

8.110.52 Consideration of trusts in determining Medicaid eligibility

A. Trusts established before August 11, 1993:

1. Medicaid Qualifying Trust (MQT)

- a. In the case of a Medicaid qualifying trust, as defined in 42 U.S.C. Sec. 1396a(k), the amount of the trust property that is considered available to the applicant/recipient who established the trust (or whose spouse established the trust) is the maximum amount that the trustee(s) is permitted under the trust to distribute to the individual assuming the full exercise of discretion by the trustee(s) for the distribution of the maximum amount to the applicant/recipient. This amount of property is deemed available resources to the individual, whether or not is actually received.
 - b. 42 U.S.C. Sec. 1396a(k) was repealed in 1993 and is reprinted here exclusively for purposes of trusts established before August 11, 1993. 42 U.S.C. Sec. 1396a(k) defines a Medicaid qualifying trust as "a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual."
2. This provision does not apply to any trust or initial decrees established before April 7, 1986, solely for the benefit of a developmentally disabled individual who resides in an intermediate care facility for the developmentally disabled.
 3. This provision does not apply to individuals who are receiving SSI.

B. Trusts established on or after July 1, 1994:

1. The following definitions apply to trusts established on or after July 1, 1994:

- a. Assets include all income and resources of the individual and the individual's spouse, including all income and resources which the individual or the individual's spouse is entitled to but does not receive because of action by any of the following:
 - 1) The individual or the individual's spouse,
 - 2) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse, or
 - 3) Any person court or administrative body acting at the direction of or upon the request of the individual or the individual's spouse.
2. In determining an individual's eligibility for Medicaid, the following regulations apply to a trust established by an individual:

- 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 following individuals established the trust, other than by will:
 - 1) The individual or the individual's spouse
 - 2) A person, including a court or administrative body, with legal authority to act in place of, or on the behalf of, the individual or the individual's spouse;
 - 3) A person, including a court or administrative body acting at the direction or upon the request of the individual or the individual's spouse.
- b. In the case of a trust, the corpus of which includes assets of an individual and the assets of any other person(s), this regulation shall apply to the portion of the trust attributable to the assets of the individual.
- c. These regulations apply without regard to the following:
 - 1) The purposes for which a trust is established;
 - 2) Whether the trustees have or exercise any discretion under the trust;
 - 3) Any restrictions on when or whether distributions may be made from the trust; or
 - 4) Any restrictions on the use of distributions from the trust.

3. Revocable Trust

- a. The corpus of the trust shall be considered resources available to the individual.
- b. Payments from the trust to or for the benefit of the individual shall be considered income to the individual, and
- c. Any other payments from the trust shall be considered assets transferred by the individual for less than fair market value and are subject to a 60 month look back period and a penalty period of ineligibility as set forth in the regulations on transfers without fair consideration in this volume.

4. Irrevocable Trust

- a. If there are any circumstances under which payments from the trust could be made to or for the benefit of the individual, the following shall apply:
 - 1) The portion of the corpus of the trust, or the income on the corpus, from which payment to the individual could be made, shall be considered as resources available to the individual.
 - 2) Payments from that portion of the corpus, or income to or for the benefit of the individual, shall be considered income to the individual.
 - 3) Payments from that portion of the corpus or income for any other purpose shall be considered as a transfer of assets by the individual for less than fair market value and are subject to a 60 month look back

period and a penalty period of ineligibility as set forth in the regulations on transfers without fair consideration in this volume.

- 4) Any portion of the trust from which, or any income on the corpus from which no payment could be made to the individual under any circumstances, shall be considered as a transfer of assets for less than fair market value and shall be subject to a 60 month look back period and penalty period of ineligibility as set forth in the regulations on transfers without fair consideration in this volume. The transfer will be effective as of the date of the establishment of the trust, or the date on which payment to the individual from the trust was foreclosed, if later. The value of the trust shall be determined by including the amount of any payments made from such portion of the trust after such date.
5. The preceding regulations for trusts established on or after July 1, 1994, do not apply to the following:
 - a. Income Trusts
 - 1) A trust consisting only of the individual's pension income, social security income and other monthly income that is established for the purpose of establishing income eligibility for nursing facility care or Home and Community Based Services (HCBS). To be valid, the trust must meet the following criteria:
 - a) The individual's gross monthly income must be above the 300%-SSI limit but below the average cost of private nursing facility care in the geographic region in which the individual resides and intends to remain. The Colorado Department of Health Care Policy and Financing shall calculate the average rates for such regions on an annual, calendar-year basis. The geographic regions which are used for calculating the average private pay rate for nursing facility care shall be based on the Bureau of Economic Analysis Regions and consist of the following counties:

REGION I: (Adams, Arapahoe, Boulder, Broomfield, Denver, Jefferson)

REGION II: (Cheyenne, Clear Creek, Douglas, Elbert, Gilpin, Grand, Jackson, Kit Carson, Larimer, Logan, Morgan, Park, Phillips, Sedgwick, Summit, Washington, Weld, Yuma)

REGION III: (Alamosa, Baca, Bent, Chaffee, Conejos, Costilla, Crowley, Custer, El Paso, Fremont, Huerfano, Kiowa, Lake, Las Animas, Lincoln, Mineral, Otero, Prowers, Pueblo, Rio Grande, Saguache, Teller)

REGION IV: (Archuleta, Delta, Dolores, Eagle, Garfield, Gunnison, Hinsdale, La Plata, Mesa, Moffat, Montezuma, Montrose, Ouray, Pitkin, Rio Blanco, Routt, San Juan, San Miguel)
 - b) For nursing facility clients, each month the trustee shall distribute the entire amount of income which is transferred into the trust. An amount not to exceed \$20.00 may be retained for trust expenses such as bank charges if such charges are expected to be incurred by the trust.

