



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-06177
PJK & TJD:
v m not here Jld

DOA:.....Iwata, BB0260 – Estate recovery for Medical Assistance

FOR 2013-2015 BUDGET – NOT READY FOR INTRODUCTION

(in 12-7)
D-into
(SOON)

don't get cut

X

1 AN ACT relating to: the budget.

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 20.435 (4) (im) of the statutes is amended to read:
3 20.435 (4) (im) *Medical assistance; correct payment recovery; collections; other*
4 *recoveries.* All moneys received from the recovery of correct medical assistance
5 payments under ss. 49.496 and ~~867.035 and rules promulgated under s. 46.286 (7)~~
6 49.849, all moneys received as collections and other recoveries from providers, drug

1 manufacturers, and other 3rd parties under medical assistance performance-based
 2 contracts, and all moneys credited to this appropriation account under s. 49.89 (7)
 3 (f), for payments to counties and tribal governing bodies under s. 49.496 (4) (a), for
 4 payment of claims under s. ~~867.035 (3)~~ [✓] 49.849 (5), for payments to the federal
 5 government for its share of medical assistance benefits recovered, for the state share
 6 of medical assistance benefits provided under subch. IV of ch. 49, and for costs related
 7 to collections and other recoveries.

History: 1971 c. 125 ss. 138 to 155, 522 (1); 1971 c. 211, 215, 302, 307, 322; 1973 c. 90, 198, 243; 1973 c. 284 s. 32; 1973 c. 308, 321, 322, 333, 336; 1975 c. 39 ss. 153 to 173, 732 (1), (2); 1975 c. 41 s. 52; 1975 c. 82, 224, 292; 1975 c. 413 s. 18; 1975 c. 422, 423; 1975 c. 430 ss. 1, 2, 80; 1977 c. 29 ss. 236 to 273, 1657 (18); 1977 c. 112; 1977 c. 203 s. 106; 1977 c. 213, 233, 327; 1977 c. 354 s. 101; 1977 c. 359; 1977 c. 418 ss. 129 to 137, 924 (18) (d), 929 (55); 1977 c. 428 s. 115; 1977 c. 447; 1979 c. 32 s. 92 (11); 1979 c. 34, 48; 1979 c. 102 s. 237; 1979 c. 111, 175, 177; 1979 c. 221 ss. 118g to 133, 2202 (20); 1979 c. 238, 300, 331, 361; 1981 c. 20 ss. 301 to 356b, 2202 (20) (b), (d), (g); 1981 c. 93 ss. 3 to 8, 186; 1981 c. 298, 314, 317, 359, 390; 1983 a. 27 ss. 318 to 410, 2202 (20); 1983 a. 192, 199, 245; 1983 a. 333 s. 6; 1983 a. 363, 398, 410, 427; 1983 a. 435 ss. 2, 3, 7; 1983 a. 538; 1985 a. 24, 29, 56, 73, 120, 154, 176, 255, 281, 285, 332; 1987 a. 27, 339, 368, 398, 399, 402; 1987 a. 403 ss. 25, 256; 1987 a. 413; 1989 a. 31, 53; 1989 a. 56 ss. 13, 259; 1989 a. 102; 1989 a. 107 ss. 11, 13, 17 to 37; 1989 a. 120, 122, 173, 199, 202, 318, 336, 359; 1991 a. 6, 39, 189, 269, 275, 290, 315, 322; 1993 a. 16, 27, 76, 98, 99, 168, 183, 377, 437, 445, 446, 450, 469, 479, 490, 491; 1995 a. 27 ss. 806 to 961r, 9126 (19); 1995 a. 77, 98; 1995 a. 216 ss. 26, 27; 1995 a. 266, 276, 289, 303, 404, 417, 440, 448, 464, 468; 1997 a. 27 ss. 211, 214, 216, 217, 527 to 609; 1997 a. 35, 105, 231, 237, 280, 293; 1999 a. 5, 9, 32, 52, 84, 103, 109, 113, 133, 185, 186; 2001 a. 16, 69, 103, 105; 2003 a. 33, 139, 186, 318, 320, 326, 327; 2005 a. 15, 22; 2005 a. 25 ss. 299 to 331, 2498 to 2500, 2510; 2005 a. 74, 107, 199, 228, 264, 388, 406, 434; 2007 a. 20 ss. 331 to 422, 9121 (6) (a); 2007 a. 39, 88, 107, 111, 130; 2009 a. 2, 15; 2009 a. 28 ss. 325 to 470, 485, 488, 490; 2009 a. 76, 180, 190, 219, 274, 276, 279, 318, 334; 2011 a. 32, 70, 257; s. 35.17 correction in (4) (gr).

8 **SECTION 2.** 20.435 (4) (in) [✓] of the statutes is amended to read:

9 20.435 (4) (in) *Community options program; family care; recovery of costs*
 10 *administration.* From the moneys received from the recovery of costs of care under
 11 ss. 46.27 (7g) and ~~867.035~~ and under rules promulgated under s. ~~46.286 (7)~~ [✓] 49.849
 12 for enrollees who are ineligible for medical assistance, the amounts in the schedule
 13 for administration of the recovery of costs of the care.

History: 1971 c. 125 ss. 138 to 155, 522 (1); 1971 c. 211, 215, 302, 307, 322; 1973 c. 90, 198, 243; 1973 c. 284 s. 32; 1973 c. 308, 321, 322, 333, 336; 1975 c. 39 ss. 153 to 173, 732 (1), (2); 1975 c. 41 s. 52; 1975 c. 82, 224, 292; 1975 c. 413 s. 18; 1975 c. 422, 423; 1975 c. 430 ss. 1, 2, 80; 1977 c. 29 ss. 236 to 273, 1657 (18); 1977 c. 112; 1977 c. 203 s. 106; 1977 c. 213, 233, 327; 1977 c. 354 s. 101; 1977 c. 359; 1977 c. 418 ss. 129 to 137, 924 (18) (d), 929 (55); 1977 c. 428 s. 115; 1977 c. 447; 1979 c. 32 s. 92 (11); 1979 c. 34, 48; 1979 c. 102 s. 237; 1979 c. 111, 175, 177; 1979 c. 221 ss. 118g to 133, 2202 (20); 1979 c. 238, 300, 331, 361; 1981 c. 20 ss. 301 to 356b, 2202 (20) (b), (d), (g); 1981 c. 93 ss. 3 to 8, 186; 1981 c. 298, 314, 317, 359, 390; 1983 a. 27 ss. 318 to 410, 2202 (20); 1983 a. 192, 199, 245; 1983 a. 333 s. 6; 1983 a. 363, 398, 410, 427; 1983 a. 435 ss. 2, 3, 7; 1983 a. 538; 1985 a. 24, 29, 56, 73, 120, 154, 176, 255, 281, 285, 332; 1987 a. 27, 339, 368, 398, 399, 402; 1987 a. 403 ss. 25, 256; 1987 a. 413; 1989 a. 31, 53; 1989 a. 56 ss. 13, 259; 1989 a. 102; 1989 a. 107 ss. 11, 13, 17 to 37; 1989 a. 120, 122, 173, 199, 202, 318, 336, 359; 1991 a. 6, 39, 189, 269, 275, 290, 315, 322; 1993 a. 16, 27, 76, 98, 99, 168, 183, 377, 437, 445, 446, 450, 469, 479, 490, 491; 1995 a. 27 ss. 806 to 961r, 9126 (19); 1995 a. 77, 98; 1995 a. 216 ss. 26, 27; 1995 a. 266, 276, 289, 303, 404, 417, 440, 448, 464, 468; 1997 a. 27 ss. 211, 214, 216, 217, 527 to 609; 1997 a. 35, 105, 231, 237, 280, 293; 1999 a. 5, 9, 32, 52, 84, 103, 109, 113, 133, 185, 186; 2001 a. 16, 69, 103, 105; 2003 a. 33, 139, 186, 318, 320, 326, 327; 2005 a. 15, 22; 2005 a. 25 ss. 299 to 331, 2498 to 2500, 2510; 2005 a. 74, 107, 199, 228, 264, 388, 406, 434; 2007 a. 20 ss. 331 to 422, 9121 (6) (a); 2007 a. 39, 88, 107, 111, 130; 2009 a. 2, 15; 2009 a. 28 ss. 325 to 470, 485, 488, 490; 2009 a. 76, 180, 190, 219, 274, 276, 279, 318, 334; 2011 a. 32, 70, 257; s. 35.17 correction in (4) (gr).

