

HEALTH CARE FINANCING ADMINISTRATION

State Medicaid Manual. Part 3 - Eligibility.

Transmittal No. 64, November 1994

3258. TRANSFERS OF ASSETS FOR LESS THAN FAIR MARKET VALUE

3258.1 General.--Under the transfer of assets provisions in §1917(c) of the Act, as amended by OBRA 1993, you must deny coverage of certain Medicaid services to otherwise eligible institutionalized individuals who transfer (or whose spouses transfer) assets for less than fair market value. You may also choose to deny coverage for certain other services for noninstitutionalized individuals who transfer (or whose spouses transfer) assets for less than fair market value. The following instructions explain the specific circumstances and rules under which you must deny Medicaid services.

The provisions explained in these instructions apply to all States, including those using more restrictive eligibility criteria than are used by the SSI program, under §1902(f) of the Act. Thus, 209(b) States cannot apply periods of ineligibility due to a transfer of resources for less than fair market value except in accordance with these instructions.

A. Definitions.--The following definitions apply to transfers of assets.

1. Fair Market Value.--Fair market value is an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria you use in appraising the value of assets for the purpose of determining Medicaid eligibility.

NOTE: For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in a tangible form with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.

2. Valuable Consideration.--Valuable consideration means that an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset.

3. Uncompensated Value.--The uncompensated value is the difference between the fair market value at the time of transfer (less any outstanding loans, mortgages, or other encumbrances on the asset) and the amount received for the asset.

4. Institutionalized Individual.--An institutionalized individual is an individual who is:

- o An inpatient in a nursing facility;
- o An inpatient in a medical institution for whom payment is based on a level of care provided in a nursing facility; or
- o A home and community-based services recipient described in §1902(a)(10)(A)(ii)(VI) of the Act. For purposes of this section, a medical institution includes an intermediate care facility for the mentally retarded (ICF/MR). (See 42 CFR 435.1009.)

5. Noninstitutionalized Individual.--A noninstitutionalized individual is an individual receiving any of the services described in §3258.8.

6. Nursing Facility Services.--Nursing facility services are services as described in the State Medicaid Plan as nursing facility services.

3258.2 Effective Date.--This section applies to all transfers which are made on or after August 11, 1993. Transfers made before August 11, 1993, are treated under the rules in §3250. While this section applies to transfers made on or after August 11, 1993, penalties for transfers for less than fair market value, as described in §3258.8, cannot be applied to services provided before October 1, 1993. Instead, for the period prior to October 1, 1993, apply pre-OBRA 1993 rules regarding transfers of assets to transfers made on or after August 11, 1993, and before October 1, 1993.

EXAMPLE: An individual who applies for Medicaid transfers an asset on September 1, 1993. The transfer is found to have been made for less than fair market value. As such, a penalty, as described in §3258.8, is assessed. Because the transfer occurred after August 11, 1993, the transfer is assessed under the new rules set forth in this section. However, because a penalty under OBRA 1993 rules cannot apply before October 1, 1993, the penalty assessed under OBRA 1993 in this case begins on October 1, 1993. Pre-OBRA 1993 rules are used to determine whether a penalty is assessed for the period between September 1 and October 1. On October 1, begin using the OBRA 1993 rules for the transfer described in this example.

3258.3 Individuals To Whom Transfer of Assets Provisions Apply.--You must apply these provisions when an institutionalized individual or the individual's spouse disposes of assets for less than fair market value on or after the look-back date explained in §3258.4. You also have the option of applying this provision to noninstitutionalized individuals when those individuals or their spouses dispose of assets for less than fair market value.

See §3258 for definitions of institutionalized and noninstitutionalized individuals.

For purposes of this section, assets transferred by a parent, guardian, court or administrative body, or anyone acting in place of or on behalf of or at

the request or direction of the individual or spouse, are considered to be transferred by the individual or spouse.

For noninstitutionalized individuals, you have the option of applying these provisions. If you wish to apply these provisions to noninstitutionalized individuals, you have the further option of choosing the groups to which the provisions apply. You may apply them to all noninstitutionalized individuals, or to specific categorical groups. However, if you choose to apply these provisions only to some groups, the groups you choose must be recognized groups as listed in §1905(a) of the Act.

3258.4 Look-Back Date and Look-Back Period.--The look-back date is the earliest date on which a penalty for transferring assets for less than fair market value can be assessed. Penalties can be assessed for transfers which take place on or after the look-back date. Penalties cannot be assessed for transfers which take place prior to the look-back date. The look-back date varies for individuals transferring assets, depending on whether they are institutionalized, and there are special rules for some trusts, as described in subsection E.

