

907 KAR 20:030. Trust and transferred resource requirements for Medicaid other than Modified Adjusted Gross Income (MAGI) standards or for former foster care individuals.

RELATES TO: KRS 205.520, 205.619, 205.6322, 304.14-640, 304.14-642, 42 U.S.C. 1396p(b)-f

STATUTORY AUTHORITY: KRS 194A.030(2), 194A.050(1), 205.520(3), 205.6322, 42 C.F.R. 435, 42 U.S.C. 1396a, 1396p

NECESSITY, FUNCTION, AND CONFORMITY: The Cabinet for Health and Family Services has responsibility to administer the Medicaid program. KRS 205.520(3) authorizes the cabinet, by administrative regulation, to comply with any requirement that may be imposed or opportunity presented by federal law for the provisions of medical assistance to Kentucky's indigent citizenry. KRS 205.6322 requires the cabinet to promulgate administrative regulations to prohibit the sheltering of assets in medical assistance long-term care cases. This administrative regulation establishes trust and transferred resource requirements for Medicaid eligibility determinations for individuals for whom resources are considered for Medicaid eligibility purposes.

Section 1. Transferred Resources.

- (1) Transfer of resources on or before August 10, 1993.
 - (a) If an institutionalized individual applies for Medicaid, a period of ineligibility shall be computed if during the thirty (30) month period immediately preceding the application, but on or before August 10, 1993, the individual or the spouse disposed of property for less than fair market value.
 - (b) The period of ineligibility shall begin with the month of the transfer and shall be equal to the lesser of:
 1. Thirty (30) months; or
 2. The number of months derived by dividing the total uncompensated value of the resources transferred by the transferred resource factor at the time of the application.
- (2) Transfer of resources after August 10, 1993 and before February 8, 2006.
 - (a) If an institutionalized individual applies for Medicaid, a period of ineligibility for NF services, ICF IID services, or 1915(c) home and community based services shall be computed if:
 1. During the thirty-six (36) month period immediately preceding the baseline date, but after August 10, 1993, and before March 9, 2007, assets were transferred; or
 2. During the sixty (60) month period immediately preceding the baseline date, but after August 10, 1993, and before March 9, 2007, a trust was created whereby the individual or the spouse disposed of property for less than fair market value.
 - (b) The period of ineligibility shall:
 1. Begin with the month of the transfer; and
 2. Be equal to the number of months derived by dividing the total uncompensated value of the resources transferred by the transferred resource factor at the time of the application.
- (3) Transfer of resources on or after February 8, 2006.
 - (a) If an institutionalized individual applies for Medicaid, a period of ineligibility for NF services, ICF IID services, or 1915(c) home and community based services shall be computed if:
 1. During the sixty (60) month period immediately preceding the baseline date, but on or after February 8, 2006, assets were transferred; or
 2. During the sixty (60) month period immediately preceding the baseline date, but on or after February 8, 2006, a trust was created whereby the individual or the spouse disposed of property for less than fair market value.

- (b) The period of ineligibility shall:
 - 1. Begin with the month of Medicaid eligibility for NF services, ICF IID services, or 1915(c) home and community based services; and
 - 2. Be equal to the number of months derived by dividing the total uncompensated value of the resources transferred by the transferred resource factor at the time of application.
- (4) Jointly held resources shall be considered pursuant to 42 U.S.C. 1396p(c)(3).
- (5) The addition of another individual's name to a deed shall constitute a transfer of resources.
- (6)
 - (a) If a spouse's transfer of resources results in an ineligibility period for the institutionalized spouse, the ineligibility period shall be apportioned between the spouses if the spouse is subsequently institutionalized and a portion of the ineligibility period against the first institutionalized spouse remains.
 - (b) If one (1) spouse is no longer subject to the ineligibility period, the remaining ineligibility period applicable to both spouses shall be served by the remaining spouse.
- (7) The requirements of this subsection shall apply to an agreement in which an individual, prior to institutionalization, employed another person as a caregiver and made payment for all services provided by the caregiver prior to the individual's entry in a nursing facility.
 - (a) The caregiver agreement shall have:
 - 1. Been notarized;
 - 2. Identified and specified the cost of each caregiver service;
 - 3. Specified that payment shall not have:
 - a. Been made for a service not recognized in the agreement as a caregiver service; or
 - b. Duplicated a service provided by another source; and
 - 4. Included a provision that required payment to be made by the caregiver to the individual for the cost of each caregiver service not provided in accordance with the agreement.
 - (b) The cost of each caregiver service that was not provided in accordance with the agreement and not repaid by the caregiver shall be considered a transfer of resources.
- (8)
 - (a) The requirements of this subsection shall apply to resources sold by contractual agreement, including land contracts or contract for deeds.
 - (b) The contract shall:
 - 1. Be actuarially sound;
 - 2. Not contain balloon payments; and
 - 3. Be without forgiveness of debt if there is termination of the sale.
 - (c) A contract that does not meet the requirements established in paragraph (b) of this subsection shall be treated as the disposal of assets for less than fair market value.
- (9)
 - (a) The requirements of this subsection shall apply to annuities.
 - (b) A determination shall be completed regarding the purpose of the purchase of an annuity in order to determine if resources were transferred for less than fair market value.
 - (c) If the expected return on the annuity is commensurate with the life expectancy of the beneficiary, the annuity shall be:
 - 1. Actuarially sound; and
 - 2. Not considered a transfer of resources for less than fair market value.
 - (d) In accordance with 42 U.S.C. 1396p(c)(1)(F), the purchase of an annuity occurring on or after February 8, 2006 shall be treated as the disposal of assets for less than fair

