



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr. P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

ADMINISTRATIVE DIRECTIVE

TRANSMITTAL: 06 OMM/ADM-3

TO: Commissioners of
Social Services

DIVISION: Office of Medicaid
Management

DATE: May 4, 2006

SUBJECT: Spousal Impoverishment Allowance Increases for 2005 and 2006 and
Personal Needs Allowances for Certain Waiver Recipients

SUGGESTED DISTRIBUTION:	Medicaid Staff Fair Hearing Staff Legal Staff Audit Staff Staff Development Coordinators
CONTACT PERSON:	Local District Liaison Upstate: (518) 474-8887 New York City: (212) 417-4500
ATTACHMENTS:	"Spousal Impoverishment Income and Resource Amounts" Chart for 2005 and 2006 (available on-line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
04 OMM/ADM-4		360-4.3(f)	SSA 1924	MRG	GIS 06 MA/006
03 OMM/ADM-7		360-4.9	SSL 366-c	Pages	GIS 05 MA/049
01 OMM/ADM-4		360-4.10		225-227,	GIS 05 MA/002
96 ADM-11		360-2.6		230-231,	GIS 04 MA/032
91 ADM-33				238,	GIS 03 MA/027
91 ADM-27				331-334	GIS 03 MA/012
90 ADM-29					GIS 01 MA/037
89 ADM-47					GIS 00 MA/021
92 INF-14					GIS 00 MA/027
					MBL Transmittal
					04-2
					MBL Transmittal
					05-6

I. PURPOSE

This Administrative Directive (OMM/ADM) advises social services districts of the January 1, 2005 and January 1, 2006 increases in the following amounts:

1. Maximum protected resource allowance for a community spouse;
2. Community spouse's minimum monthly maintenance needs allowance (MMMNA);
3. Family member allowance; and
4. Personal needs allowance (PNA) for waiver recipients and non-institutionalized Program of All-inclusive Care for the Elderly (PACE) participants, whose eligibility is determined under spousal impoverishment provisions.

These amounts are used in determining the Medicaid eligibility of an institutionalized spouse.

This ADM also rescinds GIS 00 MA/027, "Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Resource Allowances," which dealt with the Robbins v. DeBuono court decision, and the provisions in 01 OMM/ADM-4, "Spousal Impoverishment Allowance Increases for 2001 and Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Resource Allowances," related to Robbins.

II. BACKGROUND

A. Maximum Community Spouse Resource Allowance

Section 366-c of the Social Services Law (SSL) specifies the rules to be used in determining the Medicaid eligibility of an institutionalized person with a spouse in the community. Section 366-c, as amended by Chapter 81 of the Laws of 1995, provides that community spouses must be allowed to retain resources equal to one-half of the couple's total countable resources (spousal share), but not less than \$74,820 and not more than the maximum community spouse resource allowance permitted under federal law.

The maximum community spouse resource allowance, which is increased each year by the same percentage as the annual increase in the federal consumer price index, was \$92,760 in 2004. The maximum community spouse resource allowance is:

- \$95,100 effective January 1, 2005; and
- \$99,540 effective January 1, 2006.

B. Minimum Monthly Maintenance Needs Allowance

Section 366-c of the SSL provides that community spouses must be allowed to retain a specified amount of monthly income, referred to as the minimum monthly maintenance needs allowance (MMMNA). The MMMNA, which is increased each year by the same percentage as the annual increase in the federal consumer price index, was \$2,319 in 2004. The MMMNA is:

- \$2,378 effective January 1, 2005; and
- \$2,489 effective January 1, 2006.

C. Family Member Allowance

Section 366-c of the SSL provides that in determining the amount of an institutionalized spouse's income to be applied toward the cost of care, a family member allowance must be deducted for each family member living with the community spouse. A family member allowance is established for a minor child, dependent child, dependent parent, or dependent sibling of the institutionalized spouse or community spouse, who is residing with the community spouse and who has over 50 percent of his or her maintenance needs met by the community spouse and/or the institutionalized spouse.

