

+-----+
 | ADMINISTRATIVE DIRECTIVE |
 +-----+

TRANSMITTAL: 92 ADM-45

TO: Commissioners of
 Social Services

DIVISION: Health and
 Long Term Care

DATE: November 4, 1992

SUBJECT: Treatment of Trusts Under the Medical Assistance Program

 SUGGESTED
 DISTRIBUTION: Medical Assistance Staff
 Public Assistance Staff
 Fair Hearing Staff
 Legal Staff
 Staff Development Coordinators

 CONTACT
 PERSON: MA Eligibility County Representative: 1-800-342-
 3715, extension 3-7581
 MA New York City Representative: (212) 417-4853
 User ID: OME060

 ATTACHMENTS: None

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
91 ADM-37		360-4.5	101, 104,	MARG pp.	92 LCM-73
90 ADM-29		360-7.11	366-c,	278-281.2	
89 ADM-47			366(3)(a)	351-355	
89 ADM-45			366(5)(c)		
88 ADM-32			369.3		
			Sect. 7-3.1 (c) of EPTL C. 41, Laws of 1992		

I. PURPOSE

This Administrative Directive (ADM) advises social services districts of the provisions of Chapter 41 of the Laws of 1992 regarding the extent to which trust income and principal can be considered available for Medical Assistance (MA) eligibility purposes. This ADM also clarifies the valuation of resources transferred to a trust.

II. BACKGROUND

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA 1985), Public Law 99-272, amended Section 1902 of the Social Security Act (Act) to provide for the deeming of assets held in Medicaid-qualifying trusts for purposes of determining the MA eligibility of trust beneficiaries. A Medicaid-qualifying trust is a trust or similar legal device established by an individual or by his or her spouse, other than by will, under which the individual may be the beneficiary of all or part of any payments from the trust and under which one or more trustees are permitted to exercise any discretion with respect to the distribution of payments to the individual. COBRA 1985 provides that if a trustee has discretion over how the income and principal of such a trust is distributed, then the maximum amount that can be made available to the individual must be counted for MA eligibility purposes, regardless of whether the trustee chooses to distribute the amount or not.

To circumvent the provisions of the Medicaid-qualifying trust rule, many estate planners have drafted trusts which terminate the trustee's discretion to make distributions to the individual immediately prior to the time when the individual is expected to apply for MA. For instance, many trusts are written so that the individual who creates the trust receives income from the trust as long as he or she remains at home, but if he or she enters a nursing home, all income is diverted to someone else (e.g., a non-institutionalized spouse or a child). This prevents any trust income from being deemed available pursuant to the Medicaid-qualifying trust rule.

Section 86 of Chapter 41 of the Laws of 1992 added Section 7-3.1(c) of the Estates, Powers and Trusts Law (EPTL). Section 7-3.1(c) states that a provision in any trust, other than a testamentary trust, which provides directly or indirectly for the suspension, termination, or diversion of the principal, income, or beneficial interest of the creator or creator's spouse in the event that the creator or creator's spouse should apply for MA or require medical care shall be void, without regard to the irrevocability of the trust or the purpose for which the trust was created.

In addition, Section 85 of Chapter 41 amended Section 369 of the Social Services Law (SSL) to authorize a social services district to recover the amount of MA paid on behalf of a creator or creator's spouse from his or her beneficial interest in a trust in the event that MA is furnished to, or on behalf of, the creator or creator's spouse.

III. PROGRAM IMPLICATIONS

A. DEFINITIONS

For purposes of implementing these new provisions, the following definitions apply:

1. Beneficial interest, as defined in SSL Section 369.3, includes any income and principal amounts to which the creator or creator's spouse would be entitled under the terms of a trust, by right or in the discretion of the trustee, assuming the full exercise of discretion by the trustee.
2. Creator is the original owner of property or assets transferred into a trust. This is usually the individual who establishes the trust. (Creator is also called the trustor, grantor, or settlor.)
3. Income is the interest, dividends, or other income (e.g., rental) generated by assets held in a trust.
4. Irrevocable trust is a trust which cannot be changed or terminated by the creator or a court once established.
5. Living trust is a trust definitely and expressly established by the creator during his or her lifetime which becomes operable during the creator's lifetime.
6. Medicaid-qualifying trust, as defined in COBRA 1985, is a living trust or similar legal device established by an individual or by his or her spouse, other than by will, under which the individual may be the beneficiary of all or part of any payments from the trust and under which one or more trustees are permitted to exercise any discretion with respect to the distribution of payments to the individual.

