Legislative Fiscal Bureau

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May 24, 2007 | Joint Committee on Finance | Paper #398

Medicaid Asset Transfers (DHFS -- MA -- Long-Term Care)

Bill Section

[LFB 2007-09 Budget Summary: Page 286, #4]

CURRENT LAW

State and federal medical assistance (MA) law include provisions that are intended to prevent individuals with financial resources from avoiding liability for the cost of care in a medical or nursing facility or other long-term care services, which would unnecessarily result in greater state and federal MA costs. The transferring of assets to avoid liability is referred to as a divestment.

In Wisconsin, divestment occurs when: (a) an individual transfers income, non-exempt assets or other homestead property that belongs to an institutionalized person or his or her spouse for less than the fair market value of the income or asset; or (b) an individual takes an action to avoid receiving income or assets to which he or she is entitled.

GOVERNOR

Reduce funding by $2,025,000 (-$816,900 GPR and -$1,208,100 FED) in 2007-08 and by $5,400,100 (-$2,299,100 GPR and -$3,101,000 FED) in 2008-09 to reflect the net effect of implementing new federal restrictions on asset transfers for MA eligible individuals enacted as part of the federal Deficit Reduction Act of 2005 (the DRA).

MA Benefits Funding. Reduce MA benefits funding by $2,625,000 (-$1,116,900 GPR and -$1,508,100 FED) in 2007-08 and $5,500,100 (-$2,349,100 GPR and -$3,151,000 FED) in 2008-09 to reflect projected savings to the MA program because some individuals' eligibility for MA will be delayed due to changes in federal divestment restrictions.

CARES System Changes. Provide $500,000 ($250,000 GPR and $250,000 FED) in 2007-08 to fund changes to the client assistance for reemployment and economic support (CARES) system that county income maintenance staff use to make MA eligibility determinations.

Income Maintenance (IM) Funding to Counties. Provide $100,000 ($50,000 GPR and $50,000 FED) annually to increase IM allocations to counties to fund additional staff time to review MA applications from individuals who may require long-term care services to ensure those applications comply with the new federal requirements.

DISCUSSION POINTS

1. The bill makes a number of changes to bring state law into compliance with federal law changes to MA made in the DRA, including: (a) extending the "look-back" period for reviewing the assets of MA applicants from three years to five years; (b) disqualifying individuals from eligibility for MA-funded long-term care services if the equity in their home and the land used and operated in connection with the home exceeds $750,000, unless their spouse, child under the age of 21, or disabled child is living in the home; and (c) modifying the starting date of any applicable penalty period from the first day of the month in which the asset was transferred to either the first day of the month during or after which the assets had been transferred, or the date on which the individual is eligible for MA and would otherwise be receiving institutional-level care, whichever is later, and that does not occur during any other period of ineligibility related to other divestments.

In accordance with federal law, these provisions would apply to transfers of assets that occurred on or after February 8, 2006. Assets transferred prior to February 8, 2006, would be subject to previous law, including a look-back period of three years (rather than five), and the penalty period commencing from the date of the divestment, rather than the later penalty period specified in the bill. A full description of the changes included in the bill to bring state law into compliance with federal MA regulations may be found in the attachment to this paper.

2. The savings estimated from this provision are a result of the assumption that the strict penalty provisions for divesting assets for less than fair market value in order to qualify for MA earlier will provide a disincentive for individuals who may have otherwise transferred assets to instead use available resources to pay for the cost of their long-term care needs, and delay their participation in MA, thus reducing overall costs. The amount of the estimate is based on a five-year projection of cost savings prepared by the Congressional Budget Office (CBO).

3. In order to implement the provisions of the DRA, certain changes will need to be made to the computerized assessment tool that county income maintenance staff use to make MA eligibility determinations, called the client assistance for reemployment and economic support (CARES) system. These changes are necessary to include prompts and checks related to the value of home equity (information that was not previously required to determine MA eligibility). Further, funds are provided to increase IM allocations to counties to fund additional staff time to review MA applications from individuals who may require long-term care services to ensure those applications

comply with the new federal requirements. The amounts provided under the bill to address these issues appear reasonable.

4. Prior to the enactment of the DRA, federal law required states to review the assets of MA applicants for a period of 36 months before the date the applicant applied for MA, or 60 months if the applicant's assets are included as part of a trust. This period is commonly referred to as the "look-back" period. If an eligibility worker determines that an individual transferred resources any time during the look-back period, the worker calculates a penalty period, which is a period of time during which that the person is ineligible for MA-funded long-term care. The penalty period is calculated by dividing the amount of the transfer by the monthly private pay rate of nursing homes. In Wisconsin, this amount is currently $5,584 per month. However, prior to the enactment of the DRA, the penalty period began on the date of the transfer.