The family member allowance equals one-third of the amount by which one-twelfth of 150 percent of the federal income official poverty line (FPL) for a family of two exceeds the otherwise available monthly income of the family member.

The maximum family member allowance (i.e., if a family member has no otherwise available income) is:

- \$535 effective January 1, 2005 (based on the actual FPL); and
- \$550 effective January 1, 2006 (based on the actual FPL).

D. Personal Needs Allowance for Institutionalized Spouses Who Reside in the Community

Spousal impoverishment budgeting is used to determine eligibility for institutionalized spouses who reside in nursing homes or other medical facilities. It also applies to institutionalized spouses living in the community who are receiving either a waiver service or participating in the Program of All-inclusive Care for the Elderly (PACE).

In accordance with the court decision in Evans v. Wing and DeBuono, the PNA amount, for persons who meet the definition of an institutionalized spouse who reside in the community, must be higher than the \$50 PNA that institutionalized residents are allowed to retain. As notified in GIS 01 MA/021, under spousal impoverishment budgeting, for persons who receive home and community based waiver services, the PNA amount is the difference between the Medicaid income level for one-person and two-person households. This is the

same amount that is used under the community eligibility rules when a household of one increases to a household of two. Non-institutionalized participants in the Program of All-inclusive Care for the Elderly (PACE), who meet the definition of an "institutionalized spouse" and reside at home, also are budgeted using the higher PNA.

Effective January 1, 2005, the PNA is \$308 for institutionalized spouses who reside in the community. Effective January 1, 2006, the decrease in the Medicaid income standard for a household of two changed the PNA amount to \$208 for institutionalized spouses who reside in the community.

E. Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Resource Allowances

Under the Department's spousal impoverishment rules, if the amount of monthly income otherwise available to a community spouse is less than the MMMNA (\$2,489 effective January 1, 2006), the institutionalized spouse may transfer income to the community spouse to bring the community spouse's income up to the MMMNA. If the institutionalized spouse's income is insufficient to bring the community spouse's income up to the MMMNA, an increased community spouse resource allowance may be established to generate income to bring the community spouse's income up to the MMMNA pursuant to a fair hearing decision or court order.

Federal law provides that Social Security benefits cannot be "alienated" (that is, subject to execution, levy, attachment, garnishment, or other legal process). In the Robbins v. DeBuono court decision, the Second Circuit Court of Appeals held that the mere attribution of Social Security benefits from an institutionalized spouse to a community spouse, for purposes of determining the community spouse's total income, constituted legal process in violation of the federal anti-alienation provision.

Although Robbins was not a class action, given the adverse decision from the Second Circuit Court of Appeals and the lack of a definitive interpretation from the Supreme Court, the Medicaid program adopted a policy consistent with the Robbins decision for all institutionalized spouses and community spouses. Under this policy (set forth in GIS 00 MA/027 and 01 OMM/ADM-4), an institutionalized spouse's Social Security benefits were not included in determining the community spouse's income unless the institutionalized spouse intended to make this income available to the community spouse. If an institutionalized spouse did not make his/her Social Security income available to the community spouse, an increased community spouse resource allowance could be established pursuant to a fair hearing decision or court order to bring the community spouse's income up to the MMMNA.

In 2003, the United States Supreme Court issued a decision addressing the interpretation of the term "other legal process" in the statute prohibiting the alienation of Social Security benefits (Washington State Dept. of Social & Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371). The Supreme Court held that the term "other legal process" should be interpreted restrictively, and be understood to refer to a process much like the processes of

execution, levy, attachment, and garnishment. On the contrary, in Robbins, the Second Circuit Court of Appeals acknowledged using an expansive definition of "legal process" to arrive at its decision.

