

**DEPARTMENT OF HEALTH SERVICES**

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December 18, 1997

MEDI-CAL ELIGIBILITY PROCEDURES MANUAL LETTER NO.: 192

TO: All Holders of the Medi-Cal Eligibility Procedures Manual

Enclosed are revised procedures for Article 9J -- Property Held In Trust.

**Procedures Revision:**

Article 9J

**Description:**

Revisions within the Individual Trust section have been made to clarify that funds may be used to pay certain expenses of the trust, as defined in this section, prior to payment to the Department of Health Services. In addition, clarifying language has been included in the sample Joe Smith Special Needs Trust regarding the "earlier" termination of the trust.

**Filing Instructions:****Remove Pages**

Article 9J  
Pages 9J-1 through 9J-4  
Pages 9J-72 through 9J-77  
Pages 9J-82 through 9J-87

**Insert Pages**

Article 9J  
Pages 9J-1 through 9J-4  
Pages 9J-72 through 9J-77  
Pages 9J-82 through 9J-87

If you have any questions on this issue, please feel free to call Sharyl Shanen-Raya at (916) 657-2942.

Sincerely,

Original signed by \_\_\_\_\_

Frank S. Martucci, Chief  
Medi-Cal Eligibility Branch

Enclosures



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## MEDI-CAL ELIGIBILITY PROCEDURES MANUAL

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### VII. TRUSTS THAT ARE NOT MQTs, SLDs, OR OBRA '93 - REGARDLESS OF THE DATE ESTABLISHED

#### A. OVERVIEW

Trusts or SLDs that do not meet the characteristics for treatment in accordance with OBRA '93, and that are not MQTs or SLDs established prior to August 11, 1993, shall be treated in accordance with Section 50489.9. Such trusts may include, but are not limited to those contained in the list below.

- Trusts or SLD's established by a will. (The Medi-Cal applicant/beneficiary is an heir.)
- Certain trusts established for disabled individuals on or after August 11, 1993.
- Blocked accounts established prior to August 11, 1993, which cannot be distributed until a minor reaches age 18.
- Trusts 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.
- Trusts established by a grandparent with his/her own property for a grandchild's college education, etc.
- Trusts established by the community for the medical and social service needs of an individual.
- Trust accounts opened under the California Uniform Transfers to Minors Act (CUTMA or UTMA) for a child with an adult named as custodian. (California Probate Code, Section 3900 et seq.)

#### B. AVAILABILITY AND TREATMENT

Review the trust document to determine if the trust is revocable or irrevocable. Depending on the terms of the trust, it may be treated in one of five ways:

- ✓ un/available property, or
- ✓ un/available income, or
- ✓ transfer of assets.



*Note:* Any trust established by the community designated for medical and social service needs of an individual shall be considered unavailable. The individual has no legal right, power, or authority to use the funds for his/her support.

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### 1. REVOCABLE TRUSTS

The entire amount of funds held in a revocable trust shall be considered totally available to the Medi-Cal applicant, beneficiary, his/her spouse or member(s) of the MFBU as long as one or more of them have the legal right, power and authority to revoke the trust and the right to use the funds.

- a. Trust principal is available property (pursuant to Section 50402, except that subsection 50402(e) does not apply to annuities purchased on or after August 11, 1993).
- b. Trust interest is income and is treated in accordance with Article 10. If the trust income is not distributed in the month of receipt, the trust income is considered income in the month received and is treated as available property (pursuant to Section 50402, except that subsection 50402(e) does not apply to annuities purchased on or after August 11, 1993). in the month following receipt.
- c. Trust assets (income and principal) are not available until distributed when the individual does not have the legal right, power, and authority to revoke the trust and to use trust proceeds.

### 2. IRREVOCABLE TRUSTS

The funds in an irrevocable trust shall be considered available only if they are actually distributed.

- a. If established with the income, property or property rights of the individual or individual's spouse:
  1. Funds distributed from trust income shall be considered income in accordance with Article 10.
  2. Funds distributed from trust principal shall be considered available property.
  3. Funds that cannot be distributed to or for the benefit of the individual or spouse shall be considered transferred assets and may result in a disqualifying transfer.



