



State of New Jersey

DEPARTMENT OF HUMAN SERVICES DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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MEDICAID COMMUNICATION: 89-22

DATE: September 29, 1989

TO: County Welfare Agency/Board of Social Services Directors

SUBJECT: Implementation of the Spousal Impoverishment Provisions of the Medicare Catastrophic Coverage Act of 1988

As you know, the so-called spousal impoverishment provisions of the Medicare Catastrophic Coverage Act (MCCA) of 1988 are (in accordance with the provisions of that Act) effective October 1, 1989.

Upon the advice of the Attorney General's Office, the Division will implement provisions of MCCA administratively and propose rules through the normal rule making provisions of the Administrative Procedures Act. Attached is a copy of the rules as we expect them to be proposed. CWAs are, by this communication, instructed to begin applying the policies contained in the draft rules for Medicaid Only and New Jersey Care cases beginning October 1, 1989 in accordance with the implementation instructions below. The CWAs will be immediately notified of any further revision to the draft rules prior to their formal proposal.

These draft rules are substantially the same as were given to CWA representatives at the spousal impoverishment briefings held September 18 and 19, 1989. Apart from a few insignificant language changes, one substantive revision has been made. In the material (on page 3 of the attached) cited as N.J.A.C. 10:71-4.7(b) (transfer of resources), a revision has been made that excludes Class A licensed special hospitals from the those facilities providing institutional level services. Therefore, with this revision, the transfer of resources provisions do not apply to persons receiving care in acute care general hospitals or Class A licensed special hospitals.

The new provisions relating to the combining of spousal resources apply only to the first period of continuous institutionalization beginning on or after September 30, 1989 (regardless of the date of application). For persons whose current period of continuous institutionalization began before September 30, 1989, the old rules apply and only those resources actually owned by the institutionalized individual will be counted in the eligibility determination.

The spousal impoverishment provisions provide that the transfer of resources penalty applies only to eligibility for Medicaid reimbursement for institutional level services. Therefore, effective October 1, 1989 and thereafter, the CWAs shall apply a period of ineligibility for resource transfer to the receipt of

Medicaid reimbursement for institutional level services (as defined in the material cited as N.J.A.C. 10:71-4.7) regardless of the date that the resource was transferred. Therefore, if a Medicaid applicant was found to have transferred a resource in July 1989, he or she would be eligible for non-institutional level Medicaid services such as, acute care general hospital, pharmaceutical, and physician services. He or she would be ineligible for institutional level services such as, skilled nursing facility services for a 24-month period beginning with the date of the resource transfer.

For persons seeking or receiving Medicaid reimbursement for institutional level services, the old rules for transfer of resources apply to all resource transfers occurring before October 1, 1989. The new provisions apply to all transfers occurring on or after October 1, 1989. Therefore, if an applicant transferred his home which was serving as his principal place of residence to his niece on September 15, 1989 for less than adequate consideration, he would not be subject to an ineligibility period because, under the pre-October 1, 1989 rules, the transfer was permissible. If, however, that same transfer occurs on or after October 1, 1989, the CWA would apply the resource transfer penalty because, under the new policy, the transfer of a home to a niece is not a permissible transaction.

The new maintenance deductions for the community spouse and other relatives are effective for any Medicaid eligible individuals residing in a Title XIX institution on or after October 1, 1989 regardless of the date the institutionalization began. The Division will be forwarding reports to the CWAs in the near future identifying all individuals currently claiming a spousal deduction and those who are on the Medicaid Eligibility File who are coded as married and who are institutionalized in a Title XIX facility. This list will help the CWA identify those cases that should be reviewed to ascertain the proper community spouse deduction under the new rules. The CWA must review potentially affected cases and adjust the community spouse allowance no later than February 1990. For any case requiring a modification to the current spousal maintenance deduction, the CWA must make the adjustment retroactive to October 1, 1989.

When reviewing the cases for increased deductions for the community spouse, the CWA shall also determine if there are other relatives in the community spouse's household qualifying for the family member deductions. Any additional deductions for their needs shall likewise be applied retroactively to October 1, 1989.

