



DOA:.....Milioto, Steve, BB0026 - Medicaid asset transfers

FOR 2007-09 BUDGET -- NOT READY FOR INTRODUCTION

\* LPS:  
delete  
VP2 D-Note  
ask PA's to  
do  
it

Don't Gen

- 1 AN ACT ...; relating to: changes in asset transfer rules for Medical Assistance
- 2 eligibility.

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a later version.  
For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

Insert A

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

- 3 SECTION 1. 49.45 (6m) (m) of the statutes is created to read:
- 4 49.45 (6m) (m) To hold a bed in a facility, the department may pay the full
- 5 payment rate under this subsection for up to 30 days for services provided to a person
- 6 during the pendency of an undue hardship determination, as provided in s. 49.453
- 7 (8) (b) 3.
- 8 SECTION 2. 49.453 (1) (a) of the statutes is amended to read:

1 49.453 (1) (a) "Assets" has the meaning given in 42 USC 1396p (e) (h) (1).

2 **SECTION 3.** 49.453 (1) (ar) of the statutes is created to read:

3 49.453 (1) (ar) "Community spouse" has the meaning given in s. 49.455 (1) (a).

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

5 49.453 (1) (d) "Income" has the meaning given in 42 USC 1396p (e) (h) (2).

6 **SECTION 5.** 49.453 (1) (e) of the statutes is amended to read:

7 49.453 (1) (e) "Institutionalized individual" has the meaning given in 42 USC  
8 1396p (e) (h) (3).

9 **SECTION 6.** 49.453 (1) (f) (intro.) of the statutes is amended to read:

10 49.453 (1) (f) (intro.) "Look-back date" means ~~for a covered individual, either~~  
11 of the following:

12 1m. For transfers made before February 8, 2006, the date that is 36 months  
13 before, or with respect to payments from a trust or portions of a trust that are treated  
14 as assets transferred by the covered individual under s. 49.454 (2) (c) or (3) (b) the  
15 date that is 60 months before:

16 **SECTION 7.** 49.453 (1) (f) 1. of the statutes is renumbered 49.453 (1) (f) 1m. a.

17 **SECTION 8.** 49.453 (1) (f) 2. of the statutes is renumbered 49.453 (1) (f) 1m. b.

18 **SECTION 9.** 49.453 (1) (f) 2m. of the statutes is created to read:

19 49.453 (1) (f) 2m. For all transfers made on or after February 8, 2006, the date  
20 that is 60 months before the dates specified in subd. 1m. a. and b.

21 **SECTION 10.** 49.453 (1) (fm) of the statutes is amended to read:

22 49.453 (1) (fm) "Noninstitutionalized individual" has the meaning given in 42  
23 USC 1396p (e) (h) (4).

24 **SECTION 11.** 49.453 (1) (i) of the statutes is amended to read:

25 49.453 (1) (i) "Resources" has the meaning given in 42 USC 1396p (e) (h) (5).

1           **SECTION 12.** 49.453 (3) (a) of the statutes is renumbered 49.453 (3) (a) (intro.)  
2 and amended to read:

3           49.453 (3) (a) (intro.) The period of ineligibility under this subsection begins  
4 on either of the following:

5           1. In the case of a transfer of assets made before February 8, 2006, the first day  
6 of the first month beginning on or after the look-back date during or after which  
7 assets have been transferred for less than fair market value and that does not occur  
8 in any other periods of ineligibility under this subsection.

9           **SECTION 13.** 49.453 (3) (a) 2. of the statutes is created to read:

10           49.453 (3) (a) 2. In the case of a transfer of assets made on or after February  
11 8, 2006, the first day of a month beginning on or after the look-back date during or  
12 after which assets have been transferred for less than fair market value, or the date  
13 on which the individual is eligible for medical assistance and would otherwise be  
14 receiving institutional level care described in sub. (2) (a) 1. to 3. based on an approved  
15 application for the care but for the application of the penalty period, whichever is  
16 later, and that does not occur during any other period of ineligibility under this  
17 subsection.

\*\*\*\*NOTE: This is the language from the federal law, except that I have excluded  
“under the state plan” after “eligible for medical assistance” and I have included  
“beginning on or after the look-back date” to parallel s. 49.453 (3) (a) in current law, which  
is renumbered in this draft to s. 49.453 (3) (a) 1. Okay?

18           **SECTION 14.** 49.453 (3) (b) (intro.) of the statutes is amended to read:

19           49.453 (3) (b) (intro.) The Subject to par. (bc), the department shall determine  
20 the number of months of ineligibility as follows:

21           **SECTION 15.** 49.453 (3) (bc) of the statutes is created to read:

22           49.453 (3) (bc) In determining the number of months of ineligibility under par.  
23 (b), with respect to asset transfers that occur after February 8, 2006, the department

1 may not round down the quotient, or otherwise disregard any fraction of a month,  
2 obtained in the division under par. (b) 3.

3 **SECTION 16.** 49.453 (4) (a) of the statutes is renumbered 49.453 (4) (ag).

4 **SECTION 17.** 49.453 (4) (ac) of the statutes is created to read:

5 49.453 (4) (ac) In this subsection, "transaction" means any action taken by an  
6 individual that changes the course of payments to be made under an annuity or the  
7 treatment of the income or principal of an annuity, including all of the following:

8 a. An addition of principal.

9 b. An elective withdrawal.

10 c. A request to change the distribution of the annuity.

11 d. An election to annuitize the contract.

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

13 49.453 (4) (am) Paragraph (a) (ag) 1. does not apply to a variable annuity that  
14 is tied to a mutual fund that is registered with the federal securities and exchange  
15 commission.

16 **SECTION 19.** 49.453 (4) (b) of the statutes is amended to read:

17 49.453 (4) (b) The amount of assets that is transferred for less than fair market  
18 value under par. (a) (ag) is the amount by which the transferred amount exceeds the  
19 expected value of the benefit.

20 **SECTION 20.** 49.453 (4) (c) of the statutes is amended to read:

21 49.453 (4) (c) The department shall promulgate rules specifying the method to  
22 be used in calculating the expected value of the benefit, based on 26 CFR 1.72-1 to  
23 1.72-18, and specifying the criteria for adjusting the expected value of the benefit  
24 based on a medical condition diagnosed by a physician before the assets were  
25 transferred to the annuity, or transferred by promissory note or similar instrument.

1 In calculating the amount of the divestment when a transfer to an annuity, or a  
2 transfer by promissory note or similar instrument, is made, payments made to the  
3 transferor in any year subsequent to the year in which the transfer was made shall  
4 be discounted to the year in which the transfer was made by the applicable federal  
5 rate specified under par. (a) (ag) on the date of the transfer.

6 **SECTION 21.** 49.453 (4) (cm) of the statutes is created to read:

7 49.453 (4) (cm) Paragraphs (ag) to (c) apply to annuities purchased before  
8 February 8, 2006, for which no transaction has occurred on or after February 8, 2006.

9 **SECTION 22.** 49.453 (4) (d) of the statutes is created to read:

10 49.453 (4) (d) 1. As a condition of receiving medical assistance for long-term  
11 care services described in sub. (2) (a), an applicant for or recipient of the long-term  
12 care services shall disclose on the application or recertification form a description of  
13 any interest the individual or his or her community spouse has in an annuity that  
14 was purchased, or with respect to which a transaction occurred, on or after February  
15 8, 2006, regardless of whether the annuity is irrevocable or is treated as an asset.  
16 The application or recertification form shall include a statement that the state  
17 becomes a remainder beneficiary under any annuity in which the individual or his  
18 or her spouse has an interest by virtue of the provision of the medical assistance.

19 2. The department shall notify the issuer of an annuity disclosed under subd.  
20 1. of the state's right as a remainder beneficiary and shall request that the issuer  
21 notify the department of any changes to or payments made under the annuity  
22 contract.

23 3. For purposes of sub. (2), the purchase of an annuity, or a transaction with  
24 respect to an annuity, on or after February 8, 2006, by an institutionalized individual

1 or his or her community spouse shall be treated as a transfer of assets for less than  
2 fair market value unless either of the following applies:

3 a. The state is designated as the remainder beneficiary in the first position for  
4 at least the total amount of medical assistance paid on behalf of the institutionalized  
5 individual.

6 b. The state is named as a beneficiary in the 2nd position after the community  
7 spouse or a minor or disabled child and is named in the first position if the community  
8 spouse or a representative of the minor or disabled child disposes of any remainder  
9 for less than fair market value.

10 SECTION 23. 49.453 (4) (e) of the statutes is created to read:

11 49.453 (4) (e) For purposes of sub. (2), the purchase of an annuity by or on behalf  
12 of an annuitant who has applied for medical assistance for nursing facility services  
13 or other long-term care services described in sub. (2) is a transfer of assets for less  
14 than fair market value unless all of the following apply:

15 1. The annuity is either an annuity described in section 408 (b) or (q) of the  
16 Internal Revenue Code of 1986 or purchased with proceeds from any of the following:

17 a. An account or trust described in section 408 (a), (c), or (p) of the Internal  
18 Revenue Code of 1986.

