



POLICY MEMO

TITLE:	CONSIDERATION OF ASSETS HELD BY GUARDIANS, CONSERVATORS OR LAWYERS
SUPERSEDES NUMBER:	N/A
EFFECTIVE DATE:	AUGUST 15, 2021
DIVISION AND OFFICE:	LEGAL DIVISION; POLICY, COMMUNICATIONS AND ADMINISTRATION OFFICE
PROGRAM AREA:	THIRD PARTY LIABILITY AND RECOVERIES
KEY WORDS:	GUARDIANSHIP ACCOUNTS, CONSERVATORSHIP ACCOUNTS, LAWYER TRUST ACCOUNTS, COLORADO LAWYER TRUST ACCOUNT FOUNDATION, COLTAF
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APPROVED BY: TOM MASSEY	

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Purpose and Audience:

The purpose of this policy memo is to inform eligibility partners that if a guardian, conservator, or lawyer holds assets on behalf of a Medicaid applicant or member, such assets may be countable as a resource in determining eligibility for Medical Assistance, subject to any applicable resource exemptions. Similarly, income attributable to these assets or other income received by an individual on behalf of a Medicaid applicant or member may be countable as income in determining eligibility for Medical Assistance, subject to any applicable disregards.

Background Information:

Similar to trusts, there is a fiduciary relationship between a guardian, conservator, or lawyer and the Medicaid applicant or member. These individuals may hold assets or income for the benefit of the applicant or member.

Guardianship and Conservatorship Accounts

If a Medicaid applicant or member is a minor or incapacitated individual, such individual may have a court-appointed guardian, conservator, or both, to act on their behalf. The appointed guardian or conservator may be a friend or family member, or a conservator may be a public administrator. Generally, a guardian is responsible for making decisions regarding the health and welfare, while a conservator manages and protects the member's or applicant's assets, although, it is possible that a guardian may also hold the assets of a Medicaid applicant or member.

While acting on behalf of a Medicaid applicant or member who is deemed by a court to lack the capacity to make their own decisions, the conservator is required to observe the same standards of care applicable to a trustee of a trust. *See* C.R.S. § 15-14-418(1). Except as otherwise provided by the order of appointment or the financial plan, assets held by a guardian or conservator on behalf of a Medicaid applicant or member may be expended for such individual's support without further court authorization or confirmation. *See* C.R.S. §§15-14-207(2)(c) & (d); 15-14-314(2)(c) & (d); and 15-14-427(1).

Notice is required to be given to each interested person in formal proceedings involving trusts or estates of minors, protected persons, or incapacitated persons. C.R.S. § 15-10-403(4)(a). Under C.R.S. § 15-14-116, a governmental agency paying or planning to pay benefits to a protected person is an interested person and, therefore, legally sufficient notice must be provided. Although the Department should receive notice of any proceedings concerning the assets of a minor or incapacitated Medicaid applicant or member, the Department rarely receives required notice. In addition to receiving notice of proceedings, the Department as an interested person has the right to request records concerning the administration of the conservatorship estate, which would include a list of the assets under the conservator's control and a list of the receipts, disbursements, and distributions. C.R.S. § 15-14-420(2)(a) & (5).

The Department is also entitled to notice in cases in which Medical Assistance planning or eligibility is set forth in the petition as a factor for requesting court authority to transfer property, even if such case is filed prior to an individual becoming a Medicaid applicant or member. 10 C.C.R. 2505-10, § 8.100.7.G.10. In consideration of the foregoing, the Department is entitled to notice of any guardianship or conservatorship proceeding involving a Medicaid applicant's or member's estate. This includes any proceeding regarding a transfer of an applicant's or member's property for eligibility purposes, and information about the applicant's or member's estate assets held by a guardian or conservator.

Lawyer Trust Accounts

Assets of a Medicaid applicant or member may also be held by a lawyer, public administrator,¹ or law firm. Common examples of this are client pre-payment of fees and expected costs, receipt of settlement proceeds, and assets held in connection with a guardianship or conservatorship proceeding. If a lawyer possesses the funds of a Medicaid applicant or member, then the lawyer is required to hold such funds in a trust account separate from the lawyer's own personal or business accounts. This trust account may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account, which is typically used when funds are nominal in amount or are expected to be held for a short period of time. Colo. RPC 1.15B(b). Interest or dividends paid on a COLTAF account are retained by COLTAF, unless such amount exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account. The lawyer or law firm is required to request a refund of any excess amount of interest or dividends, which would then be payable to the Medicaid applicant or member. Colo. RPC 1.15B(i). If the trust account is not a COLTAF account, then all interest earned and dividends paid (less deductions for service charges or fees of the depository institution) belong to the Medicaid applicant or member.

