



# PROPOSED RULE MAKING

**CR-102 (August 2017)**  
**(Implements RCW 34.05.320)**  
Do **NOT** use for expedited rule making

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FILED

DATE: December 05, 2017

TIME: 11:26 AM

WSR 17-24-082

**Agency:** Health Care Authority

- Original Notice**
- Supplemental Notice to WSR** \_\_\_\_\_
- Continuance of WSR** \_\_\_\_\_

- Preproposal Statement of Inquiry was filed as WSR 16-01-014 and WSR 17-05-062 ; or**
- Expedited Rule Making--Proposed notice was filed as WSR** \_\_\_\_\_ **; or**
- Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).**
- Proposal is exempt under RCW** \_\_\_\_\_.

**Title of rule and other identifying information:** (describe subject) Chapter 182-516 WAC, Trusts, annuities, and life estates – effects on medical program and WAC 182-513-1367 Hardship waivers

**Hearing location(s):**

<b>Date:</b>	<b>Time:</b>	<b>Location:</b> (be specific)	<b>Comment:</b>
January 9, 2018	10:00 AM	Health Care Authority Cherry Street Plaza Sue Crystal Conf Room 106A 626 8 <sup>th</sup> Ave, Olympia WA 98504	Metered public parking is available street side around building. A map is available at: <a href="http://www.hca.wa.gov/documents/directions_to_csp.pdf">www.hca.wa.gov/documents/directions_to_csp.pdf</a> or directions can be obtained by calling: (360) 725-1000

**Date of intended adoption:** Not sooner than January 10, 2018 (Note: This is **NOT** the **effective** date)

**Submit written comments to:**

Name: Wendy Barcus  
Address: PO Box 42716, Olympia WA 98504-2716  
Email: [arc@hca.wa.gov](mailto:arc@hca.wa.gov)  
Fax: (360) 586-9727  
Other:  
By (date) January 9, 2018

**Assistance for persons with disabilities:**

Contact Amber Lougheed  
Phone: (360) 725-1349  
Fax: (360) 586-9727  
TTY: (800) 848-5429 or 711  
Email: [amber.lougheed@hca.wa.gov](mailto:amber.lougheed@hca.wa.gov)  
Other:  
By (date) January 6, 2018

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:**

Chapter 182-516 WAC is being revised to align state policy with federal law. The agency added language from Section 1917 of the Social Security Act and other sources regarding life estates, promissory notes, loans, trusts, and annuities. The agency is also amending this chapter because Title V, Sec. 5007 the 21<sup>st</sup> Century Cures Act allows for a person to create his or her own D4A special needs trust. WAC 182-513-1367 Hardship waivers is being revised because it overlaps with Chapter 182-516 WAC as hardship waivers can be used for trusts, annuities, and life states.

**Reasons supporting proposal:** This rulemaking was done to streamline and clarify language; reconcile self-settled and third party trusts; provide more direction on third party trusts; better distinguish annuities as resources, income, and/or transfers; simplify language for readers who do not have inherent property law knowledge; and add information from the Social Security Administration's Program Operations Manual System.

**Statutory authority for adoption:** RCW 41.05.021, 41.05.160

**Statute being implemented:** RCW 41.05.021, 41.05.160

**Is rule necessary because of a:**

Federal Law?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

If yes, CITATION: **Sec. 1917 of the Social Security Act [42 U.S.C. 1396p] and Title V – Savings, Sec. 5007 Fairness in Medicaid supplemental needs trusts 21<sup>st</sup> Century Cures Act.**

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:** N/A

**Name of proponent:** (person or organization) Health Care Authority

<input type="checkbox"/> Private
<input type="checkbox"/> Public
<input checked="" type="checkbox"/> Governmental

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
Drafting:	Amy Emerson	PO Box 42716, Olympia WA 98504-2716	360-725-1348
Implementation:	Stephen Kozak	PO Box 45534, Olympia WA 98504-5534	360-725-1343
Enforcement:	Stephen Kozak	PO Box 4553, Olympia WA 98504-55344	360-725-1343

**Is a school district fiscal impact statement required under RCW 28A.305.135?**  Yes  No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under RCW 34.05.328?**

Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

No: Please explain: RCW 34.05.328 does not apply to Health Care Authority rules unless requested by the Joint Administrative Rules Review Committee or applied voluntarily.



**Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:**

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

- RCW 34.05.310 (4)(b) (Internal government operations)
- RCW 34.05.310 (4)(c) (Incorporation by reference)
- RCW 34.05.310 (4)(d) (Correct or clarify language)
- RCW 34.05.310 (4)(e) (Dictated by statute)
- RCW 34.05.310 (4)(f) (Set or adjust fees)
- RCW 34.05.310 (4)(g) ((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(4) .

Explanation of exemptions, if necessary: These revisions do not affect small businesses. There are no costs to businesses as a result of this rulemaking. The only potential cost impact would be to Medicaid clients who do not meet requirements for an undue hardship waiver, or clients who do not provide the information needed to obtain an undue hardship waiver. Most clients will not incur costs. The rule does not impose costs on businesses.


**COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES**

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency's analysis showing how costs were calculated.
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

- Name:
- Address:
- Phone:
- Fax:
- TTY:
- Email:
- Other:

<b>Date:</b> December 5, 2017	<b>Signature:</b> 
<b>Name:</b> Wendy Barcus	
<b>Title:</b> HCA Rules Coordinator	

**WAC 182-513-1367 Hardship waivers.** (1) ~~((People who are denied or terminated from))~~ This section defines undue hardship for long-term services and supports (LTSS) ((due to a transfer of asset penalty under WAC 182-513-1363, or having excess home equity under WAC 182-513-1350 may apply for an undue hardship waiver. The agency or its designee gives notice of the right to apply for an undue hardship waiver whenever there is a denial or termination based on an asset transfer or excess home equity. This section:

- ~~(a) Defines undue hardship;~~
- ~~(b) Specifies the approval criteria for an undue hardship request;~~
- ~~(c) Establishes the process the agency or its designee follows for determining undue hardship; and~~
- ~~(d) Establishes the appeal process for a client whose request for an undue hardship is denied)) and specifies the request, approval, denial, and other processes for hardship waivers.~~

(2) Undue hardship ~~((exists:~~

~~(a) When a person who transferred the assets or income, or on whose behalf the assets or income were transferred, either personally or through a spouse, guardian, or another person authorized to act on behalf of the person through a power of attorney document (attorney-in-fact), has exhausted all reasonable means including legal remedies to recover the assets or income or the value of the transferred assets or income that have caused a penalty period the person provides sufficient documentation to support the efforts to recover the assets or income; or~~

~~(b) The person is unable to access home equity in excess of the standard under WAC 182-513-1350; and~~

~~(c) When,))~~.

(a) Undue hardship exists when, without LTSS benefits, the ((per-  
son)) client is unable to obtain:

- ~~(i) Medical care to the extent that health or life is endangered;~~
- or
- ~~(ii) Food, clothing, shelter or other basic necessities of life.~~

~~((3) Undue hardship can be approved for an interim period while the client is pursuing recovery of the assets or income.~~

~~(4)) (b) Undue hardship does not exist when:~~

~~((a) When the transfer of asset penalty period or excess home equity provision)) (i) The denial or termination of LTSS inconveniences ((a person)) the client or restricts the ((person's)) client's lifestyle but does not seriously deprive the ((person as defined in subsection (2)(c)(i) and (ii) of this section;~~

~~(b) When the resource is transferred to a person who is handling the financial affairs of the person; or~~

~~(c) When the resource is transferred to another person by the individual that handles the financial affairs of the person.~~

~~(5) Undue hardship may exist under subsection (4)(b) and (c) of this section if the department has found evidence of financial exploitation.~~

~~(6) An undue)) client of the items described under (a) of this subsection;~~

(ii) The denial or termination of LTSS is because of a period of ineligibility under WAC 182-513-1363, and the asset was transferred by

a person or entity handling the financial affairs of the client denied or terminated from LTSS, unless the department has found evidence of financial exploitation; or

(iii) The client's situation meets undue hardship under (a) of this subsection because of restrictions placed in a trust by that client, either personally or through a spouse, guardian, court, or another person authorized to act on behalf of that client through a power of attorney document (attorney-in-fact).