14 **SECTION 3.** 20.435 (7) (im) [✓] of the statutes is amended to read:

15 20.435 (7) (im) *Community options program; family care benefit; recovery of*
 16 *costs; birth to 3 waiver administration.* From the moneys received from the recovery
 17 of costs of care under ss. 46.27 (7g) and ~~867.035~~ and under rules promulgated under
 18 s. ~~46.286 (7)~~ [✓] 49.849 for enrollees who are ineligible for medical assistance, all moneys

1 not appropriated under sub. (4) (in), and all moneys transferred to this appropriation
 2 account from the appropriation account under sub. (4) (o), for payments to county
 3 departments and aging units under s. 46.27 (7g) (d), payments to care management
 4 organizations for provision of the family care benefit under s. 46.284 (5), payment of
 5 claims under s. ~~867.035 (3)~~ 49.849 (5), payments for long-term community support
 6 services funded under s. 46.27 (7) as provided in ss. 46.27 (7g) (e) and ~~867.035 (4m)~~
 7 49.849 (6) (b), and for administration of the waiver program under s. 46.99.

History: 1971 c. 125 ss. 138 to 155, 522 (1); 1971 c. 211, 215, 302, 307, 322; 1973 c. 90, 198, 243; 1973 c. 284 s. 32; 1973 c. 308, 321, 322, 333, 336; 1975 c. 39 ss. 153 to 173, 732 (1), (2); 1975 c. 41 s. 52; 1975 c. 82, 224, 292; 1975 c. 413 s. 18; 1975 c. 422, 423; 1975 c. 430 ss. 1, 2, 80; 1977 c. 29 ss. 236 to 273, 1657 (18); 1977 c. 112; 1977 c. 203 s. 106; 1977 c. 213, 233, 327; 1977 c. 354 s. 101; 1977 c. 359; 1977 c. 418 ss. 129 to 137, 924 (18) (d), 929 (55); 1977 c. 428 s. 115; 1977 c. 447; 1979 c. 32 s. 92 (11); 1979 c. 34, 48; 1979 c. 102 s. 237; 1979 c. 111, 175, 177; 1979 c. 221 ss. 118g to 133, 2202 (20); 1979 c. 238, 300, 331, 361; 1981 c. 20 ss. 301 to 356b, 2202 (20) (b), (d), (g); 1981 c. 93 ss. 3 to 8, 186; 1981 c. 298, 314, 317, 359, 390; 1983 a. 27 ss. 318 to 410, 2202 (20); 1983 a. 192, 199, 245; 1983 a. 333 s. 6; 1983 a. 363, 398, 410, 427; 1983 a. 435 ss. 2, 3, 7; 1983 a. 538; 1985 a. 24, 29, 56, 73, 120, 154, 176, 255, 281, 285, 332; 1987 a. 27, 339, 368, 398, 399, 402; 1987 a. 403 ss. 25, 256; 1987 a. 413; 1989 a. 31, 53; 1989 a. 56 ss. 13, 259; 1989 a. 102; 1989 a. 107 ss. 11, 13, 17 to 37; 1989 a. 120, 122, 173, 199, 202, 318, 336, 359; 1991 a. 6, 39, 189, 269, 275, 290, 315, 322; 1993 a. 16, 27, 76, 98, 99, 168, 183, 377, 437, 445, 446, 450, 469, 479, 490, 491; 1995 a. 27 ss. 806 to 961r, 9126 (19); 1995 a. 77, 98; 1995 a. 216 ss. 26, 27; 1995 a. 266, 276, 289, 303, 404, 417, 440, 448, 464, 468; 1997 a. 27 ss. 211, 214, 216, 217, 527 to 609; 1997 a. 35, 105, 231, 237, 280, 293; 1999 a. 5, 9, 32, 52, 84, 103, 109, 113, 133, 185, 186; 2001 a. 16, 69, 103, 105; 2003 a. 33, 139, 186, 318, 320, 326, 327; 2005 a. 15, 22; 2005 a. 25 ss. 299 to 331, 2498 to 2500, 2510; 2005 a. 74, 107, 199, 228, 264, 388, 406, 434; 2007 a. 20 ss. 331 to 422, 9121 (6) (a); 2007 a. 39, 88, 107, 111, 130; 2009 a. 2, 15; 2009 a. 28 ss. 325 to 470, 485, 488, 490; 2009 a. 76, 180, 190, 219, 274, 276, 279, 318, 334; 2011 a. 32, 70, 257; s. 35.17 correction in (4) (gr).

8 **SECTION 4.** 46.286 (7) of the statutes is amended to read:

9 46.286 (7) RECOVERY OF FAMILY CARE BENEFIT PAYMENTS; RULES. The department
 10 shall promulgate rules relating apply to the recovery from persons who receive the
 11 family care benefit, including by liens and from estates, of correctly and incorrectly
 12 paid family care benefits, that are substantially similar to the applicable provisions
 13 under ss. 49.496 and ~~49.497~~ 49.849.

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

14 **SECTION 5.** 46.287 (2) (a) 1. k. of the statutes is amended to read:

15 46.287 (2) (a) 1. k. Recovery of family care benefit payments under s. 46.286
 16 (7).

History: 1999 a. 9; 2003 a. 33.

17 **SECTION 6.** 49.496 (1) (a) of the statutes is renumbered 49.496 (1) (ah).

18 **SECTION 7.** 49.496 (1) (af) of the statutes is created to read:

19 49.496 (1) (af) "Decedent" means a deceased recipient or a deceased
 20 nonrecipient surviving spouse, whichever is appropriate.

21 **SECTION 8.** 49.496 (1) (bk) of the statutes is created to read:

1 49.496 (1) (bk) [✓]“Long-term care program” means any of the following:

2 1. The family care program providing the benefit under s. [✓]46.286.

3 2. The self-directed [✓]services option that operates under a waiver from the
4 secretary of the federal department of health and human services [✓]under 42 USC
5 1396n (c) in which an enrolled individual selects his or her own services and service
6 providers. [✓]

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

10 4. The program for all-inclusive [✓]care for the elderly under 42 USC 1396u-4.

11 5. Any program that provides long-term [✓]care services and is operated by the
12 department [✓]under an amendment to the state medical assistance plan [✓]under 42 USC
13 1396n (i), a waiver of medical assistance laws under 42 USC 1396n (c) or 42 USC
14 1396n (b) and (c), or a demonstration project under 42 USC 1315 or 42 USC 1396n
15 (c). [✓]

16 **SECTION 9.** 49.496 (1) (bw) [✓]of the statutes is created to read:

17 49.496 (1) (bw) “Nonrecipient surviving spouse” [✓]means any person who was
18 married to a recipient while the recipient was receiving services for which the cost
19 may be recovered under sub. [✓](3) (a) and who survived the recipient. [✓]

20 **SECTION 10.** 49.496 (3) (a) (intro.) [✓]of the statutes is amended to read:

21 49.496 (3) (a) (intro.) Except as provided in par. (b), the department shall file
22 a claim against the estate of a recipient, and against the estate of a [✓]nonrecipient
23 surviving spouse, for all of the following, subject to the exclusion of any amounts

1 under the Long-Term Care Partnership Program established under s. 49.45 (31),
2 unless already recovered by the department under this section:

3 **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.

