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| LOCAL COMMISSIONERS MEMORANDUM |
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Transmittal No: 90 LCM-156

Date: October 1, 1990

Division: Commissioner's
Office

TO: Local District Commissioners

SUBJECT: Filed Regulation 352.7(o)
Filed Regulation Part 360

ATTACHMENTS: Attachment I - 352.7(o) (available on-line)

Attachment II - Part 360 (available on-line)

The following changes to the Official Regulations of the State Department of Social Services have been filed for adoption with the Secretary of State.

18 NYCRR 352.7(o) relating to removal of individuals to another state or country.

The final rule - Filed: 9/28/90 - Effective: 10/17/90.

18 NYCRR Part 360 relating to medical assistance eligibility.

Filed as an emergency rule - 11/3/89 - effective 11/3/89.

Refiled as an emergency rule - 2/1/90 - effective 2/1/90.

Refiled as an emergency rule - 4/2/90 - effective 4/2/90.

Refiled as an emergency rule - 6/1/90 - effective 6/1/90.

Refiled as an emergency rule - 7/31/90 - effective 7/31/90.

Refiled as an emergency rule - 9/28/90 - effective 9/28/90.

The final rule - Filed: 9/28/90 - Effective: 10/17/90.

Michael J. McNaughton
Director, Local District
Policy Communications

Subdivision (o) is hereby added to section 352.7 to read as follows:

(o) Removals. Allowances must be made to applicants for or recipients of public assistance who are removed to another state or country in accordance with section 310.1(h) of this Title. Such allowances can only be made for the reasonable and necessary expenses of such removals, as authorized by section 310.1(h)(2) of this Title.

STATE DEPARTMENT OF SOCIAL SERVICES
ALBANY, NEW YORK

Pursuant to the provisions of Sections 20(3)(d) and 34(3)(f) of the Social Services Law, I Cesar A. Perales, Commissioner of Social Services, do hereby amend Sections 360-1.4(k)(3), 360-1.4(p), 360-4.3(f)(1)(i), 360-4.3(f)(1)(ii), 360-4.3(f)(1)(iv), 360-4.3(f)(3), 360-4.4(b)(2), 360-4.4(c), 360-4.7(a)(1), 360-4.9, and the opening language of Sections 360-1.4(c), 360-1.4(k), 360-4.3(f)(1), and 360-4.3(f)(1)(iii), repeal Sections 360-1.4(c)(1) and (2), 360-4.3(f)(1)(iii)(a)-(e), and 360-4.3(f)(2), add Sections 360-4.10, 358-3.1(g), and 358-5.2(d), and redesignate Section 360-4.3(f)(3) as 360-4.3(f)(2) of the Official Regulations of the State Department of Social Services, being Chapter II of Title 18 NYCRR, effective when the Notice of Adoption is published in the New York State Register.

Dated: September 27, 1990

Signed: _____
Commissioner

This is to certify that this is the original of an order of the State Department of Social Services made on amending Sections 360-1.4(k)(3), 360-1.4(p), 360-4.3(f)(1)(i), 360-4.3(f)(1)(ii), 360-4.3(f)(1)(iv), 360-4.3(f)(3), 360-4.4(b)(2), 360-4.4(c), 360-4.7(a)(1), 360-4.9, and the opening language of Sections 360-1.4(c), 360-1.4(k), 360-

4.3(f)(1), and 360-4.3(f)(1)(iii),
repealing Sections 360-1.4(c)(1) and
(2), 360-4.3(f)(1)(iii)(a)-(e), and
360-4.3(f)(2), adding Sections 360-
4.10, 358-3.1(g), and 358-5.2(d), and
redesignating Section 360-4.3(f)(3) as
360-4.3(f)(2) of the Official
Regulations of the State Department of
Social Services, being Title 18 NYCRR,
a summary of which was published in the
New York State Register on

Dated: September 27, 1990

Signed: _____

Commissioner

The opening language of subdivision 360-1.4(c) is amended to read as follows:

(c) Chronic care budgeting is a budgeting procedure used for individuals who are in permanent absence status, as defined in subdivision (k) of this section. [It is applied as follows:] For recipients in permanent absence status, chronic care budgeting will begin on the first day of the calendar month following the month in which the applicant/recipient is determined to be in permanent absence status.