Similar legal devices may include escrow accounts, savings accounts, investment accounts or other accounts which may not be called trusts but have characteristics of Medicaid-qualifying trusts.

7. Nursing facility services are nursing care and related services in a nursing facility; a level of care provided in a hospital which is equivalent to the care provided in a nursing facility; or care, services or supplies furnished pursuant to a waiver under Section 1915(c) of the Act.

8. Penalty period is the period of ineligibility for nursing facility services (not to exceed 30 months) under the MA program because of a prohibited transfer of resources.
 9. Principal is the assets or property which are transferred into a trust by the creator.
 10. Testamentary trust is a trust created by and as part of a creator's will and which does not become operable until the creator's death.
 11. Trust is a legal instrument created when one person transfers title to property to another person to be held for the benefit of a beneficiary.
 12. Trustee is the individual who holds legal title of the transferred property and has fiduciary responsibilities (administers and manages) on behalf of the beneficiary.
- B. TREATMENT OF THE BENEFICIAL INTEREST OF A CREATOR OR CREATOR'S SPOUSE IN A TRUST ESTABLISHED ON OR AFTER APRIL 2, 1992

For purposes of applying the Medicaid-qualifying trust rule to trusts established on or after April 2, 1992, in determining the maximum amount of income and principal that a trustee can distribute to an applicant/recipient (A/R) under the terms of a trust, trust provisions which limit the trustee's discretion to make such distributions and which are triggered by a need for medical care or an application for MA are void.

Certain trusts may include a provision which terminates the trust in the event that the assets are deemed available for MA eligibility purposes. This means that if the trust is not excluded from being counted as an available resource for purposes of MA eligibility, the trust terminates and the principal in the trust is distributed outright to someone other than the beneficiary or the beneficiary's spouse. Under the statutory authority of EPTL Section 7-3.1(c), if a trust provision requires the termination of the trust upon the creator's application for MA or need for medical care, such provision shall be void. The maximum amount of income and principal that can be deemed available under the Medicaid-qualifying trust rule immediately prior to the time when the trust terminates is counted for MA eligibility purposes. In such cases, the creator(s) may bring action against the trustee for a recovery of his or her beneficial interest.

The provisions of Section 7-3.1(c) of the EPTL apply only to trusts established on or after April 2, 1992. If a given trust was not established by an A/R (or A/R's spouse) the trust is not affected by the new legislation and only the amount of payments actually made to the A/R or A/R's spouse may be considered available in determining eligibility for MA. Trusts established by an individual's guardian or legal representative, acting on the individual's behalf, with the individual's own money, are treated as having been established by the individual.

Section 360-4.5 of 18 NYCRR has been amended to reflect this change.

C. RECOVERIES FROM TRUSTS

The amendment to SSL Section 369 authorizes the social services district to recover the amount of MA paid on behalf of a creator or creator's spouse from the creator's or creator's spouse's beneficial interest in a trust (other than a testamentary trust).

Generally, the counting of trust income and/or principal will result in the denial of MA eligibility. However, there will be instances where MA will be authorized and the case referred to the social services district legal staff for a recovery. Such instances may include, but are not limited to:

1. Refusal of spousal support (other than a community spouse)

In accordance with SSL Section 366(3)(a), in cases where the income and resources of a spouse are not available to the applicant either because of the absence of the spouse, or the refusal or failure of the spouse to make his or her income and/or resources available for the support or care of the applicant, MA eligibility is determined by disregarding the income and/or resources belonging entirely to the non-applying spouse. However, Section 366(3) provides that the furnishing of MA in this situation creates an implied contract between the spouse and the social services district, and the cost of such MA can be recovered from the spouse. In addition, SSL Section 101 provides that a spouse is financially responsible for the support of his or her spouse, and SSL Section 104 provides for recovery from any legally responsible relative discovered to have property. Therefore, in accordance with SSL Sections 101, 104, 366(3)(a), and 369.3, the social services district should, where cost-effective, seek to recover the amount of MA paid on behalf of a recipient from the spouse's beneficial interest in a trust.

