

2003 DRAFTING REQUEST

Bill

Received: **11/18/2002**

Received By: **pkahler**

Wanted: **Soon**

Identical to LRB:

For: **Administration-Budget 7-7980**

By/Representing: **Blaine**

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

Drafter: **pkahler**

May Contact:

Addl. Drafters:

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

Extra Copies:

Submit via email: **YES**

Requester's email:

Carbon copy (CC:) to:

Pre Topic:

DOA:.....Blaine - BB0219,

Topic:

Changes to spousal impoverishment laws

Instructions:

See Attached

Drafting History:

| <u>Vers.</u> | <u>Drafted</u> | <u>Reviewed</u> | <u>Typed</u> | <u>Proofed</u> | <u>Submitted</u> | <u>Jacketed</u> | <u>Required</u> |
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| /? | pkahler 12/17/2002 | csicilia 12/19/2002 | | _____ | | | |
| /P1 | | | rschluet 12/20/2002 | _____ | amentkow 12/20/2002 | | State |
| | | | | _____ | amentkow 12/20/2002 | | |

| <u>Vers.</u> | <u>Drafted</u> | <u>Reviewed</u> | <u>Typed</u> | <u>Proofed</u> | <u>Submitted</u> | <u>Jacketed</u> | <u>Required</u> |
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FE Sent For:

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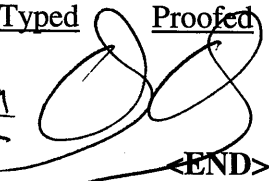
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See Attached

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781

Agency: Department of Health and Family Services

SBO Analyst: Robert Blaine (7-7980)

RBO 219

Title: Divestment and Spousal Impoverishment

Purpose of Draft: Implement various changes to laws regarding divestment and spousal impoverishment in the MA program. Specifically, to:

1. Treat the purchase of an annuity as a divestment.
2. Reduce the transfer of assets from a recipient when such a transfer does not benefit the MA recipient's spouse.
3. Set the maximum amount a recipient can transfer to a spouse at \$50,000 (current law creates a range).

For additional description, see attached request.

Priority: Medium.

Divestment and Spousal Impoverishment

Current Language

Divestment and spousal impoverishment guidelines are outlined under s.49.453, s.49.454, and s.49.455.

Proposed Changes

Amend the statutes to 1) consider the purchase of an annuity and similar asset transfers divestment unless the participant shows the purchase of the annuity would not have affected his eligibility for Medicaid or, the payment from the annuity is not greater than necessary to meet the reasonable and ordinary monthly needs of the beneficiary, 2) consider all transfers that are not for the sole benefit of the community spouse divestment, and 3) set the maximum amount of assets that can be transferred to a community spouse at \$50,000.

Effect of the Change

Currently, individuals with assets above the limit for MA eligibility can purchase an annuity in their spouse's name, and due to spousal impoverishment provisions, which exclude any income of the spouse, can become MA eligible even if the annuity generates significant income. The proposed change would establish additional restrictions on the purchase of an annuity in order for the purchase to not be considered divestment. The potential MA recipient would have to show that the purchase of the annuity would not have affected his eligibility for Medicaid or, the payment from the annuity is not greater than necessary to meet the reasonable and ordinary monthly needs of the beneficiary. Implementing this proposal would create savings for Medicaid, enforce divestment rules equally for all individuals, and provide Medicaid services to those persons who are truly in financial need. It is estimated that 1% of applicants applying for long-term care coverage use annuities, promissory notes and similar transfers to qualify for Medicaid. If these transferred funds would be used to pay the private pay rate for nursing home care or other long-term care, Medicaid's long-term care cost would decrease by approximately \$714,005 AF (\$295,000 GPR) over the 03-05 biennium.

Currently, the institutional spouse can transfer assets and income to a community spouse under the spousal impoverishment guidelines as long as it is for the sole benefit of the community spouse. However, once the funds are transferred, the department has no monitoring tools or enforcement to ensure that these funds are continually used for the sole benefit of the community spouse. It has been reported that some individuals are transferring assets and income but the income and assets are not being used for the benefit of the community spouse. For example, a

car is purchased under the name of the spouse but used by some other person, such as a nephew. This proposal would provide the Department the authority to monitor the use of assets and based on the use of the assets determine that the asset is not for the sole benefit of the spouse.

Considering all transfers that are not for the sole benefit of the spouse as divestment will ensure that income transferred from the institutionalized spouse to the community spouse is used for the intended purpose of supporting the community spouse. It is estimated that less than half of a percent of applicants for long-term care coverage use this type of transfer to qualify for Medicaid annually. If these transferred funds would be used to pay the private pay rate for nursing home care or other long-term care, MA costs would decrease by approximately \$348,532 AF (\$144,000 GPR) over the 03-05 biennium.

The spousal impoverishment guidelines regarding the spousal impoverishment asset protection level be needs to be changed to correspond to federal guidelines. Federal law provides a state discretion in establishing the asset threshold for spousal impoverishment within limits. In 2002, the maximum federal asset level is \$89,280 while the minimum is \$17,856. In addition, federal rules require that states use a single asset level for all couples. Wisconsin has set its asset threshold at the greater of: (a) \$50,000; or (b) 50% of the couple's assets up to the federal maximum, which is within the allowed federal range. However, Wisconsin is currently in violation of federal rules because the asset limit is not the same amount for all couples. To comply with federal law it is proposed that state law be changed to adopt \$50,000 as the single standard amount of assets that can be transferred from the institutionalized spouse to a community spouse. Compared to current law, this would lower the asset limit for couples that have assets greater than \$100,000 since couples can currently transfer up to 1/2 of assets (if less than the federal maximum). This proposal will generate savings of approximately \$110,997 AF (\$45,900 GPR) in FY04 and \$333,333 AF (\$137,600 GPR) in FY05, assuming an effective date of January 1, 2004. By imposing a lower community spouse asset share Wisconsin's Medicaid program will be in compliance with federal law. At the same time, Wisconsin's Medicaid program will be treating all spousal impoverishment applications equitably across economic classes.

Rationale for the Change

Divestment to qualify for Medicaid Community Options Program (COP) or the Wisconsin Chronic Disease Program (WCDP) occurs on a regular basis with the help of estate planners and lawyers who are knowledgeable in how to circumvent state and federal divestment regulations. The loopholes that allow individuals to avoid divestment and qualify for MA create costs for the state by allowing ineligible individuals to qualify for Medicaid services. The proposed divestment changes will reduce current loopholes.

Federal law provides states discretion in establishing the spousal impoverishment asset protection level within certain limits. However, Wisconsin is currently in violation of federal rules because the asset limit is not the same amount for all couples. Changing the way the spousal impoverishment asset protection level is calculated will make Wisconsin's policies consistent with federal regulations.

Desired Effective Date: January 1, 2004

Agency: DHFS
Agency Contact: Curtis Cunningham
Phone: 266-5362

Kahler, Pam

From: Blaine, Robert
Sent: Sunday, December 15, 2002 3:20 PM
To: Kahler, Pam
Cc: Cunningham, Curtis
Subject: RE: DHFS budget request

Pam --

I realize I must sound like a broken record, but I apologize for taking so long to get back to you. Below are my responses. Curtis, please let me know ASAP if you disagree with any of my comments.