When the new spousal impoverishment policies require adverse action in a Medicaid Only or New Jersey Care case, the CWA should, in the notice to the applicant or recipient, cite as the authority for the action the following as appropriate until final State rules are promulgated:

Transfer of resources - Section of 1917(c) of the Social Security Act

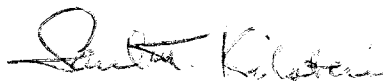
Ineligibility due to the joint counting of resources - Section 1924(c) of the Social Security Act

Any adverse action by the county based on current rules must, of course, be based on the appropriate existing New Jersey Administrative Code reference.

The Division is currently developing a resource assessment form that will be utilized for persons who request an evaluation of the couple's total resources and the amount of the community spouse's share of the resources when one member of a couple has been institutionalized. This form should be available shortly.

Questions regarding the contents of this letter or the attached policy should be referred to the Medicaid field staff assigned to your county.

Sincerely,

A handwritten signature in dark ink, appearing to read "Saul M. Kilstein", written in a cursive style.

Saul M. Kilstein
Director

SMK:RHh

Attachment

cc: Marion E. Reitz, Director
Division of Economic Assistance

Nicholas Scalera, Acting Director
Division of Youth and Family Services

DRAFT

SUBCHAPTER 4. RESOURCES

10:71-4.5 Resource eligibility standards

- (a) For eligibility in the Medicaid Only Program, total countable resources are [limited by] subject to the following limits. (See N.J.A.C. 10:71-4.1(b) regarding [resources defined] definition of resources, [and] N.J.A.C. 10:71-4.2 regarding countable resources, and N.J.A.C. 10:71-4.8 regarding resources of a couple when one member is applying for Medicaid for institutional services.)

1. and 2. (No change.)

- (b) and (c) (No change.)

- (d) Resource maximum (institutionalized individuals): The resource maximum for an individual in (c) above applies equally to individuals institutionalized in a Title XIX approved facility. Countable resources held in the institution (e.g., trust funds, personal needs accounts) together with those held outside the institution, are to be applied toward the resource maximum. If the resource maximum is exceeded, Medicaid eligibility will cease. (See also N.J.A.C. 10:71-4.8 regarding resource eligibility for institutionalized individuals.)

- (e) (No change.)

10:71-4.6 Deeming of resources

- (a) and (b) (No change.)

- (c) Applicant/recipient couple: In the case of an applicant/recipient couple, the total amount of the husband's and wife's combined countable resources shall be applied to the resource maximum for a couple. Such individuals will continue to have resources treated in this manner until they have been separated for one calendar month. At such time, the individuals will be considered to be living alone.

1. If one member of an eligible couple enters a Title XIX institution, only the resources of the institutionalized individual will be counted in the determination of his or her eligibility beginning with the date of admission except as provided in N.J.A.C. 10:71-4.8.

- (d) Applicant/recipient living with ineligible spouse: If the applicant/recipient lives with an ineligible spouse, all countable resources of the ineligible spouse are deemed to the applicant/recipient. The value of the total countable resources is compared to the resource maximum for a couple. Such individuals will continue to have resources treated in this manner until they have been separated for one full calendar month. At such time, the individuals will be considered to be living alone.

1. Separation due to institutionalization: [If a physician has certified that the applicant's/recipient's duration of stay in a Title XIX facility (or combination of such facilities) is expected to be a full calendar month or more, the applicant/recipient shall be considered to be living alone at the time of such certification.] If one member of the couple enters a Title XIX institution, only the resources of the institutionalized individual will be counted in the determination of his or her eligibility beginning with the date of admission except as provided in N.J.A.C. 10:71-4.8.

- (e) Applicant/recipient unmarried and under 18 years of age, living with parents: If the applicant/recipient is an unmarried child under the age of 18 years of age who lives with his or her parents (including stepparents), the total value of all countable resources in excess of the appropriate parental resource maximum, cited in (e)2 below, shall be applied toward the resource maximum for an individual (see N.J.A.C. 10:71-4.5). A child will be considered to be not living with his or her parents when he or she has ceased living with them for a period of one calendar month.

