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 | ADMINISTRATIVE DIRECTIVE |
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TRANSMITTAL: 96 ADM-16

TO: Commissioners of
 Social Services

DIVISION: Services and
 Community
 Development

DATE: August 28, 1996

SUBJECT: FOSTER CARE: Retention of Income by Child in Foster Care
 (Use of Trust Funds to Preserve Savings)

SUGGESTED
 DISTRIBUTION:

Directors of Services
 Foster Care Caseworkers and Supervisors
 Attorneys for Local District
 Staff Development Coordinators
 Medical Assistance Directors and Supervisors

CONTACT PERSON:

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ATTACHMENTS:

ATTACHMENT A--18 NYCRR 431.4 (available on-line)
 ATTACHMENT B--Definitions (available on-line)
 ATTACHMENT C--Model form for Trust (available on line)
 ATTACHMENT D--Excerpts ACF-AT-93-2 (available on line)

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
96 ADM-8		426.4	398.6(j)		45CFR 233.20 (a)(3)(ii) (d)
		431.4			HHS ACYF PIQ 82-15 AND ACF-AT-93-2

I. PURPOSE

The purpose of this directive is to instruct social services districts on the use of trust funds to implement provisions of 18 NYCRR 431.4 applicable to the retention of earned income by children in foster care. The directive gives direction on how to use trust funds to allow a foster child to retain earned income as savings while still retaining Title IV-E eligibility for federal reimbursement for foster care maintenance.

While not specifically addressed in this directive, these principles and the use of irrevocable trusts for accumulation of savings are applicable to non-Title IV-E eligible children in foster care as well as the Title IV-E eligibles. However, the use of trusts for non-Title IV-E foster Children may have implications for Medical Assistance eligibility in certain circumstances.

II. BACKGROUND

Pre-existing Law and Regulation

Chapter 948 of the Laws of 1966 added a provision to Section 398.6 of the Social Services Law (SSL) that allowed a child in foster care with earned income to retain a portion of that income "for future identifiable needs". This provision also set a limit of \$50/month on such savings. The rationale for the limit was based on the then existing federal resource limit of \$600 for eligibility for assistance including foster care.

Chapter 730 of the Laws of 1984 amended the provision established in 1966, now SSL Section 398.6(j), by removing the \$50 limit. This was done on the ground that the \$50/month limit was no longer valid, in that the federal resource limit had changed to \$1,000 and that there was no clear authority for limiting what a child who had earned the income could do about retaining it. While there was no rational basis for specifically limiting what a child could retain of earned income, there was a need to refer to the federal income and resource limits applicable to continuing eligibility for federal reimbursement for the cost of foster care maintenance. Thus the wording of the law in SSL 398.6(j) permits children in foster care "to retain the maximum amount of their monthly earned income for future identifiable needs in accordance with the regulations of the department and consistent with the federal law applicable to the treatment of income and resources under the aid to families with dependent children program." The reference to the Aid to Families with Dependent Children (AFDC) program reflects the fact that federal law makes the AFDC (Title IV-A) income and resources standards the standards for eligibility for Title IV-E foster care assistance.

Federal Standards

The federal standards on earned income and resources applicable to continuing Title IV-E eligibility for a child in foster care are:

Gross monthly earned income not in excess of 185 per cent of the child's standard of need (which is defined as equal to foster care maintenance cost);

Resources (including savings) not to exceed \$1,000, taking into account statutory exclusions and disregards.

These standards apply to all children in foster care up to the age of eighteen and children in foster care over eighteen but under nineteen who are in school, who are full-time students, and who will complete their schooling before their nineteenth birthday.

The impact of the resources eligibility standards on retained income will apply primarily to older children in foster care, as they are the children most likely to have earned income. The resource limits, however, may apply to any child who has accumulated savings, regardless of whether the source of the savings is earned or unearned income. The scope of this directive is specifically directed to savings accumulated as the retention of earned income by a child in foster care, but the same principles for the use of an irrevocable trust for the accumulation of savings may be applied to unearned income that becomes available to a child in foster care so long as the source of the unearned income does not preclude the use of the income in this manner.

