

ARKANSAS REGISTER

Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



Secretary of State

Mark Martin

500 Woodlane, Suite 026

Little Rock, Arkansas 72201-1094

(501) 682-5070

www.sos.arkansas.gov



For Office

Use Only:

Effective Date _____ Code Number _____

Name of Agency Department of Human Services

Department Division of County Operations

Contact Isaac Linam E-mail Isaac.Linam@dhs.arkansas.gov Phone 501-320-6570

Statutory Authority for Promulgating Rules Arkansas Code Annotated § 20-76-201;1917(c) of SSA; 5007 of Cures Act

Rule Title: Medical Services Policy H-300 – H-325 Transfer of Resources

Intended Effective Date

(Check One)

Date

☐ Emergency (ACA 25-15-204)

Legal Notice Published 10/8-10/10/2018

☐ 10 Days After Filing (ACA 25-15-204)

Final Date for Public Comment 11/06/2018

☒ Other January 1, 2019
(Must be more than 10 days after filing date.)

Reviewed by Legislative Council 12/21/2018

Adopted by State Agency 01/01/2019

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Becky Murphy

Becky.Murphy@dhs.arkansas.gov

12/21/2018

Contact Person

E-mail Address

Date

CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)



Signature

501-682-8377

Mary.Franklin@dhs.arkansas.gov

Phone Number

E-mail Address

Director, Division of County Operations

Title

December 21, 2018

Date

H-300 Transfer of Resources

H-301 Transfer of Resources Definition

H-300 Transfer of Resources

MS Manual 01/01/19

Transfer of resources applies to nursing facility, Home and Community Based Waivers (HCBS) including DDS and PACE (LTC) cases.

Exception to PACE: The transfer of resources policy (Re. [MS H-308](#)) will be reviewed with the PACE applicant at the time he or she enters the program. Transfer of resource provisions will apply only if the PACE participant enters a nursing facility. If assets have been transferred during the look back period from the time of entry into the nursing facility, a period of ineligibility for PACE services will be imposed for uncompensated value based on the current divisor. The look back period will begin with the date of entry to the facility, [MS H-302](#). It will be necessary for the PACE recipient to drop out of the PACE program when he or she enters a nursing facility when under a penalty for non-compensated transfer. When the penalty period ends, the individual may be considered for readmission to the PACE program. The transfer of resources penalty does not apply to PACE individuals in the community.

H-301 Transfer of Resources Definition

MS Manual 01/01/19

A transfer of a resource occurs when an individual, the individual's spouse or an Authorized Representative of either of them gives away or sells property that belongs to the individual or spouse. Valid transfers of resource ownership may occur through any of the following types of transactions:

- Sale of property;
- Trade or exchange of one property for another;
- Spend-down of cash;
- Giving away cash;
- The establishment of or placement into a trust;
- Transferring any financial instrument (e.g., stocks, bonds); or
- Giving away property (including adding another person's name as an owner of the property).

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-302 The Look Back Period

The policy for the transfer of resources for less than fair market value (FMV) applies only to individuals applying for or receiving Long Term Services and Supports (Re. [MS H-303](#)). The treatment of resource transfers for less than fair market value made by an applicant/recipient, his/her eligible spouse, or his/her representative is governed by the date of transfer, the institutional or waiver status of the applicant/recipient, and whether the transfer was to the applicant/recipient's spouse.

A transfer of a resource made by an applicant/recipient, his/her eligible spouse, or a representative acting on their behalf must be verified and evaluated to determine:

1. Whether the transfer is validly irrevocable;
2. Whether any interest remains legally available to the individual or is declared by the current legal owner(s) to be available; and
3. Whether a resource was transferred for less than fair market value within the applicable look back period preceding the date of application/redetermination. (Re. [MS H-303](#))

When it is determined that an applicant/recipient, his/her eligible spouse, or representative has the authority or ability to revoke the transfer and regain the transferred interest, the value of such interest will be included with countable resources.

When it is determined that an applicant/recipient or his/her eligible spouse has remaining interest or ownership in a transferred resource, the value of such interest will be included with countable resources.



NOTE: The above guidelines apply not only to an applicant/recipient or his/her eligible spouse but also to any fiduciary or individual legally authorized to act on their behalf, such as holder of power of attorney, parent of a minor child, guardian, etc. The guidelines also apply to other persons acting on behalf of the applicant/recipient or eligible spouse, e.g., an ineligible spouse.

H-302 The Look Back Period

MS Manual 01/01/19

The "Look Back Period" is the period of time prior to an individual's application for either nursing facility or Home and Community Based Waiver (including DDS) services during which a transfer of resources for less than FMV may affect the individual's current eligibility for vendor payment or waiver services. The length of the look back period is governed by federal law and regulations and thus is subject to change. The current look back period of 60 months was

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-303 Transfer for Less than Fair Market Value

established by the Deficit Reduction Act of 2005 (DRA) for transfers occurring on 2/8/2006 or later.