1. Child not living with parents due to institutionalization: If a physician has certified that the child's duration of stay in a Title XIX facility (or a combination of such facilities) is expected to be [a full calendar month] 30 consecutive days or more, such child shall be considered to be not living with his/her parents at the time of such certification. In such circumstances, only the child's own countable resources shall be applied to the resource maximum for an individual.

2. and 3. (No change.)

- (f) (No change.)

10:71-4.7 Transfer of resources

(a) The provisions of this section apply only to persons who are receiving an institutional level of services or who are seeking that level of services. 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 resources at less than fair market value at any time during or after the 24 month period 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 that the individual applies for Medicaid as an institutionalized individual.

[(a)](b) The following definitions apply in situations involving the transfer of resources:

1. and 2. (No change.)
3. Institutionalized individual: An institutionalized individual for the purposes of this of this section is a person who is an is receiving care in a skilled nursing facility, intermediate care facility (level A or B and ICFMR) and licensed special hospital (Class B or C) or Title XIX government psychiatric hospital (if under the age of 21 or age 65 and over). For the purposes of this section, an institutionalized individual shall include a person seeking befits under a home or community care waiver program, not including the Home Care Expansion Program). An institutionalized individual shall not include a person who is receiving care in an acute care general hospital or a Class A licensed special hospital.

[(b)](c) (General procedures: If an individual or his or her spouse [applying for Medicaid] 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 [nonexcluded] resources (including any interest in a resource or future rights to a resource) within the 24 months preceding the date of application or entry into institutional care, the following steps shall be taken and fully documented in the case record.

1. (No change.)

6. Advise the applicant that he or she may rebut the presumption that a resource was transferred at less than FMV in order to qualify for Medicaid (see [(g)] (i) below).

[(c)](d) [Excluded resources: Resources which are excluded in accordance with N.J.A.C. 10:71-4.4 are not subject to the transfer provisions. A transferred resource shall be excluded if, at the time of transfer, the resource would have been excluded if the individual were an applicant. For example, if an individual transfers a home serving as his or her place of residence and subsequently applies for Medicaid, the CWA would not consider the UV of the home as a resource.] The provisions of this section apply whether or not the resource would have been considered an excluded resource 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 institutionalized individual's spouse;
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;
 - 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.
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 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 must have exceeded normal personal support activities (e.g., routine transportation and shopping). The individual's physical or mental condition must have been such as to require special attention and care. The care provided by the son or daughter must have been essential to the health and safety of the individual and 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 provisions of this section do not apply to the following resource transfers:

1. The resources were transferred to the community spouse (or to another individual for the sole benefit of the community spouse) prior to the entry into institutional care so long as the resources were not subsequently transferred by the community spouse;

i. If funds were transferred to another individual for the sole benefit of the community spouse prior to entry into institutional care, in order that the transfer not be considered to have been for the purposes of qualifying for Medicaid, the funds must have been transferred in the form of a legally binding trust document specifying that the trustee(s) may use the funds solely for the benefit of the community spouse. Should the transferred funds not be so designated, the transfer will be presumed to be for the purpose of qualifying for Medicaid in accordance with the provisions of this section.

2. The resources 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,

3. The resources were transferred from the institutionalized individual or the community spouse to the institutionalized 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 Section of the Division of Medical Assistance and Health Services in accordance with the provisions of N.J.A.C. 10:71-3.13.

[(d)](f) (No change in text.)

[(e)](g) Resource transferred, resource limit not exceeded: When the UV of a transferred resource, combined with all other countable resources does not exceed the applicable resource limit, the application shall be processed as usual. In addition, the following procedures shall be adhered to.

1. (No change.)

