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DHS

Department of Health Services
2013-2015 Biennial Budget Issue Paper
October 05, 2012

Estate Recovery for Medicaid Services: Recoverable Assets

Decision Needed

In its estate recovery program, Wisconsin currently recovers from assets that pass through the recipient's estate, through the probate process. In addition, the State recovers from some non-probate assets but not others. The Department proposes to include in its estate recovery program non-probate assets that are currently excluded, including marital property.

Also, to assist in recoveries of non-probate assets, DHCAA proposes that the Department be notified prior to termination of special needs and pooled special needs trusts.

Background

The Estate Recovery Program

1) The Wisconsin Medicaid estate recovery program seeks repayment for the cost of certain long term care services paid for by Medicaid on behalf of recipients. Recovery is made from the estates of recipients and from liens placed on their homes. The money recovered is returned to the Medicaid Program and used to fund Medicaid benefits.

2) Section 1917 (b) of the Social Security Act requires states to establish an estate recovery program that pursues recovery of benefits payments from the probate estates of permanently institutionalized Medicaid recipients of any age and certain benefits received by all Medicaid participants over the age of 55. The probate estate usually only contains assets that were solely owned by the individual or owned as a tenant in common. In order for ownership of these assets to be transferred, some sort of probate proceeding must be started. The probate proceeding allows creditors, including the State, to file claims against those assets, and these claims must be paid before any property is disbursed to heirs and beneficiaries.

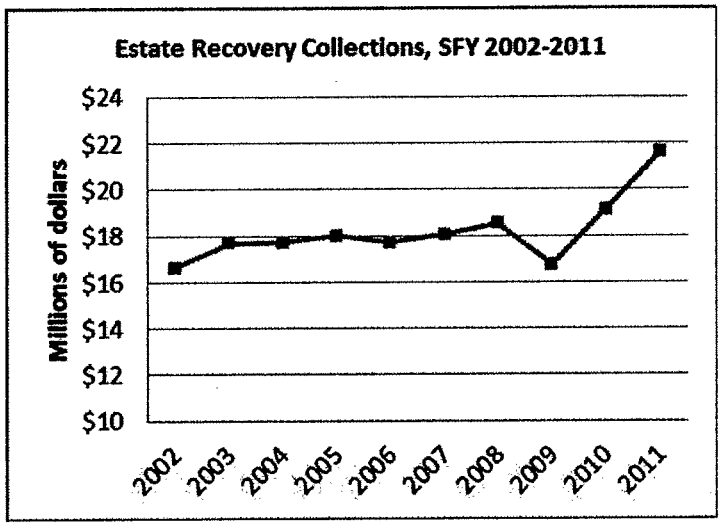
3) An individual may have an ownership interest in other assets that pass outside the probate process. These assets are commonly referred to as non-probate assets and can be transferred by simple administrative processes upon the death of the individual. Non-probate assets often pass to heirs and beneficiaries free of any creditors' claims, including the Department's claim for reimbursement of Medicaid services.

4) Federal law allows states to include non-probate assets in their definition of estate for recovery purposes. These assets may include "any other real or personal property and other assets in which the individual had any legal title or interest in at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint

tenancy, tenancy in common, survivorship, living trust or other arrangement," 42 U.S.C. 1396p (b)(4)(b).

5) States can choose which traditionally non-probate property to include in the Medicaid definition of estate. As non-probate assets transfers have increased, many states (including Minnesota, Iowa, Ohio, Idaho, Wyoming, Oregon, and Kansas) have either adopted the federal definition of expanded estate or have crafted similar language. Wisconsin currently recovers from those assets that are part of the probate estate, certain non-probate transfers on death (joint and payable on death (POD) bank accounts), and certain trusts (including special needs trusts and trusts that direct claims of the deceased to be paid). Other non-probate transfers on death are exempt from Wisconsin estate recovery requirements.

6) Wisconsin has increased its estate recovery efforts over the past decade. In FY 2002, the State recovered $16.6 million from estates for Medicaid reimbursement. Recovery amounts grew very gradually until 2009, when recoveries dropped back to 2002 levels ($16.7 million) due to the recession. Since 2009, however, recoveries have increased steadily; the Department recovered $21.6 million in FY 2011, and expects to recover approximately $25 million in FY 2012.



Changing the Definition of "Estate"

7) The Department proposes to adopt the federal definition of "estate" for recovery purposes, recovering from all assets in which the recipient had an interest. Under this proposal, the state would recover non-probate property, including marital property that passes to others outside the recipient's estate, as illustrated below:

   a) Non-spouse property. Under current law, the state recovers for assets that are formally in the recipient's estate plus payable on death and joint accounts at financial institutions, special needs trusts, certain other trusts, and certain annuities. Under the proposal, the state would collect the recipient's interest (often 50%) in any probate and non-probate assets, including transfer on death deeds, joint tenancy real property, revocable trusts, annuities, and other assets.
   b) Marital property. Currently, the state can only collect from a recipient's estate. If the recipient is survived by a spouse, the state's claim is only allowable if the estate contains an ownership

interest in a home. This occasionally happens with married couples when the recipient for some reason was the only owner of the home. Most homes are owned by spouses as survivorship marital property, and ownership passes in full to the surviving spouse outside of probate. The recipient's estate may also contain a 50% share of property other than the home. The state does not currently recover from this other marital property. Under the proposal, the state would recover 100% of all assets that were at any time marital property 5 years before Medicaid enrollment, including 100% of property that passes to the spouse outside of probate, as survivorship marital property. The state would recover either from the liens on real property or through claims in the surviving spouse's estate. It is important to emphasize that the state would recover only upon the death of the spouse, and the spouse may spend, sell, or otherwise transfer the asset before then. The state also would not recover during the lifetime of a disabled child or while a child of the deceased is under 21.

Asset Type	Maximum Allowed Under Federal Law
Non-Marital Property	Recover from probate estate and non-probate assets including TODs and other non-probate transfers, joint tenancy real property, revocable trusts, annuities, life estates, and life insurance policies.
Marital Property	Recover from 100% of all assets that were/became marital property within 5 years before MA enrollment, including 100% survivorship property. ***State only collects upon the death of the spouse, and the spouse may sell the property before then.***

8) The rationale for and implications of the proposal can be illustrated by examining some common assets held by Medicaid recipients and their spouses.

9) *Real estate and other property held as marital property.* Spouses generally own their homes as survivorship marital property. As such, when one spouse dies, the house passes automatically to the surviving spouse, outside probate without passing through the decedent's estate. Under current law, the state may not collect from any equity in the house under this circumstance. Under the proposal, the state would be able to collect up to 100% of the equity once the spouse dies.

10) The proposal would ensure that the recipient's assets would go to pay back the Medicaid program once those assets are no longer needed, while maintaining current protections of spouses and other family members. The assets would still be available to the surviving spouse during his or her lifetime. It is important to maintain this protection, to enable, among other things, the spouse to fund their own long term care expenses.

11) The state would place a lien on the house, but would release it if the spouse sold it at any time.

12) Often, to become or remain Medicaid eligible, individuals transfer their marital property interest in their houses or other assets to their spouses while they are still living. The property then becomes individual, non-marital property of the spouse. Under the proposal, the state could still recover from these assets, if they were marital property any time within five years of the Medicaid spouse's enrolling in Medicaid. This policy would ensure that assets are used to cover any Medicaid costs first before being transferred to heirs or beneficiaries of the surviving spouse. The fiscal effect of extending recoveries to 100% of assets that were marital property within the five year look back period is summarized below.

