

DEPARTMENT OF HEALTH SERVICES

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(916) 657-2941



January 5, 1994

TO: All County Welfare Directors Letter No.: 93-88
All County Administrative Officers
All County Medi-Cal Program Specialists/Liaisons

TRUSTS ESTABLISHED ON OR AFTER AUGUST 11, 1993 FOR DISABLED INDIVIDUALS

REF.: All County Welfare Directors Letter (ACWDL) No. 93-07

The purpose of this letter is to instruct counties of a change in the treatment of trusts. This change results from enactment of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93). Instructions regarding the remainder of the OBRA 93 changes will be transmitted via ACWDL to be implemented at a later date.

As a result of OBRA 93 two types of trusts for disabled individuals established on or after August 11, 1993 shall no longer be treated as Medicaid Qualifying Trusts (MQTs) (see ACWDL No. 93-07, draft regulation, Section 50489 (a)), and shall no longer be treated as a transfer of assets to establish eligibility for Medi-Cal (see ACWDL No. 90-01, draft regulations, Sections 50408-50411.5). In accordance with federal law this provision is to be effective no earlier than October 1, 1993 and shall be implemented by the counties no later than March 1, 1994. Counties shall implement at application, redetermination, and whenever such a case is brought to the county's attention. Income and property in these two types of trusts shall, however, be countable to the extent provided in ACWDL No. 93-07, draft regulation, Section 50489 (j) for trusts that are not MQTs. Copies of the draft regulations and ACWDL No. 93-07 have been enclosed for your convenience.

The two types of trusts to which this provisions applies are as follows:

FIRST TYPE OF TRUST (all conditions listed below must exist)

- o The trust document must make the Department of Health Services the first beneficiary and must provide that, the Department of Health Services shall receive all assets remaining in the trust upon the death of the individual up to the amount of medical assistance paid for the individual by Medi-Cal.
- o Pertains to trusts established on or after August 11, 1993;
- o Containing the assets (income or property) of individuals under the age of 65, (once the individual turns 65, the trust shall be considered an MQT);
- o When the individual under 65 is determined to be disabled and unable to participate in any substantial gainful activity pursuant to Title 22, California Code of Regulations, Article 5, Section 50223; and

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- o When the trust is established solely for the benefit of such individual, by a parent; grandparent, legal guardian of the individual, or a court.

Counties shall flag cases when the applicant or beneficiary reaches the age of 64 so that timely 10-day notices for discontinuance due to excess property may be sent.

SECOND TYPE OF TRUST (all conditions listed below must exist)

NOTE: The Department is aware of only one such master trust in Southern California. If you think that you are dealing with such a trust please call Ms. Sharyl Shanen-Raya to be certain.

- o The trust documents must make the Department of Health Services the first beneficiary and must provide that, the Department of Health Services shall receive an amount equal to the amount of medical assistance paid for the individual by Medi-Cal from amounts remaining in the individual's account upon the death of the individual to the extent such amounts are not retained by the trust;
- o Pertains only to trusts established on or after August 11, 1993;
- o Containing the assets (income or property) of individuals under the age of 65, (once the individual turns 65, the trust shall be considered an MQT);
- o When the individual under 65 is determined to be disabled and unable to participate in any substantial gainful activity pursuant to Title 22, California Code of Regulations, Article 5, Section 50223; and
- o When the trust is managed by a non-profit association;
- o When a separate account is maintained for each beneficiary of the trust (but for purposes of investment and management of funds, the trust pools these accounts); and
- o When the account is established solely for the benefit of such individual by the individual, the parent, grandparent, the legal guardian of the individual, or by a court.

Counties shall flag cases when the applicant or beneficiary reaches the age of 64 so that timely 10-day notices for discontinuance due to excess property may be sent.

Put into the form of a chart, the requirements are as follows:

<u>1st TYPE</u>	<u>2nd TYPE</u>	<u>Condition</u>
X	X	1) Established on or after 8/11/93.
X	X	2) Makes the Department of Health Services the first beneficiary.
X		3) Provides that: the Department of Health Services <u>shall receive all assets remaining</u> in the trust upon the death of the individual up to amount of medical assistance paid for the individual by Medi-Cal.
	X	4) Provides that the Department of Health Services <u>shall receive an amount equal to the amount of medical assistance paid</u> for the individual by Medi-Cal from amounts remaining in the individuals account upon the death of the individual to the extent such amounts are not retained by the trust.
X	X	5) Contains the assets (income or property) of individuals under 65.
X	X	6) Contains the assets of individuals who are determined to be disabled and unable to participate in any substantial gainful activity.
X	X	7) Established solely for the benefit of such individual.
X		8) Established by the parent, the grandparent, the legal guardian or by a court.
	X	9) Established by the individual, the parent, the grandparent, the legal guardian, or by a court.
	X	10) The trust is managed by a non-profit association.
	X	11) A separate account is established for each beneficiary of the trust (but for purposes of investment and management of funds, the trust pools these accounts).

