TITLE 405 OFFICE OF THE SECRETARY OF FAMILY AND SOCIAL SERVICES

Final Rule
LSA Document #08-325(F)

DIGEST

Amends 405 IAC 2 to conform to the Deficit Reduction Act of 2005, Pub. L. No. 109-171, and update eligibility standards with regard to assets, income, and resources. Amends 405 IAC 2-1-2 to require applicants for long-term care services to disclose the interest of the applicant or the applicant's spouse in an annuity and make the state a remainder beneficiary of such annuity under certain circumstances. Amends 405 IAC 2-3-1.1 to define home equity, change look back date and penalty period requirements, and penalize certain transactions involving promissory notes, loans, mortgages, and life estates. Amends 405 IAC 2-3-1.1 and 405 IAC 2-3-22 to recognize undue hardship standards listed in 405 IAC 2-3-24. Amends 405 IAC 2-3-1.2 to define annuities, the treatment of annuities in the eligibility determination, and the conditions under which purchase of such annuities will be considered transfers for less than adequate consideration. Amends 405 IAC 2-3-2 to describe life care contracts requirements and eligibility requirements for individuals possessing life care contracts. Amends 405 IAC 2-3-15 to disallow long-term care benefits to individuals with home equity greater than $500,000. Adds 405 IAC 2-3-24 to set forth standards for notice of an undue hardship exception, the application for an undue hardship exception, and the appeals rights for denial of an undue hardship exception. Amends 405 IAC 2-8-2 to clarify that the undue hardship waiver under Rule 8 provisions do not apply to Medicaid applicants affected by transfer of property and trust availability rules. Effective 30 days after filing with the Publisher.

405 IAC 2-1-2; 405 IAC 2-3-1.1; 405 IAC 2-3-1.2; 405 IAC 2-3-2; 405 IAC 2-3-15; 405 IAC 2-3-22; 405 IAC 2-3-24; 405 IAC 2-8-2

SECTION 1. 405 IAC 2-1-2 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-1-2 Interview of applicants and recipients

Authority: IC 12-13-5-3; IC 12-13-7-3; IC 12-15-1-10
Affected: IC 12-15-4; IC 12-15-5

Sec. 2. (a) In addition to the requirements of 470 IAC 2.1-1-2, each applicant for and recipient of medical assistance or the individual authorized to act in the individual's behalf must be interviewed by the division of family resources (division) at the time of the initial investigation and at each annual reinvestigation of eligibility.

(b) The initial investigation interview required under subsection (a) may be conducted:
(1) in a division office;
(2) at a home visit;
(3) by telephone; or
(4) at a community location designated by the division or designee.

(c) The annual reinvestigation interview required under subsection (a) may be conducted:
(1) in a division office;
(2) at a home visit;
(3) by telephone;
(4) by mail; or
(5) at a community location designated by the division or designee.

(d) An application for medical assistance shall be filed on the form prescribed by the division.

(e) The applicant or recipient may use an authorized representative to apply for medical assistance, to represent the applicant or recipient in all interviews, and to notify the division of any changes. The authorization must be in writing except as provided in subsections (g) and (h).

(f) Notwithstanding the availability of an authorized representative, the division may require personal contact with the applicant or recipient in order to obtain information necessary for the determination of eligibility.

(g) The parents of an applicant or recipient under twenty-one (21) years of age may apply for medical assistance on behalf of the applicant or recipient without the written authorization specified in subsection (e).

(h) The written authorization specified in subsection (e) shall not be required if medical documentation shows that the applicant or recipient is medically unable to provide such authorization.

(i) For any applicant or recipient of long-term care services, the application of the individual for such assistance, including any recertification of eligibility for such assistance, shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument as may be specified by the Secretary of HHS) regardless of whether the annuity is irrevocable or is treated as an asset.

(1) Such application or recertification packet shall include a statement signed by the individual that the state will become a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

(2) Upon disclosure by an applicant or recipient under this subsection, the state will notify the issuer of the annuity of its right as a preferred remainder beneficiary for medical assistance furnished to the individual.

~~(i)~~ **(j)** The division will accept an application for medical assistance signed with an electronic signature.

~~(j)~~ **(k)** An applicant or recipient who does not meet the requirements of this section shall be ineligible for medical assistance.

(Office of the Secretary of Family and Social Services; 405 IAC 2-1-2; filed Mar 1, 1984, 2:31 p.m.: 7 IR 1013, eff Apr 1, 1984; filed Jun 19, 1984, 10:25 a.m.: 7 IR 1821, eff Jul 1, 1984 [IC 4-22-2-5 suspends the effectiveness of a rule document for thirty (30) days after filing with the secretary of state. LSA Document #84-29 was filed with the secretary of state June 19, 1984.]; filed Feb 16, 1993, 5:00 p.m.: 16 IR 1781; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Feb 19, 2009, 10:53 a.m.: 20090318-IR-405080195FRA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA) NOTE: Transferred from the Division of Family and Children (470 IAC 9.1-1-2) to the Office of the Secretary of Family and Social Services (405 IAC 2-1-2) by P.L.9-1991, SECTION 131, effective January 1, 1992.

SECTION 2. 405 IAC 2-3-1.1 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-3-1.1 Transfer of property; penalty

Authority: IC 12-8-1-9; IC 12-8-6-5; IC 12-13-7-3; IC 12-15-1-10
Affected: IC 12-15-4; IC 12-15-5; IC 12-15-39.6

Sec. 1.1. (a) The following definitions apply throughout this section:

(1) "Assets" includes all income and resources of the applicant or recipient, and of the applicant's or recipient's spouse, including any income or resources that the applicant or recipient or the applicant's or recipient's spouse is entitled to receive but does not receive because of action by:

(A) the applicant or recipient or the applicant's or recipient's spouse;

(B) a person, including, but not limited to, a court or administrative body with legal authority to act in place of or on behalf of the applicant or recipient or the applicant's or recipient's spouse; or

(C) a person, including, but not limited to, a court or administrative body acting at the direction or upon the request of the applicant or recipient or the applicant's or recipient's spouse.

