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Commissioner

NEW YORK
state department of
HEALTH

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Executive Deputy Commissioner

ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 11 OHIP/ADM-4

TO: Commissioners of
Social Services

DIVISION: Office of Health
Insurance Programs

DATE: July 11, 2011

SUBJECT: Treatment of Irrevocable Pre-Need Funeral Agreements

SUGGESTED DISTRIBUTION:	Medicaid Staff Temporary Assistance Staff Fair Hearing Staff Legal Staff Staff Development Coordinators
CONTRACT PERSON:	Local District Liaison Upstate: (518)474-8887 New York City: (212)417-4500
ATTACHMENTS:	LDSS-4321 - Explanation of the Excess Resource Program

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
91 ADM-19		360-4.6	Gen. Bus. Law	MRG pg.365	96 GIS MA/044
91 ADM-17		(b)(1)(i),	Section 453		
88 INF-75		(ii) & (iii)	SSL 209.6		
86 ADM-47		360-4.7(a)			
84 ADM-9		(b)			

I. PURPOSE

This Administrative Directive (ADM) is to advise local departments of social services (LDSS) of the appropriate treatment of irrevocable pre-need funeral agreements, established by Medicaid applicants/recipients (A/Rs) for their or their family member's funeral and burial expenses.

II. BACKGROUND

A pre-need funeral agreement is a contract in which payment is made to a funeral director, funeral firm, undertaker, cemetery, or other person, firm or corporation, in return for the furnishing of the specified merchandise and/or services to be provided upon the death of the beneficiary of the agreement. Generally, payment is made in full for the merchandise and/or services selected under the contract in advance of need and must be kept on deposit pending use upon the death of the beneficiary of the contract, or repaid to the person making such payment.

Prior to January 1, 1997, pre-need funeral agreements created by Medicaid applicants/recipients were revocable under State law. Since these agreements were revocable, the A/R could terminate the agreement and have his or her money refunded at any time. Although assets of a revocable trust are deemed available to the A/R, amounts paid by a Medicaid A/R in connection with a revocable pre-need funeral agreement often were disregarded, either as part of the allowable \$1,500 burial fund exemption or because they represented the pre-purchase of exempt burial space items.

Chapter 660 of the Laws of 1996 amended the Social Services Law (SSL) and the General Business Law to provide that if a Medicaid or Supplemental Security Income (SSI) applicant/recipient establishes a pre-need funeral agreement for his/her own funeral and/or burial expenses on or after January 1, 1997, the agreement must be irrevocable. The A/R is not entitled to have his/her money returned once it is paid. Any funds remaining in an irrevocable pre-need funeral agreement after payment of all funeral and burial expenses must be paid to the social services official responsible for arranging indigent burials in the district where the decedent resided.

Pre-need funeral agreements entered into before January 1, 1997, continued to be revocable as a matter of law, as did pre-need funeral agreements entered into on or after January 1, 1997, for persons who were not Medicaid/SSI A/Rs. Additionally, pre-need funeral agreements entered into for the benefit of family members of the Medicaid A/R were required to be revocable under General Business Law.

Chapter 109 of the Laws of 2010 further amended the SSL and the General Business Law to require that pre-need funeral agreements established by an SSI or Medicaid A/R for a family member must be irrevocable. This change in law is effective for pre-need funeral agreements entered into on or after January 1, 2011.

For purposes of this directive, the following definitions apply:

Burial Fund - Money designated to meet burial expenses. "Burial fund" in this ADM refers to the \$1,500 (\$3,000 for a couple) that SSI-related A/Rs are allowed to retain for non-burial space items.

Burial Space Items - Burial plots, gravesites, crypts, vaults, mausoleums, caskets, urns, or other repositories customarily and traditionally used for the remains of deceased persons. Arrangements for opening and closing of the grave, burial containers (e.g., for caskets), headstones and headstone engraving are also considered burial space items.

Family Members - An A/R's spouse, minor and adult children (including adoptive children and step-children), brothers, sisters, parents, adoptive parents and the spouses of those individuals as long as the marriage is in effect.

Irrevocable Pre-Need Agreement - A contract in which payment is made in advance of need to a funeral director, funeral firm, undertaker, cemetery, or other person, firm or corporation, in return for the furnishing of the specified merchandise and/or services to be provided upon the death of the beneficiary of the agreement. Payment for the merchandise and/or services purchased under the contract is required to be held in an irrevocable trust and cannot be refunded to the purchaser or other beneficiary.

Non-Burial Space Items - Items such as topical disinfection, custodial care, dressing/casketing, cosmetology, supervision for visitation and/or funeral service, hearse, death notices, flowers and out-of-town shipping.