2. Refusal of a community spouse to make income and/or resources available

If a community spouse, as defined in 89 ADM-47, refuses or fails to make his or her resources in excess of the maximum

community spouse resource allowance available to the institutionalized spouse, and the institutionalized spouse executes an assignment of support against the community spouse in favor of the social services district or is unable to execute such assignment due to a physical or mental impairment, MA is authorized if the institutionalized spouse is otherwise eligible. The social services district should, where cost-effective, seek to recover the cost of MA provided for the institutionalized spouse from the community spouse's excess resources, including any beneficial interest in a trust.

In the event that a community spouse refuses or fails to make income in excess of the maximum community spouse monthly income allowance and any family member allowance(s), if applicable, available to meet the cost of necessary care or assistance, MA is authorized if the institutionalized spouse is otherwise eligible. However, the social services district should, where cost-effective, seek to recover the cost of any MA provided in accordance with the provisions of SSL Sections 101, 104, 366(3)(a) and 369.3.

In accordance with Section 366-c of the SSL, if a community spouse fails or refuses to cooperate in providing necessary information about his or her resources, including information regarding any beneficial interest that the community spouse may have in a trust, such refusal is reason for denying MA for the institutionalized spouse. If such a denial would result in undue hardship, as defined in 90 ADM-29, and an assignment of support is executed, or if the institutionalized spouse is unable to execute an assignment due to physical or mental impairment, MA is authorized if the institutionalized spouse is otherwise eligible and the case referred to the social services district legal staff for appropriate action.

3. Applicant unable to act on own behalf

When an A/R is unable to manage his or her own funds and cannot secure a representative, the social services district may pursue through court the appointment of a committee or conservator and the establishment of a plan for the management and distribution of the A/R's funds. Once court papers are filed, the A/R's income and resources are no longer considered available. The income and resources are considered unavailable to the A/R prospectively and for a retroactive period of three months. When the court establishes a plan, the A/R's funds are then considered available to meet his or her needs as stated in the plan. The social services district should request that the plan stipulate recovery of MA paid during the time when the A/R's funds were considered to be unavailable.

If the A/R has a committee or conservator who is not meeting his or her obligations, the social services district can take similar actions to replace the committee or conservator, seek a money judgement against the committee/conservator or an order of contempt.

IV. REQUIRED ACTION

A. VALUATION OF RESOURCES TRANSFERRED TO A TRUST

If a trust is irrevocable, social services districts must evaluate the establishment of the trust under the transfer provisions of SSL 366(5)(c) as detailed in 89 ADM-45, 90 ADM-29 and 91 ADM-37. If a trust was established within 30 months of the date of application, social services districts must consider the amount placed in trust by an applicant or recipient (or his or her spouse if created on or after September 1, 1991) as a transfer of resources.

In determining the uncompensated value of the assets transferred to create the trust, social services districts must subtract the amount of payments that actually have been received by the A/R or the spouse from the principal of the trust at the time MA eligibility is determined. The difference or uncompensated value must be used in determining the length of the transfer penalty period (i.e., divide the uncompensated value of the resources transferred by the average monthly regional rate for nursing facility services).

In determining the uncompensated value of the transfer, income generated by the trust principal which has been or may be distributed to the A/R or the A/R's spouse is not to be deducted.

Social services districts must note that if a couple's resources are transferred to create a trust on or after September 1, 1991, the combined assets of the couple that were used to create the trust are to be considered in determining the amount transferred. If a trust is established by a couple prior to September 1, 1991, only the applying spouse's share of the assets used to create the trust are evaluated as a possible transfer.

An A/R who is subject to a transfer penalty under SSL Section 366(5)(c) but who is otherwise eligible for MA may receive coverage for ancillary services not included in a facility's per diem rate, or if residing in the community, for care and services other than nursing facility services. In determining eligibility for these services, the amount of income and/or principal deemed available to the A/R or the A/R's spouse will depend on the terms of the trust and when the trust was created, (i.e., whether prior to or on or after April 2, 1992).