	Estimated Savings								
	FY 14			FY 15			Biennium		
	GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
Gross Recoveries	($634,800)	($1,205,200)	($1,840,000)	($952,100)	($1,807,700)	($2,759,800)	($1,586,900)	($3,012,900)	($4,599,800)
Admin. Costs	$128,800	$128,800	$257,600	$107,900	$107,900	$ 215,800	$236,700	$236,700	$473,400
$0	*($506,000)*	*($1,076,400)*	*($1,582,400)*	*($844,200)*	*($1,699,800)*	*($2,544,000)*	*($1,350,200)*	*($2,776,200)*	*($4,126,400)*

13) *Property transferred outside of probate.* Under the proposal, examples of assets newly subject to recovery would include the following: non-probate transfers on death of real property and security accounts, real property held in joint tenancy with right of survivorship, and revocable or living trusts. These instruments allow individuals to transfer assets outside of probate to spouses, children, and other individuals, thereby escaping estate recovery. Specific types of these instruments are discussed below.

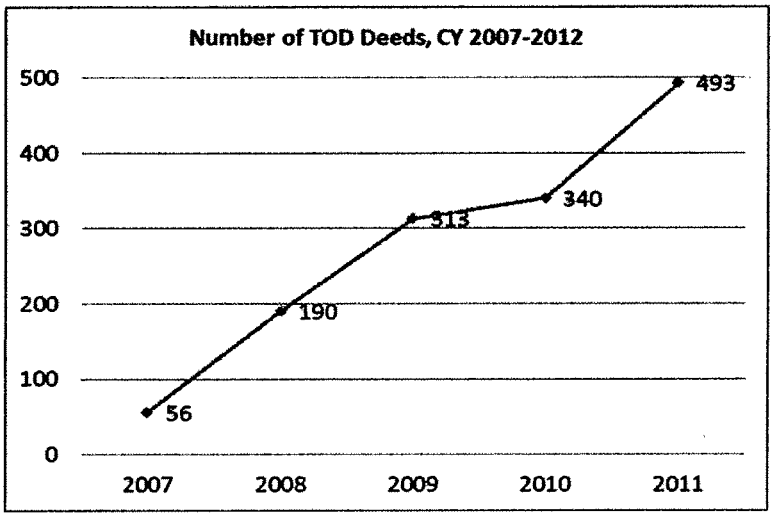
Transfer on Death Instruments

14) One example of non-probate transfers that have increased in popularity in recent years are transfers on death (TODs) instruments. TODs are legal instruments that individuals use to transfer assets to children and others when they die while retaining full ownership and control of the assets during their lives. Because the individual retains his or her ownership interest until the time of death, a TOD is generally not considered a divestment for Medicaid eligibility purposes and so is not subject to divestment penalties; and because it is transferred to the beneficiary(ies) outside of the probate process, it is often exempt from estate recovery.

15) Non-probate TODs can be used to transfer a variety of assets, including real property (TOD deeds), assets held in bank accounts, and assets held in security accounts. In concept, TOD deeds are "directly comparable to the use of pay-on-death or transfer-on-death accounts at banks or with brokerage houses."[1] However, while the Wisconsin Statutes (s. 705.04(2g)) provide that the Department may recover from transfers on death of joint and payable-on-death (POD) bank accounts, they do not provide for recovery from transfers on death of real property or securities held at brokerage houses.

[1] Kirkland, M.A., & Seal, C.A. "The Significance of the Transfer-on-Death Deed," *Probate and Property.* July/August 2007: 42-43

16) The use of TOD deeds has increased significantly in Wisconsin since the instrument was first authorized by 2005 Wisconsin Act 206. In CY 2007, 56 TOD deeds transferring ownership due to death of owner were recorded; by 2011, this number had risen to 493.[2]



17) Approximately 4.3% (21) of the TOD deed transfers recorded in CY 2011 involved properties of MA recipients. Prior to Act 206, these properties would have been part of the deceased's estate and subject to recovery. Because TOD deeds are now not available for estate recovery, however, the Department has lost that potential revenue. If no changes are made, more properties will be unavailable for estate recovery and more potential revenue will be lost as more MA recipients transfer assets via TOD deeds.

18) DHS estimates another 53 recoveries over the 2013-15 biennium from TOD deeds and 35 recoveries from securities, for gross recoveries of approximately $2.52 million AF. This estimate is based on the average potential recovery from TOD deed transfers involving MA recipients in CY 2011 ($46,500) and the average payment recovered from court-supervised estates in the 2012 recovery year. The TOD deed recovery amount factors in the costs of recoverable MA services received by the member and the value of the property transferred. If a surviving spouse was the grantee, the property was excluded from the analysis.

Workload implications

19) Allowing estate recovery from TOD deeds and requiring notification will result in more work for state estate recovery staff, who need to track and value deceased recipients' assets and make recoveries from property conveyed to heirs and beneficiaries. Additional staff is needed to ensure timely recovery of these newly recoverable assets and avoid adding to the already significant estate recovery backlog.

[2] These figures were retrieved from the Wisconsin Department of Revenue Real Estate Transfer Data for properties with transfer exemption codes 10m ("Solely to designate a TOD beneficiary under § 705.15") and 11m ("By nonprobate transfer on death under § 705.15"). They could underestimate the number of TOD deed transfers if the transfers are being reported under different transfer exemption codes.

20) In addition, there will be new job functions under the proposal associated with filing Notices of Encumbrance/Potential Claim with registers of deeds. To do this, staff must obtain the correct legal descriptions of properties from county workers or the Register of Deeds, pay recording fees, and follow up with the Register of Deeds if the Department does not receive a receipt of recording. Staff would also be responsible for responding to inquiries from title companies requesting a Clearance of Notice upon sale or transfer of the property. If the Department does not have a claim, staff would create the Clearance and send it for recording with the Register of Deeds. If it does have a claim, staff would have to compute the amount of the claim and provide it to the title company or new purchaser. The Clearance would be sent to the title company for recording upon receipt of payment.

21) Estate recovery staff are expected to have to file notice on about 9,700 properties owned by current MA recipients over the 2013-15 biennium. The Division estimates that a collections specialist could file an average of 25-30 notices per week, or about 1,200-1,500 per year.

22) The Division is requesting 1.5 FTE AF authority (0.75 GPR) for two-year project positions in order to bring the number of notices to a manageable workload. The initial need to file notice on property is critical, as it will lead to increased recoveries in the future. The Division is requesting an additional 2.0 FTE AF authority (1.0 FTE GPR) for permanent positions, who will fulfill the ongoing tasks of filing notice on real property of new MA recipients (estimated at 484 properties annually), preparing and sending certificates of clearance, and calculating and recovering claims from newly recoverable assets. These positions are needed to respond to the increase in inquiries, which will subsequently lead to an increase in future recoveries. The estimated salary, fringe, and supplies cost of one Collections Specialist-Senior is $80,200 AF ($40,100 GPR), including one-time costs of $5,200.

23) The Division expects additional administrative costs of $392,400 ($196,200 GPR) for the biennium. One-time costs include potential changes to the LEAP system used by estate recovery staff, notifying members of the change, and recording fees paid to the Register of Deeds for filing notice on the properties of current MA recipients. Recording fee costs for notices filed on current recipients are spread over the both fiscal years of the 2013-15 biennium. Ongoing costs are estimated at $14,500 annually for recording fees to file notice on properties of new MA recipients.

24) Recovering from TODs is estimated to result in net savings of approximately $1,459,100 AF over the 2013-15 biennium. The estimate assumes smaller savings in FY 14 than FY 15 due to an anticipated delay in implementation, as well as some of the one-time costs mentioned above.

	Estimated Savings								
	FY 14			FY 15			Biennium		
	GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
Recoveries	($409,500)	($777,500)	($1,187,000)	($460,400)	($874,200)	($1,334,600)	($869,900)	($1,651,700)	($2,521,600)
Admin. Costs	$304,000	$ 304,000	$ 608,000	$255,800	$255,800	$ 511,600	$559,800	$ 559,800	$ 1,119,600
Net Savings	*($114,000)*	*($489,500)*	*($603,500)*	*($215,800)*	*($639,800)*	*($855,600)*	*($329,800)*	*($1,129,300)*	*($1,459,100)*

Real Property Held in Joint Tenancy

25) Joint tenancy refers to a type of property ownership in which two or more individuals share equal ownership rights to the property. The right of survivorship provides that if one of the joint tenants

dies, the property is transferred to the survivor(s). If one of the joint tenants dies, in the case of two joint tenants, the surviving tenant becomes sole owner. In the case of more than two tenants, the survivors are joint tenants of the entire property.

