

DEPARTMENT OF HEALTH SERVICES

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February 10, 1993

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

Letter No.: 93-07

SUBJECT: IMPLEMENTATION OF TRUST REGULATIONS

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

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

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

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

Sincerely,

ORIGINAL SIGNED BY

Frank S. Martucci, Chief
Medi-Cal Eligibility Branch

Enclosure

DRAFT

November 18, 1992 R-109-87

Informative Digest

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

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

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

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

DRAFT

November 18, 1992 R-109-87

Statement of Reasons

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

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

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

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

Repeal Section 50489 as follows:

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

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

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

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

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

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

(c)---The-trust-shall-be-exempt-pending-completion-of-the-action-specified--in

(b):

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

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

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

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

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

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

Adopt a new Section 50489 to read as follows:

50489. Property Held in Trust.

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

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

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

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

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

(c) An MOT may be revocable or irrevocable.

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

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

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

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

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

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

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

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

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

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

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

(2) If the MOT or SLD is irrevocable:

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

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

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

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

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

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

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

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

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

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

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

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