(3) A hardship waiver may be requested when a client is denied or terminated from LTSS under the following scenarios:

(a) A period of ineligibility under WAC 182-513-1363 was established for a client, and that client, who transferred the assets, or on whose behalf the assets were transferred, either personally or through a spouse, guardian, or another person authorized to act on behalf of that client through a power of attorney document (attorney-in-fact), has exhausted all reasonable means including legal remedies to recover the assets or the value of the transferred assets that caused the period of ineligibility;

(b) A client was denied or terminated from LTSS due to exceeding the home equity standard under WAC 182-513-1350, and the client cannot legally access the excess equity; or

(c) The client was denied or terminated from LTSS due to the application of rules regarding trusts under chapter 182-516 WAC, except that if the application of rules regarding trusts under chapter 182-516 WAC results in a period of ineligibility under WAC 182-513-1363, then (a) of this subsection applies instead of (c) of this subsection.

(4) Process to request a hardship waiver.

(a) A hardship waiver may be requested by:

((a)) (i) The ((person)) client;

((b)) (ii) The ((person's)) client's spouse;

((c)) (iii) The ((person's)) client's authorized representative; or

((d)) (iv) With the consent of the ((person, the person's guardian, or)) client, a representative of the medical institution((, as defined in WAC 182-500-0050,)) in which ((an institutionalized person)) the client resides.

((7)) (b) The hardship waiver request must:

((a)) (i) Be in writing;

((b)) (ii) State the reason for requesting the hardship waiver;

((c)) (iii) Be signed by the requestor and include the requestor's name, address, and telephone number. If the request is being made on behalf of a ((person)) client, then ((the person's)) that client's name, address, and telephone number must be included;

((d)) (iv) Be made within thirty days of the date of denial or termination of LTSS; and

((e)) (v) Returned to the originating address on the ((denial/termination)) denial or termination letter.

((8)) (c) If additional information is needed to determine whether or not to approve a hardship waiver, then, within fifteen days of receipt of the request for the hardship waiver, the agency or ((its)) the agency's designee sends the client a written notice ((to the person)) requesting additional information ((within fifteen days of the request for an undue hardship waiver. The person may request additional time to provide the information.

((9)) under WAC 182-503-0050.

(5) Standards to approve a hardship waiver request.

(a) Period of ineligibility: If a client was denied or terminated from LTSS under WAC 182-513-1363 (the scenario described in subsection (3)(a) of this section) and undue hardship under subsection (2) of this section is found to exist, then the agency or the agency's designee approves a hardship waiver.

(b) Excess home equity: If a client was denied or terminated from LTSS under WAC 182-513-1350 (the scenario described in subsection (3)(b) of this section) and undue hardship under subsection (2) of this section is found to exist, then the agency or the agency's designee approves a hardship waiver.

(c) Trusts.

(i) The client's home is in a revocable trust: If a client was denied or terminated from LTSS under chapter 182-516 WAC (the scenario described in subsection (3)(c) of this section), then the agency or the agency's designee approves a hardship waiver for up to ninety days if the following conditions are met:

(A) The client is an institutionalized individual;

(B) The home would otherwise meet the exclusion criteria in WAC 182-512-0350 (1)(b), but it is in a revocable trust; and

(C) The client must submit in writing to the agency or the agency's designee that, in order to exclude the home under WAC 182-512-0350 (1)(b), the home will be retitled out of the revocable trust to the client, the client's spouse, or both, within ninety days.

(ii) All other denials or terminations of LTSS due to trusts: If a client was denied or terminated from LTSS under subsection (3)(c) of this section, and undue hardship under subsection (2) of this section is found to exist, then the agency or the agency's designee approves a hardship waiver.

(6) If the hardship is approved:

(a) The agency or the agency's designee sends a notice within fifteen days of receiving all information needed to ~~((determine a))~~ approve the hardship waiver. The hardship waiver approval notice specifies a time period for which the undue hardship waiver is approved.

(b) Any changes in a ~~((person's))~~ client's situation that led to the approval of a hardship wavier must be reported to the agency or ~~((its))~~ the agency's designee within thirty days of the change per WAC 182-504-0110.

~~((+10))~~ (c) If the hardship waiver is approved under subsection (5)(c)(i) of this section, the client must provide verification by the ninetieth day after the hardship waiver approval that the home has been retitled out of the revocable trust to the client, the client's spouse, or both.

(7) If the hardship waiver is denied:

(a) The agency or ~~((its))~~ the agency's designee sends a denial notice within fifteen days of receiving the ~~((requested))~~ hardship waiver request or the request for additional information. The ~~((let-ter))~~ notice will state the reason ~~((it))~~ why the hardship waiver was not approved.

(b) The denial notice has instructions on how to request an administrative hearing. The agency or ~~((its))~~ the agency's designee must receive an administrative hearing request within ninety days of the date of the adverse action ~~((or denial).~~

~~((11) If there is a conflict between this section and chapter 182-526 WAC, this section prevails)).~~

~~((12))~~ (8) The agency or ~~((its))~~ the agency's designee may revoke approval of an undue hardship waiver if any of the following occur:

(a) A ~~((person))~~ client, or the ~~((person's))~~ client's authorized representative, fails to provide timely information or resource verifications as it applies to the hardship waiver when requested by the agency or ~~((its))~~ the agency's designee per WAC 182-503-0050 and 182-504-0105;

(b) The lien or legal impediment that restricted access to home equity in excess of the home equity limit is removed; or

(c) Circumstances for which the undue hardship was approved have changed.

(9) If there is a conflict between this section and chapter 182-526 WAC, this section prevails.



Chapter 182-516 WAC  
TRUSTS, ANNUITIES, ((AND)) LIFE ESTATES, AND PROMISSORY NOTES—EFFECT  
ON MEDICAL PROGRAMS

AMENDATORY SECTION (Amending WSR 13-01-017, filed 12/7/12, effective 1/1/13)

**WAC 182-516-0001 Definitions.** "Acquire" means, in the context of trusts, to gain title to, or to gain ownership interest in an asset in a trust. Receiving payment or benefit from an asset in a trust is not acquiring the asset.

"Annuitant" means a person or entity that receives the ((income)) stream of payments from an annuity.

"Annuity" means a policy, certificate, or contract that is an agreement between two parties in which one party pays a lump sum to the other, and the other party agrees to guarantee payment of a set amount of money over a set amount of time. ((The annuity may be purchased at one time or over a set period of time and may be bought individually or with a group. It may be revocable or irrevocable. The party guaranteeing payment can be an:

(1) Individual; or

(2) Insurer or similar body licensed and approved to do business in the jurisdiction in which the annuity is established.

"Beneficiary" means an individual(s) designated in the trust who benefits from the trust. The beneficiary can also be called the grantee. The beneficiary and the grantor may be the same person.

"Designated for medical expenses" means the trustee may use the trust to pay the medical expenses of the beneficiary. The amount of the trust that is designated for medical expenses is considered an available resource to the beneficiary. Payments are a third party resource.

"Disbursement" or "distribution" means any payment from the principal or proceeds of a trust, annuity, or life estate to the beneficiary or to someone on their behalf.

"Discretion of the trustee" means the trustee may decide what portion (up to the entire amount) of the principal of the trust will be made available to the beneficiary.

"Exculpatory clause" means there is some language in the trust that legally limits the authority of the trustee to distribute funds from a trust if the distribution would jeopardize eligibility for government programs including medicaid.

"For the sole benefit of" means that for a transfer to a spouse, blind or disabled child, or disabled individual, the transfer is arranged in such a way that no individual or entity except the spouse, blind or disabled child, or disabled individual can benefit from the assets transferred in any way, whether at the time of the transfer or at any time during the life of the primary beneficiary.

"Grantor" means an individual who uses his assets or funds to create a trust. The grantor may also be the beneficiary.

"Income beneficiary" means the person receiving the payments may only get the proceeds of the trust. The principal is not available for

disbursements. If this term is used, the principal of the trust is an unavailable resource.

**"Irrevocable"** means the legal instrument cannot be changed or terminated in any way by anyone.

**"Life estate"** means an ownership interest in a property only during the lifetime of the person(s) owning the life estate. In some cases, the ownership interest lasts only until the occurrence of some specific event, such as remarriage of the life estate owner. A life estate owner may not have the legal title or deed to the property, but may have rights to possession, use, income and/or selling their life estate interest in the property.

**"Principal"** means the assets that make up the entity. The principal includes income earned on the principal that has not been distributed. The principal is also called the corpus.

**"Proceeds"** means the income earned on the principal. It is usually interest, dividends, or rent. When the proceeds are not distributed, they become part of the principal.