NOTE: For detailed instructions on transfers prior to 2/8/06, see [Appendix H](#).

The eligibility worker will look at all transfers made during the look back period. The look back period is the 60 months immediately prior to the date on which an individual is both in an institution and has applied for medical assistance or, in the case of a Waiver individual, prior to the date the individual applies for Waiver assistance.

If an institutionalized or Home and Community Based Waiver (HCBS) individual is not eligible when he first applies for assistance and later reapplies, the eligibility worker will ask about transfers in the appropriate look back period from the date of the second application, or the dates of subsequent applications if the individual is not eligible at the second application.

H-303 Transfer for Less than Fair Market Value

MS Manual 01/01/19

Fair market value (FMV) is the amount for which property would sell on the open market if put up for sale in the ordinary course of business i.e. the actual or cash value of property. Fair market value is usually determined by the purchase price of similar goods or property in the same locality. A compensated transfer results when an individual receives compensation for transferred resources equal to the fair market value of the transferred resources in the form of money, stocks, bonds, material goods, services, etc.

When it is determined that an applicant/recipient, his/her eligible spouse, or their representative has transferred a resource at less than fair market value within the applicable look back period prior to application, the transfer will be presumed to be for the purpose of establishing eligibility and the amount of uncompensated value from the transfer(s) and the appropriate penalty period will be determined. Transfer(s) of resources presumed to be for the purpose of establishing eligibility will be subject to rebuttal (Re. [MS H-312](#)) and, in some cases, subject to exclusion based on other circumstances.

Individuals and/or their spouses who transfer resources for less than fair market value will be ineligible for nursing facility vendor payments for a period of time as specified at [MS H-308](#).

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-304 Transfers to Trusts

A Home and Community Based Waiver applicant/recipient who transfers resources for less than fair market value will be ineligible for all Waiver Medicaid benefits and services for a period of time as specified at [MS H-308](#).

H-304 Transfers to Trusts

MS Manual 01/01/19

A transfer to a trust occurs when an individual, the individual's spouse or the representative of either the individual or spouse transfers the ownership of the individual's resources to the corpus of a trust.

"Trust" means 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 a beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one or more trustees or other fiduciaries who are permitted to exercise any discretion with respect to the distribution to the individual, and shall include trusts, conservatorships, and estates created pursuant to the administration of a guardianship.

"Grantor" means the individual, institution or entity that established, created or funded the trust and shall also include fiduciaries as 1) defined by Arkansas Code 28-69-201 and third parties as contemplated by 2) Arkansas Code 20-77-301, et seq. Definition of a Trust.

TRUSTS ESTABLISHED PRIOR TO 8/11/93

1. State Law

All transfers to trusts established on or before August 10, 1993, are governed by the terms of Act 1228 of 1993 and by federal law in #2 below. Act 1228 of 1993 provides the following guidelines:

A provision in a trust, other than a testamentary trust, which limits the availability of, or provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the grantor or the grantor's spouse in the event that the grantor or grantor's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the State of Arkansas, without regard to the irrevocability of the trust or the purpose for which the trust was created and without regard to whether the trust was created pursuant to court order.

2. Federal Law

The following federal policy was applicable to trusts established prior to 8/11/93.

H-300 Transfer of Resources

H-304 Transfers to Trusts

a. Trust Established by the Client or Spouse - Medicaid Qualifying Trust

A Medicaid Qualifying Trust is a trust or “similar legal device” established by an individual (or the individual’s spouse) who is the beneficiary of the trust and who gives a trustee any discretion for use of the trust fund.

A “similar legal device” is defined as an arrangement, instrument, or other device which does not qualify as a trust under state law, but which has other characteristics of a trust (e.g., escrow account, savings account, pension fund, investment account or other account managed by a custodian, guardian or other individual with a fiduciary obligation). Any such legal device described above will also be considered a Medicaid Qualifying Trust.

If an individual is not legally competent and a trust is established for the individual by a guardian or legal representative (including a parent for a child), using the individual’s resources, the trust will be treated as having been established by the individual, since he could not do it for himself.

With a Medicaid Qualifying Trust, consider as a resource to the beneficiary (for eligibility purposes) the maximum amount that a trustee could disburse if he exercised his full discretion allowed under the terms of the trust. This amount is deemed available to the individual whether or not the distribution is actually made. The amount actually distributed by a trustee is counted as income (if paid from the current monthly interest) or a resource (if paid from the principal or from past months’ accumulated interest). This provision does not apply to any trust or initial trust decree established before April 7, 1986, solely for the benefit of an individual with a developmental disability who resides in an ICF/IID facility.

