Policy Memo	
KDHE-DHCF POLICY NO: 2022-02-01	**From: Erin Kelley, Senior Manager**
Date: February 07, 2022	**Medical KEESM Reference(s): 5621(2), 5721(9), 5722(1), 5722(2), and 5723.2**
RE: Transfer to an Exempt Pooled Disability Payback Trust After Age 64	**Program(s): LTC Programs**

This memo sets forth instructions for implementation of policy changes concerning the application of an inappropriate transfer penalty when funding an exempt pooled disability payback trust after age 64. The Medical KEESM manual will be updated with the next scheduled revision.

I. Background

A properly structured irrevocable pooled disability payback trust is exempt as a resource for eligibility purposes. See Medical KEESM 5621(2). By policy, the trust may be created and funded by a grantor/beneficiary of any age and still qualify for exempt status. However, any assets transferred to the trust after age 64 are subject to an inappropriate transfer penalty for long-term care coverage purposes. See Medical KEESM 5722(1). While the trust itself may be an exempt resource, funding of the trust at age 65 or older may still be subject to a disqualifying penalty period for long term care coverage.

In general, an inappropriate transfer penalty may be negated by showing that the transfer was made either for adequate consideration or with the intent to receive adequate consideration. See Medical KEESM 5721(9) and 5723.2 respectively. These provisions have previously not been routinely applied to transfers to pooled trusts after age 64. Such transfers were generally simply penalized as inappropriate since adequate consideration was deemed to have not been received. However, recent judicial decisions have prompted a revisit of existing policy.

II. POLICY

Effective with the issuance of this memo, a potentially otherwise disqualifying inappropriate transfer penalty imposed due to funding of an exempt pooled disability payback trust after age 64 may be negated by a satisfactory showing that the trust grantor/beneficiary received, or intended to receive, adequate consideration for the transferred assets. To negate/rebut the agency assumption that the transfer was uncompensated, the applicant/recipient must thoroughly demonstrate either of the following:

A. ACTUARIALLY SOUND

Evidence must be presented that the value of all assets transferred to the trust after age 64 will be used for the benefit of the trust beneficiary within his/her life expectancy. In other words, the transfer must be actuarially sound. Life expectancy shall be established according to the T-4 Life Expectancy Table in the Medical KEESM Appendix based on the beneficiary's age at the time of the transfer(s). If the applicant/recipient fails to provide documentation that the transfer(s) is/are actuarially sound in this manner, the transfer(s) in full is/are considered an inappropriate transfer subject to penalty.

<u>Example 1</u>: An 85-year old woman with a life expectancy of 6.91 years transfers $20,000 to a pooled trust with the stated intent to use the funds to pay the difference between the cost of a shared vs private room in the nursing home once she qualifies for Medicaid coverage. Since the difference in the shared vs private room rate for the facility she is residing is a $500 per month, the funds she transferred to the trust are anticipated to be fully expended on her behalf in 40 months, which is well within her agency-established life expectancy. Therefore, the transfer is considered actuarially sound with adequate consideration to be received in her lifetime in return for the transfer, and no inappropriate transfer penalty would be applied.

<u>Example 2</u>: A 75-year old man with a life expectancy of 11.8 years transfers $10,000 to a pooled trust with the stated intent to use the funds for non-covered out-of-pocket medical expenses. The grantor/beneficiary provides verification that these expenses have averaged about $1,000/year over the last several years. Since it is anticipated that the transferred funds will be fully expended on his behalf in the next 10 years, which is within his agency-established life expectancy, the transfer is considered actuarially sound. No inappropriate transfer penalty would be applied.

<u>Example 3</u>: A 73-year old man with a life expectancy of 12.33 years transfers $12,000 to a pooled trust with the stated intent to use the funds for non-covered out-of-pocket medical expenses. The grantor/beneficiary provides verification that these expenses have averaged $500/year over the last several years. Since it is not anticipated that the transferred funds will be fully expended on his behalf in the next 12.33 years, which is within his agency-established life expectancy, the transfer is not considered actuarially

sound. This transfer would be considered an inappropriate transfer subject to a transfer of property penalty.