For example, under prior law, if an eligibility worker determined that a person made a transfer of $100,000 two years before he or she applied for MA, the worker would calculate the penalty period for the applicant ($100,000/$5,584 per month = 17.9 months, which, in Wisconsin, would have been rounded down to 17 months). Since the penalty period would begin on the date of the transfer (in this example, two years before the individual applied for MA), the penalty period would be over by the time the individual applied for MA. Hence, the applicant would not be penalized for making this transfer.

5. With the enactment of the DRA, new policies apply to assets transferred on or after the date of enactment (February 8, 2006). For transfers that occurred before February 8, prior policies still apply. Under the provision in the DRA, the look-back period is extended to five years for all income and assets disposed of by the applicant. In addition, the start date of the ineligibility period for all transfers made on or after the bill is enacted becomes the first day of the month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for MA and would otherwise be receiving institutional-level care, based on an approved application for such care but for the application of the penalty period, *whichever is later.*

Using the example described above, the same 17-month penalty period would be calculated for the applicant. However, the penalty period would begin on the date the person is determined to be eligible for MA and would be receiving care in a nursing home, or services under a home- and community-based waiver program (such as the community options waiver program), based on an approved application for such care. Under this example, the state's MA program would not pay for long-term care services for the individual until 17 months after the person applies, and is determined to be eligible for, MA-funded long-term care services. If an individual is already enrolled in MA but is not receiving long-term care services, the penalty period would begin at the time the individual is approved to receive long-term care services.

6. The DRA also addresses how the state must consider annuities. As a result, applicants and recipients of long-term care services are now required to disclose any annuities they own and whether the annuity is irrevocable or counted as an asset. The DRA further requires individuals to make the state a remainder beneficiary as a condition of eligibility for long-term care services. Further, the purchase of an annuity may be considered a divestment unless one of the

following conditions are met: (a) the state is named as the remainder beneficiary in the first position for at least the total amount of MA benefits received; (b) the state is named as a beneficiary in the second position behind a community spouse, a minor, or a disabled child; or (c) the state is named in the first position if the spouse or the child's representative disposes of any remainder for less than fair market value. As with the changes made to regulations regarding other divestments under DRA, these provisions apply to transactions occurring after February 8, 2006.

7. As a practical matter, Wisconsin has no choice but to implement the new divestment restrictions included in the DRA. Wisconsin's failure to comply with the new federal requirements would jeopardize all federal matching funds the state currently receives under the program (approximately $3 billion per year).

8. While the choice to comply with the new federal MA regulations is not optional, states do have an option relating to the amount of home equity that they may exclude in determining an individual's assets for the purpose of determining MA eligibility. The DRA would disqualify individuals from eligibility for MA-funded long-term care services if the equity in their home and the land used and operated in connection with the home (the “homestead”) exceeds $500,000, unless their spouse, child under the age of 21, or disabled child is living in the home. However, the federal legislation also permits states the option of increasing the allowable home equity to $750,000. The bill would increase the allowable home equity limit to this higher threshold.

9. Under the federally specified definition of "homestead," certain specific-use properties (such as small acreage family farms with a house on the property) would be included when determining available assets. As the definition of homestead is specified by federal regulation, and may not be modified by the state for the purpose of providing flexibility for certain types of property, increasing the allowable home equity limit from $500,000 to $750,000 may address this concern somewhat. Currently, there is no good source of survey data on the number of properties statewide that would be subject to this asset limit. Further, the number of individuals with homestead properties valued in excess of $500,000 who may also qualify for MA is estimated to be limited. Consequently, approving the higher threshold for the value of an applicant's homestead when determining MA eligibility is not expected to affect current estimates of cost savings to MA as a result of the provision.

On the other hand, if the Committee wished to maximize the savings to the MA program by the new DRA provisions, it could modify the Governor's recommendation by retaining the $500,000 limit on allowable home equity. Establishing the higher ($750,000) limit would permit individuals to retain a greater amount of their assets and therefore become eligible for MA earlier (thereby increasing MA costs), than if the current limit were retained. As previously indicated, it is not possible to estimate the additional savings to the MA program of this change to the bill.