A federal district court noted that the United States Supreme Court decision in Keffeler seriously undermines the rationale for the Robbins decision (Ruck v. Novello, 295 F.Supp.2d 258). The Court in Ruck stated that the mere attribution of income, and a fair hearing process that reviews such an attribution but has no power to direct that control over property be passed from one person to another, does not appear to involve "legal process" as defined by the Supreme Court in Keffeler. Based on these legal developments, the Department has rescinded the provisions related to Robbins.

As advised in GIS 05 MA/002, a community spouse with income less than the MMMNA will not be allowed to retain resources in excess of the maximum community spouse resource allowance in order to generate income that could be provided by the institutionalized spouse from his/her Social Security benefits.

III. PROGRAM IMPLICATIONS

A. **Maximum Community Spouse Resource Allowance**

The spousal share is an amount equal to one-half of the total value of the countable resources of the community spouse and the institutionalized spouse as of the beginning of the most recent continuous period of institutionalization of the institutionalized spouse on or after September 30, 1989.

Continuous period of institutionalization means at least 30 consecutive days of institutional care in a medical institution and/or nursing facility, or receipt of home and community based waiver services, or a combination of institutional and home and community based waiver services. Absence from a medical institution/facility or discontinuance of home and community based waiver services or PACE services for 30 consecutive days is the criteria used to determine if a continuous period of institutionalization has been broken.

The maximum community spouse resource allowance is \$95,100 effective January 1, 2005 and \$99,540 effective January 1, 2006. The minimum community spouse resource allowance is \$74,820 for years 2005 and 2006. As a result, in cases where the spousal share is less than \$74,820, the community spouse will be permitted to retain up to \$74,820 of the couple's total countable resources. In cases where the spousal share exceeds \$74,820, the community spouse is allowed to retain resources in an amount equal to the spousal share but not to exceed \$95,100 effective January 1, 2005, and \$99,540 effective January 1, 2006.

In order for the spousal share to be more than \$74,820, the total countable resources of the couple would have to be more than \$149,640.

When the first month of the most recent continuous period of institutionalization is prior to the month for which Medicaid coverage is sought, use of the spousal share figure will require social services districts to complete two assessments of a couple's resources. The first assessment will determine the total countable resources of the couple for purposes of establishing the spousal share. This assessment must be based on the resources of the couple as of the beginning of the most recent continuous period of institutionalization. The second assessment will determine the total countable resources of the couple for the month Medicaid coverage is sought. The spousal share amount, as determined by the first assessment, is used in the second assessment to determine the community spouse resource allowance and the Medicaid eligibility of the institutionalized spouse.

B. Minimum Monthly Maintenance Needs Allowance

The MMMNA is \$2,378 effective January 1, 2005, and \$2,489 effective January 1, 2006. An institutionalized spouse must be allowed, on a monthly basis, to transfer sufficient income to bring the community spouse's monthly income up to \$2,378 effective January 1, 2005, and \$2,489 effective January 1, 2006. In addition, the increased MMMNA must be used in determining the amount of any contribution to be requested from the income of a community spouse or a spouse living apart from an SSI-related applicant/recipient (A/R).

It should be noted that SSL Section 366-c(8) continues to provide for a higher community spouse income allowance based on exceptional circumstances resulting in significant financial distress. As advised in 89 ADM-47, such expenses may be of a recurring nature or may represent major one-time costs, and may include, but are not limited to: recurring or extraordinary non-covered medical expenses of the community spouse or family members; amounts to preserve, maintain, or make major repairs on the homestead; and amounts necessary to preserve an income-producing asset. These are expenses which the community spouse cannot be expected to meet from the MMMNA or amounts held in resources. Any increase of the community spouse monthly income allowance must be established by fair hearing or court order.

