

DEPARTMENT OF HEALTH SERVICES

714/744 P Street
P.O. Box 942732
Sacramento, CA 94234-7320
(916) 657-2941



December 10, 1996

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

Letter No.: 96-68

POST-HEARING CHANGES TO REGULATION PACKAGE R-20-94 - PROPERTY HELD IN TRUSTS

The purpose of this letter is to provide counties with the public notice of post-hearing changes that were made to the regulation package concerning property held in trusts. The changes are clarifying in nature and also make minor technical corrections to the original text.

Public comments on the post-hearing changes may result in additional changes to the regulation package. The Department of Health Services will keep counties advised of any additional changes.

If you have any questions on this issue, please call Sharyl Shanen-Raya at (916) 255-0918 or Kathy Harwell at (916) 255-0937 on property issues or Dave Rappolee at (916) 255-0914 on income issues.

Sincerely,

ORIGINAL SIGNED BY

FRANK S. MARTUCCI, CHIEF
Medi-Cal Eligibility Branch

Enclosure

DEPARTMENT OF HEALTH SERVICES

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NOTICE OF PUBLIC AVAILABILITY OF CHANGES TO
PROPOSED REGULATIONS REGARDING
Property Held in Trusts (R-20-94)

Pursuant to Government Code Section 11346.8(c), notice is hereby given that the Department has revised the text of the proposed regulations regarding Property Held in Trusts (R-20-94) heard at public hearing on January 10, 1996.

Notice is also given that any person interested may submit written comments regarding the revised text to:

Department of Health Services
Office of Regulations
714 P Street, Room 1000
P. O. Box 942732
Sacramento, CA 94234-7320


In order to be considered, comments must be received by the Office of Regulations between 8:00 a.m. on October 17, 1996 and 5:00 p.m. on November 1, 1996. *extended to 11/4/96.*

A copy of the revised text is attached. Inquiries concerning this matter may be directed to Sandra Ortega, Office of Regulations, at (916) 657-3174.

DEPARTMENT OF HEALTH SERVICES

R-20-94

Dated: October 16, 1996


S. Kimberly Belshé
Director

METHODOLOGY FOR INDICATING POST-HEARING CHANGES

Where text has been altered as a result of post-hearing changes, the area has been double-underlined and side-barred. Where text has been deleted, the deleted text is handwritten above the area with a line through it.

ADOPT A NEW SECTION 50489 TO READ AS FOLLOWS:

§ 50489. Trusts - General.

(a) Property and income held in trust for the benefit of an individual or individual's spouse shall be treated in accordance with Sections 50489 through Section 50489.9. These sections shall supersede any other section(s) of this article.

(b) For purposes of sections 50489 through 50489.9 the following definitions apply:

(1) "Assets" shall mean all income and property of the individual or the individual's spouse, including income or property which the individual or spouse is entitled to, but does not receive because of circumstances brought about by:

(A) the individual or the individual's spouse, or

(B) any other individual or entity, 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, or

(C) any other individual or entity, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.

(2) "Trust" means any arrangement in which an individual or entity (trustor) transfers assets to a trustee or trustees with the intent that the assets be held, managed, or administered by the trustee(s) for the benefit of the trustor or certain designated individuals (beneficiaries). The trust must be valid under State law. The term "trust" also includes any legal instrument or device similar to a trust as described in subsection (3) below.

(3) "Similar legal device" (SLD) means any legal instrument, device or arrangement that involves the transfer of assets from an individual or entity (transferor) to another individual or entity (transferee) with the intent that the assets be held, managed, or administered by an individual or entity for the benefit of the transferor ^{or} certain other individuals. This also includes annuities purchased on or after August 11, 1993.

(4) "Revocable trust" means a trust which can be revoked by its own terms or a trust deemed to be revocable under State law.

(5) "Irrevocable trust" means a trust which cannot be revoked by its own terms or a trust deemed to be irrevocable under State law.

(6) "Trustor" means an individual who creates a trust. A trustor is also known as the "settlor" or "grantor".

(7) "Beneficiary" means any individual or individuals, designated in the trust instrument as benefiting in some way from the trust.

(8) "Trustee" means any individual(s), entity, trust advisory committee, or individual(s) with power of appointment, who manages, holds, or administers a trust for the trust beneficiary or beneficiaries.

(9) "Annuity" means a contract to make periodic payments of a fixed or variable sum paid to an annuitant which are payable unconditionally. Annuity payments may continue for a fixed period of time or for as long as an annuitant lives. An annuitant purchases an annuity with his or her property or property rights. Annuities shall be established to provide the annuitant with payments representing principal and interest which are more than the fair market value of the property used to purchase the annuity. Annuities purchased prior to August 11, 1993, other periodic payment plans, or annuities that are purchased with property rights belonging to someone other than the Medi-Cal applicant/beneficiary or spouse shall continue to be treated in accordance with Title 22, Section 50402 and Article 10.