market value unless the cabinet is named:

1. The remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual; or
2.
 - a. A beneficiary in the second position after the community spouse or a minor or disabled child; and
 - b. A beneficiary in the first position if the community spouse or a representative of the child disposes of any remainder for less than fair market value.

(10)

- (a) The purchase of an annuity shall be considered a transfer of resources if:
 1. The expected return on the annuity is not commensurate with the life expectancy of the beneficiary, making the annuity not actuarially sound; and
 2. The annuity:
 - a. Does not provide substantially equal monthly payments as provided in paragraph (b) of this subsection; and
 - b. Has a balloon or deferred payment of principal or interest.
- (b) Payments shall be considered substantially equal if the total annual payment in any year varies by five (5) percent or less from the payment in the previous year.

(11) The policies in this subsection shall apply regarding the transfer of home property.

- (a) Transfer of home property to an individual listed in paragraph (b) of this subsection shall not constitute a transfer of resources for less than fair market value.
- (b) Home property may be transferred to:
 1. The spouse;
 2. An individual:
 - a. For whom the home owner is a parent; and
 - b. Who is:
 - (i) Under age twenty-one (21) years; or
 - (ii) Blind or disabled;
 3. A sibling who has:
 - a. Equity interest in the home and lived with the institutionalized individual for one (1) year prior to institutionalization; or
 - b. A child who:
 - (i) Resided with the institutionalized individual for two (2) years prior to institutionalization; and
 - (ii) Provided care to the individual to prevent institutionalization.
- (c) Transfer of home property to any individual not listed in paragraph (b) of this subsection shall constitute a transfer of resources for less than fair market value.

(12)

- (a) For multiple or incremental transfers prior to February 8, 2006, the ineligibility periods shall accrue and run consecutively beginning with the month of the initial transfer.
- (b) For multiple or incremental transfers made on or after February 8, 2006, the ineligibility period shall begin with the month of Medicaid eligibility for NF services, ICF IID services, or 1915(c) home and community based services.

(13) An individual shall not be ineligible for Medicaid or an institutional type of service:

- (a) By virtue of subsections (1) to (10) of this section to the extent that the conditions specified in 42 U.S.C. 1396p(c)(2)(B), (C), and (D) or 907 KAR 20:035 are met; or
- (b) Due to transfer of resources for less than fair market value except in accordance with this section.

(14)

- (a) The disposal of a resource, including liquid assets, at less than fair market value shall be presumed to be for the purpose of establishing eligibility unless the individual:

1. Shows the transfer was in accordance with 42 U.S.C. 1396p(c)(2)(B) or (C); or
 2. Makes a satisfactory showing to the department that the disposal was exclusively for some other purpose.
- (b) The value of the transferred resource shall be disregarded if:
1. The transfer is in accordance with 42 U.S.C. 1396p(c)(2)(B) or (C);
 2. It is for a reason other than to qualify for Medicaid; or
 3. The transferred resource was:
 - a. Not a homestead; and
 - b. Considered an excluded resource at the time it was transferred.
- (c) If the resource was transferred for an amount equal to the assessed value for tax purposes, the resource shall be considered as being disposed of for fair market value.
- (d) If the assessed agricultural value is used for tax purposes, the transfer shall be required to be for an amount equal to the fair market value.
- (15)
- (a)
1. After determining that the purpose of a transfer was to become or remain Medicaid eligible, the cabinet shall add the uncompensated equity value of the transferred resource to other currently held resources to determine if retention of the property would have resulted in ineligibility.
 2. For this purpose, the resource considered available shall be the type of resource it was prior to transfer, e.g., if nonhomestead property was transferred, the uncompensated equity value of the transferred property shall be counted against the permissible amount for nonhomestead property.
- (b) If retention of the resource would not have resulted in ineligibility, the value of the transferred resource shall be disregarded.
- (c) If retention would result in ineligibility, the cabinet shall compute a period of ineligibility for Medicaid or an institutional type of service as provided for in subsections (1) to (10) of this section.
- (16)
- (a) Uncompensated value shall be excluded from consideration if good cause or undue hardship exists.
- (b) A waiver of consideration of the uncompensated amount shall be granted subject to the criteria established in this subsection.
- (c) Good cause shall be determined to exist if an expense or loss was incurred by the individual or family group due to:
1. A natural disaster, for example fire, flood, storm, or earthquake;
 2. Illness resulting from accident or disease;
 3. Hospitalization or death of a member of the immediate family; or
 4. Civil disorder or other disruption resulting in vandalism, home explosions, or theft of essential household items.
- (d) An undue hardship shall be determined to exist if:
1. Application of transferred resource penalties deprive an individual of:
 - a. Medical care which shall result in an endangerment to the individual's health or life; or
 - b. Food, clothing, shelter, or other necessities of life; or
 2. The cabinet determines that:
 - a. The transfer of resources is not recoverable;
 - b. The transfer of resources was not intended by the applicant to result in Medicaid coverage;
 - c. The transfer of resources was made in circumstances beyond the applicant's control; or

- d. The applicant would be unable to receive necessary medical care unless an undue hardship exemption is granted.
- (e)
 - 1. The exclusions shall not exceed the amount of the incurred expense or loss.
 - 2. The amount of the uncompensated value to be excluded shall not include any amount which is payable by Medicaid, Medicare, or other insurance.
- (f) If an institutionalized individual is subject to a period of ineligibility because the individual or individual's spouse disposed of property, assets, or resources for less than fair market value, the cabinet shall notify the individual in writing and include an explanation of:
 - 1. The criteria upon which an undue hardship waiver may be granted;
 - 2. The process for seeking an undue hardship waiver; and
 - 3. How to appeal an adverse action in accordance with Section 5 of this administrative regulation.
- (g) Upon consent of the institutionalized individual or individual's personal representative, the facility in which the individual resides may:
 - 1. Request an undue hardship waiver on behalf of the institutionalized individual;
 - 2. Present information to the cabinet regarding the institutionalized individual's case; and
 - 3. File an appeal in accordance with Section 5 of this administrative regulation on behalf of the institutionalized individual if the cabinet denies the facility's request for an undue hardship waiver.
- (h) If the cabinet suspends or terminates a recipient's eligibility because the cabinet discovers that the recipient or recipient's spouse transferred resources for less than fair market value and an undue hardship waiver is requested on behalf of the recipient, the cabinet shall provide payments for nursing facility services in order to hold the bed at the facility for up to, but not more than, thirty (30) days from the date of suspension or termination.
- (i) If the cabinet decides in favor of a recipient's request for an undue hardship waiver and reverses its previous decision to suspend or terminate eligibility, the cabinet shall cover the recipient's nursing facility services at the facility's full rate for the period the individual is eligible under the undue hardship waiver.
- (17) Disclaiming of an inheritance by an individual entitled to the inheritance shall be considered a transfer of resources.

Section 2. Treatment of Resources for a Long-Term Care Applicant who has Long-Term Care Partnership Insurance.

- (1) The amount of benefits paid by the long-term care partnership insurance policy as a direct reimbursement to providers for long-term care expenses or benefits paid on a per diem basis issued directly to the individual shall be used during the eligibility determination process to determine the amount of resources the applicant shall have excluded from the eligibility determination and protected from estate recovery in accordance with 907 KAR 20:025.
- (2) If an applicant disposed of a resource for less than fair market value resulting in a transfer penalty, the applicant may choose to apply the allowable exclusion, dollar-for-dollar, to the transferred resources for the purpose of avoiding a penalty.

Section 3. Treatment of Trusts.

- (1) Regarding a Medicaid qualifying trust created on or before August 10, 1993, if an individual, or the spouse for the individual's benefit, creates, other than by will, a trust or similar legal device with amounts payable to the same individual, the trust shall be considered a "Medicaid qualifying trust" if the trustee of the trust is permitted to exercise discretion as to the amount of the payments from the trust to be paid to the individual.