C. Family Member Allowance

Effective January 1, 2005, the family member allowance will be calculated by subtracting the amount of the family member's otherwise available income from \$1,604, dividing the result by three, and rounding up to the nearest dollar. The maximum family member allowance (where the family member's otherwise available income is zero) is:

$$\frac{\$1,604}{3} = \$535 \text{ } (\$534.66 \text{ rounded up})$$

Effective January 1, 2006, the family member allowance will be calculated by subtracting the amount of the family member's otherwise available income from \$1,650, dividing the result by

three, and rounding up to the nearest dollar. The maximum family member allowance (where the family member's otherwise available income is zero) is:

$$\frac{\$1,650}{3} = \$550$$

As advised in 89 ADM-47, a family member allowance is first made up of the community spouse's income in excess of the MMMNA. If the community spouse's excess income is insufficient to provide the family member allowance, all or part of the allowance, as necessary, is subtracted from any available income of the institutionalized spouse.

A family member allowance will reduce the amount of an institutionalized spouse's or community spouse's income that is available to meet the cost of care. In addition, a family member allowance will reduce the amount of income that may be requested as a contribution from a spouse living apart from an SSI-related A/R.

D. Personal Needs Allowance for Institutionalized Spouses Who Reside in the Community

The PNA amount for waiver recipients and non-institutionalized PACE participants, whose eligibility is determined under the spousal impoverishment provisions, is \$308 effective January 1, 2005 and, \$208 effective January 1, 2006. A waiver recipient or non-institutionalized PACE participant, who is living apart from his/her spouse, may not want to make his/her income and resources available to the spouse. If this waiver/PACE recipient does not want to have his/her Medicaid eligibility determined under the spousal impoverishment provisions, he/she has the option of having eligibility determined under community budgeting rules. If the waiver/PACE recipient chooses community budgeting rules instead of spousal impoverishment budgeting, he/she is allowed an income standard equal to the Medicaid income level for one or the Temporary Assistance Standard of Need, whichever is higher. There is no PNA under community budgeting.

E. Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Resource Allowances

For Medicaid eligibility determinations made on or after January 12, 2005, a community spouse with income less than the MMMNA will not be allowed to retain resources in excess of the maximum community spouse resource allowance in order to generate income that could be provided by the institutionalized spouse from his/her Social Security benefits. This is true regardless of whether the institutionalized spouse actually makes his/her Social Security benefits available to the community spouse.

The decision to give a community spouse a higher community spouse resource allowance continues to be an issue resolved only by fair hearing decision or court order. In determining whether a community spouse is entitled to an increased community spouse resource allowance, fair hearing staff will first consider the otherwise available income of the community spouse and the community spouse's

monthly income allowance. This means that any income (including Social Security benefits) that could be made available from the institutionalized spouse to bring the community spouse up to the MMMNA, will be utilized, regardless of whether it is being made available or not.

An institutionalized spouse is allowed, but not required, to make income available to the community spouse to bring the community spouse's income up to the MMMNA. If an institutionalized spouse chooses not to make all or part of his/her income available, this income will be counted in determining the amount of the institutionalized spouse's income to be applied toward the cost of care.

IV. REQUIRED ACTION

A. Maximum Community Spouse Resource Allowance

For new cases with budgeting periods beginning January 1, 2005, social services districts must use the minimum community spouse resource allowance of \$74,820 and the maximum community spouse resource allowance of \$95,100 to determine the amount of resources that a community spouse is allowed to retain. For new cases with budgeting periods beginning January 1, 2006 and after, social services districts must use the minimum community spouse resource allowance of \$74,820 and the maximum community spouse resource allowance of \$99,540 to determine the amount of resources that a community spouse is allowed to retain. In applying these two figures (the State minimum community spouse resource allowance and the federal maximum community spouse resource allowance) to the community spouse resource allowance formula, the applicable allowance is to be determined by taking the greatest of the following amounts:

1. \$74,820; or
2. the amount of the spousal share, not to exceed \$95,100 effective January 1, 2005, and \$99,540 effective January 1, 2006; or
3. the amount established for support of the community spouse pursuant to a fair hearing decision or court order.

In order to determine whether a couple's spousal share is applicable in determining the community spouse's resource allowance, social services districts must first determine if the total countable resources of the couple were more than \$149,640 as of the beginning of the most recent continuous period of institutionalization of the institutionalized spouse. This information can be obtained at the face-to-face interview or questions can be included on a separate agency letter that accompanies the Medicaid application/recertification form.