2. The client shall be informed that although eligible at time of application, if his or her resources, including the amount of the UV, should exceed the resource maximum within the 24 month period, he or she will lose Medicaid eligibility for long term care services.

i. Example: At the time of application the UV equals \$1,000, other resources equal \$200.00 for a total of \$1,200, the client is resource eligible. At the time of redetermination, the UV equals \$1,000, other resources equal \$1,100 for total of \$2,100, the client is ineligible because of excess resources and [the case must be terminated] eligibility for long term care services will terminate.

3. (No change.)

[(f)](h) Resource transferred, resource limit exceeded: When the UV of a transferred resource combined with other countable resources, exceeds the resource limit, [the application] eligibility for long term care 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 that this amount will be counted toward the resource maximum for 24 months from the date of disposal. 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 [(g)] (i) below).
3. Prepare a list of such cases for control purposes [in accordance with (e) 3 above]. The control list must 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.

[(g)](i) (No change in text.)

[(h)](j) (No change in text.)

[(i)](k) (No change in text.)

10:71-4.8 Institutional eligibility; resources of a couple

(a) In the determination of resource eligibility for an individual requiring long term care, the county welfare agency shall establish the combined countable resources of a couple as of the first period of continuous institutionalization beginning on or after September 30, 1989. This determination shall be made upon a request for a resource assessment in accordance with N.J.A.C. 10:71-4.9 or at the time of application for Medicaid benefits. The total countable resources of the couple shall include all resources owned by either member of the couple individually or together. The CWA shall establish a share of the resources to be attributed to the community spouse in accordance with this section. (No community spouse's share of resources may be established if the institutionalized individual's current continuous period of institutionalization began at any time before September 30, 1989.)

1. The community spouse's share of the couple's combined countable resources is based on the couple's countable resources as of the first moment of the first day of the month of the current period of institutionalization beginning on or after September 30, 1989 and shall not exceed \$60,000 unless authorized in 4 or 5 below. The community spouse's share of the couple's resources shall be the greater of:

- i. \$12,000; or
- ii. One half of the couple's combined countable resources.

2. In determining the resource eligibility of the institutionalized spouse, the community spouse's share of the resources is subtracted from couple's total combined resources as of the first moment of the first day of the month of application for Medicaid. If the remaining resources are less than or equal to \$2,000, the institutionalized spouse is resource eligible. If the remaining resources exceed \$2,000, eligibility may not be established.
 - i. In the case of an individual whose eligibility for institutional care is determined in accordance with the rules applicable for New Jersey Care (see N.J.A.C. 10:72 et seq.), resource eligibility will exist when the couple's combined resources, less the community spouse's share of the resources, are equal to or less than \$4,000.
3. To the extent that the community spouse's share of the combined resources are not already owned by the community spouse, the ownership of the community spouse's share of the resources must be transferred to the community spouse within 90 days of a determination of eligibility for institutional Medicaid services. The CWA may extend the transfer period if individual circumstances warrant a longer period to affect the transfer. Resources not transferred by the end of the 90-day period (or extension) shall be counted in the determination of eligibility for the institutionalized individual.
 - i. Eligibility for the institutionalized individual shall be established pending the actual transfer of the resources if he or she attests, in writing, that he or she intends to transfer the community spouse's share of the resources to the community spouse.
4. If a court of competent jurisdiction has ordered that resources be transferred to the community spouse in an amount higher than that authorized in 1 above, the higher court-ordered amount shall be recognized as the community spouse's share. Any resource transferred under such a court order shall not be subject to the resource transfer penalty described at N.J.A.C. 10:71-4.7.
5. If in accordance with N.J.A.C. 10:71-5.7(d), additional resources have been authorized to be set aside for the community spouse in order to provide for a sufficient income maintenance level, such additional resources are not subject to the

limitation in this section on the community spouse's share of the couple's combined resources. Any resource transferred to the community spouse under this provision shall not be subject to the resource transfer provision described at N.J.A.C. 10:71-4.7.