Treatment of Savings

Savings, as a resource, would generally be subject to the \$1000 limit. If a child has savings (or a combination of savings and other resources) that aggregate to over \$1,000, that child would no longer be eligible for Title IV-E reimbursement of his or her foster care maintenance cost.

In November 1991, the Department requested an interpretation from the federal Department of Health and Human Services (DHHS) as to whether the use of trust funds to retain a child's savings for future identifiable needs may be a means of accumulating savings without having to count the trust fund as a resource for determining eligibility for Title IV-E. A favorable response from the DHHS Region II office in December 1991 indicated that funds placed in a non-invadable trust, to become accessible by the child only when the child leaves foster care or reaches age 18 would not be considered as available to the child and therefore would not have to be counted as a resource subject to the \$1,000 limitation. Assuming no other resource issues applied, the child would remain eligible for Title IV-E. The Region II response was based on ACYF PIQ 82-15 (September 15, 1982) which indicated that, in determining continued need, an agency need look only at income and resources "actually available to the child in foster care."

A more recent HHS Action Transmittal, ACT-AF-93-2 (January 13, 1993), addresses the retention of earnings issue with particular reference to treatment of trust funds. As in the 1982 transmittal, the key applicable principle is whether a resource is "available" to the child in foster care. ACF-AT-93-2 cites Federal Regulation 45 CFR 233.20(a)(3)(ii)(D) which provides as a general rule that "income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." If an individual has the legal ability to access a cash resource or to convert a non-cash resource to cash for his or her own use, the resource is considered available. A non-invadable, irrevocable trust would not be considered available, and therefore

would not have to be counted as a resource subject to the \$1000 resource limit.

III. PROGRAM IMPLICATIONS

Based on the 1991 DHHS response, Department regulation 18 NYCRR 431.4 has been revised to provide that "a child or minor in foster care as a public charge is permitted to retain the maximum amount of his or her earned monthly income as savings for future identifiable needs" and refers to Section 426.4 of Department Regulations. Section 426.4 contains the references to the income and resource standards for continuing eligibility for Title IV-E foster care reimbursement. In addition, Section 431.4 requires that "a social services district must make efforts to preserve the child's eligibility for federally reimbursable foster care maintenance payments and to provide the child with a means to accumulate resources to assist in meeting his or her permanency planning goal."

The aim of the revised regulations is two-fold:

- To allow children in foster care to retain earned income in savings for future use; and
- To maintain State/local ability to preserve the child's Title IV-E eligibility and draw federal reimbursement.

The vehicle by which these goals may best be accomplished is the use of an irrevocable trust established for the benefit of the child. This has been validated in the HHS transmittal ACF-AT-93-2 which notes that, unless there is a specific State policy on transfer of assets that would prohibit such an action, "savings in excess of the \$1,000 resource limit can be preserved while the family receives AFDC if the savings are placed in an irrevocable trust." As the income/resource standards for Title IV-E eligibility are specifically tied by federal statute and regulations to the Title IV-A (AFDC) income/resource standards, a child's Title IV-E eligibility status may also be maintained if a child's savings from earned income are placed in an irrevocable trust. Such a trust must be voluntary, established with the consent of the child. The trust must be non-invadable while the child is in foster care. Neither principal nor interest may be available to the child during the life of the trust.

Simply designating a future use for funds in a savings account, such as savings for future education or to establish one's own household when discharged from foster care, will not suffice to constitute a trust or to make the funds "unavailable" to the child or for the support of a child's foster care upkeep and maintenance. Income retained or deposited in a regular savings account held in the name of the child in foster care would generally meet the availability tests and would have to be counted as a resource. As the funds deposited are from income earned by the child, the child clearly has a legal interest in the funds. The child also maintains a legal interest in funds which are deposited to an account in his/her name. The child would have (or the child's parent or guardian would have), under normal deposit agreements, the legal ability to access the funds in his/her account. By all

standards, then, money in a regular savings account would have to be considered available to the child.

Similarly, an example of a trust that would not meet the tests for exclusion as income or resource would be one where, although the parent or child does not have direct access to the funds, funds may be disbursed by an administrator of the trust for the maintenance needs of a child. The funds received would be counted as income in the month paid and the total of the trust fund (or at least so much as can be used by the trustee for maintenance support payments) would have to be counted as an available resource.