Note: If an institutionalized spouse or community spouse fails to provide documentation/verification of resources for the beginning of the most recent continuous period of institutionalization, the social services district shall use the State minimum spousal resource standard of \$74,820 to determine the community spouse resource allowance.

Social services districts should also note that although a couple's resources may be less than \$149,640 as of the beginning of the most recent continuous period of institutionalization but greater than \$149,640 at the time of Medicaid application, the determination of the spousal share must be based on the resources of the couple as of the beginning of the most recent continuous period of institutionalization.

Once documentation is received and the spousal share determined, the spousal share is compared to \$95,100 effective January 1, 2005, and \$99,540 effective January 1, 2006. If the spousal share is more than \$74,820 but less than \$95,100 effective January 1, 2005 and \$99,540 effective January 1, 2006, the community spouse resource allowance is the actual amount of the spousal share. If the amount of the spousal share exceeds \$95,100 effective January 1, 2005, and \$99,540 effective January 1, 2006, the maximum community spouse resource allowance is capped at \$95,100 effective January 1, 2005, and \$99,540 effective January 1, 2006. As instructed in 96 ADM-11, social services districts must use the insert page to the "Institutionalized Spouse Budget Worksheet" (Attachment I to 96 ADM-11), when the amount of the spousal share is greater than \$74,820 or the maximum community spouse resource allowance is used as the community spouse resource allowance.

In determining the resources of an institutionalized spouse when the institutionalized spouse or community spouse does not claim to have resources in excess of \$149,640 as of the beginning of the most recent continuous period of institutionalization, the community spouse must be permitted to retain up to \$74,820 of the couple's total countable resources.

When determining an institutionalized spouse's eligibility for any month beginning January 1, 2005 or after (even if the individual was institutionalized prior to January 1, 2005, but did not apply for Medicaid), social services districts must use the minimum community spouse resource allowance of \$74,820 and the maximum community spouse resource allowance of \$95,100 as applicable to determine the amount of resources that a community spouse is allowed to retain. When determining an institutionalized spouse's eligibility for any month beginning January 1, 2006 or after, (even if the individual was institutionalized prior to January 1, 2006, but did not apply for Medicaid), social services districts must use the minimum community spouse resource allowance of \$74,820 and the maximum community spouse resource allowance of \$99,540 as applicable to determine the amount of resources that a community spouse is allowed to retain.

Note: Eligibility is determined based on the resource allowances in effect for the earliest month coverage is sought. For example, if an applicant has been institutionalized since February, 2004 and applies for Medicaid in March, 2005, requesting coverage effective March, 2005, the spousal impoverishment allowances in effect for the year 2005 would be used to determine Medicaid eligibility. If this applicant requested coverage retroactive to December, 2004, the resource allowances in effect for the year 2004 would be used.

B. Minimum Monthly Maintenance Needs Allowance

Social services districts must use the increased MMMNA amount of \$2,378 effective January 1, 2005, and \$2,489 effective January 1, 2006 in determining the Net Available Monthly Income (NAMI) of an institutionalized spouse or when completing an assessment. All cases involving an institutionalized spouse active on or after January 1, 2005 must have eligibility computed based on the new figure of \$2,378, and on or after January 1, 2006, must have eligibility computed based on the new figure of \$2,489. The budgeting procedures contained in 89 ADM-47 and 91 ADM-27 must be followed for computing the amount of the community spouse's monthly income allowance. Any increase in the amount of income available for a community spouse or decrease in an institutionalized spouse's NAMI is to be made effective January 1, 2005 or January 1, 2006, as appropriate.

Social services districts must also use the appropriate MMMNA amount to calculate the requested contribution from income of a community spouse or a spouse living apart from an SSI-related A/R, as set forth in Section IV.G. of 89 ADM-47.