**"Pooled trust"** means a trust meeting all of the following conditions:

(1) It contains funds of more than one disabled individual, combined for investment and management purposes;

(2) It is for the sole benefit of disabled individuals (as determined by SSA criteria);

(3) It was created by the disabled individuals, their parents, grandparents, legal guardians, or by a court;

(4) It is managed by a nonprofit association with a separate account maintained for each beneficiary; and

(5) It contains a provision that upon the death of the individual, for any funds not retained by the trust, the state will receive all amounts remaining in the individual's separate account up to the total amount of medicaid paid on behalf of that individual.

**"Revocable"** means the legal instrument can be changed or terminated by the grantor, or by petitioning the court. A legal instrument that is called irrevocable, but that can be terminated if some action is taken, is revocable for the purposes of this section.

**"Sole-benefit trust"** means an irrevocable trust established for the sole benefit of a spouse, blind or disabled child, or disabled individual. In a sole benefit trust no one but the individual named in the trust receives benefit from the trust in any way either at the time the trust is established or at any time during the life of the primary beneficiary. A sole benefit trust may allow for reasonable costs to trustees for management of the trust and reasonable costs for investment of trust funds.

**"Special needs trust"** means an irrevocable trust meeting all of the following conditions:

(1) It is for the sole benefit of a disabled individual (as determined by SSA criteria) under sixty five years old;

(2) It was created by the individual's parent, grandparent, legal guardian, or by a court; and

(3) It contains a provision that upon the death of the individual, the state will receive the amounts remaining in the trust up to the total amount of medicaid paid on behalf of the individual.

**"Testamentary trust"** means a trust created by a will from the estate of a deceased person. The trust is paid out according to the will.

**"Trust"** means property (such as a home, cash, stocks, or other assets) is transferred to a trustee for the benefit of the grantor or

another party. The department includes in this definition any other legal instrument similar to a trust. For annuities, refer to WAC 388-561-0200.

**"Trustee"** means an individual, bank, insurance company or any other entity that manages and administers the trust for the beneficiary.

**"Undue hardship"** means the client would be unable to meet shelter, food, clothing, and health care needs if the department applied the transfer of assets penalty.))

**"Beneficiary"** means, in the context of a trust, a person or entity that is entitled to benefit from a trust.

**"Grantor"** means the person or entity who owned the asset immediately before establishing a trust with that asset.

**"Immediate"** means, in the context of annuities, an annuity that is fully funded at purchase with no accumulation or deferral to allow accumulation.

**"Income"** means, in the context of a trust, the undistributed proceeds that a trust principal generates over a period including, but not limited to, interest, dividends, rents and realized gains on the sale or exchange. Any income not disbursed in one period is principal the next period.

**"Irrevocable":**

(a) For a trust, "irrevocable" means the grantor or someone acting on behalf of the grantor cannot reacquire any portion of the assets in the trust for the benefit of the grantor or unilaterally change the terms of the trust; and the beneficiary or someone acting on behalf of the beneficiary cannot acquire any portion of the assets in the trust for the benefit of the beneficiary or unilaterally change the terms of the trust. A legal instrument that is called irrevocable, but permits acquisition or reacquisition of any portion of the assets if some action is taken by or on behalf of the grantor or the beneficiary, is revocable for the purposes of this chapter.

(b) A trust or annuity that is not irrevocable is revocable.

(c) A trust is still irrevocable if it meets the definition under (a) of this definition, but allows modifications to the trust to conform with changes in trust law, which occur after the establishment of the trust.

(d) For an annuity, "irrevocable" means the contract cannot be canceled and the terms of the contract cannot be changed.

**"Principal"** means the assets, other than income, that make up the trust, promissory note, or loan.

**"Revocable"** means the instrument is not irrevocable. See the definition of "irrevocable."

**"Self-settled trust"** means any trust established with assets that were originally owned by the beneficiary, or would have been owned by the beneficiary if they had not been diverted into the trust by the beneficiary, the court, or someone acting on the beneficiary's behalf. Depending on the date a trust is established, a trust may be self-settled if the assets were originally owned by the beneficiary's spouse, or would have been owned by the beneficiary's spouse if they had not been diverted into the trust by the beneficiary's spouse, the court, or someone acting on the beneficiary's spouse's behalf.

**"Sole benefit"** of a beneficiary means a trust benefits no one but that beneficiary, whether at the time the trust is established or at any time during the lifetime of the beneficiary.

**"Third-party trust"** means a trust established with assets originally owned by someone other than the beneficiary. However, depending

on the date a trust is established, a trust may be self-settled if the assets were originally owned by the beneficiary's spouse, or would have been owned by the beneficiary's spouse if they had not been diverted into the trust by the beneficiary's spouse, the court, or someone acting on the beneficiary's spouse's behalf.

"To or for the benefit of" means that a payment or benefit of any sort from a trust is transferred to the beneficiary, another person, or entity such that the beneficiary derives some benefit from the transfer.

"Trust" means:

(a) Any arrangement in which a grantor transfers property to a trustee with the intention that it be held, managed, or administered by the trustee for the benefit of the grantor or another beneficiary; or

(b) Any legal instrument, device, or arrangement similar to a trust in which:

(i) A grantor transfers an asset to another; and

(ii) The grantor transfers the asset intending that it be held, managed, or administered for the benefit of the grantor or another beneficiary.

"Trustee" means a person or entity that manages and administers a trust for the beneficiary.

"Uncompensated asset transfer" means the entirety of the fair market value of the asset transferred was uncompensated, regardless of any consideration received in return for the asset.

AMENDATORY SECTION (Amending WSR 13-01-017, filed 12/7/12, effective 1/1/13)

**WAC 182-516-0100 Trust((s)) index.** ~~((1) The department determines how trusts affect eligibility for medical programs.~~

~~(2) The department disregards trusts established, on or before April 6, 1986, for the sole benefit of a client who lives in an intermediate care facility for the mentally retarded (ICMR).~~

~~(3) For trusts established on or before August 10, 1993 the department counts the following:~~

~~(a) If the trust was established by the client, client's spouse, or the legal guardian, the maximum amount of money (payments) allowed to be distributed under the terms of the trust is considered available income to the client if all of the following conditions apply:~~

~~(i) The client could be the beneficiary of all or part of the payments from the trust;~~

~~(ii) The distribution of payments is determined by one or more of the trustees; and~~

~~(iii) The trustees are allowed discretion in distributing payments to the client.~~

~~(b) If an irrevocable trust doesn't meet the conditions under subsection (3)(a) then it is considered either:~~

~~(i) An **unavailable** resource, if the client established the trust for a beneficiary other than the client or the client's spouse; or~~

~~(ii) An **available** resource in the amount of the trust's assets that:~~

~~(A) The client could access; or~~

~~(B) The trustee distributes as actual payments to the client and the department applies the transfer of assets rules of WAC 388-513-1363, 388-513-1364 or 388-513-1365.~~

~~(c) If a revocable trust doesn't meet the description under subsection (3)(a):~~

~~(i) The full amount of the trust is an available resource of the client if the trust was established by:~~

~~(A) The client;~~

~~(B) The client's spouse, and the client lived with the spouse; or~~

~~(C) A person other than the client or the client's spouse only to the extent the client had access to the assets of the trust.~~

~~(ii) Only the amount of money actually paid to the client from the trust is an available resource when the trust was established by:~~

~~(A) The client's spouse, and the client did not live with the spouse; or~~

~~(B) A person other than the client or the client's spouse; and~~

~~(C) Payments were distributed by a trustee of the trust.~~

~~(iii) The department considers the funds a resource, not income.~~

~~(4) For trusts established on or after August 11, 1993:~~

~~(a) The department considers a trust as if it were established by the client when:~~

~~(i) The assets of the trust, as defined under WAC 388-470-0005, are at least partially from the client;~~

~~(ii) The trust is not established by will; and~~

~~(iii) The trust was established by:~~

~~(A) The client or the client's spouse;~~

~~(B) A person, including a court or administrative body, with legal authority to act in place of, or on behalf of, the client or the client's spouse; or~~

~~(C) A person, including a court or administrative body, acting at the direction of or upon the request of the client or the client's spouse.~~

~~(b) Only the assets contributed to the trust by the client are available to the client when part of the trust assets were contributed by any other person.~~

~~(c) The department does not consider:~~

~~(i) The purpose for establishing a trust;~~

~~(ii) Whether the trustees have, or exercise, any discretion under the terms of the trust;~~

~~(iii) Restrictions on when or whether distributions may be made from the trust; or~~