In order to avoid these situations, the use of a non-invadable, irrevocable trust will allow the accumulation of savings while retaining Title IV-E eligibility for foster care maintenance support. Although not directly addressed by New York law, a child may apparently create such a trust. However, a key issue is whether the creator of a trust, including a child, has the capacity to understand what is being done in the creation of the trust and the consequences of doing so or is able to act in a reasonable manner in relation to the creation of the trust. Where a person, including a child, does not have this capacity, the trust may be created by a parent or other guardian on behalf of the child, so long as it is irrevocable and for the sole benefit of the child.

Before the trust is established, the foster child must be informed of the effect of the trust. The foster child must be made aware that funds placed in the trust may not be withdrawn until the termination of the trust, that is, until the child's discharge from foster care or the attainment of his or her eighteenth birthday (or the completion of schooling between his or her eighteenth and nineteenth birthdays).

A child may not be forced to participate in a trust. However, if he or she does not, any accumulation of income or resources that exceed the federal eligibility standards must either be spent on personal needs or be contributed to the cost of care of the child to reduce the federal share of that care. Such contribution would be necessary in order to maintain the child's Title IV-E eligibility and to retain maximum federal financial participation in the cost of the foster child's maintenance and care.

Money earned in the month earned is income and subject only to the income test for Title IV-E eligibility which is 185% of the foster care standard of need (equal to the cost of care or the rate paid for care). If that income is spent and not saved, it does not become a resource. Current statutes and regulations set no limits on how income may be spent. So a child may use his or her income for any "personal needs" (self-defined) that he or she wishes. Only when the income is saved, whether in a shoe box or savings account, does it become a resource and subject to the resource standard.

IV. REQUIRED ACTION

Local districts must, where a child has earned income, encourage the child to save as much of his or her income as possible for future identifiable needs, such as to continue education or to establish his or her own living

environment, etc. In order that these savings not jeopardize Title IV-E eligibility and continued federal assistance for the cost of foster care maintenance, districts should specifically encourage the use of trusts. Districts may also recommend and utilize the irrevocable trust mechanism for savings of available unearned income that would otherwise cause the child's resource accumulation to exceed the Title IV-A/IV-E resource limit.

The following principles apply to the establishment of trust funds so that they meet the necessary requirements for exclusion from resource accounting.

The trust:

- must be in the name of an individual child and for that child's sole benefit;
- must provide for non-invadability of principal or interest;
- must not allow access to or conversion of trust resources by the child or by a parent, guardian, or other person on behalf of the child;
- must provide that the trustee is responsible to preserve the contents of the trust for the child until termination of the trust;
- must allow for voluntary contributions to the trust from earnings or other income of the child for whom the trust is held;
- may allow the trustee to invest funds, provided that there is no loss of or risk to principal;
- must include terms that terminate the trust upon a child's discharge from foster care or upon attaining his or her eighteenth birthday. (Note: if a child will not complete his or her schooling until between his or her eighteenth and nineteenth birthdays, the trust may be set to terminate upon the completion of that school year.)

In addition to these terms, the trust form should also include provisions for disposal/dispersal of the trust in the event of the death of the child prior to the termination of the trust. Examples of such dispositions would include transfer of the trust or its proceeds to a sibling or payment of the trust to the child's parent, guardian or caretaker or inclusion of the trust in the child's estate.

Trusts must be established with appropriate legal assistance. This may be the attorney who represents the local district (whether that be the county attorney, an attorney assigned to or employed by the social services district or a volunteer attorney who serves the district pro bono) or any other attorney who may represent the child (such as a guardian ad litem) or who is willing to provide the necessary services to establish the trust to the child and/or to the local district.

The trustee must act in a fiduciary capacity in the administration of the trust. The trustee must act in good faith and wholly in the interests of the beneficiary of the trust. The trustee must accept his or her appointment as trustee. It is advisable that a successor or substitute trustee also be appointed at the time the trust is created. The successor or substitute trustee would serve as trustee in the event of the death of the trustee or of the inability of the trustee to continue.

