph; in (b), inserted "shall" preceding "apply" in the introductory paragraph.

Petition for Rulemaking.

See: 39 N.J.R. 2157(a), 2660(a), 4453(a).

Petition for Rulemaking.

See: 42 N.J.R. 1434(a), 1918(a).

#### Law Review and Journal Commentaries

Marital Status and The 60+ Crowd. Elizabeth Brody. 164 N.J.Law 39 (Mag.) (Oct.1994).

Protecting the Home In Government Benefits Planning. Gary Mazart, 164 N.J.L.J. 34 (1994).

#### Case Notes

Since federal and state Medicaid laws permit interspousal transfers of the marital home, a guardian may execute such a transfer provided that it complies with the best interest of the ward inclusive of his desire to benefit the natural objects of his bounty. Matter of Labis, 314 N.J.Super. 140, 714 A.2d 335 (N.J. 1998).

Petitioner was subject to a transfer penalty since petitioner's nephew did not meet the transfer exception for a home conveyed to a son or daughter who staved off institutionalization by at least two years. Congress clearly only applied exceptions to the penalty when the transfer was to a son or daughter who resided in the home for at least two years and provided care to the applicant, and there was no room for an interpretation that would lend itself to expand the exemption to other relatives. V.D. v. DMAHS, OAL Dkt. No. HMA 4044-08, 2008 N.J. AGEN LEXIS 1111, Final Decision (December 9, 2008).

Administrative Law Judge's acceptance of the tax assessed value of a home of \$166,400, which was \$3,000 less than the sale price of the home 16 years earlier, was unacceptable, since the price and value of

homes in New Jersey have soared over the last few years, rendering the assessed value inapposite to the market value. Petitioner's transfer of her share of the home of fair market value of \$365,000 held in tenancy in common with her nephew and his wife plus \$35,752.60 in uncompensated transfers resulted in a transfer penalty of 31.439 months (\$218,252.60/\$6,942). V.D. v. DMAHS, OAL Dkt. No. HMA 4044-08, 2008 N.J. AGEN LEXIS 1111, Final Decision (December 9, 2008).

Medicaid applicant's irrevocable trust arrangement was void because it violated New Jersey's public policy against shielding assets to become Medicaid eligible, pursuant to N.J.S.A. 30:4D-6(f), and therefore the trust res was considered an available resource. Because public policy considered the trust null and void, it was as if the trust assets were available to the applicant throughout the duration of the trust and at the time of the Medicaid application made on February 8, 2006; thus, the transfer of assets did not occur until February 8, 2006, pursuant to N.J.A.C. 10:71-4.10(m)(1), and the penalty period for the transfer began on that date. J.S. v. DMAHS, OAL Dkt. No. HMA 4896-06, 2006 N.J. AGEN LEXIS 1054, Initial Decision (December 19, 2006).

House sale made exclusively for purpose other than to qualify for Medicaid prior to traumatic onset of unforeseen disability. M.M. v. Division of Medical Assistance and Health Services and the Bergen County Board of Social Services, 97 N.J.A.R.2d (DMA) 39.

Reimbursement of Medicaid benefits ordered where recipient transferred his interest in former residence for less than fair market value. J.K. v. Division of Medical Assistance and Health Services, 97 N.J.A.R.2d (DMA) 12.

Nursing home applicant entitled to Medicaid benefits after transferring property to adult children who lived in home longer than two years and provided personal services to applicant. M.M. v. Department of Medical Assistance and Health Services and Burlington County Welfare Board, 97 N.J.A.R.2d (DMA) 6.

1990 transfer of property was effective for purposes of Medicaid eligibility despite delayed recording of deed. L.A. v. Bergen County Board of Social Services, 96 N.J.A.R.2d (DMA) 92.

Medicaid applicant's transfer of home to son for less than fair market value did not disqualify her for benefits. L.S. v. DMAHS and Burlington County Board of Social Services, 96 N.J.A.R.2d (DMA) 11.

Son's long-term care of disabled parents supports exemption for Medicaid eligibility purposes of transfer of their house to him. J.L. v. Medical Assistance and Health Services Division, 96 N.J.A.R.2d (DMA) 5.

Funds in fixed annuity and family trust were not countable or accessible resources for purpose of determining Medicaid eligibility. F.E. v. Division of Medical Assistance, 95 N.J.A.R.2d (DMA) 67.

Transfer of real property for less than true value raised presumption of transfer to obtain Medicaid benefits. P.V. v. Camden County Board, 95 N.J.A.R.2d (DMA) 38.

Presumption of transfer of assets for less than fair market value in order to establish applicant's Medicaid eligibility was not rebutted. S.G. v. Division of Medical Assistance, 95 N.J.A.R.2d (DMA) 33.

Transfer by applicant of his interest in a mortgage within 24 months of application did not preclude his eligibility for Medicaid benefits. A.R. v. Passaic County, 95 N.J.A.R.2d (DMA) 21.

Securities transferred by recipient were not a resource for Medicaid eligibility when solely for purpose of repaying a loan. W.B. v. DMAHS & Atlantic County, 95 N.J.A.R.2d (DMA) 17.

Transfer of a resource, a mortgage, held on a condominium for less than fair market value operated to render applicant ineligible for Medicaid benefits. C.M. v. Division of Medical Assistance, 95 N.J.A.R.2d (DMA) 14.

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).

Amended by R.2004 d.401, effective November 1, 2004.

See: 36 N.J.R. 922(b), 36 N.J.R. 4982(a).

In (m), rewrote 1, and substituted "\$15,000" for "\$12,000" throughout 4.

Amended by R.2006 d.133, effective November 6, 2006.

