

TREATMENT OF TRUSTS

F-500 DEFINITIONS

Trust - Any arrangement in which a grantor transfers assets to a trustee(s) with the intention it be held, managed, or administered by the trustee(s) for the benefit of the grantor or certain designated individuals (beneficiaries).

Legal Instrument or Device Similar to a Trust - Any legal instrument, device or arrangement which is similar to a trust. That is, it involves a grantor who transfers assets to an individual or entity with fiduciary obligations (trustee) with the intention that it be held, managed, or administered by the trustee(s) for the benefit of the grantor or others. This can include but is not limited to, escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligations.

Trustee - Any individual(s) or entity (such as an insurance company or bank) that manages a trust or similar device and has fiduciary responsibilities (held or found in trust or confidence).

Grantor - Any individual who creates a trust. This includes:

- a. The individual;
- b. The individual's spouse;
- c. A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse;
- d. A person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

Revocable Trust - A trust which can be revoked (recalled) by the grantor. This includes trusts which can only be modified or terminated by a court, and irrevocable trusts that will terminate if some action is taken by the grantor.

Irrevocable Trust - A trust which cannot, in any way, be revoked by the grantor.

Beneficiary - Any individual(s) listed in the trust benefiting in some way from the trust. The beneficiary can be the grantor, another individual(s), or a combination of any of these parties, excluding the trustee or any other individual whose benefit consists only of reasonable fees or payments for managing or administering the trust.

Payment - A payment from a trust is any disbursement from the corpus (principal) of the trust or from income generated by the trust. A payment may include actual cash, as well as non-cash or property disbursements, such as the right to use and occupy real property.

Annuity - This is a right to receive fixed, periodic payments, either for the life of the annuitant or for a term of years.

Assets - Assets are all income and resources of the individual including assets to which the individual is entitled or would be entitled if action had not been taken to avoid receiving the assets.

F-505 EFFECTIVE DATE

Trusts established prior to October 1, 1993, are "deemed" available to the customer and therefore countable, without regard to normal program exclusions, when determining income or resource eligibility.

Exception: Medicaid Qualifying Trusts established prior to April 7, 1986, SOLELY for the benefit of a person with an Intellectual Disabilities (ID) who resides in an Intermediate Care Facility (ICF)/ID.

Trusts established October 1, 1993, and later may be considered unavailable when determining resource eligibility.

F-515 APPLICATION OF TRUST PROVISIONS

For trusts established October 1, 1993, and later, the following rules apply without regard to:

- a. The purpose for which the trust is established;
- b. Whether the trustee(s) can exercise any discretion under the trust;
- c. Any restrictions on when or whether distributions can be made from the trust;
- d. Any restrictions on the use of the distributions from the trust.

This means any trust can be counted in determining Medicaid eligibility no matter how specifically a clause or requirement in the trust precludes a trust from being considered under Medicaid rules.

Placement of the home of an institutionalized individual in a trust does not result in the home becoming a countable resource. The home continues to be an excluded resource.

F-520 TYPES OF TRUSTS

How trusts are treated depend on the terms and conditions of the trust. The following are rules for counting various types of trusts.

F-520.1 Revocable Trust

- a. The entire corpus (principal) of the trust is counted as an available resource;
- b. Any payments from the trust made to or for the benefit of the individual are counted as income;
- c. Any payments from the trust which are not made to or for the benefit of the individual are considered assets disposed of for less than fair market value and a "look-back" period of 60 months applies.

F-520.2 Irrevocable Trust - Payment Can Be Made to Individual

If there is any circumstance under which payment can be made to or for the benefit of the individual from all or a portion of the trust, the following rules apply:

- a. Payments from income or from the corpus (principal) made to or for the benefit of the individual are treated as income;
- b. Income from the corpus (principal) of the trust which could be paid to or for the benefit of the individual are treated as an available resource;
- c. The portion of the corpus (principal) that could be paid to or for the benefit of the individual is treated as an available resource;
- d. Payments from income or the corpus (principal) not paid to or for the benefit of the individual are treated as a transfer of assets for less than fair market value and a "look-back" period of 60 months applies.

F-520.3 Irrevocable Trust - Payment Cannot Be Made to Individual

When all or a portion of the corpus (principle) or income of the trust cannot be paid to or for the benefit of the individual, treat all or any such portion or income as a transfer of assets for less than fair market value and a "look-back" period of 60 months applies.

