Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873
Email: fiscal.bureau@legis.wisconsin.gov • Website: http://legis.wisconsin.gov/lfb

September 18, 2013

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Implementation of Estate Recovery and Divestment Provisions Enacted in 2013 Wisconsin Act 20 -- Agenda Item IV

The attached paper on estate recovery and divestment provisions of 2013 Act 20 was jointly prepared by staff of the Legislative Council and Legislative Fiscal Bureau.

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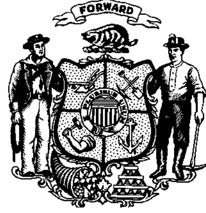
Attachment

STATE OF WISCONSIN

Legislative Council
Terry C. Anderson, Director

One East Main, Suite 401
Madison, WI 53703



Legislative Fiscal Bureau
Robert Wm. Lang, Director

One East Main, Suite 301
Madison, WI 53703

September 18, 2013

TO: Members
Joint Committee on Finance

FROM: Brian Larson, Staff Attorney, Legislative Council
Grant Cummings, Fiscal Analyst, Legislative Fiscal Bureau

SUBJECT: Implementation of Estate Recovery and Divestment Provisions Enacted in 2013 Wisconsin Act 20

REQUEST

The Department of Health Services (DHS) requests that the Committee approve the implementation of medical assistance (MA) estate recovery and divestment provisions enacted in 2013 Wisconsin Act 20 (Act 20). Committee approval is required under Act 20 prior to DHS implementation.

BACKGROUND

The Governor's recommendations for the 2013-15 biennial budget included a number of provisions intended to expand the amount and types of assets that are subject to the estate recovery and divestment aspects of the state's MA program. The Act 20 provisions relate both to the assets of the individual receiving the MA benefits (recipient) and to the assets of the recipient's spouse. A brief summary of these changes is below. See attachments 1 and 2 for a full description of the estate recovery and divestment provisions included in Act 20.

Summary of Estate Recovery Changes Under Act 20

Federal law requires every state to have an estate recovery program allowing for recovery of amounts paid on behalf of recipients for certain MA benefits, including long-term care services, hospital services, and other benefits. Federal law requires states to seek reimbursement from assets

that pass through the recipient's probate estate. Beyond that, federal law permits states to determine whether nonprobate assets may also be subject to recovery and generally allows states to set the scope of the estate recovery program.

Act 20 contains a number of changes intended to expand Wisconsin's estate recovery program. These changes include, but are not limited to, the following:

- Under Act 20, all property in which the recipient had an interest at death is subject to recovery, to the extent of that interest. This can include life estates, property held in trust, property that passes by beneficiary designation, joint tenancy property, and survivorship marital property. Prior to Act 20, recovery was mostly limited to property in the recipient's probate estate.

- In a case where the recipient was survived by a spouse, Act 20 authorizes DHS to recover all property of the recipient that is included in the estate of the non-recipient surviving spouse, upon the spouse's death, including 100% of all former marital property. Act 20 creates a presumption that all property in the estate of the non-recipient surviving spouse is former marital property. Prior to Act 20, recovery of property from the non-recipient surviving spouse's estate was very limited.

- Act 20 includes a procedure to allow DHS to monitor transfers of real property in which an individual who is eligible for public assistance has an interest, which includes filing a document in the property's chain of title. Also, under certain circumstances, DHS may commence an action to void a transfer of real property that was made to hinder, delay, or defraud DHS from recovering benefits.

- Under Act 20, upon the death of a beneficiary of a special needs or pooled trust, the trust may retain no more than 30% of the assets in the decedent's account, and the trustee must notify DHS upon the death of the beneficiary. Also, the trustee of a living trust must notify DHS upon the death of a settlor of the trust if at any time the settlor or his or her predeceased spouse received MA benefits subject to recovery.

- Under Act 20, DHS can recover the full amount of the capitation payments made to managed care organizations (MCOs) on behalf of the recipient. Prior to Act 20, the recovery amount was calculated based on actual payments to providers on behalf of the recipient.

Summary of Divestment Changes Under Act 20

In accordance with state and federal law, a person whose income or assets exceed certain limits may be ineligible for certain MA benefits. A person who divests income or assets, or disposes of them for less than fair market value, and who becomes eligible for MA within the next five years (i.e., the five-year "look-back" period), may receive a penalty resulting in ineligibility for the benefits for a specified period of time.

Act 20 modifies the statutes relating to divestment by making changes that include, but are not limited to, the following:

- Under Act 20, after a person is determined to be eligible for MA and placed in a nursing home or other institution, a transfer of assets by the noninstitutionalized spouse may be considered a divestment by the institutionalized spouse. This was not considered a divestment under prior law.

- Under Act 20, a transfer of assets for less than fair market value is considered a divestment even if the assets, if retained, are excluded under the federal law. These assets include automobiles and property used in a trade or business. The prior definition of "divestment" did not include such federally excluded assets.

- Under Act 20, a transfer of assets in exchange for a promissory note from a presumptive heir of the lender may be deemed a divestment transfer by the lender. Under prior law, this type of transaction was not deemed a divestment transaction.

- Act 20 requires individuals in a divestment penalty period to recover all of the divested assets from the person who received them before DHS may adjust the divestment penalty period. Under prior law, a so-called "partial cure" was allowed.

- Act 20 clarifies that the penalty period for a divestment transfer begins the first day of the month after DHS gives notice to the recipient.

Fiscal Effect of Estate Recovery and Divestment Changes under Act 20

The budget assumed the estate recovery provisions would result in savings of $3,393,400 ($1,013,100 GPR and $2,380,300 FED) in 2013-14 and $5,281,700 ($1,684,600 GPR and $3,597,100 FED) in 2014-15. These GPR and FED savings reflect the net effect of increased estate recovery collections of $4,409,800 PR in 2013-14 and $6,168,900 PR in 2014-15 and increased expenditures of $1,016,400 ($508,200 GPR and $508,200 FED) in 2013-14 and $887,200 ($443,600 GPR and $443,600 FED) for administrative staff and services needed to achieve the additional recoveries. The divestment provisions included in Act 20 were anticipated to generate savings of $873,300 ($328,500 GPR and $544,800 FED) in 2013-14 and $1,081,300 ($432,500 GPR and $648,800 FED) in 2014-15.

ANALYSIS

Legal Analysis – Effective Dates and Initial Applicability

The modifications to the divestment statutes under Act 20 took effect on **July 2, 2013**, and the changes to estate recovery take effect on **October 1, 2013**. [SECTIONS 9400 and 9418 (2), 2013 Wisconsin Act 20.]

Act 20 provides that the initial applicability of the estate recovery and divestment changes is expressly tied to events that occur on the effective dates. For example, the new divestment provisions first applied to transfers made on July 2, 2013, and the expanded estate recovery statutes first apply to benefits and long-term care services received on October 1, 2013. [SECTIONS 9318 (3), (4), and (8), 2013 Wisconsin Act 20.]

However, the Act also requires the Committee to approve the changes to the estate recovery and divestment statutes before DHS may implement them. Specifically, Section 9118 (6i) requires DHS to submit one or more proposals to the Committee "requesting approval of the implementation of the estate recovery and divestment provisions" of Act 20, no later than June 30, 2015. In addition, Section 9118 (6i) provides that, notwithstanding the effective date and initial applicability provisions of Act 20, as described above, DHS may not implement any of the changes to the estate recovery or divestment provisions without the approval of the Committee.