26) If real property is held in joint tenancy with a right of survivorship, the deceased tenant's interest in the property is terminated outside the probate process, and the title is held solely in the name of the surviving tenant(s).

27) Property held as survivorship marital property is equivalent to property held in joint tenancy. Under the Department's proposal, property held in joint tenancy with non-spouses would also be subject to estate recovery.

28) The Department estimates that expanding estate recovery to real property held in joint tenancy or as marital property would result in 230 additional recoveries for a total of $4.6 million over the 2013-15 biennium. The Division expects additional administrative costs of $440,400 ($220,200 GPR). The cost estimate includes one-time LEAP system changes and recording fees, as well as staff costs for 2.0 FTE authority (1.0) GPR for 2 Collections Specialist-Senior positions. Please note that this fiscal effect partially overlaps the marital property fiscal effect discussed above.

	Estimated Savings								
	FY 14			FY 15			Biennium		
	GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
Recoveries	($634,800)	($1,205,200)	($1,840,000)	($952,100)	($1,807,700)	($2,759,800)	($1,586,900)	($3,012,900)	($4,599,800)
Admin. Costs	$128,800	$128,800	$257,600	$107,900	$107,900	$ 215,800	$236,700	$236,700	$473,400
Net Savings	*($506,000)*	*($1,076,400)*	*($1,582,400)*	*($844,200)*	*($1,699,800)*	*($2,544,000)*	*($1,350,200)*	*($2,776,200)*	*($4,126,400)*

Revocable or Living Trusts

29) When an individual places assets in a revocable or living trust, he or she transfers ownership to the trust but retains the right to revoke the terms of the trust and reclaim those assets. For MA eligibility purposes, liquid assets held by revocable trusts are considered available assets. However, homesteads held in such trusts are considered exempt for Medicaid eligibility purposes if the MA recipient intends to return to live in the home. When the recipient dies, the trust is terminated outside the probate process and is not available for estate recovery unless the trust agreement contains language ordering or empowering the trustee to pay claims. Trust agreements rarely contain such language.

30) Under the Department's proposal, the state would recover from assets remaining in these trusts as well.

31) The Department expects to recover assets from 5 more revocable trusts over the 2013-15 biennium for total savings of $100,000 AF. This estimate is based on the average recovery from court-supervised estates and liens acquired through estates from June 1, 2011 to May 31, 2012 (the Estate Recovery Program's "recovery year"). The recovery amount factors in the costs of recoverable MA services received by the member and the value of the property transferred. The estimate also assumes smaller savings in FY 14 than FY 15, given that some implementation time would be needed.

Estimated Net Savings								
FY 14			FY 15			Biennium		
GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
$13,800	$26,200	$40,000	$20,700	$39,300	$60,000	$34,500	$65,500	$100,000

Notice and recovery process

32) The Department would require notice of and recover from non-probate real estate assets as follows. It should be noted that this process would be required for any expansion of estate recovery from real property, including joint tenancy and marital property.

33) First, the Department would file a combination Request for Notice of Encumbrance/Notice of Potential Claim with the applicable register of deeds for a Medicaid member. The request would not affect title to real property and would not be a lien or other interest in the real property. For living members, the request for notice/notice of potential claim would require a title company to list the request/notice in a title search prepared for a sale/mortgage. It would be the responsibility of the person or agent that is transferring or encumbering the property to give notice to the Department that the property is being transferred or encumbered. No clearance from the Department would need to be recorded for the transfer or encumbrance to be valid. However, if the property is transferred or encumbered during the life of the Medicaid recipient, the Department would be alerted and could further investigate whether this action was a divestment affecting Medicaid eligibility.

34) After a member dies, a Certificate of Clearance from the Department would be required to be recorded at the same time any transfer or encumbrance is recorded in order for the transfer/encumbrance to be valid. The person requesting transfer or encumbrance (e.g. TOD beneficiary) would contact the Department for clearance. The Department would determine whether there was a claim for Medicaid reimbursement.

35) The Department would issue a clearance certificate if there is no claim. The transferee would be responsible for recording the certificate and paying any recording fees. If there is a claim for Medicaid reimbursement, the Department would send a statement of claim to the person requesting transfer. The statement would inform the transferee of the Department's intent to recover from the property, the Medicaid estate recovery claim amount, the transferee's right to a fair hearing (under Wis. Stat. ch. 227) on the validity, extent or amount of the proposed recovery, and would give notice to the transferee of the estate recovery hardship provisions.

36) Once the claim is determined to be valid, the Department would determine the most practicable method for recovery. The Department would make no immediate recovery if the transferee were a surviving spouse or disabled child or minor child, nor would it make immediate recovery if a sibling or caretaker inhabits the home.

Notice of Termination of a Special Needs Trust

37) Special needs trusts (SNTs) are trusts established to supplement the public benefits received by a person with a long-term disability. The intent of the law is to give the disabled individual the ability to use funds from the trust while alive because costs of a long-term disability are difficult to project. Any funds remaining in a special needs trust at the time of the Medicaid member's death or at the

time the trust is terminated must be paid to the Medicaid program for services provided prior to any other distributions.

38) The Department recovered assets from 87 standard (non-pooled) special needs from November 2002 through May 2012, for a total value of $6,624,600.

39) Current policy relies on the trustee to notify the Department prior to termination of the trust. The language of these trusts provides that trustees must notify the Department of the Trust's termination and repay the Department for MA services from the trust. While many trustees follow protocol and notify the Department of the trust's termination, not all do. In these cases, the proceeds of special needs and pooled trusts may be distributed to pay unallowable expenses or disbursed to beneficiaries rather than first repaying Medicaid benefits as required by 42 USC § 1396p(d)(4)(A).

40) The Department proposes that the State amend Wis. Stat. ch. 701 to require the trustee of a special needs trust to provide notice to the Department prior to terminating the trust and distributing assets. As mentioned above, trustees are already expected to notify the Department, but the statutes do not explicitly require it. Requiring notification will increase the number of trustees notifying the Department of a trust's termination, leading to greater recoveries from special needs trusts. It has not yet been determined what, if any, penalty would be imposed for failure to comply. Any legal action would require the involvement of OLC staff, resulting in increased workload.

41) The Department estimates that this proposal will result in 5 additional recoveries from special needs trusts over the 2013-15 biennium, for savings of $130,000 AF. The estimate assumes an average recovery of $26,000, based on the median recovery made from non-pooled special needs trusts from June 2011 through May 2012. The estimate assumes smaller savings in FY 14 than FY 15, because full implementation is not expected until after the start of the 2013-15 biennium.

Estimated Net Savings								
FY 14			FY 15			Biennium		
GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
$17,900	$34,100	$52,000	$26,900	$51,100	$78,000	$44,800	$85,200	$130,000

Summary Fiscal Effect

42) The savings and administrative cost amounts for the above components overlap to some extent. Taken all together, expanding estate recovery to non-probate assets and 100% of marital property is expected to result in net GPR savings of $2,034,700 over the 2013-15 biennium. Administrative costs include the systems changes, recording fees, and staff increases discussed earlier in the paper. Full expansion would require additional systems costs of $88,000 and an additional 2.0 FTE AF authority (1.0 FTE GPR) for 2 more Collections Specialist-Senior positions. In total, the Department is requesting 8.5 FTE AF authority (4.25 FTE GPR) for one Budget and Policy Analyst-Advanced position and 7.5 Collections Specialist-Senior positions.