A. Institutionalized Individual.-- For an individual in an institution, the look-back date is 36 months prior to the baseline date. The baseline date is the first date as of which the individual was:

- o Institutionalized; and,
- o Applied for medical assistance under the State plan.

When an individual is already a Medicaid recipient and becomes institutionalized, the baseline date is the date upon which both of the above conditions are met, that is, the first day of institutionalization.

B. Noninstitutionalized Individual.--For a noninstitutionalized individual, the look-back date is 36 months prior to the baseline date, which is the date the individual:

- o Applies for medical assistance under the State plan; or, if later,
- o The date on which the individual disposes of assets for less than fair market value.

C. Multiple Periods of Institutionalization and Multiple Applications.--When an individual has multiple periods of institutionalization or has made multiple applications for Medicaid (whether or not they are successful), the look-back date is based on a baseline date that is the first date upon which the individual has both applied for Medicaid and is institutionalized. Similarly, if a noninstitutionalized individual has applied for Medicaid more than once and has made more than one transfer of assets, the baseline date is that date on which the individual has first applied for Medicaid or, if later, made the first transfer of assets for less than fair market value after applying. Thus, each individual has only one look-back date, regardless of the number of periods of institutionalization, applications for Medicaid, periods of eligibility, or transfers of assets.

D. Look-Back Period.--The look-back period is the period that begins with the look-back date and ends with the baseline date. This can be 36 or 60

months, depending on whether certain kinds of trusts are involved. (See subsection E for look-back periods involving trusts.) The look-back period is the period of time prior to the baseline date during which a previous transfer of assets for less than fair market value can be penalized. However, it is important to note that transfers which occur after the baseline date are also subject to penalty if they are made for less than fair market value.

NOTE: The 36 month look-back periods described above do not become fully effective until August 11, 1996. Prior to that date, a 36 month look-back period actually begins at some time before the date transfers are covered by these rules. While the 36 month look-back period is effective for transfers made on or after August 11, 1993, any transfers actually made before that date are treated under the rules described in §3250. Thus, the look-back period is phased in over the 36-month period ending August 11, 1996.

EXAMPLE 1: Institutionalized Individual

An individual is institutionalized on February 13, 1997. He/she applies for Medicaid on April 7, 1997. The look-back date is the date 36 months prior to the baseline date, when both initiating requirements are met, i.e., institutionalization and application for Medicaid. That date is April 7, 1997. Thus, the look-back date is April 7, 1994. The look-back period is from April 7, 1994, through April 7, 1997.

EXAMPLE 2: Institutionalized Individual

An individual is institutionalized on February 13, 1995. He/she applies for Medicaid on April 7, 1995. The look-back date is 36 months prior to April 7, 1995, or April 7, 1992. However, because the transfer provisions of OBRA 1993 apply only to transfers made on or after August 11, 1993, any transfers made prior to August 11, 1993, are treated under the rules in §3250.

EXAMPLE 3: Noninstitutionalized Individual

An individual applies for Medicaid on February 13, 1997. On April 7, 1997, he/she transfers an asset for less than fair market value. The look-back date in this case is April 7, 1994, 36 months prior to the baseline date on which he/she transferred the asset. If the asset had been transferred before February 13, 1997 (the date of application for Medicaid), the baseline date would have been February 13, 1997 (the date of application). The look-back period would begin February 13, 1994, and extend to February 13, 1997.

E. Look-Back Period for Transfers of Assets Involving Trusts.--When an individual establishes a revocable trust a portion of which is disbursed to someone other than the grantor or for the benefit of the grantor, that portion is treated as a transfer of assets for less than fair market value. When an individual establishes an irrevocable trust in which all or a portion of the trust cannot be disbursed to or on behalf of the individual, that portion is treated as a transfer of assets for less than fair market value. When a portion of a trust is treated as a transfer, the look-back period discussed in subsection D is extended to 60 months from:

o The date the individual applied for Medicaid and was institutionalized; or,

o For a noninstitutionalized individual, the date the individual applied for Medicaid or, if later, the date the transfer was made. When a trust is irrevocable but some or all of the trust can be disbursed to or for the benefit of the individual, the look-back period applying to disbursements which could be made to or for the individual but are made to another person or persons is 36 months.

When the trust is revocable, the transfer is considered to take place on the date upon which the payment to someone other than the grantor was made. If the trust is irrevocable, the transfer is considered to have been made as of the date the trust was established or, if later, the date upon which payment to the grantor was foreclosed.

When an individual places assets into an irrevocable trust and can still benefit from those assets, the amount transferred is any of those assets which have been paid out for a purpose other than to or for the benefit of the individual. When an individual places assets in an irrevocable trust and can no longer benefit from some or all of those assets, that unavailable portion of the trust is considered as transferred for less than fair market value. The value of these assets is not reduced by any payments from the trust which may be made from these unavailable assets at a later date.