This situation has created uncertainty as to what statutory authority DHS currently has, or will have on October 1, 2013, to implement an estate recovery and divestment program. None of the new or amended provisions can currently be implemented by DHS. Also, it is clear that the provisions of prior estate recovery and divestment law that did not receive treatment by Act 20 remain in the statutes. However, to the extent that portions of the divestment statutes were modified or repealed by Act 20, these changes occurred on July 2, 2013, and were not contingent on the approval of the Committee. To the extent that portions of the estate recovery statutes were modified or repealed by Act 20, the modification or repeal will occur on October 1, 2013, and will not be contingent on the approval of the Committee.

It is not possible to predict the consequences of DHS's lack of authority to implement the new provisions or how a court might interpret what statutes apply prior to the Committee's approval of the changes. Nor is it clear what actions trustees, lenders, and other individuals should take regarding new requirements that are effective, and that appear to apply to everyone but DHS, but that require guidance from or coordination with DHS. Also, when and if the Committee approves the provisions, it is not clear what actions DHS may take with respect to acts (such as transfers of real or personal property) or omissions (such as the failure of a trustee to send a required notice) occurring after the initial applicability date but prior to the Committee approval.

These ambiguities may be addressed through legislation restoring the prior statutory authority or clarifying how the new provisions will be implemented. Alternatively, the Committee may address the ambiguities by approving DHS's request to implement the changes. Finally, it should be noted that it appears the Committee may address some of the ambiguities in a more targeted way by approving the implementation of some of the provisions while not approving others.

Legal Analysis – Federal Law Issues

In addition to questions related to implementation of the estate recovery and divestment provisions included in Act 20, at least some of the provisions appear to present conflicts or potential conflicts with federal law. In assessing these issues, it is important to note that the MA program is administered by the state with significant federal oversight. The state will be required to submit its changes to the federal Centers for Medicare and Medicaid Services (CMS), which may object to provisions that it believes do not comply with federal law. In addition to this review process, any private citizen who is affected by the estate recovery and divestment statutes may identify a conflict or potential conflict with federal law to seek a remedy in court.

It is not possible to identify all of the provisions that may lead to an objection or potential

litigation. In the past, in specific instances, it appears that CMS has not objected when provisions were inconsistent with federal law. For example, some states have expanded divestment to include federally excluded assets, as described below, and DHS indicates it believes CMS has not objected to the change.

Also, it is not possible to say which conflicts or potential conflicts will lead to court proceedings, or whether federal law preempts state law in each instance. In part, this is because the outcome of a court proceeding may be determined by the specific facts of the case, including the manner in which a statute was administered by DHS. For example, DHS has stated that it believes it has discretion not to administer one of the provisions that is described as a potential conflict below, related to recovery of 100% of the former marital property of a recipient and his or her non-recipient spouse. In a case where DHS exercises discretion in the application of a statute, a court may determine that the application of the statute did not violate federal law in that instance.

However, for the benefit of the Committee in considering this proposal, this memorandum identifies three of the instances in which there appear to be conflicts or potential conflicts between federal law and the estate recovery and divestment statutes under Act 20. The provisions are: (i) the restriction on retention of pooled trust assets beyond 30% of those remaining in a deceased beneficiary's account; (ii) an expanded definition of "property of a decedent" to include 100% of former marital property of the recipient and his or her non-recipient spouse; and (iii) an expanded definition of "divestment" to include assets excluded under 42 USC 1396p.

1. Retention of Pooled Trust Assets

Federal law contains an exception to the general MA eligibility and divestment rules for assets placed in a pooled trust. A pooled trust is a trust that contains the assets of one or more disabled individuals and is managed by a non-profit association, which pools the trust assets for purposes of investment and management of the funds but otherwise maintains each beneficiary's assets as a separate account. Federal law allows the trust to retain assets remaining after the death of the beneficiary, for the use of other disabled beneficiaries, according to the terms of the trust, but provides that amounts not so retained must be paid back as reimbursement to the state. [42 USC 1396p (d) (4) (C).]

Act 20 limits the amount that may be retained by a pooled trust after the death of a beneficiary to 30% of the balance in the decedent's account, thereby allowing the remaining 70% to be subject to recovery by DHS. [s. 701.065 (5) (c) 3., Stats.] This provision appears to conflict with federal law which does not set, or appear to authorize a state to set, a limit on the amount that may be retained in a pooled trust.

In 2012, the U.S. Court of Appeals for the Third Circuit struck down a Pennsylvania statute that limited the amount that may be retained in a pooled trust to 50% of the balance in a decedent's account, allowing the remaining 50% to be subject to estate recovery. [*Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012).] In April of this year, in response to that decision, the Pennsylvania Department of Public Welfare began processing refunds to pooled trusts of assets that had been collected under the state statute. If a court evaluating Wisconsin's statute followed the approach adopted in the Third Circuit, Wisconsin's statute would also be preempted.

On the other hand, as DHS has noted, decisions in the Third Circuit are not binding precedent in Wisconsin, and the U.S. Court of Appeals for the Seventh Circuit may reach a different conclusion.

2. Recovery of 100% of Former Marital Property

Under federal estate recovery law, the definition of a recipient's "estate" must include "all real and personal property and other assets included within the individual's estate, as defined for purposes of state probate law." Additionally, the definition may include, at the state's option:

> 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 that interest), including 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. [42 USC 1396p (b) (4).]

States' courts have varying interpretations of this federal language. For example, the Supreme Court of Minnesota has held that, based on this provision, "there is no principled basis on which to interpret the federal law to allow recovery of assets in which the Medicaid recipient did not have an interest at the time of death." [*In re Estate of Barq*, 752 N.W.2d 52, 70–71 (Minn. 2008).] On the other hand, the Supreme Court of Idaho has determined that the provision allows recovery, from the non-recipient surviving spouse's estate, of the recipient spouse's community property that was "transmuted into the separate property of the surviving spouse" via a marriage settlement agreement executed during their lives. [*In re Estate of Wiggins*, No. 39129, Slip Op. 85 (Idaho, August 9, 2013).]

Act 20 permits DHS to recover up to 100% of former marital property, including property that was marital property at any time within five years before the recipient applied for public assistance. [ss. 46.27 (7g) (a) 5., 49.496 (1) (cm), 49.682 (1) (e), and 49.849 (1) (d).] This provision appears to present a potential conflict with the federal language limiting recovery to the recipient's assets "at the time of death" because a court evaluating Wisconsin's statute may determine, as did the Minnesota Supreme Court, that the federal provision only allows recovery of assets in which the recipient had an interest at death.

In its analysis, the court may consider that under Wisconsin property law, each spouse owns a 50% undivided interest in each item of marital property. [s. 766.31 (3), Stats.] This supports the view that "the extent of" the recipient's former interest in the marital property was a 50% interest as opposed to a 100% interest. A court could find that this apparent conflict provides an additional basis for preemption of Wisconsin's statute.

DHS has relied upon the Idaho Supreme Court's ruling as a basis for supporting the Wisconsin statute, particularly with respect to the statute's inclusion of property that was not owned by the recipient at the time of death. It is unclear how a court applying the logic of the Idaho court's decision would address the second issue related to the recipient having a 50% undivided interest in marital property, because this issue was not directly addressed by the Idaho Supreme Court.

3. Treatment of Excluded Assets

Federal law, at 42 USC 1396p, describes a divestment transfer as a disposition of assets for less than fair market value, and provides that the term "assets" with respect to an individual, includes all income and resources of the individual and of the individual's spouse. Federal law further provides that in determining whether an individual has made a divestment transfer, certain items shall be excluded from the definition of "resources" including such items as household goods, automobiles, and certain property used in a trade or business. [42 USC 1396p (c) (1) (A), (h) (1) and (5), and 1382b (2)–(3).] A widely understood policy rationale for the exclusion is that such items are essential to the livelihood of the recipient and his or her spouse.