A social services official, voluntary agency official, the child's law guardian, a third party or a bank official could be the trustee. There is no legal prohibition against a parent, legal guardian, or other person legally responsible for the child being trustee of the trust established for a foster child, so long as that individual understands and can carry out the fiduciary responsibilities of a trustee. If the trust fund is non-invadable, the element of the legal ability of the child to make the resource available should not be present, even when a parent, guardian or social services official is the trustee.

The trust agreement should require that the trustee waive any applicable fees. Since the purpose of the trust fund is to allow the foster child to accumulate the maximum amount of resources pending discharge from foster care, no fees should be allowed. If no other trustee is available to act without fee, the social services official must serve as trustee without fee.

V. MA IMPLICATIONS

The establishment of an irrevocable trust from accumulated savings of a child receiving foster care may have an effect on the Medical Assistance (MA) services for which the child may be eligible, depending on whether the child is in receipt of IV-E or non IV-E foster care.

In determining MA eligibility for IV-E foster care children, an irrevocable trust created from earned or unearned income as described in this ADM cannot be counted as available income or resources. Any interest accrued on such an irrevocable trust is also considered unavailable. These children continue to be eligible for all MA services.

However, establishing an irrevocable trust may have implications for a non IV-E child in foster care, since MA-Only eligibility criteria are used. Transferring assets into an irrevocable trust may render the child ineligible for nursing facility services as described in 96 ADM-8, page 7, including placements in Residential Treatment Facilities (RTFs) and Intermediate Care Facilities (ICFs), since both of these are considered to be nursing facilities for purposes of evaluating transfers of resources.

If a non IV-E foster child becomes in need of such nursing facility services, the placement of monies into an irrevocable trust must be evaluated for transfer implications. These children would continue to be eligible for all other MA services (referred to as community coverage). Districts are reminded to consider the possibility of undue hardship criteria for non IV-E foster care children who are in need of nursing facility services and who have established a trust. Payments made from the trust to or for the benefit of

the Applicant/Recipient child shall be considered available income in the month received.

There are certain "exception trusts" which may be disregarded as available income and resources for purposes of determining MA eligibility for certified blind/disabled children. For more information on "exception trusts", refer to 96 ADM-8, pages 8-11.

District Services staff can arrange for the establishment of trusts meeting the requirements described in Section IV, "REQUIRED ACTION", as the need arises.

Since MA eligibility is guaranteed to IV-E eligible children, MA must continue to be authorized until Services advises Medical Assistance staff that Title IV-E eligibility no longer exists. When Services advises MA that an irrevocable trust has been established for a non IV-E foster child, MA coverage must be reevaluated. If nursing facility services are required, transfer implications must be considered.

VI. SYSTEMS IMPLICATIONS

UPSTATE SYSTEMS

When an irrevocable trust exists at application or when Services notifies MA that an irrevocable trust has been established, the MA coverage code used will depend on whether the district has evaluated the case for transfer implications. When the district has not evaluated transfer implications, the district must use coverage code 10 for all non IV-E foster care children who are MA eligible and have placed monies in an irrevocable trust. When transfer implications have been considered and limitations have been determined not to apply, full coverage (coverage code 01) will be used.

NEW YORK CITY SYSTEMS

Coverage code 10 cannot be used for foster care children in New York City. Therefore, SERMA may generate inappropriate Medicaid coverage for non IV-E foster care children who are MA eligible and have placed monies in an irrevocable trust. These cases should be reviewed before nursing facility services noted above are provided.

VII. ADDITIONAL INFORMATION

The text of 18 NYCRR 431.4 is included as Attachment A of this directive.

Definitions of key terms are included as Attachment B.

A model form for irrevocable trusts is included as Attachment C to this directive and may be used by districts, by attorneys, or by child caring agencies wishing to establish trusts for foster children with earned and/or unearned income. This form incorporates the principles set forth in this directive.

Date August 28, 1996

Trans. No. 96 ADM-16

Page No. 9

Relevant excerpts from DHHS ACT-AF-93-2 are included as Attachment D of this directive for reference.

VIII. EFFECTIVE DATE

The effective date of the provisions in this directive is August 30, 1996, retroactive to September 30, 1992, the effective date of the promulgated regulatory amendments in 18 NYCRR 431.4.