19 b. A simplified employee pension, within the meaning of section 408 (k) of the  
20 Internal Revenue Code of 1986.

21 c. A Roth IRA described in section 408A of the Internal Revenue Code of 1986.

22 2. The annuity is irrevocable and nonassignable.

23 3. The annuity is actuarially sound, as determined in accordance with actuarial  
24 publications of the office of the chief actuary of the social security administration.

) or a transaction with respect to an annuity )

1           4. The annuity provides for payments in equal amounts during the term of the  
2 annuity, with no deferral and no balloon payments made.

3           **SECTION 24.** 49.453 (4) (em) of the statutes is created to read:

4           49.453 (4) (em) Paragraphs (d) and (e) apply to all of the following:

5           1. Annuities purchased on or after February 8, 2006.

6           2. Annuities purchased before February 8, 2006, for which a transaction has  
7 occurred on or after February 8, 2006.

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

9           49.453 (4c) PURCHASE OF NOTE, LOAN, OR MORTGAGE. (a) For purposes of sub. (2),  
10 the purchase by an individual or his or her spouse of a promissory note, loan, or  
11 mortgage after February 8, 2006, is a transfer of assets for less than fair market  
12 value unless all of the following apply with respect to the note, loan, or mortgage:

13           1. The repayment term is actuarially sound.

14           2. The payments are to be made in equal amounts during the term of the loan,  
15 with no deferral and no balloon payment.

16           3. Cancellation of the balance upon the death of the lender is prohibited.

17           (b) The value of a promissory note, loan, or mortgage that does not satisfy the  
18 requirements under par. (a) 1. to 3. is the outstanding balance due on the date that  
19 the individual applies for medical assistance for nursing facility services or other  
20 long-term care services described in sub. (2).

21           **SECTION 26.** 49.453 (4m) of the statutes is created to read:

22           49.453 (4m) PURCHASE OF LIFE ESTATE. For purposes of sub. (2), the purchase  
23 by an individual or his or her spouse of a life estate in another individual's home after  
24 February 8, 2006, is a transfer of assets for less than fair market value unless the  
25 purchaser resides in the home for at least one year after the date of the purchase.

1           **SECTION 27.** 49.453 (8) of the statutes is renumbered 49.453 (8) (a) (intro.) and  
2 amended to read:

3           49.453 (8) (a) (intro.) Subsections (2) and (3) do not apply to transfers of assets  
4 if ~~the~~ any of the following applies:

5           1. The assets are exempt under 42 USC 1396p (c) (2) or if the (A), (B), or (C).

6           2. The department determines under the process under par. (b) that application  
7 of this section would work an undue hardship. ~~The department shall promulgate~~  
8 ~~rules concerning the transfer of assets exempt under 42 USC 1396p (c) (2).~~

9           **SECTION 28.** 49.453 (8) (b) of the statutes is created to read:

10           49.453 (8) (b) The department shall establish a hardship waiver process that  
11 includes all of the following:

12           1. The department determines that undue hardship exists if the application of  
13 subs. (2) and (3) would deprive the individual who has transferred assets of medical  
14 care to the extent that the individual's health or life would be endangered, or would  
15 deprive the individual of food, clothing, shelter, or other necessities of life.

16           2. A facility in which an institutionalized individual who has transferred assets  
17 resides is permitted to file an application for undue hardship on behalf of the  
18 individual with the consent of the individual or the individual's authorized  
19 representative.

20           3. The department may, during the pendency of an undue hardship  
21 determination, pay the full payment rate under s. 49.45 (6m) for nursing facility  
22 services for up to 30 days for the individual who transferred assets, to hold a bed in  
23 the facility in which the individual resides.

24           **SECTION 29.** 49.47 (4) (a) (intro.) of the statutes is amended to read:



1           49.47 (4) (a) (intro.) Any individual who meets the limitations on income and  
2 resources under pars. (b) ~~and to~~ (c) and who complies with par. (cm) shall be eligible  
3 for medical assistance under this section if such individual is:

4           **SECTION 30.** 49.47 (4) (b) 1. of the statutes is amended to read:

5           49.47 (4) (b) 1. ~~A Subject to par. (bc),~~ a home and the land used and operated  
6 in connection therewith or in lieu thereof a mobile home if the home or mobile home  
7 is used as the person's or his or her family's place of abode.

8           **SECTION 31.** 49.47 (4) (bc) of the statutes is created to read:

9           49.47 (4) (bc) 1. Subject to subd. 2., a person shall be ineligible under this  
10 section for medical assistance for nursing facility services or other long-term care  
11 services described in s. 49. 453 (2) if the equity in his or her home and the land used  
12 and operated in connection with the home exceeds \$750,000. This subdivision does  
13 not apply if any of the following persons lawfully resides in the home:

- 14           a. The person's spouse.
- 15           b. The person's child who is under age 21 or who is disabled, as defined in s.
- 16 49.468 (1) (a) 1.

17           2. Subdivision 1. applies to all of the following:

18           a. At the time of application and at the time of recertification, to a person who  
19 applies for medical assistance for nursing facility services or other long-term care  
20 services described in s. ~~49.453 (2)~~ after the effective date of this subdivision ....  
21 [revisor inserts date].

22           b. At the time of recertification only, to a person not specified in subd. 2. a. who  
23 applied for medical assistance for nursing facility services or other long-term care  
24 services described in s. 49.453 (2) on or after January 1, 2006, and who was eligible

Insert 10-2

1 for medical assistance for those services on the effective date of this subdivision ....  
2 [revisor inserts date].

3 SECTION 32. 49.47 (4) (bm) of the statutes is created to read:

4 49.47 (4) (bm) For purposes of determining eligibility or benefits amount for  
5 a person described in par. (a) 3. or 4. who resides in a continuing care retirement  
6 community or a life care community, any entrance fee paid on admission to the  
7 community shall be considered a resource available to the person to the extent that  
8 all of the following apply:

9 1. The person has the ability to use the entrance fee, or the contract provides  
10 that the entrance fee may be used, to pay for care if the person's other resources or  
11 income are insufficient to pay for the care.

12 2. The person is eligible for a refund of any remaining entrance fee when the  
13 person dies or terminates the continuing care retirement community or life care  
14 community contract and leaves the community.

15 3. The entrance fee does not confer an ownership interest in the continuing care  
16 retirement community or life care community.

17 SECTION 33. 632.48 (3) of the statutes is created to read:

18 632.48 (3) NOTICE OF CHANGES. An insurer that receives a request from the  
19 department of health and family services under s. 49.453 (4) (d) 2. for notification  
20 shall comply with the request and notify the department of any changes to or  
21 payments made under the annuity contract to which the request for notification  
22 relates.

23 SECTION 34. 647.02 (2) (g) of the statutes is amended to read:

24 647.02 (2) (g) The figure to be used by the provider as the actual or projected  
25 length of a resident's stay in the facility in the formula in the contract provision

1 required under s. 647.05 (9) (1m) (i) and supporting information showing how the  
2 figure was determined.

3 **SECTION 35.** 647.04 (5) of the statutes is amended to read:

4 647.04 (5) Inform the commissioner of any change in the figure used by the  
5 provider as the actual or projected length of a resident's stay in the facility in the  
6 formula in the contract provision required under s. 647.05 (9) (1m) (i) within 30 days  
7 after the change is made and submit supporting information showing how the  
8 change was determined.

9 **SECTION 36.** 647.05 of the statutes is renumbered 647.05 (1m), and 647.05 (1m)  
10 (g), as renumbered, is amended to read:

11 647.05 (1m) (g) Provides that if a resident dies or the continuing care contract  
12 is terminated after the first 30 days of occupancy, but within the first 90 days of  
13 occupancy, the provider will refund at least 90% of the amount computed under sub-  
14 (6) par. (f).

15 **SECTION 37.** 647.05 (2m) of the statutes is created to read:

16 647.05 (2m) Subject to s. 49.455, a continuing care contract may require that,  
17 before a resident applies for medical assistance, the resident must spend on his or  
18 her care the resources declared for purposes of admission to the facility.

19 **SECTION 9321. Initial applicability; Health and Family Services.**

20 (1) ~~ENTRANCE FEES~~ <sup>circled</sup> The treatment of section 49.47 (4) (bm) of the statutes first  
21 applies to individuals who apply or are recertified for medical assistance for nursing  
22 facility services or other long-term care services on the effective date of this  
23 subsection <sup>paragraph</sup>.