- c) The only deductions from the monthly trust distribution to the nursing facility are the allowable deductions which are permitted for Medicaid-eligible persons who do not have income trusts. Allowable deductions include only the following:
 - 1) Personal need allowance
 - 2) Spousal income payments
 - 3) Approved PETI payments
- d) Any funds remaining after the allowable deductions shall be paid solely to the cost of the nursing facility care in an amount not to exceed the Medicaid reimbursement rate. Any excess income which is not distributed shall accumulate in the trust.
- e) No other deductions or expenses may be paid from the trust. Expenses which cannot be paid from the trust include, but are not limited to, trustee fees, attorney fees and costs (including attorney fees and costs incurred in establishing the trust), accountant fees, court fees and costs, fees for guardians ad litem, funeral expenses, past-due medical bills and other debts. Trustee fees which were ordered prior to April 1, 1996 may continue until the trust terminates.
- f) For HCBS clients, the amount distributed each month shall be limited to the 300% of the SSI limit. Any monthly income above that amount shall remain in the trust. An amount not to exceed \$20.00 may be retained for trust expenses such as bank charges if such charges are expected to be incurred by the trust. No other trust expenses or deductions may be paid from the trust. For the purpose of calculating Individual Cost Containment or client payment (PETI), the client's monthly income will be 300% of the SSI limit. Upon termination, the funds which have accumulated in the trust shall be paid to the Colorado Department of Health Care Policy and Financing (CDHCPF) up to the total amount of Medical assistance paid on behalf of the individual.
- g) For a court-approved trust, notice of the time and place of the hearing, with the petition and trust attached, shall be given to the county department of social services and the CDHCPF in the manner prescribed by law.
- h) The sole beneficiaries of the trust are the individual for whose benefit the trust is established and the CDHCPF. The trust terminates upon the death of the individual or if the trust is not required for Medicaid eligibility in Colorado.
- i) The trust must provide that upon the death of the individual or termination of the trust, whichever occurs sooner, the CDHCPF shall receive all amounts remaining in the trust up to the total amount of medical assistance paid on behalf of the individual.

- j) The trust must include the name and mailing address of the trustee. The CDHCPF must be notified of any trustee address changes or change of trustee(s) within 30 calendar days.
- k) The trust must provide that an annual accounting of trust income and expenditures and an annual statement of trust assets shall be submitted to the county department of social/human services or to the CDHCPF upon reasonable request or upon any change of trustee.
- l) The amount remaining in the trust and an accounting of the trust shall be due to the CDHCPF within three months after the death of the individual or termination of the trust, whichever is sooner. An extension of time may be granted by the CDHCPF if a written request is submitted within two months of the termination of the trust.
- m) The regulations in this section for income trusts shall also apply to income trusts established after January 1, 1992, under the undue hardship provisions in 26-4-506.3(3), C.R.S. and 15-14-412.5, C.R.S.

b. Disability Trusts

- 1) A trust that is established solely for the benefit of a disabled individual under the age of 65, which consists of the assets of the individual, and is established for the purpose or with the effect of establishing or maintaining the individual's resource eligibility for medical assistance and which meets the following criteria:
 - a) The individual for whom the trust is established must meet the disability criteria of Social Security.
 - b) The only assets used to fund the trust are (1) the proceeds from any personal injury case brought on behalf of the disabled individual, or (2) retroactive payments of SSI benefits under *Sullivan v. Zebley*. (This provision is applicable to disability trusts established from July 1, 1994 to December 31, 2000.)
 - c) The trust is established solely for the benefit of the disabled individual by a parent, grandparent, legal guardian, or the court.
 - d) The sole lifetime beneficiaries of the trust are the individual for whose benefit the trust is established and the Colorado Department of Health Care Policy and Financing (CDHCPF).
 - e) The trust terminates upon the death of the individual or if the trust is no longer required for Medicaid eligibility in Colorado.
 - f) Any statutory lien pursuant to Section 26-4-403(4) must be satisfied prior to funding of the trust and approval of the trust.
 - g) If the trust is funded with an annuity or other periodic payments, the CDHCPF shall be named on the contract or settlement as

the remainder beneficiary up to the amount of medical assistance paid on behalf of the individual.

- h) The trust shall provide that, upon the death of the beneficiary or termination of the trust, the CDHCPF shall receive all amounts remaining in the trust up to the amount of total medical assistance paid on behalf of the individual.
- i) No expenditures may be made after the death of the beneficiary, except for federal and state taxes. However, prior to the death of the individual beneficiary, trust funds may be used to purchase a burial fund for the beneficiary.
- j) The amount remaining in the trust and an accounting of the trust shall be due to the CDHCPF within three months after the death of the individual or termination of the trust, whichever is sooner. An extension of time may be granted by the CDHCPF if a written request is submitted within two months of the termination of the trust.
- k) The trust fund shall not be considered as a countable resource in determining eligibility for medical assistance.
- l) [Rule 8.110.52 B 5. b. 1) l), adopted or amended on or after November 1, 2000 and before November 1, 2001 was not extended by HB 02-1203, and therefore expired May 15, 2002.]
- m) Distributions from the trust may be made only to or for the benefit of the individual beneficiary. Cash distributions from the trust shall be considered income to the individual. Distributions for food or shelter are considered in-kind income and are countable toward income eligibility.
- n) If exempt resources are purchased with trust funds, those resources continue to be exempt. If non-exempt resources are purchased, those resources are countable toward eligibility.
- o) The trust must include the name and mailing address of the trustee. The CDHCPF must be notified of any trustee address changes or change of trustee(s) within 30 calendar days.
- p) The trust must provide that an annual accounting of trust income and expenditures and an annual statement of trust assets shall be submitted to the county department of social/human services or to the CDHCPF upon reasonable request or upon any change of trustee.
- q) Prior to the establishment or funding of a disability trust, the trust shall be submitted for review to the CDHCPF, along with proof that the individual beneficiary is disabled according to Social Security criteria. No disability trust shall be valid unless the CDHCPF has reviewed the trust and determined that the trust conforms to the requirements of 15-14-412.8, C.R.S., as amended, and any rules adopted by the Medical Services Board.

