

RESOURCES

TRANSFER OF ASSETS

Description: Sometimes an SSI-related A/R, the A/R's spouse, or someone acting on his/her behalf, makes a voluntary assignment or transfer of non-exempt assets for less than its fair market value. Under certain circumstances, an SSI-related A/R may be subject to a period of restricted Medicaid coverage or penalty period, when a transfer of assets for less than the fair market value has occurred within the look-back period.

Policy: Once an SSI-related A/R is found financially eligible for Nursing Facility Services a review is made to determine if any assets were transferred during the look-back period for less than fair market value. A/Rs are initially requested to provide an explanation of each bank transaction of \$2,000 or more. If the district identifies that transfers for less than fair market value been made, a review of all transactions made during the look-back period may be performed.

For applications of Medicaid coverage for nursing facility services and for SSI-related recipients who request an increase in coverage for nursing facility services, the look-back period increases from 36 months to 60 months (60 months for trusts) for transfers made on or after February 8, 2006.

The look-back period increases each month by 1-month increments beginning March 1, 2009 (37 months) until February 2011. Effective February 1, 2011, the full 60 month look-back period will be in place for ALL transfers of assets.

NOTE: In cases where the initial days of nursing facility care were covered as short-term rehabilitation under Community Coverage Without Long-Term Care, the look-back period is the period immediately preceding the month the SSI-related individual started to receive the short-term rehabilitation service. Any transfer penalty for an otherwise eligible individual would start the first month the individual started to receive the short-term rehabilitation service.

Once eligibility is established for an SSI-related institutional spouse, any transfers made by the community spouse do not affect the institutionalized spouse's Medicaid eligibility.

NOTE: If an SSI-related Medicaid recipient has been on Medicaid for the past 60* months, has documented current resources at each renewal; not created or funded a trust which requires a 60-month look back; and not made a prohibited transfer, a separate resource review for the past 60* months is not required for requests of increased coverage for nursing facility services.

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* The look-back period increases each month by one-month increments beginning 3/1/09 until February 2011. Effective February 1, 2011, the full 60 month look-back period will be in place.

The transfer of assets rules do not apply to persons whose eligibility is determined without a resource test. Effective for eligibility periods beginning on or after January 1, 2010 FHPlus and non-SSI-related Medicaid A/Rs will not have resources considered in determining eligibility. This change includes the following Medicaid categories: Single/Childless Couples (SCC), Low Income Families (LIF), ADC-related (including adults who spend down excess income to the Medicaid income level), children under 21 years of age when comparing income to the Medicaid income level (Under age 21), and parents living with their dependent child(ren) under age 21 with income at or below the Medicaid income level (FNP Parents).

In determining eligibility, resources are never considered for pregnant women and infants under one year of age. Resources are also not considered for children over age one but under age 19.

In addition, there is no resource test for applicants for the Family Planning Benefit Program, Medicaid Cancer Treatment Program, the Medicare Savings Program including the Qualified Individual Program (QI-1), Qualified Medicare Beneficiaries (QMB) and Specified Low Income Medicare Beneficiaries (SLIMB), AIDS Health Insurance Program (AHIP) and policy holders who have utilized the minimum required benefits under a total asset Partnership for Long-Term Care insurance policy. (See **RESOURCES** NEW YORK STATE PARTNERSHIP FOR LONG-TERM CARE)

Transfer of assets provisions do not apply to individuals applying for or receiving coverage for HCBS waiver services.

References: SSL Sect. 104-a
366
366.5
366-a(2)
366-c
366-ee

Chapter Laws 109 of the Laws of 2006

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Dept. Reg.	360-1.4 360-2.3 360-4.4(b)(2) 360-4.4(c) 360-4.6 360-4.7(a)(1)
ADMs	10 OHIP/ADM-01 09 OHIPADM-3 08 OLTC-01 06 OMM/ADM-5 04 OMM/ADM-6 96 ADM-8 91 ADM-37 91 ADM-31 90 ADM-36 90 ADM-29 89 ADM-45 85 ADM-27
GISs	09 MA/027 09 MA/016 09 MA/007 08 MA/019 07 MA/018 07 MA/007 06 MA/016 05 MA/012

Interpretation: When an institutionalized SSI-related A/R or spouse makes a prohibited transfer, but is otherwise eligible for Medicaid, a penalty period is imposed. During this penalty period, the SSI-related A/R will not be eligible for nursing facility services. (See **RESOURCES RESOURCE DOCUMENTATION REQUIREMENTS** for a complete list of nursing facility services.)