(10) "Annuitant" means a person who has the right to receive payments from an annuity. The annuity shall be annuitized based upon the life expectancy of the annuitant.

(11) "Annuitized" means an annuity that is paying a fixed, equal amount to the annuitant on a periodic basis. Payments shall be no less frequently than monthly over a number of years equal to or less than the annuitant's life expectancy as indicated in life expectancy tables provided by the Secretary for the Department of Health and Human Services. The final annuity payment may be for an amount less than the previously fixed annuity payments in order to fully exhaust benefits under the annuity. An annuity shall be considered annuitized even though it may provide

an annual cost of living adjustment equal to or less than 5%.

(12) "Date of establishment" means the date the trust document (in the case of a trust), annuity purchase agreement (in the case of an annuity), or other creating document (in the case of a similar legal device) is signed and dated. A trust is not considered to be established on the date it has been amended.

(c) For purposes of this article, trusts shall be classified in three ways:

(1) Medicaid Qualifying Trusts (MQT): A trust established prior to August 11, 1993, as described in Section 50489.1.

(2) OBRA 93 Trusts: A trust established on or after August 11, 1993 as described in Section 50489.5.

(3) Other Trusts: A trust other than those in (1) or (2) as described above.

(d) Placement of assets in, or distributions from, a trust other than a burial trust which is exempt pursuant to Section 50479, shall be considered a transfer of assets.

(e) Trust verification shall be performed by the county in accordance with subsection (1) and (2) below.

(1) A written trust shall be verified by examining the trust documents and any other related documents.

(2) An oral trust shall be verified by written affidavit and by any other related documents. Affidavits shall be dated and signed under penalty of perjury, and shall specify the terms of the oral agreement. Real property cannot be held in an oral trust. Oral trusts which are held in financial institutions are subject to the requirements of Section 50402.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396a(k)(1)(A) and 1396p(c), (d) and (e), Title 42, United States Code.

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ADOPT A NEW SECTION 50489.1 TO READ AS FOLLOWS:

§ 50489.1. Medicaid Qualifying Trusts.

(a) A Medicaid Qualifying Trust (MQT):

(1) Is established prior to August 11, 1993, 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; and which

(2) Provides that the individual or the spouse may receive all or part of the income or principal of the trust, that is dispersed directly or to another person or entity on behalf of that individual; and which

(3) Gives the trustee(s) discretion in distributing funds to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual; and

(4) Is not described in Section 50489.9, and

(5) Shall be treated in accordance with subsections (b) through (e) below.

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

(c) An MQT may be revocable or irrevocable.

(d) An MQT may be established to enable the individual or the spouse to qualify for Medi-Cal.

(e) Property in an MQT is available as specified below:

(1) If the MQT is revocable, it shall be available.

(2) If the MQT is irrevocable then:

(A) Any amount distributed from the principal of the MQT to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual or spouse shall be available property.

(B) Any amount distributed from the income of the MQT to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual or spouse shall be considered income and

shall be subject to Article 10.

(C) The maximum amount that the trustee(s) could distribute to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual or spouse from trust principal shall be considered available property. The maximum amount is the amount the trustee(s) may distribute if the trustee(s) were to exercise full discretion under the terms of the MQT.

(D) The maximum amount that the trustee(s) may distribute to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual or spouse from trust income if the trustee(s) were to exercise full discretion under the terms of the MQT is available income and is subject to Article 10.

(E) Any amount of trust principal for which the trustee(s) has no discretion to release to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual or spouse shall be considered transferred property. The date of the transfer shall be the date the trust was established, ^{or} the date the trust receives the property, or the date disbursement is ^{discontinued} foreclosed, whichever is the most recent.

(F) Any amount of trust income for which the trustee(s) has no discretion to release to the individual, ^{or} to the spouse, or to another person or entity on behalf of that individual or spouse shall be considered transferred assets. The date of the transfer shall be the date trust disbursement is ^{discontinued} foreclosed, or the date the trust receives income, whichever is the most recent. Transfers of income occurring prior to August 11, 1993, shall not be considered.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code; Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396a(k), 1396a(r)(2)(A) and 1396p(c), (d) and (e), Title 42, United States Code.

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ADOPT A NEW SECTION 50489.5 TO READ AS FOLLOWS:

§ 50489.5. OBRA 93 Trusts Established On Or After August 11, 1993.

(a) An OBRA 93 trust:

(1) Is established, in part or in whole with assets of an individual or individual's spouse, on or after August 11, 1993, other than by will; and

(2) Is not described in Section 50489.9, and

(3) Shall be treated in accordance with the remainder of this section.