III. PROGRAM IMPLICATIONS

Effective January 1, 1997, pre-need funeral agreements established for the funeral and/or burial expenses of Medicaid A/Rs with assets of the A/R or a legally responsible relative must be irrevocable. Effective January 1, 2011, pre-need funeral agreements established with assets of an A/R or a legally responsible relative for the funeral and/or burial expenses of a family member must also be irrevocable. The money put into a trust for an irrevocable pre-need funeral agreement must be used only for funeral and burial expenses. If any money is left over after funeral and burial expenses have been paid, the remaining money goes to the local department of social services where the decedent resided for indigent burials.

For Medicaid eligibility purposes, the value of an irrevocable pre-need funeral agreement is not considered an available resource of the A/R. In addition, as long as the A/R, or his/her spouse, is paying fair market value for the services and merchandise to be furnished pursuant to the agreement, the payment of funds in connection with the agreement is not considered an uncompensated transfer of assets.

Generally, the pre-need funeral agreement includes pre-paid burial space items. However, certain burial space items may be purchased and paid for in full prior to entering into an irrevocable pre-need funeral agreement.

These items remain outside the agreement, and may include such items as a cemetery plot, urn, vault, mausoleum, crypt or headstone. Burial space items purchased outside of a pre-need agreement are excluded from treatment as a countable resource.

For Medicaid applicants who do **not** have a resource test, a review of pre-need funeral agreements is not required. For SSI-related A/Rs who have a resource test, the district must review pre-need agreements established for the A/R or a family member with assets of the A/R or the A/R's legally responsible relative. In determining whether a pre-need funeral agreement is irrevocable, the local district must review:

1. The date of the agreement - Pre-need funeral agreements entered into for Medicaid A/Rs on or after January 1, 1997, are required by law to be irrevocable. Agreements entered into for an A/R's family member on or after January 1, 2011, are required by law to be irrevocable; and
2. The language of the agreement - Effective January 1, 1997, irrevocable pre-need funeral agreements created in New York are required by law to contain the following disclosure statement:

"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."

Effective January 1, 2011, all irrevocable pre-need funeral agreements created in New York are required by law to contain the following revised disclosure statement:

"NEW YORK LAW REQUIRES THIS AGREEMENT TO BE IRREVOCABLE FOR APPLICANTS FOR AND RECIPIENTS 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. WHETHER THIS AGREEMENT IS FOR YOUR FUNERAL AND BURIAL EXPENSES OR FOR THOSE OF A FAMILY MEMBER, 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. IF THIS AGREEMENT IS FOR THE FUNERAL AND BURIAL EXPENSES OF A FAMILY MEMBER, AFTER YOUR DEATH SUCH FAMILY MEMBER MAY CHANGE THE CHOICE OF FUNERAL HOME AT ANY TIME."

In addition to an irrevocable pre-need funeral agreement, an SSI-related A/R may supplement the funeral agreement with a separate burial fund of up to \$1,500 (\$3,000 for a couple) when the funeral agreement includes less than \$1,500 (\$3,000 for a couple) in non-burial space items. If an SSI-related A/R has a separate burial fund, the LDSS must review the A/R's irrevocable pre-need funeral agreement to determine whether the agreement includes at least \$1,500 (\$3,000 for a couple) for the non-burial space items purchased under the agreement. As described more fully in Section IV.C. of the ADM, if less than \$1,500 (\$3,000 for a couple) has been paid for non-burial space items, the A/R may establish a supplemental burial fund in addition to the irrevocable pre-need funeral agreement.

IV. REQUIRED ACTION

A. Irrevocable Pre-Need Funeral Agreements Purchased for Medicaid A/Rs

Effective January 1, 1997, all pre-need funeral agreements entered into for Medicaid A/Rs with assets of the A/R or a legally responsible relative must be irrevocable, and the funds put into the agreement used only for funeral and burial expenses.

Medicaid/Family Health Plus A/Rs, who do not have a resource test, are not required to provide information on pre-need funeral agreements. The following instructions apply to SSI-related A/Rs who have a resource test.

In determining Medicaid eligibility for an SSI-related A/R, districts must review any pre-need funeral agreement entered into by the SSI-related A/R, or the A/R's spouse, for the A/R's benefit. If entered into on or after January 1, 1997, districts must review the agreement to verify that the agreement includes the irrevocable disclosure statement. The value of the agreement is not a countable resource if the agreement includes the irrevocable disclosure statement.

Note: An SSI-related Medicaid recipient whose receipt of Medicaid began prior to January 1, 1997, and who had a revocable pre-need funeral agreement in place, which was considered exempt because it contained exempt burial space items for the A/R and/or the A/R's spouse, and/or up to \$1,500 (\$3,000 for a couple) for non-burial space items, may maintain the revocable agreement.