If the denial of an individual's eligibility would result in undue hardship under the transfer of assets rules, as defined in 90 ADM-29, MA coverage must be provided if the individual is otherwise eligible. The amount of income and/or principal to be considered available will depend on the terms of the trust and when the trust was created.

In the event that a trust terminates, with distribution of the principal outright to someone other than the A/R or the A/R's spouse, the transfer of resources provision generally would not apply. Since the creator(s) of an irrevocable trust relinquishes ownership of assets placed in a trust at the time the trust is created, assets which are later distributed to another party are not a transfer by the creator(s). If, however, a trust is set up to be fully revocable, but later terminates if and when a specified event occurs, other than the creator's need for medical care, the termination of the trust would be considered a transfer of countable resources since it is at the point in time when the trust terminates that the creator(s) relinquishes ownership of the assets.

If a trust is set up to be fully revocable, but terminates if and when the creator(s) applies for MA or requires medical care, the termination of the trust is void under the provisions of EPTL Section 7-3.1(c) and the trust continues to be revocable for purposes of MA eligibility. In such cases, the transfer provision would not apply.

NOTE: For A/Rs subject to federally non-participating (FNP) treatment of transfers, a transfer of countable assets to a trust within 12 months of the date of application is presumed to have been made for the purpose of qualifying for MA. An FNP individual or couple remains ineligible for 12 months following the date of transfer, regardless of the uncompensated value of the resource or amount of medical expenses incurred.

B. EVALUATING TRUSTS ESTABLISHED PRIOR TO APRIL 2, 1992

As advised in 88 ADM-32, "Treatment of Potential Payments from Medicaid-Qualifying Trusts for Medicaid Applicant/Recipients," social services districts must review the terms of any trust agreement of an A/R or the A/R's spouse to determine if it meets the definition of a Medicaid-qualifying trust. The agency shall evaluate each case involving a Medicaid-qualifying trust or similar legal device on an individual basis to determine the amount of income and/or principal that must be deemed available from the trust. Social services districts should contact the trustee, court or financial institution involved to obtain a copy of the trust. Generally, all trusts should be referred to district legal staff for decisions and opinions regarding the terms of a trust. In referring trust documents to legal staff, social services workers should highlight areas of a trust that concern eligibility. Such areas may include:

1. When was the trust created?
2. Who is the grantor?
3. Who is the beneficiary?
4. Is the trust irrevocable or revocable?
5. What assets or income may the trustee make available to the beneficiary?

Social services districts must deem available to an A/R the maximum amount of payments that the trustee may make to the A/R under the terms of a Medicaid-qualifying trust. These amounts must be considered available whether or not the trustee actually makes the maximum payments.

If, under the terms of the trust, the trustee has unlimited discretion concerning distribution of trust principal, the entire amount of principal is budgeted as an available resource. If disbursement of the principal is limited by the terms of the trust, only the maximum amount allowed is budgeted as available resources. Any income or interest that can be distributed under the terms of the trust is budgeted as unearned income. Any payments made to a legal guardian or representative payee are to be considered payments to the beneficiary.

When a trustee has discretion to pay or distribute any income or principal of a trust to an A/R and the A/R's spouse jointly, one-half of the maximum amount which the trustee(s) can distribute must be deemed available to the A/R, regardless of whose assets were used to create the trust.

NOTE: A trust established prior to April 7, 1986 for the sole benefit of a mentally retarded individual who resides in an intermediate care facility for the mentally retarded is not considered a Medicaid-qualifying trust under the provisions of OBRA 1986 (Public Law 99-509). Therefore, only the actual amount of trust income or principal received may be considered available for purposes of determining eligibility.

C. EVALUATING TRUSTS ESTABLISHED ON OR AFTER APRIL 2, 1992

Similar to the treatment of trusts established prior to April 2, 1992, in evaluating trusts established by an A/R or his or her spouse on or after April 2, 1992, social services districts must consider as available income and/or resources the maximum amount of payments that the trustee may make to the A/R under the terms of the trust, regardless of whether the trustee actually makes the maximum amount available. However, in determining the maximum amount of payments that a trustee can make to the A/R under the

terms of a trust created on or after April 2, 1992, social services districts must ignore any provision in the trust document which limits the trustee's discretion or ability to make such payments in the event that the creator or creator's spouse applies for MA or requires medical care.