-----Original Message-----

From: Kahler, Pam
Sent: Monday, November 25, 2002 1:12 PM
To: Blaine, Robert
Subject: DHFS budget request

Robert:

These are the questions I have for the DHFS request related to divestment and spousal impoverishment:

1. The first part of the request says to consider the purchase of an annuity and similar asset transfers to be divestment unless the individual shows a couple of things. How does this affect s. 49.453 (4)? Does it completely replace it?

[Blaine, Robert] BASICALLY, I THINK YOU'RE RIGHT IN TERMS OF WE'D HAVE TO CHANGE THE FOCUS OF (4). THIS SECTION CURRENTLY CONSIDERS THE DIFFERENCE BETWEEN THE FAIR MARKET VALUE OF AN ASSET AND THE VALUE OF AN ANNUITY (RESULTING FROM THE TRANSFER OF AN ASSET) AS DIVESTMENT. THE PROPOSAL IS TO TREAT ALL TRANSFERS INTO ANNUITIES (WITH THE EXCEPTIONS NOTED IN THE REQUEST) AS DIVESTMENT.

✓ 2. The second part of the request says to consider all transfers that are not for the sole benefit of the community spouse to be divestment. The narrative on the effect of the change, however, says that the "proposal would provide the Department the authority to monitor the use of assets..." Is striking "to, or" after "par. (b)" in s. 49.455 (6) the only change that is being requested? That would require the transfer under s. 49.455 (6) to be for the sole benefit of the community spouse, but this seems too simple. I'm not sure what sort of "monitoring" DHFS has in mind, or if this simple language change would give them the authority.

[Blaine, Robert] THE DEPARTMENT WANTS THE LAW TO BE CLEAR THAT SUCH TRANSFERS CAN ONLY BE FOR THE SPOUSE. I THINK YOUR DELETION OF 'to, or' PLUS DELETING THE COMMA AFTER "benefit of," WOULD ACHIEVE THIS.

3. The final part of the request asks that \$50,000 be set as the maximum amount of assets that may be transferred to the community spouse. I think this is what we currently have, within the parameters of the federal law. In *Wisconsin Department of Health and Family Services v. Irene Blumer* (I don't have the cite now, but I could find it for you if you need it - or I could also fax you a copy of the decision), the U.S. Supreme Court interpreted s. 49.455 (6) (b) as setting a \$50,000 floor. I think federal law requires us to have s. 49.455 (6) (b) 2., 3., and 4. I could repeal s. 49.455 (6) (b) 1., since it is definitely less than \$50,000, although in time (a long time) it might possibly exceed \$50,000 - if the increase in the consumer price index is large enough.

[Blaine, Robert] THE PROPOSAL IS FOR \$50,000 TO BE THE MAXIMUM, OR THE CAP, I.E., NO MORE THAN \$50,000 COULD BE TRANSFERRED FOR ALL PERSONS. THE CASE YOU CITE SEEMS TO SET A FLOOR, WHICH IS NOT WHAT WE WANT TO DO. CMS HAS GIVEN DHFS GUIDANCE THAT HAVING A RANGE RATHER THAN A HARD CAP IS NOT ALLOWABLE UNDER FEDERAL RULE (THOUGH, IF FEDERAL LAW STATES OTHERWISE, THIS WOULD BE GOOD TO KNOW), HENCE THE REQUEST TO ELIMINATE 40.455 (6)(b) 2. I WOULD AGREE YOU NEED TO KEEP 49.455 (6)(b) 3. & 4.

Thanks for your help, Pam.

[Blaine, Robert] NO, THANK YOU!

Kahler, Pam

From: Blaine, Robert
Sent: Monday, December 16, 2002 12:09 PM
To: Kahler, Pam
Subject: FW: DHFS budget request



James Jones.vcf

more from DHFS on divestment.

-----Original Message-----

From: Cunningham, Curtis
Sent: Monday, December 16, 2002 12:02 PM
To: Blaine, Robert
Cc: Megna, Richard
Subject: Fwd: RE: DHFS budget request

Robert,
Attached are comments from Jim regarding the divestment and SI stat. language.
Unfortunately, I probably won't get a change to look at the stat lang. till tomorrow afternoon. Please let me know if that is to late.

-Curtis

-----Original Message-----

Date: 12/16/2002 11:11 am -0600 (Monday)
From: James Jones
To: Curtis Cunningham
Subject: Fwd: RE: DHFS budget request

On #1. The idea is to say that an annuity shall be treated as an irrevocable trust.

On #2. Just what we wanted.

On #3. The Blumer case was decided by the U.S. Supreme Court last year. It was a Wisconsin case that involved a part of the spousal impoverishment law that allows fair hearing examiners to increase the asset amount to be transferred to the spouse to bring her monthly income up to the community spouse minimum income allowance. Where we set the asset amount (\$20k or \$50k or \$90k) is irrelevant to the finding in Blumer. We need to set a single amount of asset shares according to CMS. Set our community spouse asset share as the maximum (about \$90k) or the minimum (about \$18,000) or set it at a some number in between. The state law is written in a way that would allow a maximum AND a minimum. We have to pick one number.

I hope this helps.

>>> Curtis Cunningham 12/16/02 10:17AM >>>

Jim,
Could you please let me know if you disagree with any of Robert's answers in the attached e-mail. Please especially look at number 2 and verify that this is what you want done to prevent asset transfers that are not used for the sole benefit of the community spouse.

Thanks,
Curtis

Kahler, Pam

From: Blaine, Robert
Sent: Monday, December 16, 2002 1:45 PM
To: Kahler, Pam
Subject: FW: Divestment



James Jones.vcf

more info.

-----Original Message-----

From: Jones, James
Sent: Monday, December 16, 2002 1:38 PM
To: Blaine, Robert
Cc: Cunningham, Curtis
Subject: Re: Divestment

Perhaps I wasn't clear on this topic. . .

1. CMS has told us that we need to set a single community spouse asset share amount. It has to be no greater than the maximum and no less than the minimum.
2. Regardless of what asset share number we pick, there is still a right in the spousal impoverishment federal law that allows the couple to take their case to the a fair hearing officer. The fair hearing officer can choose any asset share amount that is greater than the amount set that he determines will bring the community spouse's monthly income up to the federally set allocation amount (\$2,000 / month).

So, if a couple came to us after (if) the new law is passed, the eligibility worker would tell them that their asset share is \$50,000. the worker would also determine that she has \$500 a month of her own and that the nursing home spouse can allocate \$800 to her each month.

The couple could then go to a fair hearing and tell the examiner that \$50,000 will not generate enough income to bring the community spouse's income up to \$2,000 month. The fair hearing officer will then determine 1) how much income the community spouse has (\$500), 2) how much income the institutionalized spouse can give to the community spouse under spousal impoverishment (before the IS pays the cost share) (\$800) and 3) how much more in assets (above \$50,000) need to be set aside for the CS to generate the difference between \$1300 and the maximum monthly income allocation of \$2,000. The examiner would look at local interest rates and determine that the community spouse could keep an additional \$200,000 in assets (\$250,000 total) to meet her needs.

Blumer allows states the option of including the amount that the nursing home spouse can allocate to the community spouse before deciding how much more income is needed.