- 1) If Client is Trustee - If the client is trustee of a trust established by himself or his spouse, consider the trust assets as a resource if he has legal authority to revoke or dissolve the trust, or to use the assets for the benefit of himself or his spouse.
- 2) If Appointed Trustee with Full Discretion - If the client is beneficiary of a trust with an appointed trustee who has full discretion for use of trust funds for the client’s benefit, consider the trust assets as a resource to the client.
- 3) If Appointed Trustee With Limited Discretion
If the appointed trustee has limited discretion, the assets will be considered available to the maximum extent allowed by the trust, whether they are distributed or not.

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-304 Transfers to Trusts

b. Trust Established by Other(s) for Client

- 1) Consideration of Trust Principal - If the applicant, as beneficiary of the trust, has no access to the trust principal, it is not considered a resource to him. If the trust agreement provides for regular payments from the principal to the beneficiary, they are considered to be income in the month of their receipt and, if retained, to be a resource in the month(s) following.

When the beneficiary of the trust has direct access to the principal of a trust it is considered as a resource and withdrawals are not considered as income.

- 2) Consideration of Interest Income from Trust Principal - When the beneficiary has legal access to the income from the trust principal, it is considered to be income as it becomes available, whether used or not. If not used, the amount will become a resource in the month(s) following its availability.

When the beneficiary has no right to the interest income from the trust principal and it is added to the principal, it is not income to the beneficiary, and only the trust payments made to the beneficiary are considered to be income. If retained, the payment(s) will be considered a resource in the month(s) following.

If the trustee exercises authority over the use of trust payments, the payments are still considered to be income to the beneficiary whether received direct or "in-kind".

TRUSTS ESTABLISHED 8/11/93 AND LATER

1. General Provisions

All transfers to trusts established August 11, 1993, or later are governed by the terms of OBRA 1993 which, as federal law, supersedes Act 1228 and other applicable policy previously considered.

The consideration of trusts established August 11, 1993, or later is as follows:

- 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 such trust, other than by will:
 - 1) The individual;
 - 2) The individual's spouse;

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-304 Transfers to Trusts

- 3) A person, including any court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
 - 4) A person, including any court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.
 - b. If the corpus of a trust includes resources of an individual and resources of any other person(s), the provisions of this section shall apply to the portion of the trust attributable to the resources of the individual.
 - c. With the exception of a trust as described below in subsection No. 4 (Trusts Not Considered an Available Resource), this section (1a & b) shall apply without regard to:
 - 1) The purpose 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.
2. Consideration of Revocable Trusts
 - a. The corpus of the trust is considered available to the individual;
 - b. Payments from the trust to or for the benefit of the individual are considered income to the individual; and
 - c. Any other payments from the trust (e.g., to another individual) will be treated as a transfer of resources.
3. Consideration of Irrevocable Trusts
 - a. If the trust permits payments, under any circumstances, to or for the benefit of the individual, the portion of the corpus from which payment to the individual could be made (or the income on the corpus from which payment to the individual could be made) shall be considered a resource available to the individual; and payments actually made from that portion of the corpus shall be considered as follows:
 - 1) Payments to or for the benefit of the individual shall be considered income of the individual; and

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-304 Transfers to Trusts

- 2) Payments for any other purpose shall be considered a transfer of resources by the individual.
 - b. Any portion of the corpus of a trust from which, or any income on the corpus from which, no payment could under any circumstances be made to or for the benefit of the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be a transfer of resources. The value of such trust shall be determined by including the amount of any payments made from such portion of the trust after such date.
4. Trusts Not Considered an Available Resource
- A trust will not be considered an available resource to an individual if it meets the criteria of one of the 3 trusts described below:
- a. A trust containing the resources of an individual under age 65 who is disabled, as determined by SSI or MRT, and which has been established for the benefit of the individual by the individual, a parent, grandparent, legal guardian of the individual, or a court, if the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual;
 - b. A trust (Re. [MS H-110](#)) established for the benefit of an individual receiving Social Security and other pension:
 - 1) If the trust is composed ONLY of pension, Social Security, and other income to the individual (and accumulated income in the trust);
 - 2) If the state will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual subsequent to establishment of the trust; and
 - 3) As long as the state provides facility services to individuals in institutions under the federal income level (3 times the SSI payment level) but does not provide the same assistance to medically needy individuals.
 - c. A trust containing the resources of an individual who is disabled, as determined by SSI or MRT, that meets the following conditions:
 - 1) The trust is established and managed by a non-profit association;

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-305 Documentation of Resource Transfers

- 2) A separate account is maintained for each beneficiary of the trust but, for purposes of investment and management of funds, the trust pools these accounts;
- 3) Accounts in the trust are established solely for the benefit of individuals with disabilities (by SSI or MRT determination, including individuals age 65 and older) by the parent, grandparent, or legal guardian of such individuals, or by a court; and
- 4) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays the state from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

5. Hardship

If it is determined that denial of eligibility due to the transfer of resources into a trust would work an undue hardship on an individual, the hardship provisions at [MS H-720](#) may be applied.