The term includes assets that an individual is entitled to receive but does not receive because of failure to take action subject to subsection (j).

(2) "Individual" means an applicant or recipient of Medicaid.

(3) "Institutionalized individual" means an applicant or recipient who is:

(A) an inpatient in a nursing facility;

(B) an inpatient in a medical institution for whom payment is made based on a level of care provided in a nursing facility; or

(C) receiving home and community based waiver services.

(4) "Net income" means the income produced by real property after deducting allowable expenses of

ownership. Allowable and nonallowable expenses are as follows:

(A) The following are allowable expenses of ownership if the owner is responsible for the expenses:

(i) Property taxes.
(ii) Interest payments.
(iii) Repairs and maintenance.
(iv) Advertising expenses.
(v) Lawn care.
(vi) Property insurance.
(vii) Trash removal expenses.
(viii) Snow removal expenses.
(ix) Utilities.
(x) Any other expenses of ownership allowed by the Supplemental Security Income program.

(B) The following are not allowable expenses of ownership:

(i) Depreciation.
(ii) Payments on mortgage principal.
(iii) Personal expenses of the owner.
(iv) Mortgage insurance.
(v) Capital expenditures.

(5) "Noninstitutionalized individual" means an applicant or recipient receiving any of the services: ~~described in subsection (e).~~

(A) Home health care services.
(B) Home and community care services for functionally disabled elderly individuals.
(C) Personal care services as defined in 42 U.S.C. 1396a(a)(24).

(6) "Qualified long-term care insurance policy" has the meaning set forth in 760 IAC 2-20-30.

(7) "Uncompensated value" means the difference between the fair market value of the asset and the value of the consideration received by the applicant or recipient in return for transferring the asset.

(b) A look back date is sixty (60) months before the first date as of which the individual both:
(1) is an institutionalized individual; and
(2) has applied for medical assistance.

(c) If an applicant or recipient of Medicaid, or the spouse of an applicant or recipient, disposes of assets for less than fair market value on or after the look back date, the applicant or recipient is ineligible for medical assistance for services described in subsection (e) of this section for a period of time known as the penalty period. The penalty period is equal to the number of months specified in subsection (g) of this section and shall begin on the later of the first day of the month in which assets have been transferred for less than fair market value, or the date on which the individual would be eligible for services described in subsection (e) of this section, based on an approved application for such assistance without regard to any penalty periods, whichever is later, and which does not occur during any other period of ineligibility.

~~(b)~~ **(d)** A transfer of assets includes any cash, liquid asset, or property that is transferred, sold, given away, or otherwise disposed of as follows:

(1) Transfer includes any total or partial divestiture of control or access, including, but not limited to, any of the following:

(A) Converting an asset from individual to joint ownership.
(B) Relinquishing or limiting the applicant's or recipient's right to liquidate or sell the asset.
(C) Disposing of a portion or a partial interest in the asset while retaining an interest.
(D) Transferring the right to receive income or a stream of income, including, but not limited to, income produced by real property.
(E) Renting or leasing real property.
(F) Waiving the right to receive a distribution from a decedent's estate, or failing to take action to receive a distribution that the individual is entitled to receive by law subject to subsection (j).
(G) For transactions converting funds to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage:

(i) has a repayment term that is actuarially sound in accordance with actuarial publications of the Social Security Administration;
(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and
(iii) prohibits the cancellation of the balance upon the death of the lender.

(H) For the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least one (1) year beginning immediately after the date of purchase.

(2) If an applicant or recipient relinquishes ownership or control over a portion of an asset, but retains ownership, control, or an interest in the remaining portion, the portion relinquished is considered transferred.
(3) A transfer of the applicant's or recipient's assets completed by the applicant's or recipient's power of attorney or legal guardian is considered a transfer by the applicant or recipient.
(4) For purposes of this section, in the case of an asset held by an individual in common with another person or persons in a joint tenancy, tenancy in common, or similar arrangement, the asset, or the affected portion of the asset, shall be considered transferred by the applicant or recipient when any action is taken, either by the applicant or recipient or by any other person, that reduces or eliminates the applicant's or recipient's ownership or control of the asset.
(5) This section applies without regard to the exclusion of the home described in 42 U.S.C. 1382b(a)(1).
(6) This section applies without regard to the exclusion of income-producing real property described in section 15 of this rule, except for property used in a trade or business. The transfer of income-producing real property other than property used in a trade or business is subject to penalty under subsections (h) and (l). "Trade or business" means a trade or business that is actively managed or operated by the applicant or recipient.