Exceptions:

- The transfer of exempt assets, other than a homestead, does not affect the SSI-related A/R's eligibility.
- An SSI-related A/R and/or the spouse may transfer the homestead, without penalty, to his/her:
 - Spouse;
 - Child under the age of 21;
 - Certified blind/disabled child of any age;
 - Sibling who has an equity interest in the SSI-related A/R's home and has resided in the home for at least one (1) year immediately prior to the A/R's most recent institutionalization; or

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- Adult child who resided in the SSI-related A/R's home for at least 2 years, immediately prior to the A/R's most recent institutionalization and who provided care to the SSI-related A/R which permitted the A/R to reside at home rather than in a medical facility. It is presumed that the child "provided care" unless there is evidence to the contrary.

The transfer of a homestead to any other person for less than fair market value may render the SSI-related A/R ineligible for Medicaid coverage of nursing facility services.

Transfer of assets penalties are not imposed against an SSI-related A/R when an asset other than the individual's home is transferred:

- to the individual's spouse, or to another for the sole benefit of the individual's spouse;
- from the individual's spouse to another for the sole benefit of the individual's spouse;
- to the individual's child who is certified blind or certified disabled; or
- to a trust established solely for the benefit of an individual under 65 years of age who is disabled.

Sole Benefit – A transfer is considered to be for the "sole benefit of the SSI-related individual's spouse" if the transfer is arranged in such a way that no individual or entity other than the spouse can benefit from the assets transferred in any way, whether at the time of the transfer or any time in the future. A remainder man is someone who will inherit property in the future (e.g., after a person's death). A transfer is not for the sole benefit of the spouse if the transferred asset has a remainder person. For example, if an SSI-related institutionalized spouse takes money that is in his/her name, purchases an annuity so that only the community spouse receives payments, and there is a designation of a remainder man (beneficiary other than the community spouse's estate), this would be evaluated as an uncompensated transfer.

A transfer penalty is not imposed against an SSI-related A/R when a satisfactory showing is made that:

- the SSI-related A/R or the A/R's spouse intended to dispose of the asset for its fair market value or exchange it for other consideration of similar value;

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- all of the assets transferred for less than the fair market value have been returned to the individual.

Assets Transferred to Purchase Life Estate Interest

If an SSI-related A/R or the A/R's spouse transfers assets to purchase a life estate interest in property owned by another individual on or after February 8, 2006, the purchase is to be treated as a transfer of assets for less than fair market value, unless the purchaser resides in the home for at least a continuous period of one year after the date of purchase.

The amount used to purchase the life estate interest is the amount to be treated as the uncompensated transfer of assets in the eligibility determination. This policy applies to applications filed on or after August 1, 2006 for nursing facility services, including requests for an increase in coverage for nursing facility services.

Assets Transferred to Purchase Loans, Promissory Notes and Mortgages

Applications filed on or after August 1, 2006 for nursing facility services, including requests for an increase in coverage for nursing facility services, if an SSI-related A/R or the A/R's spouse purchases a loan, promissory note or mortgage, the funds used are to be treated as a transfer for less than fair market value, unless the note, loan or mortgage:

- Has a repayment term that is actuarially sound;
- Provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
- Prohibits the cancellation of the balance upon the death of the lender.

The amount of the transfer is the outstanding balance due as of the date of the individual's application for nursing facility services.

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Assets Transferred to Purchase a Personal Service Contract

A personal service contract that does not provide for the return of any prepaid monies in the event the caregiver becomes unable to fulfill his/her duties under the contract, or if the SSI-related A/R dies before his/her calculated life expectancy, must be treated as a transfer of assets for less than FMV. If a personal service contract does provide for the return of funds in the events the caregiver is unable to fulfill his/her obligation under the contract or the SSI-related A/R dies before his/her calculated life expectancy, a determination must still be made as to whether the SSI-related A/R will receive FMV in exchange for funds transferred.

If the personal service contract provides that services will be delivered on an "as needed" basis, no determination that FMV will be received and a transfer of assets penalty must be calculated.

