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 | ADMINISTRATIVE DIRECTIVE |
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TRANSMITTAL: 90 ADM-29

TO: Commissioners of
 Social Services

DIVISION: Medical
 Assistance

DATE: September 6, 1990

SUBJECT: Medical Assistance Eligibility: Determination of
 Undue Hardship For Spousal Impoverishment And
 Transfer Of Assets

SUGGESTED
 DISTRIBUTION:

Medical Assistance Staff
 Fair Hearing Staff
 Legal Staff
 Staff Development Coordinators

CONTACT
 PERSON:

MA Eligibility County Representative
 at 1-800-342-3715, extension 3-7581
 MA New York City Representative at (212) 587-4853

ATTACHMENTS:

Attachment I - Information Notice To Couples With
 An Institutionalized Spouse (available
 on-line)

 Attachment II - Effect Of Transfers Of Resources On
 Medical Assistance Eligibility
 (available on-line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
89 ADM-45		360-4.4(c)	366.5		90GIS029
89 ADM-47		360-10	366-c		
90 INF-19		370.2(c)(6)	MCCA of 1988 FSA of 1988		

I. PURPOSE

The purpose of this release is to notify social services districts of revisions to the definitions of undue hardship under the transfer of assets and spousal impoverishment provisions of the Medical Assistance (MA) Program.

II. BACKGROUND

The provisions of the Medicare Catastrophic Coverage Act of 1988 (MCCA), as amended by the Family Support Act of 1988, regarding transfer of assets and spousal impoverishment became effective in New York State October 1, 1989. Effective November 22, 1989, the Department filed regulations on an emergency basis implementing these MCCA provisions. The Department also issued implementing instructions in Administrative Directive 89 ADM-45, "Transfer of Resource Provisions Under the Medical Assistance Program," and in 89 ADM-47, "Treatment of Income and Resources for Institutionalized Spouses/Individuals and Legally Responsible Relatives."

As a result of comments received on the emergency regulations, the Department revised the regulations and refiled them on an emergency basis effective June 1, 1990. Among the revisions were changes to the definitions of undue hardship set forth in 18 NYCRR 360-4.4(c) and 360-4.10(a), and included in 89 ADM-45 and 89 ADM-47.

III. PROGRAM IMPLICATIONS

A. Undue Hardship - Spousal Impoverishment

In determining the resources of an institutionalized spouse at the time of application for MA, all the countable resources of the couple must be considered to be available to the institutionalized spouse, but only to the extent that the amount of such resources exceeds the maximum community spouse resource allowance. Section 366-c of Social Services Law (SSL) clarifies that, notwithstanding any other provision of law, such resources are considered available to the institutionalized spouse. Therefore, if the community spouse fails or refuses to cooperate in providing necessary information about his/her resources, such refusal shall be reason for denying MA for the institutionalized spouse because eligibility cannot be determined. If such a denial will result in undue hardship, and an assignment of support is executed or the institutionalized spouse is unable to execute such an assignment due to physical or mental impairment, MA must be authorized, and the case must be referred to the social services district legal staff for appropriate action.

Section 360-4.10(a)(11) has been revised by adding a new clause (d) under subparagraph (iv), to read as follows:

"(11) Undue hardship means a situation where:

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

If the requirements of subparagraphs (i), (ii), (iii) and (iv) are met, assistance shall not be denied for an institutionalized spouse.

The addition of clause (d) under subparagraph (iv) results in additional situations under which undue hardship may be met. Such situations would include, for example, a situation where the institutionalized spouse, if discharged from a nursing home, would be in danger of harm, neglect, or hazardous conditions in the home because the community spouse has threatened to harm the institutionalized spouse or has threatened not to provide or arrange for necessary care.

B. Undue Hardship - Transfer of Assets

Section 360-4.4(c)(2)(ii) has been amended to clarify that the undue hardship exception to the transfer of resources rule will be applied only to individuals who are not able to make a satisfactory showing that a resource was transferred exclusively for a purpose other than to qualify: for nursing care and related

services in a nursing facility; for a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or for care, services or supplies furnished pursuant to a waiver under Section 1915(c) of the Social Security Act.

Section 360-4.4(c)(2)(ii)(d)(2) now reads as follows:

"(2) in the absence of a satisfactory showing under subclause (1), it is determined that the denial of eligibility will result in an undue hardship. Denial of eligibility will result in an undue hardship if the institutionalized individual is: (i) otherwise eligible for MA; (ii) unable to obtain appropriate medical care without the provision of MA; and (iii) despite his/her best efforts, unable to have the transferred resource returned or to receive fair market value for the resource. Best efforts include cooperating, as deemed appropriate by the commissioner of the social services district, in the pursuit of the return of such resource."