See §§3259ff. for a discussion of treatment of trusts in determining eligibility for Medicaid.

See §3259.6 for rules which apply when assets which may involve a transfer of assets for less than fair market value are placed in a trust.

3258.5 Penalty Periods.--When an individual (or spouse) makes a transfer of assets for less than fair market value, payment for certain services received by the individual is denied for a specified period of time. However, the individual remains eligible for Medicaid and can have payment made for services not subject to penalty. (See §3258.8.) For example, an institutionalized individual who transfers assets for less than fair market value must be denied reimbursement for nursing facility services. However, he or she may still be eligible for reimbursement for physician's services, provided such services are not provided as part of the individual's nursing home care.

A. Penalty Date.--The penalty date is the beginning date of each penalty period that is imposed for an uncompensated transfer. The penalty date for all individuals who transfer assets for less than fair market value is the first day of the month in which the asset was transferred (or, at State option, the first day of the month following the month of transfer), provided that date does not occur during an existing penalty period. If an asset was transferred prior to the look-back date discussed in §3258.4, no penalty can be imposed for that transfer.

B. Penalty Period - General.--The penalty period is the period of time during which payment for specified services is denied. Unlike the penalty period under the rules discussed in §3250, which was limited to 30 months, the penalty period under the OBRA 1993 rules has no statutory limit. Rather, the length of the penalty period is based solely on the value of the assets transferred and the cost of nursing facility care.

C. Transfer of Assets Takes Place During Existing Penalty Period.--When a transfer for less than fair market value takes place during an

existing penalty period, whether imposed under the pre-OBRA 1993 or post-OBRA 1993 rules, a new penalty period cannot begin until the existing penalty period has expired.

EXAMPLE: An individual transferred an asset in May 1993 for which a penalty of 12 months was imposed. The individual transfers another asset in October 1993 to which another 12 month penalty applies. Because the second transfer took place within the first 12 month penalty period, the second penalty period cannot begin until the first expires, on April 30, 1994. Thus, the first penalty period runs from May 1, 1993, through April 30, 1994, and the second runs from May 1, 1994, through April 30, 1995.

D. Restricted Coverage - Institutionalized Individual.--The penalty for an institutionalized individual consists of ineligibility for certain services for a period or periods of ineligibility that equal the number of months calculated by taking the total, cumulative uncompensated value of all assets transferred by the individual or spouse on or after the look-back date discussed in §3258.4, divided by the average monthly cost to a private patient of nursing facility services in the State at the time of application. As an alternative, the State may use the average monthly cost in the community in which the individual is institutionalized.

When the amount of the transfer is less than the monthly cost of nursing facility care, you have the option of not imposing a penalty or imposing a penalty for less than a full month. Under the latter option, the actual length of the penalty is based on the proportion of the State's private nursing facility rate that was transferred. If you choose to impose penalties for less than a full month, you must impose such penalties in all cases where a partial month penalty applies.

When an individual makes a series of transfers, each of which is less than the private nursing facility rate for a month, you have the option of imposing no penalty or imposing a series of penalties, each for less than a full month.

E. Restricted Coverage - Noninstitutionalized Individual.--The penalty period for a noninstitutionalized individual is calculated using the same method that is used for an institutionalized individual, including use of the average monthly cost of nursing facility services. The penalty for a noninstitutionalized individual cannot exceed the number of months calculated using this method. However, you may impose shorter penalty periods if you wish to do so. Obtain HCFA approval for any shorter penalty period you choose to impose, including approval of the methodology you use to calculate the shorter penalty period. See subsection D for transfers which are less than the private monthly rate for nursing facility care.

F. Individual Has Penalty Period Both As Institutionalized And Noninstitutionalized Individual.--When an individual incurs separate penalty periods as both institutionalized and noninstitutionalized for the same transfer, the total penalty period cannot exceed the penalty period that is applicable under only one category. In other words, a penalty imposed during a period of institutionalization reduces a penalty imposed for the same transfer or transfers made during the period of noninstitutionalization and vice versa.

EXAMPLE: An institutionalized individual transfers assets for less than

fair market value, thereby incurring a transfer penalty of 24 months. After 12 months have elapsed, the individual leaves the institution and returns home. Because the State imposes penalties on noninstitutionalized individuals for transfers for less than fair market value, the same 24 month penalty applies to the individual, even though he/she left the institution. However, because of the limits on total penalty described above, the individual incurs only the 12 month penalty remaining from the transfer which occurred while he/she was institutionalized.

G. Multiple Transfers - General.--OBRA 1993 provides that the number of months of restricted coverage discussed in subsections C and D is based on the total, cumulative uncompensated value of the assets transferred. When a single asset is transferred or a number of assets are transferred during the same month, the penalty period is calculated using the total value of the asset(s) divided by the average monthly cost of nursing facility care. When assets are transferred at different times, use the following methods for calculating the penalty periods.