**Example:** Ann Jones is applying for Medi-Cal on behalf of her husband Bob who is in long term care. She declares that her husband placed all of his separate property into a trust on September 20, 1992. Ann is the trustee. The trust document has been set up to be irrevocable and provides no discretion for Ann to release funds from either the principal or income. Bob's son Joseph is the beneficiary upon Bob's death. The trust contains approximately \$100,000 in personal property which is income producing.



**Discussion:** In this example, the trust was established on September 20, 1992 with the assets of Bob Jones. The trustee has no discretion to release funds from the trust. The \$100,000 would be considered a transferred asset which may result in a disqualifying transfer.

- b. If established with income, property or property rights of an individual who is not a MFBU member or responsible relative:

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1. Funds actually distributed for the support and maintenance of the individual or spouse shall be considered income in accordance with Article 10.
2. Funds that are not distributed are not subject to the transfer of asset provisions since the trust was established with funds belonging to an individual who is not the individual or spouse, not a member of the MFBU and not a responsible relative.

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

Two types of trusts established on or after August 11, 1993, specifically for disabled individuals, have been excepted from treatment under the OBRA '93 provisions. These two types, Individual Trusts and Pooled Trusts, are established with the assets or property rights of disabled individuals and are to be treated in accordance with Section 50489.9 described in B above. Per ACWDL 94-01, treatment is effective no earlier than October 1, 1993 at application and redetermination.



*Note:* Transfer of asset provisions do not apply to Individual and Pooled Trusts for Disabled Individuals established on or after August 11, 1993 unless there is an addition or augmentation to that trust after the individual or spouse reaches age 65 [refer to Section C(3) below].

If a trust is established on or after August 11, 1993 for a disabled individual or disabled spouse, with his/her assets or property rights, which meets the criteria for an **Individual Trust** except that the disabled individual or disabled spouse is age 65, or older, it shall be treated as an OBRA '93 trust pursuant to Section 50489.5 and the exceptions discussed in this subsection shall not apply. If a trust is established on or after August 11, 1993 for a disabled individual or disabled spouse, with his/her assets, which meets the criteria for a **Pooled Trust** except that the disabled individual or disabled spouse is age 65, or older, the transfer may be considered a disqualifying transfer of assets. The Pooled Trust shall continue to be treated under the following procedures.

#### 1. INDIVIDUAL TRUST CHARACTERISTICS

Individual trusts must have all of the following conditions:

- a. Was established on or after August 11, 1993, and
- b. Was established for the benefit of the disabled individual or disabled spouse, by a parent, grandparent, legal guardian of the individual, or court, and
- c. Contains the assets or property rights of the disabled individual or disabled spouse who was both:
  - (1) under the age of 65 when the trust was established whether or not he/she is currently age 65 or over, and
  - (2) who, at the time the trust was established, was determined to be disabled as verified in accordance with Title 22, Section 50167(a) and who is currently determined to be disabled, and

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- d. Provides that, upon the death of the disabled individual or disabled spouse or upon termination of the trust, **DHS shall receive all assets remaining in the trust up to an amount equal to the total medical assistance paid on behalf of that individual by Medi-Cal.**



*Note:* A beneficiary may be named in the trust, to receive amounts remaining in the trust upon the death of the primary beneficiary, however, the terms of the trust must be clear that the transfer to the secondary beneficiary occurs **only after DHS** has been reimbursed for the medical assistance provided.

- (1) Funds may be retained by the trust upon the death of the disabled individual or disabled spouse, for whose benefit the trust was established, for:
- ✓ the cost of the individual's remaining management and investment fees, or
  - ✓ outstanding bills for the benefit of the disabled individual or disabled spouse that fall within the terms of the trust, or
  - ✓ burial/funeral expenses of the disabled individual or disabled spouse.
- (2) In addition, there is no requirement in State or federal law that DHS is obligated to submit any type of claim in order to be reimbursed, nor is the State required to include reimbursement from this type of trust as part of its estate recovery process. It is the responsibility of the trustee to contact DHS to obtain the dollar amount of medical assistance provided by DHS and then submit that amount, or the amount remaining in the trust, whichever is less, to DHS Recovery Branch. Any trust which contains provisions allowing reimbursement of medical assistance provided only upon submission of a "claim" or a "proper claim", shall not be considered an "Other" trust and shall be treated as an OBRA '93 trust under Procedures Section 9JV.