If an A/R has a revocable funeral agreement worth more than \$1,500, the A/R must convert the agreement to an irrevocable pre-need funeral agreement in order to have the entire amount of the agreement disregarded. If the agreement remains revocable, only amounts designated for non-burial space items (up to \$1,500 for an individual and \$3,000 for a couple) can be disregarded. The A/R must be allowed ten days from the date of notification to convert a revocable pre-need agreement to an irrevocable agreement. The ten-day period may be extended if more time is needed (i.e., if delay is due to circumstances beyond the A/R's control).

SSI-related A/Rs who are eligible to spenddown excess resources must be given ten days from the date that they are advised of an excess resource amount to reduce the excess resource by establishing an irrevocable pre-need funeral agreement and/or a burial fund. For eligibility retroactive to the month of application and the three-month retroactive period, only amounts used to purchase an irrevocable funeral agreement and/or a burial fund for the applicant and the applicant's spouse can be used to reduce excess resources. The ten-day period may be extended if more time is needed. Offsetting of excess resources by these burial-related disregards will be allowed as if they were purchased during the retroactive period (see attached LDSS-4321, "Explanation of the Excess Resource Program").

For SSI-related individuals applying for Medicaid coverage of nursing facility services, an itemized statement of the services and merchandise purchased under the irrevocable pre-need agreement must be reviewed to determine whether an uncompensated transfer of assets has been made during the look-back period (a period of 60 months prior to the month of eligibility for coverage of nursing facility services). Payment to the funeral director is not considered an uncompensated transfer as long as the A/R is paying fair market value for customary non-burial space items and burial space items.

Customary non-burial space items can include, but are not limited to, transportation of the deceased by hearse, out-of-town shipping, newspaper death notices and flowers. An irrevocable pre-need funeral agreement should not include food, lodging or transportation expenses for family, friends or guests. If such expenses are included in the agreement, and the agreement was purchased during a transfer of assets look-back period, the funds paid for these expenses are to be treated as an uncompensated transfer of assets. Since the law provides for the purchase of a single irrevocable agreement for the A/R and any family member, the purchase of more than one irrevocable funeral agreement for the same individual may result in the purchase of additional agreements being treated as an uncompensated transfer.

Pre-existing irrevocable pre-need funeral agreements established in another state do not have to be converted and shall be disregarded. An out-of-state irrevocable pre-need funeral agreement does not have to contain the disclosure language stated on page 4 of this ADM.

After payment of the appropriate funeral and burial expenses, any funds remaining in an irrevocable pre-need funeral agreement must be paid to the social services official responsible for arranging indigent burials in the district where the decedent resided.

B. Irrevocable Pre-Need Funeral Agreements Purchased for Family Members

Effective January 1, 2011, pre-need funeral agreements established for a Medicaid A/R's family member with assets of the A/R or a legally responsible relative must be irrevocable as a matter of law. As with irrevocable agreements purchased for the A/R, irrevocable pre-need agreements purchased for family members are agreements with a funeral firm, funeral director, undertaker, or any other person, firm or corporation which can create such an agreement.

In determining Medicaid eligibility for SSI-related A/Rs, the district must review any pre-need funeral agreement purchased by the A/R, or his/her spouse, for a family member of the A/R. If the SSI-related individual was a Medicaid applicant/recipient when the pre-need funeral agreement was entered into, and the agreement was entered into on or after January 1, 2011, the agreement must be irrevocable. The value of the agreement, if it includes the appropriate irrevocable disclosure statement as referenced on page 4 of this directive, is disregarded. If the A/R, or the A/R's spouse, does not purchase an irrevocable funeral agreement for an A/R's family member, other than a spouse, prior to the month the A/R is seeking Medicaid coverage, amounts used to purchase the agreement are countable resources for the A/R until the month following the month in which the funds are actually paid to a funeral director. Unlike funeral agreements purchased for the A/R and his/her spouse, retroactive eligibility cannot be obtained by spending down excess resources through the purchase of irrevocable pre-need funeral agreements for family members.

Revocable pre-need agreements for an SSI-related A/R's family member entered into prior to January 1, 2011, must be converted to an irrevocable agreement or the value of the agreement will be treated as a countable resource. Pre-need agreements for family members purchased on or after January 1, 2011, but prior to the filing of an application for Medicaid, must be converted to an irrevocable pre-need funeral agreement in order to have the amount of the agreement disregarded. The A/R must be allowed ten days from the date of notification to convert the family member's revocable pre-need agreement to an irrevocable agreement. The ten-day period may be extended if more time is needed (i.e., if delay is due to circumstances beyond the A/R's control).