H. Transfers Made So That Penalty Periods Overlap.--When assets have been transferred in amounts and/or frequency that make the calculated penalty periods overlap, add together the value of all assets transferred, and divide by the cost of nursing facility care. This produces a single penalty period which begins on the first day of the month in which the first transfer was made.

EXAMPLE: An individual transfers \$10,000 in January, \$10,000 in February, and \$10,000 in March, all of which are uncompensated. Calculated individually, based on a nursing facility cost of \$2,500 a month, the penalty for the first transfer is from January through April, the second is from February through May, and the third is from March through June. Because these periods overlap, calculate the penalty period by adding the transfers together (a total of \$30,000) and dividing by the nursing home cost (\$2,500). This yields a penalty period of 12 months, which runs from January 1 through December 31 of that year.

As an alternative, calculate the individual penalty periods, as above, and impose them sequentially. Thus, the penalty for the first transfer extends from January through April, the second extends from May through August, and the third extends from September through December. In this example, the result is the same regardless of the method used.

I. Transfers Made So That Penalty Periods Do Not Overlap.--When multiple transfers are made in such a way that the penalty periods for each do not overlap, treat each transfer as a separate event with its own penalty period.

EXAMPLE: An individual transfers \$5,000 in January, \$5,000 in May, and \$5,000 in October, all of which are uncompensated. Assuming a State private nursing facility cost of \$2,500 a month, the penalty periods for transfers are, respectively, January through February, May through June, and October through November.

If you wish to use other methodologies for determining penalty periods, you may do so, provided you obtain HCFA approval for those methods. However, any alternative method must adhere to the basic principles that:

- o The total, cumulative uncompensated value of the asset or assets transferred is used to determine the length of the penalty period or periods;
- o Penalty periods do not overlap, nor in any way run concurrently; and
- o No penalty period can begin while a previous penalty period is in effect.

J. Transfer By a Spouse That Results in Penalty Period for the Individual.--When a spouse transfers an asset that results in a penalty for the individual, the penalty period must, in certain instances, be apportioned between the spouses. You must apportion the penalty when:

- o The spouse is eligible for Medicaid;
- o A penalty could, under normal circumstances, be assessed against the spouse, i.e., the spouse is institutionalized, or the State has elected to impose penalties on noninstitutionalized individuals; and
- o Some portion of the penalty against the individual remains at the time the above conditions are met.

When these conditions are met, you must apportion any existing penalty period between the spouses. You may use any reasonable methodology you wish to determine how the penalty is apportioned. However, the methodology you use must provide that the total penalty imposed on both spouses does not exceed the length of the penalty originally imposed on the individual.

EXAMPLE: Mr. Able enters a nursing facility and applies for Medicaid. Mrs. Able transfers an asset that results in a 36 month penalty against Mr. Able. Twelve months into the penalty period, Mrs. Able enters a nursing facility and becomes eligible for Medicaid. The penalty period against Mr. Able still has 24 months to run. Because Mrs. Able is now in a nursing facility, and a portion of the original penalty period remains, you must apportion the remaining 24 months of penalty between Mr. and Mrs. Able. You may apportion the remaining penalty period in any way you wish, provided that the total remaining penalty period assessed against both spouses does not exceed 24 months.

When, for some reason, one spouse is no longer subject to a penalty (e.g., the spouse no longer receives nursing facility services, or the spouse dies), the remaining penalty period applicable to both spouses must be served by the remaining spouse.

In the above example, assume the 24 month penalty period was apportioned equally between Mr. and Mrs. Able. After six months, Mr. Able leaves the nursing facility, but Mrs. Able remains. Because Mr. Able is no longer subject to the penalty, the remaining total penalty (12 months) must be imposed on Mrs. Able. If Mr. Able returns to the nursing facility before the end of the 12 month period, the remaining penalty is again apportioned between the two spouses.

K. Penalty Period When Individual Leaves Institution.--A penalty period imposed for a transfer of assets runs continuously from the first date

of the penalty period (the penalty date), regardless of whether the individual remains in or leaves the institution (or waiver program). Thus, if the individual leaves the nursing facility, the penalty period nevertheless continues until the end of the calculated period.

3258.6 Treatment Of Income As Asset.--Under OBRA 1993, income, in addition to resources, is considered to be an asset for transfer (and trust) purposes. Thus, when an individual's income is given or assigned in some manner to another person, such a gift or assignment can be considered a transfer of assets for less than fair market value.

In determining whether income has been transferred, do not attempt to ascertain in detail the individual's spending habits during the 36 or 60 month look-back period. Absent some reason to believe otherwise, assume that ordinary household income was legitimately spent on the normal costs of daily living.