Previously, districts were instructed that undue hardship could not be considered to exist if the resource in question was transferred to any relative of the individual. Concern was expressed that such a policy would not protect individuals who had no control over the circumstances of the transfer (i.e., the relative coerced the individual into transferring the resource through actual or threatened abuse, or the relative has misappropriated the resource without the individual's knowledge or has made an unauthorized transfer). In such circumstances, an individual should be able to show that the resource was transferred for a purpose other than to qualify for nursing facility level of care or waived services. Therefore, the former distinction between transfers to relatives and transfers to non-relatives has been eliminated, and the undue hardship provisions now apply to both types of transfers. However, an individual must cooperate as deemed appropriate by the social services district in pursuing the return of the resource.

C. Revised Notices

As a result of the changes to the undue hardship definitions, it is necessary to revise the "Information Notice to Couples With an Institutionalized Spouse" contained in 89 ADM-47, and the notice "Effect of Transfers of Resources on Medical Assistance Eligibility" contained in 89 ADM-45, to include the new definitions of undue hardship.

IV. REQUIRED ACTION

A. Spousal Impoverishment

The individual/representative must document the need for protection from actual or threatened harm, neglect, or hazardous

conditions if the individual is discharged from an appropriate medical setting. This may be established by use of records from the district's Protective Services for Adults (PSA) Unit or from law enforcement agencies or other social services agencies which indicate a history of or potential for abuse or neglect. In the absence of such records, affidavits must be obtained from other persons having knowledge of the individual's situation and the history of or potential for harm or neglect.

B. Transfer of Assets

An individual who is unable to demonstrate that a transfer was made exclusively for a purpose other than to qualify for certain services under the MA Program, must cooperate as deemed appropriate by the social services district in pursuing the return of the resource, or obtaining fair market value for the resource. The social services district must determine the cost effectiveness and reasonableness of pursuing the return of the resource, and may require the individual to take any reasonable actions, including pursuing the return of the resource in a court of law.

Some cases involving the transfer of assets by a physically or mentally impaired adult will warrant a referral to the district's PSA Unit for an investigation and assessment of the situation and the provision of any services which may be necessary. Therefore, districts must assure that appropriate cases are identified and referred to PSA.

C. Notice Requirements

Due to the revision of the definitions of undue hardship contained in the "Information Notice to Couples With an Institutionalized Spouse" (Attachment I) and the notice "Effect of Transfers of Resources on Medical Assistance Eligibility" (Attachment II), the Department will distribute these revised notices to all medical institutions, nursing facilities, and Long Term Home Health Care Program providers. Social services districts are required to make these notices available to all persons requesting such information, and are required to include these notices with all MA applications involving an institutionalized spouse. These notices are mandated, and must be reproduced by the district without modification until such time as they become available from this Department.

D. Implementation Date

The new definitions of undue hardship must be utilized when determining eligibility in spousal impoverishment and transfer of assets situations, for all applications filed on, or pending on or after June 1, 1990. In addition, any case brought to the attention of the district which was denied as not meeting the previous definition of undue hardship must be re-evaluated to determine if, based on revised definitions, undue hardship

currently exists. Any individual meeting the revised definition of undue hardship at the time of his/her original application must be authorized as of the month of application (including the retroactive period), if otherwise eligible.

V. SYSTEMS IMPLICATIONS

None.

VI. EFFECTIVE DATE

The provisions of this ADM are effective September 30, 1990, retroactive to June 1, 1990, the filing date of the revised regulations.

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

INFORMATION NOTICE TO COUPLES WITH AN INSTITUTIONALIZED SPOUSE

Medicaid is an assistance program that may help pay for the costs of your or your spouse's institutional care or home and community-based waived services. The institutionalized spouse is considered medically needy if his/her resources are at or below a certain level and the monthly income after deductions is less than the cost of care in the facility.

The federal Medicare Catastrophic Coverage Act of 1988 and implementing State legislation require that income and resource eligibility rules for institutionalized spouses which are effective October 1, 1989, be utilized to determine that spouse's eligibility for Medicaid. These rules protect some of the income and resources of the couple for the community spouse.