Rose M. Pandozy
Deputy Commissioner
Division of Services and Community Development

18 NYCRR 431.4

431.4 Retention of earnings of children in foster care. A child or minor in foster care as a public charge is permitted to retain the maximum amount of his or her earned monthly income as savings for future identifiable needs in accordance with Section 426.4 of this Title. A social services district must make efforts to preserve the child's eligibility for federally reimbursable foster care maintenance payments and to provide the child with a means to accumulate resources to assist in meeting his or her permanency planning goal.

DEFINITIONS

A number of terms used in this directive may be unfamiliar. The following definitions are included to clarify these terms as used in relation to the subject of this directive.

Beneficiary--A person named in a trust account as the one for whom the account is managed or administered; the person for whose benefit property is held in trust.

Irrevocable trust--A trust that cannot be revoked, withdrawn or cancelled until the terms of the trust and/or the expiration/termination date of the trust are completed.

Non-invadable trust--Trust in which none of the funds or other property in the trust (neither principal nor any earned income) may be removed until the termination of the trust.

Trust--Funds or property held in a special account or under the administration of a person or entity who keeps it for the benefit of another; A right of property, real or personal, held by one party (the trustee) for the benefit of another (the beneficiary); Any arrangement whereby property is transferred with the intention that it be administered by a trustee for another's benefit.

Trustee--Person in whom property, interest, or power is vested, under an express or implied agreement that that person administer or exercise the property, interest or power for the benefit of or to the use of another; A person or institution who manages money or property for another and who must exercise a standard of care in such management activity as imposed by law, contract or agreement.

ATTACHMENT C

TRUST AGREEMENT

SPECIMEN FORMAT

TRUST AGREEMENT

ARTICLE ONE. DECLARATIONS

A. THIS TRUST AGREEMENT is made this ____ day of _____,
_____, by and between _____,
residing at _____, _____, New York
(herein called the "Grantor"), and _____,
residing at _____, _____,
New York (herein called the "Trustee"). _____
is designated as the Beneficiary of the trust.

B. The Grantor and the Trustee hereby declare their mutual
agreements governing the trust fund to be as contained in this instrument.

C. The Grantor is currently a foster child in the care and custody
of an authorized agency as defined by Section 371(10) of the Social Services
Law. The Grantor cannot have available resources in excess of the amount
allowed by regulations of the United States Department of Health and Human
Services or the New York State Department of Social Services without adversely
affecting eligibility for federal reimbursement for foster care maintenance
payments. The trust agreement is in compliance with state and federal laws
and regulations regarding foster care services and eligibility. The trust
agreement will not prevent federal reimbursement of the cost of foster care of
the Grantor.

ARTICLE TWO. THE TRUST ESTATE

A. The Grantor has delivered and irrevocably transferred to the
Trustee the property set forth in Schedule A (attached to and made a part of
this instrument) IN TRUST under this instrument.

B. All of the property described in the schedules that have been made part of this instrument, and any property that later becomes subject to the trust, shall constitute the trust estate, which shall be administered, paid over and delivered by the Trustee in accordance with the terms of this instrument.

C. The Trustee accepts the property transferred in trust and hereby acknowledges that the Trustee holds said property in trust for the purposes and subject to the conditions herein stated. The Trustee hereby expressly undertakes and assumes the trust created hereunder and agrees to carry out the provisions of this Agreement. The Trustee agrees to hold the trust fund, including any cash, securities or other property, real, personal or mixed, at any time forming a part of this trust, and to collect and receive the income, and to apply and distribute the income and principal as provided in this instrument.

D. The Trustee shall invest and reinvest the trust fund in accordance with section J. of this Article during the lifetime of the Beneficiary or until the Beneficiary is discharged from foster care. Said period shall be called the "trust term."

E. The Beneficiary shall have no direct control over the trust account or over the disbursement of the trust funds. The principal and income of the trust account shall not be expended on behalf of the Beneficiary or invaded by the Beneficiary during the trust term.

F. The Grantor unequivocally expresses Grantor's intention that Section 7-1.6(b) of the Estates, Powers and Trusts Law of the State of New York, or any successor statute, of any other jurisdiction, shall not be applied by any court having jurisdiction of an inter vivos or testamentary

trust to compel, against the Trustee's discretion, the payment or application of the trust principal to or for the benefit of the Beneficiary or any beneficiary for any reason whatsoever. It is the Grantor's intention that the Trustee shall not be held accountable to any court or to any person for the exercise or non-exercise of this completely discretionary power.