24 **SECTION 9421. Effective dates; Health and Family Services.**

Medical Assistance asset transfer changes.

circled auto ref a  
(a) Entrance fees (1)

Insert 11-23

1 (1) MEDICAL ASSISTANCE ASSET TRANSFER CHANGES. The treatment of sections  
2 49.45 (6m) (m), 49.453 (1) (a), (ar), (d), (e), (f) (intro.), 1., 2., and 2m., (fm), and (i), (3)  
3 (b) (intro.) and (bc), (4) (a), (ac), (am), (b), (c), (cm), (d), (e), and (em), (4c), and (4m),  
4 49.47 (4) (a) (intro.), (b) 1., (bc), and (bm), 632.48 (3), 647.02 (2) (g), and 647.04 (5) of  
5 the statutes, the renumbering and amendment of section 49.453 (3) (a) and (8) and  
6 647.05 of the statutes, the creation of section 49.453 (3) (a) 2. and (8) (b) and 647.05  
7 (2m) of the statutes, and SECTION 9321 (1) of this act take effect on October 1, 2007,  
8 or on the first day of the 4th month beginning after publication, whichever is later.

9 (END)

(#), (b), and (c)

auto ref a ↑

auto ref b ↑

auto ref c ↑

2007-2008 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0266/P2ins  
PJK:kjf:nwn

INSERT 10-2

- 1 a. At the time of application, to a person who applies for medical assistance for  
2 nursing facility services or other long-term care services described in s. 49.453 (2)  
3 after the effective date of this subdivision .... [revisor inserts date].
- 4 b. At the time of the person's first recertification after the effective date of this  
5 subdivision .... [revisor inserts date], to a person not specified in subd. 2. a. who  
6 applied for medical assistance for nursing facility services or other long-term care  
7 services described in s. 49.453 (2) on or after January 1, 2006, and who was eligible  
8 for medical assistance for those services on the effective date of this subdivision ....  
9 [revisor inserts date].

(END OF INSERT 10-2)

INSERT 11-23

- 10 ~~(#)~~ *Divestment changes.* The treatment of section 49.453 (1) (f) (intro.), 1., 2.,  
11 and 2m. and (fm), (3) (b) (intro.) and (bc), (4) (a), (ac), (am), (b), (c), (cm), (d), (e), and  
12 (em), (4c), and (4m) of the statutes, the renumbering and amendment of section  
13 49.453 (3) (a) and (8) of the statutes, the creation of section 49.453 (3) (a) 2. and (8)  
14 (b) of the statutes first apply to individuals who apply or are recertified for medical  
15 assistance for nursing facility services or other long-term care services on the  
16 effective date of this paragraph.
- 17 ~~(#)~~ *Continuing care contracts.* The treatment of section 647.05 (2m) of the  
18 statutes first applies to contracts entered into on the effective date of this paragraph.

(END OF INSERT 11-23)

create auto ref b

create auto ref c

INSERT A

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

Under current law, DHFS administers the Medical Assistance (MA) program, which provides federal and state moneys to pay for health care and long-term care services, including care in a nursing home, provided to MA recipients, who are, generally, low-income, elderly, or disabled persons who meet other specific eligibility requirements. To be eligible for MA for long-term care services, an individual must meet certain very low income and resource requirements, and may have to "spend down" his or her income and resources by paying for his or her own long-term care until the eligibility requirements are met.

Current law provides rules, based on federal law, concerning divestment, which refers to the transferring of one's assets for less than fair market value for the purpose of reducing one's income and resources to become eligible for MA for long-term care services. If a person divests assets on or after the person's look-back date (generally, the date that is three years before the person applies for MA for long-term care services), the person may be ineligible for MA for a specific time period (penalty period). The federal Deficit Reduction Act, which became effective on February 8, 2006, made a number of changes in the divestment rules. To conform Wisconsin law to the federal law, this bill makes a number of changes with respect to divestment, including, among other things:

1. Changes the look-back date to five years for transfers that occur on or after February 8, 2006.
2. Changes the beginning date for the penalty period from the date on which assets were transferred to the later of the date on which assets were transferred or the date on which the person applies and is eligible for MA.
3. Provides that the purchase of a loan, promissory note, mortgage, or life estate after February 8, 2006, is a divestment and specifies the requirements for when such a purchase is not to be considered a divestment.
4. Provides that as a condition of receiving MA for long-term care services an applicant (when applying) or recipient (when being recertified) must disclose any interest he or she or his or her spouse has in an annuity that was purchased on or after February 8, 2006, or with respect to which a transaction occurred on or after February 8, 2006. A transaction is defined as any action that changes the course of payments to be made or the treatment of income or principal.
5. Specifies the conditions under which the purchase of an annuity on or after February 8, 2006, or a transaction with respect to an annuity on or after February 8, 2006, is not to be considered a divestment, including designating DHFS as a remainder beneficiary under the annuity in the first position.

→ \*\*\*NOTE: Draft seems to be purchase only. Check that.

6. Requires DHFS to establish a hardship waiver process, with certain criteria, under which the divestment rules would not apply to a person because it would result in undue hardship for the person and allows DHFS to pay the full nursing facility

payment rate for up to 30 days to hold a bed in the facility for a person involved in a pending undue hardship determination.

7. Provides, generally, that a person is ineligible for MA for long-term care services if the equity in their home exceeds \$750,000 unless their spouse or minor or disabled child is living in the home. Under current law, a person's home, regardless of the value, is not counted when the person's income and resources for MA eligibility are determined.

(END OF INSERT A)

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

LRB-0266/P2dn  
PJK:kjf:nwn

January 2, 2007

I have included an initial applicability provision in this draft for only one of the changes (entrance fees) because the intext dates may be enough for the remainder of the changes. As you ponder each of the changes in this draft, try to determine whether you think initial applicabilities are necessary in addition to the intext dates.

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

*Adelate*



**Kahler, Pam**

---

**From:** Milioto, Steve - DOA  
**Sent:** Thursday, November 30, 2006 8:43 AM  
**To:** Kahler, Pam  
**Subject:** FW: Draft 266 - Medicaid Asset Transfers

**Attachments:** Asset Transfers--Comments on Draft Statutory Language--111506.doc



Asset  
sfers--Comments or  
Hi Pam --

Here are the department's comments regarding draft 266. Sorry for the delay. Best, Steve

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

From: Richard Megna [mailto:megnarh@dhfs.state.wi.us]  
Sent: Wednesday, November 29, 2006 2:49 PM  
To: Milioto, Steve - DOA  
Subject: RE: Draft 266 - Medicaid Asset Transfers

Steve,

I copied Scott's email comments and pasted them directly below plus I have attached a word document that has Scott's main comments.  
Hopefully, this will get through. Let me know if you get this.

Richard

Hi Kirstin. My comments on the above are attached.

I have only had time to answer the drafter's questions. I have not had time to do a cross-walk between the draft state legislation and the federal language. This needs to be done, eventually. Even though I limited my review to the drafter's questions, I found numerous discrepancies between the federal and state provisions as drafted.

The biggest issue for us remains the effective date. See my comments in the attached.

While the effective date is obviously important, I think the drafter could resume work on this while we resolve that issue. I also recommend that LRB be asked to submit another draft to us so that we can do the necessary cross-walk with the DRA.

Let me know if you have any questions, thanks.

\* \* \* \* \*

NOTICE: This email and any attachments may contain confidential information. Use and further disclosure of the information by the recipient must be consistent with applicable laws, regulations and agreements. If you received this email in error, please notify the sender; delete the email; and do not use, disclose or store the information it contains.

Scott Riedasch  
Medicaid Policy Section Chief  
Bureau of Health Care Eligibility

>>> "Milioto, Steve - DOA" <steve.milioto@wisconsin.gov> 11/29/06 2:18

PM >>>

Hi Richard --

The e-mail hasn't shown up yet. Best, Steve

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

From: Richard Megna [mailto:megnarh@dhfs.state.wi.us]  
Sent: Wednesday, November 29, 2006 12:46 PM  
To: Milioto, Steve - DOA  
Subject: RE: Draft 266 - Medicaid Asset Transfers

I have resent the email so you should have it by now. Let me know if you did not get it.  
Richard

>>> "Milioto, Steve - DOA" <steve.milioto@wisconsin.gov> 11/29/06  
12:32  
PM >>>  
Thanks Richard.

Please resend it as I don't have a record of it in my Inbox or my special Drafts Folder.  
Best, Steve

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

From: Richard Megna [mailto:megnarh@dhfs.state.wi.us]  
Sent: Wednesday, November 29, 2006 12:31 PM  
To: Forsaith, Andrew C - DHFS; Milioto, Steve - DOA  
Cc: Jones, James D - DHFS  
Subject: Re: Draft 266 - Medicaid Asset Transfers

Steve,

Kirstin sent you an email on Nov. 29th on the asset transfer language.

I will resend that email shortly.

Richard

>>> "Milioto, Steve - DOA" <steve.milioto@wisconsin.gov> 11/29/06 9:53  
AM >>>  
Hi Andy --

Has anyone taken a look at draft 266 (Mediciad Asset Transfers) yet?