Act 20 defines a "divestment" as a transfer of "assets, regardless of whether those assets, if retained, are excluded under 42 USC 1396p." [s. 49.453 (2) (a), Stats.] This appears to conflict with federal law, which expressly requires the exclusion of those items.

In response to questions about this apparent conflict with federal law, DHS has pointed to the fact that the scope of the potential conflict is limited to the divestment statute. That is, the federally excluded assets will not be taken into account for purposes of determining a recipient's MA eligibility under Wisconsin law. Because the change is limited to divestment, it is not clear whether CMS would object to the change; arguably, enforcing a divestment penalty for the disposition of excluded items is consistent with broader policy objectives.

Fiscal Effects and Other Considerations

Representatives from the Elder Law and Family Law sections of the Wisconsin State Bar (the State Bar) and the banking, real estate, land-title, and trust industries expressed concerns with a number of the new estate recovery and divestment provisions. The Department has provided fiscal and equity arguments in support of the new provisions. Some of these positions are described below.

The State Bar has raised concerns that many of the Act 20 provisions are in conflict with federal law. Some of these conflicts or potential conflicts with federal law are analyzed above. The Bar has also argued that the marital property and spousal divestment provisions in Act 20 will increase the number of divorces in the state, as getting divorced five years before becoming MA eligible is one way couples can prevent DHS from recovering both of their estates. In addition, they mentioned that trustees would have difficulty complying with the notice provisions required under Act 20, especially smaller trustees and those trusts with multiple settlors.

Representatives of family farmers and small business owners have argued that the Act 20 provisions will prevent couples from passing their farms or businesses down to their children. The spousal divestment provisions and the expanded definition of divestment would impose a penalty period on the recipient if the non-recipient spouse transfers their farm or business for less than fair market value within five years of the recipient's eligibility for MA. In such instances, the non-recipient spouse might not be able to transfer the farm or business to their child before they died without imposing a divestment penalty on their spouse. Under Act 20, the farm or business would also be recoverable upon the non-recipient spouse's death due to the estate recovery provisions.

Representatives of farmers have also expressed concerns about the treatment of fair market value in the Act 20 provisions. Specifically, they note that some farms are zoned partly as agricultural property and partly as commercial property. Their concern is that, for the purposes of determining divestment, DHS may require farmers to transfer their farms at the fair market value for commercial property. The fair market value for commercial property can be much higher than the fair market value for agricultural land. Farmers also voiced opposition to the provision that voids promissory notes if the debtor is a presumptive heir of the lender. Promissory notes from parent to child are a common method farm families and small businesses use to transfer their businesses from one generation to the next.

Title insurance companies, real estate companies, and bankers have argued against two of the provisions in Act 20. First, they have concerns regarding the provisions that allow DHS to void certain transfers of real property. They stated that any property with a potential claim by DHS would be unlikely to receive a mortgage loan because DHS could potentially void a transfer at any point in the chain of title. Moreover, if a lender did approve a loan for such a property, title insurance companies may not be able to insure against that risk. This could shift the burden of risk to the transacting parties, which may prevent transactions from going forward. Second, these groups have concerns with the provision requiring DHS to record a request for notice of its claim on properties. The title insurance industry argued that the Department's requests for notification will be treated similarly to a lien, but unlike other types of liens, which can be addressed at closing, they are skeptical that DHS will have the operational capacity to monitor, respond to, and release encumbrances in a timely manner.

Many of the stakeholder groups indicate they are concerned about the practical implementation of these provisions and whether DHS will have the policies and systems in place to begin receiving and responding to recording requirements that will go into effect on October 1, 2013. In its request letter to the Committee, DHS indicated that it still needs to finalize many forms, processes, and policies needed to implement the new provisions, but that it is working with stakeholders to do so. It is not clear when the Department would have the systems in place to implement the new provisions even if the Committee approved the request.

The Department argued that the provisions included in Act 20 will improve the equity of the MA program. In its request to the Committee, DHS gave three specific equity arguments. First, the Department notes that the eligibility requirements for elderly, blind, and disabled MA do not include an accounting of the resources and assets of heirs and beneficiaries. DHS argues that although the estate recovery and divestment provisions may prevent heirs and beneficiaries from receiving a large inheritance, the MA program also ensures they do not have to expend all of their assets providing care to their aging or disabled family members.

Second, DHS argues that state and federal taxpayers should not be forced to fund an individual's long-term care so the individual can pass on an inheritance to their heirs or beneficiaries. Instead, the Department asserts that individuals who want to make sure they can leave an inheritance to their heirs can purchase long-term care insurance.

Third, the Department believes expanding estate recovery and divestment as provided in Act 20 results in more equitable estate recovery and divestment programs. Under the pre-Act 20

provisions, Wisconsin could recover from probate and some non-probate assets. Other non-probate assets, such as transfers-on-death, were not recoverable. The Act 20 provisions allow DHS to recover more non-probate assets and thereby reduces the disparity between how probate and non-probate assets were treated.

The Department also indicates that some of the statutory sections modified in Act 20 are the basis for the Department's pre-Act 20 estate recovery program. The Department has reviewed the language in Act 20 and has determined that without Committee approval, it may not be able to implement three parts of the current estate recovery program that generate significant recoveries. DHS believes it cannot implement these sections because the pre-Act 20 provisions were repealed, recreated, and renumbered, but the renumbered and recreated sections cannot be implemented by DHS without the Committee's approval.

DHS has estimated that if it cannot operate the estate recovery program as it did before Act 20, recoveries would decrease by $10,995,800 ($4,340,300 GPR and $6,655,500 FED) per year to reflect the following reductions: (a) $8,674,100 ($3,469,700 GPR and $5,204,400 FED) per year because the Department would no longer be able to collect from transfers by affidavit; (b) $2,143,000 ($803,600 GPR and $1,339,400 FED) per year because it would not be able to collect from the estates of non-institutionalized Family Care, Family Care Partnership, or long-term care waiver participants; and (c) $178,600 ($67,000 GPR and $111,600 FED) per year because it could no longer recover from liens on the homes of nursing home residents for waiver services they received while living in the community.

Adjusting the Department's estimates for the year and three quarters remaining in the 2013-15 biennium, the lost recoveries from the pre-Act 20 program could total approximately $19,242,600 ($7,595,500 GPR and $11,647,100 FED). These estimates assume that DHS does not receive approval to implement the Act 20 provisions at any time in the 2013-15 biennium.

Discussion of Alternatives

Section 9118(6i) of Act 20 requires DHS to submit one or more proposals to the Committee, which the Committee may then approve or deny. Section 9118(6i) does not give the Committee the authority to modify the language that was enacted as part of Act 20. For this reason, new legislation would be needed to modify the proposals or to re-instate the estate recovery and divestment programs as they existed prior to Act 20.

The Committee could choose to approve the entire request (Alternative 1). This alternative would eliminate ambiguity as to which estate recovery and divestment provisions are in effect. DHS would have full authority to implement expansion of the estate recovery and divestment programs as envisioned under Act 20. There would be no change from the estate recovery and divestment fiscal estimates assumed in Act 20. Actual implementation, however, would require DHS to finalize policies and procedures. In addition, some of the Act 20 provisions, as discussed above, appear to present conflicts or potential conflicts with federal law. Under Alternative 1, DHS would be required to implement these provisions, subject to obtaining approval from CMS.