If a trust provides for the reduction, suspension, or diversion of an A/R's or the spouse's interest in a trust when the A/R applies for MA or requires medical care, such provision is void and the social services district must count as available all income and/or principal amounts to which the A/R or the A/R's spouse would have been entitled under the terms of the trust, either by right or in the discretion of the trustee, immediately prior to the filing of an MA application or the need for medical care.

The following types of trusts demonstrate the availability of trust income and/or resources:

1. Revocable trust

If a trust is set up to be revocable while the creator is living at home, any trust provision making the trust irrevocable if and when the creator enters a nursing home is void, and the entire principal of the trust is therefore available to the A/R for purposes of determining MA eligibility for nursing home care. Any income generated by the trust including any interest accrued is budgeted as unearned income.

2. Countable income from a trust fund

If a trust is written so that the trustee may pay the entire net trust income to or for the benefit of the creator as long as he or she remains at home, but if the creator enters a nursing home all income is diverted to someone else, the full amount of net income generated by the trust is deemed available in determining the creator's MA eligibility for nursing home care. The social services district should request an accounting of all income generated by the trust. This information should cover the past year so that a monthly average can be determined.

If the creator was not entitled to any distribution of trust principal, no portion of the principal would be considered to be an available resource.

3. Trusts established to maintain a couple's current standard of living

Another type of trust that can be established by a couple is one that allows the trustee to distribute only such sums from the principal and the net income of the trust as the trustee

deems necessary to maintain the couple's current standard of living. Either spouse loses access to the principal and income if he or she is placed in a nursing home or receives long term custodial care on a planned, on-going and permanent basis. Such a provision is void. If the trustee has discretion to make payments to the A/R and the A/R's spouse jointly, the trust principal and all of the net income generated by the trust is divided equally between the couple. If, however, the trustee is permitted to make payments to the A/R separately, the entire amount of the principal and income is deemed available to the A/R.

D. RECOVERIES

Based on the program implications outlined in Section III. C., when MA is provided to an A/R in instances where the spouse, other than a community spouse, fails or refuses to make his or her income and resources available, social services districts should, where cost-effective, pursue a recovery for the cost of MA provided to the A/R from the spouse. In accordance with Section 369.3 of the SSL, the social services district is authorized to recover the amount of MA paid from the A/R's or the spouses's beneficial interest in a trust.

Similarly, if assistance is provided to an institutionalized spouse when the community spouse has refused to make available his or her income and/or resources in excess of the applicable allowances, the social services district should, where cost-effective, seek to recover the cost of MA provided from the community spouse's excess income and resources, including any beneficial interest of the community spouse in a trust.

In determining the beneficial interest of a non-contributing spouse/community spouse, social services districts must consider the amount of income and principal of a trust to which the spouse/community spouse would be entitled under the terms of the trust, assuming the full exercise of discretion by the trustee. For trusts established on or after April 2, 1992, such income and principal includes the maximum amount of payments permitted under the terms of the trust despite any language in the trust document which limits or excludes the availability of such payments in the event the A/R applies for MA or needs medical care.

When an A/R is unable to act on his or her own behalf and there is no one willing or able to act on behalf of the A/R, social services districts must treat the income and assets of the individual in accordance with Section III.C.3. The social services district should seek to recover the cost of MA provided during the time the income and assets of the A/R were countable but unavailable.

NOTE: Nothing in this ADM should be read as preventing social services districts from maintaining an appropriate action under the New York State Debtor and Creditor Law to set aside a transfer of resources into an irrevocable trust or any other transaction which appears to have been made for the purpose of qualifying a person for MA or for avoiding a lien or recovery of MA paid on behalf of an MA recipient.

V. SYSTEMS IMPLICATIONS

System support is available on MBL for properly entering and identifying countable income from a trust - Unearned Income Source Code "03" and a trust fund as an available resource - Resource Code "06".

VI. EFFECTIVE DATE

The provisions of this ADM are effective November 1, 1992.

Gregory M. Kaladjian
Executive Deputy Commissioner