*Note:* When a disabled individual or disabled spouse has resided in more than one state, the trust must provide that the funds remaining in the trust be distributed to each state in which the individual received Medicaid, based on the state's proportionate share of the total amount of Medicaid benefits paid by all of the states on behalf of the individual.

### 2. POOLED TRUST CHARACTERISTICS

Pooled trusts must have all the following conditions:

- a. Established on or after August 11, 1993, and
- b. Established and managed by a non-profit association, and
- c. Contains the assets of the individual or spouse who is determined to be currently disabled as verified in accordance with Title 22, Section 50167 (a)(1), and

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- d. Maintains a separate account for each beneficiary of the trust (but for purposes of investment and management of funds, the trust pools these accounts), and
- e. Provides that **DHS**, upon the death of the disabled individual or disabled spouse or upon earlier termination of the trust, receive all amounts remaining in that individual's account, equal to the amount of medical assistance paid on behalf of that individual to the extent that amounts remain in that individual's account and are not retained by the trust to cover the costs of that individual's remaining management and investment fees, outstanding bills that fall within the terms of the trusts, and burial/funeral expenses.

In addition, there is no requirement in State or federal law that DHS is obligated to submit any type of claim in order to be reimbursed, nor is the State required to include reimbursement from this type of trust as part of its estate recovery process. It is the responsibility of the trustee to contact DHS to obtain the dollar amount of medical assistance provided by DHS and then submit that amount, or the amount remaining in the trust, whichever is less, to DHS Recovery Branch. Any trust which contains provisions allowing reimbursement of medical assistance provided only upon submission of a "claim" or a "proper claim", shall not be considered an "Other" trust and shall be treated as an OBRA '93 trust under Procedures Section 9JV.



*Note:* When a disabled individual or disabled spouse has resided in more than one state, the trust must provide that the funds remaining in the trust be distributed to each state in which the individual received Medicaid, based on the state's proportionate share of the total amount of Medicaid benefits paid by all of the states on behalf of the individual.

- f. Each account is established solely for the benefit of the disabled individual or the disabled spouse by the disabled individual, disabled spouse, his or her parents or grandparents, the legal guardian of that individual, or by a court.
- (1) The account assets are to benefit no one other than the disabled individual or disabled spouse for whose benefit the account was established, from the time the account was established until **DHS'** interest has been paid. If the account assets are not solely for the benefit of the disabled individual or disabled spouse, then the trust is to be treated as an OBRA '93 trust pursuant to Section 50489.5. (See Procedure Section 9 J V).



*Note:* A beneficiary may be named in the trust, to receive amounts remaining in the trust upon the death of the primary beneficiary, however, the terms of the trust must be clear that the transfer to the secondary beneficiary occurs only after DHS has been reimbursed for the medical assistance provided.

- (2) If funds are to be retained by the trust upon the death of the disabled individual or disabled spouse, for whose benefit the trust was established, for any purpose other than:
- ✓ the cost of the individual's remaining management and investment fees, or
  - ✓ outstanding bills for the benefit of the disabled individual or disabled spouse that fall within the terms of the trust, or

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- ✓ burial/funeral expenses of the disabled individual or disabled spouse,

the account will not be considered solely for the benefit of the disabled individual or disabled spouse and shall be treated as an OBRA '93 trust pursuant to Section 50489.5. (See Procedure Section 9 J V).

### 3. ADDITION OR AUGMENTATION OF INDIVIDUAL OR POOLED TRUSTS

When an Individual or Pooled trust is established for a disabled individual or disabled spouse under the age of 65, the exception from treatment under OBRA '93 continues after that individual or spouse becomes age 65. However, Individual and Pooled trusts cannot be added to, or otherwise augmented with assets of the individual or spouse, after that individual or spouse reaches age 65. Any such addition or augmentation may be considered a disqualifying transfer of assets.