6. Inquiries to the Office of Chief Counsel (OCC)

When the eligibility worker becomes aware of the existence of a trust or of the transfer of resources into a trust, whether made by an individual, spouse, court of law, etc., the trust document along with other pertinent documents will be sent electronically to the Division of County Operations with a request for review by the Office of Chief Counsel. (Re. [MS E-501](#)).

H-305 Documentation of Resource Transfers

MS Manual 01/01/19

Each individual who is subject to a penalty for uncompensated transfers and who applies for Medicaid must complete Form DHS-727, Disposal of Assets Disclosure, in conjunction with his/her application for assistance. The eligibility worker will explain to each applicant/recipient (or to his/her representative) that transfers of any resources within the applicable look back period must be disclosed as a part of the eligibility determination.

Reported property transfers will be documented by copy of bill of sale, title transaction, deed, business records, receipts, account statements, etc. A signed statement from the receiving party of the transaction may also serve as evidence. The applicant/recipient or person acting on

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-306 Determining the Value of Compensation Received

his behalf must provide necessary documentation to verify the transfer. The eligibility worker will give assistance when necessary.

In addition to documenting the actual transfer, when a transfer has been made by an applicant/recipient, his/her eligible spouse, or another joint owner or account holder and fair market value compensation was not received, the eligibility worker must complete a Form DCO-778, Resource Inquiry, and forward it to the individual who received ownership of the resource. This inquiry is completed to document current ownership of the resource, the purpose of the transfer, and any expected compensation. If a complete Asset Inquiry Form cannot be obtained, the eligibility worker should attempt to gather the information through other means, e.g., direct from the client, etc. Assistance cannot be denied solely on the basis of not being able to obtain a completed Asset Inquiry Form.

H-306 Determining the Value of Compensation Received

MS Manual 01/01/14

The value of compensation received is based on the agreement and expectation of the parties at the time of transfer. For example, if the purchaser agreed to pay the individual \$10,000 in 10 installments of \$1,000 each, the compensation is valued at \$10,000 regardless of the amount of any payment(s) actually received at the time of application or redetermination.

The value of compensation is the gross amount paid or to be paid in a tangible form (such as cash, real or personal property) by the purchaser (the value is not reduced by expenses attributed to a sale). When compensation is equal to or greater than the value of the resource transferred, the transfer will not be considered uncompensated. However, any balance of resources from the transaction will be counted toward the resource limit.



NOTE: A transfer for love and consideration is not considered a transfer for fair market value. It is presumed that services provided for free at the time were intended to be provided without compensation. Therefore, any transfer for care or services provided for free is a transfer of resources for less than fair market value.

When uncompensated value exists, refer to [MS H-308](#).

H-307 Ownership Held in Common with Others

MS Manual 01/01/14

When resources are held by an individual in common with another person or persons in joint tenancy, tenancy in common or other similar arrangements, the resource (or portion of the

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-308 Determination of Uncompensated Value and Penalty Period

resource) shall be considered to be transferred by the individual when any action is taken, either by the individual or by any other person, that reduces or eliminates the individual's ownership or control of such resource. For example, Mrs. White adds her daughter's name to a bank account. Adding a name to a resource in itself does not necessarily constitute a transfer because, in this case, Mrs. White still has full access to her money. However, the daughter later withdraws the money. The withdrawal shall be viewed as if Mrs. White had directly transferred the money to her daughter, and a penalty period will be imposed on Mrs. White if she applies for facility or Waiver assistance. (Re. [MS H-308](#))

If in the case of joint tenancy property ownership where an individual cannot access his interest in property due to the refusal of the other owners to give consent to sell the property, it should be determined when the joint tenancy ownership was established.

EXAMPLE: During the look back period an individual had full ownership of 10 acres of land but, prior to entering a facility, deeded the property to himself and two brothers as joint owners who will not consider sale of the property. In this situation, a transfer of resources should be considered, because an action occurred which eliminated or reduced the owner's access to a resource. If, on the other hand, the joint tenancy ownership has existed for a period of time longer than the look back period, a transfer of resources will not be considered and the applicant's interest in the property will not be considered a resource if the other owners will not consider sale of the property.