>>> Blaine, Robert 12/16/02 12:52PM >>>

Yet another question -- my assumption is that the department is not requesting removal of the divestment language related to fair hearings and court orders. Please let me know ASAP if I'm mistaken.

When we met to talk about divestment, my recollection is the reason why we had to pick one income limit (rather than have the range, as we currently do), is that CMS told us to pick one of the options listed under 1924(f)(2)(A). If this is so, then it would seem that we couldn't keep the language related to

fair hearings or court orders. Did I misunderstand the explanation?

Robert Blaine

State Budget Office -- WI Dept. of Administration
608/267-7980
608/267-0372 (fax)
robert.blaine@doa.state.wi.us

STATE OF WISCONSIN
 DEPARTMENT OF ADMINISTRATION
 DIVISION OF EXECUTIVE BUDGET AND FINANCE
 DOA-5167 N(R06/95)

FACSIMILE COVER MESSAGE

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|------------------------------------|---|---|
| TO <i>Pam KATZEK</i> | | |
| Name | <i>LRB</i> | Facsimile Telephone Number <i>4-6948</i> |
| Location | Room Number | Telephone Number |
| FROM (Sender) <i>ROBERT BLAINE</i> | | |
| Name | Number of Pages Including This Cover Sheet <i>4</i> | Facsimile Telephone Number (608) 267-0372 |
| Location | STATE BUDGET OFFICE 101 EAST WILSON STREET, 10TH FLOOR | Telephone Number <i>7-7880</i> |

COMMENTS / INSTRUCTIONS

RE DIVESTMENT

Divestment
October 30, 2002

The paper indicates we are in violation of federal rules because the asset limit is not the same for all couples – when was this federal rule established?

- Please share a copy of the page in the federal rule which indicates the asset limit (as opposed to standard) must be the same for all couples.

Social Security Act

1924(f) PERMITTING TRANSFER OF RESOURCES TO COMMUNITY SPOUSE.--

(1) IN GENERAL.--An institutionalized spouse may, without regard to section 1917(c)(1), transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) COMMUNITY SPOUSE RESOURCE ALLOWANCE DEFINED.--In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which--

(A) the greatest of--

(i) \$12,000 (subject to adjustment under subsection (g)), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1), or (II) \$60,000 (subject to adjustment under subsection (g)),

(iii) the amount established under subsection (e)(2); or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders.--If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1917 shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

- Is Wisconsin the only state that has a "greater of the following" – type standard?

DHFS staff in consulting with lead policy staff at CMS' Center for Medicaid State Operations have been told that Wisconsin's is the only state plan amendment that has a methodology other than the use of a single amount.

Page 2 indicates that an institutional spouse can transfer income to keep the community spouse at 200% FPL. The FPL limit shown (\$2,232 / month) seems to represent 200% FPL for a couple (household size of 2). If one spouse is in a nursing home, why would we use the FPL limit for a household size of 2?

Because the Social Security Act, 1924(d)(3) states:

(A) IN GENERAL.--Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds--

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981⁽²¹⁰⁾) for a family unit of 2 members (emphasis added by DHFS staff); plus. . . .

My understanding of this proposal is to change the treatment of an annuity so that it is shown on the asset side and not on the income side when determining MA eligibility.

- If the individual converted an asset into an annuity several years before applying for MA, how will you establish the value of that annuity? In other words, how do you determine what is "available."

We are not defining the annuity as an available asset. We are changing the definition of divestment into a trust to include annuities. Divestment is a nonfinancial, not a financial, eligibility factor. The amount placed into the annuity (if within the look back period of five years) would be the divested amount. This amount is divided by the average nursing home private pay rate to arrive at the number of months that the individual cannot receive Medicaid coverage of long term care services. The beginning of the penalty period is the month in which the divestment occurred.

The paper indicates Idaho & New Jersey treat annuities like trusts; did this treatment predate the federal rule prohibiting such a treatment, or did these states enact these changes in spite of the federal rule?

New Jersey and Idaho reacted to a letter from CMS' Tom Hamilton stating that CMS considered annuities to be trusts. There is no other federal guidance (regulation, State Medicaid Director's letter, etc.) indicating how annuities should be treated. Only the Social Security Act states that annuities should be treated as the DHHS Secretary indicates. New Jersey changed their divestment rules/statutes *after* they received the letter from Tom Hamilton. Idaho received a copy of the letter and they are interpreting it to mean that DHHS has now stated that annuities can be treated as trusts.

If an annuity is factored into an individual's income for MA eligibility purposes, if that annuity is roughly tied to an individual's life expectancy, and if federal rules indicate states may not treat annuities like trusts, what is the policy rationale for this change?

There are no federal rules. Transfer into an annuity is a divestment. Divestment is a nonfinancial factor, not a financial factor. Just like trusts that can be treated as divestment, we would continue to count the income from an annuity for Medicaid eligibility purposes.

The paper identifies a lack of department monitoring tools to monitor asset transfers, to ensure such transfers are benefiting the community spouse? How does creating statutory language address this deficiency? Is the current restriction simply a department policy (admin rule)?

We are asking for the legislature and Governor to agree on a definition of 'for the sole benefit of the community spouse'. This isn't a Department deficiency, but a change in our divestment rules. By putting this definition into law, rather than into administrative rule or the Medicaid handbook, DHFS will have more protection in court from challenges from estate planners and elder law attorneys.

With regards to spousal impoverishment, by capping spousal assets at \$50,000 the state would save \$110,900 AF.

- How high could the asset cap be set and still be budget neutral?
- Would there be any cost in setting cap at the federal max?

Yes, that's why DOA suggested changing the policy back to a minimum and a maximum in the 99-01 budget.

- Would this asset level be indexed with inflation or adjusted for changes in the cost-of-living (as the federal range currently is)?

The cost estimate for the 2 attorneys shows a cost of \$50,700 GPR and \$71,300 (or a federal share of 59%). Shouldn't the split be 50/50?

Please show, by state fiscal year and by funding source, the savings associated with:

- Treating annuities like trusts
- Capping assets for spouses at \$50,000
- Restricting transfers of assets to the community spouse.

Note: many figures in the paper are biennial, all funds. For purposes of B2 file maintenance, I need at least all funds amounts for each fiscal year.



SA ✓
P-rob ✓

State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-0781/1

PJK./:....

cjs

DOA:.....Blaine - BB0219, Changes to divestment and spousal impoverishment laws

FOR 2003-05 BUDGET — NOT READY FOR INTRODUCTION

D-note
SOON
(12-17)

do not gen cat

1 AN ACT relating to: asset divestment and spousal impoverishment under the
2 Medical Assistance program.

Analysis by the Legislative Reference Bureau

This is a very preliminary draft. An analysis will be included with a later version.

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

3 SECTION 1. 46.27 (6u) (b) 1. of the statutes is amended to read:
4 46.27 (6u) (b) 1. For persons applying for or receiving services under sub. (7),
5 a declaration of assets, on a form prescribed by the department. The declaration
6 shall include any assets that the person applying for or receiving the services, or his
7 or her spouse, has, after August 12, 1993, transferred to another for less than fair
8 market value at any time within the 36-month period, or, with respect to payments

1 from a trust or portions of a trust that would be treated as assets transferred by an
 2 individual under s. 49.454 (2) (c) or (3) (b) or with respect to the purchase of an
 3 irrevocable annuity, within the 60-month period, immediately before the date of the
 4 declaration.