3 **SECTION 11.** 49.496 (3) (a) 2. a. of the statutes is amended to read:

4 49.496 (3) (a) 2. a. Home-based or community-based services under 42 USC
5 1396d (a) (7) and (8) [✓] and under any waiver granted under 42 USC 1396n (e) (4) (B)
6 or 42 USC 1396u.

7 **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.

7 **SECTION 12.** 49.496 (3) (a) 2. am. of the statutes is created to read:

8 49.496 (3) (a) 2. am. Any services provided as a benefit under a long-term care
9 program. [✓]

10 **SECTION 13.** 49.496 (3) (a) 2. b. of the statutes is repealed. [✓]

11 **SECTION 14.** 49.496 (3) (a) 2. c. of the statutes is repealed. [✓]

12 **SECTION 15.** 49.496 (3) (ad) [✓] of the statutes is created to read:

13 49.496 (3) (ad) The amount the department may claim against an estate of a
14 recipient for services that are described under par. [✓](a) 2. am. and that are provided
15 by a managed long-term care program [✓]funded by capitated payments is equal to the
16 amount of the capitated payment for that recipient.

17 **SECTION 16.** 49.496 (3) (aj) [✓] of the statutes is created to read:

18 49.496 (3) (aj) There is a presumption, which may be rebutted by clear and
19 convincing evidence, that all property in the estate of a [✓]nonrecipient surviving
20 spouse was marital property held with the recipient and that [✓]100 percent of the
21 property in the estate of the nonrecipient surviving spouse is subject to the
22 department's claim under par. (a). [✓]

23 **SECTION 17.** 49.496 (3) (am) [✓](intro.) of the statutes is amended to read:

1 49.496 (3) (am) (intro.) The court shall reduce the amount of a claim under par.
2 (a) by up to the amount specified in s. 861.33 (2) if necessary to allow the recipient's
3 decedent's heirs or the beneficiaries of the recipient's decedent's will to retain the
4 following personal property:

5 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.

5 **SECTION 18.** 49.496 (3) (c) 1. of the statutes is amended to read:

6 49.496 (3) (c) 1. If the department's claim is not allowable because of par. (b)
7 and the estate includes an interest in any real property, including a home, the court
8 exercising probate jurisdiction shall, in the final judgment or summary findings and
9 order, assign the interest in the ~~home~~ real property subject to a lien in favor of the
10 department for the amount described in par. (a). The personal representative or
11 petitioner for summary settlement or summary assignment of the estate shall record
12 the final judgment as provided in s. 863.29, 867.01 (3) (h), or 867.02 (2) (h).

13 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.

13 **SECTION 19.** 49.496 (3) (c) 2. of the statutes is amended to read:

14 49.496 (3) (c) 2. If the department's claim is not allowable because of par. (b),
15 the estate includes an interest in any real property, including a home, and the
16 personal representative closes the estate by sworn statement under s. 865.16, the
17 personal representative shall stipulate in the statement that the ~~home~~ real property
18 is assigned subject to a lien in favor of the department for the amount described in
19 par. (a). The personal representative shall record the statement in the same manner
20 as described in s. 863.29, as if the statement were a final judgment.

21 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.

21 **SECTION 20.** 49.496 (3) (d) (intro.) of the statutes is amended to read:

22 49.496 (3) (d) (intro.) The department may not enforce the a lien under par. (c)
23 on a home as long as any of the following survive the decedent:

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.

****NOTE: Am I correct to assume that, even with the survivors mentioned, the lien may be enforced against real property that is not a home?

1 **SECTION 21.** [✓] 49.496 (6) (b) of the statutes is amended to read:

2 49.496 (6) (b) The department may file a claim under sub. (3) only with respect
3 to a recipient who dies after ~~September 30, 1991~~ [✓] the date that is 90 days after the
4 effective date of this paragraph ... [LRB inserts date].

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.

5 **SECTION 22.** 49.496 (6m) of the statutes is amended to read:

6 49.496 (6m) WAIVER DUE TO HARDSHIP. The department shall promulgate rules
7 establishing standards for determining whether the application of this section would
8 work an undue hardship in individual cases. If the department determines that the
9 application of this section would work an undue hardship in a particular case, the
10 department shall waive application of this section in that case. This subsection does
11 not apply with respect to claims against the estates of nonrecipient surviving
12 spouses. [✓]

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.

13 **SECTION 23.** 49.4962 of the statutes is created to read:

14 **49.4962** [✓] **Voiding certain transfers of real property. (1)** [✓] **DEFINITIONS.** In
15 this section: [✓]

16 (a) "Conveyance" has the meaning given in s. [✓]706.01 (4).

17 (b) "Fair market value" [✓] means the price that a willing buyer would pay a willing
18 seller for the purchase of real property. [✓]

19 (c) [✓] "Fraudulent transfer" means any of the following:

20 1. A transfer of title to real property for less than [✓] fair market value.

21 2. A transfer of title to [✓] real property by a conveyance that is not recorded in the
22 office of the register of deeds of the county in which the real property is located. [✓]

1 (2) [✓]VOIDABLE TRANSFERS. (a) A transfer of real property to which all of the
2 following [✓]apply is voidable by the department: [✓]

3 1. The transfer was made by a person receiving or who received medical
4 assistance, or someone on his or her behalf, during the time that the person was
5 eligible for medical assistance. [✓]

6 2. The department was not notified and was unaware that the transfer was
7 made. [✓]

8 3. The transfer was made to hinder, delay, or defraud the [✓]department from
9 recovering medical assistance benefits that were paid on behalf of the transferor. [✓]

10 (b) The department may commence an action in circuit court against the
11 transferee to void the transfer. If the court voids the transfer, the title to the real
12 property reverts to the transferor or his or her estate. [✓]

 ****NOTE: Practically, how would the department void a transfer except by a court
action?

13 (3) [✓]PRESUMPTION. There is a presumption, which may be rebutted by clear and
14 convincing evidence, that a transfer described in sub. (2) (a) 1. [✓]that is a fraudulent
15 transfer was made to hinder, delay, or defraud the department [✓]from recovering
16 medical assistance benefits that were paid on behalf of the transferor. [✓]

17 (4) [✓]BURDEN OF PROOF. With respect to a transfer under sub. (1) (c) 1., [✓]the burden
18 of proof for establishing fair market value is on the party to whom the property was
19 transferred. [✓]Fair market value must be established through a credible methodology,
20 which may include an appraisal performed by a licensed appraiser.

21 (5) [✓]INAPPLICABLE TO PURCHASER IN GOOD FAITH. [✓]Subsection (2) does not apply if,
22 after the transfer described in sub. [✓](2), the real property was transferred to a

1 purchaser in good faith and for a valuable consideration and the conveyance was
2 recorded.

3 **SECTION 24.** 49.682 (1) (am) ^X of the statutes is created to read:

4 49.682 (1) (am) "Decedent" [✓] means a deceased client or a deceased nonclient
5 surviving spouse, whichever is applicable. [✓]

6 **SECTION 25.** 49.682 (1) (d) ^X of the statutes is created to read:

7 49.682 (1) (d) "Nonclient surviving spouse" [✓] means any person who was married
8 to a client while the client was receiving services for which the cost may be recovered
9 under sub. (2) (a) [✓] and who survived the client.