6. For purposes of this section, an institutionalized individual does not include any individual who is not likely to remain in a Title XIX facility for a period of 30 consecutive days. If a physician has not certified that the individual's stay in the facility is expected to be a period of 30 or more consecutive days, that individual's Medicaid eligibility will be determined as if he or she continued to reside in the community until he or she has been in a Title XIX facility (or a combination of Title XIX facilities) for a period of 30 consecutive days.
7. For purposes of this section, a continuous period of institutionalization means 30 consecutive days of institutional care in a medical institution, and/or Medicaid funded home and community-based waiver services. Continuity is broken by absences from the institution for 30 consecutive days or the non-receipt of home or community based services for 30 consecutive days.
8. For purposes of determining the community spouse's share of the couple's resources only, countable resources of a couple shall include all resources not subject to exclusion under N.J.A.C. 10:71-4.4 except that one automobile shall be excluded without regard to the dollar limits set forth at N.J.A.C. 10:71-4.4(b)2 and personal effects and household goods shall be excluded without regard to the dollar limits set forth at N.J.A.C. 10:71-4.4(b)3.
9. In determining retroactive eligibility (the three-month period immediately preceding the month of application) based on the first Medicaid application in a continuous period of institutionalization, the community spouse's share of the resources shall be deducted from the couple's combined total resources. If the institutionalized individual subsequently files another Medicaid application for the same continuous period of institutionalization, retroactive eligibility will be based on all resources actually owned by the institutionalized individual.

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 welfare agency 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 welfare agency 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 shall establish the total countable resources of the couple. The county welfare agency 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 welfare agency.
 - 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 welfare agency or the requesting parties request a delay.
- (c) At the time of providing the couple with a copy of the resource assessment, the county welfare agency 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.

10:71-5.4 Includable income

- (a) (No change.)
- (b) Countable income: Income remaining after appropriate income exclusions shall be applied toward the applicable income eligibility standard. The applicant's living arrangement affects the method of treatment of income and its relationship to the standards as stated in the variations appearing below.

1. (No change.)
2. Applicant/recipient couple: In the case of an applicant/recipient couple, living together, the total amount of the husband's and wife's countable income shall be combined and applied to the appropriate income eligibility standard for a couple. Such individual's will continue to have their income combined until they have been separated for a period of 6 months.
 - i. One member of a couple institutionalized: When one member of an eligible couple is institutionalized and the other remains in the community, [income of both is combined for the first 6 months and applied toward the amount of the Medicaid "Cap" plus the appropriate community living arrangement standard. The institutionalized individual's gross income is combined with the income (after exclusions) of the spouse in the community. In the determination of income available for medical reimbursement, only the income of the institutionalized spouse shall be considered. After 6 months of institutionalization, the couple shall be treated as separate individuals with no combining of income.] no income of the community spouse will be used in the determination of income eligibility beginning in the month of admission into a Title XIX facility.
 - ii. (No change.)
3. Applicant/recipient living with ineligible spouse: If the applicant/recipient lives with an ineligible spouse, the income of the ineligible spouse is deemed to the applicant/recipient (N.J.A.C. 10:71-5.5). Such individuals income shall continue to be deemed until the husband and wife have been separated for 1 month. At such time the individual's will be considered to be living alone and deeming shall cease.
 - i. Effect of institutionalization: [If a physician has certified that the applicant's/recipient's duration of stay in a Title XIX facility (or a combination of such facilities) is expected to be a full calendar month or more, the applicant/recipient shall be considered to be living alone and deeming shall cease at the time of such certification.] Income of the community spouse shall not be considered in the

determination of income eligibility of the institutionalized individual beginning with the month of admission into a Title XIX facility.

4. (No change.)

10:71-5.6 Income eligibility standards

(a)-(c) (No change.)

(d) Institutional eligibility: For the purpose of the Medicaid Program, Title XIX approved facilities shall include acute care general hospitals, skilled nursing facilities, intermediate care facilities (level A, B, and C) and Title XIX psychiatric hospitals (for persons under the age of 21 and age 65 and over).

1.-3. (No change.)

4. Temporary absence from the institution: Any temporary absence, during which the individual remains a patient of the institution, does not interrupt a continuous stay in the institution.