Paragraphs 360-1.4(c)(1) and (2) are repealed.

The opening language of subdivision (k) of section 360-1.4 is amended to read as follows:

(k) Permanent absence status means that an individual is not expected to return home or that an individual is an institutionalized spouse as defined in section 360-4.10 of this Part. [Permanent absence status] It will be presumed that an individual will not return home if:

Paragraph 360-1.4(k)(3) is amended to read as follows:

(3) a person without a community spouse remains in an acute care hospital for more than six calendar months.

Subdivision 360-1.4(p) is amended to read as follows:

(p) Temporary absence means a time when a person is absent from his/her permanent residence and is expected to return. Reasons for temporary absence may include employment, hospitalization, military service, vacation, education or visits. A period of temporary absence will be presumed to exist if:

(1) the person is not an institutionalized spouse, as defined in section 360-4.10 of this Part, and returns to his/her permanent residence in the month in which he/she left or the following month;

[(2) the person continues to return to his/her permanent residence on a regular basis; or]

[(3)] (2) [the] a person without a community spouse is in an acute care hospital for six calendar months or less [.] ;

(3) a person with a spouse in the community is expected to be in an acute care hospital for less than thirty consecutive days; or

(4) a person with a spouse in the community is expected to receive home and community-based services provided pursuant to a waiver under Section 1915(c) of the Social Security Act for less than thirty consecutive days.

The presumptions set forth in paragraphs (1) through [(3)] (4) of this subdivision may be overcome by competent evidence. Competent medical evidence is required to overcome the [presumption] presumptions set forth in [paragraph (3)] paragraphs (2), (3), and (4) of this subdivision.

The opening language of paragraph 360-4.3(f)(1) is amended to read as follows:

(f) Legally responsible relatives. (1) This paragraph explains when the income and resources of a legally responsible [relatives are] relative is considered available to an MA applicant/recipient. Legally responsible relative is defined in section 360-1.4(h).

Subparagraphs 360-4.3(f)(1)(i) and (ii) are amended to read as follows:

(i) Legally responsible relative living with an MA applicant/recipient who is not an institutionalized spouse as defined in section 360-4.10 of this Subpart. A portion of the legally responsible relative's income and resources, if he/she is of sufficient financial ability, will be considered available to the MA applicant/recipient. The applicant/recipient will not be denied MA if the legally responsible relative refuses or fails to contribute toward the applicant's/recipient's medical support. However, the furnishing of MA will create an implied contract with the legally responsible relative and the cost of any MA provided may be recovered from such relative by the social services district pursuant to sections 101 and 366(3)(a) of the Social Services Law.

(ii) Legally responsible relative living apart from a non-institutionalized [dependent relative] MA applicant/recipient. The legally responsible relative, if of sufficient financial ability, will be asked to contribute a portion of his/her income and resources to the MA applicant/recipient. Regardless of the amount of any requested contribution, [Only] only the amount that [a] the legally responsible relative [gives] actually contributes to [a] the non-institutionalized [dependent relative living apart] MA applicant/recipient will be considered available when determining MA eligibility. However, the social services district may seek to recover the cost of any MA provided from the legally responsible relative pursuant to sections 101 and 366(3)(a) of the Social Services Law. [The amount of assistance the legally responsible relative can reasonably provide will be determined according to paragraphs (2) and (3) of this subdivision.]

The opening language of subparagraph 360-4.3(f)(1)(iii) is amended to read as follows:

(iii) Spouses living apart due to institutionalization of one spouse. The ability of the community spouse to contribute income to the institutionalized spouse's cost of care will be determined in accordance with section 360-4.10(b) of this Subpart. The availability of the community spouse's resources will be determined in accordance with section 360-4.10(c) of this Subpart.

Clauses (a), (b), (c), (d), and (e) of subparagraph 360-4.3(f)(1)(iii) are repealed.

Subparagraph 360-4.3(f)(1)(iv) is amended to read as follows:

(iv) [The income and resources of parents] Parents of a child under the age of 21 who is [not] certified blind or certified disabled and who is expected to be living separately from the parental household for 30 days or more, will not be [evaluated to determine the amount, if any, to be] requested [for the support of the child] to make their incomes and resources available to meet the cost of the child's necessary care or assistance, or to provide information concerning their incomes and resources.