*Note:* Parents of a disabled son(s) or daughter(s), regardless of age, may make transfers of assets to their disabled son(s) or daughter(s) directly or to the son's or daughter's Individual or Pooled Trust. Such a transfer by a parent of a disabled son or daughter would not be considered a disqualifying transfer of assets in determining the eligibility of the parents for Medi-Cal.

### 4. RECOVERY OF COSTS

To ensure that recovery of the costs of medical care occurs, counties shall notify Department of Health Services Third Party Liability (TPL) Branch whenever either one of these two types of trusts is discovered. The TPL Branch should also be notified whenever the county finds out that the disabled individual or disabled spouse has died or the trust is being terminated. Send the beneficiary's name, Social Security number, Medi-Cal I.D. number, and photocopies of the trust documents to:

Department of Health Services  
Third Party Liability Branch  
P.O. Box 225  
Sacramento, CA 95814

JOE SMITH SPECIAL NEEDS TRUST

DECLARATION OF TRUST

*Trustor / Settlor* → This trust forms a part of the *settlement arrived at between Joe Smith, by and through his Guardian ad Litem, Sally Smith et al., Plaintiffs, and ABC Hospital et al., Defendants, in Case No. 123456, in the Superior Court of the State of California, County of Stanislaus.*

*Beneficiary* → The settlement provides in part for establishment of a special needs trust in accordance with California Probate Code Section 3604 and 3605 and for certain payments by or on behalf of *Joe Smith*

*Exculpatory Language* → The intent of this trust is to provide a *discretionary, spendthrift trust, to supplement public resources and benefits when such resources are unavailable or insufficient to provide for the Special Needs of the Beneficiary.* As used in this instrument, the term "Special Needs" means the requisites for maintaining the Beneficiary's good

*Discretion* → health, safety, and welfare, when in the *absolute discretion of the Trust Advisory Committee;* such requisites are not being provided by any public agency, office, or department of the State of California, or of any other state, or of the United States of America.

*Principal / Corpus* → The *settlement and all payments*thereunder are the result of a compromise and settlement of disputed claims, wherein no party is acknowledging any liability. With the approval and order of the Court in the above-described action, this Joe Smith Special Needs Trust is established, *ABC Bank is appointed as Trustee thereof.*

*Trustee(s)* → *Sally Smith, Jane Doe, and John Jones are appointed as members of the Trust Advisory Committee;* and those parties are authorized by the Court in the above-described action to execute this trust.

ARTICLE I

*Trustee* → *ABC Bank is appointed initial Trustee* of the trust. Any Trustee shall have the right to resign at any time. ABC Bank shall for any reason cease to act as Trustee, a successor corporate Trustee shall be appointed by the Trust Advisory Committee.

*Trustee(s)* → The term "trustee" as used in this instrument shall include any Trustee or Trustees named herein or appointed pursuant to the provisions hereof. *Sally Smith, Jane Doe, and John Jones are appointed the initial members of the Trust Advisory Committee.* There shall always be a minimum of 3 members of the Trust Advisory Committee. All action of the Trust Advisory Committee shall be by majority vote.

*Discretion* → The *Trust Advisory Committee shall have the power and the authority, in its absolute discretion, to determine and direct the Trustee concerning payments to be made to or for the benefit of the Beneficiary during his lifetime*

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ARTICLE II  
DISTRIBUTION OF INCOME AND PRINCIPAL

All property now or hereafter subject to this trust shall constitute the trust estate and shall be held, allocated, administered, and distributed as hereinafter provided.

*Treatment of income and principal* →

The *income shall be added to and become principal, forming a common fund* The Trustee may distribute from such common fund to or for the benefit of the Beneficiary during his lifetime, such sums and at such times as the Trust Advisory Committee, in its absolute discretion, determines appropriate for the Beneficiary's Special Needs.