If a revocable pre-need funeral agreement entered into for the A/R's spouse is not converted to an irrevocable funeral agreement, only amounts designated for non-burial space items (up to \$1,500) can be disregarded.

Note: An SSI-related Medicaid recipient whose receipt of Medicaid began prior to January 1, 2011, and who had a revocable pre-need funeral agreement in place for a family member, which was considered exempt because the items purchased under the agreement were burial space items, may maintain the revocable agreement.

For individuals applying for Medicaid coverage of nursing facility services, where a pre-need funeral agreement was purchased for a family member during the look-back period, an itemized statement of services and merchandise purchased under the irrevocable pre-need agreement must be reviewed to determine whether an uncompensated transfer of assets has been made.

Any funds remaining in an irrevocable pre-need agreement after payment of the funeral and burial expenses must be paid to the social services official responsible for arranging indigent burials in the district where the decedent resided.

C. Supplemental Burial Fund

SSI-related A/Rs, who do not have an irrevocable pre-need funeral agreement or who have less than \$1,500 designated for non-burial space items in a pre-need funeral agreement, may be eligible to have additional funds disregarded by establishing a supplemental burial fund. If the A/R's spouse does not have an irrevocable pre-need funeral agreement or has a pre-need funeral agreement that has less than \$1,500 designated for non-burial space items, the A/R may also set up a supplemental burial fund for his/her spouse. A supplemental burial fund must be separately identifiable with a maximum initial value of \$1,500 (\$3,000 for a couple), or greater if it is court ordered. Exempt burial funds cannot be commingled with non-burial related resources.

To determine if a supplemental burial fund would be disregarded as a countable resource, the district must determine the amount designated for non-burial space items in the irrevocable pre-need funeral agreement. If the amount designated for non-burial space items does not equal \$1,500 (\$3,000 for a couple), the A/R may choose to have a supplemental burial fund. Life insurance policies owned by the A/R or the A/R's spouse must be counted first toward the supplemental burial fund as follows:

1. If the combined face value of the life insurance policies owned by the A/R is \$1,500 or less, add the amount designated for non-burial space items in the irrevocable funeral agreement to the combined face value of the life insurance policies. If the total is less than \$1,500, a supplemental burial fund for the difference would be allowed.
2. If the combined face value of life insurance policies is greater than \$1,500, the cash value is a countable resource. The A/R may designate the cash value as a burial fund in order to bring the non-burial space items up to the allowable \$1,500. If the life insurance policies have a face value greater than \$1,500 and their cash value exceeds \$1,500, only up to \$1,500 of the cash value is exempt as a burial fund. Any cash value in excess of the allowable supplemental burial fund is a countable resource.
3. When the cash value exceeds \$1,500, the A/R must provide a written statement that the entire cash value is intended for burial expenses. Although only amounts up to the \$1,500 may be disregarded, the excess is then considered funds set aside for burial expenses, which avoids the prohibition against commingling burial funds with non burial-related funds.
4. If the A/R does not have life insurance or the face/cash value, as applicable, does not equal \$1,500, other resources may be used to establish or add to a burial fund.

The same policy is applied when determining whether a supplemental burial fund may be established for the A/R's spouse.

Court ordered burial funds are allowed in any amount. When the court ordered burial fund exceeds \$1,500 (\$3,000 for a couple), the district may appeal the court order. If the court ordered burial fund is less than \$1,500 (\$3,000 for a couple), a supplemental burial fund may be established as appropriate.

Accumulated interest on burial funds is disregarded, regardless of whether the funds are exempt burial funds or non-exempt burial funds.

V. SYSTEMS IMPLICATIONS

A. MBL

Since irrevocable pre-need funeral agreements are not considered available resources, it is not necessary to enter the value of an irrevocable pre-need funeral agreement on MBL.

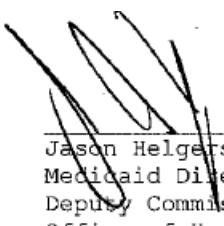
Exempt burial funds for the A/R (and his/her spouse) continue to be identified in MBL using resource exemption code 45.

B. Client Notice System

The "Explanation of the Excess Resource Program" attached to this ADM has been revised to explain when funeral/burial expenses can be used to reduce excess resources for retroactive eligibility. The "Explanation of the Excess Resource Program" is automatically attached to CNS excess resource notices.

VI. EFFECTIVE DATES

The provisions of this directive pertaining to pre-need funeral agreements purchased for an A/R's family member are effective July 1, 2011, retroactive to January 1, 2011. The policy provisions regarding pre-need funeral agreements entered into by Medicaid A/Rs for their own funeral and burial expenses has been effective since January 1, 1997, as advised in GIS 96 MA/044.



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