# 1999 DRAFTING REQUEST

## Bill

Received: **09/22/98**

Received By: **yacketa**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Geisler**

This file may be shown to any legislator: **NO**

Drafter: **yacketa**

May Contact: **Victoria Agnew-Lyon, DHFS**

Alt. Drafters:

Subject: **Public Assistance - med. assist.**

Extra Copies: **DAK**

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**Topic:**

DOA:......Geisler - Expand prohibition on divestments for MA eligibility

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**Instructions:**

See Attached

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**Drafting History:**

| Vers. | Drafted | Reviewed | Typed | Proofed | Submitted | Jacketed | Required |
|---|---|---|---|---|---|---|---|
| /1 | yacketa 10/20/98 | gilfokm 10/21/98 | martykr 10/22/98 | _______ _______ | lrb_docadmin 10/22/98 | | |
| /2 | yacketa 01/15/99 | gilfokm 01/18/99 | hhagen 01/19/99 | _______ _______ | lrb_docadmin 01/19/99 | | |

FE Sent For:

**<END>**

# 1999 DRAFTING REQUEST

## Bill

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| /1 | yacketa 10/20/98 | gilfokm 10/21/98 | martykr 10/22/98 | _______ _______ | lrb_docadmin 10/22/98 | | |
| | | /2-1-18-99 kmg | lH 1/19 | ch 1/19 | | | |

FE Sent For:

<END>

**LRB-0263**

# 1999 DRAFTING REQUEST

## Bill

Received: **09/22/98**

Wanted: **As time permits**

For: **Administration-Budget**

This file may be shown to any legislator: **NO**

May Contact: **Victoria Agnew-Lyon, DHFS**

Subject: **Public Assistance - med. assist.**

Received By: **yacketa**

Identical to LRB:

By/Representing: **Geisler**

Drafter: **yacketa**

Alt. Drafters:

Extra Copies: **DAK, ~~DHFS~~**

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**Topic:**

DOA:......Geisler - Expand prohibition on divestments for MA elig.

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**Instructions:**

See Attached priority: high

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**Drafting History:**

| Vers. | Drafted | Reviewed | Typed | Proofed | Submitted | Jacketed | Required |
|---|---|---|---|---|---|---|---|
| /? | yacketa | /1-10-21 kmg | km 10/21 | ~~2/1~~ 10/22 | | | |

FE Sent For:

<END>

# DHFS

**_Department of Health and Family Services_**
**1997-99 Biennial Budget Statutory Language Request**
**September 11, 1998**

## Expand Prohibitions on Divestment for Medicaid Eligibility

### Current Language

Federal and state law both define 'divestment' as the disposal of assets for less than fair market value. §49.453 of the Wisconsin Statue and HSS 103.065 further specify that divestment using an irrevocable annuity includes situations where the annuity fails to pay to the annuitant (the person purchasing the annuity) fair market value within his or her life expectancy. The Department is charged with the authority for setting Medicaid eligibility policy, consistent with federal and state law. State law and administrative rule say that divestment occurs when an annuity fails to return fair market value within the person's life expectancy. However, state law is silent on promissory notes; it does not require any minimum monthly payment, and does not define fair market value. (References: Wisconsin Statute, Wisconsin Administrative Code, HSS 103.065, and §49.453, Social Security Act, Section 1917(c)(1)(A) & 1902(a)(18)

### Proposed Change

Modify state law §49.453. to require that an applicant for Medicaid who has sheltered assets in an annuity, promissory note, or like devices must receive minimum monthly payments on the note that consist of both principal and interest at the prevailing interest rate, and that the payments be either equally divided across the terms of the agreement, or meet a standard repayment schedule that eliminates the current practice of a large balloon payment due in the last month of the notes. These requirements would be in addition to the current requirement that the payment schedule must be concluded within the life expectancy of the owner of the asset. Extend the requirement that the payment schedule must be concluded within the life expectancy of the owner of the asset to apply to not only annuitics, but also to promissory notes and other like devices.

## Effect of the Change

Fewer individuals will meet financial eligibility requirements for Medicaid. Those who still qualify for Medicaid will pay a greater portion of the cost of their care because they will have the regular income each month from the note to apply to nursing home liability.

## Rationale for the Change

1. Over the last year, Department staff have learned of several new divestment/asset-sheltering strategies involving promissory notes and annuities.

2. Promissory notes are being used to 'loan' the assets of an MA applicant to a relative. The applicant and the relative sign a promissory note in which the relative agrees to repay the loan amount plus nominal interest. The promissory note agreement usually includes a clause in which the MA applicant agrees to 'forgive' a portion of the debt each month or establishes a payment schedule in which the relative pays a nominal amount each month with the remainder paid at some distant point in the future (a 'balloon' payment). Some promissory notes allow for the debt to be extinguished upon the death of the lender, regardless of how much is still owed on the note.