Out of concern for potential conflicts with federal law and the arguments raised by

stakeholders, the Committee could deny the Department's request in its entirety (Alternative 2). This would prevent DHS from implementing the Act 20 provisions and, based on the Department's analysis, some pre-Act 20 operations. If the Department cannot implement any of these provisions, the Department estimates recoveries could decrease by $12,513,500 ($4,596,800 GPR and $7,916,700 FED) in 2013-14 and by $17,358,800 ($6,457,400 GPR and $10,901,400 FED) in 2014-15. Act 20 requirements may still apply to all parties except DHS.

Alternative 2 could be coupled with separate legislation that could address some of the issues raised above. If the Committee chooses Alternative 2 and pursues separate legislation, uncertainty would continue with regards to which statutes are in effect until the separate legislation is enacted. If the legislation was not enacted, the effects would be the same as described for Alternative 2 above.

The Committee could approve most of the Department's request, but deny one or more provisions (Alternative 3). The provisions included in Alternative 3 are those authorized under statutory sections that are severable from the remainder of the provisions and that address specific issues raised by stakeholders. None of the specific provisions identified in Alternative 3 are necessary for the Department to implement the pre-Act 20 program. It is important to note that DHS would not be able to implement any provision the Committee rejects, but it appears the provision would apply to all other parties.

Alternative 3.a. would prevent DHS from counting, for the purposes of determining divestments, transfers of assets that were exempt prior to Act 20 and promissory notes between a lender and their presumptive heir. Approving this alternative may address some concerns from farmers and business owners that they cannot transfer their business on to their child before becoming eligible for MA long-term care. Act 20 did not include a specific fiscal effect for these provisions.

Alternative 3.b. would prevent the Department from voiding certain transfers of real property and from implementing the recording requirements created in Act 20. Rejecting the Department's ability to void transfers of real property may alleviate some of the concerns that title insurance companies, bankers, and realtors have had about the new provisions. This provision was expected to result in savings of approximately $40,000 ($13,800 GPR and $26,200 FED) in 2013-14 and $60,000 ($20,700 GPR and $39,300 FED) in 2014-15.

By rejecting the implementation of the new recording requirements, Alternative 3.b. may reduce concerns by stakeholders regarding the potential effect on real estate transactions. The Department, however, indicates that the recording requirements are the process by which it would monitor property transfers and recover property from the estates of a recipient or a recipient's spouse. It is unclear what amount of savings attributable to the new Act 20 provisions require this specific provision.

Alternative 3.c. would reject provisions relating to special needs, pooled, and living trusts. This may reduce concerns that were raised by stakeholders regarding trustee obligations and the amount trusts may retain. Act 20 assumed this provision would save approximately $245,500 ($84,700 GPR and $160,800 FED) in 2013-14 and $368,200 ($127,000 GPR and $241,200 FED)

in 2014-15.

Separately or in conjunction with another alternative, the Committee could direct DHS to return to the Committee with a report by December 1, 2013 describing the policies and procedures the Department will use to implement the Act 20 provisions and any legislation the Department determines is necessary based on meetings with stakeholders (Alternative 4). The Committee could indicate approval of the request would be conditional on the findings of the report. The Committee could also use the report to inform new legislation or as a progress report if the provisions are approved.

ALTERNATIVES

A. Implementation of Estate Recovery and Divestment Provisions in Act 20

1. Approve implementation of all provisions in the request.

2. Deny implementation of all provisions in the request.

3. Approve implementation of all provisions in the request, except for one or more of the following items:

a. For the purposes of determining divestment, counting transfers of assets that were exempt prior to Act 20 and transfer of assets in exchange for a promissory note from the presumptive heir of the lender.

b. Voiding transfers of certain real property and implementing the recording requirements.

c. Provisions relating to special needs, pooled, and living trusts.

B. Reporting Requirement

1. Direct the Department of Health Services to return to the Committee with a report, by no later than December 1, 2013, which describes the policies and procedures the Department will use to implement the Act 20 provisions and any remedial legislation the Department determines is necessary based on meetings with stakeholders.

2. Take no action.

BL/GC/sas
Attachments

ATTACHMENT 1

Summary of Estate Recovery Provisions in 2013 Wisconsin Act 20

Prior to enactment of 2013 Wisconsin Act 20, DHS was required to recover amounts the state paid for certain benefits individuals received while they were enrolled in several MA-related programs ("recipients"), and individuals that received services under the GPR-funded community options program and the disease aids program ("clients"). However, statutory provisions relating to recoveries under these programs varied. Act 20 made the recovery provisions consistent with each other (including the use of common definitions), made changes to the non-probate property recovery program so that it would apply to all types of assets, and renumbered and changed statutory references to these provisions. Act 20 prohibits DHS from implementing any of these provisions without the approval of the Joint Committee on Finance, and requires DHS to submit one or more proposals to the Committee by June 30, 2015, requesting the Committee approve the implementation of the estate recovery provisions contained in the act.

Act 20 contains provisions to expand the Department's authority and ability to recover the cost of public assistance payments made on behalf of long-term care recipients from the estates of recipients and their spouses by: (a) defining "property of a decedent" to encompass all real and personal property to which the recipient held an interest including, upon the death of a surviving spouse, property to which the recipient held a marital property interest within five years before or during the individual's program eligibility; (b) authorizing DHS to recover the cost of all MA-eligible services provided to a long-term care program recipient, not just the cost of MA-eligible long-term care services; (c) changing the amounts recoverable from MA benefits provided through managed care organizations (MCOs), from the payments MCOs made to health care providers for services the recipient received, to the capitation payments DHS paid to the MCO to support services for the recipient; (d) voiding property transfers intended to hinder, delay or defraud the state from recovering MA benefits; and (e) limiting the amounts pooled trusts may retain to 30% of the amount in the recipient's trust immediately before the recipient's death. These and other related provisions are summarized below.

Funding Changes

Increase funding by $1,016,400 (-$1,013,100 GPR, -$2,380,300 FED and $4,409,800 PR) in 2013-14 and by $887,200 (-$1,684,600 GPR, -$3,597,100 FED and $6,168,900 PR) in 2014-15, and provide 8.50 positions (4.25 GPR positions and 4.25 FED positions), beginning in 2013-14, to reflect the net effect of additional administrative costs for the estate recovery program and anticipated increases in collections that would occur due to proposed statutory changes and staff increases.