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To ensure that recovery of the costs of medical care occurs, counties shall also notify Recovery Branch whenever either one of these two types of trusts are discovered. Send the beneficiary's name, Social Security number, Medi-Cal I.D. number, and photocopies of the trust documents to:

Department of Health Services
Recovery Branch
P. O. Box 225
Sacramento, CA 95814

If you have any questions regarding this issue, please call Ms. Sharyl Shanen-Raya of my staff at (916) 657-2942.

Sincerely,

ORIGINAL SIGNED BY

Frank S. Martucci, Chief
Medi-Cal Eligibility Branch

Enclosures

DEPARTMENT OF HEALTH SERVICES

214-744 P STREET

P.O. BOX 942732

SACRAMENTO, CA 94234-7320



February 10, 1993

TO: All County Welfare Directors
All County Administrative Officers
All County Medi-Cal Program Specialists/Liaisons

Letter No.: 93-07

SUBJECT: IMPLEMENTATION OF TRUST REGULATIONS

The purpose of this letter is to provide counties with regulations (Section 50489 regarding trusts) which are being processed through the Office of Administrative Law and will be released soon for public hearing. Counties shall implement the provisions of these pending regulations no later than May 1, 1993 for applications and redeterminations. If any post-hearing changes take place, counties will be notified immediately. Two parts of the regulation package (the "Statement of Reasons" and the "Informative Digest") have also been included for your information and background.

NOTE: We have received a number of requests to clarify whether or not an annuity can be considered a trust or "similar legal device" as defined in this regulation package. Please remember, annuities are not trusts or similar legal devices. Once an annuity has been purchased, the funds transferred are no longer being managed by a trustee for the purchaser. The funds used to purchase an annuity become the property of the seller at the point of purchase.

Secondly, counties must follow the definitions provided in the draft regulation to determine the existence of an oral or written Medicaid Qualifying Trust (MQT) or a similar legal device (SLD). If all the requirements of the definitions are not met, the instrument cannot be treated as an MQT or SLD.

If you have any questions on this issue, please call Sharyl Shanen-Raya at (916) 657-2942. If it appears that additional clarification is necessary, procedures will be developed to provide that information.

Sincerely,

ORIGINAL SIGNED BY

Frank S. Martucci, Chief
Medi-Cal Eligibility Branch

Enclosure

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November 18, 1992 R-109-87

Informative Digest

This proposed regulation repeals the current title 22, California Code of Regulations (CCR), section 50489, and adopts a new section 50489 to comply with federal law at title 42, United States Code (USC), Sections 1396a(k), 1396a(r)(2)(A), and 1396p(c). Welfare and Institutions Code sections 14005.7, 14006(c), and 14015 provide that resources and income shall be treated in accordance with federal Medicaid law under Title XIX of the federal Social Security Act (42 USC, Section 1396 et seq.).

Title 42, USC, Section 1396a(k), defines a Medicaid Qualifying Trust (MQT) and establishes the treatment of those trusts. For trusts which are not MQTs, federal law at title 42, USC, Section 1396a(r)(2)(A) requires states' eligibility requirements to be no more restrictive than the cash assistance programs. Supplemental Security Income (SSI), the cash assistance program, does not count amounts in irrevocable trusts until distributed. SSI counts the amount in revocable trusts which is revocable and the amount which is actually distributed. Regulations at title 20, Code of Federal Regulations, Section 416.1201(a)(1) and rules at Program Operations Manual System Section SI 01120.200 specify how trusts are to be evaluated.

Section 50489 currently exempts real or personal property held in trust when an applicant or recipient cannot obtain access to the principal of that trust, and describes the steps that must be taken in order to determine whether or not the trust is available.

The proposed Section 50489 define Medicaid Qualifying Trusts and Similar Legal Devices, provide the circumstances under which trust principal and income are available, and describe how the transfer of property into trusts will be treated.