G. The trust shall terminate on the discharge of the Beneficiary from foster care or the death of the Beneficiary, whichever occurs first. Discharge from foster care for the purposes of this trust agreement will mean final discharge from foster care, whether to a status of independent living or discharge to a parent, relative or person legally responsible, or the issuance and entry of a court order that removes the care and custody of a child from an authorized agency.

H. Upon the termination of the trust, the Trustee shall distribute any principal and accumulated interest that then remains in the trust as follows:

1. If the trust term shall end upon the discharge from foster care of the Beneficiary, then to the Beneficiary free of further trust.

2. If the trust term shall end upon the death of the Beneficiary, then to the heirs of the Beneficiary, with their identity and respective shares to be determined in accordance with the laws of the State of New York.

- I. In the event of a ruling that (1) the provisions of this trust are void as being against public policy; or (2) the trust fund may be subject to the claims of the federal, state or local agencies for services rendered to the beneficiary; or (3) the trust fund is considered a resource of the Beneficiary under any entitlement program, then in the sole

discretion of the Trustee this trust and the lifetime interest of the Beneficiary shall terminate and the trust property shall be distributed in accordance with the provisions of Section H.1 of this Article.

J. The Trustee shall have the power to invest and reinvest the trust corpus in a savings account in any federally insured lending institution and keep the trust corpus invested and intact so far as the Trustee is able to do so to advantage. The Grantor may make direct deposits of funds into the trust account established by the Trustee.

K. No interest in the principal or income of this trust shall be anticipated, assigned or encumbered or shall be subject to any creditor's claims or to any legal process prior to the actual receipt by the beneficiary. Furthermore, no part of the corpus hereof, neither principal nor undistributed income, shall be construed as part of any beneficiary's estate or be subject to the claims of voluntary or involuntary creditors for the provision of care and services, including residential care by any public entity, office, department, or agency of any state or the United States or any governmental agency.

L. For purposes of determining the beneficiary's eligibility for federally reimbursed foster care maintenance payments, no part of the principal or undistributed income or the trust estate shall be considered available to the Beneficiary.

ARTICLE THREE. SUCCESSOR TRUSTEE

Persons shall succeed to the position of Trustee in the following priority:

A. In the event that the Trustee should die during the trust term, or should resign or refuse or become unable to perform the duties of

Trustee, then _____ shall become and be the final Trustee without the execution of any document.

B. In the event the remaining Trustee should resign or refuse or become unable to perform the duties of Trustee, then the remaining Trustee may appoint a Successor Trustee by instrument in writing delivered to the Beneficiary.

C. Any successor Trustee shall qualify by executing an instrument in writing, duly acknowledged, by which he or she expressly agrees to assume the trust and to carry out the provisions hereof.

ARTICLE FOUR. ADDITIONS TO THE TRUST FUND

The Grantor, or any other person, may at any time and from time to time either by inter vivos transfer or by will, assign, set over, give bequeath or devise other and further property to the Trustee, and the Trustee shall receive and accept any such additions to the trust fund in the form of cash, securities or other property, real, personal or mixed. Any and all such additions shall be administered as part of this trust fund and subject to the terms and conditions of this Agreement.

ARTICLE FIVE. POWER OF RESIGNATION

A Trustee may resign at any time by delivering or mailing written notice of resignation to the Beneficiary and the Guardian of his or her property, and to each adult person who would be entitled to a share of the principal if the trust were to terminate at the time of mailing or delivering notice. Such resignation shall take effect upon the date specified in the notice, but not less than thirty days after mailing or delivery, and upon the date so specified all duties of the Trustee so resigning shall cease.

ARTICLE SIX. BOND AND LIABILITY OF TRUSTEE

A. No bond shall be required of any Trustee, or any successor Trustee, in any jurisdiction in which they may be called upon to act.

