

DATE: November 17, 2023

TO: ALL COUNTY WELFARE DIRECTORS Letter No.:23-22E
ALL COUNTY WELFARE ADMINISTRATIVE OFFICERS
ALL COUNTY MEDI-CAL PROGRAM SPECIALISTS/LIAISONS
ALL COUNTY HEALTH EXECUTIVES
ALL COUNTY MENTAL HEALTH DIRECTORS
ALL COUNTY MEDS LIAISONS

SUBJECT: Treatment of Trusts after the January 1, 2024, Elimination of Assets

(References: Title 22, California Code of Regulations (CCR), Sections [50489](#), [50489.5](#), and [50489.9](#), ACWDL [89-58](#), Medi-Cal Eligibility Procedures Manual [Article 9J](#), [Article 10](#))

The purpose of this All County Welfare Directors Letter (ACWDL) errata is to provide updated guidance to counties regarding the treatment of trusts after the January 1, 2024 elimination of assets for Non-Modified Adjusted Gross Income (Non-MAGI) Medi-Cal programs.

Corrections to ACWDL 23-22 are recorded using the following:

- ~~Strike through~~ for deleted language
- **Underline and bold** for adding new language

Below is the content of ACWDL 23-22, with the revisions located on pages 2, 3, 4, 5, 6, 7, 8, 9, and 10.

Background

The elimination of assets, as enacted by [Assembly Bill \(AB\) 133 \(Chapter 143, Statutes of 2021\)](#), for all Non-MAGI Medi-Cal programs, including Medicare Savings Programs (MSPs) and Long-Term Care (LTC), becomes effective on January 1, 2024.

Trust Terminology

As a refresher, below are some common terms that will aid in the review of trust documents:

- **Trust:** A trust is any arrangement in which an individual or entity (trustor) transfers income, property, or property rights to a trustee(s) with the intent that the income, property, or property rights are held, managed, or administered by the trustee(s) for the benefit of certain designated individuals (beneficiaries). The trust must be valid under State law and manifested by a valid trust instrument or

agreement. A trust must include a designated trust beneficiary, trustor, and trustee. Although these roles may be designated to the same individual, at least one other person must be designated as a beneficiary upon the death of the individual beneficiary.

- Trustee: Any individual(s) or entity, such as an insurance company, bank, a trust advisory committee, or a person with powers of appointment, who manages, holds, or administers a trust for the benefit of the trust beneficiary or beneficiaries. The person or entity who holds legal title and manages the property and income in the trust, according to the instructions in the trust agreement, for the benefit of another. The trustee of a trust has a fiduciary (the duty to act primarily for another's benefit) responsibility outlined in the trust to deal with the trust income or property in a way that carries out the wishes of the trustor for the benefit of the trust beneficiary.
- Trustor: An individual with income, property, or property rights who creates the trust and whose income, property, or property rights fund a trust. This person could also be called a settlor or grantor.
- Beneficiary: Any individual or individuals, designated in the trust document as benefitting in some way from the trust.
- Established: A trust is established on the date the trust documents are dated and signed. A trust is not considered to be established on the date it is merely amended.
- Irrevocable: A trust that cannot, in any way, be revoked or terminated by its own terms. A trust may be irrevocable even though it may be modified under the terms of the trust. For example, the trust may state that the trustor may, at any time during their lifetime, amend any of the terms of the trust agreement by a notarized written instrument, signed by the trustor and delivered to the trustee. A revocable trust is considered to be irrevocable whenever the trustor dies or becomes incompetent and the trust documents have not provided that the power to revoke the trust be passed on to the trustee or another person. The terms of a revocable trust could make the trust irrevocable if a triggering event takes place, such as entry into long term care.

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- Revocable: A trust which can be revoked or terminated by its own terms. The trust principal is available property to anyone who can revoke the trust and who can use the principal thereafter, whether or not they actually do.