~~(iv) Restrictions on the use of distributions from the trust.~~

~~(d) For a revocable trust established as described under subsection (4)(a) of this section:~~

~~(i) The full amount of the trust is an available resource of the client;~~

~~(ii) Payments from the trust to or for the benefit of the client are income of the client; and~~

~~(iii) Any payments from the trust, other than payments described under subsection (4)(d)(ii), are considered a transfer of client assets.~~

~~(e) For an irrevocable trust established as described under subsection (4)(a) of this section:~~

~~(i) Any part of the trust from which payment can be made to or for the benefit of the client is an available resource. When payment is made from such irrevocable trusts, we will consider the payments as:~~

~~(A) Income to the client when payment is to or for the client's benefit; or~~

~~(B) The transfer of an asset when payment is made to any person for any purpose other than the client's benefit;~~

~~(ii) A trust from which a payment cannot be made to or for the client's benefit is a transfer of assets. For such a trust, the transfer of assets is effective the date:~~

~~(A) The trust is established; or~~

~~(B) The client is prevented from receiving benefit, if this is after the trust is established.~~

~~(iii) The value of the trust includes any payments made from the trust after the effective date of the transfer.~~

~~(5) For trusts established on or after August 1, 2003:~~

~~(a) The department considers a trust as if it were established by the client when:~~

~~(i) The assets of the trust, as defined under WAC 388-470-0005, are at least partially from the client or the client's spouse;~~

~~(ii) The trust is not established by will; and~~

~~(iii) The trust was established by:~~

~~(A) The client or the client's spouse;~~

~~(B) A person, including a court or administrative body, with legal authority to act in place of, or on behalf of, the client or the client's spouse; or~~

~~(C) A person, including a court or administrative body, acting at the direction of or upon the request of the client or the client's spouse.~~

~~(b) Only the assets contributed other than by will to the trust by either the client or the client's spouse are available to the client or the client's spouse when part of the trust assets were contributed by persons other than the client or the client's spouse.~~

~~(c) The department does not consider:~~

~~(i) The purpose for establishing a trust;~~

~~(ii) Whether the trustees have, or exercise, any discretion under the terms of the trust;~~

~~(iii) Restrictions on when or whether distributions may be made from the trust; or~~

~~(iv) Restrictions on the use of the distributions from the trust.~~

~~(d) For a revocable trust established as described under subsection (5)(a) of this section:~~

~~(i) The full amount of the trust is an available resource of the client;~~

~~(ii) Payments from the trust to or for the benefit of the client are income of the client; and~~

~~(iii) Any payments from the trust, other than payments described under subsection (5)(d)(ii), are considered a transfer of client assets.~~

~~(e) For an irrevocable trust established as described under subsection (5)(a) of this section:~~

~~(i) Any part of the trust from which payment can be made to or for the benefit of the client or the client's spouse is an available resource. When payment is made from such irrevocable trusts, the department will consider the payment as:~~

~~(A) Income to the client or the client's spouse when payment is to or for the benefit of either the client or the client's spouse; or~~

~~(B) The transfer of an asset when payment is made to any person for any purpose other than the benefit of the client or the client's spouse;~~

~~(ii) A trust from which a payment cannot be made to or for the benefit of the client or client's spouse is a transfer of assets. For such a trust, the transfer of assets is effective the date:~~

~~(A) The trust is established; or~~

~~(B) The client or client's spouse is prevented from receiving benefit, if this is after the trust is established.~~

~~(iii) The value of the trust includes any payments made from the trust after the effective date of the transfer.~~

~~(6) Trusts established on or after August 11, 1993 are not considered available resources if they contain the assets of either:~~

~~(a) A person sixty four years of age or younger who is disabled as defined by SSI criteria (as described in WAC 388 475 0050) and the trust:~~

~~(i) Is established for the sole benefit of this person by their parent, grandparent, legal guardian, or a court; and~~

~~(ii) Stipulates that the state will receive all amounts remaining in the trust upon the death of the client, up to the amount of medic-aid spent on the client's behalf; or~~

~~(b) A person regardless of age, who is disabled as defined by SSI criteria (as described in WAC 388 475 0050), and the trust meets the following criteria:~~

~~(i) It is irrevocable;~~

~~(ii) It is established and managed by a nonprofit association;~~

~~(iii) A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;~~

~~(iv) Accounts in the trust are established solely for the benefit of the disabled individual as defined by the SSI program;~~

~~(v) Accounts in the trust are established by:~~

~~(A) The individual;~~

~~(B) The individual's spouse, where the spouse is acting in the place of or on behalf of the individual;~~

~~(C) The individual's parent, grandparent, legal guardian;~~

~~(D) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or~~

~~(E) A person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.~~

~~(vi) It stipulates that either:~~

~~(A) The state will receive all amounts remaining in the client's separate account upon the death of the client, up to the amount of medicaid spent on the client's behalf; or~~

~~(B) The funds will remain in the trust to benefit other disabled beneficiaries of the trust.~~

~~(7) Trusts established on or after August 1, 2003 are not considered available resources if they contain the assets of either:~~

~~(a) A person sixty four years of age or younger who is disabled as defined by SSI criteria (as described in WAC 388 475 0050) and the trust:~~

~~(i) Is irrevocable;~~

~~(ii) Is established for the sole benefit of this person by their parent, grandparent, legal guardian, or a court; and~~

~~(iii) Stipulates that the state will receive all amounts remaining in the trust upon the death of the client, the end of the disability, or the termination of the trust, whichever comes first, up to the amount of medicaid spent on the client's behalf; or~~

~~(b) A person regardless of age, who is disabled as defined by SSI criteria (as described in WAC 388-475-0050), and the trust meets the following criteria:~~

~~(i) It is irrevocable;~~

~~(ii) It is established and managed by a nonprofit association;~~

~~(iii) A separate account is maintained for each beneficiary of the trust but for purposes of investment and management of funds the trust pools the funds in these accounts;~~

~~(iv) Accounts in the trust are established solely for the benefit of the disabled individual as defined by the SSI program;~~

~~(v) Accounts in the trust are established by:~~

~~(A) The individual;~~

~~(B) The individual's spouse, where the spouse is acting in the place of or on behalf of the individual;~~

~~(C) The individual's parent, grandparent, legal guardian;~~

~~(D) A person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or~~

~~(E) A person, including a court or administrative body, acting at the direction or upon the request of the individual or the individual's spouse.~~

~~(vi) It stipulates that either:~~

~~(A) The state will receive all amounts remaining in the client's separate account upon the death of the client, the end of the disability, or the termination of the trust, whichever comes first, up to the amount of medicaid spent on the client's behalf; or~~

~~(B) The funds will remain in the trust to benefit other disabled beneficiaries of the trust.~~

~~(8) Trusts described in subsection (6)(a) and (7)(a) continue to be considered an unavailable resource even after the individual becomes age sixty five. However, additional transfers made to the trust after the individual reaches age sixty five would be considered an available resource and would be subject to a transfer penalty.~~

~~(9) The department does not apply a penalty period to transfers into a trust described in subsections (6)(b) and (7)(b) if the trust is established for the benefit of a disabled individual under age sixty five as described in WAC 388-513-1363 and 388-513-1364 and the transfer is made to the trust before the individual reaches age sixty five.~~

~~(10) The department considers any payment from a trust to the client to be unearned income. Except for trusts described in subsection (6), the department considers any payment to or for the benefit of either the client or client's spouse as described in subsections (4)(e) and (5)(e) to be unearned income.~~

~~(11) The department will only count income received by the client from trusts and not the principal, if:~~

~~(a) The beneficiary has no control over the trust; and~~

~~(b) It was established with funds of someone other than the client, spouse or legally responsible person.~~

~~(12) This section does not apply when a client establishes that undue hardship exists.~~

~~(13) WAC 388-513-1363, 388-513-1364, 388-513-1365, and 388-513-1366 apply under this section when the department determines that a trust or a portion of a trust is a transfer of assets.) The medicaid agency or its designee applies the following rules to determine how trusts affect eligibility for medicaid:~~

~~(1) WAC 182-516-0105 General rules that apply to all trusts.~~



(2) WAC 182-516-0110 Self-settled trusts overview.

(3) WAC 182-516-0115 Revocable self-settled trusts established on or after August 11, 1993.

(4) WAC 182-516-0120 Irrevocable self-settled trusts for a disabled client under age sixty-five established on or after August 11, 1993.

(5) WAC 182-516-0125 Irrevocable pooled self-settled trusts for a disabled client established on or after August 11, 1993.