B. No Trustee shall be liable for any loss or damage sustained by the trust, or by any person interested therein, by reason of any act or failure to act, or of any exercise of discretion or failure to exercise discretion, or of any cause or reason whatsoever, except a Trustee shall be liable for the Trustee's own individual or joint acts of fraud, bad faith or willful misconduct.

C. A Trustee may consult with counsel and shall be fully protected in any course of conduct taken in accordance with the advice of counsel.

ARTICLE SEVEN. COMPENSATION

The Trustee shall serve without commissions or other compensation provided that any and all expenses incurred by the Trustee in the course of performing the Trustee's duties hereunder (including taxes incurred) shall be reimbursed from the trust fund.

ARTICLE EIGHT. TRUST ACCOUNTING

A. The accounts of the Trustee for the Trustee's proceedings under this Trust Agreement may be settled without judicial accounting by submission of the accounts to and approval or adjustment by the Beneficiary, or if the Beneficiary has not yet attained his or her majority, then by the Guardian of his or her property. Any such approval or adjustment shall be binding and conclusive upon all persons interested in the trust fund.

B. There shall be no interim accounting required of the Trustee during the trust term.

ARTICLE NINE. DEFINITIONS

Whenever in this Agreement the words "Trustee" or "Trustees" are used, they shall be construed, unless otherwise indicated, to include the Trustee and the Trustee's successor or successors in office, and all pronouns used herein in reference to such Trustee shall be construed in the singular or plural, and in such gender, as the sense and circumstances require.

ARTICLE TEN. PERPETUITIES SAVING PROVISION

Anything herein to the contrary notwithstanding, the trust created by this agreement shall terminate not later than the expiration of twenty-one (21) years after the death of the last survivor of the descendants of the Grantor's parents in being at the date of this Trust Agreement, and if a trust shall be in existence hereunder on such expiration date such trust shall terminate on such date and the principal thereof shall be assigned, transferred and paid over to the then income beneficiary or beneficiaries thereof.

ARTICLE ELEVEN. IRREVOCABILITY

This trust may not be terminated, revoked, altered, or amended in any respect by any person. This trust Agreement is hereby declared to be irrevocable, and the Grantor expressly surrenders, waives and releases all right and power to terminate, revoke, alter, or amend it in any respect.

ARTICLE TWELVE. GOVERNING LAW

This Trust Agreement shall be interpreted and the administration of the trust shall be governed by the laws of the State of New York.

(NOTHING FURTHER)

SCHEDULE A

Schedule to the Trust dated _____, _____ between

_____, as Grantor, and

_____, as Trustee.

Description

Approximate Amounts

Grantor

Trustee

USDHSS ACTION TRANSMITTAL ACF-AT-93-2

The following is a typewritten copy of relevant text of the United States Department of Health and Human Services, Administration for Children and Families (ACF), Office of Family Assistance, Action Transmittal ACF-AT-93-2, dated January 19, 1993. While every effort has been made to ensure that the copied text is accurate, districts and others are cautioned that any action taken in reference to this Transmittal should include consultation of the original document issued and signed by DHHS, which is available upon request from the USDHHS ACF Regional Administrator.

Aid to Families with Dependent Children (AFDC) Action Transmittal

TRANSMITTAL No.: ACF-AT-93-2

Date: January 19, 1993

TO: STATE ADMINISTRATORS AND OTHER INTERESTED ORGANIZATIONS AND AGENCIES

SUBJECT: Availability of Income and Resources

RELATED REFERENCES: Section 402(a)(7) and (a)(8) of the Social Security Act (the Act
 45 CFR 233.20(a)(1)(i)
 45 CFR 233.20(a)(3)(i)(B)
 45 CFR 233.20(a)(3)(ii)(A)
 45 CFR 233.20(a)(3)(ii)(D)
 45 CFR 233.20(a)(3)(ix)

PURPOSE: This transmittal provides clarification of AFDC policy regarding availability of income and resources under 45 CFR 233.20(a)(3)(ii)(D).

BACKGROUND: 45 CFR 233.20(a)(3)(ii)(D) provides as a general rule that "income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." Under this provision, a resource is considered available if the individual has the legal ability to convert the resource to cash for his own use.

We have received inquiries from States on . . . issues relative to availability of income and resources. The first involves the treatment of trust accounts. The second deals with the meaning of "legal interest." . . .

