

**Tips for Qualifying for Medicaid in New York State by Using
“Excess Resources” for Pre-Paid Funeral Arrangements**

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NOTE: This fact sheet is for people in New York State only who are age 65+, blind or disabled. Most Medicaid applicants under age 65 who do not have Medicare have no asset test under the Affordable Care Act. This memorandum includes changes in New York law enacted in 2011. References for state directives and laws are at the end of this fact sheet.¹

1. In General – Why Pre-Pay for a Funeral?

- You are not eligible for Medicaid if your financial resources exceed the resource limits. Medicaid allows \$15,750 (Single person in 2020). Medicaid allows applicants to use excess resources to pre-pay for funerals or create burial accounts – for themselves and for some family members. This obviates the need to spend down the excess assets on the cost of medical care. It also eliminates the need to transfer excess assets which would trigger a “transfer penalty,” which disqualifies the individual from receiving Medicaid for nursing home care for a certain “penalty period,” the length of which depends on the amount transferred and where in New York State the individual resides.

2. What is a Pre-Paid Funeral Agreement and What Expenses May it Pay?

1. A pre-need funeral agreement is created by paying a funeral director, funeral firm, undertaker, or cemetery for specified merchandise and services provided upon the death of the applicant or recipient (“A/R”), or upon the death of certain immediate family members. NYS Dept. of Health 11 OHIP/ADM-4, at 2 (full cite at end).¹
2. **IMMEDIATE FAMILY** - The funeral agreement may be for “*Immediate family*,” which includes the A/R’s parents, adoptive parents, spouse, children (minors or adults, and including adopted children and stepchildren), and brothers and sisters (including step-siblings and adopted siblings). The spouse of each of these relatives is also included in the definition of “immediate family,” provided they are still married to the A/R’s relative. For example, Susan, the A/R, may pre-pay for funeral costs for her brother’s wife or her daughter’s husband.

3. REQUIREMENTS:

- The A/R may set up and pay for **no more than one** pre-paid funeral agreement for her/himself and, separately, one for a spouse and for each other “immediate family” member. N.Y. Social Services Law Section 209.6(b), 11 OHIP/ADM-4 at IV.A. However, certain burial space items purchased and paid for in full **prior to** entering into an irrevocable pre-need funeral agreement may remain outside the agreement, such as a cemetery plot, urn, vault, mausoleum, crypt, or headstone. 11 OHIP/ADM-4 p. 4. Such items will not be considered available resources.

- The agreement for the applicant or immediate family must be **IRREVOCABLE** and include a specified **disclosure statement** that acknowledges that the once the payment is made to the funeral home, the A/R or legally responsible relative may not change her mind and cancel the agreement or ask for her money back. It is permissible to change the choice of funeral home, funeral director, undertaker or cemetery. General Business Law §453, MRG p. 368.¹

4. **EXPENSES THAT MAY BE PAID.** The following expenses may be included for both the applicant and the immediate family members listed above. Before 2011, only those listed as “Burial Space” items could be included in agreements for family members, as opposed to the applicant. There is no longer any distinction between which expenses may be included for family members. However, there is still a distinction as to how these expenses are categorized, explained later.

COVERED ITEMS INCLUDE:

- **Burial Space Items:**
 - Casket, urn, mausoleum, vault, headstone, burial containers and headstone engraving
 - Burial plot/ gravesite
 - Cost of opening and closing of the gravesite
 - Cremation and urn
 - Perpetual care contract for the gravesite
- **Non-Burial Space Items:**
 - Embalming/ cosmetology and burial clothes
 - Funeral transportation (hearse, limousine, out of town shipping),
 - Use of funeral home facilities for services, visitation, or wake,
 - Clergy services, death notices, and flowers

MAY NOT INCLUDE:

- Food, lodging or transportation expenses for family, friends or guests. 11 OHIP/ADM-4 p. 6. The cost of these items will be considered an uncompensated transfer for purposes of determining eligibility for nursing home Medicaid if included in a pre-needs agreement.

5. **Is there a limit on the cost of the agreement or how it is paid?** What if there is money left over after I die?

- There is no limit on the cost but it must be for fair market value - otherwise it could be considered a transfer of assets. NYS DOH Medicaid Reference Guide [MRG] p. 365¹
- Since the agreement is irrevocable, one should not pay more than one normally wants for a funeral.
- Any money left over after the funeral and burial expenses have been paid will go to the city or county Department of Social Services. N.Y. Social Services Law § 141(6)
- Payment of the agreement may be made with the money of the A/R or of a legally responsible relative. MRG. p. 365. The spouse is a legally responsible relative, as is the parent of a child under age 21. N.Y. Social Services Law § 366 (2)(b)(1). Since the spouse’s assets are deemed available to the applicant, this is a way to “spend down” those assets.
- If the cost of the NON-BURIAL SPACE ITEMS in the agreement is less than \$1500, then you may still have life insurance policies with a combined FACE VALUE under \$1500, *but may not also have* a BURIAL FUND or life insurance with a cash value over \$1500. MRG, p. 366 (see more below).