However, you should attempt to determine whether the individual has transferred lump sum payments actually received in a month. Such payments, while counted as income in the month received for eligibility purposes, are counted as resources in the following month if they were retained. Disposal of such lump sum payments before they can be counted as resources could constitute an uncompensated transfer of assets. Also attempt to determine whether amounts of regularly scheduled income or lump sum payments, which the individual would otherwise have received, have been transferred. Normally, such a transfer takes the form of a transfer of the right to receive income. For example, a private pension may be diverted to a trust and no longer be paid to the individual. You may raise questions on whether lump sums of income or the right to income have been transferred based on information given on the Medicaid application or through active questioning of the individual concerning sources of income, income levels in the past versus the present, direct questions about giving income to others, etc.

When you find that income or the right to income has been transferred, a penalty for that transfer must be imposed for institutionalized individuals (if no exceptions apply). In determining the length of the penalty period, you may use several methods of treating the income involved.

When a single lump sum is transferred (e.g., a stock dividend check is given to another person in the month in which it is received by the individual), the penalty period is calculated on the basis of the value of the lump sum payment. When the amount of the payment is small enough that a full month's penalty does not result, you have the option of not imposing a penalty or, if you choose, applying the penalty for only part of the month.

EXAMPLE: A lump sum amount of \$1,000 is transferred, but the State's private nursing facility rate is \$2,000. You can either impose no penalty or apply a penalty for half of the month.

When a stream of income, (i.e., income received in a regular basis, such as a pension) or the right to a stream of income is transferred, you can calculate the penalty period as you would for a single lump sum. Using this method, a penalty period is imposed for each income payment. When the transfer involves a right to income (as opposed to periodic transfers of income the individual owns) you can, as an alternative, make a determination of the total amount of income expected to be transferred during the individual's life, based on an actuarial projection of the individual's life expectancy, and calculate the

penalty on the basis of the projected total income.

You may choose to use alternative methods for determining the length of the penalty period where income is transferred. However, you must obtain approval from HCFA for use of alternative methods.

3258.7 Treatment Of Jointly Owned Assets.--When an asset is held by an individual in common with another person or persons via joint tenancy, tenancy in common, joint ownership, or a similar arrangement, the asset (or affected portion of the asset) is considered to be transferred by the individual when any action is taken, either by the individual or any other person, that reduces or eliminates the individual's ownership or control of the asset.

Under this provision, merely placing another person's name on an account or asset as a joint owner might not constitute a transfer of assets subject, of course, to the specific circumstances of the situation. In such a situation, the individual may still possess ownership rights to the account or asset and thus have the right to withdraw all of the funds in the account or possess the asset at any time. Thus, the account or asset is still considered to belong to the individual. However, actual withdrawal of funds from the account or removal of the asset by the other person removes the funds or property from the control of the individual and so constitutes a transfer of assets. Also, if placing another person's name on the account or asset actually limits the individual's right to sell or otherwise dispose of the asset (e.g., the addition of another person's name requires that the person agree to the sale or disposal of the asset where no such agreement was necessary before), such placement constitutes a transfer of assets.

Use regular Medicaid rules to determine what portion of a jointly held asset is presumed to belong to an applicant or recipient. This portion is subject to a transfer penalty if it is withdrawn by a joint owner. However, you must also provide an opportunity for the owners to rebut the presumption of ownership. If either the applicant/recipient or the other person can establish to your satisfaction that the funds withdrawn were, in fact, the sole property of and contributed to the account by the other person, and thus did not belong to the applicant/recipient, withdrawal of those funds should not result in the imposition of a penalty.

3258.8 Penalties for Transfers of Assets for Less Than Fair Market Value.--When you find that assets have been transferred for less than fair market value, OBRA 1993 provides for specific penalties. These penalties involve the denial of reimbursement for certain services received by the individual. The specific services for which reimbursement must be withheld depend on the individual's situation.

A. Penalties For Institutionalized Individuals.--For institutionalized individuals, the services for which payment must be withheld are:

- o Nursing facility services, as defined in the State Medicaid Plan;
- o A level of care in any institution equivalent to that of nursing facility services; and
- o Home and community-based services provided under a waiver for individuals eligible for such services under §1915(c) or (d) of the Act.

B. Penalties for Noninstitutionalized Individuals.--For a noninstitutionalized individual, the services for which payment must be withheld are the following, not including those services described above:

- o Home health services, as described in §1905(a)(7) of the Act;
- o Home and community care (to the extent allowed and as defined in §1929 of the Act) for functionally disabled elderly adults (see §1905(a)(22) of the Act); and
- o Personal care services furnished to individuals who are not inpatients in certain medical institutions. (See §1905(a)(24) of the Act.)