INSTRUCTION: Treatment of Trust Accounts

There have been a large number of inquiries regarding AFDC resource policy subsequent to a highly publicized Connecticut Supreme Court case, Mercado v. Commissioner of Income Maintenance, 607 A.2d 1142 (Conn.1992). In this case, the court recognized that, pursuant to section 402(a)(7) and (a)(8) of the Act and implementing regulations at 45 CFR 233.20(a)(3)(i)(B) and 45 CFR 233.20(a)(6)(viii), a savings account which exceeds the \$1,000 resource limit must be counted for AFDC purposes, even though these funds may be the accumulated earnings of an AFDC dependent child who is saving the money for her education.

In the absence of a contrary State policy regarding transfer of assets, savings in excess of the \$1,000 resource limit can be preserved while a family receives AFDC if the savings are placed in an irrevocable trust. Trust funds are considered to be irrevocable when the family does not have the legal ability to convert the funds to cash which can be used for the family's support and maintenance.

Federal program policy on trusts is derived from section 402(a)(7) of the Act which specifies that the State agency, in determining need, shall take into consideration all income and resources, unless specifically disregarded by statute. Federal regulations at 45 CFR 233.20(a)(3)(ii)(D) implementing this provision specify that resources available for current use shall be considered. These regulations further provide that income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance. States must evaluate trust accounts in each individual case based on the accessibility of the trust funds. The source of the funds is not controlling in the availability determination.

In conjunction with this policy, Federal regulations at 45 CFR 233.20(a)(3)(ix) provide that the State agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability. Under this provision, States are expected to pursue with recipients whatever steps might be taken to determine whether the trust is, in fact, unavailable to meet their needs.

Funds that are actually disbursed by the administrator of the trust for the maintenance needs of the individual must be counted as available income in the determination of eligibility for AFDC and the amount of the assistance payment. However, if it is determined that the trust funds are not available under the above provisions, then the funds cannot be counted for AFDC purposes. The following examples illustrate this policy.

Example 1. An AFDC child receives \$14,038.45 net accident settlement. The court order stipulates that the money be deposited in an interest bearing guardianship account to be used for the benefit of the child. The mother may get money from the account only by petition to the court and must subsequently account to the court as to how the released money is spent for

-3-

the child. The mother received \$2,038.45 upon settlement and, later, another \$1,000 was released to the mother upon her petition. What is the amount available? Should any amount be considered available to the entire unit in light of the restrictions in the court order that the money be used for a specific child?

In this case, the State should have a policy requiring that the mother request the total amount of the funds (\$14,038.45) in the guardianship account, because they are a potential source of income. The amount to be counted as income is only that amount released by the court, i.e., \$2,038.45 and \$1,000.

Any income released should be considered available to the entire unit pursuant to 402(a)(7) of the Act and implementing regulations at 45 CFR 233.20(a)(3)(ii) which require that all income not expressly disregarded by Federal statute be considered in determining the AFDC need and payment amount.

Example 2. An AFDC minor recipient working after school deposited accumulated earnings of \$4,500 in a savings account. The State discovers the account, determines the family ineligible for AFDC on the basis that the account exceeds the \$1,000 resource limit, and subsequently charges the family with a \$9,342 AFDC overpayment. Is the State correct in its actions?

Yes, the State is correct. Section 402(a)(7) of the ACT and implementing regulations at 45 CFR 233.20(a)(3)(i)(B) set a \$1,000 limit (or a lower amount set by the State) on the equity value of resources that a family may have and still be eligible for AFDC. Accordingly, savings in excess of the resource limit can be preserved while a family receives AFDC only if the savings are placed in an irrevocable trust account, thus making such funds unavailable for the family's support and maintenance. AFDC payments made to the family for the period during which the savings account was in excess of the resource limit are overpayments and must be recovered pursuant to 45 CFR 233.20(a)(13).

"Legal interest" and Availability of income and resources

. . . When an individual exercises an apparent right of ownership over income, e.g., uses, spends and/or invests it, that income shall be considered available until actually repaid. This position is consistent with section 402(a)(7) of the Act which provides that all income and resources must be considered for AFDC purposes unless expressly disregarded.