I  
have no record of anyone signing off on this draft or asking for revisions. Please  
advise. Best, Steve

**Kahler, Pam**

---

**From:** Nelson, Kirstin B - DHFS  
**Sent:** Thursday, November 30, 2006 1:14 PM  
**To:** Milioto, Steve; Kahler, Pam; Riedasch, Scott A - DHFS; OSdm.OSpo.HFS618CR; Megna, Richard; Nelson, Kirstin B - DHFS  
**Cc:** Jones, James D - DHFS  
**Subject:** Discuss DHFS Comments on MA Asset Transfers Draft Stat Language

If this time is inconvenient for those outside DHFS, please let me know and we can reschedule. I chose this time based on DHFS calendars, since those are the only ones I have access to. :)

Kirstin Nelson  
Budget and Policy Analyst  
Office of Strategic Finance  
Department of Health and Family Services  
(608) 266-5362  
nelsokb@dhfs.state.wi.us

\* \* \* \* \*

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2:00 Dec 6 rm 618

**SECTION 3.** 49.453 (3) (b) (intro.) of the statutes is amended to read:

49.453 (3) (b) (intro.) The Subject to par. (bc), the department shall determine the number of months of ineligibility as follows:

**SECTION 4.** 49.453 (3) (bc) of the statutes is created to read:

49.453 (3) (bc) In determining the number of months of ineligibility under par. (b), the department may not round down the quotient, or otherwise disregard any fraction of a month, obtained in the division under par. (b) 3.

**SECTION 5.** 49.453 (4) (d) of the statutes is created to read:

49.453 (4) (d) 1. As a condition for the provision of long-term care services, an applicant for or recipient of long-term care services shall be required to disclose on the application or recertification form a description of any interest the individual has in an annuity, including whether it is irrevocable (and counted as an asset)\*, and shall be required to designate the state as a remainder beneficiary under the annuity.

**Comment [D7]:** Or community spouse...

\*\*\*\*NOTE: Would an applicant or recipient know whether the annuity was counted as an asset? Wouldn't the department be in a better position to know that?

**Comment [D8]:** I think this might be worded more clearly. Federal law states it as follows: "... shall disclose a description of any interest the individual or community spouse has in an annuity... regardless of whether the annuity is irrevocable or is treated as an asset." See s. 1917(e) (1) of the SSA.

2. The department shall notify an insurer issuing an annuity under which the state is designated as a remainder beneficiary and shall request that the insurer notify the department of any changes to or payments made under the annuity contract.

3. For purposes of this section, the purchase of an annuity by an institutionalized individual or his or her community spouse is a transfer of assets for less than fair market value unless the state is designated as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the individual or the spouse.

**Comment [D9]:** There is a condition under which the state can be named the remainder beneficiary in the second position (after the community spouse or minor or disabled child.) See s. 1917(c) (1) (F) (ii).

\*\*\*\*NOTE: How do these provisions coordinate with current law s. 49.453 (4)? Is any of s. 49.453 (4) replaced by any of these provisions? Should the requirement under subd. 3. above be an additional requirement under s. 49.453 (4) (a) for a transfer to an annuity that is not in excess of the expected value?

**Comment [D10]:** I don't think so.

**Comment [D11]:** I'm not sure about the best way to handle this. You could try to work the concept into s.49.453(a), however it makes for a cumbersome statement. Perhaps it is better to create something apart from (a) that communicates "(a) notwithstanding..." In other words, irrespective of any conditions that may or may not be met under (a), the transfer will be considered to be a disposal of an asset for less than fair market value if the state is not named as the remainder beneficiary.

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

LRB-0266/P1dn  
PJK:kjfrs  
September 29, 2006

I expect that this draft will need a lot of changes, additions, etc. I wasn't sure whether to follow the pared down description of what was wanted in the DHFS memo or whether to include all that was in the federal law. In general, I followed the DHFS description. However, I want to mention how helpful it was that the DHFS instructions included references to the relevant sections of the Deficit Reduction Act. I really appreciated being able to quickly find the federal law on which the changes were based. Much of the federal language did not make sense to me, however, and I've included numerous questions in notes embedded in the draft.

One of the changes requested was to allow the department to count all transfers during the look-back period as one divestment amount. It seems to me that the current language under s. 49.453 (3) (b) 1., which says that the department shall determine the total, cumulative uncompensated value of all assets transferred...on or after the look-back date, does just that. If you total up the value of all of the assets transferred during the look-back period, doesn't that give you one amount as if there were one transfer? Am I missing something?

The instruction related to annuities said that s. 632.56 (3) would need to be amended. I don't know why or in what way. That section relates to life insurance, not annuities.

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

**Comment [D1]:** I agree. It seems like the problem might not be in the statutes, but rather in the administrative rules at HFS 103.065(4) (am). It states there that we must consider multiple divestments in a calendar month as a single divestment. As such, for example, two transfers that occurred in January could be considered a single divestment; however, if another transfer occurred in June, it would have to be considered a separate divestment under the current rule. The new federal provision (and current state statutory language, it appears) would allow us to treat these as a single divestment.

2007 – 2008 LEGISLATURE

DOA:.....Milioto, Steve, BB0026 – Medicaid asset transfers  
FOR 2007-09 BUDGET -- NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** changes in asset transfer rules for Medical Assistance eligibility.

**Analysis by the Legislative Reference Bureau**

This is a preliminary draft. An analysis will be provided in a later version. 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) (f) (intro.) of the statutes is amended to read:  
49.453 (1) (f) (intro.) "Look-back date" means for a covered individual, the date that is 36 months before, or with respect to payments from a trust or portions of a trust that are treated as assets transferred by the covered individual under s. 49.454 (2) (c) or (3) (b) the date that is 60 months before:

\*\*\*\*NOTE: What will the initial applicability be for this provision? Will this first apply to individuals who apply for MA on the effective date?

**SECTION 2.** 49.453 (3) (a) of the statutes is amended to read:  
49.453 (3) (a) The period of ineligibility under this subsection begins on the first day of the first month beginning on or after the look-back date during or after which assets have been transferred for less than fair market value and that does not occur in any other periods of ineligibility under this subsection day on which the individual applies for and is otherwise eligible for medical assistance.

\*\*\*\*NOTE: As drafted, this applies to both institutionalized and noninstitutionalized individuals. The instructions mention only an "institutionalized person" Does a distinction need to be made? If so, does the period of ineligibility for a noninstitutionalized individual remain as in current law?

\*\*\*\*NOTE: What is the initial applicability for this provision? Will this first apply to individuals who apply for MA on the effective date?

**Comment [D2]:** The DRA lengthens the look back date for all disposals to 5 years. See s. 1917(c) (1) (B) (i).

**Comment [D3]:** The DRA requires the provision to be applied to divestments that occur on or after the effective date of the DRA (2/8/06). We have an OLC opinion saying that we could apply this retroactively; that is, it could be made applicable to persons applying for Medicaid on or after the effective date of the state legislation, but actually cover divestments which occurred on or after February 8, 2006. However, the OSF fiscal estimate associated with these changes assumed no retroactivity. The assumption was that the new provisions would apply to applicants for Medicaid (or those having their Medicaid eligibility reviewed) on or after enactment of the state legislation and would cover only divestments that occurred on or after enactment of the state legislation. Note also that we have received inquiries from elder law attorneys suggesting that there may be legal challenges if we attempt to apply the new provisions to a time period during which there was no state statutory authority. That said, to apply these provisions in any way that ignores divestments that occurred on or after enactment of the DRA, could jeopardize federal financial participation.

**Comment [D4]:** This was an oversight.

**Comment [D5]:** The new provisions apply to both institutional and non-institutional persons.

**Comment [D6]:** See above. We need to decide.

Subdivisions 1. and 3. above seem to conflict. Under subd. 1., designating the department as a beneficiary is a *condition* of receiving long-term care services, so not designating the department would completely rule out receiving long-term care services....at least until the department is designated. Under subd. 3., however, purchasing an annuity is divestment if the department is not designated as a beneficiary, so not designating the department would prevent receiving long-term care services but only for the applicable penalty period

**Comment [D12]:** No, disclosing the annuity on the application is a condition of eligibility.

**Comment [D13]:** I think these could be stated in a way that more clearly communicates the following:

1. As a condition of receiving Medicaid covered long-term care services, the applicant must disclose any interest that they (or their community spouse) have in an annuity. They must do so as part of the Medicaid application process. See s. 1917(e) (1).
2. The Medicaid application form, which the person must sign (under another provision of the law), must include a statement that designates the state as the remainder beneficiary. If you refuse to sign the form containing the statement, you will not be found eligible to receive Medicaid long-term care services... in fact, you will not be found eligible for any Medicaid. See s. 1917(e) (1).
3. If the applicant discloses the annuity and signs the application form containing the required statement, but then fails to take subsequent action to modify the annuity so as to designate the state as the remainder beneficiary, it will be considered to be disposal of an asset for less than fair market value and a penalty will be imposed, i.e., the person will lose eligibility for Medicaid long-term care services. See s. 1917(c) (1) (F).