Paragraph 360-4.3(f)(2) is repealed. Paragraph 360-4.3(f)(3) is redesignated 360-4.3(f)(2) and is amended to read as follows:

(2)(i) The social services district must request a legally responsible relative, other than a community spouse as defined in section 360-4.10 of this Subpart, to contribute any excess resources toward the support of [a dependent relative who is an] the MA applicant/recipient.

(ii) In determining the amount of [excess resources] contribution to be requested, legally responsible relatives who are not aged, certified blind, or certified disabled will be allowed the resource disregard in section 360-4.6(b)(1) of this Subpart and the standard resource exemptions listed in section 360-4.7(a) of this Subpart. Legally responsible relatives who are aged, certified blind, or certified disabled will be allowed the resource disregards in section 360-4.6(b) of this Subpart and the standard resource exemptions listed in section 360-4.7(a) of this Subpart.

Paragraph 360-4.4(b)(2) is amended to read as follows:

(2) [all non-exempt] certain resources transferred [within 24 months before the date of an MA application for the purpose of qualifying for MA] for less than fair market value, as explained in subdivision (c) of this section;

Subdivision 360-4.4(c) is amended to read as follows:

(c) Transfer of resources. (1) Transfers made on or after April 10, 1982 and prior to October 1, 1989. Any non-exempt resources the applicant/recipient transfers within 24 months before the date of MA application will be presumed to have been transferred for the purpose of qualifying for MA. Unless the applicant/recipient can provide evidence that the transfer was made for a reason other than to qualify for MA, the uncompensated value of such a resource will be considered an available resource. Uncompensated value is the fair market value of the resource at the time it was transferred, less any compensation received for the resource.

[(1)] (i) An otherwise eligible applicant/recipient who has transferred non-exempt resources with an uncompensated value of \$12,000 or less will be ineligible for MA. He/she will remain ineligible for 24 months from the date of the transfer or until the medical expenses incurred since the date of the transfer are equal to the amount of excess resources, whichever period is shorter.

[(2)] (ii) An otherwise eligible applicant/recipient who has transferred non-exempt resources with an uncompensated value of more than \$12,000 will be ineligible for MA. He/she will remain ineligible for 24 months plus an additional month for every \$2000 over \$12,000 or until his/her medical expenses incurred since the date of the transfer equal the amount of excess resources, whichever period is shorter.

(2) Transfers made on or after October 1, 1989. (i) General rule. Any transfer of a resource for less than fair market value made within or after the 30-month period immediately preceding the date a person becomes an institutionalized person, or the date an institutionalized person applies for MA, whichever is later, shall be presumed to have been made for the purpose of qualifying for: nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the federal Social Security Act. The uncompensated value of the transferred resource will be considered an available resource and the transfer will result in a period of ineligibility for these services, as explained in subparagraph (iii) of this paragraph. For purposes of this paragraph, an institutionalized person means an in-patient in a nursing facility, an in-patient in a medical facility who is receiving a level of care provided in a nursing facility, or a person receiving care, services, or supplies pursuant to a waiver under Section 1915(c) of the federal Social Security Act.

(ii) Exceptions. A person will not be ineligible for MA as a result of a transfer described in subparagraph (i) of this paragraph if:

(a) the resource transferred was a disregarded or exempt resource under sections 360-4.4(d), 360-4.6(b), and 360-4.7(a)(2)-(5) of this Subpart;

(b) the resource transferred was a homestead, as defined in section 360-1.4(f) of this Part, and title to the homestead was transferred to:

(1) the spouse of such person; or

(2) a child of such person who is certified blind, certified permanently and totally disabled, or under the age of twenty-one; or

(3) a sibling of such person who has an equity interest in such home and who was residing in such home for a period of at least one year immediately before the date the person becomes institutionalized; or

(4) a son or daughter of such person who was residing in such home for a period of at least two years immediately before the date the person becomes institutionalized, and who provided care, as defined in section 311.4(a)(1) of this Title, to such person which permitted such person to reside at home rather than in an institution or facility; or