History: 1981 c. 20; 1983 a. 27; 1983 a. 189 s. 329 (5); 1983 a. 197 s. 239; 1985 a. 29 ss. 876s to 896am, 3200 (56); 1985 a. 120, 176; 1987 a. 27, 399; 1989 a. 31, 77, 336, 359; 1991 a. 32, 39, 235, 274; 1993 a. 16, 27, 437; 1995 a. 27; 1997 a. 11, 27, 39, 79, 237; 1999 a. 9, 63; 2001 a. 16, 103.

5 **SECTION 2.** 49.453 (1) (ak) of the statutes is created to read:

6 49.453 (1) (ak) "Consumer price index" has the meaning given in s. 49.455 (1)
 7 (b).

8 **SECTION 3.** 49.453 (1) (c) of the statutes is amended to read:

9 49.453 (1) (c) "Expected value of the benefit" means the amount ~~that an~~
 10 irrevocable annuity will pay to the annuitant of payments to a covered individual or
 11 his or her spouse during his or her expected lifetime as determined under sub. (4) (c).

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

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

13 49.453 (1) (f) (intro.) "Look-back date" means, for a covered individual, the date
 14 that is 36 months before, or, with respect to payments from a trust or portions of a
 15 trust that are treated as assets transferred by the covered individual under s. 49.454
 16 (2) (c) or (3) (b) or with respect to the purchase of an irrevocable annuity, the date that
 17 is 60 months before:

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

18 **SECTION 5.** 49.453 (4) (title) of the statutes is amended to read:

19 49.453 (4) (title) ~~IRREVOCABLE ANNUITIES, PROMISSORY~~ PROMISSORY NOTES AND
 20 SIMILAR TRANSFERS.

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

21 **SECTION 6.** 49.453 (4) (a) (intro.) of the statutes is amended to read:

22 49.453 (4) (a) (intro.) For the purposes of sub. (2), whenever a covered
 23 individual or his or her spouse, or another person acting on behalf of the covered

1 individual or his or her spouse, transfers assets ~~to an irrevocable annuity, or~~
2 ~~transfers assets~~ by a promissory note or similar instrument, in an amount that
3 exceeds the expected value of the benefit, the covered individual or his or her spouse
4 transfers assets for less than fair market value. A transfer ~~to an annuity, or a~~
5 ~~transfer~~ by a promissory note or similar instrument, is not in excess of the expected
6 value only if all of the following are true: ✓

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

7 **SECTION 7.** 49.453 (4) (a) 1. (intro.) and a. of the statutes are consolidated,
8 renumbered 49.453 (4) (a) 1m., and amended to read:

9 49.453 (4) (a) 1m. The periodic payments back to the transferor include
10 principal and interest at a rate that, at the time that the transfer is made, is at least
11 ~~at one of the following: a. For an annuity, promissory note or similar instrument that~~
12 ~~is not specified under subd. 1. b. or par. (am),~~ the applicable federal rate required
13 under section 1274 (d) of the Internal Revenue Code, as defined in s. 71.01 (6).

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

14 **SECTION 8.** 49.453 (4) (a) 1. b. of the statutes is repealed. ✓

15 **SECTION 9.** 49.453 (4) (am) of the statutes is repealed. ✓

16 **SECTION 10.** 49.453 (4) (c) of the statutes is amended to read:

17 49.453 (4) (c) The department shall promulgate rules specifying the method to
18 be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to
19 1.72-18, and specifying the criteria for adjusting the expected value of the benefit
20 based on a medical condition diagnosed by a physician before the assets were
21 transferred ~~to the annuity, or transferred by the~~ promissory note or similar
22 instrument. In calculating the amount of the divestment when a transfer ~~to an~~
23 ~~annuity, or a transfer~~ by a promissory note or similar instrument, is made, payments
24 made to the transferor in any year subsequent to the year in which the transfer was

1 made shall be discounted to the year in which the transfer was made by the
2 applicable federal rate specified under par. (a) on the date of the transfer.

History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

3 SECTION 11. 49.453 (4m) of the statutes is created to read:

4 49.453 (4m) IRREVOCABLE ANNUITIES. For the purposes of sub. (2), if a covered
5 individual or his or her spouse, or another person acting on behalf of the covered
6 individual or his or her spouse, purchases an irrevocable annuity, the covered
7 individual or his or her spouse transfers assets for less than fair market value, unless
8 any of the following ~~is/are~~

9 (a) The purchase of the annuity ~~is/are~~ ^{does} not ~~is/are~~ affected ^{the} the covered
10 individual's eligibility for medical assistance. ✓

11 (b) Payments from the annuity are not greater than necessary to meet the
12 reasonable and ordinary monthly needs of the beneficiary of the annuity. ✓

13 SECTION 12. 49.453 (5) of the statutes is amended to read:

14 49.453 (5) CARE OR PERSONAL SERVICES. For the purposes of sub. (2), whenever
15 a covered individual or his or her spouse, or another person acting on behalf of the
16 covered individual or his or her spouse, transfers assets to a relative as payment for
17 care or personal services that the relative provides to the covered individual, the
18 covered individual or his or her spouse transfers assets for less than fair market
19 value unless the care or services directly benefit the covered individual, the amount
20 of the payment does not exceed reasonable compensation for the care or services that
21 the relative performs and, if the amount of the payment in any year exceeds 10% of
22 the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1.
23 \$12,000 increased by the same percentage increase as the percentage increase in the
24 consumer price index between September 1988 and September of the year before the

The Department determines

1 calendar year in which the care or services for which the payment was made were
2 performed, the agreement to pay the relative is specified in a notarized written
3 agreement that exists at the time that the relative performs the care or services.

4 History: 1993 a. 437 ss. 74 to 92; 1997 a. 35; 1999 a. 9, 185.

4 **SECTION 13.** 49.455 (5) (b) of the statutes is amended to read:

5 49.455 (5) (b) Notwithstanding ch. 766, in determining the resources of an
6 institutionalized spouse at the time of application for medical assistance, the amount
7 of resources considered to be available to the institutionalized spouse equals the
8 value of all of the resources held by either or both spouses minus the greatest of the
9 amounts determined under sub. (6) (b) ~~1.~~ 1m. to 4. ✓

10 History: 1989 a. 31, 81; 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27.

10 **SECTION 14.** 49.455 (6) (a) of the statutes is amended to read:

11 49.455 (6) (a) Notwithstanding s. 49.453 (2), an institutionalized spouse may
12 transfer an amount of resources ~~equal to~~ not exceeding the community spouse
13 resource allowance determined under par. (b) ~~to, or,~~ for the sole benefit of, the
14 community spouse, without becoming ineligible for medical assistance for the period
15 of ineligibility under s. 49.453 (3) as a result of the transfer. The institutionalized
16 spouse shall make the transfer as soon as practicable after the initial determination
17 of eligibility for medical assistance, taking into account the amount of time that is
18 necessary to obtain a court order under par. (c). ✓

19 History: 1989 a. 31, 81; 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27.

19 **SECTION 15.** 49.455 (6) (b) (intro.) of the statutes is amended to read:

20 49.455 (6) (b) (intro.) The community spouse resource allowance equals the
21 ~~amount by which the amount of resources otherwise available to the community~~
22 ~~spouse is exceeded by the greatest of the following:~~

History: 1989 a. 31, 81; 1991 a. 39, 269; 1993 a. 16, 437; 1995 a. 27.