See: 37 N.J.R. 3774(a), 37 N.J.R. 4505(a), 38 N.J.R. 4712(a).

In (m)1, substituted "2005" for "2003" and substituted "\$6,525" for "\$6,050"; and deleted (p)2i.

Petition for Rulemaking.

See: 39 N.J.R. 2157(a), 2660(a), 4453(a).

Petition for Rulemaking.

See: 42 N.J.R. 1434(a), 1918(a).

**Law Review and Journal Commentaries**

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

**Case Notes**

Medicaid applicants' challenge to state-payback requirement for community spouse annuity trusts (CSATs), whereby state was required to be named first beneficiary of trust assets upon death of spouse residing in community if it had paid benefits on behalf of institutionalized spouse, was moot, where, upon its decision to count CSAT assets in determining Medicaid eligibility, state no longer imposed state-payback condition. Johnson v. Guhl, 357 F.3d 403 (3d Cir. N.J. 2004).

Recipient of homecare assistance sold her home to her grandson, and kept a leasehold in an apartment in the house for the term of her life. As the nature of the recipient's leasehold interest was not explained by the lease or by extrinsic evidence, whether she received fair market value for her leasehold interest, and thus for the house itself, could not be determined from the record for purposes of determining her continued eligibility for homecare assistance benefits. B.D. v. Division of Med. Assistance & Health Servs., 397 N.J. Super. 384, 937 A.2d 980, 2007 N.J. Super. LEXIS 366 (App.Div. 2007).

In determining a claimant's eligibility for benefits, the Director of the New Jersey Department of Human Services has the expertise to determine the significance and sufficiency of various types of asset transfers, and when the Director's findings are supported by credible evidence and correct legal principles, they are entitled to deference by a reviewing court. B.D. v. Division of Med. Assistance & Health Servs., 397 N.J. Super. 384, 937 A.2d 980, 2007 N.J. Super. LEXIS 366 (App.Div. 2007).

Decision of the Director of Division of Medical Assistance and Health Services (DMAHS), which upheld the imposition of a Medicaid transfer penalty based on an unequal equitable distribution to a non-institutionalized spouse of a Medicaid applicant in a bed and board divorce action, was reversed as there existed no regulation that authorized such a decision; furthermore, the DMAHS's in-house rule imposing such a penalty for a transfer of assets as equitable distribution of more than 50 percent to the non-institutionalized spouse was contrary to both New Jersey public policy and the law of equitable distribution. W.T. v. DMAHS, 391 N.J. Super. 25, 916 A.2d 1066, 2007 N.J. Super. LEXIS 59 (App.Div. 2007).

Petitioner was subject to a transfer penalty since petitioner's nephew did not meet the transfer exception for a home conveyed to a son or daughter who staved off institutionalization by at least two years. Congress clearly only applied exceptions to the penalty when the transfer was to a son or daughter who resided in the home for at least two years and provided care to the applicant, and there was no room for an interpretation that would lend itself to expand the exemption to other relatives. V.D. v. DMAHS, OAL Dkt. No. HMA 4044-08, 2008 N.J. AGEN LEXIS 1111, Final Decision (December 9, 2008).

Penalty period imposed by federal law (42 U.S.C.A. 1396p(c)(1)(D)), effective Feb. 8, 2006, and not that imposed by prior law, applied to institutionalized Medicaid applicant's gift transfers because sufficient funds to cover the gift checks, allegedly written before Feb. 8, 2006, were not in the account on which the checks were drawn until Feb. 13, 2006; thus, the penalty period expired Sept. 15, 2008, rather than Nov. 1, 2007, despite petitioner's contention that another bank's alleged delay in liquidating CDs to cover the checks rendered the funds outside her control. M.M. v. DMAHS, OAL Dkt. No. HMA 929-08, 2008 N.J. AGEN LEXIS 1017, Final Decision (July 18, 2008).

Applicant was not entitled to Medicaid assistance where she voluntarily reduced her pension income but remained able to rescind the reduction; thus, the original monthly pension benefit of \$556.34 was available to the applicant and was properly counted in the determination of Medicaid eligibility. J.C. v. DMAHS, OAL Dkt. No. HMA 6950-07, 2008 N.J. AGEN LEXIS 39, Initial Decision (January 17, 2008).

There is a clear conflict between federal law (42 U.S.C.A. 1396p(c)) and the New Jersey regulation (N.J.A.C. 10:71-4.10(m)) because the regulation begins the penalty period for a transfer of assets for less than fair market value with the month of the transfer, whereas federal law imposes the penalty at either the month of the transfer, the month after the transfer, or the date upon which the individual becomes eligible, whichever is later. The Division correctly applied the current federal law to petitioner's Medicaid Only application because the courts have held that states participating in a federal entitlement program must conform to federal statutes and regulations. E.B. v. DMAHS, OAL Dkt. No. HMA 2289-07, 2007 N.J. AGEN LEXIS 605, Initial Decision (August 23, 2007).

Medicaid applicant's irrevocable trust arrangement was void because it violated New Jersey's public policy against shielding assets to become Medicaid eligible, pursuant to N.J.S.A. 30:4D-6(f), and therefore the

trust res was considered an available resource. Because public policy considered the trust null and void, it was as if the trust assets were available to the applicant throughout the duration of the trust and at the time of the Medicaid application made on February 8, 2006; thus, the transfer of assets did not occur until February 8, 2006, pursuant to N.J.A.C. 10:71-4.10(m)(1), and the penalty period for the transfer began on that date. *J.S. v. DMAHS*, OAL Dkt. No. HMA 4896-06, 2006 N.J. AGEN LEXIS 1054, Initial Decision (December 19, 2006).

#### 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