When a transfer was made in the look back period by a joint owner, which reduces or eliminates an individual's ownership or control of a resource, the individual will be given the right to rebut the presumption of ownership of joint accounts, if applicable, and to rebut the presumption that resources were transferred to establish eligibility (Re. [MS H-312](#)).

H-308 Determination of Uncompensated Value and Penalty Period

MS Manual 01/01/19

This section of policy provides guidelines on:

1. Determining the value of an uncompensated transfer;
2. Determining the appropriate penalty period;
3. Determining the penalty period for multiple transfers;
4. Determining the penalty period for an uncompensated transfer to an annuity; and

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-308 Determination of Uncompensated Value and Penalty Period

5. Determining the penalty period an uncompensated transfer due to the purchase of a life estate.

When an uncompensated transfer is made and an individual applies for nursing facility services, that individual will not be eligible for a vendor payment until the penalty period has expired. An individual in a nursing facility will be eligible to receive a Medicaid card during the penalty period, provided he/she is otherwise eligible.

The uncompensated value from a resource transfer is the difference between the fair market value of the resource at the time of transfer (Re. [MS E-514](#) for real property and [MS E-522](#) for personal property) and the value of compensation (cash, material goods, services, etc.) received for the resource (Re. [MS H-306](#)).

A Home and Community Based Waiver (HCBS) applicant and/or spouse who transfer resources for less than fair market value during the look back period will be ineligible for the Waiver program until one of the following is met:

- the applicant meets the criteria at [MS H-310](#) to begin the penalty period, the penalty expires, and reapplication is made; or
- the date of the transfer is no longer in the look back period; or
- the applicant enters a nursing facility, an appropriate penalty period based on the transfer begins, the penalty expires, and reapplication is made for a HCBS Waiver.

A Waiver recipient and/or spouse who transfer resources for less than fair market value after approval, will be ineligible for the Waiver program during the penalty period. At the end of the penalty period, reapplication will be necessary and all eligibility factors must be verified prior to approval.

Determining the Penalty Period

The number of months of ineligibility will be determined by dividing the uncompensated value of all resources transferred by the individual or spouse on or after the look back date by the current divisor (see [Appendix R](#)). There is no cap on the total number of months of ineligibility. Any fraction remaining after dividing the total uncompensated value by the divisor will not be dropped. The remaining fraction will be multiplied by 30 (days) and the resulting number will be rounded up to calculate the additional number of days of ineligibility. The penalty period will begin on the first day of the month of the transfer or the date on which the individual is eligible for Medicaid, whichever is the later date.

Multiple Transfers – The eligibility worker will determine the penalty period for multiple resource transfers by treating the total cumulative, uncompensated value of the resources

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-309 Exceptions to the Penalty Period

transferred by the individual, the individual's spouse or the designated representative during all the months of the look back period as one transfer. This applies to all transfers regardless of the amount transferred. The eligibility worker will add the amount of all the transfers together to calculate the penalty period. The penalty period will begin on the first day of the month of the transfer or the date on which the individual is eligible for Medicaid, whichever is the later date.

Penalty for an Uncompensated Transfer to an Annuity - If an applicant with an annuity has not yet annuitized (i.e., started receiving regular payments) and the annuity is revocable, the principal of the annuity is a countable resource. If annuity payments have begun and the contract is irrevocable, the number of years of payout of the annuity must be equal to or less than the number of years of expected life remaining for the individual, based on the life expectancy tables at [Appendix L](#). If the payout years are greater than the life expectancy years, a transfer of resources for less than fair market value has been made.

If an annuity is made irrevocable and there will be no payout during the life of the annuitant, the full purchase price of the annuity is subject to a penalty for transfer of resources.

Penalty for an Uncompensated Transfer Due to the Purchase of a Life Estate - The purchase of a life estate will be treated as an uncompensated transfer of resources if the purchaser does not live on the property for at least 12 consecutive months after the property is purchased. Also, if an individual purchases a life estate in someone else's home the individual must live in that home for a period of 12 consecutive months after the date of purchase. In either case, the full amount of the purchase price of the life estate will be considered as the uncompensated transfer.

If the transfer occurred after more than one year of occupancy, the eligibility worker will look at the purchase price of the life estate to determine if the purchase price was for fair market value. (See [MS H-306](#)). If the value of the life estate is less than the price of the life estate purchased, a transfer penalty is imposed for the difference between the value of the life estate interest and the purchase price.



NOTE: The Asset Transfer Worksheet is available to assist the eligibility worker in computing the correct penalty period.

