

INCOME DIVERSION TRUSTS

I. Background

- A. Prior to March 25, 1993, persons with gross monthly incomes in excess of the income eligibility cap were ineligible for and denied institutional Medicaid benefits.
- B. On July 10, 1992, the Senior Citizens' Law Office, Inc. (SCLO) and co-counsel Susan Tomita, Elizabeth Simpson, Judith Schrandt, and Mary Ann Green filed a federal class action lawsuit against New Mexico's Human Services Department (HSD). Maxwell v. Heim, CIV No. 92-0724 (D.N.M.) was filed on behalf of nursing home residents who were beneficiaries of court ordered income diversion trusts but whose Medicaid applications were denied because HSD determined that their incomes exceeded the applicable Medicaid monthly eligibility standard. Plaintiffs' pre-trust incomes exceeded the applicable Medicaid monthly eligibility standard. Plaintiffs' pre-trust income was well-below the average cost of nursing home care in New Mexico. The issues raised had been successfully litigated in the case of Miller v. Ibarra, 746 F. Supp. 19 (D. Colo. 1990).
- C. On March 25, 1993, Judge E.L. Mechem signed the Stipulated Judgement entered into by parties to the litigation. The class was never certified nor stipulated to, however, the Judgement applied to "plaintiffs and other persons similarly situated."

II Provisions of Maxwell v. Heim

- A. The Judgment states that individuals who are beneficiaries of "income diversion trusts" may become Medicaid eligible if:
 - 1. They meet all other Medicaid eligibility standards;
 - 2. Their pre-trust gross monthly incomes exceed New Mexico's Medicaid cap; and
 - 3. Their pre-trust gross monthly income is less than the average monthly cost of a private pay, semi-private room in nursing homes in the geographical area in which the individual resides.
- B. The "Income Diversion Trusts" contemplated by the Judgement must meet the following criteria:

1. The trust is court ordered and irrevocable.
2. The trust does not include any resources (only the individual's income or a portion of his/her income is funding the trust).
3. The trustee's discretion is limited to distributing funds each month to an amount which, in combination with other income, is \$1.00 below the Medicaid cap.
4. The trustee may not distribute any other monies from the trust.
5. Upon the trust beneficiary's death, the remaining trust funds shall be paid to New Mexico's Medicaid program.

C. Impact of OBRA-93 on Income Diversion Trusts

1. OBRA-93 trust rules do not apply to a trust comprised only of income of the individual in a state which has no medically needy program for nursing home recipients but which uses an income cap for nursing home Medicaid eligibility, if, when the individual dies, the state receives any amount remaining in the trust up to Medicaid payments made for the individual.
2. There is no requirement that the "income diversion trust" be court ordered.
3. Commentary: A technical drafting error seems to exist, in that the transfer of assets penalties do not exempt from penalty transfers of income made to an income diversion trust. In March, 1994, the Health Care Financing Administration (HCFA) issued an interpretation of this apparent conflict in the federal law which states that transfers of assets penalties will not apply to income placed in an income diversion trust, to the extent that the "trust instrument provides that the income placed in the trust will in turn be paid out of the trust for" nursing facility services or the equivalent in any institution, or for home and community-based services provided under a waiver.

D. Status of Income Diversion Trusts in New Mexico after October 1, 1993

1. HSD's regulation which implements the OBRA-93 Income Diversion Trust provision is Section 8.281.510.11 C. The New Mexico regulation states that, "To be considered an Income Diversion Trust, a trust must meet the following requirements:

1. The trust is composed only of pension, Social Security, and other income to the applicant/recipient, including accumulated income in the trust; and
2. The state receives all amounts remaining in the trust upon the death of the applicant/recipient up to an amount equal to the total Medicaid benefits paid on behalf of the applicant/recipient.

The trusts described in this section are also known in New Mexico as Maxwell v. Heim income diversion trusts. Those trusts executed on or after August 11, 1993 no longer have to be court ordered or approved.”

2. Neither federal law nor Section 8.281.510.11 C make mention of the Maxwell v. Heim requirement that the pre-trust gross monthly income not exceed the average monthly cost of nursing home care in New Mexico. Indeed, HSD has approved trusts for individuals whose gross monthly pre-trust income exceeds the average monthly cost of nursing home care. Examples include an individual with exorbitant monthly prescription drug expenses, or if there is a spouse in the community and the Medicaid applicant’s income is insufficient to pay the cost of nursing home care and the expenses of the community spouse.
3. An Income Diversion Declaration of Trust was drafted by plaintiffs’ counsel in Maxwell v. Heim and approved by counsel for defendant HSD in the context of the litigation. This Declaration of Trust has been refined over the years and a copy of the most recent version is included in the Appendix section of this Manual. ***Warning: HSD is rejecting Income Diversion Trusts that do not conform to the Declaration of Trust it has approved.*** The latest approved version has not been the subject of formal rule-making so the public has not been notified of recent modifications. The Declaration of Trust included in the Appendix contains all the latest revisions. Also included in the Appendix is a letter to trustees explaining trust provisions.