- (a) Except as provided by paragraph (b) of this subsection, the amount considered available to the trust beneficiary shall be the maximum amount the trustee may, using the trustee's discretion, pay in accordance with the terms of the trust, regardless of the amount actually paid.
- (b) The cabinet may consider as available only that amount actually paid if to do otherwise would create an undue hardship upon the individual in accordance with Section 1(16)(d) of this administrative regulation.
- (2) For purposes of determining eligibility in accordance with Section 1(1) to (10) of this administrative regulation regarding trust agreements, the rules provided for under 42 U.S.C. 1396p(d)(3) shall be met and shall apply to a trust created after August 10, 1993 and established by an individual subject to 42 U.S.C. 1396p(d)(4).
- (a) An individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the individuals described under 42 U.S.C. 1396p(d)(2)(A)(i), (ii), (iii), and (iv) established the trust other than by a will.
- (b)
1. If the corpus of a trust includes income or resources of any other person or persons, the trust rules shall apply to the portion of the trust attributable to the income or resources of the individual.
 2. In determining countable income and resources, income and resources shall be prorated based on the proportion of the individual's share of income or resources.
- (c) Subject to 42 U.S.C. 1396p(d)(4), the trust provisions in 42 U.S.C. 1396p(d) shall be applied in a manner consistent with 42 U.S.C. 1396p(d)(2)(C).
- (d)
1. Payments made from revocable or irrevocable trusts to or on behalf of an individual shall be considered as income to the individual with the exception of payments for medical care or medical expenses.
 2. Payments for medical care or medical expenses shall be excluded as income.
- (e) A trust which is considered to be irrevocable and terminates if action is taken by the grantor shall be considered a revocable trust.
- (f) An irrevocable trust which may be modified or terminated by a court shall be considered a revocable trust.
- (g) If payment from a revocable or irrevocable trust may be made under any circumstance, the amount of the full payment that could be made shall be considered as a resource including amounts that may be disbursed in the distant future.
- (h) Placement of an excluded resource into an irrevocable trust shall not change the excluded nature of the resource.
- (i) Placement of a countable resource into an irrevocable trust shall constitute a transfer of resources for less than fair market value.
- (3) The treatment of trusts established in this section shall be waived if undue hardship criteria is met as established in Section 1(16)(b) of this administrative regulation.
- (4) Regarding subsection (1), (2), or (3) of this section, for trusts created on or prior to August 10, 1993, any resources transferred into a previously established trust after August 10, 1993 shall be considered a transfer of resources and subject to an ineligibility period as provided for under Section 1 of this administrative regulation using the thirty-six (36) month transfer rules.
- (5) An individual may create a qualifying income trust, in accordance with this subsection, to establish financial eligibility for Medicaid.
- (a) A transfer of resources shall not apply to a qualifying income trust if:
1. The trust is established in Kentucky for the benefit of an individual;
 2. The trust is composed solely of the income of the individual, including accumulated interest in the trust;

3. Upon the death of the individual, the department receives all amounts remaining in the trust, up to an amount equal to the total medical assistance paid on behalf of the individual by Medicaid; and
 4. The trust is irrevocable.
- (b) The money in a qualifying income trust shall:
1. Be maintained in a separate account; and
 2. Not be commingled with any other checking or savings account.
- (c) The corpus of a qualifying income trust and interest generated by the trust shall not be counted as available income for an individual for the determination of Medicaid eligibility.
- (d) A qualifying income trust shall state that the funds shall only be used for:
1. Valid medical expenses, including patient liability; or
 2. The community spouse income allowance established in accordance with 907 KAR 20:035.
- (e) All expenditures from a qualifying income trust shall require verification by the department that the expenditures are allowable expenditures.
- (f) Allowable payments from a qualifying income trust shall be made:
1. Every month; or
 2. By the end of the month following the month the funds were placed in the trust.
- (g) If payments by the qualifying income trust are made for medical care, the individual shall be considered to have received fair market value for income placed in the trust.

Section 4. Applicability. The provisions and requirements established in this administrative regulation shall not apply to an individual whose Medicaid eligibility is determined:

- (1) Using the modified adjusted gross income standard; or
- (2) Pursuant to 907 KAR 20:075.

Section 5. Appeal Rights. An appeal of a department decision regarding Medicaid eligibility of an individual based upon application of this administrative regulation shall be in accordance with 907 KAR 1:560.

(21 Ky.R. 2882; 22 Ky.R. 298; eff. 7-26-1995; 30 Ky.R. 1122; 1537; eff. 1-5-2004; 33 Ky.R. 1176; 1866; 2319; eff. 3-9-2007; 35 Ky.R. 1644; 2751; 7-6-2009; TAm 7-16-2013; Recodified from 907 KAR 1:650, 9-30-2013; 40 Ky.R. 1173; 1777; 2163; eff. 4-4-2014; Crt eff. 12-6-2019.)