In calculating the transfer penalty, the value of services actually received from the time the personal service contract was signed and funded through the date of the Medicaid eligibility determination must be "credited" by reducing the transferred amount before calculating the period of ineligibility.

NOTE: Credit is not allowed for services that are provided as part of the Medicaid nursing home rate.

In assessing the value of furnished services, districts must be provided with credible documentation, such as a log with dates specific services were provided and the hour(s) each service was provided. The value of the caregiver services must be commensurate with a reasonable wage scale, based on fair market value for the actual job performed and the qualifications of the caregiver. If credible documentation is not provided, no credit is deducted in calculating the uncompensated transfer amount. When a district determines that a reasonable pay rate for a job/service is less than the amount spelled out in the personal services contract, the district must use the lesser amount in calculating the amount of compensation received for the transfer.

NOTE: Assistance in evaluating job duties and pay rates may be found in the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook at: <http://www.bls.gov/oco/>. This handbook includes information on training and other qualifications needed for particular jobs.

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The SSI-related A/R or the A/R's spouse is allowed a minimum of twenty days to present evidence that the transfer was made exclusively for a purpose other than to qualify for Medicaid coverage of nursing facility services. An SSI-related A/R's Medicaid coverage may not be restricted due to a transfer of assets without first advising the SSI-related A/R and the spouse, in writing, of the right to present evidence. Some factors suggesting that the transfer was made exclusively for another purpose include:

- The traumatic onset of a disability after the transfer (e.g., A/R has a heart attack shortly after the transfer and there was no previous record of heart disease); or
- The unexpected loss of other resources which would have precluded Medicaid eligibility.

Rebuttal Presumption of Prohibited Transfer

If an SSI-related individual transfers resources (e.g. gives them away or sells them for less than fair market value), there is a rebuttable presumption that the resources were transferred for the purpose of establishing or maintaining eligibility for Medicaid coverage of nursing facility services. The presumption is rebutted only if the SSI-related individual provides convincing evidence that the resources were transferred exclusively for a purpose other than to become or remain eligible for Medicaid. If the SSI-related individual had some other purpose of transferring the resource but an expectation of establishing and maintaining Medicaid eligibility was also a factor, the transfer will result in a period of ineligibility for Medicaid coverage of nursing facility services.

An SSI-related A/R's Medicaid coverage may not be restricted due to a transfer of assets without first advising the SSI-related A/R and the spouse, in writing, of the right to present evidence to rebut the presumption that a transfer was made in order to qualify for Medicaid coverage of nursing facility services. To meet this requirement, the "Explanation of Effects of Transfer" must be given to the applicant who is applying for Medicaid coverage of nursing facility services.

The SSI-related individual must provide convincing evidence (i.e. written documentation) that the transfer was exclusively for a purpose other than to qualify for Medicaid benefits. An individual's signed statement regarding the circumstances of the transfer should cover the individual's

- Purpose of transferring the resource;

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- Attempts if any, to dispose of the resource at fair market value (FMV);
- Reason for accepting less than FMV for the resource;
- Means or plans for self-support after the transfer;
- Relationship, if any, to the person(s) to whom the resource was transferred;
- Belief that he/she received FMV, if applicable.

NOTE: A signed statement by the SSI-related individual is not, by itself, convincing evidence. Pertinent documentary evidence includes, but is not limited to, legal documents, real estate agreements, relevant correspondence, medical reports, etc.

The following are examples of situations that while not conclusive, may indicate that the transfer was made exclusively for some purpose other than to qualify for Medicaid coverage of nursing facility services. After the transfer:

- There is a traumatic onset (e.g. traffic accident) of disability or blindness; or
- There is a diagnosis of a previously undetected disabling condition (e.g., heart attack when there was no previous record of heart disease), or
- There is an unexpected loss of other income or resources which would have precluded Medicaid eligibility.

If the SSI-related A/R is unable to present evidence that the A/R or his/her spouse intended to dispose of the asset for the fair market value, or that the asset was transferred exclusively for a purpose other than to qualify for Medicaid, the case is evaluated to determine if the restriction of Medicaid coverage would cause the SSI-related A/R "undue hardship". Undue hardship occurs when the SSI-related A/R is otherwise eligible for Medicaid; is unable to obtain appropriate medical care without Medicaid coverage; and despite the best efforts of the A/R and/or the spouse, is unable to have the transferred assets returned or to receive fair market value for the assets. Best efforts include cooperating, as deemed appropriate by the local social services district, in the pursuit of the return of such assets.