Definitions

Create the following definitions, as they relate to estate recoveries.

a. "decedent" -- a deceased client (or recipient) or deceased nonclient (or nonrecipient) surviving spouse, whichever is applicable.

b. "department" -- the Department of Health Services.

c. "conveyance" -- written instrument evidencing a transaction and that satisfies statutory requirements for conveyances of real property.

d. "fair market value" -- the price that a willing buyer would pay a willing seller for the purchase of real property.

e. "fraudulent transfer" -- a transfer of title to real property for less than fair market value or a transfer of title to real property by a conveyance that is not recorded during the lifetime of the grantor in the office of the register of deeds of the county in which the real property is located.

f. "grantee" -- person to whom the interest in land passes. Whenever consistent with the context, reference to the interest of a party includes the interest of the party's heirs, successors, personal representatives and assigns.

g. "grantor" -- the person from whom an interest in lands passes by conveyance, including, without limitations, lessors, vendors, mortgagors, optioners, releasers, assignors and trust settlors of interest in lands. Whenever consistent with the context, reference to the interest of a party includes the interest of the party's heirs, successors, personal representatives and assigns.

h. "long-term care program" -- any of the following: Family Care, IRIS (Include, Respect, I Self-Direct), Family Care Partnership, Program for All-Inclusive Care for the Elderly (PACE), and any program that provides long-term care services and is operated by DHS under a state plan amendment, waiver, or demonstration project.

i. "nonclient surviving spouse" and "nonrecipient surviving spouse" -- any person who was married to a client (recipient) while the client (recipient) was receiving services for which the cost may be recovered and who survived the client (recipient).

j. "property of a decedent" -- all real and personal property to which the client held any legal title or in which the client had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, living trust, or any other arrangement. Property of a decedent also includes all real and personal property in which the nonclient surviving spouse had an ownership interest at the client's death and in which the client had a marital property interest with that nonclient surviving spouse at any time within five years before the client applied for long-term care services, MA, the community options program (COP), and/or the disease aids program (aid for individuals with kidney disease, cystic fibrosis, or hemophilia) or during the time that the client was eligible for those services.

k. "public assistance" -- any services provided as a benefit under a long-term care program (Family Care, IRIS, Family Care Partnership, PACE), MA, the community options program (COP), or the disease aids program (aid for individuals with kidney disease, cystic fibrosis, or hemophilia) that may be recoverable.

l. "recipient" -- a person who received public assistance.

Estates of Surviving Spouses

Specify that all property of a decedent (as defined above) that is included in the estate of a client or recipient or in the estate of a nonclient surviving spouse or nonrecipient surviving spouse is subject to DHS' claim. Create a presumption, which may be rebutted by clear and convincing evidence, that all property in the estate of the nonclient surviving spouse or nonrecipient surviving spouse was marital property held with the client or recipient and that 100 percent of the property in the estate of the nonclient surviving spouse or nonrecipient surviving spouse is subject to DHS' claim.

Under prior law, the state recovered for assets that were in the recipient's estate through the probate process, plus some, but not all, non-probate assets, which can be transferred administratively upon the death of an individual. Some non-probate assets passed to heirs free of any creditors' claims, including DHS claims for reimbursement of medical services.

Recovery for All Services for Long-Term Care Recipients Over Age 55

Authorize DHS to recover payments for all services paid on behalf of the recipient after the recipient attained 55 years of age and while the recipient was participating in a long-term care program.

Under prior law, DHS could only recover from the estate of a recipient for MA services paid on behalf of the recipient while the recipient resided in a nursing home, was an inpatient in a hospital and was required to contribute to the cost of care, or was over the age of 55. For individuals over age 55, DHS could only recover for services provided under a home and community-based waiver program, related hospital services, related prescription drug services, and personal care services.

Calculation of Recovery Amounts for Services Provided by MCOs

Specify that the amount DHS may claim against an estate of a recipient or an estate of a nonrecipient surviving spouse for services that are provided by a managed long-term care program funded by capitated payments is the amount of the capitated payment for the recipient.

Under administrative rule, for individuals enrolled in Family Care, DHS could recover the amount of the services the recipient received from the managed care organization (MCO), not the amount of the capitated payment DHS made to the MCO.

Voiding Certain Transfers of Real Property

Voidable Transfers. Specify a transfer of real property is voidable by DHS if all of the following apply: (a) the transfer was made by a grantor who was receiving or who received MA, or by someone on his or her behalf, during the time the grantor was eligible for MA; (b) DHS was not notified and was unaware that the transfer was made; and (c) the transfer was made to hinder, delay, or defraud DHS from recovering MA benefits that were paid on behalf of the grantor. Authorize DHS to commence an action in circuit court against the grantee to void the

transfer. If the court voids the transfer, the title to the real property reverts to the grantor or his or her estate.

Presumption. Establish a presumption, that may be rebutted by clear and convincing evidence, that a fraudulent transfer made by a grantor while the grantor was eligible for MA was made to hinder, delay, or defraud DHS from recovering MA benefits that were paid on behalf of the grantor.

Burden of Proof. Provide that with respect to a fraudulent transfer made for less than fair market value, the burden of proof for establishing fair market value is on the grantee. Fair market value must be established through a credible methodology, which may include an appraisal performed by a licensed appraiser.

Inapplicable to Purchaser in Good Faith. Provide that voidable transfers are not voidable, if after the transfer, the real property was transferred by a conveyance to a purchaser in good faith and for a valuable consideration, and the conveyance was recorded.

Applicability. Specify that transfers are voidable under these provisions if the transfer is made on or after the effective date of this section or the transfer was made before the effective date of the paragraph but the grantor is receiving MA on, or receives MA after, the effective date of these provisions.

Treatment of Real Property Owned by Certain Public Assistance Recipients

Creation of Documents for Recording. Require DHS to create a document entitled "Request for notice of transfer or encumbrance and notice of potential claim" ("Request"), which would require notice to DHS with respect to any transfer of title to, placement of an encumbrance on, or termination of an interest in, a property and which would provide notice that DHS may have a claim against the property on the basis of providing public assistance to an individual who has or had a legal interest in the property.

Require DHS to create a document entitled "Termination of request for notice of transfer or encumbrance and notice of potential claim" ("Termination") which would provide notice that, with respect to a property against which a "Request" has been recorded, no notice to DHS is required when title to the property is transferred, an encumbrance is placed on the property, or an interest in the property is terminated.

Require DHS to create a document entitled "Certificate of Clearance" ("Clearance") which would provide notice that, with respect to property against which a "Request" has been recorded, but against which a "Termination" has not been recorded, DHS has no objection to the transfer of title to, placement of an encumbrance on, or termination of an interest in, the property, and that no notice to DHS is required in the future when those actions are taken.

Recording of Request for Notice and Termination of Request for Notice. Provide that whenever an individual becomes eligible for public assistance, and at any time during the time that an individual is eligible for public assistance, DHS may record a "Request" if the individual has any of the following ownership interests in real property: (a) current ownership interest in real property, including a marital property interest; or (b) at any time within the five years before

the individual applied for public assistance or during the time that the individual is eligible for public assistance, a marital property interest in real property with his or her current spouse, if that spouse currently holds title to the real property. DHS must record the document in the office of the register of deeds of the county in which the real property is located. An interest in real property includes a vendee's or vendor's interest in a land contract or an interest in real property held in a revocable trust.

Provide that whenever DHS determines that, with respect to property against which a "Request" has been recorded, DHS no longer requires notice when title to the property is transferred, an encumbrance is placed on the property, or an interest in the property is terminated, DHS would record a "Termination" in the office of the register of deeds of the county in which the "Request" was recorded.

Disclosure of Request for Notice. Provide that if, in the course of a title search on real property, a title insurance company or agent finds that a "Request" has been recorded against the property but a "Termination" has not been recorded against the property, the title insurance company or agent must disclose that a "Request" has been recorded against the property in any report submitted preliminary to issuing, or in any commitment to offer, a certificate of title insurance for the real property.

Transferring, Encumbering, or Terminating an Interest in Property; Clearance by the Department. Specify that any person transferring title to, encumbering, or terminating an interest in property against which a "Request" has been recorded, but against which a "Termination" has not been recorded, must notify DHS of the proposed transfer, encumbrance, or termination. If, on the date that the person sends the notice, the recipient who had the ownership interest in the property when DHS recorded the "Request" is alive, the person may transfer title to, encumber, or terminate interest in the property with no further action by DHS. If the person is deceased, DHS must determine whether it has a claim against the property for recoverable amounts paid on behalf of the recipient. If DHS determines that it has no recoverable claim, DHS must issue to the person seeking to transfer title to, encumber, or terminate an interest in the real property, a "Clearance," which the person must record along with the instrument transferring title to, encumbering, or terminating the interest in the property. If DHS determines the claim is recoverable, DHS must follow the procedure described below. Provide that transferring title to, encumbering, or terminating an interest in the property is not valid unless DHS issues to the person and the person records a "Clearance."