Full Fiscal Effect									
	Estimated Savings								
	FY 14			FY 15			Biennium		
	GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
Gross Recoveries	($1,446,000)	($2,745,200)	($4,191,200)	($1,540,500)	($2,924,600)	($4,465,100)	($2,986,500)	($5,669,800)	($8,656,300)
Admin. Costs	$508,200	$508,200	$1,016,400	$443,600	$443,600	$ 887,200	$951,800	$951,800	$1,903,600
Net Savings	*($937,800)*	*($2,237,000)*	*($3,174,800)*	*($1,096,900)*	*($2,481,000)*	*($3,577,900)*	*($2,034,700)*	*($4,718,000)*	*($6,752,700)*
FTE -Project	0.75	0.75	1.5	0.75	0.75	1.5	0.75	0.75	1.5
FTE -Permanent	3.5	3.5	7.0	3.5	3.5	7	3.5	3.5	7.0
Total FTE	4.25	4.25	8.5	4.25	4.25	8.5	4.25	4.25	8.5

Recommendation

1. Amend Wis. Stat. §49.496 to redefine "estate" for recovery purposes using the federal definition, which includes probate estate and "any other real or personal property and other assets in which the individual had any legal title or interest in at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, living trust or other arrangement" (42 U.S.C. 1396p (b)(4)(b)).

2. Clarify that "other arrangement" includes all marital property; any transfers made by the recipient to his or her spouse at any time during the marriage; and any of the recipient's property that was reclassified as individual property of the non-recipient spouse within 5 years before MA enrollment.

3. Provide the Department the authority to file claims in the estates of surviving spouses.

4. Amend applicable statutes to provide the Department the ability to file notices of encumbrance/potential claim as well as the ability to file liens after the death of a Medicaid recipient in which the deceased recipient had an interest.

5. Amend Wis. Stat. chapter 705 and other applicable non-probate transfer on death provisions to clarify that any property transferred may be subject to estate recovery.

6. Amend Wis. Stat. ch. 701 to require trustees to notify the Department prior to the termination of a special needs or pooled trust.

	Biennial Change to Base	
	Funding	Positions
GPR	($2,034,700)	4.25
FED	($4,718,000)	4.25
PR/PRS		
SEG		
TOTAL	($6,752,700)	8.5

May retain up to 30%

DHS

Department of Health Services
2013-2015 Biennial Budget Issue Paper
October 5, 2012

Estate Recovery for Medicaid Services: Limiting the Amount Retained by Pooled Trusts

Decision Needed

Under current law, funds remaining in special needs trusts upon a member's death or the trust's termination are used to reimburse Medicaid for benefits provided. However, pooled trusts may include language allowing them to retain all funds in a trust account balance if the total Medicaid benefits exceed the trust balance. To ensure that pooled trusts are used to repay Medicaid as intended, the Department requests authority to limit the amount that pooled trusts can retain after a member's death or trust termination.

Background

1. Special needs trusts (SNTs) are trusts established to supplement the public benefits received by a person with a long-term disability. The intent of the law is to give the disabled individual the ability to use funds from the trust while alive because costs of a long-term disability are difficult to project. Any funds remaining in a trust at the time of the Medicaid member's death or at the time the trust is terminated must be paid to the Medicaid program for services provided prior to any other distributions.[1] This occurs through estate recovery.

(d)(4)(A)

2. Standard special needs trusts are only available for disabled Medicaid members under the age of 65. These trusts are generally established as a consequence of lawsuits stemming from accidents, malpractice and other disabling events.

3. Pooled trusts, a less restrictive form of special needs trusts, have been growing in popularity over the past several decades. Pooled trusts are established and managed by nonprofit associations, who maintain separate accounts for each individual beneficiary but pool the funds for the purposes of investment and management of funds.[2] In contrast to other special needs trusts, under federal law, pooled trusts have no age restrictions and payback is limited to amounts not retained by the trust.[3] The remaining amount retained after the MA recipient's death is intended to be used to assist other disabled individuals served by the pooled trust.

(d)(4)(c)

4. In Wisconsin, pooled trusts can be established for Medicaid members of any age who are determined to be disabled, and an increasing number of members age 65 and over are holding

[1] 42 USC § 1396p(d)(4)(A)
[2] 42 USC § 1396p (d)(4)(C)
[3] McDonald, J., & Raetzman, S. *State Promising Practices Related to Medicaid Exception Trusts.* Thomson Reuters, 2008: 17-18

assets in these trusts. This increase has been associated with the five-year look-back period for asset transfers established in the Deficit Reduction Act of 2005. To maintain MA eligibility, members 65 and over seek a disability determination from the Department's Disability Determination Bureau and then, if determined disabled, place their excess assets in a pooled trust rather than spending them down.

5. One organization that offers pooled trusts reported in their 2010 newsletter that their program had grown in 6 ½ years from 75 accounts and $4.5 million in assets to 719 accounts and $32 million in assets.

6. The increase in popularity of pooled trusts is problematic for three reasons. First, because individuals over the age of 65 were traditionally deemed eligible for Social Security or SSI benefits based on age, and ineligible for Social Security Disability Insurance (SSDI) or Social Security Insurance (SSI) benefits based on disability determination, there are no disability determination criteria for this population. More individuals seeking disability determination consume the resources of the Department's Disability Determination Bureau, which is 100% federally funded.

7. Second, members over age 65 and applying for long-term care are beginning to use these trusts to shelter assets in order to maintain MA eligibility, not necessarily to help cover additional costs incurred due to disability. This practice conflicts with the policy goals underlying initial special needs trusts legislation.

8. Third, because federal law limits the MA payback to amounts not retained by the trust, but does not limit the amount a trust can retain, trusts may be able to retain all the assets that remain in a member's account without reimbursing Medicaid. States have therefore found it very difficult to recover from pooled trusts.[4] In Wisconsin, certain pooled trusts include language that allows the trust to retain all assets that remain in a member's trust account, if that amount is less than the amount of Medicaid to be repaid. In most instances, the amount of Medicaid to be repaid exceeds the trust balance and Medicaid is not repaid anything from the trusts.

9. In November 2009, the Estate and Casualty Recovery Section in the Division of Health Care Access and Accountability began tracking trusts that were terminated without any repayment to Medicaid because of such trust agreement language. Since that date, one non-profit organization has been able to retain approximately $1.4 million from 53 trusts. During the 2012 recovery year (June 2011 through May 2012), this organization retained approximately $340,000 from 19 pooled trusts. These funds would have otherwise gone to repay Medicaid if the trust balances had been greater than the Medicaid benefits to be repaid. As a comparison, the Department recovered $1.9 million from November 2002 through May 2011 from 45 pooled trusts.

10. One solution to this problem, which other states have authorized, is to limit the amount that a pooled trust is allowed to retain. Minnesota limits the amount of assets that a pooled trust

[4] Ibid.

may retain to reasonable administration fees and expenses, plus 10 percent of the remaining trust balance. Oklahoma allows the pooled trust to retain 30 percent of the remaining balance. North Carolina allows a pooled trust to retain a percentage based on the number of years the individual participated in the trust, but not to exceed 50 percent. Utah allows 50 percent to be retained.

11. It should be noted that Pennsylvania enacted legislation to allow 50 percent to be retained. However, a federal Third Circuit court decision filed in June 2012 found Pennsylvania's 50% retention provision to be "irreconcilable" with the Medicaid statute governing recovery from pooled trusts.[5] The decision is precedential within the Third Circuit, but is not binding in Wisconsin, which lies outside of the district.

Options

12. The Department seeks statutory authority to limit the amount of assets that a pooled trust may retain to 30%, or 50% – of the member's account balance at the time of death or trust termination. The Department estimates that, over the 2013-15 biennium, it will be able to recover from 33 additional trusts which had balances totaling $876,700. This estimate is based on number of pooled trusts from which the Department has failed to recover since November 2009 and the average amount retained in each. It also assumes fewer recoveries in FY 14 (13) than in FY 15 (20) due to an anticipated delay in implementation. If the state allows the trust to retain 30 percent, savings are estimated at $613,700 AF.