c. Pooled Trusts

- 1) A trust consisting of individual accounts established for disabled individuals for the purpose of establishing resource eligibility for Medicaid. A valid pooled trust shall meet the following criteria:
 - a) The individual for whom the trust is established must meet the disability criteria of Social Security.
 - b) The trust is established and managed by a non-profit association which has been approved by the Internal Revenue Service.
 - c) A separate account is maintained for each beneficiary; however, the trust pools the accounts for the purposes of investment and management of the funds.
 - d) The sole lifetime beneficiaries of each trust account are the individual for whom the trust is established and the CDHCPF.
 - e) If the trust is funded with an annuity or other periodic payments, the CDHCPF or the pooled trust shall be named as remainder beneficiary.
 - f) The trust account shall be established by the disabled individual, parent, grandparent, legal guardian, or the court.
 - g) The only assets used to fund each trust account are (1) the proceeds from any personal injury case brought on behalf of the disabled individual, or (2) retroactive payments of SSI benefits under Sullivan v. Zeblev. (This provision is applicable to pooled trusts established from July 1, 1994 to December 31, 2000.)
 - h) Any statutory lien pursuant to Section 26-4-403(4) must be satisfied prior to funding of the individual's trust account and approval of the joinder agreement.
 - i) Following the disabled individual's death or termination of the trust account, whichever occurs sooner, to the extent that the remaining funds in the trust account are not retained by the pooled trust, the CDHCPF shall receive any amount remaining in the individual's trust account up to the total amount of medical assistance paid on behalf of the individual.
 - j) The pooled trust account shall not be considered as a countable resource in determining Medicaid eligibility.
 - k) Distributions from the trust account may be made only to or for the benefit of the individual. Cash distributions to the individual from the trust shall be considered as income to the individual. Distributions for food or shelter are considered in-kind income and are countable toward income eligibility.
 - l) If exempt resources are purchased with trust funds, those resources continue to be exempt. If non-exempt resources are

purchased, those resources are countable toward resource eligibility.

- 2) If an institutionalized individual for whom a pooled trust is established is 65 years of age or older, the transfer of assets into the pooled trust creates a rebuttable presumption that the assets were transferred without fair consideration and shall be analyzed in accordance with the rules on transfers without fair consideration in this volume. This regulation is effective for transfers to pooled trusts after January 1, 2001.

C. When the individual beneficiary of an income, disability or pooled trust dies or the trust is terminated, the trustee shall promptly notify the county department of social services and the CDHCPF. To the extent required by these rules the trustee shall promptly forward the remainder of the trust property to the CDHCPF, up to the amount of medical assistance paid on behalf of the individual beneficiary.

D. Third Party Trusts

1. Third party trusts are trusts which are established with assets which are contributed by individuals other than the applicant or the applicant's spouse for the benefit of an applicant or client
2. The terms of the trust will determine whether the trust fund is countable as a resource or income for Medicaid eligibility.
 - a. Trusts which limit distributions to non-support or supplemental needs will not be considered as a countable resource. If distributions are made for income or resources, such distributions are countable as such for eligibility.
 - b. If the trust requires income distributions, the amount of the income shall be countable as income in determining eligibility.
 - c. If the trust requires principal distributions, that amount shall be considered as a countable resource.
 - d. If the trustee may exercise discretion in distributing income or resources, the income or resources are not countable in determining eligibility. If distributions are made for income or resources, such distributions are countable as such for eligibility.

E. Submission of Trust Documents and Records

1. The trustee of a trust which was established by or which benefits a Medicaid Applicant or client shall submit trust documents and records to the county department of social services and to the CDHCPF.
2. This requirement includes documents and records for income trusts, disability trusts and the joinder agreement for each pooled trust account.
3. The county department of social services shall submit any trust which is submitted with an application or at redetermination to the CDHCPF. The county department shall determine Medicaid eligibility based on the determination of the CDHCPF as to the effect of the trust on eligibility.

F. Federally Approved Trusts

1. If an SSI recipient has a trust which has been approved by the Social Security Administration, eligibility for Medicaid cannot be delayed or denied. Individuals on SSI are automatically eligible for Medicaid despite the existence of a federally approved trust.
2. If the county department of social/human services has a copy of a federally approved trust, the county must send a copy to the CDHCPF.

8.110.53 Transfers of assets without fair consideration

- A. If an institutionalized individual or the spouse of such individual disposes of assets for less than fair market value on or after the look-back date, the individual shall be subject to a period of period of ineligibility for long term care services, including nursing facility care, Home and Community Based Services (HCBS), and the Program of All Inclusive Care for the Elderly (PACE).
- B. The following definitions apply to transfers of assets without fair considerations:
 1. Assets include all income and resources of the individual and such individual's spouse, including all income or resources which the individual or such individual's spouse is entitled to but does not receive because of action by any of the following:
 - a. The individual or such individual's spouse,
 - b. A person, a court, or administrative body with legal authority to act on behalf of the individual or such individual's spouse, or
 - c. Any person, court or administrative body acting at the direction of or upon the request of the individual or such individual's spouse.
 2. Fair market value is the value of the asset if sold at the prevailing price at the time it was transferred.
 3. Fair consideration is the amount the individual receives in exchange for the asset that is transferred, which is equal to or greater than the value of the transferred asset.
 4. For transfers made before February 8, 2006, the look-back date is 36 months prior to the date of application. For transfers made on or after February 8, 2006, the look-back date is 60 months prior to the date of application.
 5. An institutionalized individual is one who is institutionalized in a medical facility, a nursing facility, or applying for or receiving Home and Community Based Services (HCBS) or the Program of All Inclusive Care for the Elderly (PACE).
- C. If an institutionalized individual or such individual's spouse transfers assets without fair consideration on or after the look-back date, the transfer shall be evaluated as follows:
 1. The fair market value of the transferred asset, less the actual amount received, if any, shall be divided by the average monthly private pay cost for nursing facility care in the state of Colorado at the time of application.
 2. The resulting number is the number of months that the individual shall be ineligible for medical assistance. For transfers made before February 8, 2006, the period of ineligibility shall begin with the month in which the transfer occurred. For transfers made on or after February 8, 2006, the period of ineligibility shall begin on the later of the following dates:

- a. The first day of the month in which the transfer occurred, or
 - b. The date on which the individual would be eligible for HCBS, PACE or institutional services based on an approved application for such assistance without regard to any penalty periods.
 3. The period of ineligibility shall also include partial months, which shall be calculated by multiplying 30 days by the decimal fractional share of the partial month. The result is the number of days of ineligibility. For transfers occurring on or after April 1, 2006, the result should be rounded up to the nearest whole number.
 4. There is no maximum period of ineligibility.
 5. The total amount of all of the transfers are added together and the period of ineligibility begins the first day of the month in which the resources are transferred.
 - a. If the previous penalty period has completely expired, the transfers are not added together.
 - b. If the previous penalty period has not completely expired and the first day of the month in which the resources are transferred is part of a prior penalty period, the new penalty period begins the first day after the prior penalty period expires.
 6. The institutionalized individual may continue to be eligible for Supplemental Security Income (SSI) and basic Medicaid services, but shall not be eligible for medical assistance for nursing facility services, Home and Community Based Services or the Program of All Inclusive Care for the Elderly due to the transfer without fair consideration.
 7. If a transfer without fair consideration is made during a period of eligibility, a period of ineligibility shall be assessed in the same manner as stated above.
- D. Actions that prevent income or resources from being received, as set forth on the following list, which is not exclusive, shall create a rebuttable presumption that the transfer was without fair consideration:
1. Waiving pension income.
 2. Waiving a right to receive an inheritance.
 3. Preventing access to assets to which an individual is entitled by diverting them to a trust or similar device. This is not applicable to valid income trusts, disability trusts and pooled trusts for individuals under the age of 65 years.
 4. Failure of a surviving spouse to elect a share of a spouse's estate.
 5. Failure to obtain a family allowance or exempt property from an estate of a deceased spouse or parent.
 6. Not accepting or accessing a personal injury settlement.
 7. Transferring assets into an irrevocable private annuity which was not purchased from a commercial company.
 8. Transferring assets into an irrevocable entity such as a Family Limited Partnership which eliminates or restricts the individual's access to the assets.

9. Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony, if the benefit outweighs the cost.
10. Failure to exercise rights in a Dissolution of Marriage case, which insure an equitable distribution of marital property and income.

E. Treatment of certain assets as transfers without fair consideration

1. Promissory notes established before April 1, 2006
 - a. The fair market value of promissory notes is a countable resource and must be evaluated in accordance with the regulations on consideration of resources in this volume.
 - b. Promissory notes with one or more of the following provisions, indicating they have little or no market value, shall create a rebuttable presumption of a transfer without fair consideration:
 - 1) An interest rate lower than the prevailing market rate.
 - 2) A term for repayment longer than the life expectancy of the holder of the note.
 - 3) Low payments.
 - 4) Cancellation at the death of the note holder.
 - c. Promissory notes which have been appraised by a note broker as having little or no value shall create a rebuttable presumption of a transfer without fair consideration.
2. Promissory notes established on or after April 1, 2006
 - a. Subject to the look-back date described in Section 8.110.53.B.4., for the purpose of calculating the penalty period of ineligibility for a transfer without fair consideration, the value of a promissory note, loan or mortgage which does not meet the criteria in Section 8.110.51.B.12.a.1.-3. is the outstanding balance due as of the date of the individual's application for medical assistance for services described in Section 8.110.53.B.5.
3. Personal care services
 - a. Family members who provide assistance or services are presumed to do so for love and affection, and compensation for past assistance or services shall create a rebuttable presumption of a transfer without fair consideration unless the compensation is in accordance with the following:
 - 1) A written agreement must be executed prior to the delivery of services.
 - 2) The agreement must be signed by the applicant, or a legally authorized representative, such as agent under a power of attorney, guardian, or conservator. If the agreement is signed by a representative, that representative may not be a beneficiary of the agreement.
 - 3) The agreement must be dated and the signature must be notarized.

- 4) Compensation for services rendered must be comparable to what is received in the open market.
 - b. Payment for services, which were rendered previously and for which no compensation was made, shall be considered as a transfer without fair consideration.
 - c. Assets transferred in exchange for a contract for personal services for future assistance provided by family members or by a professional after the date of application are considered available resources.
 - d. A family member may provide homemaking or caregiving services prior to the date of institutionalization and may be paid at the time of rendering the services a reasonable hourly rate comparable to the prevailing market rate without the necessity of a written contract.
 - 4. Transfers of real property into joint tenancy without fair consideration
 - a. If real property is transferred into joint tenancy with right of survivorship with one or more joint tenants, the amount transferred depends on the number of joint tenants to whom the property is transferred. The following are examples:
 - 1) If the transfer is to one joint tenant, the amount transferred is equal to one-half of the value of the property at the time of the transfer.
 - 2) If the transfer is to two joint tenants, the amount transferred is equal to two-thirds of the value.
 - 3) If the transfer is to three joint tenants, the amount transferred is equal to three-fourths of the value of the property at the time of the transfer.
 - b. If the transfer is completed with two deeds or transactions, the first of which transfers a fractional share of the property into tenancy in common, and the second into joint tenancy, the amount transferred shall be determined in the same manner as set forth above.
- F. No period of ineligibility will be imposed if the individual transferred the assets under any of following circumstances:
- 1. The asset transferred was a home and title to the home was transferred to:
 - a. The spouse of such individual;
 - b. A child of such individual who is either
 - 1) Under the age of 21 years, or
 - 2) Is blind or totally and permanently disabled as determined by the Social Security Administration.
 - c. A brother or sister
 - 1) Who has an equity interest in the home and