Procedure if the Department Has a Claim Against Real Property. Create a procedure for DHS to follow if: (a) DHS determines it has a claim against real property in response to a notice of proposed transfer, encumbrance, or termination of interest in the property; or (b) upon the death of a recipient whose surviving spouse has an ownership interest in real property in which the recipient had a marital property interest with that spouse at any time within five years before the recipient applied for public assistance or during the time that the recipient was eligible for public assistance, regardless of whether DHS recorded a "Request" with respect to the property.

Unless the property is being transferred by affidavit or through formal or informal administration of the recipient's estate, require DHS to send the person providing the notice or to the surviving owner of the property, whichever is applicable, a statement of claim that states all

of the following: (a) DHS has a claim against the property that it intends to recover from the property; (b) the amount and basis for the claim; (c) that the person has a right to an administrative hearing which must be requested within 45 days after DHS sent the statement of claim, on the extent and fair market value of the recipient's interest in the property and how to request an administrative hearing; and (d) that the transferee of the recipient's interest in the property or the surviving owner of the property may request from DHS a hardship waiver and how to request a hardship waiver.

Provide that a person who receives a statement of claim from DHS is entitled to and may, within 45 days after DHS sent the statement of claim, request a departmental fair hearing on the value of the property and the extent of the recipient's interest in the property. The value of the recipient's interest in the property would be determined in the manner described below under "Value of Recipient's Interest."

Authorize DHS to recover against the property in the manner determined by DHS to be appropriate, including by placing a lien on the property. DHS may enforce a lien on the property by foreclosure in the same manner as a mortgage on real property. Retain prior law provisions that prohibit DHS from enforcing a lien as long as the recipient's spouse or the recipient's child, who is under age 21 or disabled, is alive. Provide that if the recipient's surviving spouse or child, who is under age 21 or disabled, refinances a mortgage on the property, the Department's lien is subordinate to the new encumbrance.

Require DHS to release a lien that it cannot enforce because the recipient's spouse or child, who is under age 21 or disabled, is alive, if any of the following applies: (a) the recipient's surviving spouse or child, who is under age 21 or disabled, sells the property for fair market value during the spouse's or child's lifetime; (b) the recipient's surviving spouse or child transfers the property for less than fair market value and/or the transferee, or surviving owner sells the property during the spouse's or child's lifetime and places proceeds equal to the lesser of DHS' lien or the sale proceeds due to the seller in a trust or bond, and DHS is paid the secured amount upon the death of the recipient's spouse or disabled child or when the recipient's child, who is not disabled, reaches age 21.

Expand Types of Recoverable Property and Property Subject to Liens

Provide that property transferred by affidavit to or by an heir, trustee, or guardian is subject to DHS' right to recover amounts paid on behalf of the decedent or the decedent's spouse. Upon request, require the heir or trustee to provide DHS information about any of the decedent's property that the heir, trustee, or guardian has distributed and information about the persons to whom the property was distributed.

Expand the interests for which DHS may be assigned a lien, by the probate court or a personal representative closing an estate by sworn statement, from "home" to "real property, including a home" and/or "real property".

Provide that death benefits payable under a life insurance policy or an annuity are subject to the right of DHS to recover an amount equal to public assistance payments paid on behalf of the deceased policyholder or annuitant.

Consolidated Recovery Provisions Applicable to Public Assistance Programs

Create provisions relating to recovery of correct public assistance payments, using common definitions described above, that would apply to each public assistance program.

Recoverable Amounts. Create a presumption, which may be rebutted by clear and convincing evidence, that all property of the deceased nonrecipient surviving spouse was marital property held with the recipient and that 100% of the property of the deceased nonrecipient surviving spouse is subject to a DHS claim.

Authorize DHS to collect from the property of a decedent, by affidavit or by lien, amounts equal to services provided under public assistance programs and that was paid on behalf of the decedent or the decedent's spouse. However, retain conditions that DHS may recover from the property of a decedent only if the decedent (a) died after September 30, 1991, and (b) is not survived by a spouse or a child who is under age 21 or disabled.

Repeal two additional conditions that must apply in order for DHS to recover from the property of a decedent under prior law: (a) no person files a petition for administration or summary settlement or assignment of the decedent's estate within 20 days of death; and (b) the value of the property subject to administration in this state left by the decedent, after payment of burial costs, does not exceed $50,000.

Transmittal of Property Upon Receipt of Affidavit. Provide that any property of a decedent that is transferred by a person who has possession of the property at the time of the decedent's death is subject to the right of DHS to recover public assistance. Upon request, require the person who transferred the property to provide DHS information about the property of the decedent that the person has transferred and information about the persons to whom the property was transferred.

Require that an affidavit from DHS contain all of the following information: (a) that DHS has a claim against property that it intends to recover from the property; (b) the amount and basis of the claim; (c) that the person may have a right to an administrative hearing on the extent and fair market value of the recipient's interest in the property, which must be requested within 45 days after DHS sent the affidavit; (d) how to request an administrative hearing; (e) that the person may request from DHS a hardship waiver, if the person co-owned the property with the decedent or is a beneficiary of the property; and (f) how to request a hardship waiver.

Recovery Against Real Property. Under prior law, DHS was provided a lien in the amount that it may recover, under "Recoverable amounts" above, on any interest in the decedent's real property if all of the following conditions applied: (a) if the decedent died after September 30, 1991; (b) the decedent was not survived by a spouse or a child who is under age 21 or disabled; (c) no person filed a petition for administration or summary settlement or assignment of the decedent's estate within 20 days of death; and (d) the value of the property subject to administration in this state left by the decedent, after payment of burial costs, did not exceed $50,000. DHS was also provided a lien to recover on any interest in the decedent's home if conditions (a), (c), and (d) above applied.

Act 20 requires DHS be provided a lien if the decedent died after September 30, 1991, and

removes reference to the other three conditions. The act also expands the amount that DHS may recover through the lien from "any interest in the decedent's home" to "any interest in any property of the decedent that is real property, including a home".

Allowable Costs of Sale of Real Property. Provide that if any real property of a decedent has been sold after the death of the decedent, only the following reasonable expenses, if any, incurred in preserving or disposing of the real property may be deducted from the sale proceeds that DHS may recover: (a) closing costs of sale, including reasonable attorney fees of the seller, the cost of title insurance, and recording costs; (b) property insurance premiums; (c) property taxes due; (d) utility costs necessary to preserve the property; and (e) expenses incurred in providing necessary maintenance or making necessary repairs, without which the salability of the property would be substantially impaired. Provide that these expenses may only be deducted from the sale proceeds if they are documented and approved by DHS and they were not incurred while any other individual was living on the property.

Value of Recipient's Interest. Provide that, for purposes of determining the value of the recipient's interest in property of the decedent, all of the following apply. First, if the recipient held title to real property jointly with one or more persons other than their spouse, the recipient's interest in the real property is equal to the fractional interest that the recipient would have had in the property if the property had been held with the other owner or owners as tenants in common.