~~(c) If an applicant or recipient of Medicaid, or the spouse of an applicant or recipient, disposes of assets for less than fair market value on or after the look-back date specified in this subsection, the applicant or recipient is ineligible for medical assistance for services described in subsections (d) through (e), for a period beginning on the first day of the first month after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility under this section. If the transfer took place prior to July 1, 2003, the penalty period begins in the month of the transfer. The ineligibility period is equal to the number of months specified in subsection (g). The look-back date is determined as follows:~~
~~(1) In the case of transfers that do not involve a trust, the look-back date is determined as follows:~~
~~(A) For an institutionalized individual, the look-back date is thirty-six (36) months before the first date as of which the individual both:~~
~~(i) is an institutionalized individual; and~~
~~(ii) has applied for medical assistance.~~
~~(B) For a noninstitutionalized individual, the look-back date is thirty-six (36) months before the later of the date on which the individual:~~
~~(i) applies for medical assistance; or~~
~~(ii) disposes of assets for less than fair market value.~~
~~(2) In the case of transfers that involve payments from a trust or portions of a trust that are treated as assets disposed of by an applicant or recipient under section 22(b)(3) or 22(c)(2) of this rule, the look-back date is determined as follows:~~
~~(A) For an institutionalized individual, the look-back date is sixty (60) months before the first date as of which the individual both:~~
~~(i) is an institutionalized individual; and~~
~~(ii) has applied for medical assistance.~~
~~(B) For a noninstitutionalized individual, the look-back date is sixty (60) months before the later of the date on which the individual:~~
~~(i) applies for medical assistance; or~~
~~(ii) disposes of assets for less than fair market value.~~

~~(d)~~ **(e)** During the penalty period, an institutionalized individual is ineligible for medical assistance for the following services:
(1) Nursing facility services.
(2) A level of care in any institution equivalent to that of nursing facility services.
(3) Home or community based waiver services.

~~(e) During the penalty period, a noninstitutionalized individual is ineligible for the following services:~~
~~(1) Home health care services.~~
~~(2) Home and community care services for functionally disabled elderly individuals.~~
~~(3) Personal care services as defined in 42 U.S.C. 1396a(a)(24).~~
~~(4) Any other long term care services, including, but not limited to, the services listed in subsection (d).~~

(f) If an individual is ineligible for medical assistance for services under this section, expenses for those

services are not allowable medical expenses in calculating an individual's nursing home liability for any month of Medicaid eligibility.

(g) The number of months of ineligibility shall be equal to the total, cumulative uncompensated value of all assets transferred by the individual, or the individual's spouse, on or after the look back date specified in subsection ~~(c)~~ **(b),** divided by the average monthly cost to a private patient of nursing facility services in the geographic area that includes the county where the individual resides at the time of application. As used in this subsection, "geographic area" means the region identified in Section 2640.10.35.20 of the Family and Social Services Administration Program Policy Manual for Cash Assistance, Food Stamps, and Health Coverage. ~~For transfers taking place on or after July 1, 2003, in determining the total, cumulative uncompensated value of assets transferred, transfers made in consecutive months are added together. The penalty period begins with the month following the first month in which assets were transferred, and that does not occur in any other penalty period.~~ **If in calculating the period of ineligibility a fractional period of ineligibility is determined, the state shall not round down, or otherwise disregard any fractional period of ineligibility.**

(h) This subsection applies to the transfer of a stream of income, including, but not limited to, the transfer of the income generated by income-producing real property. The uncompensated value of income transferred is determined by calculating the greater of:
(1) the fair market value; or
(2) the actual amount;
of total net income that the property or other source of income is capable of producing during the lifetime of the transferor, based on life expectancy tables published by the office, and subtracting the income, if any, that the transferor will receive from the property or other source of income after the transfer.

(i) When an individual accepts a rental payment that is less than the fair market rental value for income-producing property, the uncompensated value of the transfer is determined by:
(1) calculating the difference between the fair market rental value and the amount of rent accepted; and
(2) multiplying the difference by the person's life expectancy based on life expectancy tables published by the office.

(j) This subsection applies to a transfer of assets that results from failure to take action to receive assets to which one is entitled to receive by law. No penalty will be imposed if any of the following circumstances applies:
(1) The applicant or recipient, or the individual with legal authority to act on behalf of the applicant or recipient, is unaware of his or her right to receive assets or becomes aware of the right to receive assets after the deadline for taking action has passed. If the office notifies the applicant or recipient of his or her right to receive assets prior to the deadline for taking action, the individual will be presumed to be aware of his or her right to receive assets unless subdivision (2) applies.
(2) A physician states that the applicant or recipient is not capable of taking action to receive the assets, and there is no guardian or other individual with the authority to act on the applicant's or recipient's behalf.
(3) The expenses of collecting the assets would exceed the value of the assets.
(4) In the case of a surviving spouse who fails to take a statutory share of a deceased spouse's estate, no penalty will be imposed if the deceased spouse has made other equivalent arrangements to provide for a spouse's needs. "Other equivalent arrangements" includes, but is not limited to, a trust established for the benefit of the surviving spouse.

(k) An applicant or recipient shall not be ineligible for medical assistance under this section if any of the following apply:
(1) The assets transferred were a home, and title to the home was transferred to any of the following persons:
(A) The spouse of the applicant or recipient.
(B) A child of the applicant or recipient who is:
(i) under twenty-one (21) years of age; or
(ii) blind or disabled as defined in 42 U.S.C. 1382c.
(C) A sibling of the applicant or recipient who:
(i) has an equity interest in the home; and ~~who~~
(ii) was residing in the applicant's or recipient's home for a period of at least one (1) year immediately before the date the applicant or recipient becomes an institutionalized individual.
(D) A son or daughter of the applicant or recipient, other than a child described in clause (B), who:
(i) was residing in the applicant's or recipient's home for a period of at least two (2) years immediately