- 2) Who was residing in such individual's home for at least one year immediately before the date that the individual becomes institutionalized.
- d. A son or a daughter of such individual
 - 1) Who was residing in the home for a period of at least two years immediately before the date the individual becomes institutionalized and
 - 2) Who provided care to such individual by objective evidence, that permitted such individual to reside at home rather than in an institution.
 - 3) Documentation shall be submitted proving that the son or daughter's sole residence was the home of the parent. The parent's attending physician(s) or professional health provider(s) during the past two years must substantiate in writing that the care was provided, and that the care prevented the parent from requiring placement in a nursing facility.
2. The assets were transferred:
 - a. To the individual's spouse or to another for the sole benefit of the individual's spouse.
 - b. From the individual's spouse to another for the sole benefit of the individual's spouse.
 - c. To a trust which is established solely for benefit of the individual's child who is determined to be blind or totally disabled by the Social Security Administration or to that child directly for the sole benefit of the child.
 - d. To a trust established solely for the benefit of an individual under 65 years of age who is determined to be blind or totally disabled by the Social Security Administration.
3. Definition of the term "for the sole benefit of," as used in the preceding exceptions to the transfer penalty rules:
 - a. A transfer or a trust is considered to be for the sole benefit of the spouse, blind or disabled child, or a disabled individual if the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.
 - b. To insure that the asset transferred is for the sole benefit of the spouse, blind or disabled child or disabled individual, the following criteria must be met:
 - 1) The transfer must be accomplished by a written instrument which legally binds the parties to a specified course of action and sets forth:
 - a) The conditions under which the transfer was made, and
 - b) A statement as to whom can benefit from the transfer.
 - 2) The written instrument must provide for the spending of funds or use of the transferred assets for the benefit of the individual on a basis that is actuarially sound based on the life expectancy of the individual.

- 3) Disability trusts and income trusts, which designate the Colorado Department of Health Care Policy and Financing as the remainder beneficiary up to the amount of medical assistance paid on behalf of the individual are exempt from this requirement.
- 4) A community spouse to whom a Community Spouse Resource Allowance has been transferred does not have to provide a written document or comply with the requirement that the transfer is actuarially sound. However, the Community Spouse Resource Allowance must be for the sole benefit of the community spouse to whom it is transferred. Upon the death of the community spouse, those resources shall be made available to the surviving spouse, at least up to the amount of the elective share of the augmented estate, the family allowance and the exempt property allowance.

G. There is a rebuttable presumption the transfer without fair consideration was made for purposes of Medicaid eligibility.

1. The transfer is presumed to have been made for the purpose of obtaining eligibility or remaining eligible unless the individual provides convincing, objective evidence that the transfer was exclusively for some other purpose and the reason for the transfer did not include Medicaid eligibility. Transfers that are made to avoid the Medicaid lien or the Medicaid estate recovery program shall be included in the definition of Medicaid eligibility.
2. A subjective statement of intent or ignorance of the transfer penalty or verbal assurances that the individual was not considering Medicaid eligibility when the transfer was made are not sufficient.
3. There is a rebuttable presumption that transfers without fair consideration were made for the purpose of Medicaid eligibility in the following cases:
 - a. In any case in which the individual's assets and the assets of the individual's spouse remaining after the transfer total an amount insufficient to meet all living expenses and medical expenses reasonably expected to be incurred by the individual or the individual's spouse in the thirty-six months following the transfer. Medical expenses include the cost of long term care unless the future necessity of such care could have been absolutely precluded because of the particular circumstances.
 - b. In any case where the transfer was made on behalf of the individual or the individual's spouse, by a guardian, conservator, or agent under a power of attorney to any spouse, child, grandchild, brother, sister, niece, nephew, parent, grandparent, by birth, adoption, or marriage of the guardian, conservator, or agent under a power of attorney.
4. Convincing evidence may include, but is not limited to, verification which establishes:
 - a. That at the time of the transfer the individual could not have anticipated needing long term medical assistance due to the existence of other circumstances which would have precluded the need.
 - b. Other assets were available at the time of the transfer to meet current and future needs of the individual, including the cost of nursing facility or other institutionalized care for a period of thirty-six months.

- c. The specific purpose for which the assets were transferred and the reason the transfer was necessary and the reason there was no alternative but to transfer the assets for less than fair market value. The presumption cannot be rebutted successfully by stating it was done for estate planning purposes or to avoid probate.
- d. When the individual had some other purpose for transferring the assets, but any expectation of establishing eligibility could reasonably be inferred to be a factor in the decision to transfer the asset, the presumption cannot be successfully rebutted.

H. Apportionment of penalty period between spouses

- 1. If a transfer results in a period of ineligibility for an individual, and the individual's spouse becomes institutionalized and is otherwise eligible for Medicaid, the period of ineligibility shall be apportioned equally between the spouses.
- 2. If one spouse dies or is no longer institutionalized, any months remaining in the period of ineligibility shall be assigned to the spouse who remains institutionalized.

I. If the individual or the individual's spouse has transferred assets into a trust or is a beneficiary of a trust, the trust document shall be submitted to the Colorado Department of Health Care Policy and Financing to determine the effect of the trust on Medicaid eligibility.

J. Notice

- 1. The Colorado Department of Health Care Policy and Financing is an interested person according to 15-14-406, C.R.S. or a successor statute.
- 2. As an interested party, the department shall be given notice of a hearing in cases in which Medicaid planning or Medicaid eligibility is set forth in the petition as a factor for requesting court authority to transfer property.

K. Undue Hardship

- 1. The period of ineligibility resulting from the imposition of the transfer or the trust provisions may be waived if denial of eligibility would create an undue hardship. Undue hardship can be established only if all of the following conditions are met:
 - a. The individual is otherwise eligible;
 - b. The individual is unable to obtain medical care without the receipt of Medicaid benefits;
 - c. Application of the transfer penalty would deprive the individual of medical care such that the individual's health or life would be endangered or would deprive the individual of food, clothing, shelter or other necessities of life; and
 - d. The individual must also produce evidence to prove that the assets have been irretrievably lost, and that all reasonable avenues of legal recourse to regain possession of them has been exhausted.
- 2. Undue hardship shall not exist when the application of the trust or transfer rules merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him or her at risk of serious deprivation.