*Payment to State* →

Upon the death of Joe Smith or the earlier termination of this trust, the Trustees shall *give notice of Joe Smith's death to the directors of the Departments of Health Services and Developmental Services, and to any county or city and county that has made a written request to the Trustees for such notice, addressed to that county or city and county at the address specified in the request.* The Trustees shall *first distribute from the remaining principal and income of the trust to the State Department of Health Services for all medical assistance paid for or reimbursed by the Department up to the amount remaining in the trust.* The State Department of Mental Health, the State Department of Developmental Services, and any county or city and county in the State of California shall be reimbursed *after the State Department of Health Services* for the purpose of reimbursing it for costs and expenses of medical, health vocational, or other services provided to the plaintiff, and other assistance for such services paid by it to the plaintiff, to the full extent to which it may be so entitled pursuant to law or regulation, and shall distribute any sums remaining thereafter to the plaintiff's surviving children in equal shares or to their issue by right of representation.

**Note: THE FOLLOWING LANGUAGE DOES NOT PROVIDE THAT THE STATE DEPARTMENT OF HEALTH SERVICES IS THE FIRST PAYEE AS REQUIRED FOR INDIVIDUAL AND POOLED TRUSTS.**

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Upon the death of Joe Smith, the *Trustees shall pay all preferred claims of government agencies as set forth in Probate code 3605, the Trustees shall give notice of Joe Smith's death to the directors of the Departments of Health Services and Developmental Services, and to any county or city and county that has made a written request to the Trustees for such notice, addressed to that county or city and county at the address specified in the request. The Departments of Health Services and Developmental Services, and any other state agency which has provided benefits on behalf of Joe Smith during his lifetime, shall be reimbursed and receive all assets remaining in the Trust up to the amount of total medical assistance and other benefits paid, for Joe during his lifetime.* If the trust

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property is insufficient to pay all claims, then the Trustees shall petition the court for instructions and claims shall be paid from the trust property as the Court deems just. The remainder, if any, shall be distributed to Joe's heirs at law.

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*No part of the interest earned by or the corpus of the trust created herein shall be used to supplant or replace public assistance benefits of any county, state, federal or other governmental agency which has a legal responsibility to serve persons with disabilities.*

*Exculpatory language* →

*For the purposes of determining the beneficiary's Veterans Administration, Medi-Cal, or any other public benefits programs eligibility, no part of the principal or income of the trust estate shall be considered available to said beneficiary. In the event the trustee is requested by any department or agency administering Medi-Cal or any other benefits to release principal or income of the trust to or on behalf of the beneficiary to pay for equipment, medication, or services which Medi-Cal or any other government benefit program is authorized to provide, the trustee is authorized to deny such request and is authorized to defend, at the expense of the trust estate, any such request.*

*Irrevocable* →

**ARTICLE III**  
**TRUST IRREVOCABLE**

This Trust may not be modified or revoked except by order of the appropriate Court. In no event, shall the beneficiary of this Trust have any right to revise, amend, or modify this Trust or to exercise any power whatsoever with respect to this Trust, except by Order of the appropriate jurisdiction and only by the Trustee.

**ARTICLE IV**  
**GENERAL PROVISIONS**

This trust has been accepted by the Trustee in the State of California and its validity, construction, and all rights under it shall be governed by the law of that State. This provision shall apply regardless of any change in the place of the administration of the trust, or the change of residence of any Trustee or beneficiary.

*Date Established* →

Executed at Modesto, California, this *12th day of August, 1994*, pursuant to that certain Order Approving Compromise of Disputed Claim dated July 10, 1994 in Case No. 1234546, Superior Court of the State of California, for the County of Stanislaus.

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*Background:* The county has already determined that Mr. Smith was 50 years old and disabled on August 12, 1994. He is still disabled.



*Discussion:* If Mr. Smith and/or his spouse is applying for Medi-Cal the trust shown above should be considered as an **Individual Trust**, established for a disabled individual excepted from treatment in accordance with OBRA '93 provisions. (See Procedures Section 9 J VII).