before the date the applicant or recipient becomes an institutionalized individual; and ~~who~~
(ii) the office determines has provided care to the applicant or recipient that permitted the applicant or recipient to reside at home rather than in an institution or facility.
(2) The assets were transferred to:
(A) the applicant's or recipient's spouse; or ~~to~~
(B) another for the sole benefit of the applicant's or recipient's spouse.
(3) The assets were transferred from the applicant's or recipient's spouse to another for the sole benefit of the applicant's or recipient's spouse.
(4) The assets were transferred to:
(A) the applicant's or recipient's child who is disabled or blind as defined in 42 U.S.C. 1382c; or
(B) ~~to~~ a trust, including a trust described in section 22(i) of this rule, established solely for the benefit of the applicant's or recipient's child who is disabled or blind as defined in 42 U.S.C. 1382c.
(5) The assets were transferred to a trust, including a trust described in section 22(i) of this rule, established solely for the benefit of an individual under sixty-five (65) years of age who is disabled as defined in 42 U.S.C. 1382c.
(6) The assets transferred are disregarded for eligibility purposes through the use of a qualified long-term care insurance policy under IC 12-15-39.6. If an asset is disregarded through the use of a qualified long-term care insurance policy, that asset and any income generated by that asset may be transferred without penalty.
(7) A satisfactory showing is made to the office, in accordance with standards specified under 42 U.S.C. 1396p(c)(2)(C) by the Secretary of Health and Human Services, that:
(A) the applicant or recipient intended to dispose of the assets at fair market value or for other valuable consideration;
(B) the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or
(C) all assets transferred for less than fair market value have been returned to the applicant or recipient.
In order to establish that a transfer was made exclusively for purposes other than qualifying for medical assistance, the applicant or recipient must submit sufficient evidence to show that the transfer was made exclusively for reasons not related to Medicaid eligibility, estate recovery, or lien.
(8) The office may waive the application of this section in cases of undue hardship, but only to the extent required by standards specified under 42 U.S.C. 1396p(c)(2)(D) by the Secretary of Health and Human Services **and section 24 of this rule.**

(l) For transfers of income-producing real property not used in a trade or business on and after July 1, 2003, six thousand dollars ($6,000) of the equity value can be transferred without penalty if the transferred property produces an annual income of at least three hundred sixty dollars ($360). If the equity value of the property is less than six thousand dollars ($6,000), the property can be transferred without penalty if the property produces an annual income of at least six percent (6%) of the equity. This six thousand dollars ($6,000) exemption is a single, one (1) time exemption that applies to the total value of all income-producing real property transferred by the applicant during the applicant's lifetime. If the property does not produce an annual income of at least six percent (6%) of the lesser of six thousand dollars ($6,000) or the equity value, the entire equity is the uncompensated value.

(m) In the case of a transfer by the spouse of an applicant or recipient that results in a period of ineligibility for medical assistance, the office shall apportion the period of ineligibility, or any portion of that period, between the applicant or recipient and the applicant's or recipient's spouse, if the spouse otherwise becomes eligible for medical assistance, as specified in regulations promulgated under 42 U.S.C. 1396p(c)(4) by the Secretary of Health and Human Services.

(Office of the Secretary of Family and Social Services; 405 IAC 2-3-1.1; filed May 1, 1995, 10:45 a.m.: 18 IR 2223; errata filed Jun 9, 1995, 2:30 p.m.: 18 IR 2796; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; filed Mar 13, 2002, 10:09 a.m.: 25 IR 2472; filed Apr 8, 2004, 3:16 p.m.: 27 IR 2479; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA)

SECTION 3. 405 IAC 2-3-1.2 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-3-1.2 Transfers involving annuities

Authority: IC 12-8-1-9; IC 12-8-6-5; IC 12-15-1-10
Affected: IC 12-15-4

Sec. 1.2. (a) For purposes of ~~this~~ section, "annuity" means a policy, certificate, contract, or other arrangement between two (2) or more parties whereby one (1) party pays a lump sum of money or other valuable consideration to the other party in return for the right to receive payments in the future **and shall include any similar financial instrument, as may be specified by the Secretary of Health and Human Services. An annuity not purchased from an entity described in subsection (b) of this section will be considered a transfer for inadequate consideration.**

(b) The purchase of an annuity, any instrument purporting to be an annuity, or any other arrangement that meets the definition of an annuity in subsection (a) shall be considered an uncompensated transfer of assets resulting in a penalty under section 1.1 of this rule unless the ~~following criteria are met:~~

~~(1) The~~ annuity is purchased from one (1) of the following:

~~(A)~~ **(1)** An insurance company or another commercial company that sells annuities as part of the normal course of business.

~~(B)~~ **(2)** A nonprofit organization qualified under Section 501(c) of the Internal Revenue Code as amended.

~~(2) The annuity provides substantially equal monthly payments of principal and interest and does not have a balloon or deferred payment of principal or interest. Payments will be considered substantially equal if the total annual payment in any year varies by five percent (5%) or less from the payment in the previous year.~~

~~(3) The annuity will return the full purchase price within the purchaser's life expectancy as determined by life expectancy tables published by the office.~~

~~(c) If an annuity complies with the criteria in subsection (b)(1) and (b)(2), but does not comply with subsection (b)(3), the uncompensated value of the transfer is the difference between the purchase price and the amount that the annuity will return within the purchaser's life expectancy. If an annuity does not comply with one (1) or more of the criteria in subsection (b)(1) or (b)(2), the uncompensated value is the entire purchase price.~~

~~(d) If an annuity is revocable or can be assigned to another person, it is considered an available resource for Medicaid eligibility purposes.~~

~~(e) This section applies to any annuity regardless of purchase date, except that the requirements in subsection (b)(1) and (b)(2) apply only to the following:~~

~~(1) Any annuity purchased on or after the later of:~~

~~(A) June 1, 2002; or~~

~~(B) the effective date of this rule.~~

~~(2) Any annuity regardless of purchase date, if the annuity is annuitized on or after the later of:~~

~~(A) June 1, 2002; or~~

~~(B) the effective date of this rule.~~

(c) An annuity described in subsection (a) of this section is not an asset for purposes of section 1.1 of this rule if:

(1) the annuity is:

(A) an annuity described in subsection (b) or (q) of Section 408 of the Internal Revenue Code of 1986, as amended; or

(B) purchased with proceeds from an account or trust described in subsection (a), (c), or (p) of Section 408 of such Code, a simplified employee pension within the meaning of Section 408 of the Code, or a Roth IRA described in Section 408(A) of such Code; or

(2) the annuity:

(A) is irrevocable and nonassignable;

(B) is actuarially sound; and

(C) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

(d) An annuity shall be treated as a transfer of property for less than fair market value under section 1.1 of this rule unless:

(1) the state is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on the behalf of the applicant for medical assistance;

(2) the state is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value; or

(3) the individual purchased a long-term care insurance policy that protects the annuity.