****NOTE: I realize that the language I have stricken parallels the federal statutory language, but it seems to unnecessarily complicate the concept. Is there any reason why we need to keep it?

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

LRB-0781/Edn ^{P1}

PJK:.....
/

ejs

Robert:

1. Because the instructions with respect to transferring assets to an annuity were so vague, I have drafted this request without an analysis and with only a stab at what might be wanted for the annuity portion of the draft. I expect that that portion of the draft will have to be reworked considerably. ✓

2. As proposed s. 49.453 (4m) is drafted, an annuity purchased for someone other than the covered individual or his or her spouse might satisfy proposed s. 49.453 (4m) (b) but assets actually would be divested. Perhaps proposed s. 49.453 (4m) (b) should be limited to an annuity that is purchased for the covered individual or his or her spouse. ✓

✓ Instead of the way in which I have drafted the annuity provision, did DHFS intend that s. 49.454 be amended to include annuities so that they are treated in the same manner as trusts? ✓

3. I amended s. 49.455 (6) (a) to read "an amount of resources *not exceeding* (rather than equal to) the community spouse resource allowance" because some spouses may have less than \$50,000 in total to transfer. ✓

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0781/P1dn

PJK:cjs:rs

December 19, 2002

Robert:

1. Because the instructions with respect to transferring assets to an annuity were so vague, I have drafted this request without an analysis and with only a stab at what might be wanted for the annuity portion of the draft. I expect that that portion of the draft will have to be reworked considerably.

2. As proposed s. 49.453 (4m) is drafted, an annuity purchased for someone other than the covered individual or his or her spouse might satisfy proposed s. 49.453 (4m) (b) but assets actually would be divested. Perhaps proposed s. 49.453 (4m) (b) should be limited to an annuity that is purchased for the covered individual or his or her spouse.

Instead of the way in which I have drafted the annuity provision, did DHFS intend that s. 49.454 be amended to include annuities so that they are treated in the same manner as trusts?

3. I amended s. 49.455 (6) (a) to read "an amount of resources *not exceeding* (rather than equal to) the community spouse resource allowance" because some spouses may have less than \$50,000 in total to transfer.

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

Kahler, Pam

From: Blaine, Robert
Sent: Sunday, January 12, 2003 12:13 PM
To: Kahler, Pam
Cc: Cunningham, Curtis
Subject: FW: FW: LRB Draft: 03-0781/P1 Changes to divestment and spousal impoverishment laws

Pam --

DHFS has decided (and I agree) that divestment portions of the stat. language are not needed, and that changes could be implemented administratively. Therefore, we would request deleting the divestment sections (everything but Sections 13 through 17), and thus only retaining the spousal impoverishment provisions. The spousal impov. pieces, by the way, look good, and we do not need any further changes here.

Give me a call if you have any questions. If I'm not around, it's okay with me if you want to contact DHFS directly (Curtis Cunningham, at 6-5362) if you need a question answered right away.

Thanks,
Robert

-----Original Message-----

From: Cunningham, Curtis
Sent: Friday, January 10, 2003 9:48 AM
To: Blaine, Robert
Cc: Jones, James; McIlquham, Cheryl; Bove, Fredi-Ellen; Cunningham, Curtis; Megna, Richard
Subject: Re: FW: LRB Draft: 03-0781/P1 Changes to divestment and spousal impoverishment laws

Robert,
For the divestment proposals, the Department has determined that both proposals can be implemented by making changes to the handbook and therefore no statutory language changes will be needed. A statutory language change will still be needed for the spousal impoverishment proposal. Below I have tried to summarize how the Department will address implementing the divestment changes. I am still waiting for feedback on the spousal impoverishment language but I am hopeful I will get that information today.

Annuities and similar transfers

It has been determined that the Feds will not let us treat annuities like irrevocable trusts. However, New Jersey is now treating annuities as countable assets since there is a market in which annuities can be sold. It is proposed that the Department take the same position as New Jersey and treat an annuity as a countable asset if it can be sold. This change in policy would be made by the current handbook. The Department would also develop the standard that would have to be met to prove that the annuity cannot be sold. If the annuity cannot be sold it will be subject to the existing statutes under 49.453(4) which defines if an annuity has been transferred in excess of the expected value.

Sole benefit of the Community Spouse

The department's handbook will incorporate language that is similar to the following New Jersey language.

"In order for a transfer of assets to be considered to be for the sole benefit of the community spouse, disabled child, or disabled individual under the age of 65, the transfer shall have been arranged in such a way that no individual except the spouse, disabled child, or disabled individual under the age of 65 can, in any way, benefit from the assets transferred either at the time of the transfer, or at any time in the future. The person administering the funds

shall only be compensated for the reasonable cost that can be directly attributable to the administration of the funds and for compensation for that administration. In no event shall the compensation exceed the amounts allowed by law for the administration of trusts.

In determining whether an asset was transferred for the sole benefit of the community spouse, child, or disabled individual shall be accomplished via a written instrument of transfer, such as a trust document, which legally binds the parties to a specific course of action and which clearly sets out the conditions under which the transfer was made, as well as who can benefit from the transfer."

Please let me know if you have any questions.

Regards,
Curtis

>>> Blaine, Robert 12/31/02 08:47AM >>>
Curtis & Jim --

This draft needs considerable work, and I am not expert enough to see if it achieves what is intended. Because we are so limited on time, I need all comments by January 8. Let me know ASAP if this is not workable, but I doubt I can go much beyond the 10th. Finalizing these stat language drafts should be treated as top priorities.

Following is the PDF version of draft 03-0781/P1.



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-0781/P2
PJK:cjs:rs
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DOA:.....Blaine - BB0219, Changes to ~~investment~~ and spousal impoverishment laws

FOR 2003-05 BUDGET - NOT READY FOR INTRODUCTION

SOON
(1-13)

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1 AN ACT ~~relating to investment and~~ relating to spousal impoverishment under the
2 Medical Assistance program.

Analysis by the Legislative Reference Bureau

~~This is a very preliminary draft. An analysis will be included with a later version.~~

Insert
A

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

3 SECTION 1. 46.27 (6u) (b) 1. of the statutes is amended to read:
4 46.27 (6u) (b) 1. For persons applying for or receiving services under sub. (7),
5 a declaration of assets, on a form prescribed by the department. The declaration
6 shall include any assets that the person applying for or receiving the services, or his
7 or her spouse, has, after August 12, 1993, transferred to another for less than fair
8 market value at any time within the 36-month period, or, with respect to payments

1 from a trust or portions of a trust that would be treated as assets transferred by an
 2 individual under s. 49.454 (2) (c) or (3) (b) ~~or with respect to the purchase of an~~
 3 ~~irrevocable annuity, within the 60-month period, immediately before the date of the~~
 4 declaration.

5 SECTION 2. 49.453 (1) (ak) of the statutes is created to read:

6 49.453 (1) (ak) "Consumer price index" has the meaning given in s. 49.455 (1)

7 (b).