- Principal/Corpus: The principal of the trust refers to:
 - Original investments of income, property, or property rights placed in the trust,
 - Any subsequent additions of income, property, or property rights into the trust, and
 - Any income (such as interest and dividends) generated by the income, property, or property rights placed in the trust for which there are no provisions in the trust documents for distribution.

- Trust Income: Trust income is income generated by the trust, such as interest and dividends, or payments of income made in the name of the trust, such as annuity payments, etc.

- Property right: The right of an individual to receive income or property. It could be the right to any type of specific property, such as real property, personal property, intellectual property, etc. An individual is said to have a property right when:
 - the individual has been designated or named to receive income or property such as in a will, trust, or insurance policy, or
 - when the individual has been awarded income or property, such as in a settlement by the courts, or
 - when the individual contracts with them.

Tips for Reviewing Trust Documents

1. Review the trust documentation to determine who is the applicant or Medi-Cal member and their role (i.e., are they the trust beneficiary?).

2. Review the trust documentation to determine if the trust allows for or requires any distributions/payments from the trust.

3. Determine how trust income is treated (e.g., whether it is distributed), and if it is distributed, who receives it? How often is trust income distributed? How much is the income distribution?

Common Trust Types

There are three primary types of trusts that counties are likely to see and their treatment for Medi-Cal eligibility purposes is ~~are~~ described below:

- **OBRA 93 Trusts or Medicaid Trusts** ([22 CCR § 50489.5](#))
 - Trusts created by a Medi-Cal individual or spouse with their own assets.
- **Third Party Trusts** ([22 CCR § 50489\(c\)\(3\)](#))
 - These are also referred to as Other Trusts. These trusts are established with the assets of someone other than the trust beneficiary or their spouse.
- **Excepted OBRA 93 Trusts for Disabled Individuals** ([22 CCR § 50489.9\(a\)\(3\)-\(a\)\(4\)](#))
 - These trusts are sometimes referred to as Special Needs Trusts, (D)(4)(A) trusts, or payback trusts.

The treatment of each of the three types of trusts, both revocable and irrevocable, is discussed in the specified sections below.

*Please note: Medi-Cal Qualifying Trusts (MQTs) are trusts established prior to October 1, 1993; therefore, they are uncommon. For purposes of this letter, DHCS is only focusing on the most common types of trusts that are likely to be reported by applicants and members. If the county does come across an MQT, please refer to Medi-Cal Eligibility Procedures Manual [Article 9J](#) or contact DHCS for technical assistance.

OBRA 93 Trusts

An OBRA 93 trust is a trust that is established by an individual on or after August 11, 1993 and is made up in whole or in part of assets (income, property, or property rights) of the individual and is created by a means other than by will. An OBRA 93 trust can be either revocable or irrevocable.

A trust is considered to have been established by an individual if it is established by:

- The Medi-Cal individual,
- The individual's spouse,

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- A person or entity, including a court, or administrative body with legal authority to act for the Medi-Cal individual or spouse or who acts at the direction or request of the Medi-Cal individual or spouse.

Revocable OBRA 93 Trusts

Treatment effective January 1, 2024

The new policy change because of asset elimination is: The principal of a revocable trust will be disregarded because resources are no longer a factor in the Medi-Cal eligibility determination. **The following rules are not changed by asset elimination:** Payments from the trust to or for the benefit of the individual are counted as income to the individual **according to Medi-Cal income counting rules of the Medi-Cal program for which eligibility is being determined.** Any other payments are considered transfers of assets made by the individual. **Refer to the regulatory language in [22 CCR § 50489.5\(e\)](#) for detailed information on trust payments as income and transferred assets.**

Revocable OBRA 93 Trust—Example 1

Professor Sun established a Revocable Trust with a trust principal of \$100,000 on January 15, 2024, naming their child, Aspen, as the trustee. Professor Sun enters a Long-Term Care facility on October 7, 2024, and applies for Medi-Cal on November 15, 2024. Under the terms of the trust, the trustee has complete discretion in disbursing funds from the trust. Each month, Aspen disburses \$100 to Professor Sun from the trust ~~income~~. The \$100 payment from the trust ~~income~~ would count as unearned income for Professor Sun's Medi-Cal eligibility determination. The principal of Professor Sun's trust is disregarded because resources are no longer a factor in the Medi-Cal eligibility determination.