(Office of the Secretary of Family and Social Services; 405 IAC 2-3-1.2; filed May 1, 2002, 10:38 a.m.: 25 IR 2726; errata filed Aug 22, 2002, 3:12 p.m.: 26 IR 35; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA)

SECTION 4. 405 IAC 2-3-2 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-3-2 Life care contracts

Authority: IC 12-8-6-5; IC 12-15
Affected: IC 12-13-7-3; IC 12-15

Sec. 2. **(a)** An applicant who has entered into a life care contract with an institution whereby he has transferred his **or her** available assets to the institution in exchange for full maintenance and medical care during his **or her** lifetime in that institution is ineligible for medical assistance for the aged, blind, or disabled unless the contracting institution can prove to the ~~county department~~ **division** by a complete and accurate accounting of all funds involved that it is unable to fulfill its contract obligations to the applicant.

(b) For purposes of determining an individual's eligibility for, or an amount of, benefits under this article, when an applicant or recipient residing in a continuing care retirement community or similar life care community collects an entrance fee on admission from such individual the fee shall be considered an available resource to the extent that:

(1) an individual who has the ability to use the entrance fee, or should the contract provide that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

(2) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

(3) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.

(Office of the Secretary of Family and Social Services; 405 IAC 2-3-2; filed Mar 1, 1984, 2:31 p.m.: 7 IR 1018, eff Apr 1, 1984; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA) NOTE: Transferred from the Division of Family and Children (470 IAC 9.1-3-4) to the Office of the Secretary of Family and Social Services (405 IAC 2-3-2) by P.L.9-1991, SECTION 131, effective January 1, 1992.

SECTION 5. 405 IAC 2-3-15 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-3-15 Resources; limitations and exclusions

Authority: IC 12-8-6-5; IC 12-15
Affected: IC 12-13-7-3; IC 12-15

Sec. 15. (a) An applicant or recipient is ineligible for medical assistance for any month in which the total equity value of all nonexempt personal property exceeds the applicable limitation, set forth as follows, on the first day of the month:

(1) One thousand five hundred dollars ($1,500) for the applicant or recipient, including the amount determined in subsection (b), or in addition to the amount determined in subdivision (3), if applicable.

(2) Two thousand two hundred fifty dollars ($2,250) for the applicant or recipient and his or her spouse if the couple is living together, or if the most recent continuous period of institutionalization of one (1) member of the couple began prior to September 30, 1989.

(3) Twelve thousand dollars ($12,000), subject to adjustment under Section 1924(g) of the Social Security Act, as the spousal resource standard provided for in Section 1924(f)(2)(A)(i) of the Social Security Act, or a higher amount as determined under:

(A) Section 1924(f)(2)(A)(ii);

(B) Section 1924(f)(2)(A)(iii); or

(C) Section 1924(f)(2)(A)(iv);
of the Social Security Act for a community spouse as defined in Section 1924(h) of the Social Security Act.

(b) Except as provided in subdivision (3), if the applicant or recipient is under eighteen (18) years of age, his or her personal property includes the value of his or her parents' personal property in excess of the following limitations and in the following situations:
(1) If the child lives with one (1) parent, one thousand five hundred dollars ($1,500) of the parent's personal property is excluded. If the child lives with two (2) parents, two thousand two hundred fifty dollars ($2,250) of the parents' personal property is excluded.
(2) If the child is institutionalized, one thousand five hundred dollars ($1,500) of the personal property of his or her custodial parent or two thousand two hundred fifty dollars ($2,250) of the personal property of both parents is excluded.
(3) If the child is approved for home and community based services under the waiver for persons with autism, in accordance with 42 U.S.C. 1396n, parental resources are excluded regardless of parental income.

(c) In determining eligibility of an individual applying for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds five hundred thousand dollars ($500,000). The dollar amount specified in this subsection shall be increased beginning with 2011, from year to year, in accordance with federal law. The limitation in this subsection shall not apply if:
(1) the individual's spouse or dependent child under the age of twenty-one (21), or blind or disabled child lawfully resides in the home;
(2) a reverse mortgage or home equity loan has reduced the individual's equity interest in the home below the equity interest restriction;
(3) the individual purchased a long-term care insurance policy that will protect the excess home equity;
(4) the individual can prove through the process in section 24 of this rule that the application of this subsection will create a hardship for the individual under the standards stated in that rule.