At the option of the State, you may also withhold reimbursement for services provided to noninstitutionalized individuals for other long term care services for which medical assistance is otherwise available under the State plan to individuals requiring long term care. Such services might include, for example, private duty nursing. However, the specific services involved depend on your own State plan.

3258.9 Treatment of Certain Kinds of Transfers for Less Than Fair Market Value.--Certain financial transactions or purchases may constitute a transfer of assets for less than fair market value. Treat the following as described.

A. Life Estates.--Under a life estate, an individual who owns property transfers ownership of that property to another individual while retaining, for the rest of his or her life (or the life of another person), certain rights to that property. Generally, a life estate entitles the owner of the life estate (the grantor) to possess, use, and obtain profits from the property as long as he or she lives. However, actual ownership of the property has passed to another individual. In a transaction involving a life estate, a transfer of assets is involved. This transfer is for less than fair market value whenever the value of the transferred asset is greater than the value of the rights conferred by the life estate.

In determining whether a penalty is assessed because of a life estate and how long that penalty should be, compute the value of the asset transferred and the value of the life estate, and calculate the difference between the two.

The value of the asset transferred is computed by using the regular Medicaid rules for determining the value of assets. To calculate the value of the life estate, use the life estate table below (from POMS SI 01140.120). Determine the value of the life estate by multiplying the current market value of the property by the life estate factor that corresponds to the grantor's age. The value of the life estate is then subtracted from the value of the asset transferred to determine the portion of the asset that was transferred for less than fair market value. Or, if only the value of the transferred portion is needed, multiply the current market value of the asset by the remainder factor.

EXAMPLE: Mrs. Able, age 65, owns a house with a small farm attached to it, worth \$100,000 in total. She deeds the house and farm to her son but retains a life estate in the property. Under the terms of the life estate, Mrs. Able is entitled to live in the house for the rest of her life and to any produce, income, etc. generated by the farm. To determine the value of Mrs. Able's life estate, the

current market value of the property (\$100,000) is multiplied by a life estate factor corresponding to Mrs. Able's age in the table (.67970), resulting in a life estate worth \$67,970. The penalty is assessed for the difference between the value of the asset transferred (\$100,000) and the value of the life estate (\$67,970), or a penalty based on \$32,030 of assets transferred for less than fair market value.

Some States allow life estates with powers, wherein the owner of the property creates a life estate for himself or herself, retaining the power to sell the property, with a remainder interest to someone else, e.g., a child. Since the life estate holder retains the power to sell the property, its value as a resource is its full equity value. In this situation, the individual has not transferred anything of value, because he or she can terminate the life estate at any time and restore full ownership to himself or herself. Instead, the full value of the asset in question is treated as a countable resource to the individual (assuming, of course, that it is not an otherwise excluded resource).

LIFE ESTATE AND REMAINDER INTEREST TABLE

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(See 26 CFR 20.2031-7 and 49 FR Vol. 49 No. 93/5-11-84.)

B. Annuities.--Section 1917(d)(6) of the Act provides that the term "trust" includes an annuity to the extent and in such manner as the Secretary specifies. This subsection describes how annuities are treated under the trust/transfer provisions.

When an individual purchases an annuity, he or she generally pays to the entity issuing the annuity (e.g., a bank or insurance company) a lump sum of money, in return for which he or she is promised regular payments of income in certain amounts. These payments may continue for a fixed period of time (for example, 10 years) or for as long as the individual (or another designated beneficiary) lives, thus creating an ongoing income stream. The annuity may or may not include a remainder clause under which, if the annuitant dies, the contracting entity converts whatever is remaining in the annuity into a lump sum and pays it to a designated beneficiary.

Annuities, although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets, a determination must be made with regard to the ultimate purpose of the annuity (i.e., whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound.

To make this determination, use the following life expectancy tables, compiled from information published by the Office of the Actuary of the Social Security Administration. The average number of years of expected life remaining for the individual must coincide with the life of the annuity. If the individual is not reasonably expected to live longer than the guarantee

period of the annuity, the individual will not receive fair market value for the annuity based on the projected return. In this case, the annuity is not actuarially sound and a transfer of assets for less than fair market value has taken place, subjecting the individual to a penalty. The penalty is assessed based on a transfer of assets for less than fair market value that is considered to have occurred at the time the annuity was purchased.

For example, if a male at age 65 purchases a \$10,000 annuity to be paid over the course of 10 years, his life expectancy according to the table is 14.96 years. Thus, the annuity is actuarially sound. However, if a male at age 80 purchases the same annuity for \$10,000 to be paid over the course of 10 years, his life expectancy is only 6.98 years. Thus, a payout of the annuity for approximately 3 years is considered a transfer of assets for less than fair market value and that amount is subject to penalty.