Revocable OBRA 93 Trust—Example 2

Aspen, the trustee of Professor Sun's revocable trust, disburses a monthly payment of \$2000 from the trust income to a property management company for ~~rent the upkeep of Professor Sun's home~~ while they are in Long-Term Care. This \$2000 monthly payment counts as in-kind income for housing to Professor Sun, because the payments are for the benefit of Professor Sun **and are for the entire rent payment.** In-kind income chart values for housing shall be used in the Medi-Cal eligibility determination unless the reported value is less than **[the chart value \(ACWDL 89-58\).](#)**

Irrevocable OBRA '93 Trusts

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Treatment effective January 1, 2024

The new policy change because of asset elimination is: Trust principal, including the portion from which payments could be made to or for the benefit of the individual or spouse at any time or under any circumstances is disregarded, because resources are no longer a factor in the Medi-Cal eligibility determination.

The following rules are not changed by asset elimination: Payments from the trust or trust income **for the benefit of the individual** are counted as unearned income to the individual **unless an exemption applies or the income is unavailable. Refer to Article 10 of the California Code of Regulations and the Medi-Cal Eligibility Procedures Manual for Non-MAGI income exemptions. Refer to the regulatory language in 22 CCR § 50489.5(f)(2) for detailed information on trust payments as income.** Payments for any other purpose are considered a transfer of assets by the individual. If the trust does not allow for payments of any portion of the trust or trust income, payment to the individual under any circumstances is considered to be a transfer of assets on the date the trust was established, or the date the access to the trust funds was blocked. **Refer to the regulatory language in 22 CCR § 50489.5(f)(3) and (4) for detailed information on trust payments as transferred assets.**

Irrevocable OBRA 93 Trust—Example

Willow is the beneficiary of an irrevocable trust created and funded by their deceased parents. Willow's sibling, Rowan, is the trustee. The terms of the trust give Rowan full discretionary power to withdraw funds for Willow's educational expenses. The trustee uses these funds to pay Willow's tuition and room and board at a University. The trust pays \$200 of monthly interest income into a separate account that designates Willow as owner. Willow has the right to use these funds for any purpose.

The trust principal is disregarded because resources are no longer a factor in the Medi-Cal eligibility determination. The payments of tuition are for Willow's benefit, but since they do not provide food or housing, they are not counted as income for eligibility purposes. However, the payments for room and board **are** counted as in-kind housing income because they provide Willow with **the entire housing need**, and the in-kind income chart values for housing shall be used in the Medi-Cal eligibility determination unless the reported value is less than the chart value. The \$200 payments of interest income to Willow's bank account are counted as unearned income in the Medi-Cal eligibility determination.

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Third-party trusts are established with income and/or property of someone other than the Medi-Cal applicant/member or their spouse ([22 CCR § 50489.9\(a\)\(1\)](#)). Payments from a third-party trust are counted as income in the Medi-Cal eligibility determination of the individual who receives the distributions for their personal needs in the month of receipt. The treatment of third-party trusts **will not change** starting January 1, 2024 because the trust does not contain any assets belonging to the beneficiary.

Third Party Trust—Example

Grandparent Moon establishes a revocable third-party trust with her own income and property. The terms of the trust provide for a monthly distribution of trust income of \$500 to her grandchild, Phoenix, who is applying for Medi-Cal. Since the \$500 of income from the trust is distributed directly to Phoenix, the \$500 is counted as unearned income to Phoenix in the month received in the Medi-Cal eligibility determination.