10 **SECTION 26.** 49.682 (2) (a) ^X of the statutes is amended to read:

11 49.682 (2) (a) Except as provided in par. (d), the department shall file a claim
12 against the estate of a client [✓] or [✓] and against the estate of the [✓] a nonclient surviving
13 spouse ~~of a client~~, for the amount of aid under s. 49.68, 49.683, or 49.685 paid to or
14 on behalf of the client.

15 History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. 225 ss. 127, 128; 1999 a. 9.

15 **SECTION 27.** 49.682 (2) (bm) ^X of the statutes is created to read:

16 49.682 (2) (bm) There is a presumption, which may be rebutted by clear and
17 convincing evidence, that all property in the estate of the [✓] nonclient surviving spouse
18 was marital property held with the client and that 100 [✓] percent of the property in the
19 estate of the [✓] nonclient surviving spouse is subject to the department's claim under
20 par. (a). [✓]

21 **SECTION 28.** 49.682 (2) (c) (intro.) ^X of the statutes is amended to read:

22 49.682 (2) (c) (intro.) The court shall reduce the amount of a claim under par.
23 (a) by up to the amount specified in s. 861.33 (2) if necessary to allow the client's

1 decedent's heirs or the beneficiaries of the client's decedent's will to retain the
2 following personal property:

3 History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. 225 ss. 127, 128; 1999 a. 9.

SECTION 29. 49.682 (2) (e) 1. of the statutes is amended to read:

4 49.682 (2) (e) 1. If the department's claim is not allowable because of par. (d)
5 and the estate includes an interest in real property, including a home, the court
6 exercising probate jurisdiction shall, in the final judgment or summary findings and
7 order, assign the interest in the home real property subject to a lien in favor of the
8 department for the amount described in par. (a). The personal representative or
9 petitioner for summary settlement or summary assignment of the estate shall record
10 the final judgment as provided in s. 863.29, 867.01 (3) (h), or 867.02 (2) (h).

11 History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. 225 ss. 127, 128; 1999 a. 9.

SECTION 30. 49.682 (2) (e) 2. of the statutes is amended to read:

12 49.682 (2) (e) 2. If the department's claim is not allowable because of par. (d),
13 the estate includes an interest in real property, including a home, and the personal
14 representative closes the estate by sworn statement under s. 865.16, the personal
15 representative shall stipulate in the statement that the home real property is
16 assigned subject to a lien in favor of the department for the amount described in par.
17 (a). The personal representative shall record the statement in the same manner as
18 described in s. 863.29, as if the statement were a final judgment.

19 History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. 225 ss. 127, 128; 1999 a. 9.

SECTION 31. 49.682 (2) (f) (intro.) of the statutes is amended to read:

20 49.682 (2) (f) (intro.) The department may not enforce the lien under par. (e)
21 on a home as long as any of the following survive the decedent:

22 History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. 225 ss. 127, 128; 1999 a. 9.

SECTION 32. 49.682 (3) of the statutes is amended to read:

1 49.682 (3) The department shall administer the program under this section
2 and may contract with an entity to administer all or a portion of the program,
3 including gathering and providing the department with information needed to
4 recover payment of aid provided under s. 49.68, 49.683, or 49.685. All funds received
5 under this subsection, net of any amount claimed under s. ~~867.035 (3)~~ [✓] 49.849 (5),
6 shall be remitted for deposit in the general fund.

History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. ~~225~~ [✓] ss. 127, 128; 1999 a. 9.

7 **SECTION 33.** 49.682 (4) (b) of the statutes is amended to read:

8 49.682 (4) (b) The department may file a claim under sub. (2) only with respect
9 to a client who dies after ~~September 1, 1995~~ [✓] the date that is 90 days after the effective
10 date of this paragraph [✓].... [LRB inserts date].

History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. 49.682; 1995 a. 225 ss. 127, 128; 1999 a. 9.

11 **SECTION 34.** 49.682 (5) of the statutes is amended to read:

12 49.682 (5) The department shall promulgate rules establishing standards for
13 determining whether the application of this section would work an undue hardship
14 in individual cases. If the department determines that the application of this section
15 would work an undue hardship in a particular case, the department shall waive
16 application of this section in that case. This subsection [✓] does not apply with respect
17 to claims against the estates of nonclient surviving spouses. [✓]

History: 1995 a. 27 ss. 3044b to 3044j; Stats. 1995 s. ~~49.682~~ [✓]; 1995 a. 225 ss. 127, 128; 1999 a. 9.

18 **SECTION 35.** 49.849 of the statutes is created to read:

19 **49.849** [✓] **Recovery by affidavit of correct payments under certain public**
20 **assistance programs. (1) (DEFINITIONS)** [✓] In this section: [✓]

21 (a) "Decedent" [✓] means a deceased recipient or a deceased nonrecipient surviving
22 spouse, whichever is appropriate. [✓]

23 (b) "Department" [✓] means the department of health services. [✓]

1 (c) "Nonrecipient surviving spouse" means any person who was married to a
2 recipient while the recipient was receiving public assistance and who survived the
3 recipient.

4 (d) 1. "Property of a decedent" means all real and personal property to which
5 the decedent held any legal title or in which the decedent had any legal interest at
6 the time of death, to the extent of that title or interest, including assets transferred
7 to a survivor, heir, or assignee through joint tenancy, tenancy in common,
8 survivorship, life estate, living trust, or any other arrangement.

****NOTE: This language parallels the federal law. However, instead of "at the time
of death," should the language be "immediately before death," as in s. 867.035 (1) (a)
(intro.)?

9 2. Notwithstanding subd. 1., "property of a decedent" includes any marital
10 property in which the recipient had an interest, within 5 years before the date on
11 which the recipient applied for public assistance, with the spouse to whom the
12 recipient was married on the date on which the recipient applied for public
13 assistance.

****NOTE: Does this work for both decedents, even if the surviving spouse was not
the same spouse as the one on the date on which the recipient applied for public
assistance?

14 (e) "Public assistance" means any services provided as a benefit under a
15 long-term care program, as defined in s. 49.496 (1) (bk), medical assistance under
16 subch. IV, long-term community support services funded under s. 46.27 (7), or aid
17 under s. 49.68, 49.683, or 49.685.

18 (f) "Recipient" means a person who received public assistance.

****NOTE: Section 867.035 is renumbered into this new section.

19 (2) (c) There is a presumption, which may be rebutted by clear and convincing
20 evidence, that all property of the deceased nonrecipient surviving spouse was
21 marital property held with the recipient and that 100 percent of the property of the

1 deceased nonrecipient surviving spouse is subject to the department's claim under
2 par. (a).[✓]

3 (3) (a) Any of the decedent's property that is transferred by a person who has
4 possession of the property at the time of the decedent's death is subject to the right
5 of the department to recover the amounts specified in sub. (2) (a).[✓] Upon request, the
6 person who transferred the property shall provide to the department information
7 about the decedent's property that the person has transferred and information about
8 the persons to whom the property was transferred.[✓]

9 **SECTION 36.**[✓] 700.24 of the statutes is amended to read:

10 **700.24 Death of a joint tenant; effect of liens.** A real estate mortgage, a
11 security interest under ch. 409, or a lien under s. 72.86 (2), 1985 stats., or s. 71.91 (5)
12 (b),[✓] or ch. 49 or 779 or rules promulgated under s. 46.286 (7) on or against the interest
13 of a joint tenant does not defeat the right of survivorship in the event of the death
14 of such joint tenant, but the surviving joint tenant or tenants take the interest such
15 deceased joint tenant could have transferred prior to death subject to such mortgage,
16 security interest, or statutory lien.