I don't see any conflict when it's laid out this way.

See 6016

**SECTION 6.** 49.453 (4c) of the statutes is created to read:

49.453 (4c) PURCHASE OF NOTE, LOAN, OR MORTGAGE. Notwithstanding sub. (1) (a), for purposes of this section, funds used by an individual to purchase a promissory note, loan, or mortgage are assets unless all of the following apply with respect to the note, loan, or mortgage:

- (a) The repayment term is actuarially sound.
- (b) The payments are to be made in equal amounts during the term of the loan, with no deferral and no balloon payment.
- (c) Cancellation of the balance upon the death of the lender is prohibited.

\*\*\*\*NOTE: I don't understand the significance of calling the funds used to purchase a promissory note, loan, or mortgage assets. Wouldn't funds used to purchase *anything* probably be assets, i.e., either income or resources? If so,

**Comment [D14]:** This creates some exceptions to the definition of "assets" found at 42 USC 1396p (e) (1). Assets, as defined there, is very broad and includes all income and resources of the person and his/her spouse, including income and resources that they're entitled to, but don't receive under specified circumstances. The intent of 49.453 (4c)...see s. 1917(c) (1) (I)... should be, I think, to make an exception from transfer of asset provisions for any funds used to purchase a promissory note, loan, or mortgage... to the extent that the note, loan or mortgage has a repayment term that is actuarially sound, provides for payments to be made in equal amounts during the term, etc.

why does this need to be stated separately from the general definition of assets? Should this instead say that the purchase of a note, loan, or mortgage is a transfer of assets for less than fair market value unless (a), (b), and (c) above apply?

**SECTION 7.** 49.453 (4m) of the statutes is created to read:

49.453 (4m) PURCHASE OF LIFE ESTATE. Notwithstanding sub. (1) (a), for purposes of this section, funds used by an individual to purchase a life estate in another individual's home are assets unless the purchaser resides in the home for at least one year after the date of the purchase.

\*\*\*\*NOTE: Same question as above. Wouldn't funds used to purchase a life estate be assets, i.e., either income or resources, under the current law definition of assets in s. 49.453 (1) (a)? Should this instead say that the purchase of a life estate in the home of another is a transfer of assets for less than fair market value unless the purchaser resides in the home for at least one year?

**Comment [D15]:** See comment above. This develops another exception to "assets" in the context of the new "transfer of assets" provisions.

**SECTION 8.** 49.453 (8) of the statutes is renumbered 49.453 (8) (a) (intro.) and amended to read:

49.453 (8) (a) (intro.) Subsections (2) and (3) do not apply to transfers of assets if the any of the following applies:

1. The assets are exempt under 42 USC 1396p (c) (2) or if the (A), (B), or (C).
2. The department determines under the process under par. (b) that application of this section would work an undue hardship. The department shall promulgate rules concerning the transfer of assets exempt under 42 USC 1396p (c) (2).

**SECTION 9.** 49.453 (8) (b) of the statutes is created to read:

49.453 (8) (b) The department shall establish a hardship waiver process that includes all of the following:

1. The department determines that undue hardship exists if the application of subs. (2) and (3) would deprive the individual who has transferred assets of medical care to the extent that the individual's health or life would be endangered, or would deprive the individual of food, clothing, shelter, or other necessities of life.
2. A facility in which an institutionalized individual who has transferred assets resides is permitted to file an application for undue hardship on behalf of the individual with the consent of the individual or the individual's authorized representative.



3. The department may, during the pendency of an undue hardship determination, pay for nursing facility services for up to 30 days for the individual who transferred assets, to hold a bed in the facility in which the individual resides.

**SECTION 10.** 49.47 (4) (b) 1. of the statutes is amended to read:

49.47 (4) (b) 1. A Subject to par. (bc), a home and the land used and operated in connection therewith or in lieu thereof a mobile home if the home or mobile home is used as the person's or his or her family's place of abode.

**SECTION 11.** 49.47 (4) (bc) of the statutes is created to read:

49.47 (4) (bc) A person who applies for medical assistance on or after January 1, 2006, shall be ineligible under this section for nursing facility services or other long-term care services if the equity in his or her home and the land used and operated in connection with the home exceeds \$750,000. This paragraph does not apply if any of the following persons lawfully resides in the home:

1. The person's spouse.
2. The person's child who is under age 21 or who is disabled, as defined in s. 49.468 (1) (a) 1.

**SECTION 12.** 632.48 (3) of the statutes is created to read:

632.48 (3) NOTICE OF CHANGES. An insurer that receives a request from the department of health and family services under s. 49.453 (4) (d) 2. for notification shall comply with the request and notify the department of any changes to or payments made under the annuity contract to which the request for notification relates.

**SECTION 13.** 647.02 (2) (g) of the statutes is amended to read:

647.02 (2) (g) The figure to be used by the provider as the actual or projected length of a resident's stay in the facility in the formula in the contract provision required under s. 647.05 (9) (1m) (i) and supporting information showing how the figure was determined.

**SECTION 14.** 647.04 (5) of the statutes is amended to read:

647.04 (5) Inform the commissioner of any change in the figure used by the provider as the actual or projected length of a resident's stay in the facility in the formula in the contract provision required under s. 647.05 (9) (1m) (i) within 30 days after the change is made and submit supporting information showing how the change was determined.

**SECTION 15.** 647.05 of the statutes is renumbered 647.05 (1m), and 647.05 (1m) (g), as renumbered, is amended to read:

647.05 (1m) (g) Provides that if a resident dies or the continuing care contract is terminated after the first 30 days of occupancy, but within the first 90 days of occupancy, the provider will refund at least 90% 90 percent of the amount computed under sub. (6) par. (f).

**SECTION 16.** 647.05 (2m) of the statutes is created to read:

647.05 (2m) Subject to s. 49.455, a continuing care contract may require that, before a resident applies for medical assistance, the resident must spend on his or her care the resources declared for purposes of admission to the facility.

\*\*\*\*NOTE: I do not know if continuing care contracts are what the federal law refers to by "contracts for admission to a continuing care retirement community or life care community." I consulted with Debora Kennedy on this issue because I thought that this provision might relate more to her drafting subject matter; she felt that continuing care contracts were the closest things we have in the statutes to what the federal law is referring to.

**Comment [D16]:** I am not familiar with continuing care contracts.

Sec 1 → Feb 8, 2006 transfers occurring  
on or after

6 months

but 36 months step for transfers  
before Feb 8, 2006

(except for new types of assets)

ini op → first applic  
to transfers of assets that  
occurred on  
Feb 8, 2006

\$750,000 equity → Jan 1, 2006  
was effective ↑

Sec 2 → date of application or transfer

if transfer occurs after application  
& eligible

(no change in total, cumulative)

Sec 3 → ok

Sec 4 → ok

Sec 5 → way of apply to purchase or changes  
to annuity made on or after Feb 8, 2006

Sec 6 → ~~note, loan, mty - funds to purchase  
these are not assets~~

~~funds to purchase these are not assets  
if that~~

"Community" spouse → do we need to use it  
or just spouse?

49.453(4)(d) ~~1~~ + 3, (intro.) + b.

(if so, add def)

"continuing care contracts" - what to do?

**Kahler, Pam**

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**From:** LaPhilliph, John O - DHFS  
**Sent:** Friday, December 15, 2006 4:06 PM  
**To:** Kahler, Pam  
**Cc:** Jessup, Vicki L - DHFS; Jones, James D - DHFS; Richard Megna; Nelson, Kirstin B - DHFS; Simpson, Joanne - DHFS  
**Subject:** Response to Draft DRA language

I'm sorry, but we are still working on the responses to your questions and your draft of the asset transfer statutes. There are a number of options and effective date issues that we need to resolve. I will do my best to have this finished for you on Monday or Tuesday morning at the latest.

At this point, there are couple of minor recommendations I can make.

In 49.453(1):

✓ All references to 42 USC 1396p (e) (1-5) should be changed to 42 USC 1396p (h), which was renumbered by the DRA.

✓ We do not believe the definition of community spouse has to be limited to a noninstitutionalized person.

In 49.453(3)

There are still some issues that we are not sure have been completely resolved by CMS. We recommend that the federal DRA [s. 6011 (b) ] language be used for the beginning date of the divestment penalty period. In addition, the statute needs to mention that the new begin date policy only applies to transfers that occur on or after 2/8/06.

In 49.453 (3) (bc):

Not being allowed to round down the number of months for the ineligibility period only applies to transfers that occur after (not "on or after") 2/8/06. This same applicability provision (i.e., transfers after 2/8/06,) also applies to:

1. Combining multiple transfers into one penalty period,
2. Transfers of certain Notes and Loans
3. Transfers to purchase life estates.

Again, I'm very sorry for the delay.