With any trust account, pre-paid fees held by a lawyer or law firm in a COLTAF or other account are the property of the Medicaid applicant or member until the lawyer earns the fees by conferring a benefit or performing a legal service. Colo. RPC 1.5(f). Upon termination of legal representation, the lawyer or law firm is required to return to the Medicaid applicant or member any unearned portion of pre-paid fees. Colo. RPC 1.16(d). A Medicaid applicant or member also has the right to have funds belonging to them returned promptly upon request to the lawyer or law firm. Colo. RPC 1.15A(b).

Policy Information:

Any asset held on behalf of a Medicaid applicant or member by a guardian, conservator, or lawyer is the property of the applicant or member and may be countable as a resource and/or income for the purpose of determining Medical Assistance eligibility. *See* 10 C.C.R. 2505-10, §§ 8.100.3.K.10.a.viii, 8.100.4.C.1.b, 8.100.5.E.3 & 8.100.5.M. This includes unearned fees held by a lawyer or law firm. Therefore, the eligibility partner should request copies of any court filings related to the individual's assets held by a guardian, conservator, or lawyer and request bank statements and financial documents for any assets held by a guardian, conservator, or lawyer on behalf of the

¹ Public administrators acting on behalf of Medicaid applicants or members are generally lawyers and, therefore, hold client assets in the law firm COLTAF or other account.

Medicaid applicant or member to verify financial eligibility. If copies of all related court filings are not provided, please contact the trust unit at Medicaid.trusts@state.co.us.

For purposes of determining Medical Assistance eligibility, assets should be evaluated as either income or a resource in accordance with the Department's regulations. Any impact on eligibility should be determined in accordance with the appropriate Medical Assistance eligibility category. For example, if the asset is being evaluated for a category of aid that does not have a resource test, then only income attributable to the asset (e.g. interest, dividends, or annuity payments) should be considered in determining eligibility. Any such income would also be subject to any applicable disregards.

For Guardianship and Conservatorship Accounts:

Assets held by a guardian or conservator on behalf of an applicant or member may be used for the applicant's or member's support and, therefore, these assets are countable resources to the applicant or member subject to any applicable exemptions. See POMS SI: 01140.215.B.1 & 01140.215DEN. Should a guardian or conservator prevent the use of these assets for the applicant's or member's support, this action creates a rebuttable presumption that the transfer was without fair consideration, unless the assets are transferred into a valid income trust, disability trust or pooled trust for individuals under the age of 65 years. See 10 CCR 2505-10, § 8.100.7.F.2.j. Similarly, income received on behalf of an applicant or member is countable income subject to any applicable disregards.

For Lawyer Trust Accounts:

The balance of the Medicaid applicant's or member's funds held in the lawyer's or law firm's COLTAF or other account, less earned fees and incurred expenses, is countable as an applicant or member resource. POMS SI 001120.020.C.2 (addressing circumstances where assets are resources when held by an agent on behalf of an individual). The interest or dividends earned on the trust account balance is countable as income in the month received unless the funds are held in a COLTAF account. 10 CCR 2505-10, § 8.100.5.F.5.e. If the Medicaid applicant's or member's funds are held in a COLTAF account, then the interest or dividends are only countable if the account earns excess interest or dividends. The remaining balance, type of account, and

entitlement to interest or dividends should be verified in writing by the Medicaid applicant's or member's lawyer or law firm.

References:

The rules concerning lawyer or law firm trust accounts are under Rules 1.15A through 1.15E of the Colorado Rules of Professional Conduct (RPC), which can be found at <https://www.cobar.org/RulesofProfessionalConduct>

The Program Operations Manual System (POMS) can be found at <https://secure.ssa.gov/apps10/poms.nsf/Home?readform>

Attachment(s):

None

Department Contact:

Medicaid.trusts@state.co.us

Medicaid.eligibility@state.co.us