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Statement of Reasons

This proposed regulation change repeals the current Section 50489, title 22, California Code of Regulations (CCR) and adopts a new Section 50489, to comply with Sections 1396a(k) and 1396a(r)(2)(A) and 1396p(c), title 42, United States Code (USC). This proposed section defines Medicaid Qualifying Trusts (MQTs), and Similar Legal Devices (SLDs), and sets forth their treatment in determining eligibility for Medi-Cal, which is California's Medicaid program. This section is necessary to ensure conformity with, and statewide implementation of, Sections 1396a(k), 1396a(r)(2)(A) and 1396 p(c), and to provide uniform application of Medi-Cal eligibility criteria. Failure to make these regulation changes would render the Medi-Cal program out of compliance with federal law, resulting in quality control errors, and potential loss of federal financial participation.

Under the proposed Section 50489, if a trust or SLD meets the criteria for an MQT, the maximum amount the trustee can distribute under the terms of the MQT is considered available, regardless of whether that amount is actually distributed. Property in the MQT which cannot be distributed is considered unavailable. The transfer of property into the MQT is considered a transfer of property and may result in a period of ineligibility for nursing facility level of care pursuant to Section 1396p(c) of title 42, United States Code. If the property is transferred into a trust which is an exempt burial trust pursuant to Section 50479, CCR, the transfer will not result in a period of ineligibility for nursing facility level of care.

The proposed Section 50489 evaluates property in trusts which are not MQTs by the same methodology used in the federal Supplemental Security Income (SSI) program. Federal law at Section 1396a(r)(2)(A), title 42, USC, requires that states use eligibility methodology which is no more restrictive than the cash assistance program. Any property which the person has the legal right, authority or power to liquidate is considered a resource by SSI, pursuant to Section 416.1201(a)(1), title 20, Code of Federal Regulations (CFR). If a property right cannot be liquidated, SSI does not consider it a resource. If property is in a trust which cannot be revoked, the property is not considered available until it is distributed, pursuant to Program Operations Manual System Section SI 01120.100.

The proposed Section 50489 would no longer require a trust beneficiary to take specific steps to obtain trust funds, and would not consider the trust funds available if those steps were not taken. Property in trusts other than MQTs would be considered available only when distributed, or when the trust is revocable. The transfer of property into a trust could result in a period of ineligibility for nursing facility level of care, unless the trust is an exempt burial trust pursuant to Section 50479, CCR.

Repeal Section 50489 as follows:

50489:--Property-Held-in-Trust:

(a)--Real-or-personal-property-held-in-trust-for-the-applicant-or-beneficiary shall-be-exempt-if-the-applicant-or-beneficiary-cannot-obtain-access-to-the principal-of-the-trust:

(b)---To-determine-whether-the-trust-is-available-the-applicant-or beneficiary-shall-take-whichever-of-the-following-actions-is-appropriate within-30-days-of-being-advised-by-the-county-department-of-the responsibility-to-do-so:

(1)--Request-the-trustee-to-release-the-funds:

(2)-Request-that-the-trustee-petition-the-court-for-the-release-of-the-funds:

(3)--Petition-the-court-directly-if-the-trustee-refuses-to-take-the-action specified-in-(1)-or-(2):

(e)---The-trust-shall-be-exempt-pending-completion-of-the-action-specified-in (b):

(d)--The-trust-shall-be-included-in-the-property-reserve;-or-considered-as other-real-property;-under-either-of-the-following-conditions:

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(1) -- The applicant or beneficiary refuses to initiate the action specified in

(b):

(2) -- The court determines that the trust is available to the applicant or beneficiary:

(e) -- The provisions of this section shall not apply if the trust agreement clearly specifies that the applicant or beneficiary is the income beneficiary only and has no ownership interest in the corpus of the trust.

NOTE: -- Authority cited: -- Sections 10725 and 14124.5 Welfare and Institutions Code.

Reference: -- Section 14006, Welfare and Institutions Code.

Adopt a new Section 50489 to read as follows:

50489. Property Held in Trust.

(a) A Medicaid Qualifying Trust (MQT) is a trust or similar legal device (SLD) which:

(1) is established, other than by will, by an individual or the individual's spouse, or by the individual's guardian, conservator, or legal representative who is acting on the individual's behalf;

(2) provides that the individual may receive all or part of the payment from the trust, either directly or to another person or entity on behalf of the individual; and

(3) gives the trustee any discretion in distributing funds to the individual or to another person or entity on behalf of the individual.