If you or your spouse is:

- (1) in a medical institution or nursing facility and expected to remain in such institution/facility for at least 30 consecutive days; or
- (2) in receipt of home and community-based waived services and expected to receive such services for at least 30 consecutive days; or
- (3) in a medical institution/nursing facility or in receipt of home and community-based waived services, and expected to receive a combination of institutional services and home and community-based waived services for at least 30 consecutive days;

AND

- (4) married to a person who is not described in items 1-3, these income and resource eligibility rules for institutionalized spouses may apply to you or your spouse.

If you wish to discuss these eligibility provisions which are effective October 1, 1989, please contact your local department of social services.

Even if you have no intention of pursuing a Medicaid application at this time, you are urged to contact your local department of social services to request an assessment of the total value of your combined countable resources. You may call your local department of social services or send in the completed section of this notice to request such an assessment. New York City residents should call (718) 291-1900 (HRA Info Line). Under the October 1, 1989 Medicaid resource eligibility requirements, the community spouse is allowed to keep up to \$60,000 of your and your spouse's countable resources, unless a higher amount is established by a court order or fair hearing. This maximum community spouse resource allowance of \$60,000* will also be increased annually for changes in the Consumer Price Index.

In order to determine the community spouse resource allowance, the combined countable resources of you and your spouse at the time of MA application will be utilized for Medicaid eligibility purposes. In determining the total value of the countable resources, we will not count the value of your home, household goods, personal property, the car and certain funds established for burial expenses. It is, therefore, to the advantage of community spouses to request such an assessment to make sure that allowable resources are not depleted by your or your spouse's cost of care.

* See the attached Table for the current dollar amounts.

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Either spouse or a representative acting on their behalf may request at the beginning or any time after the beginning of the continuous period of institutionalization, an assessment of the couple's countable resources. Upon receipt of such request and all relevant documentation, the local district will assess and document the total value of the couple's countable resources and provide each spouse with a copy of the assessment and the documentation upon which it is based. If the request is not filed with a Medical Assistance application, the local social services department may charge up to \$25.00 for the cost of preparing and copying the assessment and documentation.

You may also request an assessment/determination of:

** (1) the community spouse monthly income allowance* (an amount of up to \$1,500 a month for 1989, if the community spouse has no income of his/her own, or a greater amount as established by court order or fair hearing); and

(2) a family allowance for each minor child, dependent child, dependent parent or dependent sibling of either spouse living with the community spouse* (an amount of up to \$271 a month for 1989, if the family member has no income of his/her own).

If you wish to request an assessment of the total value of your and your spouse's countable resources, a determination of the community spouse resource allowance, community spouse monthly income allowance, or family allowance(s) and the method of computing such allowances, contact your local social services department. Residents of New York City should call (718) 291-1900 (HRA Info Line).

For purposes of determining the Medicaid eligibility of the institutionalized spouse, effective October 1, 1989, a community spouse must cooperate in providing necessary information about his/her resources. Refusal to provide such information shall be reason for denying Medical Assistance for the institutionalized spouse because Medical Assistance eligibility cannot be determined. If denial of Medical Assistance would result in undue hardship for the institutionalized spouse and an assignment of support is executed or the institutionalized spouse is unable to execute such assignment due to physical or mental impairment, Medical Assistance shall be authorized. However, if the community spouse refuses to make such resource information available then the Department may, at its option, refer the matter to court.

* See the attached Table for the current dollar amounts.

** The community spouse may be able to obtain additional amounts of the institutionalized spouse's income than would otherwise be allowed under the Medical Assistance Program by commencing a family court proceeding against the institutionalized spouse. Such court orders are only effective back to the filing date of the petition. Social Services Law 366.2(a)(7) requires that the amount of such support orders be deducted from the institutionalized spouse's income for eligibility purposes. Your own attorney or local Office for the Aging can give you more information in this regard.

Undue hardship is a situation where:

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

An institutionalized spouse will not be determined ineligible for Medical Assistance because the community spouse refuses to make his or her resources in excess of the maximum community spouse resource allowance available to the institutionalized spouse if:

- (1) the institutionalized spouse executes an assignment of support from the community spouse in favor of the social services district; or
- (2) the institutionalized spouse is unable to execute such assignment due to physical or mental impairment.

The amount of money that we will request as a contribution from the community spouse will be based on his or her income and the number of persons in the community depending on that income. We will request a contribution from a community spouse of 25% of the amount his/her otherwise available income exceeds the minimum monthly maintenance needs allowance plus any family allowance(s). If the community spouse feels that he/she cannot contribute the amount requested, he/she has the right to schedule a conference with the local department of social services to try to reach an agreement about the amount he/she is able to pay.