17 History: 1971 c. 307 s. 118; 1975 c. 39; 1979 c. 32 s. 92 (9); 1987 a. 27 s. 3202 (47) (a); 1987 a. 312 s. 17; 1999 a. 9.

17 **SECTION 37.** 701.065 (1) (b) 1. of the statutes is amended to read:

18 701.065 (1) (b) 1. The claim is a claim based on tort, on a marital property
19 agreement that is subject to the time limitations under s. 766.58 (13) (b) or (c), on
20 Wisconsin income, franchise, sales, withholding, gift, or death taxes, or on
21 unemployment compensation contributions due or benefits overpaid; a claim for
22 funeral or administrative expenses; a claim of this state under s. 46.27 (7g), 49.496

1 or, 49.682, or rules promulgated under s. 46.286 (7) 49.849; or a claim of the United
2 States.

History: 1997 a. 188; 1999 a. 9.

3 SECTION 38. 701.065 (5) of the statutes is created to read:

4 701.065 (5) CLAIMS OF DEPARTMENT OF HEALTH SERVICES. (a) Definitions. In this
5 subsection:

6 1. "Department" means the department of health services.

7 2. "Long-term care program" has the meaning given in s. 49.496 (1) (bk).

8 (b) Living trusts. 1. Notwithstanding sub. (1) (a), if a settlor of a living trust
9 received, at any time before death, any services provided as a benefit under a
10 long-term care program, medical assistance under subch. IV of ch. 49, long-term
11 community support services funded under s. 46.27 (7), or aid under s. 49.68, 49.683,
12 or 49.685, the trustee shall provide written notice to the department within 30 days
13 after the death of the settlor and before any property held in the trust is distributed.

****NOTE: What information should the notice provide to DHS?

* ****NOTE: Is this ^{or okay} or do you want to limit this to either a revocable or an
irrevocable living trust?

14 2. After the death of a settlor described in subd. 1., the department may recover
15 under s. 46.27 (7g), 49.496, 49.682, or 49.849, from property held in the living trust
16 immediately before the settlor's death, an amount equal to the medical assistance
17 that is recoverable under s. 49.496 (3) (a), an amount equal to aid under s. 49.68,
18 49.683, or 49.685 that is recoverable under s. 49.682 (2) (a), or an amount equal to
19 long-term community support services under s. 46.27 that is recoverable under s.
20 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or the decedent's spouse.

21 3. If a trustee under subd. 1. distributes property from the trust before the
22 department makes a request to the trustee for the recovery of any amount specified

1 in subd. 2.,[✓] the trustee shall provide the department with information about the
2 distributed property and to whom it was distributed or transferred. The department
3 is entitled to recover any amounts specified in subd. 2.[✓] from the persons to whom the
4 property was distributed or transferred.

5 (c) *Special needs or pooled trusts.*[✓] 1. Notwithstanding[✓] sub. (1) (a), within 30
6 days after the death of a beneficiary under a trust described in 42 USC 1396p (d) (4)
7 (A) or (C), the trustee shall provide written notice to the department and shall repay
8 the department for any medical assistance paid on behalf of the decedent, as required
9 under the terms of the trust.[✓]

****NOTE: What information should the notice provide to DHS?

****NOTE: Is 30[✓] days sufficient time for the trustee to comply with the repayments
provisions in the trust, or is it only the notice that must be given within 30 days of death?

10 2. If a trustee under subd. 1.[✓] fails to comply with the notice and repayment
11 requirements under subd. 1.[✓], the trustee is personally liable to the department for
12 any costs the department incurs in recovering medical assistance amounts paid on
13 behalf of the decedent from property distributed from the trust before any repayment
14 is made and for any recoverable amounts that the department is unable to recover
15 from persons to whom the property was distributed.

16 3. Notwithstanding the terms of the trust, after the death of a beneficiary under
17 a trust described in 42 USC 1396p (d) (4) (C), the trustee may retain up to[✓]30 percent
18 of the balance in the decedent's account, unless the trustee fails to comply with the
19 notice and repayment requirements under subd. 1.[✓], in which case the trustee may
20 not retain any of the balance in the decedent's account.

21 **SECTION 39.** 705.04 (2g)^{✓x} of the statutes is amended to read:

22 705.04 (2g) Notwithstanding subs. (1) and (2), the department of health
23 services may collect, from funds of a decedent that are held by the decedent

SECTION 39

1 immediately before death in a joint account or a P.O.D. account, an amount equal to
 2 the medical assistance that is recoverable under s. 49.496 (3) (a), an amount equal
 3 to aid under s. 49.68, 49.683, or 49.685 that is recoverable under s. 49.682 (2) (a), or
 4 an amount equal to long-term community support services under s. 46.27 that is
 5 recoverable under s. 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or
 6 the decedent's spouse ~~or an amount equal to the family care benefit under s. 46.286~~
 7 ~~that is recoverable under rules promulgated under s. 46.286 (7) and that was paid~~
 8 ~~on behalf of the decedent or the decedent's spouse.~~ ✓

History: 1973 c. 291; 1983 a. 186; 1985 a. 37 s. 187; 1995 a. 27 ss. 7065 to 7065c, 9126 (19); 1999 a. 9; 2005 a. 216, 387; 2007 a. 20 s. 9121 (6) (a); 2007 a. 97; 2009 a. 177.

9 SECTION 40. 859.02 (2) (a) ✓ of the statutes is amended to read:

10 859.02 (2) (a) It is a claim based on tort, on a marital property agreement that
 11 is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income,
 12 franchise, sales, withholding, gift, or death taxes, or on unemployment insurance
 13 contributions due or benefits overpaid; a claim for funeral or administrative
 14 expenses; a claim of this state under s. 46.27 (7g), 49.496 ✓ or, 49.682, or rules
 15 ~~promulgated under s. 46.286 (7)~~ 49.849 ✓; or a claim of the United States; or

History: 1989 a. 96; 1991 a. 39, 89, 301; 1995 a. 27; 1997 a. 39; 1999 a. ✓ 2005 a. 216.

16 SECTION 41. 859.07 (2) (a) 3. of the statutes is amended to read:

17 859.07 (2) (a) 3. The decedent or the decedent's spouse received ~~the family care~~
 18 ~~benefit under s. 46.286~~ services provided as a benefit under a long-term care
 19 program, as defined in s. 49.496 (1) (bk), ✓ medical assistance under subch. IV of ch.
 20 49, long-term community support services funded under s. 46.27 (7), or aid under s.
 21 49.68, 49.683, or 49.685.

History: 1977 c. 73; 1985 a. 29; 1989 a. 31, 96, 359; 1991 a. 39; 1995 a. 27 ss. 7191b to 7191c, 9126 (19); 1995 a. 77; 1997 a. 237; 1999 a. 9; 2001 a. 107; 2007 a. 20 ss. 3768 to 3769, 9121 (6) (a).

22 SECTION 42. 867.01 (3) (am) 4. of the statutes is amended to read:

1 867.01 (3) (am) 4. Whether the decedent or the decedent's spouse received the
2 ~~family care benefit under s. 46.286 services provided as a benefit under a long-term~~
3 ~~care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under subch. IV of
4 ch. 49, long-term community support services funded under s. 46.27 (7) or aid under
5 s. 49.68, 49.683 or 49.685.