\* \* \* \* \*

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\* \* \* \* \*

John LaPhilliph  
Lead Health Care Eligibility Innovations Planner Bureau of Eligibility Management Division  
of Health Care Financing Wisconsin Department of Health and Family Services  
608-266-6772  
laphijo@dhfs.state.wi.us

## Kahler, Pam

---

**From:** LaPhilliph, John O - DHFS  
**Sent:** Wednesday, December 20, 2006 12:53 PM  
**To:** Kahler, Pam  
**Cc:** Jessup, Vicki L - DHFS; Jones, James D - DHFS; Richard Megna; Steve Milioto; Nelson, Kirstin B - DHFS; Simpson, Joanne - DHFS  
**Subject:** Response to Draft DRA language

**Attachments:** LRB 12-08 draft wi stats ch 49.doc; BEM Response to LRB Draft of Statutes for DRA Asset Divestment Provisions.doc



LRB 12-08 draft wi stats ch 49...  
BEM Response to LRB Draft of S...

Attached are the responses from DHFS concerning your draft statutory language for the asset divestment provisions in the budget bill. I included in the document the earlier responses that I sent you by email on 12/15/06.

We found it helpful to put your drafting changes into a document that included the existing statutory language in sec. 49.453. I am including that document as well, in hopes that it will be of help for you and the others receiving this email to follow along. Our responses are pretty much in order of the statutory sections you changed and your questions in your drafting document.

Please let us know if you have any questions or concerns about our responses and suggested changes.

Thank you.

**BEM Response to LRB Draft of Statutes for DRA Asset Divestment Provisions**  
December 19, 2006

**Responses shared in 12/15/06 email:**

In 49.453(1):

✓ All references to 42 USC 1396p (e) (1-5) should be changed to 42 USC 1396p (h), which was renumbered by the DRA. *done*

✓ We do not believe the definition of community spouse has to be limited to a noninstitutionalized person. *ok*

✓ In 49.453(3)

There are still some issues that we are not sure have been completely resolved by CMS. We recommend that the federal DRA [s. 6011 (b) ] language be used for the beginning date of the divestment penalty period. In addition, the statute needs to mention that the new begin date policy only applies to transfers that occur on or after 2/8/06. *Same issue*

In 49.453 (3) (bc):

Not being allowed to round down the number of months for the ineligibility period only applies to transfers that occur after (not "on or after") 2/8/06. This same applicability provision (i.e., transfers after 2/8/06,) also applies to:

1. ~~Combining multiple transfers into one penalty period,~~

✓ **12/20/06 Note: Ignore item 1. The state statute concerning combining multiple divestments is not changed by the DRA, so effective date is not relevant.**

- ✓ 2. Transfers of certain Notes and Loans *done*
- ✓ 3. Transfers to purchase life estates.

**Additional Comments from 12/19/06**

LRB NOTE attached to 49.453(3)(a): As drafted, this applies to both institutionalized and noninstitutionalized individuals. The instructions mention only an "institutionalized person." Does a distinction need to be made? If so, does the period of ineligibility for a noninstitutionalized individual remain as in current law?

✓ BEM Response: We recommend using the DRA language in s. 6011 (b) so that the statute will read like the new 1396p(c)(1)(D). That language, for instance, creates a distinction between ineligibility periods for divestments that occur before 2/8/06 and those that occur on or after 2/8/06. DHFS will continue to develop more detailed interpretations of the federal and state statutory language. *did that*

2nd LRB NOTE attached to 49.453(3)(a): What is the initial applicability for this provision? Will this first apply to individuals who apply for MA on the effective date?

*(except as otherwise specifically provided)*

BEM Response - Effective Dates: All of the new policies are going to affect individuals who apply on or after the state legislation's effective date as well as those individuals who are eligible for Medical Assistance on or after that date. The various new policies will be applied to divestments that occur on or after February 8, 2006. Some other DRA provisions have other dates relating to the assets and how they are to be treated, and those will be discussed elsewhere in this document.

*initial ap for all 5*

In addition, DHFS would not be able to implement the new policies immediately upon enactment of the budget bill. We will require some additional time after the law has been passed to analyze any amendments made to the proposed statutory language and to provide adequate training of new policies and procedures to the local IM agencies. For that reason, DHFS is requesting that the bill make the effective date October 1, 2007, or until the first of the month that is three months after the date of enactment of the budget bill, whichever is later.

*eff date for all*

49.453(4) (a) through (c)

The treatment of annuities under these paragraphs only applies to annuities that were purchased prior to 2/8/06 and for which there have been no transactions on or after 2/8/06. Such transactions include any action taken by the individual that changes the course of payments to be made by the annuity, or the treatment of the income or the principle of the annuity. These actions include additions of principle, elective withdrawals, requests to change the distribution of the annuity, elections to annuitize the contract and similar actions taken by the individual on or after February 8, 2006.

*provide specific applicability provision + define transaction*

49.453(4) (d)

This section affects annuities purchased before 2/8/06 for which a transaction occurred on or after 2/8/06, and all annuities purchased on or after 2/8/06. We would prefer that the statute include the definition of transactions described above instead of saying, "(or modified in some respect)".

The long-term care services mentioned here should be referenced to those in subsection (2).

(d)3.

This section also affects annuities purchased before 2/8/06 for which a transaction occurred on or after 2/8/06, not just annuities purchased on or after 2/8/06.

Make the following change in sub. par a. to be consistent with changes made to DRA by the Tax Relief and Health Care Act of 2006 (H.R. 6111.)

✓ "The state is designated as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual or the spouse."

LRB NOTE after 49.453(4) (d): In this case, what is the uncompensated value, the entire amount used to purchase the annuity?



BEM Response: We are not specifying what amount we are using for the divestment at this time. DHFS will continue to develop more detailed interpretations of the federal and state statutes and provide those in rules and/or policy.

49.453 (4)

This subsection needs to be expanded to include the provisions specified in the DRA in s. 6012(c) which creates a new subparagraph (G):

“(G) For purposes of this paragraph with respect to a transfer of assets, the term ‘assets’ includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance with respect to nursing facility services or other long-term care services under this title unless—

“(i) the annuity is—

“(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

“(II) purchased with proceeds from—

“(aa) an account or trust described in subsection (a), (c), (p) of section 408 of such Code;

“(bb) a simplified employee pension (within the meaning of section 408(k) of such Code); or

“(cc) a Roth IRA described in section 408A of such Code; or

“(ii) the annuity—

“(I) is irrevocable and nonassignable;

“(II) is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

“(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.”

*additional annuity step for new date*

This section affects annuities purchased before 2/8/06 for which a transaction occurred on or after 2/8/06, and annuities purchased on or after 2/8/06.

49.453(4c)

Please make the following changes.

(4c) PURCHASE OF NOTE, LOAN, OR MORTGAGE. For purposes of sub. (2), the purchase by an individual or his or her spouse of a promissory note, loan, or mortgage after February 8, 2006, in an amount that exceeds the expected value of the return is a transfer of assets for less than fair market value unless all of the following apply with respect to the note, loan, or mortgage:

(a) The repayment term is actuarially sound.

(b) The payments are to be made in equal amounts during the term of the loan, with no deferral and no balloon payment.

(c) Cancellation of the balance upon the death of the lender is prohibited.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of paragraphs (a) through (c), the value of such note, loan, or mortgage shall be the outstanding

balance due as of the date of the individual's application for medical assistance for services described in subsection (2)."

LRB NOTE: I don't understand the significance of calling the funds used to purchase a promissory note, loan, or mortgage assets. Wouldn't funds used to purchase anything probably be assets, i.e., either income or resources? If so, why does this need to be stated separately from the general definition of assets? Should this instead say that the purchase of a note, loan, or mortgage is a transfer of assets for less than fair market value unless (a), (b), and (c) above apply?

BEM Response (to the last question): Yes. See changes made above.

#### 49.453(4m)

Please make the following changes:

(4m) PURCHASE OF LIFE ESTATE. For purposes of sub. (2), the purchase by an individual or his or her spouse of a life estate in another individual's home after February 8, 2006, ~~in an amount that exceeds the expected value of the benefit~~ is a transfer of assets for less than fair market value unless the purchaser resides in the home for at least one year after the date of the purchase.

LRB NOTE: Same question as above. Wouldn't funds used to purchase a life estate be assets, i.e., either income or resources, under the current law definition of assets in s. 49.453 (1) (a)? Should this instead say that the purchase of a life estate in the home of another is a transfer of assets for less than fair market value unless the purchaser resides in the home for at least one year?

BEM Response: See requested changes above.

#### Additional Hardship Waiver Provision

We would request wording added to s. 49.45(6m) that would say something about DHFS paying the full payment rate under subsection (6m) for services provided to an individual while waiting for a hardship determination under s. 49.453(8)(b)3. This would be added to clarify that we would not be paying at the same, lower, bed hold rate used for other institutionalized recipients who are temporarily absent from facilities.