Note: In example 3, because the transfer did not intend to receive adequate consideration at the time of the transfer, the entire $12,000 is subject to the transfer of property penalty.

B. INTENT

The applicant/recipient must demonstrate that when the trust was funded, there was an intent to receive adequate consideration. Evidence must be presented that based on the non-covered medical needs of the grantor/beneficiary at the time the pooled trust was funded after age 64, the funds were anticipated to be fully expended within his/her life expectancy. Should unforeseen circumstances change after funding of the trust which subsequently makes expenditure of all transferred funds unlikely or impossible within his/her life expectancy, adequate consideration is still considered to have been received if the original demonstrated intent would have been actuarially sound.

Note that a simple affidavit, without other compelling documentation, indicating the grantor/beneficiary intended to fully use the funds for a stated purpose within his/her life expectancy does not constitute sufficient evidence for purposes of this policy. In general, to be compelling, the evidence presented must be documented rather than attested.

Example 4: Same 85-year old woman as in Example 1 above. If she unexpectedly transitions from the nursing home to HCBS after 6 months, she will have $17,000 remaining in the trust that will likely not be expended on her behalf within her remaining lifetime. But, since her original intent was to fully spend the funds within her life expectancy, she will not be penalized due to an unanticipated change in circumstances. No transfer penalty would be applied.

However, if it had been known at the time of the funding that the nursing home stay was indeed only temporary and not permanent, then the transition to HCBS could be foreseen, negating any claim that the intent was to make the transfer actuarially sound. In that instance, a transfer penalty would be appropriate.

Example 5: A 65-year old man with a life expectancy of 17.81 years transfers $15,000 to a pooled trust with the stated intent to use the funds to travel out-of-state to visit his younger brother once a year. The documented cost of the annual excursion is approximately $1,500. It is anticipated the funds will be fully expended in 10 years. After 3 years, his brother unexpectedly passes away. He applies for long term care coverage at age 69 with $10,500 remaining in the trust account, which will likely never be expended within his lifetime. Since the intent at the time of funding was to expend all the funds within his life expectancy, the transfer is considered actuarially sound. He will not be penalized for the unanticipated change in circumstances. No transfer penalty would be applied.

Example 6: An 81-year old woman with a life expectancy of 9.04 years transfers $5,500 to a pooled trust. Upon review, the worker finds that there is no stated intent for how the funds would be used, other than the joinder agreement stating these monies are excess resources. As the funds were transferred to a pooled trust after she turned 65-years old, the entire $5,500 is considered an inappropriate transfer subject to a transfer of property penalty.

Note: When multiple transfers to the trust occur after age 64, each transfer is evaluated separately based on the date of the transfer and how the funds are/were intended to be used. This may result in some transfers being considered actuarially sound, or intended to be actuarially sound, while others are penalized as an inappropriate transfer. When multiple transfers are to be penalized, see Medical KEESM 5724.3.

III. PROCESS

The process for eligibility staff has not changed. All trusts, including pooled disability payback trusts (i.e. ARCare Trust, Midwest Special Needs Trust, and Northview Developmental Disabilities Trust), along with all supporting documentation, shall continue to be sent to KDHE Eligibility Policy for review. See Medical KEESM 5600. KDHE Eligibility Policy will determine the availability of the trust as a resource and whether an inappropriate transfer has occurred. If additional information is needed, eligibility staff may be directed to request the information from the applicant/recipient and forward to KDHE Eligibility Policy upon receipt for further review.

IV. QUESTIONS

For questions or concerns related to this document, please contact the KDHE Medical Policy Staff at KDHE.MedicaidEligibilityPolicy@ks.gov.

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Questions regarding any KEES issues are directed to the KEES Help Desk at KEES.HelpDesk@ks.gov.