(6) WAC 182-516-0130 Irrevocable self-settled trusts established on or after August 11, 1993.

(7) WAC 182-516-0135 Self-settled trusts established before August 11, 1993.

(8) WAC 182-516-0140 Third-party trusts.

(9) WAC 182-516-0145 Trusts containing both assets of the beneficiary and third-party assets.

#### NEW SECTION

**WAC 182-516-0105 General rules that apply to all trusts.** (1) Regardless of treatment under this chapter, all trusts remain subject to Title 182 WAC, which include income and resource rules under chapter 182-512 WAC and asset transfer rules under WAC 182-513-1363, unless specified otherwise.

(2) The medicaid agency or its designee treats the trust or a distribution from the trust as a third-party resource under WAC 182-501-0200 if:

(a) The agency or its designee determines the trust is not an available resource or determines the distributions from a trust are not income; and

(b) The terms of the trust or how the trust is being administered meet the third-party resource rules under WAC 182-501-0200.

(3) The agency or its designee applies the rules under WAC 182-516-0100 to both the language of the trust and how the trust is being administered.

(4) Assets in a trust are available resources to the beneficiary if the beneficiary:

(a) Is a trustee; or

(b) Can direct the use of the trust principal or income, or direct the trustee's use of trust principal or income, for that beneficiary's support and maintenance under the terms of the trust.

(5) Cash distributions from a trust to the beneficiary are unearned income to the beneficiary in the month they are received or should have been received under the trust's terms.

(6) For asset transfer dates for trusts, the transfer date of an asset under WAC 182-513-1363 is the latest of:

(a) The date the trust was established;

(b) The date the asset being evaluated was transferred into the trust; or

(c) The date access to the asset was foreclosed by any action, inaction, or language in the trust, which prevents the beneficiary from accessing the asset.

(7) A client who is denied or terminated from medicaid due to the application of any rules under WAC 182-516-0100 may apply for a hardship waiver under WAC 182-513-1367.

NEW SECTION

**WAC 182-516-0110 Self-settled trusts overview.** (1) A trust containing the assets of a beneficiary's spouse may be a self-settled trust based on the date it was established. For specific rules regarding this, see WAC 182-516-0130.

(2) To determine whether the assets of the self-settled trust should be counted as income, a resource, or an asset transfer, the medicaid agency or its designee applies the following rules based on when the trust was established:

(a) For revocable self-settled trusts, see WAC 182-516-0115.

(b) For irrevocable self-settled trusts for a disabled client under age sixty-five established on or after August 11, 1993, see WAC 182-516-0120.

(c) For irrevocable pooled self-settled trusts for a disabled client established on or after August 11, 1993, see WAC 182-516-0125.

(d) For all other irrevocable self-settled trusts:

(i) Established on or after August 11, 1993, see WAC 182-516-0130.

(ii) Established before August 11, 1993, see WAC 182-516-0135.

NEW SECTION

**WAC 182-516-0115 Revocable self-settled trusts established on or after August 11, 1993.** (1) This section applies to revocable trusts that are self-settled and established on or after August 11, 1993.

(2) This section does not apply to assets in a revocable trust established before August 11, 1993.

(3) A revocable trust is a self-settled trust if:

(a) The assets of the trust are at least partially from the beneficiary or the beneficiary's spouse;

(b) The trust is not established by will; and

(c) The trust was established by:

(i) The beneficiary or that beneficiary's spouse;

(ii) A person, including a court or administrative body, with legal authority to act in place or on behalf of the beneficiary or that beneficiary's spouse; or

(iii) A person, including a court or administrative body, acting at the direction or upon the request of the beneficiary or that beneficiary's spouse.

(4) The medicaid agency or its designee treats assets in a revocable self-settled trust under this section as follows:

(a) Assets are subject to the resource exclusions under chapter 182-512 WAC; however, for an institutionalized individual, the resource exclusion for the home under WAC 182-512-0350 does not apply; and

(b) Assets not excluded under chapter 182-512 WAC are available resources.

(5) Payments from assets in the trust under this section to or for the benefit of the beneficiary are unearned income of the beneficiary.

(6) If unearned income under subsection (5) of this section was from an available resource under subsection (4) of this section, then

the value of the available resource will be reduced by the amount of unearned income under subsection (5) of this section.

(7) Any payments from the revocable trust, other than payments under subsections (5) and (6) of this section, are uncompensated asset transfers.

#### NEW SECTION

#### **WAC 182-516-0120 Irrevocable self-settled trusts for a disabled client under age sixty-five established on or after August 11, 1993.**

(1) This section governs how the agency or its designee treats self-settled trusts, for a disabled client under age sixty-five established under 42 U.S.C. 1396p(d)(4)(a) on or after August 11, 1993, for medic-aid eligibility purposes.

(2) A self-settled trust established on or after August 11, 1993, is not an available resource if:

(a) The beneficiary is under age sixty-five and disabled under WAC 182-512-0050 (1)(c) when the trust is established;

(b) The trust is irrevocable;

(c) The trust was established for the sole benefit of that beneficiary;

(d) The trust was established by the beneficiary's parent, the beneficiary's grandparent, the beneficiary's legal guardian, by a court, or on or after December 13, 2016, the beneficiary; and

(e) The trust says that the states that have spent medicaid funds for the beneficiary will receive all amounts remaining in the trust up to the amount of medicaid funds spent for the beneficiary.

(i) For trusts established from August 11, 1993, to July 31, 2003, the trust must pay the states when the beneficiary dies.

(ii) For trusts established on or after August 1, 2003, the trust must pay the states when the beneficiary dies, the trust terminates, or the beneficiary's disability ends.

(3) The medicaid agency or its designee does not apply a penalty period to a beneficiary for asset transfers into a trust, described under subsection (2) of this section, when the beneficiary is under age sixty-five as of the date of the transfer.

(4) Assets in trusts under subsection (2) of this section continue to be unavailable resources, even after the beneficiary turns age sixty-five.

(5) Asset transfers to the trust from the beneficiary, after the beneficiary turns age sixty-five, may be subject to a transfer penalty under WAC 182-513-1363.

(6) If a trust does not meet the requirements under subsection (2) of this section, see WAC 182-516-0130.

#### NEW SECTION

#### **WAC 182-516-0125 Irrevocable pooled self-settled trusts for a disabled client established on or after August 11, 1993.**

(1) This section governs how the agency or its designee treats pooled self-settled trusts, for a disabled client established under 42 U.S.C.

1396p(d)(4)(c) on or after August 11, 1993, for medicaid eligibility purposes.

(2) A pooled self-settled trust established on or after August 11, 1993, is not an available resource if:

(a) The beneficiary is disabled under WAC 182-512-0050 (1)(c) when the trust is established;

(b) The trust is irrevocable;

(c) An account in the trust was established for the sole benefit of that beneficiary;

(d) An account in the trust was established by that beneficiary, the beneficiary's parent, grandparent, legal guardian, or by a court;

(e) The trust was established by and is managed by a nonprofit association;

(f) A separate account is maintained for each beneficiary of the trust, but, for the purposes of the investment and management of funds, the trust pools these accounts; and

(g) The trust says that:

(i) Upon the death of the beneficiary, or, for trust accounts established on or after August 1, 2003, when the trust account terminates or the beneficiary's disability ends, the funds will remain in the trust to benefit other disabled beneficiaries; or

(ii) The states that have spent medicaid funds for the beneficiary will receive all amounts remaining in the trust account for that beneficiary up to the amount of medicaid funds spent for the beneficiary.

(A) For trust accounts established from August 11, 1993, to July 31, 2003, the trust must pay the states when the beneficiary dies.

(B) For trust accounts established on or after August 1, 2003, the trust must pay the states when the beneficiary dies, the trust terminates, or the beneficiary's disability ends.

(3) The medicaid agency or its designee does not apply a penalty period to a beneficiary for asset transfers into a trust, described under subsection (2) of this section, when the beneficiary is under age sixty-five as of the date of the transfer.

(4) Assets in trusts under subsection (2) of this section continue to be unavailable resources, even after the beneficiary turns age sixty-five.

(5) Asset transfers to the trust from the beneficiary, after the beneficiary turns age sixty-five, may be subject to a transfer penalty under WAC 182-513-1363.

(6) If a trust does not meet the requirements under subsection (2) of this section, see WAC 182-516-0130.