LIFE EXPECTANCY TABLE - MALES

http://elderlawanswers.com/elaii/statregsearchdetail.ASP?searchstr=annuities&TITLE=LIFE+EXPECTANCY+TABLE+%2D+MALES&SELECT_TABLE=STATUTES&statregid=255

LIFE EXPECTANCY TABLE - FEMALES

http://elderlawanswers.com/elaii/statregsearchdetail.ASP?searchstr=annuities&TITLE=LIFE+EXPECTANCY+TABLE+%2D+FEMALES&SELECT_TABLE=STATUTES&statregid=256

3258.10 Exceptions to Application of Transfer of Assets Penalties.--There are a number of instances where, even if an asset is transferred for less than fair market value, the penalties discussed above do not apply. These exceptions are:

A. The asset transferred is the individual's home, and title to the home is transferred to:

- o The spouse of the individual;
- o A child of the individual who is under age 21;
- o A child who is blind or permanently and totally disabled as defined by a State program established under title XVI in States eligible to participate in such programs or blind or disabled as defined by the SSI program in all other States;
- o The sibling of the individual who has an equity interest in the home and who has been residing in the home for a period of at least one year immediately before the date the individual becomes institutionalized; or
- o A son or daughter of the individual (other than a child as described above) who was residing in the home for at least two years immediately before the date the individual becomes institutionalized, and who (as determined by the State) provided care to the individual which permitted the individual to reside at home, rather than in an institution or facility.

B. The assets were:

- o Transferred to the individual's spouse or to another for the sole benefit of the individual's spouse;
- o Transferred from the individual's spouse to another for the sole benefit of the individual's spouse;

- o Transferred to the individual's child, or to a trust (including a trust described in §3259.7) established solely for the benefit of the individual's child (The child must be blind or permanently and totally disabled, as defined by a State program established under title XVI, in States eligible to participate in such programs or blind or disabled as defined under SSI in all other States); or

- o Transferred to a trust (including a trust as discussed in § 3259.7) established for the sole benefit of an individual under 65 years of age who is disabled as defined under SSI.

1. For the Sole Benefit of.--See §3257 for a definition of the term "for the sole benefit of."

In determining whether an asset was transferred for the sole benefit of a spouse, child, or disabled individual, ensure that the transfer was accomplished via a written instrument of transfer (e.g., a trust document) which legally binds the parties to a specified course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer. A transfer without such a document cannot be said to have been made for the sole benefit of the spouse, child, or disabled individual, since there is no way to establish, without a document, that only the specified individuals will benefit from the transfer.

2. Blind or Disabled as Defined Under SSI Program.--When it is alleged that an asset was transferred to or for the benefit of an individual who is blind or totally and permanently disabled, you must determine that the individual in fact meets the definitions of blindness or disability used by the SSI program (which are currently the same definitions as under the title II program) or under the State plan programs established under title XVI or under the title II program. If the individual is receiving SSI benefits or is eligible for Medicaid as a result of blindness or disability, you can accept the determination of blindness or disability as valid evidence. However, if the individual is not receiving SSI and/or Medicaid, you must make a separate determination of blindness or disability. When such a determination is necessary, follow the procedures usually used in your State when an individual applies for Medicaid on the basis of blindness or disability. However, if you use more restrictive criteria under §1902(f) of the Act, you may not use a more restrictive definition of blindness or disability. Instead, you must use the definitions used by the SSI program.

C. In addition to the above, a penalty for transferring an asset for less than fair market value is not assessed if a satisfactory showing is made to the State that:

- o The individual intended to dispose of the assets either at fair market value or for other valuable consideration;

- o The assets were transferred exclusively for a purpose other than to qualify for Medicaid;

- o All of the assets transferred for less than fair market value have been returned to the individual; or

- o Imposition of a penalty would work an undue hardship.

Pending publication of regulations on transfers of assets that will provide guidelines on what is meant by the term "satisfactory showing," you must determine what constitutes a satisfactory showing in your State.

1. Intent to Dispose of Assets for Fair Market Value or for Other Valuable Consideration.--See §3258.1 for a definition of the term "valuable consideration." In determining whether an individual intended to dispose of an asset for fair market value or for other valuable consideration you should require that the individual establish, to your satisfaction, the circumstances which caused him or her to transfer the asset for less than fair market value. Verbal statements alone generally are not sufficient. Instead, require the individual to provide written evidence of attempts to dispose of the asset for fair market value, as well as evidence to support the value (if any) at which the asset was disposed.

