600 Washington Street, Boston, MA 02111

TO: Joanne McDonald, Director Long Term Care

FROM: Jean C. Sullivan, Chief Counsel for Medical Services JCS
BY: Michael H. Goetz, Assistant General Counsel MG

DATE: 4/29/1992

RE: Transfer and Trust Issues
Reconciliation of Department Policy

Recently several questions have been raised regarding Medicaid's transfer of asset and trust policies. These issues have been handled inconsistently by the local offices. Following is a restatement of the questions raised with our recommended policy, and a brief analyses.

Question 1: Can a Medicaid applicant who is subject to a period of disqualification due to a transfer of resources for less than fair market value [106 C.M.R. § 505.125] have the resources transferred back to himself and thereby become eligible for Medicaid?

Recommendation: No. Once a disqualifying transfer of assets is made, Medicaid eligibility cannot be reestablished until the period of disqualification has ended even if the transfer is effectively reversed before the disqualification period expires.[1]

Federal law at 42 U.S.C. § 1396p (c) requires states participating in the Medicaid program to provide for a period of ineligibility for persons who dispose of assets for less than fair market value for the purpose of obtaining Medicaid payments for nursing facility level of services. The law is silent with respect to assets subsequently transferred back to the applicant.

The thirty month disqualification period is only effective if it operates as a deterrent against transferring assets. Permitting applicants to "cure" a transfer would in effect end the deterrent value of the disqualification period, making transferring assets the optimal choice for all prospective applicants. If the Department prohibits applicants from "curing" a transfer,

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[1]With the exception being the "undue hardship" provision. 106.C.M.R. § 505.125 (E). Joanne McDonald has suggested that the Department establish a central review committee to make determinations of undue hardship, this should be considered.

transferring assets becomes the optimal choice for only those applicants who are willing to take the risk that they will not need Medicaid during the period of ineligibility, or who are willing to place all of their wealth in the hands of their relatives or trustees.

Question 2 (a): Where a Medicaid applicant transfers resources to a revocable trust does a disqualifying transfer result; or available assets based on the ability to revoke the trust; or both?

Recommendation: We should treat it first as a disqualifying transfer, and second as a source of available assets. The transfer of resources to a trust is a disqualifying transfer subject to the period of disqualification specified at 106 C.M.R. 505.125. This is so regardless of whether the trust is revocable or irrevocable. If at the end of the period of disqualification any assets remain in the revocable trust they are treated as available resources because the applicant can simply revoke the trust and spend down the resources. If the revocable trust is revoked before the end of the disqualification period the period still applies to the individual. If the revocable trust is revoked after the period of disqualification, the asset shall be treated as an available asset but may or may not be countable, depending on the type of asset. Assets held in a revocable trust after the period of disqualification are always available and countable.

Some lawyers have argued that a transfer of assets to a revocable trust is not a transfer (or disposition as stated in 42 U.S.C. § 1396p (c)) because the applicant retains a certain amount of control over the resources based on his or her ability to revoke the trust and regain possession of them. This argument ignores the facts that to place an asset in trust requires an affirmative act of transferring the asset from one legal entity to another with the intended result of removing the asset from the applicant's estate. Further, depending on the language of the trust, this arrangement could place the asset beyond the donor's control should the trustee liquidate, transfer, or distribute the asset before the donor can revoke the trust.

Question (b): Does the outcome differ if the asset transferred is a primary residence?

Recommendation: No. A transfer of a primary residence to a trust is a disqualifying transfer.

Medicaid policy permits the transfer of a primary residence to certain individuals listed at 106 C.M.R. § 505.125 (B)(3). A trust, whether revocable or irrevocable, is a separate entity from the donor and is not one of the protected parties to whom a transfer can be made without disqualification (unless for a

spouse as noted). Individuals no longer retain legal title to their homes once they are placed in trust.

The Department should not grant Medicaid following the transfer of a home to a revocable trust, because this would allow individuals to obtain medical assistance without assuming the concurrent future obligation to repay the Commonwealth from their estate. The home remains outside the "estate" so long as it remains in trust. In contrast, individuals who retain legal title to their homes, may obtain Medicaid eligibility, but also carry a future obligation to repay the Commonwealth from their estate which includes the home.

Question 3 (a): Can a house owned by a Medicaid Qualifying Trust (MQT) be considered a "home," and therefore be subject to the special considerations accorded a home for purposes of determining whether to treat the accessible property as exempt or countable?

Recommendation: No. An applicant / recipient must have ownership of the residence in order for the property to be considered a home for purposes of determining Medicaid eligibility. See M.G.L. c. 118E, § 10(2). Where an applicant / recipient is only the beneficiary of a MQT and the MQT contains (or owns) the house, the property is a countable asset like any other real property held in a Medicaid Qualifying Trust and therefore is countable up to the limit of the trustee's discretion to distribute it to the applicant.