#### NEW SECTION

**WAC 182-516-0130 Irrevocable self-settled trusts established on or after August 11, 1993.** (1) This section governs irrevocable self-settled trusts established on or after August 11, 1993, that do not meet the rules under either WAC 182-516-0120 or 182-516-0125.

(2) A trust established on or after August 1, 2003, is a self-settled trust if:

(a) The assets of the trust are at least partially from the beneficiary or the beneficiary's spouse, or would have been owned by the beneficiary or the beneficiary's spouse unless diverted by the benefi-

ciary, the beneficiary's spouse, the court, or someone acting on behalf of the beneficiary or the beneficiary's spouse;

- (b) The trust is not established by will; and
- (c) The trust was established by:
  - (i) The beneficiary or that beneficiary's spouse;
  - (ii) A person, including a court or administrative body, with legal authority to act in place or on behalf of the beneficiary or that beneficiary's spouse; or
  - (iii) A person, including a court or administrative body, acting at the direction or upon the request of the beneficiary or that beneficiary's spouse.

(3) A trust established from August 11, 1993, to July 31, 2003, is a self-settled trust if:

- (a) The assets of the trust are at least partially from the beneficiary, or would have been owned by the beneficiary unless diverted by the beneficiary, the court, or someone acting on behalf of the beneficiary;
- (b) The trust is not established by will; and
- (c) The trust was established by:
  - (i) The beneficiary;
  - (ii) A person, including a court or administrative body, with legal authority to act in place or on behalf of the beneficiary; or
  - (iii) A person, including a court or administrative body, acting at the direction or upon the request of the beneficiary.

(4) This section applies only to the assets contributed to a trust:

- (a) Under subsection (2) of this section, by either the beneficiary or that beneficiary's spouse; or
- (b) Under subsection (3) of this section, by the beneficiary.

(5) The medicaid agency or its designee applies the rules of this section without regard to:

- (a) The purpose for establishing a trust;
- (b) Whether the trustees have or may exercise any discretion under the terms of the trust;
- (c) Restrictions on when or whether distributions may be made from the trust; and
- (d) Restrictions on the use of distributions from the trust.

(6) Treatment of payments or benefits from trusts established under this section.

- (a) Subject to subsection (7) of this section, if there are any circumstances under which payment or benefit from the trust could be made to or for the benefit of the beneficiary, the portion of the principal from which, or the income on the principal from which, payment to the beneficiary could be made is an available resource to the beneficiary, and the payment or benefit from that portion:
  - (i) Is unearned income when payment or benefit is to or for the benefit of the beneficiary; and
  - (ii) Is an uncompensated asset transfer, if payment or benefit is for any other purpose.
- (b) If there are no circumstances under which any payment or any benefit from the trust could be made to or for the benefit of the beneficiary, the part of the trust or income of that trust, from which payment or benefit cannot be made, is an uncompensated asset transfer.

(7) For the purposes of subsection (6)(a) of this section, "available resource" means a resource after the resource exclusions under chapter 182-512 WAC are applied; however, for an institutional-

ized individual, the resource exclusion for the home under WAC 182-512-0350 does not apply.

(8) If unearned income under subsection (6)(a)(i) of this section was from an available resource under subsection (6)(a) of this section, then the value of the available resource will be reduced by the amount of unearned income under subsection (6)(a)(i) of this section.

#### NEW SECTION

**WAC 182-516-0135 Self-settled trusts established before August 11, 1993.** (1) A revocable or irrevocable self-settled trust established before August 11, 1993, under this section is one:

(a) Established other than by will by a beneficiary or that beneficiary's spouse;

(b) Under which that beneficiary may be the beneficiary of all or part of the payments from the trust; and

(c) Under which the distribution of those payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the beneficiary.

(2) For trusts established under subsection (1) of this section, the maximum value the trustee may distribute, under any circumstances, to the beneficiary is unearned income.

(3) If a trust does not meet subsection (1)(c) of this section:

(a) The trust is an available resource to the extent that trust assets can be used for the beneficiary; and

(b) Any asset that cannot be used for the beneficiary is an uncompensated asset transfer.

(4) This section does not apply to any trust or initial trust decree established before April 7, 1986, for the sole benefit of an intellectually disabled client who resides in an intermediate care facility for the intellectually disabled.

#### NEW SECTION

**WAC 182-516-0140 Third-party trusts.** (1) This section governs third-party trust as defined under WAC 182-516-0001.

(2) A trust containing the assets of a beneficiary's spouse may be a self-settled trust based on the date it was established. For specific rules regarding this, see WAC 182-516-0130.

(3) A testamentary trust is a third-party trust created by a will where the trust is in the will and the estate is the grantor.

(4) There is no requirement for a state to be named as a remainder beneficiary in third-party trusts.

(5) If the beneficiary has the power to acquire the assets from the third-party trust, the trust is an available resource.

(6) If the beneficiary has no power to access or control trust assets or distributions, as described under WAC 182-516-0105(4), a third-party trust is not an available resource.

NEW SECTION

**WAC 182-516-0145 Irrevocable trusts containing both assets of the beneficiary and third-party assets.** (1) For irrevocable trusts that contain both assets of the beneficiary and third-party assets, the medicaid agency or its designee treats the assets of the beneficiary under the self-settled trust rule in effect as of the date of the trust's establishment:

(a) After August 11, 1993:

(i) For irrevocable self-settled trusts for a disabled client under age sixty-five, see WAC 182-516-0120;

(ii) For irrevocable pooled self-settled trusts for a disabled client, see WAC 182-516-0130; and

(iii) For all other trusts, see WAC 182-516-0130.

(b) Before August 11, 1993, see WAC 182-516-0135.

(2) For irrevocable trusts that contain both assets of the beneficiary and third-party assets, the agency or its designee treats third-party assets under the third-party trust rules under WAC 182-516-0140.

AMENDATORY SECTION (Amending WSR 13-01-017, filed 12/7/12, effective 1/1/13)

**WAC 182-516-0200 Annuities established prior to April 1, 2009.**

(1) ~~((The department determines how annuities affect eligibility for medical programs.~~

~~(2))~~ A revocable annuity is ~~((considered))~~ an available resource.

~~((3))~~ (2) An irrevocable annuity established prior to May 1, 2001, is not an available resource when issued by an individual, insurer, or other body licensed and approved to do business in the jurisdiction in which the annuity is established.

~~((4))~~ (3) The income from an irrevocable annuity ~~((meeting))~~ that meets the requirements of this section ~~((, is considered in))~~ is income for determining eligibility and the amount of participation in the total cost of care. The annuity itself is not ~~((considered))~~ a resource ~~((or income))~~.

~~((5))~~ (4) Subject to subsection (5) of this section, an annuity established on or after May 1, 2001, and before April 1, 2009 ~~((will be considered))~~, is an available resource unless it:

(a) Is irrevocable;

(b) Is paid out in equal monthly amounts within the actuarial life expectancy of the annuitant;

(c) Is issued by an individual, insurer, or other body licensed and approved to do business in the jurisdiction in which the annuity is established; and

(d) Names the ~~((department))~~ state of Washington as the beneficiary of the remaining funds up to the total of medicaid funds spent on the client during the client's lifetime. This subsection only applies if the annuity is in the client's name.

~~((6))~~ (5) If an irrevocable annuity ~~((established on or after May 1, 2001 and before April 1, 2009 that is not scheduled to be paid out in equal monthly amounts, can still be considered))~~ is an availa-

ble resource under subsection (4) of this section because it does not pay out in equal monthly amounts, it is an unavailable resource if:

(a) The full pay out is within the actuarial life expectancy of the client; and

(b) The client:

(i) Changes the scheduled pay out into equal monthly payments within the actuarial life expectancy of the annuitant; or

(ii) Requests that the ((department)) medicaid agency or its designee calculate and budget the payments as equal monthly payments within the actuarial life expectancy of the annuitant. The income from the annuity remains unearned income to the annuitant.