	Estimated Savings								
	FY 14			FY 15			Biennium		
Retained Amount	GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
30%	$84,700	$160,800	$245,500	$127,000	$241,200	$368,200	$211,700	$402,000	$613,700

13. Advocates may argue against the proposal because pooled trusts are intended to assist other disabled individuals. Individuals do not use these trusts to shelter assets from estate recovery for the purpose of passing assets to beneficiaries.

14. In addition, it should be noted that while Pennsylvania's court decision is not binding in Wisconsin, it provides strong support for advocates against limiting the amount retained by pooled trusts. It may therefore be difficult to designate these limits in statute, regardless of the percentage of the account it represents.

Recommendation

Amend Wis. Stat. § 49.454 to limit the amount that can be retained by a "pooled" trust for MA members, as defined in 42 USC § 1396p (d) (4) (C), to 30% of the assets that remain in the beneficiary's trust subaccount at the time of the beneficiary's death.

49.454(4) → section does not apply to pooled trusts

[5] *Lewis v. Alexander*, No. 11-3439, 3rd Circuit Court of Appeals, June 20, 2012

Request a decrease of ($84,700) GPR and ($160,800) FED in FY 14 and ($127,000 GPR) and ($241,200 FED) in FY 15.

	Biennial Change to Base	
	Funding	Positions
GPR	($211,700)	
FED	($402,000)	
PR/PRS		
SEG		
TOTAL	($613,700)	

Voiding certain transfers

DHS

Department of Health Services
2013-2015 Biennial Budget Issue Paper
October 5, 2012

Equity in Estate Recovery for Medicaid Services: Voiding Unrecorded and Certain Other Real Property Transfers

Decision Needed

Under current law, the assets of MA recipients involved in unlawful asset transfers may be exempt from estate recovery, while the assets of MA recipients not involved in such transfers remain subject to estate recovery. To resolve this inequity by returning the assets to the deceased recipient's estate, thereby making them subject to estate recovery, should the Department be allowed to void unrecorded transfers of real property?

Background

1. Transfer of non-exempt assets and the homestead property for below fair market value may be considered divestment for Medicaid eligibility purposes. If a divestment is discovered during a Medicaid recipient's lifetime, the recipient loses eligibility until he or she spends down their divested assets. If an unlawful asset transfer is not discovered until after the recipient's death, however, the transfer is considered valid, and the assets are not available for estate recovery because they are no longer owned by the Medicaid recipient.

2. One example of such a transfer is a "vest pocket deed," a conveyance of real property that has been executed and delivered, but never recorded during the MA recipient's lifetime. In most cases, the Division has found that these transfers are never reported during eligibility and would have been considered divestment had they been discovered. Sometimes these transfers are recorded after the death of the MA recipient. However, because the recipient is deceased when the conveyance is finally recorded, there is no consequence.

3. County workers have alerted the Department to a number of vest pocket deed cases in which a deceased recipient had owned a house, but ownership then transferred to his or her adult children without the transfer being recorded. These workers have expressed frustration with the Department's inability to recover in these circumstances.

4. The Department believes that the transfer of real property via vest pocket deeds could be considered fraud for Medicaid eligibility purposes. However, pursuing the transfer as fraud is politically infeasible. There is reluctance to pursue fraud committed by elderly Medicaid recipients or their family members, particularly after the death of the recipient.

5. As an alternative, the Department requests authority to void unrecorded transfers of real property, which are often vest pocket deeds, as well as other transfers intended to hinder,

delay or defraud the State from recovering Medicaid benefits. By permitting unlawful transfers made in order to gain Medicaid eligibility to be voided or overturned after the recipient's death, the State would be returning the assets to the recipient's estate, which would make the assets available for estate recovery under Wis. Stat. § 49.496.

6. Specifically, DHS proposes to amend Wis. Stat. ch. 49, to allow the Department to void a transfer or bring action against the transferee in circuit court when a transfer, that was unknown to the eligibility agency, has been made by a Medicaid recipient or someone on his or her behalf and was intended to hinder, delay or defraud the State from recovering medical assistance benefits.

Policy Implications

7. There are several arguments in favor of this proposal. First, to reduce incentives to divest, assets that are fraudulently transferred to artificially reduce assets for MA eligibility purposes should be made available to pay for Medicaid benefits received. Under current law, MA recipients and family members involved in these types of asset transfers face no consequences if the transfer is discovered after the recipient's death. Under the proposal, the Department would at least be able to use a recipient's fraudulently transferred assets to repay Medicaid for the services for which the recipient would have been found ineligible if not for the asset transfer.

8. Second, general property law provides legal support for the proposal by voiding unrecorded transfers of real property under certain circumstances. Under Wis. Stat. § 706.08, unrecorded conveyances of real property are considered void when subsequent arm's length transactions of the same property are recorded (Wis. Stat. § 706.08).

9. Third, a number of states – including Minnesota, Iowa, Oregon, Florida, Idaho, and Kansas – have provisions that allow any conveyance made without adequate consideration (e.g. for less than fair market value) to be voided and the property returned to the recipient or deceased recipient's estate. These provisions have successfully made transferred assets available for estate recovery. For an example, see Minnesota Statute 256B.0595 Subd. 8.

10. The proposal also poses several challenges, however. First, a transferee may be living on the transferred property for a significant period of time prior to the Department voiding the transfer, creating the potential for conflict between the transferee and the Department.

11. Second, uncertainties about what constitutes a fraudulent transfer may arise. Concern may arise that honest buyers could potentially lose ownership of their property if they had purchased the property, but for below fair market value. Transferees could also argue that they were simply ignorant of the improper nature of the transfer.

12. In response, the Department would have to prove intent to avoid recovery, which may be difficult for transfers other than unrecorded vest pocket deeds. The Division would require the assistance of the Office of Legal Counsel to help staff make this determination and initiate the voiding process. Any action brought against transferees would need to involve

OLC and would increase the Department's presence in state circuit court. Under the proposal, however, the Division may limit the number of transfers it pursues to unrecorded transfers of real property if it chooses.

13. Though the Department is not requesting additional staff or administrative resources to implement it, this proposal would result in additional workload for estate recovery and legal staff.

14. The Department estimates that implementation of either of these alternatives would result in 5 additional recoveries over the 2013-15 biennium for total savings of $100,000. This estimate assumes an average recovery of $20,000, which is the average recovery from court-supervised estates and liens on estates from June 2011 through May 2012. The savings estimate for FY 14 is lower than that for FY 15 because of an anticipated delay in implementation.

Estimated Savings								
FY 14			FY 15			Biennium		
GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
($13,800)	($26,200)	($40,000)	($20,700)	($39,300)	($60,000)	($34,500)	($65,500)	($100,000)

Recommendation

Amend Wis. Stat. ch. 49, to allow the Department to void a transfer or bring action against the transferee when a transfer, that was unknown to the eligibility agency, has been made by a Medicaid recipient or someone on his or her behalf and was intended to hinder, delay or defraud the State from recovering medical assistance benefits.

Request a decrease of ($13,800) GPR and ($26,200 FED) in FY 14 and ($20,700 GPR) and ($39,300 FED) in FY 15.

	Biennial Change to Base	
	Funding	Positions
GPR	($34,500)	
FED	($65,500)	
PR/PRS		
SEG		
TOTAL	($100,000)	

DHS

Department of Health Services
2013-2015 Biennial Budget Issue Paper
October 5, 2012

Estate Recovery for Medicaid Services: Capitation Payments for Long-Term Care Managed Care Programs

Decision Needed

In its long-term care managed care programs, the State reimburses providers using capitation rates. Estate recovery claims, which reimburse Medicaid for benefits provided, are based on actual service costs for each member, encounter data reported. DHS estate recovery staff have found that encounter reporting is difficult to utilize at times and may lead to inaccurate recovery of benefits. In addition, CMS advises states to recover based on capitation payments from managed care program participants. For these reasons, the Department requests statutory authority to enable it to use capitation payments to calculate estate recovery amounts for long-term care managed care program participants.