[(e) Living allowance deductions: When an individual is in a Title XIX facility and program eligibility has been determined under the Medicaid "Cap", certain income deductions shall be made in the calculation of excess income available for payment to the facility. These amounts shall be clearly noted on Form PA-3L (Statement of Income Available for Long Term Care Facility Payment).

1. Personal needs allowance: An amount of \$25.00 per month for personal needs expenses plus the gross amount of additional income derived from work that is considered essential toward satisfying the individual's developmental need to achieve a certain degree of independence shall be deducted from the income available for payment to the facility. The combined total deduction may not exceed the community living standard established for a noninstitutionalized individual.

2. Maintenance of dependents: Living allowance deductions shall be provided in accordance with 2i and 2ii below. Such deductions shall be reduced dollar for dollar by any unearned income that the dependents in community may have. Earned income of the dependents shall be adjusted by subtracting only mandatory payroll deductions prior to applying such income against the allowance. Any deductions provided for in this section are to be applied only

towards maintenance of dependents in the community and, in no event, may such deductions be accumulated by the institutionalized individual.

- i. A maximum of the amount shown in Table B, Figure II for an individual shall be deducted per month for the maintenance of an eligible individual's spouse who resides in the community without dependent children, provided that the couple resided together immediately prior to institutionalization.
 - ii. For those dependent individuals who fit the basic definition of an AFDC eligible unit (see N.J.A.C. 10:81-1.3 et seq. of the ASH), a monthly amount shall be deducted, not to exceed the AFDC-C allowance standard for the number of dependents.
 - iii. Efforts should be made to refer the individual's spouse or other dependent(s) remaining in the community to appropriate public assistance programs to apply for benefits on their own behalf.
3. Maintenance of a home: When a physician has certified that an eligible individual will be institutionalized for a temporary period only and is likely to return home within 6 months, a maximum of \$150.00 may be deducted from income for the maintenance of the individual's home in the community. This allowance shall be the actual cost of such maintenance (e.g., mortgage or lease payments, insurance, and other incidental costs) or \$150.00, whichever is less. The period of this maintenance deduction shall not exceed 6 months. This deduction shall be applied only after eligibility under the Medicaid "Cap" has been established and may not be utilized when an allowance has been deducted for the maintenance of a dependent spouse and/or children or if any person(s) residing in the home is able to provide such maintenance.
- i. Any deduction provided for in this subsection is to be applied only toward the maintenance of a home in the community and in no event may such deduction be accumulated by the institutionalized individual.
4. Health insurance premiums: Health insurance premiums covering the recipient may also be deducted.

- i. If the premium is not paid monthly, the amount shall be prorated over the period it is intended to cover.
 - ii. If the premium covers other individuals in addition to the recipient, only that portion attributable to the recipient shall be deducted.
- (f) Temporary absence from the institution: Any temporary absence, during which the individual remains a patient of the institution, does not interrupt a continuous stay in the institution.
- (g) Eligibility under life care and pay-as-you-go agreements: In a contractual agreement where the individual has transferred his available assets to the facility in exchange for full medical care in the institution, the institution has a legal responsibility to provide such care and Medicaid benefits are not payable for the institutional care. However, Medicaid eligibility may exist in the following circumstances. (See also N.J.A.C. 10:71-5.4(a)13.)
 - 1. When it can be determined that no enforceable contract exists (e.g., because the facility is financially unable to fulfill its responsibilities under the contract and all terms of the agreement are thus void), the facility has a legal obligation to refund to the individual any assets which remain from the amount assigned at the time the contract was signed. The individual may be eligible for Medicaid Only as long as all other eligibility criteria (including resources) are met.
 - 2. When a contract is not actually rescinded and the individual retains his/her right under the terms of the contract but, where his/her contract rights for care in the facility are not fully met, Medicaid benefits may be available for those medical expenses not being met by this facility if the individual meets eligibility requirements.
 - 3. When the contractual agreement for care in the facility does not include all of the medical care (e.g., is limited to basic room and board), Medicaid benefits may be available for those medical expenses not covered by the contract as long as all eligibility criteria are met.
 - 4. In those contractual situations above where Medicaid eligibility may exist, the value of in-kind room and board is not considered income.]