H-309 Exceptions to the Penalty Period

MS Manual 07/13/15

A penalty period shall not be calculated according to [MS H-308](#) if:

1. The resource transferred was a home, and title to the home was given to:

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-309 Exceptions to the Penalty Period

- a. The individual's community spouse;
 - b. A child of the individual who is under age 21, or who is blind or has a disability (as determined by SSA or MRT);
 - c. A child of the individual (other than a child described in "b" above) who lived in the home for at least two years immediately before the individual was admitted to a medical institution, Waiver program or nursing facility and who provided care to the individual which allowed the individual to remain at home during that time rather than enter an institution; or
 - d. A sibling of the individual who has an equity interest in the home and who was residing in the home for at least one year immediately before the individual was admitted to a Medical institution, Waiver program or nursing facility;
2. The resources 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 the individual's child who has a permanent disability or is blind as determined by SSA or MRT, solely for the benefit of that child, or to a trust, described at [MS H-304](#), solely for the benefit of that child; or
 - d. To a trust (including a trust described at [MS H-304](#)) established solely for the benefit of an individual under 65 years of age who has a disability (as determined by SSA or MRT or Railroad Retirement Board).



NOTE: Sole benefit means that it will benefit that individual only and that no other individual will derive benefit from the transferred resource during the lifetime of the individual to whom the resource was transferred. There must be a legal document executed to establish the transfer and evidence of "sole benefit", and it must be established that the transferred resource will have some immediately measurable monetary value which will benefit the spouse or child, e.g., a CD or other instrument which produces income, land or rental property which produces income, etc.

3. The individual intended to dispose of the resources either at fair market value or for other valuable consideration, or that the resources were transferred exclusively for a purpose other than to qualify for medical assistance (the procedures for rebuttal of the presumption that resources were transferred to establish eligibility in [MS H-312](#) are applicable);

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-310 Imposing the Penalty

4. All resources transferred for less than fair market value have been either returned directly to the client or used for the client's care; or
5. Denial of eligibility would cause an undue hardship ([MS H-700](#)).

H-310 Imposing the Penalty

MS Manual 01/01/19

For nursing home applicants/recipients the penalty period begins on the first day of the month of the transfer or the date on which the individual is eligible for Medicaid, whichever is the later date. Once a penalty period begins, it continues to run until expiration. ([MS H-315](#)) No penalty period will apply if the transfer can be excluded under the provisions listed in [MS H-309](#). During the penalty period, the individual is not eligible for a vendor payment until the expiration of the penalty period but may receive other Medicaid services with the exception of Waiver services. The application must be approved for Medicaid without the vendor payment if all eligibility requirements have been met.

Even though the vendor payment has been closed for nursing home recipients, Medicaid will continue to cover services not covered under the vendor payment.

For Home and Community Based Services Waiver (HCBS) applicants, the penalty period begins on the date Medicaid would have been approved (MS C-200 section) if all the following criteria is met:

- The applicant meets the financial and nonfinancial requirements for Medicaid eligibility;
- The applicant meets the functional need (level-of-care) criteria for the waiver;
- A person-centered service plan has been developed for the individual; and
- A waiver slot is available for the individual's placement.

If the HCBS applicant does not meet the criteria, they are not eligible unless the individual enters a nursing facility or until the transfer date moves out of the look back period. If the individual enters a nursing facility, the penalty period will be determined and will begin when the individual meets the medical eligibility criteria and is determined Medicaid eligible. It will continue uninterrupted for the appropriate period of time even if the individual leaves and returns home. In that situation, Waiver services can resume when the penalty period is over.

For HCBS Waiver recipients the penalty period begins on the first day of the month of the transfer.

For both HCBS Waiver applicants and recipients, once a penalty period begins, it continues to run until expiration. ([MS H-315](#)) No penalty period will apply if the transfer can be excluded under the provisions listed in [MS H-309](#).

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-311 Notifying Individual of Established Uncompensated Value and Penalty Period

H-311 Notifying Individual of Established Uncompensated Value and Penalty Period

MS Manual 01/01/19

If otherwise eligible, when uncompensated value is established, the individual must be advised of that fact before the application or redetermination is completed. The individual will be informed by letter (Form DHS-732) that he/she transferred a resource at less than fair market value and that the uncompensated value will result in a penalty period unless he/she can provide convincing evidence that the action was exclusively for some purpose other than establishing eligibility. A copy of the letter will be scanned in the electronic record.

For Home and Community Based Services Waiver (HCBS) applicants, when the criteria at MS H-310 is not met and no penalty period can be imposed, the individual will be sent a DHS-707 informing him/her, that the penalty for transferring a resource for uncompensated value will be total ineligibility for the Waiver program for five years from the date of transfer, unless the individual enters a nursing facility or meets the criteria at MS H-310.

If the individual does not respond to the letter, DHS-732, Notification of Asset Transfer at Less Than Fair Market Value, within 15 days, it will be assumed that he does not wish to rebut the presumption that the transfer was for the purpose of establishing eligibility.