Background

1. In Wisconsin, managed care programs that provide long-term care include Family Care, PACE, and Partnership. These are capitated programs, so Medicaid pays for services received by program members using the capitation rate. Each MCO has unique capitation rates based on the acuity of its members. Also, each MCO has two capitation rates – one for participants with a nursing home level of care, and one for a lower level of care. Almost all Family Care participants are at a nursing home level of care.

2. For Family Care participants, the capitation rate includes payments for long-term care services, all of which are recoverable for estate recovery purposes. For Partnership participants, the capitation rate includes payments for primary and acute care, which are not currently recoverable services. PACE participants are currently not subject to estate recovery; a budget proposal to allow the Department to recover from the estates of PACE participants is discussed in a separate paper.

3. In 2001 the Centers for Medicare and Medicaid Services (CMS) published in the State Medicaid Manual guidelines for recovering from the estates of individuals enrolled in a capitated program. The guidelines specify that states that recover for all Medicaid services received by beneficiaries age 55 and older "must recover from the individual's estate the total capitation rate for the period the beneficiary was enrolled in the managed care organization." States that recover for some but not all services covered in the State Plan "must recover from the individual's estate that portion of the capitation payment that is attributable to the recoverable services, based on the most appropriate actuarial analysis determined by the State."

4. Wisconsin currently does not use the capitation rate to determine the estate recovery amount. Instead, it uses the cost of actual services provided to the particular member in question, based on data reported by MCOs in the long-term care encounter reporting system to determine the recovery amount. This method is specified in Wis. Admin. Code § DHS 10.62(1)(a), which governs Family Care estate recovery and was established prior to the publication of the CMS guidelines. The rationale for this policy is that capitation rates are based on average costs and do not account for variation in costs among individual participants.

5. In addition to noncompliance with the CMS guidelines, the Department has encountered a number of challenges in recovering the costs reported in LTC encounter system. First, encounter services may not be reported as timely or as accurately as needed to prove a deceased recipient's liability for an estate recovery claim. MCOs may not report claims consistently, or may have difficulty determining the Medicaid versus Medicare components of Partnership claims. These issues have likely led to understated estate recovery claims in the past.

6. Second, basing recoveries on reported costs creates uncertainty for members and their heirs, who may not understand how their service costs are calculated and may be skeptical of the final claim amount. In particular, members and their heirs may have difficulty understanding non-direct medical costs, such as case management. In fact, there has been an increasing number of legal challenges based on encounter costs for case management, as the value of hours spent on case management may not be visible to family members.

7. Third, using encounter costs creates a significant administrative burden for estate recovery staff. In addition to responding to heirs who are challenging encounter costs, staff must review each query report from the long-term care encounter universe and manually exclude non-recoverable services for PACE and Partnership participants.

8. Fourth, using reported costs for estate recovery for LTC managed care programs in lieu of the capitation rate creates several claiming inconsistencies. The capitation payment is the amount the State paid for the member to receive the services, and is the amount claimed on the CMS-64. Moreover, the Department currently recovers based on the capitation rate in cases of member fraud. To recover based on the capitation rate instead of on reported costs would eliminate these inconsistencies.

9. To resolve the above issues, the Department proposes to amend Wis. Stat. § 49.496 to specify that, notwithstanding DHS 10.62(1)(a), Family Care members will have the amount of the capitation payments made on their behalf to the managed care organization as being the amount of Medicaid benefits recoverable from their estates or from liens on their homes. The same should be specified for members enrolled in Partnership (and PACE, if it is decided to recover these benefits), and any other members who receive recoverable services through participation in an MCO.

Potential Benefits

10. Using the capitation rate to calculate estate recovery amounts would have a number of potential benefits. As discussed above, the proposal would bring the State in compliance with CMS guidance in the State Medicaid Manual. It would also create consistency between estate recovery, provider reimbursement, and cost claiming.

11. Implementation of the proposal would increase transparency for the member. Being informed of his or her capitation rate prior to receiving services, the member would be able to determine their eventual liability. By reducing uncertainty for members and their heirs, the proposal may reduce the potential for legal challenges.

12. The amount of recoveries made by the Department should not increase as a result of this proposal, as member costs tend to be higher than the value of member estates. In an analysis of estate recoveries for Family Care members, DHCAA staff found that 980 of the 1,017 cases analyzed (96%) had recovery amounts below the total estimated recoverable benefits. When looking only at the 37 cases where full payment was received, actual costs were lower than the capitation payment amount in 24 cases, or 65% of the time. When looking at the entire population of 1017 cases, however, actual costs were lower than the capitation payment in 467 cases, only 46% of the time.

13. Despite no anticipated increase in recoveries, savings could be generated in several ways. First, the proposal would eliminate encounter reporting errors that result in underestimation of Medicaid benefits paid and therefore lower estate recovery amounts. Second, by reducing legal challenges based on cost reporting, the proposal would reduce administrative burdens on estate recovery staff as well as Office of Legal Counsel staff. Currently, OLC staff have to go to probate court to defend recovery amounts based on MCO cost reporting.

14. The administrative efficiency will allow staff to process more recoveries in a more timely fashion. DHCAA estimates that staff spend 390 hours annually resolving issues related to MCO cost reporting. This time would otherwise be spent making recoveries. Using an average recovery amount per hour of $495.03, DHCAA estimates that this proposal would result in increased recoveries of $321,800 over the 2013-15 biennium.

Estimated Savings								
FY 14			FY 15			Biennium		
GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
$44,400	$84,300	$128,700	$66,600	$126,500	$ 193,100	$111,000	$210,800	$321,800

Stakeholder Concerns

15. A number of issues should be taken into account when considering this proposal. First, there is an equity argument against the proposal. Because capitation payments made to MCOs are based on average costs, one member's actual costs may be significantly lower than the capitation amount, while another member's actual costs may be significantly higher. The change would penalize lower cost members, though it may benefit higher cost members. This

inequity may also lead to legal challenges by the heirs of members with actual costs that are lower than the capitation payment. This is especially true given that Family Care and WPP pay MCOs a blended capitation rate for all target groups. Elderly members especially tend to have lower costs than the blended capitation rate.

16. Second, a related issue could arise when determining the actuarially appropriate proportion that will be used for recoverable services. It is unlikely that this proportion could be established at the individual member level. If the proportion of the capitation payment spent on long-term care is determined using statewide data, the potential for recoveries that do not equal individual service costs would increase.

Recommendation

Amend Wis. Stat. § 49.496 to specify that, notwithstanding Wis. Admin. Code § DHS 10.62(1)(a), for members in Family Care, Partnership (and PACE, if applicable), and other members who receive recoverable services through participation in an MCO, the amount of Medicaid benefits recoverable from their estates or from liens on their homes will be the amount of the capitation payments made on their behalf to the managed care organization.

Request a decrease of ($44,400) GPR and ($84,300) FED in FY 14 and ($66,600) GPR and ($126,500) FED in FY 15.

	Biennial Change to Base	
	Funding	Positions
GPR	($111,000)	
FED	($210,800)	
PR/PRS		
SEG		
TOTAL	($321,800)	

DHS

Department of Health Services
2013-2015 Biennial Budget Issue Paper
October 5, 2012

Estate Recovery for All Allowable Services Received by Long Term Care Recipients Age 55 and Over

Decision Needed

Under Wisconsin's estate recovery program, recoverable services roughly equate to long-term care services. Federal law permits states to recover all services under the state plan for individuals age 55 and over, with several exceptions. With the exception of Senior Care benefits and services exempted by federal law, the Department proposes to recover for all services received by Medicaid long term care recipients who are age 55 and over.

Background

1. Federal law requires that states, at a minimum, pursue estate recovery of nursing facility services, home and community-based services and related hospital and prescription drug services paid for Medicaid participants age 55 or older. States, however, have the option to recover any items or services under the State plan, except for the Medicare cost-sharing benefits and premiums paid for individuals participating in a Medicare Savings Program (MSP).