(c) the resource was transferred:

(1) to or for the sole benefit of the community spouse, as defined in subdivision 360-4.10(a) of this Subpart; or

(2) to the person's child who is certified blind or certified permanently and totally disabled; or

(3) to or for the sole benefit of the person's spouse (other than a community spouse), provided such spouse does not transfer such resource to another person other than the spouse for less than fair market value within the period provided for by subparagraph (iii) hereof; or

(d)(1) a satisfactory showing is made that:

(i) the person intended to dispose of the resource either at fair market value, or for other valuable consideration; or

(ii) the resource was transferred exclusively for a purpose other than to qualify for: nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the level of care provided in a nursing facility; or care, services, or supplies furnished pursuant to a waiver under Section 1915(c) of the federal Social Security Act; or

(2) in the absence of a satisfactory showing under subclause (1), it is determined that the denial of eligibility will result in an undue hardship. Denial of eligibility will result in an undue hardship if the institutionalized individual is: (i) otherwise eligible for MA; (ii) unable to obtain appropriate medical care without the provision of MA; and (iii) despite his/her best efforts, unable to have the transferred resource returned or to receive fair market value for the resource. Best efforts include cooperating, as deemed appropriate by the commissioner of the social services district, in the pursuit of the return of such resource.

(iii) Period of ineligibility.

(a) An institutionalized person determined to have made a transfer under this paragraph will be ineligible for: nursing facility services; a level of care equivalent to that of nursing facility services provided in a hospital; and care, services, and supplies provided pursuant to a waiver under Section 1915(c) of the federal Social Security Act. Such person will remain ineligible for such services for the lesser of:

(1) thirty months from the date of transfer; or

(2) a period equal to the uncompensated value of the transferred resources divided by the average cost of care to a private patient for skilled nursing facility services in the region in which such person is institutionalized, on the date the person first applies or recertifies for MA as an institutionalized person.

(b) For purposes of this subparagraph:

(1) uncompensated value is the fair market value of the resource at the time it was transferred, less any compensation received for the resource; and

(2) the cost of care to a private patient in the region in which the person is institutionalized will be presumed to be 120 percent of the average MA rate for skilled nursing facility care for the facilities within the region. The average regional rate will be updated each January first by the Department. Regions will be the same as those established by Section 2807-c of the Public Health Law.

Paragraph 360-4.7(a)(1) is amended to read as follows:

(1) a homestead which is essential and appropriate to the needs of the household. Homestead is defined in subdivision 360-1.4(f) of this Title. A homestead loses its exempt status if the owner is in a medical facility in permanent absence status, as defined in subdivision 360-1.4(k) of this Title, and no spouse, child under 21 years of age, certified blind or certified disabled child, or other dependent relative is living in the home. [Permanent absence status is defined in subdivision 360-1.4(k) of this Title;] In addition, as explained in paragraph 360-4.4(c)(2) of this Part, transfers of homesteads to certain persons may result in ineligibility for MA coverage of certain care, services, and supplies, including nursing facility services;

Section 360-4.9 is amended to read as follows:

360-4.9 Post-eligibility utilization of income. For a person in permanent absence status in a medical facility, after MA eligibility is established the person is subject to chronic care budgeting. Under chronic care budgeting, all income must be applied toward the cost of care in the facility, including income disregarded or considered unavailable for the purpose of determining MA eligibility. However, before any income is required to be applied to the person's cost of care, deductions will be made in the following order:

(a) For an institutionalized person without a community spouse:

[(a)] (1) A personal needs allowance of \$50 will be allotted to an applicant/recipient who is a resident of a residential health care facility, as defined by Article 28 of the Public Health Law, or who is in permanent absence status in an acute care hospital certified under Article 28 of the Public Health Law. A personal needs allowance of \$33.50 will be allotted to an applicant/recipient who is a resident of a psychiatric care facility, developmental center, or related intermediate care facility regulated by Article 31 of the Mental Hygiene Law.

[(b)] (2) An amount will be deducted to cover third party health insurance premiums, federal and State income taxes, and court-ordered support payments.

[(c)] (3) An amount will be set aside to meet any maintenance needs of dependent members of the applicant's/recipient's former family household. The amount deducted will be the amount needed to bring the income of the [spouse or] family up to the MA standard or the Public Assistance Standard of Need, whichever is higher.