~~(c)~~ **(d)** In addition to that property required to be excluded by federal statute or regulation, the following property is exempt from consideration:
(1) All household goods and personal effects.
(2) Personal property required by an individual's employer while the individual is employed.
(3) The equity value of personal property used to produce food for home consumption or used in the production of income.
(4) The value of life insurance with a total face value of one thousand four hundred dollars ($1,400) or less if provision has been made for payment of the applicant's or recipient's funeral expenses from the proceeds of such insurance. However, the one thousand four hundred dollars ($1,400) limitation shall be reduced by any amount in an irrevocable burial trust or irrevocable prepaid funeral agreement.
(5) For a period of ~~no~~ **not** more than nine (9) months from the date of receipt, the proceeds or any interest earned on the proceeds of casualty insurance received as a result of damage, destruction, loss, or theft of exempt real or personal property if the applicant or recipient demonstrates that the proceeds are being used to repair or replace the damaged, destroyed, lost, or stolen exempt property.
(6) One (1) motor vehicle according to the following provisions:
(A) One (1) motor vehicle is excluded, regardless of value, if, for the applicant or recipient or other member of his or her household, the motor vehicle is:
(i) necessary for employment;
(ii) necessary for the medical treatment of a specific or regular medical problem; or
(iii) modified for operation by or transportation of a handicapped person.
(B) If no motor vehicle is excluded under clause (A), four thousand five hundred dollars ($4,500) of the current market value of one (1) motor vehicle is excluded.
(7) Burial spaces.
(8) Subject to the requirements in subsection ~~(d),~~ **(e),** the home ~~which~~ **that** is the principal place of residence of **the:**
(A) ~~the~~ applicant or recipient;
(B) ~~the~~ spouse of the applicant or recipient;
(C) ~~the~~ **parent or** parents of the applicant or recipient;
(D) ~~the~~ applicant's or recipient's biological or adoptive **child or** children under eighteen (18) years of age; or
(E) ~~the~~ applicant's or recipient's blind or disabled biological or adoptive **child or** children eighteen (18) years of age or older.

(9) For an applicant or recipient of medical assistance under the blind category, an amount of his or her resources, as specified in an approved plan for achieving self-support, is disregarded for a period of time not to exceed twelve (12) months. Such a plan will be approved by the division of family ~~and children~~ **resources** in conjunction with the Indiana division of services for the blind if the plan is in writing and fully documents that the resources to be disregarded will be used by the applicant or recipient in pursuing a bona fide activity aimed at achieving self-support.
(10) Income-producing real property if the income is greater than the expenses of ownership.

~~(d)~~ **(e)** The home exempted by subsection ~~(c)(8)~~ **(d)(8)** is exempt until such time as it is verified that none of the persons listed in subsection ~~(c)(8)~~ **(d)(8)** intends to reside there. The home is the shelter in which the person resides, the land on which the shelter is located, and related outbuildings.

~~(e)~~ **(f)** As a condition of eligibility for medical assistance for the aged, blind, and disabled, each applicant and recipient and his or her legally responsible relatives must sign an agreement to offer for sale or for rent all nonexempt real property that he or she or his or her legally responsible relatives own, except in those situations involving a community spouse and an institutionalized spouse, as defined in Section 1924(h) of the Social Security Act, wherein the total equity value of all resources of the couple does not exceed the sum of the institutionalized spouse's resource limitation specified in subsection (a)(1) and the community spouse resource standard, as determined under Section 1924(f)(2)(A) of the Social Security Act.

~~(f)~~ **(g)** If nonexempt real property is not offered for sale or for rent at current market value within thirty (30) days of written notification of medical assistance or within thirty (30) days after the agreement referenced in subsection ~~(e)~~ **(f)** is signed, whichever is later, the recipient shall be ineligible for medical assistance.

(Office of the Secretary of Family and Social Services; 405 IAC 2-3-15; filed Dec 16, 1986, 11:00 a.m.: 10 IR 1080, eff Feb 1, 1987; filed Jul 16, 1987, 2:00 p.m.: 10 IR 2670; errata, 11 IR 96; filed Jun 30, 1989, 5:00 p.m.: 12 IR 2048; filed Dec 15, 1989, 11:50 a.m.: 13 IR 878; filed Aug 21, 1996, 2:00 p.m.: 20 IR 13; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA) NOTE: Transferred from the Division of Family and Children (470 IAC 9.1-3-17) to the Office of the Secretary of Family and Social Services (405 IAC 2-3-15) by P.L.9-1991, SECTION 131, effective January 1, 1992.

SECTION 6. 405 IAC 2-3-22 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-3-22 Trusts

Authority: IC 12-13-5-3; IC 12-15-1-10
Affected: IC 12-15-2-17; IC 12-15-3

Sec. 22. (a) This section:
(1) governs the treatment of trusts when determining eligibility of an applicant or recipient of Medicaid; ~~This section~~ **and**
(2) applies to trusts established by an applicant or recipient of Medicaid as defined in subsection (e).
As used in this section, "individual" means an applicant or recipient of Medicaid.

(b) A revocable trust established by an applicant or recipient shall be considered as follows:
(1) The corpus of the trust shall be considered resources available to the individual.
(2) Payments from the trust to or for the benefit of the individual shall be considered income of the individual.
(3) Any other payments from the trust shall be considered assets disposed of by the individual for purposes of section 1.1 of this rule **(405 IAC 2-3-1.1).**

(c) An irrevocable trust established by an applicant or recipient shall be considered as follows:
(1) If there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus or income from which payment to the individual could be made shall be considered resources available to the individual. Payments from that portion of the corpus or income shall be counted as follows:
(A) Payments to or for the benefit of the individual shall be considered income of the individual.
(B) Payments for any other purpose shall be considered assets disposed of by the individual subject to

section 1.1 of this rule **(405 IAC 2-3-1.1).**

(2) If there are no circumstances under which payment from a portion of the trust could be made to or for the benefit of the individual, the portion of the corpus or income from which no payment to the individual could be made shall be considered to be assets disposed of by the individual for purposes of section 1.1 of this rule **(405 IAC 2-3-1.1).** For purposes of section 1.1 of this rule **(405 IAC 2-3-1.1),** the following shall apply:

(A) The assets shall be considered disposed of as of the date:

(i) of establishment of the trust; or ~~the date~~

(ii) on which payment to the individual was foreclosed, whichever is later.