F-520.4 Special Needs Trust

The trust must be irrevocable and must contain the assets of an individual under age 65 who is disabled and which trust is established for the sole benefit of the disabled individual by the disabled individual, a parent, grandparent, legal guardian of the disabled individual, or a court (effective with special needs trusts established on or after 12/13/2016), or prior to 12/13/2016 by a parent, grandparent, legal guardian of the disabled individual, or a court. In addition to the assets of the individual, the trust may also contain the assets of individuals other than the disabled individual.

The trust must specify that upon the death of the disabled individual, the state receive all amounts remaining in the trust up to an amount equal to the total amount of medical assistance paid on behalf of the disabled individual.

If the trust meets all the above requirements, the corpus (principle) of the trust is not considered available when determining resource eligibility.

However, any liquid funds, e.g., cash paid out of the trust that are used for items other than the supplemental or special needs of the individual, are considered income in the month paid out for financial eligibility and patient liability. **Exception:** Administrative and trust fees are allowed as deductions without counting as income or a transfer in the month paid out.

Any non-liquid resource, e.g., re-title of home from the trust to an individual, removed from the trust may convert an exempt resource to a countable resource in the month it is removed from the trust. Any non-liquid resource removed from the trust not for the supplemental or special needs of the individual are considered assets disposed of for less than fair market value and a transfer of assets penalty will apply.

If the trust is used to purchase a residence for a beneficiary, the fair market rental value for others living in the home will be considered income each month that others live in the home, unless the trust is paid fair market rental value for such other persons.

The trustee must immediately inform the Division of Welfare and Supportive Services (DWSS) of any
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expenditure of the trust that exceeds \$5,000. It must be for the sole benefit of the individual. The trustee is also required to provide a reconciled financial accounting of the expenditures made from the trust on an annual basis or as otherwise requested by the DWSS. A justification of the expenditures must accompany the financial record to ensure the expenditures were used to or for the *sole* benefit of the individual. A transfer of assets penalty may apply.

The trustee must immediately notify the DWSS when the disabled individual passes away and must, no later than three (3) months after the individual passes away or if the trust exemption is terminated, repay the state up to the amount of the individual's cost of care.

Any additions to, or augmentations of any funds to the trust after age 65, are considered assets which are not subject to the resource exemption.

F-520.5 Pooled Trusts

The trust must be irrevocable, must contain the assets of a disabled individual, and be established and managed by a non-profit association as defined in section 501(c) of the Internal Revenue Code (IRC) and which has tax-exempt status under section 501(a) of the IRC.

Separate accounts are maintained for each beneficiary of the trust (like a bank that holds the assets of individual accountholders) but assets are "pooled" for investing and management purposes. An account may be established for the sole benefit of the disabled individual by the individual, or by the parent(s), grandparent(s), legal guardian(s) or a court. If the account provides a benefit to any other individual, this exception does not apply.

The trust must also specify that upon the death of the disabled individual, the state receive all amounts remaining in the trust up to an amount equal to the total amount of medical assistance paid on behalf of the disabled individual.

If the trust meets all the above requirements, the corpus (principle) of the trust is not considered available when determining resource eligibility. However, transfer of assets provisions may apply. For example, funds added to the trust after the disabled individual is aged 65 or funds used to pay for family vacations will be considered a transfer of assets.

Any non-liquid resources, e.g., re-title of home from the trust to an individual removed from the trust may convert an exempt resource to a countable resource in the month it is removed from the trust. Resources removed from the trust not for the supplemental or special needs of the individual are considered assets disposed of for less than fair market value and a transfer of assets penalty will apply.

Administrative and trust fees are allowed as deductions without counting as income in the month paid out.

F-520.6 Miller Type or Qualified Income Trusts - QITs

A trust established to enable individuals with income that exceeds the income limit, to become eligible for Institutional Medicaid or Home and Community Based Waiver (HCBW) programs by placing their income into the Trust.

a. Miller Type or QIT Requirements:

1. The trust must be irrevocable.
2. The trust must be established from income of the recipient, composed only of the individual's pensions, Social Security, and any other unearned income which the individual receives, from whatever source, including accumulated interest in the trust.
3. No resources may be used to establish or augment the trust. Inclusion of resources voids the exemption.
4. The trust must specify that the only payments allowed from the trust are those permitted in 42 CFR 435.725 which includes patient liability, personal needs allowance (PNA), spousal/family allowance and certain unreimbursed medical expenses. Accumulation of income is NOT allowed. Any income deposited in the trust must be spent by the month following the month in which the income was deposited.
5. The trust must not provide for the payment of guardianship fees, attorney fees or trustee fees as a deduction from the trust or from the patient liability owed by the individual.
6. The trust must specify that upon the death of the individual, the state receive all amounts remaining in the trust up to an amount equal to the total amount of medical assistance paid on behalf of the individual.