3. MA applicants are also transferring property to others in return for an immediate annuity (monthly payment agreement) from those who receive the property. To make the transfer for fair market value and therefore allowable under current MA law, the terms of these annuities are tailored to the life expectancy of the annuitant (the individual transferring the property or their spouse). Frequently, these annuities are structured to make small payments to the annuitant for all but the final payment. The final payment is then a balloon payment that represents the entire amount of the transferred property and any accumulated interest. If the applicant dies before the last month of the agreement is reached, the final payments are waived or made to a beneficiary rather than to the estate of the annuitant. This type of agreement makes it easier for individuals and couples to meet MA's income eligibility requirements, and can limit a recipient's liability toward the monthly cost of his or her care, or "nursing home liability obligation". Further, this type of annuity makes the transferred property immune from estate claims (or liens, in the case of transferred homes) and thereby prohibits MA estate recovery of the assets remaining in the annuity after the death of a recipient.

    - To illustrate this annuity arrangement, suppose a woman transfers $120,000 ($50,000 in cash and a home valued at $70,000) to her daughter in return for annuity payments from that daughter. The woman is age 84 when she enters into the annuity agreement in February 1999 and her life expectancy at that time is age 92. The agreement calls for payments of $20 each month in the first year, $25 in the second year, $30 in years three through five, and $33 in years six through eight. A final balloon payment of $177,627.63

($120,000 at 6% interest per annum less payments made) is payable to the recipient on January 31, 2005. Since the recipient will not turn 93 until December 2007, all payments are being made to her within her life expectancy, therefore, no divestment has occurred. By transferring her cash and home to her daughter in this manner, the woman has made herself eligible for Medicaid without any spend-down requirement. Further, if the recipient dies prior to the end of the annuity, all remaining payments are payable to either her daughter or grandchildren, not to the woman's estate and therefore they are not available for Medicaid estate recovery collection.

4. The amount of assets being sheltered by these agreements is unknown. However, in eight examples of these types of annuities, the amount of transferred assets averages over $83,000.

5. County economic support workers have expressed concern that an increasing number of elder law attorneys appear to be drafting these agreements. Elder law attorneys are counseling clients and conducting seminars on how to 'protect savings' when entering a nursing home. The Governor, the Department and legislators have received letters of concern regarding the sheltering of assets by MA recipients and about elder law attorneys promoting this activity.

6. Some counties have denied eligibility to applicants with promissory notes and balloon payment annuities on the grounds that these are not fair market value transfers. To date, administrative appeals of these decisions have been decided in support of the counties. However, some of the decisions have been appealed in court and there is no guarantee that these decisions will be upheld. The Department has received letters from attorneys who specialize in estate planning challenging the Department's ability to restrict specific asset sheltering activities under current law. For this reason, the Department believes that asset sheltering prohibitions for MA applicants need to be more clearly addressed in statute.

| | |
|---|---|
| **Desired Effective Date:** | Upon passage |
| **Agency:** | DHFS |
| **Agency Contact:** | Victoria Agnew-Lyon |
| **Phone:** | 266-5422 |

Soon D-NOTE

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-0263/P1
TAY...:Kmg

DOA:......Geisler – Expand prohibition on divestments for MA elig.

FOR 1999–01 BUDGET — NOT READY FOR INTRODUCTION

transfer that is

the

Don't Gen Cat.

AN ACT ...; relating to: the budget.

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*Analysis by the Legislative Reference Bureau*

**HEALTH AND HUMAN SERVICES**

**MEDICAL ASSISTANCE**

Currently, under the medical assistance program (MA), a person who disposes of assets for less than the fair market value in order to qualify for MA is ineligible for MA for a certain period of time. Current law specifies that a transfer of assets to an irrevocable annuity is a below-fair-market-value transfer if the amount of the transfer exceeds the expected benefit.

This bill specifies that a transfer of an asset to an irrevocable annuity, or by promissory note or similar instrument, must be considered a transfer for less than the fair market value of the asset if any of the following is true:

1. The periodic payments back to the transferor do not include principal and interest ~~at~~ that is at least the prevailing interest rate at the time the transfer is made.

2. The terms of the instrument provide for a payment schedule that includes one or more disproportionately large payments (commonly known as balloon payments) in comparison to the majority of the payments.

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

at

**SECTION 1.** 49.453 (4) (title) of the statutes is amended to read:

49.453 **(4)** (title) IRREVOCABLE ANNUITIES, PROMISSORY NOTES AND SIMILAR TRANSFERS.