2. Currently, Wisconsin recovers the federally mandated services, which includes all the 1915c waiver programs (COP-W, CIP I, CIP II, BIW, Family Care, Partnership and IRIS). Waiver participants also have legend drugs and costs related to an inpatient hospital stay recovered from their estates. In addition, Wisconsin recovers certain optional services such as home health services, home health therapy services, private duty nursing services, personal care services, and all services received while a Medicaid recipient resides in a nursing home or is institutionalized in an inpatient hospital.

3. Wisconsin's recoverable services roughly equate to long-term care services. The only long-term care services that Wisconsin currently does not recover are those provided under the PACE program. Services received by individuals age 55 and older who live in the community and who are not participating in a home and community-based waiver program, including Family Care and Partnership, are not subject to estate recovery, except for those persons who receive home health services, home health therapy services, private duty nursing, personal care and all services received while residing in a nursing home.

4. In "Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices," the AARP Public Policy Institute (June 2005) lists the services that states have decided to subject to estate recovery. See Appendix A to this paper. Since this survey, at least seven states (Colorado, Idaho, Kansas, Massachusetts, Nevada, Washington and Wyoming) are now recovering for all Medicaid services received by an individual age 55 or older (except for the

Medicare cost-sharing benefits and premiums paid for individuals participating in a Medicare Savings Program (MSP) that are now prohibited from recovery). In extending estate recovery to all allowable Medicaid services, states are ensuring that recipients' assets are being used to repay the Medicaid program for services received.

5. The Department proposes that Wis. Stat. § 49.496 be amended to recover all Medicaid benefits paid for services received by long term care recipients age 55 and older, with the exception of SeniorCare and services exempted by federal law. Under the proposal, the State would not recover from any new categories of Medicaid participants, but would recover for all services received by those participants already subject to estate recovery.

6. The change would result in relatively low savings, since long-term care costs, which are already recoverable, comprise the vast majority of all costs incurred by participants of long-term care programs. In addition, because recipients' estates already tend to be of lower value than total Medicaid benefits paid for services, expanding recoverable services for the current ERP population would likely not increase recovery amounts significantly.

7. This option would not require additional administrative resources to implement. It may result in administrative efficiency by eliminating the need for estate recovery staff to identify and break out non-recoverable services for those participants already served. However, it would not require additional staff or administrative resources.

8. The Department does not recommend expanding estate recovery to non-long term care recipients. There is concern that extending estate recovery to community Medicaid individuals as well as long-term care recipients could result in additional costs to the state over the long run.

9. MA-funded long-term care programs tend to include middle-class individuals who can enroll in MA due to long-term care needs and associated high health care costs. In contrast, non-long term care MA recipients tend to have very low incomes and few assets, and to use benefits for lower cost primary and acute care services. It could be argued that the case for estate recovery from this group is less supported by their circumstances – lower resources and less use of Medicaid services.

10. Participants age 55 and over enrolled in long-term care programs have an average PMPM of $3,294. In contrast, participants age 55 and over who receive Medicaid card services only have an average PMPM of $415. Excluding home health, personal care, and durable medical equipment costs, which are already recoverable, the PMPM for this group is $217. This low PMPM is largely due to Medicare coverage of dual eligibles.

11. Collections from this population will likely be very low relative the administrative costs of estate recovery. The average estate recovery amount for the current estate recovery population was $2,752 in the 2012 recovery year with a median recovery of $883. These figures include recoveries from real property. It can be assumed that few community members reach the $2,000 asset limit or own real property, and therefore that the per

member recovery amount is likely to be significantly lower for the newly affected Medicaid population than for the current population.

12. In addition, there is concern that the possibility of estate recovery will deter newly affected members from obtaining necessary services, including primary care services. This issue is particularly important given the population's high morbidity rate for chronic conditions such as diabetes, hypertension and asthma. If members defer primary medical care, they may increase their likelihood of entering the system later with more profound and costly health care needs, including emergency care, inpatient hospital services, and possibly institutionalization.

13. It is estimated that the option to expand estate recovery to all services received by long term care recipients would generate savings of $465,600 AF ($160,600 GPR) over the 2013-15 biennium. This estimate is based on the number of recoveries for the full benefit amount made in the 2012 recovery year (194), the estimated PMPM for acute services received by long-term care recipients ($75), and a 24-month acute care service period. The savings estimate is lower in FY 14 than FY 15 because of an anticipated delay in implementation.

Estimated Savings								
FY 14			FY 15			Biennium		
GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
($64,200)	($122,000)	($186,200)	($96,400)	($183,000)	($279,400)	($160,600)	($305,000)	($465,600)

Estate Recovery for PACE

14. The Program for All-inclusive Care for the Elderly (PACE) is a full-risk, managed care program that provides all services for its elderly participants, including both acute and long-term care services. PACE is only available in Milwaukee and Waukesha counties.

15. Fee-for-service long-term care services and long-term care services provided under a 1915c Home and Community Based Waiver are all subject to estate recovery. PACE provides similar services to the Partnership Program, which is a recoverable waiver program, and has similar eligibility standards to Partnership and other recoverable long-term care programs. However, Wisconsin's statutes currently do not provide for recovery for services provided under the federal law governing PACE (42 USC § 1396u-4). PACE is therefore the only long-term care program excluded from estate recovery requirements.

16. PACE has likely been excluded as a result of an unintentional drafting error when the PACE statute was created. Cross-references to the PACE statute were excluded.

17. That PACE is the only long-term care program excluded from estate recovery requirements results in inequities in the application of estate recovery. Under current law, long-term care recipients in Wisconsin may be treated differently based on geographic location. While individuals who live in Milwaukee or Waukesha County might choose to participate in PACE rather than Family Care or other home and community based waiver programs to avoid estate recovery, individuals who receive

long-term care services in other counties remain subject to estate recovery because PACE is not available.

18. To resolve this issue, the Department proposes to permit estate recovery from PACE participants. Specifically, DHCAA would amend Wis. Stat. § 49.496(3) (a) 2 to include as recoverable services those provided under 42 USC § 1396u-4.

19. Because the Department would not recover for services provided prior to implementation of the proposal, savings are not expected until FY 15. The Division estimates that this proposal will result in 27 additional recoveries in FY 15 for total savings of $74,300 AF ($25,600 GPR). This estimate assumes an average recovery amount of $2,752, the average recovery made from all types of estates, from June 2011 through May 2012.

Estimated Savings								
FY 14			FY 15			Biennium		
GPR	FED	AF	GPR	FED	AF	GPR	FED	AF
$0	$0	$0	($25,600)	($48,700)	($74,300)	($25,600)	($48,700)	($74,300)

20. If the Governor's Budget pursues a statutory change, it is assumed that it would be drafted to include the Department's "Virtual PACE" proposal as well.

Recommendation

1. Amend Wis. Stat. § 49.496 to recover Medicaid benefits paid for all services received, with the exception of SeniorCare and services exempted by federal law for all Medicaid recipients age 55 and over who are also receiving long-term care benefits.

Request a decrease of ($64,200) GPR and ($122,000) FED in FY 14 and ($96,400) GPR and ($183,000) FED in FY 15.

	Biennial Change to Base	
	Funding	Positions
GPR	($160,600)	
FED	($305,000)	
PR/PRS		
SEG		
TOTAL	($465,600)	

2. Amend Wis. Stat. § 49.496(3) (a) 2 to include as recoverable services PACE services, as provided under 42 USC § 1396u-4.

Request a decrease of ($25,600) GPR and ($48,700) FED in FY 15.

	Biennial Change to Base Funding
GPR	($25,600)
FED	($48,700)
PR/PRS	
SEG	
TOTAL	($74,300)

Appendix A.