History: 1971 c. 40 s. 93; 1973 c. 42, 90; 1975 c. 331, 421; 1977 c. 449; 1985 a. 278; 1987 a. 27; 1989 a. 234; 1991 a. 220; 1993 a. 16, 437, 486; 1995 a. 27 ss. 7193b to 7194c, 9126 (19); 1999 a. 9, 94; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a); 2009 a. 28.

6 **SECTION 43.** 867.01 (3) (d) of the statutes is amended to read:

7 867.01 (3) (d) *Notice.* The court may hear the matter without notice or order
8 notice to be given under s. 879.03. If the decedent or the decedent's spouse received
9 ~~the family care benefit under s. 46.286 services provided as a benefit under a~~
10 ~~long-term care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under
11 subch. IV of ch. 49, long-term community support services funded under s. 46.27 (7),
12 or aid under s. 49.68, 49.683, or 49.685, the petitioner shall give notice by certified
13 mail to the department of health services as soon as practicable after filing the
14 petition with the court.

History: 1971 c. 40 s. 93; 1973 c. 42, 90; 1975 c. 331, 421; 1977 c. 449; 1985 a. 278; 1987 a. 27; 1989 a. 234; 1991 a. 220; 1993 a. 16, 437, 486; 1995 a. 27 ss. 7193b to 7194c, 9126 (19); 1999 a. 9, 94; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a); 2009 a. 28.

15 **SECTION 44.** 867.02 (2) (am) 6. of the statutes is amended to read:

16 867.02 (2) (am) 6. Whether the decedent or the decedent's spouse received the
17 ~~family care benefit under s. 46.286 services provided as a benefit under a long-term~~
18 ~~care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under subch. IV of
19 ch. 49, long-term community support services funded under s. 46.27 (7), or aid under
20 s. 49.68, 49.683, or 49.685.

History: 1971 c. 40 s. 93; 1973 c. 90, 243; 1975 c. 331, 421; 1977 c. 449; 1985 a. 278; 1987 a. 27 ss. 2160w, 2170d, 3200 (47); 1989 a. 234; 1991 a. 220; 1993 a. 16, 437, 486; 1995 a. 27 ss. 7195b to 7196, 9126 (19); 1999 a. 9, 94; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

21 **SECTION 45.** 867.03 (1g) (c) of the statutes is amended to read:

22 867.03 (1g) (c) Whether the decedent or the decedent's spouse ever received the
23 ~~family care benefit under s. 46.286 services provided as a benefit under a long-term~~

1 care program, as defined in s. 49.496 (1) (bk), medical assistance under subch. IV of
2 ch. 49, long-term community support services funded under s. 46.27 (7) or aid under
3 s. 49.68, 49.683 or 49.685.

History: 1973 c. 43; 1975 c. 380 s. 5; 1979 c. 29; 1989 a. 234; 1993 a. 16, 205, 437; 1995 a. 27 ss. 7197b to 7199c, 9126 (19); 1997 a. 27; 1999 a. 9, 94; 2005 a. 216, 387;
2007 a. 20 s. 9121 (6) (a).

4 **SECTION 46.** 867.03 (1m) (a) of the statutes is amended to read:

5 867.03 (1m) (a) Whenever an heir, trustee, or person who was guardian of the
6 decedent at the time of the decedent's death intends to transfer a decedent's property
7 by affidavit under sub. (1g) and the decedent or the decedent's spouse ever received
8 ~~the family care benefit under s. 46.286~~ services provided as a benefit under a
9 long-term care program, as defined in s. 49.496 (1) (bk), medical assistance under
10 subch. IV of ch. 49, long-term community support services funded under s. 46.27 (7),
11 or aid under s. 49.68, 49.683, or 49.685, the heir, trustee, or person who was guardian
12 of the decedent at the time of the decedent's death shall give notice to the department
13 of health services of his or her intent. The notice shall include the information in the
14 affidavit under sub. (1g) and the heir, trustee, or person who was guardian of the
15 decedent at the time of the decedent's death shall give the notice by certified mail,
16 return receipt requested.

History: 1973 c. 43; 1975 c. 380 s. 5; 1979 c. 29; 1989 a. 234; 1993 a. 16, 205, 437; 1995 a. 27 ss. 7197b to 7199c, 9126 (19); 1997 a. 27; 1999 a. 9, 94; 2005 a. 216, 387;
2007 a. 20 s. 9121 (6) (a).

17 **SECTION 47.** 867.03 (1m) (b) of the statutes is amended to read:

18 867.03 (1m) (b) An heir, trustee, or person who was guardian of the decedent
19 at the time of the decedent's death who files an affidavit under sub. (1g) that states
20 that the decedent or the decedent's spouse received ~~the family care benefit under s.~~
21 ~~46.286~~ services provided as a benefit under a long-term care program, as defined in
22 s. 49.496 (1) (bk), medical assistance under subch. IV of ch. 49, long-term community
23 support services funded under s. 46.27 (7), or aid under s. 49.68, 49.683, or 49.685

1 shall attach to the affidavit the proof of mail delivery of the notice required under par.

2 (a) showing ~~the~~ ^{↓ ↓} the delivery date ~~that is not less than 10 days before the day on which~~
3 ~~the heir, trustee, or person who was guardian of the decedent at the time of the~~
4 ~~decedent's death files the affidavit.~~ ✓

History: 1973 c. 43; 1975 c. 380 s. 5; 1979 c. 29; 1989 a. 234; 1993 a. 16, 205, 437; 1995 a. 27 ss. 7197b to 7199c, 9126 (19); 1997 a. 27; 1999 a. 9, 94; 2005 a. 216, 387; 2007 a. 20 s. 9121 (6) (a).

5 **SECTION 48.** 867.03 (2g) of the statutes is renumbered 867.03 (2g) (a) and
6 amended to read:

7 867.03 (2g) (a) By accepting the decedent's property under this section the heir,
8 trustee, or guardian assumes a duty to apply the property transferred for the
9 payment of obligations according to priorities established under s. 859.25 and to
10 distribute any balance to those persons designated in the appropriate governing
11 instrument, as defined in s. 854.01, of the decedent or if there is no governing
12 instrument, according to the rules of intestate succession under ch. 852, subject to
13 par. (b). ✓ An heir or guardian may publish a notice to creditors in the same manner
14 and with the same effect as a trustee under s. 701.065. This subsection paragraph ✓
15 does not prohibit any appropriate person from requesting administration of the
16 decedent's estate under s. 856.07 or ch. 865.

History: 1973 c. 43; 1975 c. 380 s. 5; 1979 c. 29; 1989 a. 234; 1993 a. 16, 205, 437; 1995 a. 27 ss. 7197b to 7199c, 9126 (19); 1997 a. 27; 1999 a. 9, 94; 2005 a. 216, 387; 2007 a. 20 s. 9121 (6) (a).

17 **SECTION 49.** 867.03 (2g) (b) of the statutes is created to read:

18 867.03 (2g) (b) Property transferred under this section ✓ to or by an heir, trustee,
19 or guardian is subject to the right of the department ✓ of health services to recover
20 under s. 46.27 (7g), ✓ 49.496, ✓ 49.682, ✓ or 49.849 ✓ an amount equal to the medical
21 assistance that is recoverable under s. 49.496 (3) (a), ✓ an amount equal to aid under
22 s. 49.68, ✓ 49.683, ✓ or 49.685 ✓ that is recoverable under s. ✓ 49.682 (2) (a), or an amount
23 equal to long-term community support services under s. 46.27 ✓ that is recoverable

1 under s. 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or the decedent's
 2 spouse. Upon request, the heir, trustee, or guardian shall provide to the department
 3 of health services information about any of the decedent's property that the heir,
 4 trustee, or guardian has distributed and information about the persons to whom the
 5 property was distributed.