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35.

renumbered 49.453(4)(a) (intro.) and

**SECTION 2.** 49.453 (4) (a) of the statutes is amended to read:

49.453 **(4)** (a) (intro.) For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, shall be considered to be in excess of the expected value if any of the following is true:

wpo: fix spaces

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35.

**SECTION 3.** 49.453 (4) (a) 1. and 2. of the statutes are created to read:

49.453(4)(a) ~~1~~.

1. The periodic payments back to the transferor do not include principal and interest that is at ~~w~~ least at the prevailing interest rate, as defined by the department by rule, at the time the transfer is made.

2. The terms of the instrument provide for a payment schedule that includes that one or more disproportionately large payments in comparison to the majority of the payments.

**SECTION 4.** 49.453 (4) (c) of the statutes is amended to read:

49.453 **(4)** (c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72–1 to 1.72–18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity, or transferred by promissory note or similar instrument.

**History:** 1993 a. 437 ss. 74 to 92; 1997 a. 35.

**(END)**

# Drafter's Note
## from the
## Legislative Reference Bureau

LRB–0263/1dn change
TAY...:.:... kmg

To Jeff Geisler:

1. This bill does not contain an initial applicability section. The intent in omitting the initial applicability section is to avoid the interpretation that this bill creates new law. Under current law, the department must impose a period of ineligibility for MA on a person who has transferred assets for less than fair market value. The department maintains that transfers involving minimal periodic payments back to the transferor and a final, very large balloon payment to the transferor are transfers for less than fair market value, regardless of the legal instrument used to make the transfer.

Because the statutes specifically mention transfers to annuities, but not other types of legal instruments that may accomplish the same purpose, estate planners use other legal instruments (such as promissory notes) to avoid the period of ineligibility and to shelter assets. Although these strategies have so far been unsuccessful (the department has upheld counties' ~~denying~~ denials of eligibility on the basis of a fair market value assessment), if the department's characterization of those transfers is correct, then an initial applicability section would be inaccurate. That is, the amendment to current law would not <u>first</u> apply on the effective date of the bill; it already applies. If the department's characterization of current law is wrong, a court will decide that and an initial applicability section would be superfluous.

If you have any questions about this discussion, please feel free to call me.

2. Do you want to define "prevailing interest rate"? Currently, I have the department defining the term by rule, but it may be better to define the term by statute.

Tina A. Yacker
Legislative Attorney
261–6927

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

LRB–0263/1dn
TAY:kmg:km

October 21, 1998

To Jeff Geisler:

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Tina A. Yacker
Legislative Attorney
261–6927

## Yacker, Tina

**From:** Geisler, Jeffrey [jeffrey.geisler@doa.state.wi.us]
**Sent:** Monday, January 11, 1999 12:07 PM
**To:** Yacker, Tina
**Subject:** FW: stat language, LRB-0263/1dn

See 234.90(5) for alternative to prevailing interest rate

Tina,
Please see the DHFS comments below.
Can you find a current definition of "prevailing interest rate" to use that would not require DHFS to set that rate?
I agree that DHFS should avoid getting into that line of work.

I have no problems with the DHFS comments on "disproportionately large payments" and would
like to use their suggestion. Do you think we need to pick a value for "periodic"? I hope not.
If you agree that the DHFS suggestion can work and that we need not pick a value for "periodic"
then we need not discuss this. I will simply wait to see your redraft.
Thanks
Jeffrey A. Geisler
267-7980
DOA State Budget Office

> -----Original Message-----
> From: Agnew-Lyon, Victoria
> Sent: Monday, January 11, 1999 9:08 AM
> To: Geisler, Jeffrey
> Cc: Wood, Susan; *Daniel Wasilewski; Jones, James; Stier, Daniel; Bove,
> Fredi-Ellen; Bormett, Michael
> Subject: stat language, LRB-0263/1dn
>
> Jeff,
> We have reviewed the draft of the divestment prohibition and have two
> concerns.
> First, in 49.453 (4)(a)1., a prevailing interest rate "as defined by the
> department by rule" is referenced. We would prefer to have the language
> refer
> to an existing standard prevailing interest rate, such as the one that (we
> believe) the state's investment board sets since this department does not
> currently deal with or set interest rates. Our second concern is
> regarding
> 49.453(4)(a)2. We are concerned that the term "disproportionately large
> payments" is vague and may lead to legal challenges. We would prefer
> language
> that would require the payments under an annuity to be periodic (monthly
> or
> quarterly?) payments that are equal, except that payments may be unequal
> if they
> are keyed to the prevailing interest rate, and the inequality is
> exclusively
> caused by fluctuations in the prevailing interest rate. Such language
> would be
> clearer than the "disproportionately large" language in the current draft.
> Please call if you ha e any further questions. Thanks for your help with
> this.
>