3. May you have a Burial Fund or Life Insurance in addition to a Funeral Agreement?

1. The A/R and/or his or her **spouse** may have a \$1500 “burial fund” in addition to the pre-paid funeral agreement above, **unless** the pre-paid funeral agreement includes \$1500 or more worth of “non-burial space” items, as defined on page 2 above. 11 OHIP/ADM-4 pg. 5. If there is less than \$1500 in non-burial space items in the pre-paid agreement, the A/R and his spouse may set up separate burial fund.
2. Type of Burial Fund – the \$1500 may be in the form of a bank account or life insurance or a combination.
3. A bank account is an account separate from one’s regular bank account(s) designated as a burial fund. The maximum balance of the account at the time of application combined with the cash value of any life insurance policy(ies) must be no more than \$1500.
 - A burial account may not be treated like most savings accounts. Once money is deposited, no withdrawals may be made. Otherwise the account will no longer be exempt and will be counted against the Medicaid resource limit.
 - Medicaid does not count accumulated interest earned on a burial account.
11 OHIP/ADM-4 p. 9.
4. Life Insurance – A life insurance policy that has both a “face value” and a “cash value” is generally a so-called “whole life” policy. The face value is the amount to be paid on death. The cash value is the amount that the policy owner would get if s/he cashed in the policy and forfeited any payment on death. The cash value is usually the total amount of premiums paid in plus interest. To learn the cash value, call the life insurance company and ask for a statement. There is no other way to calculate the cash value.
 - **If the FACE VALUE of the policy is under \$1500**, the A/R may keep this policy even if the pre-paid funeral agreement *does* include non-burial space items worth more than \$1500. MRG p. 366. If the FACE VALUE exceeds \$1500, then look at the cash value.
 - **If the CASH VALUE of the policy is less than \$1500** at the time of the application, then the applicant may also have a separate burial fund in an amount that brings the total combined burial amount up to \$1500 (life insurance cash value + burial fund = \$1500) MRG, p. 365.1
 - **If the CASH VALUE exceeds \$1,500 at the time of application, the A/R may keep the policy, but:**
 - the amount that exceeds \$1,500 will count toward the resource limit, AND
 - The A/R must provide a written statement that the entire cash value is intended for burial expenses. This avoids the prohibition against commingling the burial account with regular savings. Without this statement, the \$1,500 is not exempt. MRG, p. 370
 - EXAMPLE: Cash value of life insurance is \$3500. This is permissible if the A/R provides a written statement that the entire \$3500 is intended for burial expenses. Because the cash value is \$2000 over the \$1500 burial limit, the A/R must keep her regular bank account \$2000 below the usual limit.
 - If the cash value is still too high, a **loan may be taken** on the policy. MRG p. 324. Proceeds of a bona fide loan are not counted as income. MRG p. 221. The money received would count as a resource if saved into the month after the loan is issued.

- Planning tip: Whether or not you may have a burial fund depends on the cash value of your life insurance policy, whether your pre-paid funeral agreement has “non-burial space” items valued over \$1500, and your total countable resources.

4. When is one Eligible for Medicaid after creating a Funeral Agreement or Burial Fund?

1. The answer depends on whether the funeral arrangements are for the A/R and his/her spouse or other members of the immediate family, as defined above on page 1.
2. **Applicant or spouse create the funeral agreement for themselves:**
 - As long as the funeral agreement and/or burial fund is established for the applicant or spouse within 10 days of being notified by Medicaid that the applicant has excess resources, the funeral agreement **retroactively** brings the excess resources down to the allowed limits. If the resources were otherwise below the limit during the retroactive period, the A/R is eligible for Medicaid for up to **3 months** before the month in which the application was filed.
 - Example: Betty is single and has \$26,750 in resources at the time of her Medicaid application in April 2020. She is \$11,000 over resourced (using the 2020 resource limit of \$15,750). She is notified in June 2020 that she is over-resourced. Within 10 days of receiving this notification she establishes an irrevocable pre-needs agreement for herself in an amount of \$11,000. She is eligible for Medicaid as of January 2020, the third month prior to the month of application. This assumes that her resources during the three month retroactive period were \$26,750 or less. See 11 OHIP/ADM-4 p. 8, MRG p. 368.1.
3. **Applicant creates funeral agreement for “immediate family members” other than spouse:**
 - Three-month retroactive eligibility cannot be established through the purchase of irrevocable pre-need funeral agreements for immediate family members other than the spouse. Funeral agreements for immediate family members that bring the excess resources down to the allowed limits may only qualify the A/R for Medicaid the following month after payment. MRG. 366.1
 - Example: Betty is single and has \$25,700 when she applies for Medicaid in January 2020. She is \$10,000 over resourced. She already has a pre-paid funeral agreement for herself and does not wish to add additional funds to it. She is eligible for Medicaid for Feb. 2020 if she establishes a pre-paid irrevocable funeral agreement with her excess resources in Jan. 2020 for her sister, son, and/or other immediate family members listed on page 1 of this fact sheet. If the agreement were for her spouse, it could be retroactive, but not for other family.

Contact the Evelyn Frank Legal Resources Program with any questions

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See more info about Medicaid at <http://nyhealthaccess.org>

¹ The laws about pre-paid funeral agreements are N.Y. Social Services Law Sections 141(6) and 209.6, and General Business Law Sect. 453. The NYS Dept. of Health directive implementing the 2011 change is [11 OHIP/ADM-04 - Treatment of Irrevocable Pre-Need Funeral Agreements](#) (July 11, 2011) available at http://www.health.ny.gov/health_care/medicaid/publications/pub2011adm.htm. See also the NYS DOH Medicaid Reference Guide [MRG] section on funeral agreements and burial funds, available at http://www.health.ny.gov/health_care/medicaid/reference/mrg/index.htm - click on [Medicaid Reference Guide \(Full Version\)](#) pp. 365-371.