Excepted OBRA 93 Trusts for Disabled Individuals

There are two types of **Excepted OBRA 93 Trusts** for Disabled Individuals:

- **Individual Excepted OBRA 93 Trusts for Disabled Individuals ([22 CCR § 50489.9\(a\)\(3\)](#))**
 - Trusts established for the benefit of a disabled individual, who was under the age of 65 at the time the trust was established, containing assets of the individual, established by a parent, grandparent, legal guardian of the individual, or a court. After December 13, 2016, individuals can establish their own special needs trusts.
 - Must contain state Medicaid payback provision.
 - If the trust is added to with the individual's own assets after the age of 65, it is considered a transfer of assets.
 - If the trust meets the criteria for an individual trust, except the individual is age 65 or older **when the trust was established**, the trust is treated as an OBRA 93 trust ([MEPM Article 9J-74](#)).
- **Pooled Excepted OBRA 93 Trusts for Disabled Individuals ([22 CCR § 50489.9\(a\)\(4\)](#))**
 - Trusts established for the benefit of a disabled individual, established, and managed by a non-profit organization, containing assets of the individual, and maintains a separate account for each beneficiary of the trust, but for purposes of investment and management of the funds, the trust pools

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these accounts. After December 13, 2016, individuals can establish their own special needs trusts.

- Must contain state Medicaid payback provision.
- If the trust is added to after the age of 65 with the individual's own assets, it is considered a transfer of assets.

Revocable Excepted OBRA 93 Trusts for Disabled Individuals (Individual or pooled)

Treatment effective January 1, 2024

The new policy change because of asset elimination is: Funds distributed to the individual from **trust principal** for their support and maintenance are **is** disregarded because resources are no longer a factor in the Medi-Cal eligibility determination.

The following rules are not changed by asset elimination: Trust income, including interest and dividends, counts as income in the month received regardless of whether the funds are distributed to the individual unless an exemption applies.

Funds distributed to the individual for their support and maintenance from the trust, including distributions of interest, are counted as unearned income in the month received by the trust in the Medi-Cal eligibility determination, regardless if the funds are distributed to the individual or not.

Revocable Special Needs Trust—Example

River establishes a trust with their own assets. The trust document states the trust is revocable at any time by River, and they have the right to use the funds. The interest earned on trust principal is trust income, which counts as unearned income in the month received to the trust in the Medi-Cal eligibility determination.

Irrevocable Excepted OBRA 93 Trusts for Disabled Individuals (Individual or pooled)

Treatment effective January 1, 2024

The new policy change because of asset elimination is: Funds distributed to the individual from **trust principal** for their support and maintenance are disregarded because resources are no longer a factor in the Medi-Cal eligibility determination. **The following rule is not changed by asset elimination:** Funds distributed to the individual for their support and maintenance from **trust income** are counted as unearned income in the month the funds are distributed to the individual in the Medi-Cal eligibility determination.

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Irrevocable Special Needs Trust—Example 1

Sky establishes a trust for the benefit of their child with disabilities, Winter. The trust principal is not counted in the eligibility determination. Trust income is not counted **until distributed**. The trust makes monthly payments of trust income to Winter for their needs. The payments are counted as unearned income to Winter in the Medi-Cal eligibility determination.

Irrevocable Special Needs Trust—Example 2

Bear is the beneficiary of a trust for disabled individuals (special needs trust). The trust provisions provide the trustee with full discretion to release any amount of trust income and trust principal. Payments can be made to, or for the benefit of Bear. The trustee makes distributions of trust principal to pay for professional services, such as landscaping and housekeeping. These distributions are disregarded and do not count as income to Bear in the Medi-Cal eligibility determination, because resources are no longer considered in the Medi-Cal eligibility determination. However, the trustee also distributes \$150 a month directly to Bear for incidentals from the trust income. The monthly payments directly to Bear count as unearned income in the Medi-Cal eligibility determination.