#### 49.47(4)(bc)

Please note that the provisions concerning home equity will be applied:

1. At the time of application; for individuals who apply for Medical Assistance for the long term care services listed in s. 49.453(2), after the effective date of the divestment budget provisions, (i.e., after October 1, 2007, or the first of the month that is three months after the date of enactment of the budget bill, whichever is later.)
2. At the time of the next recertification; for individuals who applied for Medical Assistance for the long term care services listed in s. 49.453(2), on or after January 1, 2006, and were eligible as of the effective date of the divestment budget provisions.

Note: The home equity provisions do not apply to persons who applied for long term care Medical Assistance before January 1, 2006 and have been continuously eligible since that time.

✓ The reference in s. 49.47(4)(bc) to nursing facility services and long term care services should cite those services defined in s. 49.453(2).

Section 49.47 (4) should be amended to include another definition of assets for persons eligible under (4)(a) 3. or 4. (elderly, blind and disabled) and who are residing in a continuing care retirement community based on DRA s. 6015(b). That section states:

\* "(1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title, the rules specified in paragraph (2) shall apply to individuals residing in continuing care retirement communities or life care communities that collect an entrance fee on admission from such individuals.

(2) TREATMENT OF ENTRANCE FEE.—For purposes of this subsection, an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that—  
(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;  
(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and  
(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.'

✓ 632.48

No changes needed.

647.05(2m)

✓ No changes needed

*initial op? ↑*

*↑  
create a (bm)*

## LRB 12/8/06 DRAFT STATUTES

### 49.453 Divestment of assets.

(1) DEFINITIONS. In this section and in s. 49.454:

(a) "Assets" has the meaning given in 42 USC 1396p (e) (1).

(am) "Covered individual" means an individual who is an institutionalized individual or a noninstitutionalized individual.

(ar) "Community spouse" has the meaning given in s. 49.455 (1) (a).

NOTE: Since we are using the term "community spouse" in this section, I added a definition. The definition in s. 49.455 (1) (a), however, does not specify that the community spouse is noninstitutionalized. Should it do so for this definition in s. 49.453 (1) (ar)?

(b) "Disabled" has the meaning given in 42 USC 1382c (a) (3).

(c) "Expected value of the benefit" means the amount that an irrevocable annuity will pay to the annuitant during his or her expected lifetime as determined under sub. (4) (c).

(d) "Income" has the meaning given in 42 USC 1396p (e) (2).

(e) "Institutionalized individual" has the meaning given in 42 USC 1396p (e) (3).

(f) "Look-back date" means ~~for a covered individual~~ either of the following:

1m. For transfers made before February 8, 2006, the date that is 36 months before, or with respect to payments from a trust or portions of a trust that are treated as assets transferred by the covered individual under s. 49.454 (2) (c) or (3) (b) the date that is 60 months before:

a. For a covered individual who is an institutionalized individual, the first date on which the covered individual is both an institutionalized individual and has applied for medical assistance.

b. For a covered individual who is a noninstitutionalized individual, the date on which the covered individual applies for medical assistance or, if later, the date on which the covered individual, his or her spouse, or another person acting on behalf of the covered individual or his or her spouse, transferred assets for less than fair market value.

2m. For all transfers made on or after February 8, 2006, the date that is 60 months before the dates specified in subd. 1m. a. and b.

(fm) "Noninstitutionalized individual" has the meaning given in 42 USC 1396p (e) (4).

(g) "Reasonable compensation" means the prevailing local market rate of compensation for the service or care provided.

(h) "Relative" means an individual who is related to another by blood, marriage or adoption.

(i) "Resources" has the meaning given in 42 USC 1396p (e) (5).

## LRB 12/8/06 DRAFT STATUTES

(j) "Trust" has the meaning given in 42 USC 1396p (d) (6).

### (2) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES.

(a) Institutionalized individuals. Except as provided in sub. (8), if an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, transfers assets for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3):

1. For nursing facility services.
2. For a level of care in a medical institution equivalent to that of a nursing facility.
3. For services under a waiver under 42 USC 1396n.

(b) Noninstitutionalized individuals. Except as provided in sub. (8), if a noninstitutionalized individual or his or her spouse, or another person acting on behalf of the noninstitutionalized individual or his or her spouse, transfers assets for less than fair market value on or after the noninstitutionalized individual's look-back date, the noninstitutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3):

1. Services that are described in 42 USC 1396d (a) (7), (22) or (24).
2. Other long-term care services specified by the department by rule.

### (3) PERIOD OF INELIGIBILITY.

(a) ~~The period of ineligibility under this subsection begins on the first day of the first month beginning on or after the look-back date during or after which assets have been transferred for less than fair market value and that does not occur in any other periods of ineligibility under this subsection~~ day on which the individual applies for and is otherwise eligible for medical assistance.

NOTE: As drafted, this applies to both institutionalized and noninstitutionalized individuals. The instructions mention only an "institutionalized person." Does a distinction need to be made? If so, does the period of ineligibility for a noninstitutionalized individual remain as in current law?

NOTE: What is the initial applicability for this provision? Will this first apply to individuals who apply for MA on the effective date?

(b) ~~The~~ Subject to par. (bc), the department shall determine the number of months of ineligibility as follows:

1. The department shall determine the total, cumulative uncompensated value of all assets transferred by the covered individual or his or her spouse on or after the look-back date.

## LRB 12/8/06 DRAFT STATUTES

2. The department shall determine the average monthly cost to a private patient of nursing facility services in the state at the time that the covered individual applied for medical assistance.

3. The number of months of ineligibility equals the number determined by dividing the amount determined under subd. 1. by the amount determined under subd. 2.

(bc) In determining the number of months of ineligibility under par. (b), the department may not round down the quotient, or otherwise disregard any fraction of a month, obtained in the division under par. (b) 3.

(c) If the spouse of an individual makes a transfer of assets that results in a period of ineligibility under this section and otherwise becomes eligible for medical assistance, the department shall apportion the period of ineligibility between the individual and the spouse. The department shall promulgate rules establishing a reasonable methodology for apportioning a period of ineligibility under this paragraph.

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

(a) 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, is not in excess of the expected value only if all of the following are true:

1. The periodic payments back to the transferor include principal and interest that, at the time that the transfer is made, is at least at one of the following:

a. For an annuity, promissory note or similar instrument that is not specified under subd. 1. b. or par. (am), the applicable federal rate required under section 1274 (d) of the Internal Revenue Code, as defined in s. 71.01 (6).

b. For an annuity with a guaranteed life payment, the appropriate average of the applicable federal rates based on the expected length of the annuity minus 1.5%.

2. The terms of the instrument provide for a payment schedule that includes equal periodic payments, except that payments may be unequal if the interest payments are tied to an interest rate and the inequality is caused exclusively by fluctuations in that rate.

(am) Paragraph (a) 1. does not apply to a variable annuity that is tied to a mutual fund that is registered with the federal securities and exchange commission.

(b) The amount of assets that is transferred for less than fair market value under par. (a) is the amount by which the transferred amount exceeds the expected value of the benefit.

(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. In calculating the amount of the divestment

## LRB 12/8/06 DRAFT STATUTES

when a transfer to an annuity, or a transfer by promissory note or similar instrument, is made, payments made to the transferor in any year subsequent to the year in which the transfer was made shall be discounted to the year in which the transfer was made by the applicable federal rate specified under par. (a) on the date of the transfer.

(d) 1. As a condition of receiving medical assistance for long-term care services, an applicant for or recipient of the long-term care services shall disclose on the application or recertification form a description of any interest the individual or his or her community spouse has in an annuity purchased (or modified in some respect) on or after February 8, 2006, regardless of whether the annuity is irrevocable or is treated as an asset. The application or recertification form shall include a statement that the state becomes a remainder beneficiary under any annuity in which the individual or his or her spouse has an interest by virtue of the provision of the medical assistance.

2. The department shall notify the issuer of an annuity disclosed under subd. 1. of the state's right as a remainder beneficiary and shall request that the issuer notify the department of any changes to or payments made under the annuity contract.

3. For purposes of sub. (2), regardless of whether par. (a) applies, the purchase of an annuity on or after February 8, 2006, by an institutionalized individual or his or her community spouse shall be treated as a transfer of assets for less than fair market value unless either of the following apply:

a. The state is designated as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the individual or the spouse.

b. The state is named as a beneficiary in the second position after the community spouse or a minor or disabled child and is named in the first position if the community spouse or a representative of the minor or disabled child disposes of any remainder for less than fair market value.

NOTE: In this case, what is the uncompensated value, the entire amount used to purchase the annuity?

(4c) PURCHASE OF NOTE, LOAN, OR MORTGAGE. For purposes of sub. (2), the purchase by an individual or his or her spouse of a promissory note, loan, or mortgage in an amount that exceeds the expected value of the return is a transfer of assets for less than fair market value unless all of the following apply with respect to the note, loan, or mortgage:

(a) The repayment term is actuarially sound.