(B) The value of the trust shall be determined by including the amount of any payments made from that portion of the trust after the date in clause (A).

(d) As used in this section, "trust" includes, but is not limited to, any legal instrument or device that is similar to a trust. The term includes an annuity only to such extent and in such manner as allowed by regulations of the Secretary of Health and Human Services.

(e) For purposes of this section, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust, and if any of the following individuals established the trust other than by will:

(1) The individual.

(2) The individual's spouse.

(3) A person with legal authority to act in place of or on behalf of the individual or the individual's spouse, including, but not limited to, a court or administrative body.

(4) A person acting at the direction or upon the request of the individual or the individual's spouse, including, but not limited to, a court or administrative body.

(f) As used in this section, "assets" includes all income and resources of the individual and of the individual's spouse, including any income or resources ~~which~~ **that** the individual or the individual's spouse is entitled to but does not receive because of action **by:**

(1) ~~by~~ the individual or the individual's spouse;

(2) ~~by~~ a person with legal authority to act in place of or on behalf of the individual or the individual's spouse, including, but not limited to, a court or administrative body; or

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

(g) In the case of a trust, the corpus of which includes assets of an individual and assets of any other person or persons, this subsection shall apply to that portion of the trust attributable to the assets of the individual.

(h) Subject to subsection (i), this subsection shall apply without regard to any of the following:

(1) The purposes for which a trust is established.

(2) Whether the trustees have or exercise any discretion under the trust.

(3) Any restrictions on when or whether distributions may be made from the trust.

(4) Any restrictions on the use of distributions from the trust.

(i) This section shall not apply to any of the following trusts:

(1) A trust containing the assets of an individual under sixty-five (65) years of age who is disabled as defined in 42 U.S.C. 1382c(a)(3), and which is established for the benefit of the individual by 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 the individual up to an amount equal to the total medical assistance paid on behalf of the individual.

(2) A trust composed only of:

(A) pension;

(B) Social Security;

(C) other income of the individual; and

(D) accumulated income in the trust;

if the state will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual.

(3) A trust containing the assets of an individual who is disabled as defined in 42 U.S.C. 1382c(a)(3) that meets the following conditions:

(A) The trust is established and managed by a nonprofit association.

(B) 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.
(C) Accounts in the trust are established solely for the benefit of individuals who are disabled by:
(i) the parent, grandparent, or legal guardian of the individuals;
(ii) the individuals; or
(iii) a court.
(D) 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 to the state from the remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary.

(j) The office may waive the application of this section in cases of undue hardship, but only to the extent required by standards specified under 42 U.S.C. 1396p(d)(5) by the Secretary of Health and Human Services **and section 24 of this rule.**

(k) This section applies to trusts established on or after August 11, 1993. Trusts established before August 11, 1993, are governed by 42 U.S.C. 1396a(k).

(Office of the Secretary of Family and Social Services; 405 IAC 2-3-22; filed May 1, 1995, 10:45 a.m.: 18 IR 2225; errata filed Jun 9, 1995, 2:30 p.m.: 18 IR 2796; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA)

SECTION 7. 405 IAC 2-3-24 IS ADDED TO READ AS FOLLOWS:

405 IAC 2-3-24 Undue hardship exception for Medicaid eligibility purposes

Authority: IC 12-13-7-3; IC 12-15-1-10
Affected: IC 12-15-2-10

Sec. 24. (a) At the time an applicant is notified that they are being denied Medicaid benefits due to:
(1) section 1.1 of this rule;
(2) section 22 of this rule; or
(3) both;
the state shall notify the applicant that a hardship exception to the rules exists. An applicant may file for a hardship exception only if they chose not to file for an administrative appeal on the merits of their determination. The filing for a hardship exception shall serve as admittance by the applicant that a transfer for less than adequate consideration was made and the agency's determination of any penalty was correct. If an applicant files for both an administrative appeal and a hardship exception, the application for the hardship exception will be forwarded to the administrative law judge.

(b) The following persons can apply for the hardship exception and will have standing to pursue an appeal of denial of such exception:
(1) The applicant for benefits.
(2) The applicant's personal representative.
(3) The nursing facility in which the applicant currently resides, so long as the applicant or the applicant's personal representative consent.

(c) An applicant has thirty (30) days from the date they are notified that they are denied Medicaid benefits under subsection (a) to apply for the hardship exception.

(d) In order to qualify for a hardship exception, the recipient shall supply written documentation proving that the application of transfer of asset rules will deprive the applicant of:
(1) medical care such that the applicant's health would be endangered; or
(2) food, clothing, shelter, or other necessities of life.

(e) An undue hardship shall not exist when:
(1) the imposition of the transfer of assets provisions:

(A) merely cause the applicant inconvenience; or
(B) such imposition might restrict the applicant's lifestyle but not put the applicant at risk of serious deprivation;
(2) an individual is required to the sell an asset in an arms length transaction, which would result in a sale of the asset that is less than the current fair market value;
(3) the undoing of a transfer causes:
(A) adverse tax consequences; or
(B) penalties, interest, or other contract damages;
however where such penalties, interest, and contract damages are incurred in a contract between members of the same family (including step- and half- family members) the penalties, interest, and damages shall be considered transfers for inadequate consideration;
(4) applicant claims that:
(A) imposition of the transfer penalty will result in the dissolution of a marriage; or
(B) the only way to avoid the transfer penalty is to dissolve the marriage;
(5) the undoing of a transfer will cause hardship to an individual who is not the applicant.
This list shall not be exclusive, and the decision to deny an undue hardship exception shall not be limited to situations described in this subsection.