8 SECTION 3. 49.453 (1) (c) of the statutes is amended to read:

9 49.453 (1) (c) "Expected value of the benefit" means the amount that an
 10 ~~irrevocable annuity will pay to the annuitant of payments to a covered individual or~~
 11 ~~his or her spouse during his or her expected lifetime as determined under sub. (4) (c).~~

12 SECTION 4. 49.453 (1) (f) (intro.) of the statutes is amended to read:

13 49.453 (1) (f) (intro.) "Look-back date" means, for a covered individual, the date
 14 that is 36 months before, or, with respect to payments from a trust or portions of a
 15 trust that are treated as assets transferred by the covered individual under s. 49.454
 16 (2) (c) or (3) (b) ~~or with respect to the purchase of an irrevocable annuity,~~ the date that
 17 is 60 months before:

18 SECTION 5. 49.453 (4) (title) of the statutes is amended to read:

19 49.453 (4) (title) ~~IRREVOCABLE ANNUITIES, PROMISSORY PROMISSORY NOTES AND~~
 20 SIMILAR TRANSFERS.

21 SECTION 6. 49.453 (4) (a) (intro.) of the statutes is amended to read:

22 49.453 (4) (a) (intro.) For the purposes of sub. (2), whenever a covered
 23 individual or his or her spouse, or another person acting on behalf of the covered
 24 individual or his or her spouse, transfers assets to an ~~irrevocable annuity, or~~
 25 ~~transfers assets by a promissory note or similar instrument, in an amount that~~

keep ↓

1 exceeds the expected value of the benefit, the covered individual or his or her spouse
2 transfers assets for less than fair market value. A transfer to an annuity, or a
3 transfer by a promissory note or similar instrument, is not in excess of the expected
4 value only if all of the following are true:

5 **SECTION 7.** 49.453 (4) (a) 1. (intro.) and a. of the statutes are consolidated,
6 renumbered 49.453 (4) (a) 1m., and amended to read:

7 49.453 (4) (a) 1m. The periodic payments back to the transferor include
8 principal and interest at a rate that, at the time that the transfer is made, is at least
9 ~~at one of the following: a. For an annuity, promissory note or similar instrument that~~
10 ~~is not specified under subd. 1. b. or par. (am),~~ the applicable federal rate required
11 under section 1274 (d) of the Internal Revenue Code, as defined in s. 71.01 (6).

12 **SECTION 8.** 49.453 (4) (a) 1. b. of the statutes is repealed.

13 **SECTION 9.** 49.453 (4) (am) of the statutes is repealed.

14 **SECTION 10.** 49.453 (4) (c) of the statutes is amended to read:

15 49.453 (4) (c) The department shall promulgate rules specifying the method to
16 be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to
17 1.72-18, and specifying the criteria for adjusting the expected value of the benefit
18 based on a medical condition diagnosed by a physician before the assets were
19 transferred to the annuity, or transferred by the promissory note or similar
20 instrument. In calculating the amount of the divestment when a transfer to an
21 annuity, or a transfer by a promissory note or similar instrument, is made, payments
22 made to the transferor in any year subsequent to the year in which the transfer was
23 made shall be discounted to the year in which the transfer was made by the
24 applicable federal rate specified under par. (a) on the date of the transfer.

25 **SECTION 11.** 49.453 (4m) of the statutes is created to read:

1 49.453 (4m) IRREVOCABLE ANNUITIES. For the purposes of sub. (2), if a covered
2 individual or his or her spouse, or another person acting on behalf of the covered
3 individual or his or her spouse, purchases an irrevocable annuity, the covered
4 individual or his or her spouse transfers assets for less than fair market value, unless
5 the department determines any of the following:

6 (a) The purchase of the annuity does not affect the covered individual's
7 eligibility for medical assistance.

8 (b) Payments from the annuity are not greater than necessary to meet the
9 reasonable and ordinary monthly needs of the beneficiary of the annuity.

10 SECTION 12. 49.453 (5) of the statutes is amended to read:

11 49.453 (5) CARE OR PERSONAL SERVICES. For the purposes of sub. (2), whenever
12 a covered individual or his or her spouse, or another person acting on behalf of the
13 covered individual or his or her spouse, transfers assets to a relative as payment for
14 care or personal services that the relative provides to the covered individual, the
15 covered individual or his or her spouse transfers assets for less than fair market
16 value unless the care or services directly benefit the covered individual, the amount
17 of the payment does not exceed reasonable compensation for the care or services that
18 the relative performs and, if the amount of the payment in any year exceeds 10% of
19 ~~the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1.~~
20 \$12,000 increased by the same percentage increase as the percentage increase in the
21 consumer price index [✓] between September 1988 and September of the year before the
22 calendar year in which the care or services for which the payment was made were
23 performed, the agreement to pay the relative is specified in a notarized written
24 agreement that exists at the time that the relative performs the care or services.

25 SECTION 13. 49.455 (5) (b) of the statutes is amended to read: ✓

1 49.455 (5) (b) Notwithstanding ch. 766, in determining the resources of an
2 institutionalized spouse at the time of application for medical assistance, the amount
3 of resources considered to be available to the institutionalized spouse equals the
4 value of all of the resources held by either or both spouses minus the greatest of the
5 amounts determined under sub. (6) (b) ~~1.~~ 1m. to 4.

6 SECTION 14. 49.455 (6) (a) of the statutes is amended to read:

7 49.455 (6) (a) Notwithstanding s. 49.453 (2), an institutionalized spouse may
8 transfer an amount of resources equal to not exceeding the community spouse
9 resource allowance determined under par. (b) ~~to, or,~~ for the sole benefit of, the
10 community spouse, without becoming ineligible for medical assistance for the period
11 of ineligibility under s. 49.453 (3) as a result of the transfer. The institutionalized
12 spouse shall make the transfer as soon as practicable after the initial determination
13 of eligibility for medical assistance, taking into account the amount of time that is
14 necessary to obtain a court order under par. (c).

15 SECTION 15. 49.455 (6) (b) (intro.) of the statutes is amended to read:

16 49.455 (6) (b) (intro.) The community spouse resource allowance equals the
17 ~~amount by which the amount of resources otherwise available to the community~~
18 ~~spouse is exceeded by the greatest of the following:~~

→ ******NOTE:** I realize that the language I have stricken parallels the federal statutory language, but it seems to unnecessarily complicate the concept. Is there any reason why we need to keep it?

19 SECTION 16. 49.455 (6) (b) 1. of the statutes is repealed.

20 SECTION 17. 49.455 (6) (b) 2. of the statutes is repealed.

21 (END)

2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0781/P2ins
PJK:cjs:rs

INSERT A

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

The Under current law, if an individual who is in a medical institution or nursing facility transfers assets for less than market value, he or she is ineligible for medical assistance for three years from the date of the transfer. This is known as divestment. However, if the institutionalized individual is married (institutionalized spouse) and his or her spouse is not also in a medical institution or nursing facility (community spouse), the institutionalized spouse may transfer a certain amount of assets to, or for the sole benefit of, the community spouse without losing eligibility for medical assistance. *fair* This asset amount that may be transferred is called the "community spouse resource allowance" and the purpose for this allowance is to prevent the impoverishment of the community spouse so that he or she may continue to reside outside of an institution.