~~((7))~~ (6) An irrevocable annuity(~~(, established prior to May 1, 2001 that is scheduled to pay out beyond the actuarial life expectancy of the annuitant, will be considered a resource transferred without adequate consideration at the time it was purchased. A penalty period of ineligibility, determined according to WAC 388-513-1365, may be imposed equal to the amount of the annuity to be paid out in excess of the annuitant's actuarial life expectancy.~~

~~(8) An irrevocable annuity, established on or after May 1, 2001 and before April 1, 2009 that is scheduled to pay out beyond the actuarial life expectancy of the annuitant, will be considered a resource transferred without adequate consideration at the time it was purchased. A penalty may be imposed equal to the amount of the annuity to be paid out in excess of the annuitant's actuarial life expectancy. The penalty for a client receiving:~~

~~(a) Long term care benefits will be a period of ineligibility (see WAC 388-513-1365).~~

~~(b) Other medical benefits will be ineligible in the month of application.~~

~~(9) An irrevocable annuity is considered unearned income when the annuitant is:~~

~~(a) The client;~~

~~(b) The spouse of the client;~~

~~(c) The blind or disabled child, as defined in WAC 388-475-0050 (b) and (c), of the client;~~

~~(d) A person designated to use the annuity for the sole benefit of the client, client's spouse, or a blind or disabled child, as defined in WAC 388-475-0050 (b) and (c), of the client.~~

~~(10)) is unearned income when the annuitant is:~~

~~(a) The client;~~

~~(b) The spouse of the client;~~

~~(c) The blind or disabled child, as defined in WAC 182-512-0050 (1)(b) and (c), of the client; or~~

~~(d) A person designated to use the annuity for the sole benefit of the client, client's spouse, or a blind or disabled child, as defined in WAC 182-512-0050 (1)(b) and (c), of the client.~~

(7) An annuity is not ~~((considered))~~ an available resource when there is a joint owner, co-annuitant or an irrevocable beneficiary who will not agree to allow the annuity to be cashed, unless the joint owner or irrevocable beneficiary is the community spouse. In the case of a community spouse, the ~~((cash surrender))~~ value of the annuity is ~~((considered))~~ an available resource and counts toward the maximum community spouse resource allowance.



**WAC 182-516-0201 Annuities established on or after April 1, 2009.** ~~((1) The department determines how annuities affect eligibility for medical programs. Applicants and recipients of medicaid must disclose to the state any interest the applicant or spouse has in an annuity.~~

~~(2) A revocable annuity is considered an available resource.~~

~~(3) The following annuities are not considered an available resource or a transfer of a resource as described in WAC 388-513-1363, if the annuity meets the requirements described in (4)(d), (e) and (f) of this subsection:~~

~~(a) An annuity described in subsection (b) or (g) of section 408 of the Internal Revenue Code of 1986;~~

~~(b) Purchased with proceeds from an account or trust described in subsection (a), (c), or (p) of section 408 of the Internal Revenue Code of 1986;~~

~~(c) Purchased with proceeds from a simplified employee pension (within the meaning of section 408 of the Internal Revenue Code of 1986); or~~

~~(d) Purchased with proceeds from a Roth IRA described in section 408A of the Internal Revenue Code of 1986.~~

~~(4) The purchase of an annuity not described in subsection (3) established on or after April 1, 2009, will be considered as an available resource unless it:~~

~~(a) Is immediate, irrevocable, nonassignable; and~~

~~(b) Is paid out in equal monthly amounts with no deferral and no balloon payments;~~

~~(i) Over a term equal to the actuarial life expectancy of the annuitant; or~~

~~(ii) Over a term that is not less than five years if the actuarial life expectancy of the annuitant is at least five years; or~~

~~(iii) Over a term not less than the actuarial life expectancy of the annuitant, if the actuarial life expectancy of the annuitant is less than five years.~~

~~(iv) Actuarial life expectancy shall be determined by tables that are published by the office of the chief actuary of the social security administration (<http://www.ssa.gov/OACT/STATS/table4c6.html>).~~

~~(c) Is issued by an individual, insurer or other body licensed and approved to do business in the jurisdiction in which the annuity is established;~~

~~(d) Names the state as the remainder beneficiary when the purchaser of the annuity is the annuitant and is an applicant for or recipient of medicaid, or a community spouse of an applicant for or recipient of long term care or waiver services:~~

~~(i) In the first position for the total amount of medical assistance paid for the individual, including both long term care services and waiver services; or~~

~~(ii) In the second position for the total amount of medical assistance paid for the individual, including both long term care services and waiver services, if there is a community spouse, or a minor or disabled child as defined in WAC 388-475-0050 (b) and (c) who is named as the beneficiary in the first position.~~

~~(e) Names the state as the beneficiary upon the death of the community spouse for the total amount of medical assistance paid on be-~~

half of the individual at any time of any payment from the annuity if a community spouse is the annuitant;

(f) Names the state as the beneficiary in the first position for the total amount of medical assistance paid on behalf of the individual at the time of any payment from the annuity, including both long-term care services and waiver services, unless the annuitant has a community spouse or minor or disabled child, as defined in WAC 388-475-0050 (b) and (c). If the annuitant has a community spouse or minor or disabled child, such spouse or child may be named as beneficiary in the first position, and the state shall be named as beneficiary in the second position;

(i) If the community spouse, minor or disabled child, or representative for a child named as beneficiary is in the first position as described in (f) and transfers his or her right to receive payments from the annuity for less than fair market value, then the state shall become the beneficiary in the first position.

(5) If the annuity is not considered a resource, the stream of income produced by the annuity is considered available income.

(6) An irrevocable annuity established on or after April 1, 2009 that meets all of the requirements of subsection (4) except that it is not immediate or scheduled to be paid out in equal monthly amounts will not be treated as a resource if:

(a) The full pay out is within the actuarial life expectancy of the annuitant; and

(b) The annuitant;

(i) Changes the scheduled pay out into equal monthly payments within the actuarial life expectancy of the annuitant; or

(ii) Requests that the department calculate and budget the payments as equal monthly payments within the actuarial life expectancy of the annuitant beginning with the month of eligibility. The income from the annuity remains unearned income to the annuitant.

(7) An irrevocable annuity, established on or after April 1, 2009 that is scheduled to pay out beyond the actuarial life expectancy of the annuitant, will be considered a resource.

(8) An irrevocable annuity established on or after April 1, 2009 that meets all of the requirements of subsection (4) or (5) is considered unearned income when the annuitant is:

(a) The client;

(b) The spouse of the client;

(c) The blind or disabled child, as defined in WAC 388-475-0050 (b) and (c), of the client; or

(d) A person designated to use the annuity for the sole benefit of the client, client's spouse, or a blind or disabled child of the client.

(9) An annuity is not considered an available resource when there is a joint owner, co annuitant or an irrevocable beneficiary who will not agree to allow the annuity to be cashed, unless the joint owner or irrevocable beneficiary is the community spouse. In the case of a community spouse, the cash surrender value of the annuity is considered an available resource and counts toward the maximum community spouse resource allowance.

(10) Nothing in this section shall be construed as preventing the department from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity other than an annuity described in subsections (3), (4), and (5).)) (1) The medicaid agency or its designee determines how an annuity, pur-

chased by or on behalf of an annuitant and established on or after April 1, 2009, affects eligibility for medicaid.

(2) General information.

(a) Clients of noninstitutional medicaid must disclose to the agency or its designee any interest that client, or the financially responsible members of that client's assistance unit, has in an annuity.

(b) Clients of institutional or home and community-based (HCB) waiver services must disclose to the agency or its designee any interest that client, or that client's community spouse, has in an annuity.

(c) Subject to (d) of this subsection, this section applies when the annuitant is:

(i) The client of medicaid;

(ii) That client's spouse, if that spouse is financially responsible for that client; or

(iii) That client's community spouse.

(d) If this section does not apply because of (c) of this subsection, but the client of institutional or HCB waiver services, or that client's community spouse, is the owner of the annuity, then the purchase of the annuity is evaluated as an asset transfer under WAC 182-513-1363.

(e) For the definition of "disabled," see WAC 182-512-0050 (1)(b) and (c).

(f) Actuarial life expectancy in this section is rounded up to the nearest whole year.

(3) Annuities as resources.

(a) Subject to (b) of this subsection, a revocable annuity is an available resource.

(b) The following annuities are not available resources, even if revocable:

(i) An annuity described under 26 U.S.C. Sec. 408(b) or (q); or

(ii) An annuity purchased with proceeds from:

(A) An account or trust described under 26 U.S.C. Sec. 408(a), (c), or (p);

(B) A simplified employee pension (within the meaning of 26 U.S.C. Sec. 408(k)); or

(C) A Roth IRA described under 26 U.S.C. Sec. 408A.

(c) An annuity not described under (b) of this subsection is an available resource unless the annuity:

(i) Is issued by an entity licensed and approved to issue annuities in the jurisdiction in which the annuity is established;

(ii) Is immediate, irrevocable, nonassignable; and

(iii) Is paid out, in equal monthly amounts with no deferral and no balloon payments, over a term:

(A) Of at least five years, if the actuarial life expectancy of the annuitant is at least five years; or

(B) Not less than the actuarial life expectancy of the annuitant, if the actuarial life expectancy of the annuitant is less than five years.