Services Recoverable	AL	AK	AZ	AR	CA	CT	DE	DC	FL	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MN	MS	MT	NE
Nursing facility	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
ICF/MR	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
HCBS – state plan services	•	•		•	•	•			•	•	•	•	•	•	•	•	•	•	•	•	•		•	•
HCBS – waiver services	•	•	?	•	•	•	•		•	•	•	•	?	•	•	•	•	•	?	•	•	•	•	•
Hospice	•	?	•		•	•	•		•	•	•	•	•	•	•	•		•	•	•	•		•	•
Hospital	•	•	•	•	•	•	•		•	•	?	•	•	•	•	•	•	•	•	•	•	•	•	•
Prescription drugs	•	•	•	•	•	•	•		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Physician services	•	•	•	•	•	•	•		•	•	•	•	•	•	•	•		•	•	•	•		•	•
Managed care	•		•	?	•				•	•		•	•	•	•	•			•	•	•		•	•
Medicare Savings Program (MSP)		?				•		•	•	•	•	•		•	•					•	•	•	•	•
Perm. institutionalization <age 55	•	•				•				•		•		•	•	•			•	•	•		•	•
All other items under state plan	•		•		•		•		•	•		•	•	•		•		•	•		•		•	•
Some other items under state plan						•		•			•									•		•		

Services Recoverable	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	UT	VT	VA	WA	WV	WI	WY	Total Yes
Nursing facility	•	•	•	?	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	45
ICF/MR	•	•	•	?	•		•	•	•	•	•	•	•	•	?	•		•		•	•	•	40
HCBS – state plan services	•	•	•	?	•	•	•	•	•		•	•		•		•	•	•	•		•	•	37
HCBS – waiver services	•	•	•	?	•	•	•	•	•	•	•	•	•	•	•	•		•		•	•	•	39
Hospice	•	•	•	?	•	•	•	•	•	•	•	•	•	•		•	•	•			?	•	36
Hospital	•	•	•	?	•	•	•	•	•	•	•	•	•	•		•	•	•	•	•	?	•	41
Prescription drugs	•	•	•	?	•	•	•	•	•	•	•		•	•		•		•	•	•	?	•	41
Physician services	•	•	•	?	•	•	•	•	•	•	•	•	•			•		•		•	?	•	37
Managed care		•	•	?	•		•	•	•	•	•	•				•		•					26
Medicare Savings Program (MSP)	•		•	?			•	•		•	•			•		•		•			?	?	23
Perm. institutionalization <age 55		•		?	•	•				•		•	•	•					•	•	•	•	24
All other items under state plan		•	•	?	•		•	•	•	•		•			•	•		•					25
Some other items under state plan	•			?		•					•								•		•		10

ICF/MR = intermediate care facility for people with mental retardation
HCBS = home and community –based care
? = don't know/no response

less stringent than the consumer protection standards which applied under such State plan amendment as of December 31, 2005.

(v) The regulations of the Secretary required under clause (iii)(VI) shall be promulgated after consultation with the National Association of Insurance Commissioners, issuers of long-term care insurance policies, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, and shall specify the type and format of the data and information to be reported and the frequency with which such reports are to be made. The Secretary, as appropriate, shall provide copies of the reports provided in accordance with that clause to the State involved.

(vi) The Secretary, in consultation with other appropriate Federal agencies, issuers of long-term care insurance, the National Association of Insurance Commissioners, State insurance commissioners, States with experience with long-term care insurance partnership plans, other States, and representatives of consumers of long-term care insurance policies, shall develop recommendations for Congress to authorize and fund a uniform minimum data set to be reported electronically by all issuers of long-term care insurance policies under qualified State long-term care insurance partnerships to a secure, centralized electronic query and report-generating mechanism that the State, the Secretary, and other Federal agencies can access.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title; and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B) of this section, when—

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution),

is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3)(A) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(B) The standards specified by the Secretary under subparagraph (A) shall require that the procedures established by the State agency under subparagraph (A) exempt income, resources, and property that are exempt from the application of this subsection as of April 1, 2003, under manual instructions issued to carry out this subsection (as in effect on such date) because of the Federal responsibility for Indian Tribes and Alaska Native Villages. Nothing in this subparagraph shall be construed as preventing the Secretary from providing additional estate recovery exemptions under this subchapter for Indians.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual—

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

(5)(A) For purposes of clause (iii)(III), the model regulations and the requirements of the model Act specified in this paragraph are:

(i) In the case of the model regulation, the following requirements:

(I) Section 6A (relating to guaranteed renewal or noncancellability), other than paragraph (5) thereof, and the requirements of section 6B of the model Act relating to such section 6A.

(II) Section 6B (relating to prohibitions on limitations and exclusions) other than paragraph (7) thereof.

(III) Section 6C (relating to extension of benefits).

(IV) Section 6D (relating to continuation or conversion of coverage).

(V) Section 6E (relating to discontinuance and replacement of policies).

(VI) Section 7 (relating to unintentional lapse).

(VII) Section 8 (relating to disclosure), other than sections 8F, 8G, 8H, and 8I thereof.

(VIII) Section 9 (relating to required disclosure of rating practices to consumer).

(IX) Section 11 (relating to prohibitions against post-claims underwriting).

(X) Section 12 (relating to minimum standards).

(XI) Section 14 (relating to application forms and replacement coverage).

(XII) Section 15 (relating to reporting requirements).

INSERT

SECTION 1. 46.286 (7) of the statutes is amended to read:

46.286 **(7)** RECOVERY OF FAMILY CARE BENEFIT PAYMENTS~~; RULES~~. The department shall ~~promulgate rules relating~~ apply to the recovery from persons who receive the family care benefit, including by liens and from estates, of correctly and incorrectly paid family care benefits, ~~that are substantially similar to~~ the applicable provisions under ss. 49.496 and 49.497.

History: 1999 a. 9, 185; 2001 a. 16, 109; 2003 a. 33; 2005 a. 25, 264, 388; 2007 a. 20; 2009 a. 28.

(END INSERT)

INSERT

SECTION 2. 49.496 (1) (bk) of the statutes is created to read:

49.496 **(1)** (bk) "Long–term care program" means any of the following:

1. The family care program providing the benefit under s. 46.286.

2. The self–directed services option that operates under a waiver from the secretary of the federal department of health and human services under 42 USC 1396n (c) in which an enrolled individual selects his or her own services and service providers.

3. The family care partnership program that is an integrated health and long–term care program operated under an amendment to the state medical assistance plan, as authorized in 42 USC 1396n (i).

4. The program for all–inclusive care for the elderly under 42 USC 1396u–4.

5. Any program that provides long–term care services and is operated by the department under an amendment to the state medical assistance plan under 42 USC 1396n (i), a waiver of medical assistance laws under 42 USC 1396n (c) or 42 USC

1396n (b) and (c), or a demonstration project under 42 USC 1315 or 42 USC 1396n (c).

SECTION 3. 49.496 (3) (a) 2. a. of the statutes is amended to read:

49.496 **(3)** (a) 2. a. Home–based or community–based services under 42 USC 1396d (a) (7) and (8) ~~and under any waiver granted under 42 USC 1396n (c) (4) (B) or 42 USC 1396u~~.

History: 1991 a. 39, 269; 1993 a. 301, 437, 491; 1995 a. 27; 1997 a. 27; 1999 a. 9; 2003 a. 33; 2007 a. 20; 2009 a. 15.

SECTION 4. 49.496 (3) (a) 2. am. of the statutes is created to read:

49.496 **(3)** (a) 2. am. Any services provided as a benefit under a long–term care program.

SECTION 5. 49.496 (3) (a) 2. b. of the statutes is repealed.

SECTION 6. 49.496 (3) (a) 2. c. of the statutes is repealed.

SECTION 7. 49.496 (3) (ad) of the statutes is created to read:

49.496 **(3)** (ad) The amount the department may claim against an estate of a recipient for services that are described under par. (a) 2. am. and that are provided by a managed long–term care program funded by capitated payments is equal to the amount of the capitated payment for that recipient.

(END INSERT)