C. Family Member Allowance

Effective January 1, 2005, the family member allowance will be calculated by subtracting the amount of the family member's otherwise available income from \$1,604, dividing the result by three, and rounding up to the nearest dollar. The maximum family member allowance is \$535.

Effective January 1, 2006, the family member allowance will be calculated by subtracting the amount of the family member's otherwise available income from \$1,650, dividing the result by three, and rounding up to the nearest dollar. The maximum family member allowance is \$550.

All spousal impoverishment cases involving a family member must be computed using the appropriate family member allowance formula.

The revised family member allowance must be used in determining any contribution of income from a community spouse or from a spouse living apart from an SSI-related A/R. The new family member allowance must also be used when completing an assessment of a couple's resources and income.

D. Personal Needs Allowance for Institutionalized Spouses Who Reside in the Community

Social services districts must use the PNA amount of \$308 effective January 1, 2005, and \$208 effective January 1, 2006 in determining the NAMI/excess income of a waiver recipient or non-institutionalized PACE participant, whose eligibility is determined under the spousal impoverishment provisions.

E. Treatment of Institutionalized Spouses' Social Security Benefits and Requests for Additional Resource Allowances

Effective for Medicaid eligibility determinations made and notices sent on or after January 12, 2005, a community spouse with income less than the MMMNA will not be allowed to retain resources in excess of the maximum community spouse resource allowance in order to generate income if it could be provided by the institutionalized spouse from his/her Social Security benefits. This is true regardless of whether the institutionalized spouse actually makes Social Security benefits available to the community spouse. The decision to give a community spouse a higher community spouse resource allowance continues to be an issue adjudicated only by fair hearing decision or court order.

F. Notice Requirements

The "Spousal Impoverishment Income and Resource Amounts" chart (the attachment to the "Information Notice to Couples with an Institutionalized Spouse") has been updated to reflect the year 2005 and the year 2006 increases. Social services districts must make available the "Information Notice to Couples with an Institutionalized Spouse," (revised 12-03, Attachment I in 04 OMM/ADM-4) along with the updated "Spousal Impoverishment Income and Resource Amounts" chart (Attachment I in this ADM), to all persons requesting such information and are required to include this notice with all Medicaid applications involving an institutionalized spouse.

V. SYSTEM IMPLICATIONS

MBL

As of November 29, 2004 Upstate and January 2, 2005 in New York City, MBL supported \$2,378 as the MMMNA for community spouses and \$308 as the PNA for waiver recipients and non-institutionalized PACE participants, whose eligibility is determined under spousal impoverishment provisions, when a budget effective From Date of January 1, 2005 to December 31, 2005 was entered. As of November 28, 2005 Upstate and January 3, 2006 in New York City, MBL has supported \$2,489 as the MMMNA and \$208 as the PNA for budgets with effective From Dates of January 1, 2006 or later. The amount of court ordered support in excess of \$2,378, effective January 1, 2005, and \$2,489 effective January 1, 2006 should be entered on MBL as Additional Allowance Code 19.

The calculation of a couple's countable resources, the amount of resources the community spouse is permitted to retain, and family member allowance(s) must be done using the "Institutionalized Spouse Budget Worksheet." Any resources attributed to the institutionalized spouse should be entered on MBL using the appropriate Categorical Code (CTG) and Chronic Care Indicator (I). The total amount of the family member allowance should be entered on MBL as Additional Allowance Code 23.

VI. EFFECTIVE DATE

The spousal impoverishment allowance increases are effective June 1, 2006, retroactive to January 1, 2005 and January 1, 2006, as applicable.

The PNA amounts for waiver recipients and non-institutionalized PACE participants, whose eligibility is determined under the spousal impoverishment provisions, are effective June 1, 2006, retroactive to January 1, 2005 and, January 1, 2006, as applicable.

The change in the treatment of an institutionalized spouse's Social Security income is effective June 1, 2006, retroactive to January 12, 2005, the date of issuance of GIS 05 MA/002.

Brian Wing, Deputy Commissioner
Office of Medicaid Management