Pursuant to 366(3)(a) of the Social Services Law, Medicaid MUST be provided to the institutionalized spouse, if the community spouse fails or refuses to contribute his/her income towards the institutionalized spouse's cost of care.

However, if the community spouse fails or refuses to make his/her income available as requested then the Department may, at its option, refer the matter to court for a review of the spouse's actual ability to pay.

Date _____

Request for Assessment

Institutionalized Spouse's Name _____

Current Address _____

Telephone # _____

Community Spouse's Name _____

Current Address _____

Telephone # _____

I/we request an assessment of the items checked below:

- ☐ Couple's countable resources and the community spouse resource allowance.
- ☐ Community spouse monthly income allowance.
- ☐ Family allowance

Signature of requesting individual

Address and telephone # if different
from above

Check ☐ if you are a representative acting on behalf of either spouse.
Please call your local department of social services if we do not contact
you within 10 days of this request.

NOTE: If an assessment is requested without a Medical Assistance
application, the local department of social services may charge up to \$25
for the cost of preparing and copying the assessment and documentation.

SPOUSAL IMPOVERISHMENT INCOME AND RESOURCE AMOUNTS

Maximum Community Spouse Resource Allowance

\$60,000 - Effective October 1, 1989

\$62,580 - Effective January 1, 1990

Note: A higher amount may be established by court order or fair hearing.

Maximum Community Spouse Monthly Income Allowance is an amount of up to:

\$1,500 - Effective October 1, 1989

\$1,565 - Effective January 1, 1990

if the community spouse has no income of his/her own.

Note: A higher amount may be established by court order or fair hearing.

Family Member Allowance - for each family member is an amount of up to:

\$271 - Effective October 1, 1989

\$285 - Effective July 1, 1990

if the family member has no income of his/her own.

EFFECT OF TRANSFERS OF RESOURCES ON
MEDICAL ASSISTANCE ELIGIBILITY

The following is an explanation of how a transfer of certain resources or assets may affect your eligibility for Medical Assistance. A transfer is when the title or right to property or assets is conveyed or transferred from one person to another. For Medical Assistance purposes, a prohibited transfer is the voluntary assignment or the giving of your property or assets to another person without receiving something of equal value in return, in order to qualify for nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the federal Social Security Act. The following information applies only to transfers made on or after October 1, 1989.

The Medical Assistance Program does not allow the transfer of countable resources (the value of property and assets that are in excess of the allowable Medical Assistance resource standard) for less than fair market value within or after the 30 months immediately before the date you become in need of the services listed in 1, 2, or 3 below, if you are receiving Medical Assistance on that date, or within or after 30 months of the date you apply for Medical Assistance for these services. If it is determined that a prohibited transfer has been made within this time period, and you meet all other eligibility requirements, your Medical Assistance coverage will be limited for a period of time. Limited coverage means that during this period of time you will not be able to receive coverage for the following types of care and services:

1. services provided in skilled nursing facilities, health-related facilities, intermediate care facilities, or residential treatment facilities;
2. alternate level of care provided to persons whose acute care needs have already been met but who are awaiting placement in a lower level of care (for example, a nursing home or home care program);
3. the non-medical home and community-based services listed below, which are provided primarily through the Long Term Home Health Care Program or the Nursing Home Without Walls Program:
 - o Home Maintenance Tasks
 - o Housing Improvement
 - o Social Transportation
 - o Congregate/Home Delivered Meals
 - o Respite Care
 - o Social Day Care
 - o Personal Emergency Response System Services
 - o Moving Assistance
 - o Medical Social Services
 - o Respiratory Therapy
 - o Nutritional Counseling/Educational Services

You will, however, be able to receive coverage for all other eligible services provided under the Medical Assistance Program, provided you are otherwise eligible.

How is the limited coverage period determined?

The period of time during which your Medical Assistance coverage will be limited begins with the month in which you made the prohibited transfer, even if you were not receiving Medical Assistance or were not in need of nursing facility services at that time. It will be equal to the lesser of:

1. 30 months; or
2. a period equal to the total uncompensated value of the transferred resource(s), divided by the average monthly rate* for nursing facility services in the region in which you reside. In computing this period of time, we use the regional rate in effect at the time you first apply or reapply for Medical Assistance coverage for any of the services listed previously.