NOTE: Effective February 8, 2006 to meet the definition of undue hardship, the SSI-related individual must meet all of the conditions described above and be deprived of food, clothing, shelter or other necessities of life.

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Uncompensated Value

The uncompensated value of a transfer is the difference between the fair market value at the time of transfer (less any outstanding loans, mortgages or other legal encumbrances on the asset) and the amount received for the asset. If the SSI-related A/R's resources are below the appropriate resource level, the amount by which the resource level exceeds the SSI-related A/R's resources must be deducted from the uncompensated value of the transfer. In addition, amounts specified in regulations for burial funds (\$1,500 for SSI-related A/Rs), but not for burial space items, must be deducted, if the SSI-related A/R does not have an irrevocable pre-need funeral agreement with \$1,500 designated for non-burial space items or a burial fund.

Example: An SSI-related applicant makes a prohibited transfer in April, 2005 of \$20,000 and applies for Medicaid coverage of nursing home care in May, 2005. The only resource the SSI-related applicant has is \$2,000 in a bank account. To determine the uncompensated value of the prohibited transfer, subtract the SSI-related applicant's countable resources from the Medicaid Resource Level for a household of one ($\$4,000 - \$2,000 = \$2,000$). If there is a remainder, subtract the remainder from the prohibited transfer amount ($\$20,000 - \$2,000 = \$18,000$). \$18,000 is the uncompensated value of the transfer.

If the SSI-related applicant also does not have an irrevocable pre-need funeral agreement with \$1,500 designated for non-burial space items or a \$1,500 burial fund, the prohibited transfer amount is further reduced by \$1,500 ($\$18,000 - \$1,500 = \$16,500$). \$16,500 is the uncompensated value of the transfer.

The uncompensated value cannot be reduced by applying it to the maximum community spouse resource allowance.

Except as provided below concerning multiple transfers, for transfers made prior to February 8, 2006 the penalty period begins on the first day of the month following the month in which the assets were transferred.

For transfers made on or after February 8, 2006, the penalty period starts the first day of the month after assets have been transferred for less than fair market value, OR the first day of the month the otherwise eligible SSI-related institutionalized individual is receiving nursing facility services for which Medicaid would be available but for the

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transfer penalty, whichever is later, and which does not occur during any other period of ineligibility.

The penalty period is a period of months equal to the total uncompensated value of the transferred assets divided by the average regional rate for nursing facility services in the region where the SSI-related individual is institutionalized. There is no cap on the length of the penalty period. The regional rates are revised annually and are based on average nursing home costs in each of the seven regions of the State. (See **REFERENCE REGIONAL RATES FOR TRANSFER OF ASSETS**)

Once a penalty period has been established for an otherwise eligible SSI-related individual, the penalty period continues to run regardless of whether the individual continues to receive nursing facility services or remains eligible for Medicaid. Upon reapplication for Medicaid coverage of nursing facility services, any uncompensated transfer that still falls within the new look-back period which has already resulted in an expired penalty period, would not again be assessed a penalty. Only subsequent transfers can result in a transfer penalty period.

Partial Month Penalty Period

If the uncompensated value of the transferred assets is less than the regional rate, or the penalty period results in a partial month penalty, count the uncompensated value attributable to the partial month as part of the Net Available Monthly Income (NAMI) or, in the case of an individual receiving waiver services in the community, spenddown liability for the month.

Example: An SSI-related applicant in the Northern Metropolitan region makes an uncompensated transfer of \$29,162 in April, 2005. The uncompensated transfer amount of \$29,162, divided by \$8,332 (the 2005 Medicaid monthly regional rate for the Northern Metropolitan region), equals 3.5 months. The 3-month penalty period runs from May, 2005, the month following the month of transfer, through July, 2005, with a partial month penalty calculated for August, 2005. The calculations follow:

\$ 8,332	Medicaid monthly regional rate (for Northern Metropolitan region)
<u> 3</u>	three-month penalty period
\$24,996	penalty period amount for three full months

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\$29,162	uncompensated transfer amount
<u>-24,996</u>	penalty period amount for three full months
\$ 4,166	partial month penalty amount

For August, 2005, the partial month penalty amount of \$4,166 would be added to the SSI-related institutionalized person's NAMI.