10:71-5.7 Post-eligibility treatment of income; institutionalized individuals

- (a) The amounts specified in (b) through (h) of this section shall be deducted from the income of an institutionalized individual prior to the application of his or her income to the cost of the long term care. These deductions apply only after the individual is determined eligible for Medicaid and shall not be deducted in the determination of income eligibility.
1. Should the total deductions authorized under this section exceed the institutionalized individual's income, no assistance is available from the Medicaid program to make up the deficit. In such circumstances, available funds shall first be used to provide the institutionalized individual with his or her personal needs allowance. Any remaining deductible income may be distributed to the community spouse or other family members as decided by the institutionalized individual, not to exceed the amount authorized under this section for any individual.
 2. The deductions authorized in (c) through (e) below for the maintenance of the community spouse and other family members apply only so long as there is a community spouse as defined in (c) below. Deductions for the community spouse and other family members shall cease in the first full-calendar month after the community spouse dies, becomes divorced, or is institutionalized.
- (b) A personal needs allowance in the amount of \$35.00 shall be deducted from the institutionalized individual's income. In addition, gross income derived from employment that is considered essential toward satisfying the individual's developmental need to achieve a certain amount of independence shall be deducted from the individual's income. The combination of these deductions shall not exceed the amount in Table B for an individual living alone as found at N.J.A.C. 10:71-5.6(c)5.
- (c) There shall be deducted from the institutionalized individual's income an amount for the maintenance of the community spouse. Except as specifically provided below, the deduction for the maintenance of the community spouse shall not exceed \$815.00. For purposes of this section, a community spouse shall be defined as an individual who is legally married to an institutionalized individual under the provisions of State law, who resided with the institutionalized individual immediately prior to the

institutionalization, and who is not himself or herself institutionalized. In arriving at the amount that may be deducted for the maintenance of the community spouse, the deductions authorized by this section shall be reduced by the gross income of the community spouse. The community spouse deduction is authorized only to the extent that the income deducted is actually made available to (or for the benefit of) the community spouse. No amount of the community spouse's maintenance deduction may be retained by the institutionalized individual.

1. If the community spouse's average monthly shelter expenses for his or her principal place of residence exceed \$244.00, the amount of that excess shall increase the maximum community spouse maintenance deduction. Shelter expenses are limited to rent or mortgage (including principal and interest), taxes and insurance, a utility standard for the individual's utility expenses, and in the case of a condominium or cooperative, the monthly required maintenance charge.

2. A utility allowance shall not be authorized unless the community spouse directly incurs charges for utilities. A community spouse who directly incurs charges for heating fuel (in accordance with food stamp regulations at N.J.A.C. 10:87-5.10(a)5iv) separate and apart from their rent or mortgage payments, shall be entitled to a utility allowance in the amount specified as the "Heating Utility Allowance" at N.J.A.C. 10:87-12.1. If the community spouse does not directly incur heating fuel charges but does directly incur charges for a utility other than telephone, water, sewerage, or garbage collection, a utility allowance in the amount specified as "Standard Utility Allowance" at N.J.A.C. 10:87-12.1. If the only direct utility charge incurred by the community spouse separate and apart from the rent or mortgage is the telephone the amount specified at N.J.A.C. 10:87-12.1 as "Uniform Telephone Allowance" shall be added to the community spouse's monthly shelter costs. The telephone allowance shall not be used if either of the above utility allowances have been used because those standard allowances include telephone charges.

(d) When the institutionalized individual's income is insufficient to provide the maximum authorized deduction for the community spouse, either the institutionalized spouse or the community spouse can request a fair hearing in accordance with N.J.A.C. 10:71-8.4. If either member can establish at the fair hearing that the income

generated from the community spouse's share of the couple's resources is inadequate to raise the community spouse's income (together with the community spouse maintenance deduction) to the maximum authorized level, additional resources (beyond the community spouse's share as established at N.J.A.C. 10:71-4.8) may be set aside for the community spouse. The amount of resources to be set aside shall be that amount that is determined sufficient to generate sufficient income to raise the community spouse's gross income to the maximum authorized level.