Department regulations at 106 C.M.R. § 505.170 (A) lists "the home of the filing unit . . . if . . . used as the principal place of residence" as a noncountable asset. Regulations at 106 C.M.R. § 505.160 (I) accords special treatment of an applicant / recipient's "former home."

Federal regulations at 20 CFR § 416.1212 (a) define a home as "any property in which an individual (and spouse, if any) has an ownership interest and which serves as the individual's principal place of residence." Therefore a house is not a home for purposes of determining Medicaid eligibility unless the applicant / recipient has an ownership interest in it. Where a house is owned by a trust, the house is not considered a home despite the fact that the applicant / recipient may be a beneficiary of the trust. Likewise, state law (cited above) requires "ownership of the residence" for any home exemption to apply.

Question b: Is a house owned by a revocable trust a countable asset, and if so what effect does the revocation of the trust have on the status of the house as a countable asset?

Recommendation: A house owned by a revocable trust is a countable asset. The real property does not receive the special

treatment accorded a home, because the applicant / recipient does not own it, the trust does. The assets of a revocable trust (for as long as they are in a revocable trust) are considered available as long as the applicant / recipient retains the power to revoke the trust and regain possession of the assets. If the trust is revoked, however, the property is owned by the applicant / recipient again, and should be treated prospectively (after the period of disqualification) as if the trust never existed. The property may then qualify for treatment as a home if it serves as the applicant's / recipient's primary residence, or meets the "intent to return" test under 106 C.M.R. 505.160 (I). If the individual does not reside in the property and does not intend to return, it becomes a countable piece of real estate subject to the provisions of 106 C.M.R. 505.160 (I) requiring a good faith effort to liquidate the assets.

Question 4 (a): If an applicant / recipient who owns a house creates a life estate is there a disqualifying transfer? 106 C.M.R. § 505.125.

Recommendation: Yes, unless the remainder interest is transferred to one of the parties to whom a home can be transferred without a period of ineligibility who are listed at 106 C.M.R. § 505.125 (B)(3).

A life estate is created when a property owner separates the ownership of the property into a present interest – the life estate, and a future interest - the remainder. The owner of the life estate has full rights to use property until they die. Upon the death of the owner of the life estate the remaindermen become full owners of an undivided interest. In Medicaid eligibility determinations the common case is one in which an owner of property deeds a life estate to themselves and a remainder interest to a relative.

In the common situation where the applicant retains ownership of the life interest and transfers the remainder interest, the applicant is subject to a period of ineligibility equal to the number of the months that would result from dividing the equity value of the remainder interest by the average monthly private pay cost of nursing home care or thirty months whichever is less. 106 C.M.R. 505.125. (See next question regarding the valuation of "remainder" interest).

Question 4 (b): If an applicant / recipient owns a life estate in a house and leaves the house without intending to return to it is the life estate a countable asset?

Recommendation: Yes. A life estate is a separate interest in real property that can be sold. If an individual leaves a house in which he or she owns a life estate for reasons other than to enter an institution, the house becomes a countable asset. 106

C.M.R. § 505.160 (I)(1). If an individual moves out of a house in which he or she owns a life estate to enter a medical institution the life estate should be treated the same as any home by applying the "house as an asset" methodology found at 106 C.M.R. § 505.160 (I)(3).

The equity value of a life estate (needed for purposes of calculating a period of ineligibility resulting from a transfer, or to determine the asset value to count) is determined through the use of actuarial tables. When using an actuarial table the value of the property is cross referenced with the life expectancy of the person owning the life estate. The resulting actuarial value of the life estate is the amount we consider the life interest to be worth. Similarly a remainder interest can be determined by determining the value of the life interest and subtracting it from the total value of the real estate. The value of the property minus the value of the life estate is the value of the remainder interest.[2] Of course if an applicant / recipient owns a life estate in a home and does intend to return to the home, the life estate is a noncountable asset.

Finally, if an applicant or recipient has <u>access</u> to a life estate in a former home, but not ownership because it is held in either a revocable trust or an MQT of which he or she is a beneficiary, then the applicant / recipient cannot receive the benefit of the "home exemption" the applicant / recipient must have ownership. Once transferred to a trust the "life estate" is owned by the <u>trust</u>. As in question 3 above, it should be treated like an interest in real property rather than an exempt house.

If you have any questions please call Michael Goetz at 617-348-5279.

cc: Bruce Bullen
Ardith Wieworka
Medicaid Legal Unit

[2]The Department is currently considering which actuarial tables to use in making these determinations.