We determine the total uncompensated value of a transferred resource by obtaining an estimate of the fair market value of the resource at the time it was transferred, and deducting any outstanding loans, mortgages or other encumbrances on the resource and the amount of compensation received in exchange for the resource. We will also deduct the amount you are allowed to keep up to the Medical Assistance resource standard, if not already taken into account through other resources owned by you. (If you are married and either you or your spouse is institutionalized, refer to "Information Notice To Couples With An Institutionalized Spouse", for information regarding the Medical Assistance eligibility resource requirements which are effective October 1, 1989.)

How do we determine if you have made a prohibited transfer?

There are exceptions to the transfer of resource prohibitions. Under the following circumstances, we are not required to limit your Medical Assistance coverage when a transfer has been made if:

1. you transferred the resource to or for the sole benefit of your community spouse (the spouse of an institutionalized person); or
2. you transferred the resource(s) to or for the sole benefit of your spouse, other than your community spouse, as long as your spouse does not transfer the resource(s) to another person, for less than fair market value; or
3. you transferred the resource(s) to your child who is certified blind, or certified permanently and totally disabled; or

* Information on average rates is available upon request from your local social services district.

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4. the resource transferred was your homestead, and title to the homestead was transferred to:

- your spouse;
- your minor child under age 21, or your child of any age who is certified blind or certified permanently and totally disabled;
- your brother or sister who also has an equity interest in the home and who lived in the home for at least one year immediately before you entered a nursing facility;
- your child (other than a child who is under 21 or who is certified blind/disabled) who was living in your home for at least two years immediately before you entered a nursing facility and who we determine provided care to you which permitted you to reside at home rather than in a nursing facility.

The transfer of resources for less than fair market value under any other circumstances is not allowed and will result in limitation of your Medical Assistance coverage unless:

1. you present evidence that proves you intended to sell the resource(s) at fair market value or to receive other valuable consideration in exchange for the resource(s); or
2. you present evidence that proves the resource(s) was transferred exclusively for a purpose other than to qualify for nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the federal Social Security Act; or
3. in the absence of the evidence described in 1. or 2. above, we will not limit your Medical Assistance coverage if we determine that such limitation will result in undue hardship for you. We will consider undue hardship to exist if you: (1) meet all other eligibility requirements; and (2) are unable to obtain appropriate medical care without the provision of Medical Assistance; and (3) despite your best efforts you are unable to have the transferred resource returned or to receive fair market value for the resource. Best efforts must include your cooperation with the Department of Social Services in pursuing the return of the resource. Best efforts may include pursuing the return of the resource in a court of law, if determined appropriate by the social services district.

How can you prove you did not transfer to qualify for these certain medical services?

We will presume that any prohibited transfer of a resource made within or after 30 months immediately before the date you become in need of the previously listed services, if you are receiving Medical Assistance on that date, or within or after 30 months of your application for Medical Assistance for these services, was made for the purpose of qualifying for nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in

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a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the federal Social Security Act. If you disagree with this presumption, you should present evidence to your Medical Assistance eligibility examiner which proves that the transfer was made exclusively for some other purpose. Some factors which may establish that a transfer was made for a purpose other than to obtain Medical Assistance eligibility are:

1. sudden, unexpected onset of serious illness or disability after the transfer occurred
2. unexpected loss of other resources or income which would have made you ineligible for Medical Assistance, after the transfer occurred
3. court-ordered transfers.

These are examples only. All of the circumstances of the transfer will be considered as well as factors such as your age, health and financial situation at the time the transfer was made. It is important to note that you have the burden of providing this agency with complete information regarding all assets and any other relevant factors which may affect your eligibility.

What appeal rights do you have?

You will receive a written notice if we determine that your Medical Assistance coverage is to be limited based on your transfer of resources for less than fair market value. If you are in a nursing facility or require the previously listed services at the time we make our decision, the notice will tell you how long you will have limited coverage. If you are not in a nursing facility or receiving nursing facility services, the notice will only tell you the projected period of limited coverage. This period will never be more than 30 months and may be shorter based on the average rate for nursing facility services in the region in which you reside.

You have the right to appeal our decision to limit your coverage. Our written notice will provide you with information on how to request a conference with us to review our actions. Our notice will also provide you with information on your right to a State Fair Hearing if you believe our action is wrong.

THIS INFORMATION APPLIES ONLY TO TRANSFERS MADE
ON OR AFTER OCTOBER 1, 1989

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT YOUR
MEDICAL ASSISTANCE ELIGIBILITY EXAMINER.