(b) The provisions of this section shall apply to OBRA 93 trusts without regard to:

(1) the purpose for which the trust is established,

(2) whether the trustee(s) has, or exercises, any discretion under the terms of the trust,

(3) restrictions on when, or whether, distributions may be made from the trust, or

(4) restrictions on the use of trust assets or distributions.

(c) The provisions of this section shall apply to any OBRA 93 trust if it was established by any of the following:

(1) the individual, or

(2) the individual's spouse, or

(3) any other person or entity, 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, regardless of whether that person or entity claims to be acting in such a capacity at the time of the action, or

(4) any other person or entity, including any court or administrative body, acting at the direction, or upon the request of, the individual or the individual's spouse.

(d) In the case of an OBRA 93 trust which includes the assets of someone other than the individual or the individual's spouse, the provisions of this section shall apply only to that portion of the trust containing the assets of the individual or the individual's spouse.

(e) In the case of a revocable OBRA 93 trust:

the principal and income of the trust
(1) trust income and principal shall be considered property available to the individual who ~~or spouse~~

has the right, power, and authority to revoke the trust and to use the proceeds, and

(2) payments from the trust to, or for the benefit of, the individual or spouse shall be considered income of that individual or spouse in accordance with Article 10 of this chapter, and

(3) if payments are made to any person or entity, other than the individual or spouse, for any purpose other than for the benefit of the individual or spouse, those payments shall be considered ^a ~~of~~ ^{of} transferred assets as of the date of payment.

(f) In the case of an irrevocable OBRA 93 trust:

(1) if payment(s) can be made from the trust to, or for the benefit of, the individual or spouse at any time or under any circumstances, the portion of the trust income or principal from which payment(s) to the individual or spouse could be made shall be considered property available to that individual or spouse.

(2) if payment(s) from the trust income or principal is made to, or for the benefit of, the individual or spouse, the payment(s) shall be considered income of that individual or spouse, in accordance with Article 10 of this chapter.

(3) if payment(s) is made from the trust income or principal for any other purpose, the payment(s) shall be considered a transfer of assets by the individual or spouse as of the date of payment, and

(4) if any portion of the trust income or principal from which payment cannot be made to, or for the benefit of, the individual or spouse, then that portion shall be considered a transferred ^{of} asset. The value of the assets transferred shall include the amount of assets used to establish the trust and any assets added to that portion. Payments which have been made from that portion of the trust shall not be deducted from the value of the assets transferred. The date of transfer shall be the date the trust was established, the date the trust receives the asset or the date disbursement is foreclosed, whichever is most recent.

(g) In the case of an annuity:

(1) Payments shall be considered income in accordance with Article 10, and

(2) Section 50402 shall apply only to the extent that it is not inconsistent with subsections (A) - (D) below.

(A) The undistributed balance of the annuity shall be considered unavailable if the annuity contract is annuitized upon the life expectancy of the individual or spouse or for a shorter period of time.

(B) The life expectancy of the annuitant shall be determined in accordance with life expectancy tables specified by the Secretary of the Department of Health and Human Services.

(C) Any payment scheduled to occur beyond the life expectancy of the individual or spouse, as determined in accordance with subsection (3) above, shall be considered a transfer of assets.

(D) Any payment made to, or set aside for, another individual (other than for the sole benefit of the spouse), shall be considered a transfer of assets.

(h) Eligibility may not be denied based upon the provisions of this section if undue hardship is found to exist. The provisions of this section may be waived if the individual demonstrates that the application of these provisions would work an undue hardship. If undue hardship, in accordance with the provisions of this subsection, is considered and found not to apply, the county shall state that on the notice of action. For purposes of this section, undue hardship exists when all of the conditions in subsections (1) through (4) exist or when the conditions in subsections (5) or (6) exist.

(1) The trust assets cannot, under any circumstances, be used to provide for the health care or medical needs of the ~~the individual or spouse~~ ^{the individual or spouse} Medi-Cal applicant or Medi-Cal beneficiary, and

(2) Health care cannot be obtained from, and medical needs cannot be met by, any source other than Medi-Cal without depriving the individual of food, clothing or shelter or other necessities of life, and

(3) The individual's parents (if the individual is under 21) or the individual's spouse, cannot provide for the health care and medical needs, or health care coverage of the individual without

depriving themselves of food, clothing or shelter or other necessities of life, and

(4) The courts have denied a good faith petition to release the trust assets to pay for the required medical care.

(A) A petition to release the trust assets shall not be considered a valid good faith petition if the petition contains language which suggests or requests that the courts do anything other than release the trust assets needed to pay for the required medical care.

(B) The counties shall verify by examining the petition and the court order.

(C) Subsection (h)(4) does not apply to an annuity.

(5) No person shall be made ineligible to the extent the trust contains otherwise exempt income or property.