Reminder: Counties are still required to send copies of special needs trust to DHCS' Third-Party Liability and Recovery Division for purposes of recovering the cost of medical assistance provided in accordance with [22 CCR § 50489.9\(d\)](#).

Disbursements from Trusts

The rules regarding the treatment of income for Medi-Cal eligibility purposes are not changed because of asset elimination. Refer to the regulations in Article 10 of the California Code of Regulations and the Medi-Cal Eligibility Procedures Manual for the regulatory language for specific Medi-Cal income rules.

A. Disbursements from trusts that Count as Income

Cash paid directly from the trust to the individual is unearned income. **Disbursements from the trust to third parties that result in the trust beneficiary receiving housing, utilities, or food are counted as in-kind income if the entire item of need is provided.** However, ~~D~~disbursements from the trust to third parties that result in the trust beneficiary receiving non-cash items other than **housing, utilities, or** food ~~or shelter~~ are **not** counted as in-kind income in the Medi-Cal eligibility determination.

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Disbursements that Count as Income Example

Summer receives a \$100 monthly cash payment from ~~the~~ **an other** trust ~~described above~~. The \$100 payment goes directly to Summer to spend however she chooses. The \$100 is counted as unearned income in the Medi-Cal eligibility determination.

B. Disbursements that do not Count as Income

Disbursements from the trust to a third party are not income to the trust beneficiary. Examples of the types of disbursements that a trust may allow and that would not count as income include those made for educational expenses, therapy, transportation, professional fees, medical services, phone bills, recreation, and entertainment.

Disbursements from the trust to third parties that result in the trust beneficiary receiving non-cash items other than **housing, utilities, or** food are not counted as **in-kind** income, ~~if the items would not be counted as property if retained the month after the month of receipt based on previous Medi-Cal asset rules. County's refer to [Article 9](#) of the CCR to determine previously exempt property.~~ Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not counted as income in the Medi-Cal eligibility determination.

Disbursements that do not Count as Income—Example

August is the beneficiary of a trust. The trust purchases a laptop for August. The purchase of the laptop from the trust is not counted as income to August, ~~as the laptop would have been considered exempt property under the previous asset rules.~~

Any disbursements from the trust that are not made to, or for the benefit of the individual are considered a transfer of assets as of the date of the payment. The payment is not considered income to the individual in the Medi-Cal eligibility determination.

Undue Hardship

The CEW must evaluate whether or not undue hardship exists as a result of the application of the OBRA 93 trust provisions, prior to denying or discontinuing an individual's Medi-Cal eligibility. The undue hardship provisions are set forth in MEPM [Article 9J-59](#). If the CEW determines that the individual has demonstrated that undue hardship exists, the treatment of income from the trust under the OBRA 93 provisions is waived, and the income from the trust for purposes of Medi-Cal eligibility is determined under [22 CCR 50489.9 \(a\) and \(c\)](#).

Verification Requirements

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In order to verify income from payments from a trust, counties shall continue to request copies of the trust documentation along with any additional information to demonstrate the payments to the individual ([22 CCR 50489\(e\)\(1\)](#)). Such additional verification can include:

- A current bank statement depicting the receipt of trust income,
- Copies of checks verifying payment of trust income,
- A sworn statement outlining the amount of the income distributed from the trust, the date the distribution was made to the Medi-Cal individual/spouse, and how often the distribution of trust income will be made.

Verification of the receipt of trust income shall be requested at application, annual renewal, and change in circumstance, or if any change in the amount or frequency of the trust income is reported.

If you have any questions, or if we can provide further information, please contact Sara McDonald, by phone at (916) 345-8061 or by email at Sara.McDonald@dhcs.ca.gov.

Sincerely,

Theresa Hasbrouck
Chief, Policy Development Branch
Medi-Cal Eligibility Division
Department of Health Care Services