2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid.--Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

In some instances, the individual may argue that the asset was not transferred to obtain Medicaid because the individual is already eligible for Medicaid. This may, in fact, be a valid argument. However, the validity of the argument must be determined on a case-by-case basis, based on the individual's specific circumstances. For example, while the individual may now be eligible for Medicaid, the asset in question (e.g., a home) might be counted as a resource in the future, thus compromising the individual's future eligibility. In such a situation, the argument that the individual was already eligible for Medicaid does not suffice.

3. All Assets Transferred for Less Than Fair Market Value Are Returned to the Individual.--When all assets transferred are returned to the individual, no penalty for transferring assets can be assessed. In this situation, you must ensure that any benefits due on behalf of the individual are, in fact, paid. When a penalty has been assessed and payment for services denied, a return of the assets requires a retroactive adjustment, including erasure of the penalty, back to the beginning of the penalty period.

However, such an adjustment does not necessarily mean that benefits must be paid on behalf of the individual. Return of the assets in question to the individual leaves the individual with assets which must be counted in determining eligibility during the retroactive period. Counting those assets as available may result in the individual being ineligible for Medicaid for some or all of the retroactive period, (because of excess income/resources) as well as for a period of time after the assets are returned.

It is important to note that, to void imposition of a penalty, all of the assets in question or their fair market equivalent must be returned. If, for example, the asset was sold by the individual who received it, the full market value of the asset must be returned to the transferor, either in cash or another form acceptable to the State.

When only part of an asset or its equivalent value is returned, a penalty

period can be modified but not eliminated. For example, if only half the value of the asset is returned, the penalty period can be reduced by one-half.

4. Imposition of Penalty Would Work Undue Hardship.--When application of the transfer of assets provisions discussed in these sections would work an undue hardship, those provisions do not apply. Unlike the policies applying to transfers made on or before August 10, 1993, which only required that you acknowledge that the statute included an undue hardship provision, under OBRA 1993 you must implement an undue hardship procedure for transfers of assets. Further, that procedure must be described in your Medicaid State Plan. You have considerable flexibility in implementing an undue hardship provision. However, your undue hardship procedure must meet the requirements discussed in subsection 5.

5. Undue Hardship Defined.--Undue hardship exists when application of the transfer of assets provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter, or other necessities of life.

Undue hardship does not exist when application of the transfer of assets provisions merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him/her at risk of serious deprivation.

You have considerable flexibility in deciding the circumstances under which you will not impose penalties under the transfer of assets provisions because of undue hardship. For example, you can specify the criteria to be used in determining whether the individual's life or health would be endangered and whether application of a penalty would deprive the individual of food, clothing, or shelter. You can also specify the extent to which an individual must make an effort to recover assets transferred for less than fair market value. As a general rule, you have the flexibility to establish whatever criteria you believe are appropriate, as long as you adhere to the basic definition of undue hardship described above.

However, your undue hardship procedure must, at a minimum, provide for and discuss the following administrative requirements:

- o Notice to recipients that an undue hardship exception exists;
- o A timely process for determining whether an undue hardship waiver will be granted; and
- o A process under which an adverse determination can be appealed.

3258.11 Transfers of Assets and Spousal Impoverishment Provisions.--Under §1917(c) (2) (B) of the Act, certain transfers of assets for less than fair market value are exempt from penalty. (See §3258.10 for a complete discussion of those exemptions.) Among those exemptions are transfers from an individual to a spouse, transfers from an individual to a third party for the sole benefit of a spouse, and transfers from a spouse to a third party for the sole benefit of the spouse.

Section 1924 of the Act sets forth the requirements for treatment of income and resources where there is an individual in a medical institution with a spouse still living in the community. This section of the Act provides for apportioning income and resources between the institutional spouse and the community spouse so that the community spouse does not become impoverished because the individual is in a medical institution. (See §3260 for a complete discussion of the spousal impoverishment provisions.)

The exceptions to the transfer of assets penalties regarding interspousal transfers and transfers to a third party for the sole benefit of a spouse apply even under the spousal impoverishment provisions. Thus, the institutional spouse can transfer unlimited assets to the community spouse or to a third party for the sole benefit of the community spouse.

When transfers between spouses are involved, the unlimited transfer exception should have little effect on the eligibility determination, primarily because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse. Thus, resources transferred to a community spouse are still be considered available to the institutionalized spouse for eligibility purposes.

The exception for transfers to a third party for the sole benefit of the spouse may have greater impact on eligibility because resources may potentially be placed beyond the reach of either spouse and thus not be counted for eligibility purposes. However, for the exception to be applicable, the definition of what is for the sole benefit of the spouse (see §3257) must be fully met. This definition is fairly restrictive, in that it requires that any funds transferred be spent for the benefit of the spouse within a time-frame actuarially commensurate with the spouse's life expectancy. If this requirement is not met, the exemption is void, and a transfer to a third party may then be subject to a transfer penalty.