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PAGE 1

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TO: Local District Commissioners, MA Directors

FROM: Ann Clemency Kohler, Director, Office of Medicaid Management

SUBJECT: Irrevocable Burial Trusts

EFFECTIVE DATE: January 1, 1997

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This message is to provide social services districts with information concerning the recently enacted funeral trust legislation, which amended State law with respect to pre-need funeral agreements. A pre-need funeral agreement is a contract in which moneys are paid to a funeral firm, funeral director, undertaker, cemetery, or other person or entity (hereafter funeral director), in return for the furnishing of specified services and/or merchandise upon the death of the person to whom the agreement pertains. The new law provides that if an applicant for or recipient of Medicaid or Supplemental Security Income enters into a pre-need funeral agreement on or after January 1, 1997, the funeral director must place all moneys received into an irrevocable trust.

Previously, State law required all pre-need funeral agreements to be completely revocable; that is, the purchaser could terminate the agreement and have his or her money refunded at any time. As a result of the new law, if a Medicaid applicant or recipient (A/R) enters into a pre-need funeral agreement on or after January 1, 1997, such agreement is irrevocable and the A/R will not be entitled to have his/her money returned once it is paid to the funeral director. Pre-need funeral agreements entered into before January 1, 1997 continue to be revocable as a matter of law, as do pre-need funeral agreements entered into on or after January 1, 1997 by individuals who are not A/Rs.

There is no need to review the pre-need funeral agreements of the undercare caseload. For persons who achieved Medicaid eligibility prior to January 1, 1997, exempt agreements will continue to be exempt. For persons with Medicaid applications submitted or pending on or after January 1, 1997, the following rules apply with respect to pre-need funeral agreements.

REVOCABLE AGREEMENTS. For SSI-related A/Rs, any portion of a revocable pre-need funeral agreement that represents non-burial space items, up to \$1,500, should be disregarded as a burial fund (after first applying toward the burial fund any life insurance policies with a combined face value of \$1500 or less). The remaining portion of the revocable agreement should be counted as an available resource for purposes of determining Medicaid eligibility. A person who applies or has an application pending on or after January 1, 1997 will be allowed 10 days after notification to establish an irrevocable agreement if he or she wishes to do so.

IRREVOCABLE AGREEMENTS. The payment of moneys to a funeral director to set up an irrevocable pre-need funeral agreement is a compensated transfer of assets, provided that the person is paying fair market value for the goods and services to be furnished. In addition, an irrevocable pre-need funeral agreement is not a countable resource in determining Medicaid eligibility. However, any portion of the agreement that represents non-burial space items should be counted toward the A/R's \$1,500 burial fund.

For an SSI-related A/R with an irrevocable pre-need funeral agreement, the burial fund should be made up first of moneys in the irrevocable agreement which are designated for non-burial space items. If an irrevocable pre-need funeral agreement does not contain a full \$1,500 in burial funds, then a supplemental burial fund can be established; for SSI-related A/Rs, life insurance policies with a combined face value of \$1,500 or less will be counted first toward the supplemental burial fund. Life insurance policies cannot name the funeral director as the beneficiary. NOTE: Even when a pre-need funeral agreement contains a full \$1,500 in burial funds, an aged, blind, or disabled A/R is also entitled to a separate, non-burial-related disregard of the cash value of life insurance policies with a combined face value of \$1,500 or less. See 18 NYCRR 360-4.6(b)(2)(ii).

There is no dollar limit on goods and services purchased through an irrevocable pre-need funeral agreement purchased in New York State. The new law provides, however, that any funds remaining in a trust after payment of all funeral expenses are to be paid to the social services district official responsible for arranging for burials. Social services districts may wish to contact funeral directors in their area to advise where and to whom these funds should be forwarded. Under the statute, irrevocable pre-need funeral contracts must contain the following disclosure:

"New York Law requires this agreement to be irrevocable for applicants for receipt of supplemental security benefits under section two hundred nine of the Social Services Law or of Medical Assistance under section three hundred sixty-six of the Social Services Law, and for the moneys put into a trust under this agreement to be used only for funeral and burial expenses. If any money is left over after your funeral and burial expenses have been paid, it will go to the county. You may change your choice of funeral home at any time."

An Administrative Directive on this subject will be forthcoming. In the interim, if you have any questions, please contact Wendy Sutherland.