Second, if the recipient held title to personal property jointly with one or more persons other than their spouse, the recipient's interest in the personal property is equal to either the percentage interest that was attributed to the recipient when his or her eligibility for public assistance was determined or, if the percentage interest was not determined as part of an eligibility determination, the fractional interest that the recipient would have had in the property if the property had been held with the other co-owner or co-owners as tenants in common.

Third, if the recipient held a life estate in real property, the recipient's interest is equal to the recipient's percentage of ownership in property based on the recipient's age on date of death and calculated using the fair market value of the property and life estate - remainderman tables used by DHS to value life estates for purposes of determining eligibility for MA.

Fourth, a property's fair market value is the price a willing buyer would pay a willing seller for the purchase of the property. The burden of proof for establishing a property's fair market value is on the surviving owners or beneficiaries, or their representatives. Fair market value must be established through a credible methodology, which may include an appraisal by a licensed appraiser.

Fair Hearing. Provide that a person who has possession of any property of the decedent, or who receives an affidavit from DHS for transmittal of any property of the decedent, is entitled to and may, within 45 days after the affidavit was sent, request a departmental fair hearing on the value of the property and the extent of the recipient's interest in the property, if the property is not being transferred by affidavit or through formal or informal administration of the decedent's estate.

Action or Order to Enforce Recovery. Provide that if, after receipt of an affidavit, a person who possesses the property of a decedent does not transmit the property to DHS or timely

request a hearing, DHS may bring an action to enforce its right to collect recoverable amounts from the property or may issue an order to compel transmittal of property. Any person aggrieved by an order issued by DHS may appeal the order as a Class 3 contested case proceeding by filing a request for appeal, within 30 days after date of order, with the Division of Hearings and Appeals in the Department of Administration. The date on which the Division receives the request for appeal would be the date of service. The only issue at the hearing would be whether the person has transmitted the property to DHS. The decision of the Division would be the final decision of DHS.

Provide that, if any person named in an order to compel transmittal of property fails to transmit the property under the terms of the order and no contested case to review the order is pending and the time for filing for a contested case review has expired, DHS may present a certified copy of the order to the circuit court for any county. The sworn statement of the Secretary of Health Services would be evidence of DHS' right to collect recoverable amounts from the property and of the person's failure to transmit property to DHS. The circuit court would, without notice, render judgment in accordance with the order. A judgment rendered by the circuit court would have the same effect and would be entered in the judgment and lien docket and may be enforced in the same manner as if the judgment had been rendered in an action tried and determined by the circuit court. Provide that these recovery procedures are in addition to any other recovery procedure authorized by law.

Rules for Hardship Waiver

Exempt DHS from promulgating rules establishing standards for determining whether the application of estate recovery would work an undue hardship in cases involving claims against the estates of nonclient surviving spouses or nonrecipient surviving spouses.

Under prior law, DHS was required to promulgate rules establishing standards to determine whether the recovery of payments would work an undue hardship in individual cases. If DHS determined that recovery would work an undue hardship in a particular case, DHS was required to waive the recovery of payments in that case.

Trusts

Living Trusts. Provide that, notwithstanding a notice of a deadline for filing claims that the trustee has published in a newspaper, if a settlor of a living trust or if a predeceased spouse of a settlor of a living trust, at any time received any services provided as a benefit under a public assistance program, the trustee must provide written notice to DHS by registered or certified mail within 30 days after the death of the settlor and before any property held in trust is distributed. Specify that the notice must include demographic information about the settlor and the settlor's predeceased spouse, if any, information about how to file a claim, a copy of the trust document, and documentation supporting the value of the trust on the settlor's date of death.

Provide that after the death of a settlor who received, or whose spouse received, public assistance benefits, DHS may recover from the property held in a living trust immediately before the settlor's death, an amount equal to the public assistance paid on behalf of the decedent or the decedent's spouse. Specify that the deadline for DHS to file a claim for recovery is four months after the date of the trustee's notice for filing claims.

Within 90 days after the receipt of a claim for recovery from DHS, require a trustee to pay to DHS any amount that DHS may recover. If a trustee distributes the property from the trust before DHS makes a claim to the trustee for the recovery of public assistance payments, the trustee must provide DHS with information about the distributed property and to whom it was distributed or transferred. Provide that DHS is entitled to recover from the persons to whom the property was distributed or transferred.

Special Needs or Pooled Trusts. Provide that, notwithstanding a notice of a deadline for filing claims that the trustee has published in a newspaper, within 30 days after the death of a beneficiary under a special needs or pooled trust, the trustee must provide a written notice to DHS by registered or certified mail. Specify that the notice must include demographic information about the decedent, information about how to file a claim, a copy of the trust document, and documentation supporting the value of the decedent's property held in the trust on the decedent's date of death. Within 90 days after receipt of a claim from DHS, require the trustee to repay DHS for any MA paid on behalf of the decedent, as required under the terms of the trust.

Provide that if a trustee fails to comply with the notice and repayment requirements, the trustee is personally liable to DHS for any costs DHS incurs in recovering amounts from the property distributed from the trust before any repayment is made and for any recoverable amounts that DHS is unable to recover from persons to whom the property was distributed.

Provide that after the death of a beneficiary under a special needs or pooled trust, the trustee may retain up to 30% of the balance in the decedent's account, unless the trustee fails to comply with the notice and repayment requirements above, in which case the trustee may not retain any of the balance in the decedent's account.

Reporting to the Department of Revenue and Recovery of Payments Through Tax Returns

Require DHS to certify to the Department of Revenue at least annually the amounts of non-probate assets that, based on notifications and other information received by DHS, DHS has determined that it may recover. The certification would be subject to existing requirements for such certifications and to a new requirement, created in Act 20, that the determination was rendered as a judgment as described under "Action or Order to Enforce Recovery" above. DHS must also inform the person that it intends to certify to the Department of Revenue an amount that DHS determines to be due for setoff from any state tax refund that may be due the person.

Family Care Recovery Rules

Require that recovery of correctly paid payments for the Family Care benefit by liens, affidavits, and estates follow the process created in statute under Act 20. Repeal prior law provisions that authorize DHS to use a process DHS establishes by rule.

Transfers More than 30 Years Old

Under prior law, there was a provision that prohibited any person, the state, or political subdivision from commencing an action affecting real estate based on an instrument that was

recorded more than 30 years before an action is commenced, unless a legal instrument or notice describing the claim was recorded with the register of deeds within 30 years after the instrument was recorded. If the notice or instrument was not recorded until after the 30 years, the claim was still effective, except with respect to the rights of the purchaser of the real estate or any interest in the real estate that was during the time between the end of the 30 years and the recording of the notice. Act 20 makes these provisions apply to DHS liens on real property.

Initial Applicability and Effective Dates

Prohibit DHS from implementing any of these provisions without the approval of the Joint Committee on Finance. Require DHS to submit one or more proposals to the Joint Committee on Finance by June 30, 2015, requesting the Committee to approve the implementation of the estate recovery provisions contained in the act. Prior law is repealed on October 1, 2013.

Provisions relating to the recovery of long-term care payments and recovery of capitation payments would first apply to services individuals received on that effective date. Provisions relating to special needs and pooled trusts would first apply to pooled trusts that are created or modified on that effective date and to trustee notification requirements for deaths that occur on that effective date. Provisions relating to recoveries of public assistance from the property of a decedent would first apply to the recovery of public assistance provided to individuals who die on that effective date.