3. Notice of an undue hardship exception shall be given to the applicant or client, and a determination of whether an undue hardship waiver will be granted shall be given in a timely manner. An adverse determination may be appealed in accordance with the appeal process as set forth in RECIPIENT APPEALS PROTOCOLS/PROCESS in this volume.
 4. The facility in which an institutionalized individual is residing may file an undue hardship waiver application on behalf of the individual with the individual's or his or her personal representative's consent.
- L. No period of ineligibility shall be assessed in any of the following circumstances:
1. Convincing and objective evidence is provided that the individual intended to dispose of the resources either at fair market value or for other valuable consideration.
 2. Convincing and objective evidence is presented proving that the resources were transferred exclusively for a purpose other than to qualify or remain eligible for medical assistance.
 3. All of the resources transferred for less than fair market value have been returned to the individual.
 4. For assets transferred before February 8, 2006, the assets were transferred more than 36 months prior to the date of application.
 5. For assets transferred before February 8, 2006, the penalty period has expired based on the following formula: The fair market value of the transferred asset is divided by the average cost of nursing facility care in the state at the time of application and the resulting number of months of ineligibility has ended prior to the date of application.

8.110.54 Treatment of Life Estates

- A. Effective July 1, 1995, for an applicant/recipient of Medicaid, and/or his/her spouse, who established a life estate on his/her residence, a transfer of assets without fair consideration may occur. A transfer of assets without fair consideration occurs when a life estate was established on the residence by the applicant/recipient of Medicaid, and/or their spouse, within 36 months from the date of Medicaid application. However, in no event shall these regulations apply to a life estate established before July 1, 1995.

The amount to be considered as a transfer of assets without fair consideration shall be computed by using equity value of the property and applying it to the life estate table contained in these rules as follows:

1. Determine the equity value of the property at the time the life estate was established. The equity value of the residential property shall be determined by obtaining the actual value and subtracting encumbrances. The actual value shall be obtained by using the actual value reported by a county assessor or from the most recent property assessment notice. If the actual value is not shown on the property assessment notice, the assessed value shall be divided by the appropriate percentage value for residential property as established by state law to obtain the actual value.

Encumbrances include mortgages, liens, judgments, delinquent taxes, loan agreements, and other forms of indebtedness.

2. Multiply the equity value by the "Remainder" factor from the Life Estate Remainder Interest Table contained in these rules that corresponds to the person's age at the time the life estate was established. The result is the amount to be considered as a transfer of assets without fair consideration.

When a life estate is established on the residence held by spouses in joint tenancy, the age of the youngest individual shall be used to calculate the amount of the transfer.

Once the transfer of asset amount is computed, the penalty period for transfer of assets without fair consideration is determined by using the steps in accordance with the rules at 8.110.53.C.

- B. Effective April 1, 2006, the purchase of a life estate interest in an individual's home is a transfer without fair consideration unless the purchaser resides in the home for a period of at least one year after the date of purchase.

LIFE ESTATE REMAINDER INTEREST TABLE

<u>AGE</u>	<u>REMAINDER</u>	<u>AGE</u>	<u>REMAINDER</u>
0	.02812	30	.04457
1	.01012	31	.04746
2	.00983	32	.05058
3	.00992	33	.05392
4	.01019	34	.05750
5	.01062	35	.06132
6	.01116	36	.06540
7	.01178	37	.06974
8	.01252	38	.07433
9	.01337	39	.07917
10	.01435	40	.08429
11	.01547	41	.08970
12	.01671	42	.09543
13	.01802	43	.10145
14	.01934	44	.10779
15	.02063	45	.11442
16	.02185	46	.12137
17	.02300	47	.12863

<u>AGE</u>	<u>REMAINDER</u>	<u>AGE</u>	<u>REMAINDER</u>
18	.02410	48	.13626
19	.02520	49	.14422
20	.02635	50	.15257
21	.02755	51	.16126
22	.02880	52	.17031
23	.03014	53	.17972
24	.03159	54	.18946
25	.03322	55	.19954
26	.03505	56	.20994
27	.03710	57	.22069
28	.03938	58	.23178
29	.04187	59	.24325
60	.25509	85	.64641
61	.26733	86	.66236
62	.27998	87	.67738
63	.29304	88	.69141
64	.30648	89	.70474
65	.32030	90	.71779
66	.33449	91	.73045
67	.34902	92	.74229
68	.36390	93	.75308
69	.37914	94	.76272
70	.39478	95	.77113
71	.41086	96	.77819
72	.42739	97	.78450
73	.44429	98	.79000

<u>AGE</u>	<u>REMAINDER</u>	<u>AGE</u>	<u>REMAINDER</u>
74	.46138	99	.79514
75	.47851	100	.80025
76	.49559	101	.80468
77	.51258	102	.80946
78	.52951	103	.81563
79	.54643	104	.82144
80	.56341	105	.83038
81	.58033	106	.84512
82	.59705	107	.86591
83	.61358	108	.89932
84	.63002	109	.95455

8.110.55 Annuities

- A. An annuity is a contract between an individual and a commercial company in which the individual invests funds and in return is guaranteed fixed substantially equal installments for life or a specified number of years.
1. Treatment of annuities purchased prior to July 1, 1995:
 - a. An annuity purchased prior to July 1, 1995 is not an available resource if it is annuitized and regular returns are being received by the annuitant. The funds received are income in the month received.
 - b. If the annuity purchased by the applicant/ client or his/her spouse has not been annuitized it shall be considered an available resource regardless of the irrevocable status.
 2. Treatment of annuities purchased on or after July 1, 1995.
 - a. The purchase of an annuity shall be considered as a transfer of assets without fair consideration unless the following criteria are met:
 - 1) The annuity is purchased from a life insurance company or other commercial company that sells annuities as part of its normal course of business; and,
 - 2) The annuity is annuitized for the applicant/client or his/her spouse; and,
 - 3) The annuity is purchased on the life of the applicant/client or his/her spouse; and,