Under current law, the community spouse resource allowance is the greatest of the following amounts: 1) \$12,000, increased by the same percentage as the percentage increase in the consumer price index between September 1988 and ~~the~~ September of the year before the year involved; 2) \$50,000; 3) the lesser of: a) \$60,000 increased by the same percentage as the percentage increase in the consumer price index between September 1988 and ~~the~~ September of the year before the year involved, and b) one-half of the value of the spouses' assets, determined at the beginning of the institutionalized spouse's institutionalization; 4) the amount established in a fair hearing; or 5) the amount transferred under a court order.

This bill changes the amount of the community spouse resource allowance to the greatest of the following amounts: 1) \$50,000; 2) the amount established in a fair hearing; or 5) the amount transferred under a court order. ✓

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

(END OF INSERT A)

Kahler, Pam

From: Blaine, Robert
Sent: Saturday, January 25, 2003 4:37 PM
To: Kahler, Pam
Subject: FW: FW: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

Pam --

Below are two comments from DHFS on draft 0781. I am NOT requesting you incorporate them into a redraft, but thought you might want them for your records. My personal assessment is that the changes they've requested are unnecessary.

Thanks for all your work on this convulted issue!
Robert

-----Original Message-----

From: Cunningham, Curtis
Sent: Friday, January 24, 2003 5:20 PM
To: Blaine, Robert
Cc: Jones, James; McIlquham, Cheryl; Cunningham, Curtis; Megna, Richard
Subject: Re: FW: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

Robert,
We have two comments regarding this draft.

First, under section 2 line 13 it is recommended that it references 49.455 (6) (b) and the new language that was added after this reference be deleted.

Second, the analysis section does not accurately describe divestment and spousal impoverishment. The follow is what Jim Jones has suggested:

Divestment occurs when an institutionalized individual transfers assets for less than fair market value in the 36 months prior to applying for Medicaid and needing long term care services (nursing home/waiver). The penalty for divestment is that the individual's long term care costs are not paid for by Medicaid. The individual remains eligible for Medicaid card services. The divestment penalty period is of indeterminate length. The penalty period is the divested amount divided by the average private pay nursing home rate. the penalty begins in the month that the divestment occurred.

spousal Impoverishment allows a couple, in which one spouse is entering a nursing home or participating in a community waiver program, to protect some of the couple's assets so that the community spouse is not impoverished. Prior to this change the community spouse protected asset amount was the greatest of 1) a court ordered amount 2) an amount ordered by an administrative law judge in excess of the (3) to generate income for the community spouse or 3) an amount calculated in the following manner:

- a) total the couple's assets at the beginning of the first continuous institutionalized of the institutionalized spouse.
- b) divide those assets in 1/2
- c) if that amount is greater than the maximum community spouse asset share, the community spouse asset share is the maximum.
- d) if that amount is less than or equal to the minimum community spouse asset share (\$50,000), the community spouse asset share is the minimum.
- e) if that amount is less than the maximum but greater than the minimum, the community spouse asset share is 1/2 of the couple's assets

Please let me know if you have any further questions.

Regards,

Curtis

>>> Blaine, Robert 01/19/03 01:13PM >>>
need comments ASAP!!!

-----Original Message-----

From: Schlueter, Ron

Sent: Friday, January 17, 2003 2:50 PM

To: Blaine, Robert

Cc: Johnston, James; Schaeffer, Carole; Hanaman, Cathlene; Haugen, Caroline

Subject: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

Following is the PDF version of draft 03-0781/P2.

Kahler, Pam

From: Blaine, Robert
Sent: Wednesday, January 29, 2003 9:27 AM
To: Kahler, Pam
Subject: FW: RE: FW: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

You spoke too soon! I give them credit that they didn't waste any time in getting back to me.

My view is that the analysis is your judgement call. I just want the draft done!

-----Original Message-----

From: Cunningham, Curtis
Sent: Wednesday, January 29, 2003 9:10 AM
To: Blaine, Robert
Cc: Jones, James; McIlquham, Cheryl; Bove, Fredi-Ellen; Megna, Richard
Subject: RE: RE: FW: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

Robert,
I can imagine that it is easy to be at work at 8:30pm. The following are Jim's comments regarding the inaccuracies in the analysis section. I know being so busy it must seem like I am belaboring the point but that is not my intention. I just want to make sure your aware that there are some discrepancies in the analysis. I will leave it up to you to decide if you want to change the analysis. Please let me know if you need any more information.

Regards,
Curtis

While the change to the statute has some minor problems, I am most concerned about the LRB analysis provided. This is not a case of LRB trying to explain something in simpler terms, it is case where the analysis is wrong. The analysis:

States that divestment causes ineligibility for Medicaid - it doesn't, it means that Medicaid won't pay for certain long term care services for a period of time determined by the amount divested;

Explains that there is a 36 month limit on the period of 'ineligibility' - there is no limit on the divestment penalty period, the 36 months is the 'look back' period;

Implies that spousal impoverishment policy and divestment policies work together - they don't, the federal law makes no connection between the two provisions and in some instances, the two provisions conflict; and,

Does not clearly explain the reason the change in spousal impoverishment is being made - the change is being made at the insistence of the federal agency. CMS has told us that our current spousal impoverishment policy for the community spouse asset share is wrong.

Those are my points. If it really doesn't matter what LRB says in its 'analysis', then there's nothing really to object to. However, if legislators and LFB start with this analysis, they will be considering the change based upon inaccurate information.

>>> Blaine, Robert 01/28/03 08:36PM >>>
Curtis --

Perhaps I should have asked you or Jim to describe what is wrong with the analysis section. The last e-mail offered substitute language, but upon my reading it, I didn't see what the draft stated that was inaccurate or inconsistent with Jim's verbage. If the analysis is inaccurate, I'm sure Pam would be happy to correct and clarify. But remember, the bill is what becomes state law, not the LRB analysis.

Please note also that when these drafts are rolled up into one bill, these analysis sections are usually pared down significantly to save space. We could request Pam to update the analysis section, but that doesn't mean we'll actually see it in the bill.

You'll have to forgive me -- I'm a bit cranky.
Robert

-----Original Message-----

From: Cunningham, Curtis
Sent: Tuesday, January 28, 2003 4:10 PM
To: Blaine, Robert
Cc: Jones, James; McIlquham, Cheryl; Bove, Fredi-Ellen; Megna, Richard
Subject: Fwd: RE: FW: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

Robert,
Attached is Cheryl's response to not changing the spousal impoverishment stat lang. and analysis section. I agree with her that not changing the analysis section is very misleading and it is hard to understand our proposed changes if people don't have a proper understanding of current law. Please let me know if you want to talk about this further.

Thanks,
Curtis

-----Original Message-----

Date: 01/28/2003 03:44 pm -0600 (Tuesday)
From: Cheryl McIlquham
To: Cunningham, Curtis
CC: James Jones; Megna, Richard
Subject: Fwd: RE: FW: LRB Draft: 03-0781/P2 Changes to spousal impoverishment laws

Jim and I discussed this. We believe that it is important for the analysis section of the draft to be accurate as people (Legislators, advocates, etc.) often use it as a substitute for an actual review of the statutory language. If we want to ensure a true understanding of current law and what the change means, then we think it ought to be accurate. This is a very complicated section of law that could benefit from an accurate LRB analysis.