6 **SECTION 50.** 867.035 (title) of the statutes is repealed.

7 **SECTION 51.** 867.035 (1) (a) (intro.) of the statutes is renumbered 49.849 (2) (a)
 8 (intro.) and amended to read:

9 49.849 (2) (a) (intro.) Subject to par. (b), the department of health services
 10 may collect from the property of a decedent, including funds of a decedent that are
 11 held by the decedent immediately before death in a joint account or a P.O.D. account,
 12 by affidavit under sub. (2) (3) (b) or by lien under sub. (2m) (4) an amount equal to
 13 the medical assistance that is recoverable under s. 49.496 (3) (a), the long-term
 14 community support services under s. 46.27 that is recoverable under s. 46.27 (7g) (c)
 15 1., the family care benefit that is recoverable under rules promulgated under s.
 16 46.286 (7), or the aid under s. 49.68, 49.683, or 49.685 that is recoverable under s.
 17 49.682 (2) (a) and that was paid on behalf of the decedent or the decedent's spouse,
 18 if all of the following conditions are satisfied:

19 History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 26 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

SECTION 52. 867.035 (1) (a) 1. of the statutes is renumbered 49.849 (2) (a) 1.

****NOTE: I have retained this provision. Don't you need to know whether there will
 be an estate in which to file a claim?

20 **SECTION 53.** 867.035 (1) (a) 2. of the statutes is renumbered 49.849 (2) (a) 2. and
 21 amended to read:

1 49.849 (2) (a) 2. The decedent died after ~~September 30, 1991~~ the date that is
2 90 days after the effective date of this subdivision.... [LRB inserts date].

3 History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, ~~9126~~ (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

3 SECTION 54. 867.035 (1) (a) 3. of the statutes is renumbered 49.849 (2) (a) 3.

4 SECTION 55. 867.035 (1) (a) 4. of the statutes is repealed.

5 SECTION 56. 867.035 (1) (bm) of the statutes is renumbered 49.849 (2) (b), and
6 49.849 (2) (b) (intro.), as renumbered, is amended to read:

7 49.849 (2) (b) (intro.) The department of health services shall reduce the
8 amount of its recovery under par. (a) by up to the amount specified in s. 861.33 (2)
9 if necessary to allow the decedent's heirs or beneficiaries under the decedent's will
10 to retain the following personal property of the decedent:

11 History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

11 SECTION 57. 867.035 (2) of the statutes is renumbered 49.849 (3) (b) and

12 amended to read:

13 49.849 (3) (b) A person who possesses or receives property of a decedent shall
14 transmit the property to the department of health services, if the conditions in sub.
15 ~~(1) (a) 1. to 4.~~ (2) (a) 1. to 3. are satisfied, upon receipt of an affidavit by a person
16 designated by the secretary of health services to administer this section showing that
17 the department paid on behalf of the decedent or the decedent's spouse recoverable
18 benefits specified in sub. ~~(1) (2)~~ (2) (a). Upon transmittal, the person is released from
19 any obligation to other creditors or heirs of the decedent.

20 History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

20 SECTION 58. 867.035 (2m) of the statutes is renumbered 49.849 (4), and 49.849

21 (4) (a) (intro.) and (b), as renumbered, are amended to read:

22 49.849 (4) (a) (intro.) If the conditions in sub. ~~(1) (a) 1., 2., and 4.~~ (2) (a) 1. and
23 2. are satisfied, the department of health services shall have a lien in the amount that
24 it may recover under sub. ~~(1) (2)~~ (2) (a) on any interest in the decedent's home, as defined

1 in s. 49.496 (1) (b), transferred under s. 867.03 (1g). The department may record the
2 lien in the office of the register of deeds of the county in which the real property is
3 located. The department may enforce the lien by foreclosure in the same manner as
4 a mortgage on real property, unless any of the following is alive:

History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

****NOTE: Should the reference to s. 867.03 (1g) be removed in both this and the
next provision so that the department would have liens on the home and any other real
property, regardless of whether they were transferred under s. 867.03 (1g)?

5 (b) If the conditions in sub. (1) (a) ~~1. to 4.~~ (2) (a) 1. to 3. are satisfied, the
6 department of ~~health services~~ shall have a lien in the amount that it may recover
7 under sub. ~~(1)~~ (2) (a) on any interest in any real property of the decedent transferred
8 under s. 867.03 (1g). The department may record the lien in the office of the register
9 of deeds of the county in which the real property is located and may enforce the lien
10 by foreclosure in the same manner as a mortgage on real property.

History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

****NOTE: See my previous NOTE.

11 **SECTION 59.** 867.035 (3) ~~of the statutes~~ is renumbered 49.849 (5) and amended
12 to read:

13 49.849 (5) If a person has a valid claim against the decedent's estate that would
14 have a higher priority under s. 859.25 (1) if the estate were administered than the
15 department of ~~health services~~ would have under s. 859.25 (1) (e) and the person
16 demands payment in writing within one year of the date on which the property was
17 transmitted to the department, the department shall pay to the person the value of
18 the property collected under sub. ~~(2)~~ (3) or the amount of the claim, whichever is less.
19 The department may authorize any person who possesses property of the decedent
20 to honor higher priority claims with the decedent's property before transmitting
21 property to the department.

History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

1 **SECTION 60.** 867.035 (4)[✓] of the statutes is renumbered 49.849 (6) (a) and
2 amended to read:

3 49.849 (6) (a) From the appropriation under s. 20.435 (4) (im), with respect to
4 funds collected by the department under sub. (1) (2)[✓] related to medical assistance
5 paid on behalf of the decedent or the decedent's spouse, the department[✓] of health
6 services shall pay claims under sub. (3) (5)[✓], shall pay to the federal government from
7 the amount recovered under this section and not paid out as claims under sub. (3)
8 (5)[✓] an amount equal to the amount of federal funds used to pay the benefits recovered
9 under this section and shall spend the remainder of the amount recovered under this
10 section for medical assistance benefits under subch. IV[✓] of ch. 49.

11 History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

11 **SECTION 61.** 867.035 (4m)[✓] of the statutes is renumbered 49.849 (6) (b) and
12 amended to read:

13 49.849 (6) (b) From the appropriation under s. 20.435 (7) (im), with respect to
14 funds collected by the department under sub. (1) (2)[✓] related to long-term community
15 support services funded under s. 46.27 (7) paid on behalf of the decedent or the
16 decedent's spouse, the department[✓] of health services shall pay claims under sub. (3)
17 (5)[✓] and shall spend the remainder of the funds recovered under this section for
18 long-term community support services funded under s. 46.27 (7).

19 History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).

19 **SECTION 62.** 867.035 (5)[✓] of the statutes is renumbered 49.849 (7) and amended
20 to read:

21 49.849 (7) The department[✓] of health services shall promulgate rules
22 establishing standards to determine whether the application of this section would
23 work an undue hardship in individual cases. If the department[✓] of health services
24 determines that the application of this section would work an undue hardship in a

1 particular case, the department shall waive the application of this section in that
2 case. This subsection does not apply with respect to collecting from the property of
3 a deceased nonrecipient surviving spouse. ✓

History: 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27 ss. 7199y to 7206g, 9126 (19); 1997 a. 27; 1999 a. 9; 2001 a. 16; 2005 a. 216; 2007 a. 20 s. 9121 (6) (a).
****NOTE: Initial applicability and effective date provisions are not included in this
version of the draft. ✓

4

(END)

D-note

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

date

LRB-06177/dn
PJK & TJD
PI
K
Jld

This version of the draft includes the basic structure for estate recovery and definitions for your review. I arbitrarily decided to send, in a preliminary draft, everything that was drafted by the end of the week ending on December 7 so that you could let us know if we are on the right track. Some parts of the request are missing, and will be provided in later versions. Some parts of the request that are included may be incomplete. In addition to any corrections you would like to make to this draft, it might be useful if you would enumerate the parts of the request that are missing from this draft that you believe are crucial to include in this draft.