- ✓ The trust was established on August 12, 1994 (on or after August 11, 1993),
- ✓ With the assets of Joe Smith, who was under the age of 65 and disabled when the trust was established,
- ✓ By Sally Smith, Mr. Smith's guardian, who had the legal authority to act in place of, or on behalf of, Joe Smith,
- ✓ For the benefit of Joe Smith, a disabled individual,
- ✓ Who is determined to be currently disabled in accordance with Title 22, Section 50167(a).
- ✓ The trust provides that DHS shall be the first to receive all assets remaining in the trust up to an amount equal to the total medical assistance paid on behalf of that individual by Medi-Cal.
- ✓ The trust is irrevocable.

Funds distributed to Mr. Smith for his support and maintenance from trust income shall be considered income in accordance with Article 10. Funds distributed to Mr. Smith for his support and maintenance from trust principal shall be considered available property.



*Note:* If Mr Smith, age 50, and/or his spouse is applying for Medi-Cal with the trust shown above, except that the trust did not meet all of the criteria for an Individual Trust, the trust should be considered as an **OBRA '93 Trust** and treated in accordance with Procedures Section 9 J V H 3 for the following reasons.

- ✓ The trust was established on August 12, 1994 (on or after August 11, 1993),
- ✓ With the assets of Joe Smith,
- ✓ By Sally Smith, Mr. Smith's guardian, who had the legal authority to act in place of, or on behalf of, Joe Smith, and
- ✓ It is irrevocable.

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## MEDI-CAL ELIGIBILITY PROCEDURES MANUAL

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The trust provisions provide the trustees with full discretion to release any amount of trust income and trust principal. Payments can be made to or for the benefit of Joe Smith and/or his spouse. Therefore:

- ✓ Actual payment(s) of trust income made to, or for the benefit of Joe Smith or his spouse shall be treated as income in accordance with Article 10.
- ✓ Actual payment(s) from the trust principal made to, or for the benefit of Joe Smith or his spouse shall be treated as income in accordance with Article 10.
- ✓ Any portion of trust principal or trust income that could be paid to, or for the benefit of Joe Smith or his spouse under any circumstance, but is not, shall be treated as available property (pursuant to Section 50402(b)-(f) except that subsection (e) does not apply to annuities purchased on or after August 11, 1996).
- ✓ Any actual payment(s) of trust principal or trust income that is not made to, or for the benefit of Joe Smith or his spouse, shall be considered a transferred asset and may be a disqualifying transfer in accordance with ACWDL 90-01.



*Note:*

If Mr. Smith and/or his spouse are/is applying for Medi-Cal and the trust above was established on August 12, 1992 the above trust would be considered an **MQT** and treated in accordance with Procedures section 9 J VI D 3 for the following reasons.

- ✓ The trust was established prior to August 11, 1993,
- ✓ With the assets of Joe Smith, the beneficiary,
- ✓ By Sally Smith, Mr. Smith's guardian, who had the legal authority to act in place of, or on behalf of, Joe Smith.
- ✓ The trustees have discretion to release any amount of trust income and trust principal.
- ✓ The trust is irrevocable.

Even though the trust is not revocable because the trustees have full discretion to distribute trust income and trust principal, the total trust income and trust principal contained in the trust are available whether or not the trustee is actually releasing it.

- ✓ Any amount distributed from the trust principal to Joe Smith or his spouse, or to another person or entity on behalf of Joe Smith is available property.
- ✓ The maximum amount from the trust principal that the trustee may distribute to Joe Smith or his spouse, or to another person or entity on behalf of Joe Smith, but which is not distributed, is available property (pursuant to Section 50402(b)-(f) except that subsection (e) does not apply to annuities purchased on or after August 11, 1993).

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## MEDI-CAL ELIGIBILITY PROCEDURES MANUAL

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- ✓ Any amount distributed from the trust income to Joe Smith or his spouse, or to another person or entity on behalf of Joe Smith, is income and subject to treatment under Article 10.
  
- ✓ The maximum amount from the trust income that the trustee may distribute to Joe Smith or his spouse, or to another person or entity on behalf of Joe Smith, but which is not distributed, is considered income in the first month and thereafter available property (pursuant to Section 50402(b)-(f) except that subsection (e) does not apply to annuities purchased on or after August 11, 1993). This is because the terms of the trust provides that income shall be added to and become trust principal.