(b) For purposes of this section, "individual" means a person who establishes or whose spouse establishes an MQT or SLD, and who is a beneficiary of the MQT or SLD.

(c) An MQT may be revocable or irrevocable.

(d) An MQT may be established to enable the individual to qualify for Medi-Cal, or for some other purpose.

(e) Any trust established prior to April 7, 1986, solely for the benefit of a mentally retarded person who resides in an intermediate care facility for the mentally retarded, is not an MOT.

(f) A written MOT shall be verified by viewing the trust documents and other documents which substantiate any investments and distributions.

(g) An oral MOT shall be verified by written affidavit and by other documents which substantiate any investments and distributions. Affidavits shall be dated and signed under penalty of perjury, and shall specify the terms of the oral MOT. Affidavits may be obtained from the individual and from any other person who knows the terms of the MOT. Real property cannot be held in an oral MOT. Oral MOTs which are held in financial institutions are subject to the requirements of Section 50402.

(h) An SLD is an oral or written arrangement under which an individual transfers property to a person who has legal responsibility to manage the property for the benefit of the individual.

(1) An SLD has the characteristics of subdivision (a).

(2) An arrangement may be an SLD even if it is not called a trust and does not qualify as a trust under state law.

(3) A written SLD shall be verified by viewing the documents which established it and other documents which substantiate any investments and distributions.

(4) An oral SLD shall be verified by written affidavit and by other documents which substantiate any investments and distributions. Affidavits shall be dated and signed under penalty of perjury, and shall specify the terms of the oral SLD. Affidavits may be obtained from the individual and from any other person who knows the terms of the SLD. The county department may request additional documentation of the terms of the SLD. Real property cannot be held in an oral SLD. Oral SLDs which are held in financial institutions are subject to the requirements of Section 50402.

(i) Property in an MOT or SLD is available as specified below:

(1) If the MOT or SLD is revocable, it is available.

(2) If the MOT or SLD is irrevocable:

(A) Any amount distributed from the principal of the MOT or SLD to the individual or to another person or entity on behalf of the individual is available property.

(B) Any amount distributed from the income of the MOT or SLD to the individual or to another person or entity on behalf of the individual is income and is subject to Article 10.

(C) The maximum amount that the trustee may distribute if the trustee were to exercise full discretion under the terms of the MOT or SLD, but which is not distributed, is available property.

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(i) A trust which is not an MOT or SLD shall be verified as provided in subdivisions (f) and (g).

(k) Property in a trust which is not an MOT or SLD is available as specified below:

(1) If the trust is revocable, it is available to the person who has the legal right, authority, or power to revoke the trust.

(2) If the person has no legal right, authority, or power to revoke the trust or to obtain the property, the property is not available until it has been distributed.

(3) Trust income is income, and is subject to Article 10. If not distributed in the month of receipt, trust income is property.

(l) A transfer of property into a trust, an MOT or an SLD may result in a period of ineligibility for nursing facility level of care pursuant to title 42, United States Code, section 1396p(c).

(m) A transfer of property into an exempt burial trust in accordance with section 50479 shall not result in a period of ineligibility for nursing facility level of care.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code.

Reference: Sections 14006, 14005.7 and 14015(a), Welfare and Institutions Code; and Title 42, United States Code, Sections 1396a(k), 1396a(r)(2)(A) and 1396p(c).

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Amend 50408 to read:

50408. Transfers Of Property Occurring Before January 1, 1990 Which Does Do Not Result in Ineligibility. (a) Transfers of property made by an institutionalized individual occurring before January 1, 1990, shall not result in ineligibility for Medi-Cal under any of the following conditions:

No change to the remainder of the regulation.

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Add a new Section 50408.5 to read:

50408.5. Transfers of Nonexempt Property On Or After January 1, 1990. (a) These provisions are effective for transfers of nonexempt property made on or after January 1, 1990.

(b) There is a presumption that nonexempt property, as limited by (e) below, transferred by an institutionalized individual was transferred to establish eligibility or to reduce the share of cost. Such transfers shall be considered in determining a period of ineligibility for Medi-Cal unless they were made more than 30 months immediately preceding the date of application for Medi-Cal (if the applicant is an institutionalized individual) or the date of institutionalization (if the institutionalized individual is already a Medi-Cal beneficiary).