- (e) If either the institutionalized spouse or the community spouse is dissatisfied with the determination of the amount of the community spouse maintenance deduction, he or she may request a fair hearing in accordance with N.J.A.C. 10:71-8.4. If it is established at the fair hearing that the community spouse needs income above the amount established by the community spouse maintenance deduction due to exceptional circumstances resulting in financial duress, there shall be substituted for the community spouse maintenance deduction such amount as is necessary to alleviate the financial duress and for so long as directed in the final hearing decision.
- (f) If a court has entered an order against an institutionalized spouse for monthly income for the support of a community spouse and the amount of the order is greater than the amount of the community spouse deduction, the amount so ordered shall be used in place of the community spouse deduction.
- (g) A family member maintenance deduction shall be calculated for each family member of the institutionalized individual.
 - 1. For purposes of this section, family members must reside with the community spouse and shall be limited to the following persons:
 - i. Children of either member of the couple who are under the age of 21;
 - ii. Children over the age 21 who are claimed as dependents by either member of a couple for tax purposes under the Internal Revenue Code;
 - iii. Parents of either member of a couple who are claimed as dependents for tax purposes under the Internal Revenue Code as dependents by either spouse; or

iv. A brother or sister (including half-brothers and half-sisters and siblings gained through adoption) of either member of a couple and who are claimed as dependents for tax purposes under the Internal Revenue Code.

2. The family member deduction shall be computed as follows. The family member's gross income shall be subtracted from \$815.00. One-third of the remaining amount shall be the family member deduction for that family member.

(h) If a physician has certified that the individual will be institutionalized for a temporary period only and is likely to return to the his residence within six months of the date of the date of institutionalization, a maximum of \$150.00 may be deducted from the institutionalized individual's income for the maintenance of his or her home in the community. This deduction shall be limited to the actual costs of such maintenance (e.g., mortgage or rent payments, taxes, insurance, and other incidental costs) or \$150.00, whichever is less. This deduction may be applied against the individual's income for no longer than six months. This deduction may not be applied if a deduction has been made for the maintenance of a community spouse or other family member residing in that residence.

1. This deduction must be applied to the costs of maintaining the residence and may not be accumulated by the institutionalized individual.

(i) If the institutionalized individual has health insurance covering himself or herself, the amount of the insurance premiums shall be deducted.

1. If the premium is billed other than monthly, the amount of the premium shall be prorated and deducted accordingly.

2. If the premium covers other individuals in addition to the institutionalized individual, only that portion of the premium attributable to the institutionalized individual shall be deducted.

10:71-5.8 Eligibility under life care and pay-as-you-go agreements: In a contractual agreement where the individual has transferred his available assets to the facility in exchange for full medical care in the institution, the institution has a legal responsibility to provide such care and Medicaid benefits are not payable for the institutional care. However, Medicaid eligibility may

exist in the following circumstances. (See also N.J.A.C. 10:71-5.4(a)13.)

- (a) When it can be determined that no enforceable contract exists (e.g., because the facility is financially unable to fulfill its responsibilities under the contract and all terms of the agreement are thus void), the facility has a legal obligation to refund to the individual any assets which remain from the amount assigned at the time the contract was signed. The individual may be eligible for Medicaid Only as long as all other eligibility criteria (including resources) are met.
- (b) When a contract is not actually rescinded and the individual retains his or her right under the terms of the contract but, where his or her contract rights for care in the facility are not fully met, Medicaid benefits may be available for those medical expenses not being met by this facility if the individual meets eligibility requirements.
- (c) When the contractual agreement for care in the facility does not include all of the medical care (e.g., is limited to basic room and board), Medicaid benefits may be available for those medical expenses not covered by the contract as long as all eligibility criteria are met.
- (d) In those contractual situations above in which Medicaid eligibility may exist, the value of in-kind room and board is not considered income.

10:71-[5.7] 5.9 (No change in text.)