(4) An amount will be deducted to cover any expenses incurred for medical care, services, supplies, or remedial care for the institutionalized individual not subject to payment under this Title or by a third party.

[(d)] (5) The following income received by an applicant/recipient in a residential health care facility is not required to be applied toward the cost of medical care:

[(1)] (i) money received as the result of a legal action against the residential health care facility because of improper and/or inadequate treatment;

[(2)] (ii) income necessary to achieve a plan of self-support, as described in section [360-4.5(a)(2)(xx)] 360-4.6(a)(2)(xxi) of this Subpart; and

[(3)] (iii) SSI benefits paid under section 1611(e)(1)(E) of the Social Security Act.

(b) For an institutionalized spouse, as defined in section 360-4.10(a)(7) of this Subpart, the deductions set forth in section 360-4.10(b)(4) of this Subpart and in paragraphs (a)(2) and (a)(5) of this section will be made.

A new section 360-4.10 is added to read as follows:

360-4.10 Treatment of income and resources of institutionalized spouses.

(a) Definitions. Notwithstanding any regulations to the contrary, when used in this section, unless the context clearly requires otherwise:

(1) Applicable percent of the annual federal poverty level means one hundred twenty-two percent as of September 30, 1989, one hundred thirty-three percent as of July 1, 1991, and one hundred fifty percent on and after July 1, 1992.

(2) Community spouse means a person who is the spouse of an institutionalized person and who is residing in the community.

(3) Community spouse monthly income allowance means the amount by which the community spouse's minimum monthly maintenance needs allowance, as defined in paragraph (8) of this subdivision, exceeds the community spouse's otherwise available monthly income, or such greater amount as may be established by fair hearing decision or court order for the support of the community spouse.

(4) Community spouse resource allowance means the amount by which the greatest of the following amounts exceeds the total value of the community spouse's resources:

(i) sixty thousand dollars, to be increased annually by the same percentage as the percentage increase in the federal consumer price index;

(ii) the amount established for support of the community spouse pursuant to a fair hearing under Part 358 of this Title; or

(iii) the amount transferred pursuant to court order for the support of the community spouse.

(5) Family member means a minor child, dependent child, dependent parent or dependent sibling of the institutionalized spouse or of the community spouse who resides with the community spouse. For purposes of this paragraph, a person is dependent if over 50 percent of his/her maintenance needs are met by the community spouse and/or the institutionalized spouse.

(6) Family allowance for each family member is an amount equal to one-third of the amount by which the applicable percent of one-twelfth of the annual federal poverty level for a family of two exceeds the amount of the family member's otherwise available monthly income.

(7) Institutionalized spouse means a married person: who is in a medical institution or nursing facility and is likely to remain there for at least thirty consecutive days or is receiving home and community-based services provided pursuant to a waiver under Section 1915(c) of the federal Social Security Act and is likely to receive such services for at least thirty consecutive days; and whose spouse is not in a medical institution or nursing facility, and is not likely to receive such home and community-based services for thirty consecutive days.

(8) Minimum monthly maintenance needs allowance means an amount equal to one thousand five hundred dollars, to be increased annually by the same percentage as the percentage increase in the federal consumer price index.

(9) Resources do not include those disregarded or exempt under sections 360-4.4(d), 360-4.6(b), and 360-4.7(a) of this Subpart.

(10) Significant financial distress means exceptional expenses which the community spouse cannot be expected to meet from the monthly maintenance needs allowance or from amounts held in resources. 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; amounts to preserve, maintain, or make major repairs to the homestead; and amounts necessary to preserve an income-producing asset.

(11) Undue hardship means a situation where:

(i) a community spouse fails or refuses to cooperate in providing necessary information about his/her resources;

(ii) the institutionalized spouse is otherwise eligible for MA;

(iii) the institutionalized spouse is unable to obtain appropriate medical care without the provision of MA; and

(iv) (a) the community spouse's whereabouts are unknown; or

(b) the community spouse is incapable of providing the required information due to illness or mental incapacity; or

(c) the community spouse lived apart from the institutionalized spouse immediately prior to institutionalization; or

(d) due to the action or inaction of the community spouse, other than the failure or refusal to cooperate in providing necessary information about his/her resources, the institutionalized spouse will be in need of protection from actual or threatened harm, neglect, or hazardous conditions if discharged from an appropriate medical setting.