(c) There will be no such presumption for any applicant or recipient other than an institutionalized individual.

(d) Transfers of nonexempt property by institutionalized persons without adequate consideration shall result in a period of ineligibility (as limited by Section 50411.5) for nursing facility services and in a medical institution for a level of care equivalent to that of nursing facility services.

(e) For purposes of this section, property shall be considered exempt in accordance with 50490.1.

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NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Section 14002, 14006 and 14015, Welfare and Institutions Code; and 42 United States Code Sections 1396p and 1396r-5.

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Amend Section 50409 to read:

50409. Transfers of Property Occurring Before January 1, 1990, Which Results in Ineligibility. (a) Transfers of property occurring before January 1, 1990, made by an institutionalized individual or by a person who was a beneficiary prior to January 1, 1990 and such transfer is later discovered by the county department through such methods as IEVS shall result in ineligibility for Medi-Cal if:

No change to the remainder of the regulation.

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Amend Section 50411 to read:

50411. Period of Ineligibility Due to Transfers of Property Occurring Before January 1, 1990. (a) Following a determination of ineligibility due to the transfer of property under Section 50409, there shall be a period of ineligibility. This period shall be the time during which the net market value of the property at the time of transfer, less consideration received, would have supported the applicant of beneficiary and the applicant's or beneficiary's family.

No changes to the remainder of the regulation.

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Add Section 50411.3 to read:

50411.3 Calculation of the Period of Ineligibility for Transfers of Nonexempt Property Which Occurred on or after January 1, 1990. (a) The period of ineligibility for transfers of property for less than fair market value under Section 50408, shall begin with the month in which the property was transferred.

(b) The number of months in such period shall be equal to the lesser of:

(1) 30 months, or

(2) the uncompensated value as determined in (c) below, divided by average private pay rate as provided by the Department.

(c) The uncompensated value shall be the net market value of the property at the time of the transfer, less any consideration received in excess of encumbrances and closing costs, which when included in the property reserve (and the CSRA if eligibility is being established for an institutionalized spouse) would have resulted in excess property as of the date of the transfer.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14002, 14006 and 14015, Welfare and Institutions Code; and 42 United States Code Section 1396p.

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Add Section 50411.5 to read:

50411.5. Transfers of Property Occurring On or After January 1, 1990, Which Do Not Result in a Period of Ineligibility. (a) A transfer of property occurring on or after January 1, 1990, by an institutionalized individual before or after admission to the LTC facility, shall not result in a period of ineligibility to the extent that:

(1) The property transferred was previously exempt as the principal residence under Section 50425 (c) (1-7) and its title was transferred to:

(A) The spouse or community spouse.

(B) A son or daughter under 21.

(C) A son or daughter who is blind, totally or permanently disabled as verified in accordance with 50167 (a) (1).

(D) A sibling who has equity interest in such home and who was residing in the institutionalized individual's home for a period of at least one year immediately before the date the person became an institutionalized individual.

(E) A son or daughter who resided in the home for a period of at least two years immediately before the date the person became an institutionalized individual, and who provided care to the person which permitted the individual to reside at home rather than in the medical institution or nursing facility.

(2) The property transferred was exempt property under Section 50490.1.

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(3) The nonexempt property was transferred to:

(A) The community spouse (or, as of the date of the transfer, to another for the sole benefit of the community spouse).

(B) A son or daughter of the institutionalized individual who is blind, permanently or totally disabled as verified in accordance with Section 50167 (a) (1), or

(C) Prior to the admission of the institutionalized spouse to the LTC facility, to the spouse, (or as of the date of the transfer, to another for the sole benefit of the spouse), provided that the spouse did not transfer the property to another person (other than back to the spouse from which the property came) for less than fair market value.

(D) If the property was transferred under subsection (B), verification shall be required in accordance with Section 50167 (a)(1).

(4) A satisfactory showing is made that:

(A) The institutionalized individual intended to transfer the nonexempt property at fair market value or for other equally valuable consideration.
or

(B) The resources were transferred exclusively for a purpose other than to qualify for medical assistance.

(5) The period of ineligibility would work an undue hardship as defined in Section

50096.5.

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(6) The property was transferred pursuant to Section 50490.7.

NOTE: Authority cited: Section 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14002, 14006 and 14015, Welfare and Institutions Code; and 42 United States Code 1396a, 1396p and 1396r-5.