Federal Reserve Statistical Release

H.15

# Selected Interest Rates

H.15: Release | Release dates | About | ASCII | PDF (18 KB) | Historical data | Daily updates

## H.15 Release Dates

These data are released each Monday. The exact time may be obtained by calling (202) 452-3206.

| Announcement describing the change in the Federal Reserve's source of data for commercial paper |
|---|

This site has H.15 releases for the following date(s):

January 11, 1999 *Current release*
January 4, 1999
December 28, 1998
December 21, 1998
December 14, 1998
December 7, 1998
November 30, 1998
November 23, 1998
November 16, 1998
November 9, 1998
November 2, 1998
October 26, 1998
October 19, 1998
October 13, 1998
October 5, 1998
September 28, 1998
September 21, 1998
September 14, 1998
September 8, 1998
August 31, 1998
August 24, 1998
August 17, 1998
August 10, 1998
August 3, 1998
July 27, 1998
July 20, 1998
July 13, 1998
July 6, 1998
June 29, 1998

June 22, 1998
June 15, 1998
June 8, 1998
June 1, 1998
May 26, 1998
May 18, 1998
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July 15, 1996
July 8, 1996
July 1, 1996
June 24, 1996
June 17, 1996

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**Last update: January 11, 1999, 2:15 PM**

Soon

**1999 – 2000 LEGISLATURE**

LRB–0263/~~1~~ 2
TAY:kmg:km

wpo: fix

RMR

DOA:......Geisler – Expand prohibition on divestments for MA eligibility

FOR 1999–01 BUDGET — NOT READY FOR INTRODUCTION

the payments are tied to the prime lending rate and the inequality is caused exclusively by fluctuations in that rate

Don't Gen Cat.

AN ACT ...relating to: the budget.

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only

### *Analysis by the Legislative Reference Bureau*

### HEALTH AND HUMAN SERVICES

#### MEDICAL ASSISTANCE

prime lending ~~rate~~

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This bill specifies that a transfer of an asset to an irrevocable annuity, or by promissory note or similar instrument, ~~must be considered~~ is a transfer for ~~less than~~ the fair market value of the asset if ~~any~~ all of the following ~~is~~ are true:

1. The periodic payments back to the transferor ~~do not~~ include principal and interest that is at least at the ~~prevailing interest~~ rate at the time that the transfer is made.

2. The terms of the instrument provide for a payment schedule that includes ~~one or more disproportionately large payments (commonly known as balloon payments) in comparison to the majority of the payments~~ unequal payments, unless

---

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

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49.453 **(4)** (a) (intro.) For the purposes of sub. (2), whenever a covered individual or his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transfers assets to an irrevocable annuity, or transfers assets by promissory note or similar instrument, in an amount that exceeds the expected value of the benefit, the covered individual or his or her spouse transfers assets for less than fair market value. A transfer to an annuity, or a transfer by promissory note or similar instrument, ~~shall be considered to be~~ is not in excess of the expected value only if ~~any~~ all of the following ~~is~~ are true:

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49.453 **(4)** (a) 1. The periodic payments back to the transferor ~~do not~~ include principal and interest that , at the time the transfer is made, that is at least at the prime lending rate as reported by the federal reserve board in federal statistical release H.15. ~~prevailing interest rate, as defined by the department by rule, at the time that the transfer is made~~.

as reported by the federal

2. The terms of the instrument provide for a payment schedule that includes ~~one or more disproportionately large payments in comparison to the majority of the payments~~. equal periodic payments, except that payments may be unequal if the interest payments are tied to the prime lending rate, and the inequality is caused exclusively by fluctuations in that rate.

**SECTION 4.** 49.453 (4) (c) of the statutes is amended to read:

49.453 **(4)** (c) The department shall promulgate rules specifying the method to be used in calculating the expected value of the benefit, based on 26 CFR 1.72–1 to 1.72–18, and specifying the criteria for adjusting the expected value of the benefit based on a medical condition diagnosed by a physician before the assets were transferred to the annuity, or transferred by promissory note or similar instrument.

**(END)**

DOA:......Geisler – Expand prohibition on divestments for MA eligibility

FOR 1999–01 BUDGET — NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** the budget.

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#### MEDICAL ASSISTANCE

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1. The periodic payments back to the transferor include principal and interest that is at least at the prime lending rate at the time that the transfer is made.
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**(END)**