This draft does not include specific cross-references[✓] to the department's right of estate recovery with respect to various specific types of property. I don't believe that these cross-references are necessary. If the department has the right to recover from a person's probate estate and from any property that the person had immediately before death that is not included in the person's probate estate, a statement of that right should be enough without reiterating it in various places in the statutes. If you believe that these cross-references must be included, I will need more information about what property exactly, within the broader categories, is subject to the department's right to recover. For some types of property it may be obvious, but not for all. For example, what part of a life insurance policy is subject to the department's right? Is it the cash value before death? Is it the proceeds that are paid to the beneficiary(ies) under the policy? With a funeral insurance policy, the policy premiums may be paid by someone for the funeral expenses of a decedent who is a different person. Does the decedent in that case have any property interest in the policy? I think that, if general, blanket cross-references are not made, the property issues that actually^s apply at a person's death will be worked out at that time. It is impossible to address all contingencies in advance in the statutes. *

I did not add a provision to s.[✓] 49.454 relating to special needs or pooled trusts because s. 49.454 (4)[✓] provides that the section does not apply to those trusts.

For this preliminary draft, if the instructions specifically related to "medical assistance," I did not include any of the other programs in the estate recovery provision. You will have to let me know if the applicabilty of any provision needs to be expanded to more programs.

→
INSERT
FOR D-NOTE

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: pam.kahler@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0617/?dn
PJK:.....

Insert for D-note

As I'm sure you are aware, this draft may go beyond what federal law allows for recovering Medical Assistance (MA).[✓] The common law doctrine of necessities, which I believe is being used in support of recovery against the entire estate of a spouse, holds a spouse liable for what is provided to the other spouse if it is for the purpose of support or in the interest of the family. The purpose of the doctrine is to encourage sellers of goods to provide to family members what is considered necessary for the individual's or family's benefit, including medical care. MA presents a different situation, however. The state is not the seller of the services. The seller of the medical care is paid by MA; there is no need for the seller to collect from the spouse. The individual receiving the care is entitled to have his or her care paid for by MA if he or she satisfies the eligibility criteria. Federal law, not common law, controls what a state may recover of medical assistance that has been paid on behalf of an individual.[✓]

Recovery against marital property in which the individual had an interest^{at any time} in the five[✓] years preceding application for MA and against the entire estate of the individual's spouse appear to go beyond what federal law allows. Federal law explicitly provides for recovery from the estate of the individual who received MA.[✓] Federal law also provides that recovery may be made from any real or personal property in which the individual had a legal title or interest at the time of death. Nowhere does federal law provide that MA paid on behalf of an individual may be recovered from the estate of his or her spouse, or from property in which the individual had an interest at some time before death but not at death. I am persuaded, however, by the decision in *In re. Estate of Barg*, 752 N.W. 2d (Minn. 2008), that recovery may be made from the nonrecipient spouse's estate to the extent of property in which the recipient spouse had an interest



at the time of his or her death. In the draft, this limitation could be built into ss. 49.496 and 49.849 (much of which is renumbered ^{from} s. 867.035). ✓

~~~~

I cannot predict whether there will be lawsuits over whether the recovery in this draft is permissible under federal law. However, in my opinion, two aspects in particular (recovery against the entire estate of the nonrecipient spouse and considering property of the individual to include marital property in which the individual had an interest at any time during the five years preceding application for MA) go beyond what federal law allows.

(end ins)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0617/P1dn
PJK:jld:rs

December 11, 2012

This version of the draft includes the basic structure for estate recovery and definitions for your review. I arbitrarily decided to send, in a preliminary draft, everything that was drafted by the end of the week ending on December 7 so that you could let us know if we are on the right track. Some parts of the request are missing, and will be provided in later versions. Some parts of the request that are included may be incomplete. In addition to any corrections you would like to make to this draft, it might be useful if you would enumerate the parts of the request that are missing from this draft that you believe are crucial to include in this draft.

This draft does not include specific cross-references to the department's right of estate recovery with respect to various specific types of property. I don't believe that these cross-references are necessary. If the department has the right to recover from a person's probate estate and from any property that the person had immediately before death that is not included in the person's probate estate, a statement of that right should be enough without reiterating it in various places in the statutes. If you believe that these cross-references must be included, I will need more information about what property exactly, within the broader categories, is subject to the department's right to recover. For some types of property it may be obvious, but not for all. For example, what part of a life insurance policy is subject to the department's right? Is it the cash value before death? Is it the proceeds that are paid to the beneficiary(ies) under the policy? With a funeral insurance policy, the policy premiums may be paid by someone for the funeral expenses of a decedent who is a different person. Does the decedent in that case have any property interest in the policy? I think that, if general, blanket cross-references are not made, the property issues that actually apply at a person's death will be worked out at that time. It is impossible to address all contingencies in advance in the statutes.

I did not add a provision to s. 49.454 relating to special needs or pooled trusts because s. 49.454 (4) provides that the section does not apply to those trusts.

For this preliminary draft, if the instructions specifically related to "medical assistance," I did not include any of the other programs in the estate recovery provision. You will have to let me know if the applicability of any provision needs to be expanded to more programs.

As I'm sure you are aware, this draft may go beyond what federal law allows for recovering Medical Assistance (MA). The common law doctrine of necessities, which

I believe is being used in support of recovery against the entire estate of a spouse, holds a spouse liable for what is provided to the other spouse if it is for the purpose of support or in the interest of the family. The purpose of the doctrine is to encourage sellers of goods to provide to family members what is considered necessary for the individual's or family's benefit, including medical care. MA presents a different situation, however. The state is not the seller of the services. The seller of the medical care is paid by MA; there is no need for the seller to collect from the spouse. The individual receiving the care is entitled to have his or her care paid for by MA if he or she satisfies the eligibility criteria. Federal law, not common law, controls what a state may recover of medical assistance that has been paid on behalf of an individual.

Recovery against marital property in which the individual had an interest at any time in the five years preceding application for MA and against the entire estate of the individual's spouse appear to go beyond what federal law allows. Federal law explicitly provides for recovery from the estate of the individual who received MA. Federal law also provides that recovery may be made from any real or personal property in which the individual had a legal title or interest at the time of death. Nowhere does federal law provide that MA paid on behalf of an individual may be recovered from the estate of his or her spouse, or from property in which the individual had an interest at some time before death but not at death. I am persuaded, however, by the decision in *In re. Estate of Barg*, 752 N.W. 2d (Minn. 2008), that recovery may be made from the nonrecipient spouse's estate to the extent of property in which the recipient spouse had an interest at the time of his or her death. In the draft, this limitation could be built into ss. 49.496 and 49.849 (much of which is renumbered from s. 867.035).

I cannot predict whether there will be lawsuits over whether the recovery in this draft is permissible under federal law. However, in my opinion, two aspects in particular (recovery against the entire estate of the nonrecipient spouse and considering property of the individual to include marital property in which the individual had an interest at any time during the five years preceding application for MA) go beyond what federal law allows.

Pamela J. Kahler
Senior Legislative Attorney
Phone: (608) 266-2682
E-mail: pam.kahler@legis.wisconsin.gov