(b) Treatment of income. (1) At any time after the commencement of a continuous period of institutionalization, an assessment of the amount of the community spouse monthly income allowance and/or family allowance may be requested in accordance with subdivision (c) of this section.

(2) Unless rebutted by a preponderance of the evidence, for purposes of determining MA eligibility the following presumptions will apply with respect to the availability of income to an institutionalized spouse.

(i) No income of the community spouse will be considered available to the institutionalized spouse except as provided for in this section.

(ii) Income solely in the name of the institutionalized spouse or the community spouse will be considered available only to that spouse.

(iii) Income in the names of the institutionalized spouse and the community spouse will be considered available one-half to each spouse.

(iv) Income in the names of the institutionalized spouse or the community spouse, or both, and also in the name of another person or persons, will be considered available to each spouse in proportion to the spouse's interest or, if in the names of both spouses and no share is specified, one-half of the joint interest will be considered available to each spouse.

(v) Income from a trust will be considered available to each spouse in accordance with the provisions of the trust instrument, or in the absence of a specific trust provision allocating income, in accordance with the provisions of subparagraphs (ii) through (iv) of this paragraph.

(vi) Income in which there is no instrument establishing ownership will be considered to be available one-half to each spouse.

(3) The eligibility of an institutionalized spouse for MA for the first month or partial month of institutionalization will be determined by

comparing his/her net available income, computed in accordance with section 360-4.6(a)(1) and (2) of this Part, and any income actually contributed by the community spouse, to the appropriate MA or PA income standard for one person. Thereafter, the institutionalized spouse's eligibility for MA and liability for the cost of care will be determined in accordance with this section and with sections 360-1.4(c) and 360-4.9 of this Part until the month following the month in which he/she ceases to be an institutionalized spouse.

(4) In determining the amount of the institutionalized spouse's income to be applied toward the cost of medical care, services, and supplies, in accordance with section 360-4.9(b) of this Part, the following items will be deducted from the monthly income of the institutionalized spouse in the following order:

(i) a personal needs allowance;

(ii) a community spouse monthly income allowance, but only to the extent that the income is made available to or for the benefit of the community spouse;

(iii) a family allowance for each family member; and

(iv) any expenses incurred for medical care, services, supplies, or remedial care for the institutionalized spouse not subject to payment under this Title or by a third party.

(5) The community spouse will be requested to contribute 25 percent of his/her income in excess of the minimum monthly maintenance needs allowance and any family allowances toward the cost of necessary care or assistance for the institutionalized spouse. An institutionalized spouse will not be denied MA because the community spouse refuses or fails to make such income available. However, nothing contained in this paragraph prohibits a social services district from enforcing the provisions of the Social Services Law which require financial contributions from legally responsible relatives, or recovering from the community spouse the cost of any MA provided to the institutionalized spouse.

(6) If either spouse establishes that the community spouse needs income above the level established by the social services district as the minimum monthly maintenance needs allowance, based upon exceptional circumstances which result in significant financial distress as defined in paragraph (a)(10) of this section, the department must substitute an amount adequate to provide additional necessary income from the income available to the institutionalized spouse.

(c) Treatment of resources. The following rules apply in determining the resources available to the institutionalized spouse and the community spouse when determining eligibility for MA for the institutionalized spouse.

(1) At any time after the commencement of a continuous period of institutionalization, either spouse may request an assessment of the total value of their resources, or may request to be notified of the amounts of the community spouse monthly income allowance, the community spouse resource allowance, and the family allowance, and/or the method of computing such amounts.

(i) Assessment. Upon receipt of a request for assessment, together with all relevant documentation of the resources of both spouses, the social services district must assess and document within thirty days the total value of the spouses' resources and provide each spouse with a copy of the assessment and the documentation upon which it was based. If the request is not part of an MA application, the social services district may charge a fee not exceeding twenty-five dollars for the assessment which is related to the cost of preparing and copying the assessment and documentation.