- 4) The annuity provides payments for a period not exceeding the annuitant's projected life.
3. Treatment of annuities purchased on or after April 1, 1998.
 - a. The county department shall determine the MMMNA of the community spouse, if applicable. If the monthly payment amount provided by the annuity to the community spouse exceeds the MMMNA, the amount of the annuity which causes the monthly annuity payment to exceed the MMMNA shall be considered a transfer without fair consideration in determining the institutionalized spouse's eligibility. This subsection applies only to the extent that the transferred amount causes the CSRA to exceed the maximum.
 - b. The county department shall determine if the applicant/client is receiving substantially equal installments from the annuity for the period of the annuity. If the annuity is not paid in substantially equal installments, the original purchase price of the annuity shall be considered as a transfer without fair consideration.
 - c. For annuities purchased before February 8, 2006, if an annuity was purchased more than 36 months prior to the date of application, the penalty period for a transfer without fair consideration has expired. Any income received from the annuity shall be considered as income in the month received.
4. Provisions for annuities purchased on or after February 8, 2006. These provisions are in addition to those listed in 8.110.55.A.3.
 - a. An applicant for HCBS, PACE or institutional services shall disclose a description of any interest the individual or his or her community spouse has in an annuity or similar financial instrument, regardless of whether the annuity or financial instrument is irrevocable or is treated as an asset.
 - b. By providing HCBS, PACE or institutional services, the Department shall be a remainder beneficiary of the annuity or similar financial instrument.
 - c. The county shall notify the issuer of the annuity that the Department is a preferred remainder beneficiary in the annuity for medical assistance provided to the individual. This notice shall include a statement requiring the issuer to notify the county when there is a change in the amount of income or principal that is being withdrawn from the annuity.
 - d. The purchase of an annuity shall be treated as a transfer without fair consideration unless:
 - 1) The Department is named as the remainder beneficiary in the first position for the total amount of medical assistance paid on behalf of the individual; or
 - 2) The Department is named as the remainder beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value; or
 - 3) The annuity is an Individual Retirement Annuity as described in Section 408(b) of the Internal Revenue Code of 1986; or

- 4) The annuity is part of a deemed Individual Retirement Account under a qualified employer plan as described in Section 408(q) of the Internal Revenue Code of 1986; or
- 5) The annuity was purchased with proceeds from:
 - a) An Individual Retirement Account as described in Section 408(a) of the Internal Revenue Code of 1986.
 - b) An account established by an employer or association of employers as described in Section 408(c) of the Internal Revenue Code of 1986.
 - c) A simple retirement account as described in Section 408(p) of the Internal Revenue Code of 1986.
 - d) A simplified employee pension as described in Section 408(k) of the Internal Revenue Code of 1986.
 - e) A Roth IRA as described in Section 408A of the Internal Revenue Code of 1986; or
- 6) The annuity:
 - a) Is irrevocable and nonassignable; and
 - b) Is actuarially sound; and
 - c) Provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

8.110.56 Analysis of annuity to determine if purchase was a transfer without fair consideration

- A. To determine if a transfer of assets without fair consideration has occurred in the purchase of an annuity, the eligibility technician must review the annuity and:
 - 1. Determine the length of time of the return the annuity exceeds the reasonable life expectancy of the annuitant. The amount to be considered as a transfer of assets without fair consideration for this type of annuity shall be computed by using the Life Expectancy Tables contained in these regulations.
 - a. Determine the date on which the annuity was purchased.
 - b. Determine the amount of money used to purchase the annuity and the time period of return to the annuitant.
 - c. Determine the age of the annuitant at the time the annuity was purchased.
 - d. Determine the life expectancy of the annuitant at the time the annuity was purchased from the table contained in this section of these regulations. The appropriate table for male or female must be used.

- e. If the return from the annuity exceeds the life expectancy of the annuitant, a transfer of assets without fair consideration exists for the portion of the annuity return that exceeds the life expectancy of the annuitant.
 - f. If the return of the annuity over its lifetime is less than the original purchase price, the difference shall be considered a transfer without fair consideration.
 - g. For annuities purchased before February 8, 2006, if the annuity was purchased more than 36 months prior to the date of application, the transfer period has expired and any income shall be considered as income in the month received.
 - h. If the return is equal to or more than the original purchase price, the annuity is not a transfer without fair consideration and the money received by the annuitant from the annuity is considered as income in the month received.
2. If an irrevocable annuity is purchased by an applicant/client of Medicaid, or their his/her spouse, and the return or benefit from the annuity is transferred to a third party, a transfer of assets without fair consideration exists for the total amount of the annuity.
 3. If a revocable annuity is purchased by an applicant/client of Medicaid, or his/her spouse, the total amount invested in the annuity is considered as a countable resource.
 4. Once it has been determined that a transfer of assets without fair consideration exists, the penalty period shall be calculated by using the steps in accordance with the rules at 8.110.53.C.

LIFE EXPECTANCY TABLE – MALES FOR ANNUITIES PURCHASED BEFORE FEBRUARY 8, 2006

<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>
0	71.80	30	44.06	60	18.42	90	3.86
1	71.53	31	43.15	61	17.70	91	3.64
2	70.58	32	42.24	62	16.99	92	3.43
3	69.62	33	41.33	63	16.30	93	3.24
4	68.65	34	40.23	64	15.62	94	3.06
5	67.67	35	39.52	65	14.96	95	2.90
6	66.69	36	38.62	66	14.32	96	2.74
7	65.71	37	37.73	67	13.70	97	.60
8	64.73	38	36.83	68	13.09	98	2.47
9	63.74	39	35.94	69	12.50	99	2.34
10	62.75	40	35.05	70	11.92	100	2.22
11	61.76	41	34.15	71	11.35	101	2.11

12	60.78	42	33.26	72	10.80	102	1.99
13	59.79	43	32.37	73	10.27	103	1.89
14	58.82	44	31.49	74	9.27	104	1.78
15	57.85	45	30.61	75	9.24	105	1.68
16	56.91	46	29.74	76	8.76	106	1.59
17	55.97	47	28.88	77	8.29	107	1.50
18	55.05	48	28.02	78	7.83	108	1.41
19	54.13	49	27.17	79	7.40	109	1.33
20	53.21	50	26.32	80	6.98	110	1.25
21	52.29	51	25.48	81	6.59	111	1.17
22	51.38	52	24.65	82	6.21	112	1.10
23	50.46	53	23.82	83	5.85	113	1.02
24	45.55	54	23.01	84	5.51	114	0.96
25	48.63	55	22.21	85	5.19	115	0.89
26	47.73	56	21.43	86	4.89	116	0.83
27	46.80	57	20.66	87	4.61	117	0.77
28	45.88	58	19.90	88	4.34	118	0.71
29	44.97	59	19.15	89	4.09	119	0.66