To not make any change to Line 13 on page two would be okay if the intent is to continue to reference the federal minimum as we do under current law...which, I think is what we intended because if we changed this, it would have some sort of fiscal effect presumably.

Thanks

>>> Curtis Cunningham 01/27/03 02:55PM >>>

Jim and Cheryl,
Please see Robert's response to our suggested changes. I want to make sure you are OK if he doesn't site the reference to 49.455(6)(b)(1). Do you

strongly object to leaving it the way it is. If so, let me know and I will speak with Robert about this. I also realize that the analysis section is wrong but I don't think he will want to change that. Let me know what you think.

Thanks,
Curtis

Kahler, Pam

From: Blaine, Robert
Sent: Wednesday, January 29, 2003 1:18 PM
To: Kahler, Pam
Subject: RE: LRB-0781

sounds fine. thanks.

-----Original Message-----

From: Kahler, Pam
Sent: Wednesday, January 29, 2003 12:42 PM
To: Blaine, Robert
Subject: LRB-0781

Robert:

Sorry to potentially rock the boat on this one again, but in beginning to rewrite the analysis, to get rid of any mention of divestment, I noticed that in the draft the "to, or for the sole benefit of, the community spouse" language change was still in. Since that change is related to divestment, strictly speaking, and since DHFS no longer wants any divestment changes and claims that spousal impoverishment is completely unrelated to divestment, I am removing that change from the draft, in addition to changing the analysis so that there is no mention of the problematic "divestment." Sound okay to you?

Pam



State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-0781/33

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DOA:.....Blaine - BB0219, Changes to spousal impoverishment laws

FOR 2003-05 BUDGET - NOT READY FOR INTRODUCTION

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1 AN ACT relating to: spousal impoverishment under the Medical Assistance
2 program.

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

Under current law, ~~the~~ individual who is in a medical institution or nursing facility transfers assets for less than fair market value, he or she is ineligible for medical assistance for three years from the date of the transfer. This is known as divestment. However, if the institutionalized individual is married (institutionalized spouse) and his or her spouse is not also in a medical institution or nursing facility (community spouse), the institutionalized spouse may transfer a certain amount of assets to, or for the sole benefit of, the community spouse without losing eligibility for medical assistance. The asset amount that may be transferred is called the "community spouse resource allowance" and the purpose for this allowance is to prevent the impoverishment of the community spouse so that he or she may continue to reside outside of an institution.

Under current law, the community spouse resource allowance is the greatest of the following amounts: 1) \$12,000, increased by the same percentage as the percentage increase in the consumer price index between September 1988 and September of the year before the year involved; 2) \$50,000; 3) the lesser of: a) \$60,000 increased by the same percentage as the percentage increase in the consumer price

index between September 1988 and September of the year before the year involved, and b) one-half of the value of the spouses' assets, determined at the beginning of the institutionalized spouse's institutionalization; 4) the amount established in a fair hearing; or 5) the amount transferred under a court order.

This bill changes the amount of the community spouse resource allowance to the greatest of the following amounts: 1) \$50,000; 2) the amount established in a fair hearing; or 5) the amount transferred under a court order.

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

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

SECTION 1. 49.453 (1) (ak) of the statutes is created to read:

49.453 (1) (ak) "Consumer price index" has the meaning given in s. 49.455 (1)

(b).

SECTION 2. 49.453 (5) of the statutes is amended to read:

49.453 (5) CARE OR PERSONAL SERVICES. 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 a relative as payment for care or personal services that the relative provides to the covered individual, the covered individual or his or her spouse transfers assets for less than fair market value unless the care or services directly benefit the covered individual, the amount of the payment does not exceed reasonable compensation for the care or services that the relative performs and, if the amount of the payment in any year exceeds 10% of ~~the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1.~~ \$12,000 increased by the same percentage increase as the percentage increase in the consumer price index between September 1988 and September of the year before the calendar year in which the care or services for which the payment was made were

En A

1 performed, the agreement to pay the relative is specified in a notarized written
2 agreement that exists at the time that the relative performs the care or services.

3 **SECTION 3.** 49.455 (5) (b) of the statutes is amended to read:

4 49.455 (5) (b) Notwithstanding ch. 766, in determining the resources of an
5 institutionalized spouse at the time of application for medical assistance, the amount
6 of resources considered to be available to the institutionalized spouse equals the
7 value of all of the resources held by either or both spouses minus the greatest of the
8 amounts determined under sub. (6) (b) 1. 1m. to 4.

9 **SECTION 4.** 49.455 (6) (a) of the statutes is amended to read:

10 49.455 (6) (a) Notwithstanding s. 49.453 (2), an institutionalized spouse may
11 transfer an amount of resources equal to not exceeding the community spouse
12 resource allowance determined under par. (b) to, or for the sole benefit of, the
13 community spouse, ^{plain} without becoming ineligible for medical assistance for the period ^{plain}
14 of ineligibility under s. 49.453 (3) as a result of the transfer. The institutionalized
15 spouse shall make the transfer as soon as practicable after the initial determination
16 of eligibility for medical assistance, taking into account the amount of time that is
17 necessary to obtain a court order under par. (c). ✓

18 **SECTION 5.** 49.455 (6) (b) (intro.) of the statutes is amended to read:

19 49.455 (6) (b) (intro.) The community spouse resource allowance equals the
20 amount by which the amount of resources otherwise available to the community
21 spouse is exceeded by the greatest of the following: ✓

22 **SECTION 6.** 49.455 (6) (b) 1. of the statutes is repealed.

23 **SECTION 7.** 49.455 (6) (b) 2. of the statutes is repealed.

24 (END)

D - note

2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0781/P3ins
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According to DHFS, the Center for Medicaid State Operations of the federal Centers for Medicare and Medicaid Services has indicated that current law is not in compliance with federal requirements because the community spouse resource allowance under current law is a range of amounts instead of a single amount. In order to comply with federal requirements, this bill changes the community spouse resource allowance to the greatest of the following amounts: 1) \$50,000; 2) the amount established in a fair hearing; or ③ the amount transferred under a court order.

(end of ins A) ③

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

LRB-0781/P3dn

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Robert:

It is very difficult to divorce the concept of spousal impoverishment from the concept of divestment in describing current law, because they are most definitely related under current law and under the changes made in this draft. Section 49.455 (6) (a) says that, notwithstanding the divestment rules, i.e., s. 49.453 (2), an institutionalized spouse may transfer a certain amount of assets to the community spouse without becoming ineligible for MA as a result of the transfer, even though DHFS insists that eligibility is not an issue and one does not become ineligible on account of divestment. I can't help it if there is a disconnect between our statutes and federal law. However, in changing the analysis, I have refrained from any mention of divestment or loss of MA eligibility and have added what DHFS indicates is the impetus for the change.

I have not changed the description of what the community spouse resource allowance amount is under current law, however, even though it seemed as though DHFS wanted a different description. I explained it as it appears in current law. They may interpret it differently.

or administer
administer

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

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

LRB-0781/P3dn

PJK:cjs:ch

January 30, 2003

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State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-0781/P3

PJK:cjs:ch

DOA:.....Blaine – BB0219, Changes to spousal impoverishment laws
FOR 2003-05 BUDGET — NOT READY FOR INTRODUCTION

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