H-312 Rebuttal of Presumption that Resources Were Transferred to Establish Eligibility

MS Manual 01/01/14

When an individual elects to rebut the presumption that the resource was transferred to establish eligibility, he will be informed that it is his responsibility to present convincing evidence that the resource was transferred exclusively for some other purpose.

The individual's statement concerning the circumstances of the transfer will be obtained and should include (but need not be limited to) the following points:

1. Purpose of transfer of resource;
2. Attempts to transfer resource at FMV;
3. Reasons for accepting less than FMV for the resource;
4. Means of or plans for supporting himself after the transfer; and
5. Relationship, if any, to the person(s) to whom the resource was transferred.

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-313 Factors Which Indicate Transfer Exclusively for Some Other Purpose

The individual will be required to submit any pertinent documentary evidence (e.g., legal documents, realtor agreements, relevant correspondence, etc.).

The individual's statement of purpose for transfer of the resources and any documentary evidence provided will be evaluated to determine if the transfer was exclusively for some purpose other than establishing Medicaid eligibility. Refer to [MS H-313](#) for factors which indicate the transfer was for a purpose other than to establish Medicaid eligibility.

H-313 Factors Which Indicate Transfer Exclusively for Some Other Purpose

MS Manual 01/01/19

The presence of one or more of the following factors may indicate that resources were transferred exclusively for some purpose other than establishing eligibility:

1. The occurrence after transfer of the resource of:
 - a. Unexpected (traumatic) onset of disability; or
 - b. Unexpected loss of other resources which would have precluded eligibility at the time the resource was transferred; or
 - c. Unexpected loss of income which would have precluded eligibility at the time the resource was transferred.
2. The resource (if retained) would not have caused total resources to exceed the resource limit at the time of transfer.
3. The transfer was court ordered for the purpose of satisfying an obligation in existence at the time of that transfer.

If the individual indicates that he had another purpose for transferring the resource but protection of the resource against use for medical or nursing home expenses was a factor in transferring it, the presumption that it was transferred to establish eligibility is not rebutted.

H-314 Apportionment of Penalty for Spouses

MS Manual 01/01/19

If the Institutionalized Spouse (IS) is serving a penalty period due to a transfer of resources for less than fair market value, the penalty period will be apportioned between spouses if the Community Spouse (CS) otherwise becomes eligible for medical assistance.

If a penalty has been apportioned between two institutionalized spouses and one spouse dies, the penalty period for the surviving spouse will be extended by the appropriate amount.

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-315 Penalty Continues Without Interruption until Expiration

When an IS under a penalty dies or goes home, the CS of that individual later enters a facility and the penalty period of the IS has not yet expired, the CS entering the facility will inherit the remainder of the penalty previously imposed.

H-315 Penalty Continues Without Interruption until Expiration

MS Manual 01/01/19

If an institutionalized resident under a transfer penalty leaves the institution, the penalty period will continue to run. If the individual later reenters an institution and reapplies for Medicaid, the eligibility worker will not only inquire about transfers in the appropriate look back period from the date of reapplication, but will also check the case record to determine the length of the penalty previously imposed and whether or not that penalty has expired. The break in institutional status does not eliminate or disrupt a penalty previously imposed.

Even though the penalty for nursing facility services continues until expiration, an individual living in the community may still be found eligible for Medicaid in a Medicare Savings Program category.

H-316 Transfer of Resources Divisor Definition

MS Manual 01/01/19

The Transfer of Resources Divisor is one of the numbers used in the calculation to determine the penalty period resulting from a transfer of resources for less than fair market value.

The divisor is defined as the weighted average per diem Medicaid rate multiplied by 30.42 and rounded to the nearest dollar to obtain a monthly amount, calculated from cost reports submitted for the cost reporting period from July to June, and then applied to the following calendar year. The weighted average rate is calculated annually. Medicaid nursing facility resident days reported on each facility's cost report will be multiplied by each facility's per diem rate. The sum of the calculated amounts will be divided by the total resident days to get the weighted average rate. The divisor will be re-determined yearly by the Division of Medical Services with any resulting changes taking effect on April 1st. The divisor for the current year is indicated on [MS Appendix R](#).

When there is a change in the divisor, the penalty period will be reassessed at the next reevaluation, or earlier if requested, or at reapplication.

If the client is currently eligible in a nursing facility Medicaid case, but not receiving a vendor payment due to penalty, the client will be reassessed at reevaluation or earlier if requested. If

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-317 Reacquisition of/or Additional Compensation Received on Resource Transfer at less than FMV

the client is now eligible for vendor payment, vendor payment will be approved beginning the month of reassessment.