F-525 RESOURCES

If the trust meets all the above requirements, the corpus (principle) of the trust is not considered available to the recipient when determining resource eligibility.

F-530 INCOME

Income deposited into a QIT is excluded in the financial eligibility determination.

- Any income not deposited into the QIT is counted in the financial eligibility determination.
- Any withdrawals from the QIT are counted in financial eligibility determination unless used for:
 - PNA; or
 - spousal and family allowance; or
 - medical expenses not covered by Medicaid; or
 - patient liability.

Case managers must enter unearned income deposited to a QIT as income type 61-Miller Trust and make the income non-countable to ensure financial eligibility is properly determined.

F-535 PATIENT LIABILITY

The customer's total available income regardless of whether or not deposited into the QIT is used to determine the customer's share of the cost of care. See Income Types for income types excluded in the patient liability calculation.

F-540 TRANSFER OF ASSETS

Income deposited into a QIT is considered a transfer of assets, unless used to or for the benefit of the applicant/recipient. Payment towards the cost of care is considered to or for the benefit of the customer/applicant, thus avoiding a transfer of assets penalty.

When income placed in a QIT exceeds the amount paid out of the trust for the individual's monthly cost of care, the excess income is subject to a transfer of assets penalty.

F-540.1 Transfer of Asset Penalty

Medicaid applicants/recipients seeking or receiving HCBW Services must be assessed a penalty period using the same rules as those receiving Medicaid under Long Term Care (LTC) eligibility. Use the amount of the transfer divided by the average cost of LTC to determine the number of months the individual is ineligible for waiver eligibility. The TRAN record will calculate the penalty. The penalty can only be assessed if there is a slot available and the individual is otherwise eligible for services.

F-545 ELIGIBILITY & PAYMENTS REVIEW

When an individual has an income trust or court document, a copy of the trust or document must be sent to the Chief of Eligibility & Payments (E&P) to determine if it meets the requirements for an exempt trust.

NOTE: MAGI Medicaid groups do not require a resource evaluation. If a customer is applying for or receiving Medicaid in a MAGI category and the customer has a trust, do not refer the trust to the Chief of E&P for legal evaluation. Refer to MAM E-300 (Trust Funds) for instructions on counting trust income. Trusts should always be referred to E&P when a MAGI Medicaid case is to be converted to a MAABD program.

If the trust document fails to meet the requirements of a Miller Trust (QIT), the individual will be served a timely denial/termination notice. The individual will be allowed ninety days from the date of the notice to apply for undue hardship.

F-550 UNDUE HARDSHIP

The trust provisions may not apply when it is determined such application would work an undue hardship.

If undue hardship is claimed, the individual will be responsible for providing convincing evidence that application of the trust provisions would cause an undue hardship. The evidence must include:

- a. A written statement from the individual/authorized representative stating the reason they feel undue hardship applies.
- b. Verification there is no means, legal or otherwise, by which the individual is able to recover and/or access assets held in the trust.
- c. The individual's relationship, if any to the person(s) who are trustees of the trust.

Denial of eligibility would cause an undue hardship against the individual when all of the following conditions exist:

- a. The individual is otherwise eligible for Medicaid; and

- b. The trustee has refused to make such income/resources available to the individual; and
- c. The individual has sufficient funds to cover the cost of institutionalized care; and
- d. Without Medicaid, the individual would be forced to go without life sustaining medical care; and
- e. Where the individual has the ability to amend the trust so it contains the provision, upon death of the individual the State receives an amount equal to the total amount of medical assistance paid on behalf of the individual; and
- f. The customer has exercised all reasonable efforts and all possible avenues to recover and/or access the assets held in the trust.

Once the undue hardship request and all the necessary information to substantiate the claim are received, send all the information along with Form 6009 with the information below to the Chief of E&P requesting a decision on whether an undue hardship exists.

- a. The name and case number of the applicant/recipient;
- b. The applicant date;
 - c. The date the customer began receiving LTC or HCBW Services; and
- d. A brief description of the circumstances why it would be an undue hardship if the trust provisions were applied.

A decision whether an undue hardship waiver will be granted should be made within forty-five days from the date the Form 6009 and all pertinent information is received by the Chief of E&P, unless extenuating circumstances exist. An adverse determination may be appealed if received by the hearing officer within ninety days from the date of the undue hardship decision.