(ii) Determination of allowances. At the request of either spouse, the social services district must notify the requesting spouse of the amounts of the community spouse monthly income allowance, the community spouse resource allowance, and the family allowance, and/or the method of computing such amounts.

(iii) Notice of right to a fair hearing. At the time of an assessment or a determination of allowances pursuant to this paragraph, the social services district must provide to each spouse who received a copy of such assessment or determination a notice of the right to a fair hearing under section 358-3.1(g) of this Title. If the assessment or determination is made in connection with an application for MA, the fair hearing notice must be sent to both spouses at the time the eligibility determination is made. Section 358-3.1(g) of this Title provides a fair hearing right to an institutionalized spouse or community spouse, after a determination has been made on the institutionalized spouse's MA application, if the spouse is dissatisfied with the determination of the community spouse monthly income allowance, the amount of monthly income determined to be otherwise available to the community spouse, the amount of resources attributed to the community spouse or to the institutionalized spouse, or the determination of the community spouse resource allowance.

(2) At the time of application of the institutionalized spouse for MA, all resources, including resources required to be considered in determining eligibility pursuant to section 360-4.4 of this Subpart, held by the institutionalized spouse, the community spouse, or both, will be considered available to the institutionalized spouse to the extent that the value of the resource exceeds the maximum community spouse resource allowance.

(3) In the event that a community spouse fails or refuses to cooperate in providing necessary information about his/her resources, such refusal will be a reason for denying MA for the institutionalized spouse because MA eligibility cannot be determined. However, an institutionalized spouse will not be determined ineligible for MA in this situation if: the institutionalized spouse executes an assignment of his/her right to pursue support from the community spouse in favor of the social services district and the department, or is unable to execute such an assignment due to physical or mental impairment; and to deny assistance would be an undue hardship, as defined in subdivision (a) of this section.

(4) If necessary information about the resources of the community spouse is provided, but the community spouse fails or refuses to make available his/her resources in excess of the maximum community spouse resource allowance, the institutionalized spouse will be eligible for MA only if: the institutionalized spouse is otherwise eligible; and the

institutionalized spouse executes an assignment of his/her right to pursue support from the community spouse in favor of the social services district and the department, or the institutionalized spouse is unable to execute such an assignment due to physical or mental impairment. However, nothing contained in this paragraph prohibits a social services district from enforcing the provisions of the Social Services Law which require financial contributions from legally responsible relatives, or recovering from the community spouse the cost of any MA provided to the institutionalized spouse.

(5) After the month in which the institutionalized spouse has been determined eligible for MA during a continuous period of institutionalization, no resource of the community spouse will be considered available to the institutionalized spouse.

(6) Notwithstanding section 360-4.4 of this Subpart, after an institutionalized spouse is determined eligible for MA, transfers of resources by the institutionalized spouse to the community spouse will be permitted to the extent that the transfers are to or for the sole benefit of the community spouse and do not exceed the value of the community spouse resource allowance. Such transfers must be made within 90 days of the eligibility determination or within such longer period as determined by the social services district in individual cases. Such resources must actually be transferred to or for the sole benefit of the community spouse in order to be excluded when determining the continuing eligibility of the institutionalized spouse.

(7) If either spouse establishes that income generated by the community spouse resource allowance, established by the social services district, is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, the department must establish a resource allowance adequate to provide such minimum monthly maintenance needs allowance from those resources considered to be available to the institutionalized spouse.

A new subdivision 358-3.1(g) is added to read as follows:

(g) If you are an institutionalized spouse or a community spouse, as defined in section 360-4.10 of this Title, and a determination has been made on an application for Medical Assistance for the institutionalized spouse, you have a right to a fair hearing to challenge:

(1) the amount of the community spouse monthly income allowance; and/or

(2) the amount of monthly income determined to be otherwise available to the community spouse; and/or

(3) the amount of resources attributed to the community spouse or to the institutionalized spouse; and/or

(4) the amount of the community spouse resource allowance.

A new subdivision 358-5.2(d) is added to read as follows:

(d) When a hearing is requested pursuant to subdivision 358-3.1(g) of this Part, the hearing will be held within 30 days of the request, unless delayed by, or adjourned at the request of, the appellant.