If the client is not currently receiving nursing facility or HCBS Medicaid but reapplies and is under a previously imposed penalty, the penalty period will be reassessed using the current divisor. If eligible, the nursing facility case will be approved with coverage not granted before April 1st or before the three-month retro period based on the recent application, whichever is later. If eligible, the HCBS case will be approved with coverage not granted before April 1st or before the allowed Medicaid begin date in the appropriate HCBS policy in section MS C-200.

H-317 Reacquisition of/or Additional Compensation Received on Resource Transfer at less than FMV

MS Manual 01/01/14

Resources that are either returned directly to the client or used for the client's care will reduce the penalty period. The eligibility worker must verify the value of resources that were either returned to the client or spent for the client's care, and make a determination as to the extent the returned resources should reduce the penalty period. This determination will include ensuring that the returned resources were returned from the individual to whom they were originally transferred.

If transferred resources are returned to the individual who transferred them, no penalty period will be imposed, i.e., the transfer will be considered as if it had never occurred. However, an individual who regains transferred resources may not be eligible for a period of time due to the value of the resources. If only a portion of the transferred resources are returned, a penalty period will be calculated based on the value of the resources not returned and will begin with the date of transfer of the first transferred resource not returned.

The receipt of additional compensation for a resource which was transferred at less than fair market value reduces the consideration of uncompensated value for that resource by the amount of additional compensation received. The additional compensation received plus remaining uncompensated value (if any) will be counted with the value of the other resources of the individual.

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-320 Income Transfers

H-320 Income Transfers

MS Manual 01/01/14

As the definition of assets includes income to which an individual is entitled but does not receive, a penalty for transfer must be considered when, for example, an individual takes action to:

1. Irrevocably waive pension income;
2. Waive an inheritance;
3. Divert income to another recipient; or
4. Give away income during the month of receipt by the IS/CS.

The penalty period due to the uncompensated value of an income transfer is determined according to [MS H-322](#). Amounts of uncompensated value and their periods of consideration may be affected by the receipt of compensation at a later time. Refer to [MS H-317](#) for treatment.

H-321 Failure to Apply for Benefits

MS Manual 07/13/15

Federal regulations require that, as a condition of eligibility, an individual must take all necessary steps to obtain any annuities, pensions, retirement, and disability benefits to which the individual is entitled. These benefits include, but are not limited to, veterans' compensation and pensions, social security benefits, railroad retirement benefits, and unemployment compensation. If an individual fails to access any benefits to which he is entitled, he will not be eligible for Medicaid.

If otherwise eligible, Medicaid coverage will begin/resume on the first day of the month that the individual takes the necessary steps to obtain the other benefits.

H-322 Determination of Uncompensated Value and Penalty Period When Income Has Been Diverted or Waived

MS Manual 01/01/19

When income has been given away, the penalty period during which vendor payment will not be paid will be determined according to the amount of income not received, based on the life expectancy of the individual who is being penalized. (Re. [Appendix L](#))

Medical Services Policy Manual, Section H

H-300 Transfer of Resources

H-323 Income Received and Transferred in the Same Month

There is no penalty when an eligible Institutionalized Spouse gives part or all of his income to a Community Spouse in accordance with the methodology at [MS H-200](#) and on the DHS-712.

H-323 Income Received and Transferred in the Same Month

MS Manual 08/10/15

If funds are received AND transferred in the same month, the funds are treated as income in the month received and also treated as a resource in that month when considering transfer of resources. The penalty period will begin on the first day of the month of the transfer or the date on which the individual is eligible for Medicaid, whichever is the later date.

H-324 When an Ineligible Spouse Gives Away Income

MS Manual 01/01/19

No penalty will be imposed on an Institutionalized Spouse (IS) if the individual's Community Spouse (CS) gives away income belonging to the CS or fails to access CS income, since the CS's income is not counted toward the IS's eligibility nor in the budget for vendor payment. However, if a CS takes such action, no payment will be made from the income of the eligible IS's income to compensate the CS for the income not received.

If the Ineligible Spouse of a Waiver applicant/recipient has given away income or refused to access income to which that spouse was entitled, no penalty will be imposed on the Waiver applicant/recipient, since the Ineligible Spouse's income has no effect on a Waiver applicant/recipient's eligibility.

However, if an ineligible CS later enters a facility or requests Waiver services, the CS will be penalized for the income he/she has given away.

H-325 Spousal Transfers in Excess of Community Spouse Minimum Resource Allowance (CSMRA)

MS Manual 01/01/14

If an IS transfers resources or income to the CS in amounts greater than the amounts allowed by the spousal rules (Re. [MS H-200](#)) no penalty period will be imposed on the IS. However, the assets will still be considered available in the eligibility determination of the IS.