[Act 20 Sections: 353, 354, 361, 821 thru 831, 833, 834, 1179 thru 1197, 1199 thru 1210, 1221 thru 1226, 1240, 2266, 2268 thru 2270, 2271, 2275, 2294, 2295, 2296 thru 2317, 2318, 9118(6i), 9318(3) thru (6), and 9418(2)]

ATTACHMENT 2

Summary of Divestment Provisions in 2013 Wisconsin Act 20

Prior to 2013 Act 20, institutionalized individuals and non-institutionalized individuals participating in long-term care programs were not eligible for medical assistance (MA) -funded long-term care services if they transferred their property at less than fair market value, either while they were receiving MA-funded services, or within 60 months before the first day that they were both eligible for MA and receiving MA-funded long-term care services. They were not eligible for these services for the duration of their divestment penalty period, which was equal to the number of days of private pay nursing home care that could have been paid for with the amount of resources that were divested. Act 20 made several changes to divestment statutes. However, DHS is prohibited from implementing any of these provisions without the approval of the Joint Committee on Finance. DHS is required to submit one or more proposals to the Committee by June 30, 2015, requesting the Committee to approve the implementation of the divestment provisions contained in the bill. The Act 20 provisions are summarized below:

Funding

Reduce funding by $873,300 (-$328,500 GPR and -$544,800 FED) in 2013-14 and by $1,081,300 (-$432,500 GPR and -$648,800 FED) in 2014-15 to reflect estimates of savings to MA benefits costs that would result by enacting changes to MA divestment statutes and policies.

Counting Exempt Assets

Count transfers of exempt assets, such as a vehicle, towards an institutionalized or non-institutionalized individual's divestment penalty period. Under prior law, those exempt assets were not counted towards the divestment penalty period.

Penalty Period Start Date

Establish that the divestment penalty period for individuals currently receiving MA begins on the first day of the month following the month in which the individual receives advance notice of the period of ineligibility.

Under current law, the penalty period for an *applicant* for MA begins the first day that the individual applies for and would be eligible for MA and long-term care services but for the penalty period. The bill leaves the penalty period for applicants unchanged. Under prior law, the penalty period for an MA *recipient* began the first day of the month on or after a divestment. Federal law requires DHS to provide timely and adequate notice of ineligibility to current recipients before the recipient stops receiving benefits. In practice, although the penalty period for current recipients began on the date of the divestment, the recipient only lost eligibility for the time between when he or she received the notice and the end of the penalty period.

Promissory Notes to Presumptive Heirs

Specify that a promissory note in which the debtor is a presumptive heir of the lender or in

which neither the lender nor debtor has any incentive to enforce repayments is considered cancelled upon the death of the lender.

Under current law, the purchase of a promissory note, loan, or mortgage is not a divestment if the repayment term is actuarially sound, the payments are to be made in equal amounts during the term of the loan and without deferral or balloon payments, and the cancellation of the balance upon the death of the lender is prohibited. Making promissory notes to presumptive heirs canceled upon death of the lender classifies these notes as divestments and enable DHS to enforce a penalty period.

Revision of Penalty Periods Only Upon Return of All Divested Assets

Provide that, in order to meet federal requirements for transfers exempt from divestment penalties and to adjust the ineligibility period, the individual must demonstrate that all of the assets transferred for less than fair market value, or cash equal to the value of the assets transferred for less than fair market value, have been returned to him or her.

Under current law, ineligibility due to divestment and the divestment penalty period does not apply if the transfer met federal requirements for exempt transfers. One of the federal requirements is that all assets transferred for less than fair market value have been returned to the individual. Under prior law, DHS recalculated the divestment penalty period as portions of the divested assets were returned to the individual, which allowed individuals to divest and gradually return their assets so as to be penalized for only half of the time that a divestment of similar size would warrant.

Eligibility When Community Spouse Divests Assets

Provide that if a community spouse transfers his or her resources or other assets within the first five years of the institutionalized spouse's eligibility, a divestment penalty period may be applied to the institutionalized spouse.

Under prior law, after an institutionalized spouse was determined eligible for MA and during a continuous period of institutionalization, the resources of the community spouse were not considered available to the institutionalized spouse, meaning if the spouse transferred his or her assets, the transfer did not impact the institutionalized spouse's MA eligibility.

Disclosure of Total Value of Assets of Institutionalized and Community Spouse

Permit DHS to deny the MA eligibility of an institutionalized spouse, if when requested by DHS, the institutionalized spouse and the community spouse do not provide the total value of their assets and information on income and resources to the extent required under federal MA law or sign the application for MA.

Under prior law, a community spouse could choose not to provide DHS with the total value of their assets, information about their income or resources, or sign the institutionalized spouse's MA application and not affect the institutionalized spouse's MA eligibility. DHS indicated that prior law permitted couples to protect their assets by allowing an institutionalized spouse to transfer all of his or her assets to the community spouse.

Procedure for Determining Community Spouse Allocation in Fair Hearings

Under prior law, an institutionalized spouse was able to allocate their monthly income to the community spouse up to certain statutory limits. Either the institutionalized spouse or a community spouse was able to request a fair hearing to determine the amount to be allocated. When the community spouse's income, with the allocation from the institutionalized spouse, was less than the monthly minimum allowance, DHS was required to establish an amount to be allocated that would bring the community spouse's income up to the minimum allowance. Prior law did not outline a specific process DHS was required to follow when establishing the amount to be allocated.

Act 20 required DHS to base the amount to be used for this purpose on the cost of a single premium lifetime annuity that pays monthly amounts that, combined with other available income, raises the community spouse's income to the minimum monthly allowance. Any resource, regardless of whether the resource generates income, may be transferred in an amount that, combined with the institutionalized spouse's allocation calculated before the fair hearing, provides the community spouse with sufficient funds to purchase the annuity. The community spouse would not be required to purchase an annuity to obtain this amount.

Life Insurance Surrender Values

Specify that elderly, blind, or disabled individuals are not eligible for MA if they have life insurance with total face value of all life insurance policies, including riders and other attachments, is more than $1,500. The face value of a life insurance policy is the amount the insurer pays to the beneficiary if the insured dies, while the cash surrender value is the amount the insurer pays to the policyholder if the policyholder terminates the life insurance policy.

Under prior law, elderly, blind, or disabled individuals were not eligible for MA if they had life insurance with cash surrender values if the total face value of all life insurance policies was more than $1,500. In some cases, individuals have had life insurance policies with face values of $1,500 but with rider values that exceed $1,500.

Definition of Financial Institutions for Financial Record Matching Program

Define "financial institution" as any of the following: (a) a depository institution; (b) an institution-affiliated party of a depository institution; (c) a federal credit union or state credit union; (d) an institution-affiliated party of a credit union; (e) a benefit association, insurance company, safe deposit company, money market mutual fund, or similar entity authorized to do business in this state; and (f) a broker-dealer.

Under prior law, "financial institution" had the meaning given in federal law and meant any office of a bank, savings bank, card issuer, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution. The new definition expands the financial institutions that are required to participate in the state's financial record matching program.

Effective Date and Initial Applicability

Prohibit DHS from implementing any of these provisions without the approval of the Joint Committee on Finance. Require DHS to submit one or more proposals to the Joint Committee on Finance by June 30, 2015, requesting the Committee to approve the implementation of the divestment provisions contained in the bill. Prior law was repealed on July 2, 2013, the effective date of the budget act.

Provide that provisions affecting MA divestment by applicants first apply to determinations of initial eligibility for MA for individuals who apply for MA, and transfers of assets made by MA recipients or spouses of MA recipients on the bill's general effective date.

[Act 20 Sections: 1044, 1045, 1059 thru 1069, 1088, 1991, 9118(6i), and 9318(7)&(8)]