LIFE EXPECTANCY TABLE – MALES FOR ANNUITIES PURCHASED ON OR AFTER FEBRUARY 8, 2006

<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>
0	74.14	30	45.90	60	19.72	90	3.70
1	73.70	31	44.96	61	18.96	91	3.45
2	72.74	32	44.03	62	18.21	92	3.22
3	71.77	33	43.09	63	17.48	93	3.01

4	70.79	34	42.16	64	16.76	94	2.82
5	69.81	35	41.23	65	16.05	95	2.64
6	68.82	36	40.30	66	15.36	96	2.49
7	67.83	37	39.38	67	14.68	97	2.35
8	66.84	38	38.46	68	14.02	98	2.22
9	65.85	39	37.55	69	13.38	99	2.11
10	64.86	40	36.64	70	12.75	100	2.00
11	63.87	41	35.73	71	12.13	101	1.89
12	62.88	42	34.83	72	11.53	102	1.79
13	61.89	43	33.94	73	10.95	103	1.69
14	60.91	44	33.05	74	10.38	104	1.59
15	59.93	45	32.16	75	9.83	105	1.50
16	58.97	46	31.29	76	9.29	106	1.41
17	58.02	47	30.42	77	8.77	107	1.33
18	57.07	48	29.56	78	8.27	108	1.25
19	56.14	49	28.70	79	7.78	109	1.17
20	55.20	50	27.85	80	7.31	110	1.10
21	54.27	51	27.00	81	6.85	111	1.03
22	53.35	52	26.16	82	6.42	112	0.96
23	52.42	53	25.32	83	6.00	113	0.89
24	51.50	54	24.50	84	5.61	114	0.83
25	50.57	55	23.68	85	5.24	115	0.77
26	49.64	56	22.86	86	4.89	116	0.71
27	48.71	57	22.06	87	4.56	117	0.66
28	47.77	58	21.27	88	4.25	118	0.61
29	46.84	59	20.49	89	3.97	119	0.56

LIFE EXPECTANCY TABLE – FEMALES FOR ANNUITIES PURCHASED BEFORE FEBRUARY 8, 2006

<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>
0	78.79	30	50.15	60	22.86	90	4.71
1	78.42	31	49.19	61	22.06	91	4.40
2	77.48	32	48.23	62	21.27	92	4.11
3	76.51	33	47.27	63	20.49	93	3.84
4	75.54	34	46.31	64	19.72	94	3.59
5	74.56	35	45.35	65	18.96	95	3.36
6	73.57	36	44.40	66	18.21	96	3.16
7	72.59	37	43.45	67	17.48	97	2.97
8	71.60	38	42.50	68	16.76	98	2.80
9	70.61	39	41.55	69	16.04	99	2.64
10	69.62	40	40.61	70	15.35	100	2.48
11	68.63	41	39.66	71	14.66	101	2.34
12	67.64	42	38.72	72	13.99	102	2.20
13	66.65	43	37.78	73	13.33	103	2.06
14	65.67	44	36.85	74	12.68	104	1.93
15	64.68	45	35.92	75	12.05	105	1.81
16	63.71	46	35.00	76	11.43	106	1.69
17	62.74	47	34.08	77	10.83	107	1.58
18	61.77	48	33.17	78	10.24	108	1.48
19	60.80	49	32.27	79	9.67	109	1.38
20	59.83	50	31.37	80	9.11	110	1.28
21	58.86	51	30.48	81	8.58	111	1.19
22	57.89	52	29.60	82	8.06	112	1.10
23	56.92	53	28.72	83	7.56	113	1.02

24	55.95	54	27.86	84	7.08	114	0.96
25	54.98	55	27.00	85	6.63	115	0.89
26	54.02	56	26.15	86	6.20	116	0.83
27	53.05	57	25.31	87	5.79	117	0.77
28	52.08	58	24.48	88	5.41	118	0.71
29	51.12	59	23.67	89	5.05	119	0.66

LIFE EXPECTANCY TABLE – FEMALES FOR ANNUITIES PURCHASED ON OR AFTER FEBRUARY 8, 2006

<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>	<u>Age</u>	<u>Life Expectancy</u>
0	79.45	30	50.53	60	23.06	90	4.47
1	78.94	31	49.56	61	22.24	91	4.15
2	77.97	32	48.60	62	21.43	92	3.86
3	77.00	33	47.63	63	20.63	93	3.59
4	76.01	34	46.67	64	19.84	94	3.35
5	75.03	35	45.71	65	19.06	95	3.13
6	74.04	36	44.76	66	18.30	96	2.93
7	73.05	37	43.80	67	17.54	97	2.75
8	72.06	38	42.86	68	16.80	98	2.58
9	71.07	39	41.91	69	16.07	99	2.43
10	70.08	40	40.97	70	15.35	100	2.29
11	69.09	41	40.03	71	14.65	101	2.15
12	68.09	42	39.09	72	13.96	102	2.02
13	67.10	43	38.16	73	13.28	103	1.89
14	66.11	44	37.23	74	12.62	104	1.77
15	65.13	45	36.31	75	11.97	105	1.66

16	64.15	46	35.39	76	11.33	106	1.55
17	63.17	47	34.47	77	10.71	107	1.44
18	62.20	48	33.56	78	10.11	108	1.34
19	61.22	49	32.65	79	9.52	109	1.25
20	60.25	50	31.75	80	8.95	110	1.16
21	59.28	51	30.85	81	8.40	111	1.07
22	58.30	52	29.95	82	7.87	112	0.99
23	57.33	53	29.07	83	7.36	113	0.91
24	56.36	54	28.18	84	6.88	114	0.84
25	55.39	55	27.31	85	6.42	115	0.77
26	54.41	56	26.44	86	5.98	116	0.71
27	53.44	57	25.58	87	5.56	117	0.66
28	52.47	58	24.73	88	5.17	118	0.61
29	51.50	59	23.89	89	4.81	119	0.56