Recalculation of Returned Assets

If all or a portion of the transferred assets is returned after the Medicaid eligibility determination, the existing penalty period is recalculated, reducing the penalty period by the amount of assets returned. For transfers made after February 8, 2006, the recalculated penalty period cannot begin before the assets retained by the individual at the time of transfer, combined with the assets transferred, and subsequently returned to the individual, have been spent down to the applicable Medicaid resource level.

Multiple Transfers

For multiple transfers during the look-back period, where assets have been transferred in amounts and/or frequency that would make the calculated penalty periods overlap, add together the uncompensated values of all the assets transferred, and divide by the Medicaid regional rate. The period of ineligibility begins with the first day of the month following the month in which that first transfer occurred.

Multiple transfers of assets for less than fair market value made on or after February 8, 2006, must be accumulated and treated as one transfer. The penalty period starts the first day of the month after assets have been transferred for less than fair market value, OR the first day of the month the otherwise eligible SSI-related institutionalized individual is receiving nursing facility services for which Medicaid would be available but for the transfer penalty, whichever is later, and which does not occur during any other period of ineligibility.

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Apportioning Penalty Periods Between SSI-related Spouses

When an SSI-related institutionalized spouse applies for Medicaid and either spouse has made a prohibited transfer and if the SSI-related institutionalized spouse is otherwise eligible, he/she is authorized with restricted coverage for a penalty period based on the full uncompensated value of the transferred resources.

If the other member of the SSI-related couple subsequently applies for Medicaid as an SSI-related institutionalized individual (both SSI-related spouses are institutionalized), prior to the expiration of the penalty period the penalty period is apportioned equally between the SSI-related spouses. If one spouse is no longer subject to a penalty (e.g., one spouse dies), the remaining penalty period for both spouses is applied to the remaining spouse.

An institutionalized SSI-related A/R who is being penalized for making a prohibited transfer may receive Medicaid coverage for ancillary services, not included in the per diem rate, if otherwise eligible. The SSI-related A/R is budgeted by deducting the SSI-related disregards, the Medically Needy Income level for a household of one. (See **REFERENCE MEDICALLY NEEDED INCOME LEVELS** and the **REFERENCE MEDICAID RESOURCE LEVEL**) An SSI-related institutionalized spouse is budgeted as if s/he was in his/her first month of permanent absence from the community. Only those resources in excess of the community spouse resource allowance (See **REFERENCE MINIMUM/MAXIMUM COMMUNITY SPOUSE ALLOWANCE**) are considered.

It is essential that the local district carefully document the actual date of any transfer. When an SSI-related A/R or spouse deeds property to another person, the effective date of the transfer is the date the deed is delivered to and accepted by the transferee/purchaser. The deed need not be recorded to complete the transfer. When a person promises to transfer a gift or resource to another person, the date the promise is made is not significant. The date of transfer is the date the resource changed ownership.

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- Verify Status:**
- (a) When the SSI-related A/R or spouse indicates that someone else pays the mortgage or property tax;
 - (b) When the SSI-related A/R or spouse indicates that s/he is provided with a home at no cost;
 - (c) When previous records indicate resources that are no longer claimed;
 - (d) When the SSI-related A/R's or spouse's financial institution accounts indicate substantial withdrawals;
 - (e) When the SSI-related A/R or spouse declares resources in the name of another person.

- Verification:**
- (a) Obtaining an appraisal by a real estate broker;
 - (b) Seeing property tax statements;
 - (c) Seeing mortgage statements;
 - (d) Seeing financial institution account statements;
 - (e) Seeing court records.

Disposition: When the local social services district becomes aware that a transfer of resources was made by an SSI-related A/R or his/her spouse, the local district determines the date on which the resources were transferred. The SSI-related A/R is notified and given a reasonable amount of time to present evidence that the transfer was not made for the purpose of qualifying for Medicaid. When a penalty period is imposed, an adequate and timely notice is sent to the SSI-related A/R.