(6) No person shall be made ineligible due to the application of subsection (g) above, concerning an annuity purchased prior to the implementation date of these regulations when the annuity cannot be annuitized to comply with the provisions of subsection (g). Any annuity purchased prior to the implementation date of these regulations which cannot be annuitized to comply with the provisions of subsection (g), shall continue to be considered in accordance with Section 50402.

NOTE: Authority cited: Sections 10725 and 14124.5, Welfare and Institutions Code. Reference: Sections 14005.7, 14006 and 14015(a), Welfare and Institutions Code; and Sections 1396a(k), 1396a(r)(2)(A) and 1396p(c), (d) and (e), Title 42, United States Code.

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ADOPT A NEW SECTION 50489.9 TO READ AS FOLLOWS:

§ 50489.9. Trusts Other Than Those Described In 50489.1 Or 50489.5.

(a) Trusts described in subsections (a)(1) through (a)(4) below, shall be considered available in accordance with subsection (c):

(1) Trusts that are not described in Section 50489.1 or Section 50489.5,

(2) 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,

(3) A trust established on or after August 11, 1993, which meets all of the following conditions:

(A) A trust, or portion of a trust, that contains the assets of an individual or spouse who was both disabled as verified in accordance with Section 50167(a)(1) and under the age of 65 when the trust was established and who is currently disabled whether or not he/she is age 65 or over, and

(B) A trust that is established for the benefit of the disabled individual or disabled spouse in subsection (a)(1)(A) of this section by a parent, grandparent, legal guardian of the individual, or a court, and where

(C) the State receives all remaining funds in the trust, or respective portion of the trust, upon the death of the individual or spouse or upon termination of the trust up to an amount equal to the total medical assistance paid on behalf of that individual by the Medi-Cal program. A trust, or respective portion of the trust, will still be considered for the benefit of the individual or spouse if the trust permits funds to be used for other purposes when the trust's terms permit such use only after payment of the State's interest pursuant to this subsection.

(4) A trust established on or after August 11, 1993, which meets all the conditions listed in subsections (A) through (E):

(A) the trust contains the assets of the individual or spouse who is disabled as verified in

accordance with Section 50167(a)(1), and

(B) the trust is established and managed by a nonprofit association, and

(C) a separate account is maintained for each trust beneficiary, but for purposes of investment and management of funds, the trust pools these accounts, and

(D) the accounts in the trust are established solely for the benefit of the disabled individual or disabled spouse, as defined in subsection (b) below, by the disabled individual or disabled spouse, his or her parents, his or her grandparents, or the legal guardian of that individual, or by a court, and

(E) the State receives, upon the death of the disabled individual or disabled spouse, all funds remaining in the individual's account, up to an amount equal to the total amount of medical assistance paid on behalf of that individual by the Medi-Cal program. The State shall receive this amount only to the extent that funds remain in that individual's account and are not retained by the trust to cover management and investment fees associated with that account.

(b) In determining whether a trust or an account may be considered solely for the benefit of the mentally retarded or disabled individual or disabled spouse both subsections (A) and (B) below shall apply.

(1) Except in accordance with subsection (4) (E) above, the trust or account funds must benefit no one other than the mentally retarded or disabled individual or disabled spouse for whose benefit the trust or account was established. Other individuals may benefit from the account only after the State's interest has been satisfied pursuant to subsection (4) (E) above.

(2) If the trust permits funds to be used for any purpose, other than for the sole benefit of the mentally retarded or disabled individual or disabled spouse for whose benefit the trust or account was established, the trust or account will not be considered solely for the benefit of that individual or spouse. Such trusts or accounts shall be treated pursuant to Section 50489.5. A trust or account will still be considered for the benefit of the individual or spouse if the trust

permits funds to be used for other purposes when the trust's terms permit such use only after payment of the State's interest pursuant to subsection (4)(E).

(c) Trusts described in subsections (a)(1) through (a)(4) above, shall be considered available as specified below.

(1) ^A If the trust is revocable, ^{if it is available to a} trust income and principal shall be considered available to the person who has the right, power, and authority to revoke the trust and to use the proceeds.

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

(B) Trust principal is available property.

(2) If the trust is irrevocable, the trust assets are not available until distributed.

(d) Any augmentations or additions made to a trust described in subsections (a)(3) or (a)(4) after the disabled individual or disabled spouse, for whose benefit the trust was established, reaches the age of 65, shall be considered a transfer of assets for less than adequate consideration; earlier augmentations or additions shall not be considered transferred for less than adequate consideration.

(e) In the case of a trust described in subsection (a)(3) or (a)(4) above, to ensure that the Department recovers the costs of medical care it provided, the Department's Third Party Liability Branch ^{delete comma} shall be notified

(1) by the county, whenever the county becomes aware of a Medi-Cal applicant or Medi-Cal beneficiary who is a trust beneficiary, and

(2) by the trustee, upon death of the trust beneficiary, termination of the trust or change of trustee.

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

R-20-94 10/8/96

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

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