(b) The payments are to be made in equal amounts during the term of the loan, with no deferral and no balloon payment.

(c) Cancellation of the balance upon the death of the lender is prohibited.

NOTE: I don't understand the significance of calling the funds used to purchase a promissory note, loan, or mortgage assets. Wouldn't funds used to purchase anything probably be assets, i.e., either income or resources? If so, why does this need to be stated separately from the general definition of assets? Should this instead say that the purchase of a note, loan, or mortgage is a transfer of assets for less than fair market value unless (a), (b), and (c) above apply?

## LRB 12/8/06 DRAFT STATUTES

**(4m) PURCHASE OF LIFE ESTATE.** For purposes of sub. (2), the purchase by an individual or his or her spouse of a life estate in another individual's home in an amount that exceeds the expected value of the benefit is a transfer of assets for less than fair market value unless the purchaser resides in the home for at least one year after the date of the purchase.

NOTE: Same question as above. Wouldn't funds used to purchase a life estate be assets, i.e., either income or resources, under the current law definition of assets in s. 49.453 (1) (a)? Should this instead say that the purchase of a life estate in the home of another is a transfer of assets for less than fair market value unless the purchaser resides in the home for at least one year?

**(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 exceeds 10% of the community spouse resource allowance limit specified in s. 49.455 (6) (b) 1., the agreement to pay the relative is specified in a notarized written agreement that exists at the time that the relative performs the care or services.

**(6) COMMON OWNERSHIP.** For purposes of sub. (2), if a covered individual holds an asset in common with another person in a joint tenancy, tenancy in common, or similar arrangement, the asset, or the affected portion of the asset, is considered to be transferred by the covered individual when an action is taken, either by the covered individual or by any other person, that reduces or eliminates the covered individual's ownership or control of the asset.

**(7) CERTAIN AUTHORIZATIONS.** For the purposes of sub. (2), if a covered individual or his or her spouse authorizes another person to transfer, encumber, lease, consume or otherwise act with respect to an asset as though the asset belonged to that other person; if that other person exercises the authority in a way that causes the asset to be unavailable for the support and maintenance of the covered individual or his or her spouse; and if the covered individual does not receive fair market value for the asset, then the covered individual or his or her spouse transfers assets for less than fair market value at the time that the other person exercises the authority.

**(8) INAPPLICABILITY.**

(a) Subsections (2) and (3) do not apply to transfers of assets if the any of the following applies:

1. The assets are exempt under 42 USC 1396p (c) (2) (A),(B), or (C), or if the
2. The department determines under the process under par. (b) that application of this section would work an undue hardship. The department shall promulgate rules concerning the transfer of assets exempt under 42 USC 1396p (c) (2).

(b) The department shall establish a hardship waiver process that includes all of the following:



## LRB 12/8/06 DRAFT STATUTES

1. The department determines that undue hardship exists if the application of subs. (2) and (3) would deprive the individual who has transferred assets of medical care to the extent that the individual's health or life would be endangered, or would deprive the individual of food, clothing, shelter, or other necessities of life.

2. A facility in which an institutionalized individual who has transferred assets resides is permitted to file an application for undue hardship on behalf of the individual with the consent of the individual or the individual's authorized representative.

3. The department may, during the pendency of an undue hardship determination, pay for nursing facility services for up to 30 days for the individual who transferred assets, to hold a bed in the facility in which the individual resides.

### **49.47 Medical Assistance; medically indigent.**

...

#### **(4) ELIGIBILITY.**

...

(b) Eligibility exists if the applicant's property does not exceed the following:

1. A Subject to par. (bc), a home and the land used and operated in connection therewith or in lieu thereof a mobile home if the home or mobile home is used as the person's or his or her family's place of abode.

...

(bc) A person who applies for medical assistance on or after January 1, 2006, shall be ineligible under this section for nursing facility services or other long-term care services if the equity in his or her home and the land used and operated in connection with the home exceeds \$750,000. This paragraph does not apply if any of the following persons lawfully resides in the home:

1. The person's spouse.

2. The person's child who is under age 21 or who is disabled, as defined in s. 49.468 (1) (a) 1.

**Kahler, Pam**

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**From:** LaPhilliph, John O - DHFS  
**Sent:** Thursday, December 21, 2006 10:40 AM  
**To:** Kahler, Pam  
**Cc:** Jessup, Vicki L - DHFS; Jones, James D - DHFS; Richard Megna; Nelson, Kirstin B - DHFS; Simpson, Joanne - DHFS; Milioto, Steve - DOA  
**Subject:** RE: Response to Draft DRA language

The DRA provisions appear to be very exclusive for annuities on or after 2/8/06. A purchased annuity is always a divestment, unless it meets the specified conditions. As such, I do not see any need to ever apply the old terms that defined when the purchase of an annuity would be considered a divestment, except to annuities purchased before 2/8/06 that have not been affected by any transaction on or after 2/8.

I did have one additional change to request. We had asked that in s. 49.453(4)(d) that the long term care services be cross referenced to the services in subsection (2). To be consistent with the DRA language, in s. 49.453(4)(d)1., the cross reference for long term services should be para. (2)(a).

In other words, the requirement to disclose annuities to the state is only a condition for receiving long term care services provided to institutionalized individuals as described in 49.453(2)(a).

Thank you.

\* \* \* \* \*

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\* \* \* \* \*

John LaPhilliph  
Lead Health Care Eligibility Innovations Planner Bureau of Eligibility Management Division  
of Health Care Financing Wisconsin Department of Health and Family Services  
608-266-6772  
laphijo@dhfs.state.wi.us

>>> "Kahler, Pam" <Pam.Kahler@legis.wisconsin.gov> 12/20/2006 4:30:16 PM >>>  
John:

I do have a clarifying question at this time about the annuities. You indicate that s. 49.453 (4) (a) to (c) in current law only applies to certain annuities (based on date of purchase, etc.) and that new s.

49.453 (4) (d) only applies to a different set of annuities. I can draft applicability provisions right in that statute if indeed pars.

(a)  
to (c) apply to a different set of annuities from the set that par.  
(d)

applies to. Is that what you think should be done, a wholesale change in treatment of annuities depending on the factors you specify? (I'm just not sure, for example, that there isn't something in (a) to (c) that might also apply to annuities purchased on or after 2/8/06.) Also, you indicate that the long-term care services mentioned should refer to those under sub. (2) (d) 3. Do you mean sub. (2) (a) 3.?

Pam

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

From: LaPhilliph, John O - DHFS  
Sent: Wednesday, December 20, 2006 12:53 PM

To: Kahler, Pam  
Cc: Jessup, Vicki L - DHFS; Jones, James D - DHFS; Richard Megna; Steve Milioto; Nelson, Kirstin B - DHFS; Simpson, Joanne - DHFS  
Subject: Response to Draft DRA language

Attached are the responses from DHFS concerning your draft statutory language for the asset divestment provisions in the budget bill. I included in the document the earlier responses that I sent you by email on 12/15/06.

We found it helpful to put your drafting changes into a document that included the existing statutory language in sec. 49.453. I am including that document as well, in hopes that it will be of help for you and the others receiving this email to follow along. Our responses are pretty much in order of the statutory sections you changed and your questions in your drafting document.

Please let us know if you have any questions or concerns about our responses and suggested changes.

Thank you.

**Kahler, Pam**

---

**From:** LaPhilliph, John O - DHFS  
**Sent:** Wednesday, December 20, 2006 5:33 PM  
**To:** Kahler, Pam  
**Cc:** Jessup, Vicki L - DHFS; Jones, James D - DHFS; Simpson, Joanne - DHFS; Milioto, Steve - DOA  
**Subject:** RE: Response to Draft DRA language

We are still researching your first question and will have to get back to you tomorrow.

For your second question, we were referring to all services under (2).  
Not (2)(a)3.

The underlined "(d)3." in the document is the header for our next set of comments. As in, please make these changes to section 49.453  
(4)(d)3.

Sorry for not being clear.

\* \* \* \* \*

NOTICE: This email and any attachments may contain confidential information. Use and further disclosure of the information by the recipient must be consistent with applicable laws, regulations and agreements. If you received this email in error, please notify the sender; delete the email; and do not use, disclose or store the information it contains.  
\* \* \* \* \*

John LaPhilliph  
Lead Health Care Eligibility Innovations Planner Bureau of Eligibility Management Division of Health Care Financing Wisconsin Department of Health and Family Services  
608-266-6772  
laphijo@dhfs.state.wi.us

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John:

I do have a clarifying question at this time about the annuities. You indicate that s. 49.453 (4) (a) to (c) in current law only applies to certain annuities (based on date of purchase, etc.) and that new s. 49.453 (4) (d) only applies to a different set of annuities. I can draft applicability provisions right in that statute if indeed pars.

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Please let us know if you have any questions or concerns about our responses and suggested changes.

Thank you.