(f) The decision to grant or deny an undue hardship exception shall be made by the office within forty-five (45) days of receiving a request for an exception. Denial of an undue hardship exception under this section may be appealed by following the rules under article 1.1 of this title *[405 IAC 1.1]*. An ALJ may only issue a hardship waiver when the denial of the hardship waiver by the office is being appealed.

(Office of the Secretary of Family and Social Services; 405 IAC 2-3-24; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA)

SECTION 8. 405 IAC 2-8-2 IS AMENDED TO READ AS FOLLOWS:

405 IAC 2-8-2 Undue hardship due to Medicaid estate recovery

Authority: IC 12-8-6-5; IC 12-13-5-3; IC 12-15-1-10; IC 12-15-9-6
Affected: IC 12-15-9; IC 29-1-14-9

Sec. 2. (a) The office may waive the enforcement of the state's claim, in whole or in part, if enforcement of the state's claim will result in substantial and undue hardship for the surviving beneficiaries of the decedent's estate. The state's claim is suspended as long as the undue hardship condition continues to exist. **This rule is not applicable to undue hardships encountered by Medicaid applicants due to:**
(1) the imposition of transfer of property penalties; or
(2) rules related to the availability of trusts.

(b) For ~~the~~ purposes of this section, undue hardship exists only if enforcement of the state's claim would result in one (1) or more of the following conditions:
(1) Causing a beneficiary of the decedent's estate to become eligible for public assistance. As used in this section, "public assistance" means
(A) Aid to Families with Dependent Children;
(B) Medicaid;
(C) food stamps; or
(D) Supplemental Security Income.
(2) Causing a beneficiary of the decedent's estate who is currently eligible for public assistance to remain dependent on that public assistance.
(3) The complete loss of an income-producing asset or assets when the:
(A) beneficiary of the decedent's estate has no other source of income; and ~~the~~
(B) beneficiary's income does not exceed one hundred percent (100%) of the poverty level as determined annually by the U.S. Department of Health and Human Services.
(4) Other compelling circumstances as determined on a case-by-case basis by the office.
Undue hardship does not exist in circumstances where the state's recovery simply results in a loss of a preexisting standard of living.

(c) To be eligible for consideration for an undue hardship waiver, the beneficiary of the decedent's estate must, with the exception noted in this subsection, be a member of the immediate family of either the deceased recipient or the deceased recipient's spouse. For purposes of this section, "immediate family" ~~is defined as:~~ **means** a:

(1) spouse;
(2) child;
(3) grandchild;
(4) great-grandchild;
(5) parent;
(6) grandparent;
(7) brother; or
(8) sister.

In exceptional circumstances, if good cause is shown, a person other than an immediate family member may be eligible for consideration for an undue hardship waiver.

(d) The office shall notify the executor or personal representative of the deceased Medicaid recipient's estate of the state's claim against the estate and the affected beneficiary's right to apply for an undue hardship waiver. Application for an undue hardship waiver shall:

(1) be submitted to the office on such forms as may be designated by the secretary; ~~and shall~~
(2) include: ~~all of the following information:~~
~~(1)~~ **(A)** the name of the deceased recipient;
~~(2)~~ **(B)** the name of the person filing the application;
~~(3)~~ **(C)** the relationship of the applicant to the deceased;
~~(4)~~ **(D)** an explanation of the basis for requesting an undue hardship waiver;
~~(5)~~ **(E)** documentation of the existence of one (1) or more of the conditions described in subsection (b);
~~(6)~~ **(F)** other information as may be deemed necessary by the secretary; ~~Such application shall include~~ **and**
(G) a statement attesting to the accuracy of the information contained in the application; ~~and~~
(3) be signed by the applicant; ~~Applications for an undue hardship waiver shall~~ **and**
(4) be filed with the office within ninety (90) calendar days of the date that the executor or personal representative of the deceased's estate receives notification of the state's claim.

(e) The office shall review and rule on an application for a waiver of the state's claim within forty-five (45) calendar days of the receipt of a properly completed waiver application.

(f) If the office determines that an undue hardship does not exist, the office shall:

(1) notify the applicant of its decision in writing; and ~~shall~~
(2) inform the applicant of his or her right to request an administrative hearing and the procedures for filing an appeal.

An appeal and request for hearing must be filed within thirty (30) days of receipt of the office's decision that an undue hardship waiver has been denied.

(g) The office may not grant an undue hardship waiver if the granting of ~~such~~ **the** waiver will result in the payment of claims to other creditors with a lower priority standing in accordance with IC 29-1-14-9.

(h) The office may deny an undue hardship waiver if the granting of ~~such~~ **the** waiver will not result in the abatement of the undue hardship.

(Office of the Secretary of Family and Social Services; 405 IAC 2-8-2; filed Feb 15, 1996, 11:20 a.m.: 19 IR 1564; readopted filed Jun 27, 2001, 9:40 a.m.: 24 IR 3822; readopted filed Sep 19, 2007, 12:16 p.m.: 20071010-IR-405070311RFA; filed Aug 18, 2009, 11:33 a.m.: 20090916-IR-405080325FRA)

LSA Document #08-325(F)
Notice of Intent: 20080430-IR-405080325NIA
Proposed Rule: 20080827-IR-405080325PRA
Hearing Held: September 19, 2008
Approved by Attorney General: August 10, 2009
Approved by Governor: August 17, 2009
Filed with Publisher: August 18, 2009, 11:33 a.m.
Documents Incorporated by Reference: None Received by Publisher

Small Business Regulatory Coordinator: Scott Linneweber, 402 West Washington Street, Room W451, Indianapolis, IN 46204, (317) 233-0024, scott.linneweber@fssa.in.gov

Posted: 09/16/2009 by Legislative Services Agency
An html version of this document.