(d) If an annuity fails either the immediate requirement under (c)(ii) of this subsection or the monthly payout requirement under (c)(iii) of this subsection, the annuity is not a resource if:

(i) The annuity is fully paid out within the actuarial life expectancy of the annuitant; and

(ii) The annuitant:

(A) Changes the scheduled payout to equal monthly payments; or

(B) Asks the agency or its designee to calculate and budget the periodic payments as equal monthly payments beginning the month of eligibility. Periodic payments made before the month of eligibility are not included in the calculation.

(iii) Nothing under (d) of this subsection affects the deferral or balloon payment requirements under (c)(iii) of this subsection, or the payment term requirements under (c)(iii)(A) or (B) of this subsection.

(4) Annuities as income.

(a) If an annuity is not an available resource under subsection (3) of this section, the payments from the annuity are unearned income to the annuitant.

(b) If an annuity is an available resource under subsection (3) of this section, the payments from the annuity are not income to the annuitant.

(5) An annuity as a transfer of assets.

(a) The purchase of an annuity is an uncompensated asset transfer, unless the annuity designates the state of Washington as remainder beneficiary under subsection (6) of this section.

(b) The purchase of an annuity by the client of institutional or HCB waiver services is an uncompensated asset transfer, unless the annuity is an annuity under subsection (3)(b)(i) or (ii) of this section, or the annuity:

(i) Is issued by an entity licensed and approved to issue annuities in the jurisdiction in which the annuity is established;

(ii) Is immediate, irrevocable, nonassignable; and

(iii) Is paid out, in equal periodic amounts with no deferral and no balloon payments, over a term that is actuarially sound (i.e., a term that is not greater than the actuarial life expectancy of that client).

(6) Beneficiary designation requirements.

(a) Subject to (b) of this subsection, to satisfy subsection (5)(a) of this section, when the client of institutional or HCB waiver services, or that client's community spouse, is the annuitant, the annuity must:

(i) Name the states as the remainder beneficiary, for at least the total amount of services covered under medicaid, paid on behalf of the client of institutional or HCB waiver services; and

(ii) The remainder beneficiary must be listed in the annuity in the:

(A) First position;

(B) Next position, after the community spouse, and any minor or disabled children; or

(C) First position, if either the community spouse, or any minor or disabled children, or a representative for such children, named as beneficiary in the first position under (a)(ii)(B) of this subsection, transfers the right to receive payments from the annuity for less than fair market value.

(b) When the community spouse is the annuitant, the community spouse, or the community spouse's estate, cannot be named as remainder beneficiary under (a)(ii)(A) of this subsection.

(c) If a change of circumstance requires a change in beneficiary designation under (a) of this subsection, the agency or its designee reevaluates the annuity's beneficiary designation.

(7) Actuarial life expectancy is determined by tables that are published by the office of the chief actuary of the Social Security Administration.

AMENDATORY SECTION (Amending WSR 13-01-017, filed 12/7/12, effective 1/1/13)

**WAC 182-516-0300 Life estates.** (~~((1) The department determines how life estates affect eligibility for medical programs.~~

~~(2) A life estate is an excluded resource when either of the following conditions apply:~~

~~(a) It is property other than the home, which is essential to self support or part of an approved plan for self support; or~~

~~(b) It cannot be sold due to the refusal of joint life estate owner(s) to sell.~~

~~(3) Remaining interests of excluded resources in subsection (2) may be subject to transfer of asset penalties under WAC 388-513-1363, 388-513-1364 and 388-513-1365.~~

~~(4) Only the client's proportionate interest in the life estate is considered when there is more than one owner of the life estate.~~

~~(5) A client or a client's spouse, who transfers legal ownership of a property to create a life estate, may be subject to transfer of resource penalties under WAC 388-513-1363, 388-513-1364 and 388-513-1365.~~

~~(6) When the property of a life estate is transferred for less than fair market value (FMV), the department treats the transfer in one of two ways:~~

~~(a) For noninstitutional medical, the value of the uncompensated portion of the resource is combined with other nonexcluded resources; or~~

~~(b) For institutional medical, a period of ineligibility will be established according to WAC 388-513-1363, 388-513-1364 and 388-513-1365.)~~ (1) "Life estate" means an ownership interest in real property only during the lifetime of a specified person.

(2) Subject to subsection (3) of this section, a life estate is an available resource, unless it is either excluded or unavailable under chapter 182-512 WAC.

(3) For someone applying for or receiving long-term services and supports, a life estate interest is subject to the home equity limits under:

(a) WAC 182-513-1350 for institutional and home and community-based (HCB) waiver programs; and

(b) WAC 182-513-1215 for community first choice.

(4) For clients of institutional or HCB waiver services:

(a) If the remainder interest was transferred for less than fair market value, the medicaid agency or its designee will evaluate the transaction as an asset transfer under WAC 182-513-1363. "Remainder interest" is the fair market value of the property at the time the client transferred it and retained a life estate, minus the value of the life estate at the time of that transfer.

(b) If a client purchased a life estate but has not lived in the property for at least one year after the purchase, the purchase price of the life estate is an uncompensated asset transfer under WAC 182-513-1363.

(c) If a client purchased a life estate and has lived in the property for more than one year, it is not an uncompensated transfer, unless the purchase price for the life estate exceeded the value of the life estate. Any amount paid for a life estate in excess of the value of the life estate is an uncompensated transfer under WAC 182-513-1363.

(5) To calculate the value of a life estate:

(a) Identify the person whose life determines the length of the life estate;

(b) Identify whether uncompensated value or home equity is being calculated:

(i) If calculating uncompensated value under subsection (4)(a) or (c) of this section, identify that person's age on the person's last birthday before the transfer; or

(ii) If determining whether home equity requirements are met under subsection (3) of this section, identify that person's age on the person's most recent birthday; and

(c) Multiply the property's fair market value by the life estate factor corresponding to that person's age in the Life Estate and Remainder Interest Tables maintained by the Social Security Administration.

(6) To calculate the remainder interest, subtract the value in subsection (5) of this section from the property's fair market value at the time of the transaction that created the life estate.

#### NEW SECTION

**WAC 182-516-0400 Promissory notes and loans.** (1) General.

(a) In this section, note includes promissory note, loan or other obligation to pay.

(b) The medicaid agency or its designee determines the value of outstanding principal and interest payments using amortization schedules, unless otherwise stated in this section.

(2) A note as a resource.

(a) A note is a resource. The value of the note is the fair market value (FMV).

(b) The FMV of a note is the outstanding principal of the note, unless convincing evidence to the contrary is provided to the agency or its designee.

(c) If the note owner provides convincing evidence to the agency or its designee of a legal bar to the sale of the note, the note's FMV is zero.

(3) A note as income.

(a) Interest on a note is unearned income.

(b) If the FMV of the note under subsection (2)(c) of this section is zero, the principal portion of recurring payments is unearned income.

(c) The agency or its designee may budget the unearned income in equal monthly amounts at the request of the note owner, or at the agency or its designee's discretion. The budgeting period will be the note owner's certification period under chapter 182-504 WAC.

(4) A note as an asset transfer under WAC 182-513-1363.

(a) Subject to (b) of this subsection:

(i) The agency or its designee evaluates the purchase of a note as an asset transfer if the purchase price of the note exceeds the FMV of the note;

(ii) The value of the asset transfer is the difference between the purchase price of the note and the FMV of the note at the time of purchase; and

(iii) The agency or its designee determines the FMV of the note at the time of purchase using subsection (2) of this section, but can also determine the FMV of the note at a time after purchase if the agency or its designee determines FMV of the note has changed since the time it was purchased.

(b) The assets used to purchase a note are an uncompensated asset transfer under WAC 182-513-1363, unless the note:

(i) Prohibits the cancellation of the balance of the note upon death of the note owner; and

(ii) Is paid out, in equal periodic amounts with no deferral and no balloon payments, over a term not greater than the actuarial life expectancy of that note owner.

(c) The value of the uncompensated asset transfer under (b) of this subsection is the outstanding balance of the note due as of the date of the client's application for medical assistance for institutional or home and community-based waiver services.

(d) If the purchase of a note results in a period of ineligibility under both (a) and (b) of this subsection, then the period of ineligibility under WAC 182-513-1363 will be the period that is longer.