10. Under the DRA, states may delay the implementation of certain provisions of the new federal regulations to bring state practices into compliance with the new requirements. DHFS sent a letter to the Centers for Medicare and Medicaid Services (CMS) on March 27, 2007, requesting permission to delay the implementation of the provisions relating to partial month transfers, the combination of multiple transfers, the purchase of promissory notes, and the purchase

of life estates. These provisions are described in greater detail in the Appendix. CMS responded on April 13, 2007, granting permission for the state to delay implementation of these four provisions of the DRA until October 1, 2007. DRA did not provide states the option of requesting a delay in the implementation of provisions of the DRA relating to a longer look-back period or the application of a stricter penalty period for individuals who divested assets for less than fair market value after February 8, 2006.

11. Despite federal requirements specifying that the look-back period for reviewing the assets of MA applicants be extended from three years to five years, and requirements that the imposition of the applicable penalty period be assessed from either the first day of the month during or after which the assets had been transferred, or the date on which the individual is eligible for MA and would otherwise be receiving institutional-level care, whichever is later, be applied to all qualifying asset transfers occurring on or after February 8, 2006, DHFS staff have indicated that these provisions of the DRA are unlikely to be strictly enforced until state law is brought into compliance with federal law. Given the limited number of individuals who may have qualified for MA between the time that the DRA became federal law (February 8, 2006) and the time that Wisconsin is able to bring its statutes into compliance that might have otherwise been subject to the new provisions and penalties created under the DRA, DHFS staff did not feel it would be appropriate or productive to review all MA eligibility determinations made during this period of time in order to bring retroactive action against any individuals who may have potentially violated the provisions of the DRA without understanding the inconsistency between federal and current state law. It is not known whether the state will be subject to federal financial penalties as a result of this decision.

ALTERNATIVES TO BILL

1. Approve the Governor's recommendation.

ALT 1	**Change to Bill** Funding	**Change to Base** Funding
GPR	$0	- $3,116,000
FED	0	- 4,309,100
Total	$0	- $7,425,100

2. Modify the Governor's provision by maintaining the current amount of home equity that an individual may retain when applying for MA ($500,000, rather than $750,000 as proposed by the Governor).

Prepared by: Rebecca Hotynski
Attachment

ATTACHMENT

Asset Transfer Statutory Changes Included Under SB 40

The bill makes the following changes to bring state law into compliance with federal law: (a) extend the look-back period for reviewing the assets of MA applicants from three years to five years; and (b) modify the starting date of any applicable penalty period from the first day of the month in which the asset was transferred to either the first day of the month during or after which the assets had been transferred, or the date on which the individual is eligible for MA and would otherwise be receiving institutional-level care, whichever is later, and that does not occur during any other period of ineligibility related to other divestments. In accordance with federal law, the bill specifies that these provisions apply to transfers of assets that occurred on or after February 8, 2006. Assets transferred prior to February 8, 2006, would be subject to previous regulations, including a look-back period of three years (rather than five), and the penalty period commencing from the date of the divestment, rather than the later penalty period specified in the bill.

Changes also prohibit the rounding down of partial months when determining penalty periods for divestments that occurred on or after February 8, 2006. DHFS would be prohibited from rounding down the quotient, or otherwise disregarding a fraction of a month when determining the length of a penalty period.

The bill would also disqualify individuals from eligibility for MA-funded long-term care services if the equity in their home and the land used and operated in connection with the home exceeds $750,000, unless their spouse, child under the age of 21, or disabled child is living in the home. Under current law, a person's home is not counted when an individual's income and resources for MA eligibility are determined, regardless of value.

If an individual resides in a continuing care or life care community at the time that they apply for MA eligibility, the bill specifies that any entrance fee paid upon admission to the community is considered to be a resource available to the individual to the extent that all of the following apply: (a) the person has the ability to use the entrance fee to pay for care if the person's other resources or income are insufficient; (b) the person is eligible for a refund of any remaining entrance fee when the person dies or terminates their contract and leaves the community; and (c) the entrance fee does not confer an ownership interest in the community. The bill provides that a continuing care contract may require that, before a resident applies for MA they must spend the resources declared for purposes of admission to the facility on their care.

Changes provide that the purchase of a loan, promissory note, or mortgage by an individual or their spouse after February 8, 2006, is a transfer of assets for less than fair market value unless all of the following apply: (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; and (c) cancellation of the balance upon the death of the lender is prohibited. The bill specifies that the value of the loan, promissory note, or mortgage that does not meet these requirements is the outstanding balance due on the date that the individual applies for MA for nursing facility or other long-term care services.

The bill provides that the purchase of a life estate in another individual's home by an individual or their spouse after February 8, 2006, 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.

Further, the bill provides that as a condition of receiving MA for long-term care services, an applicant (when applying) or a recipient (when recertifying) must disclose any interest they or their spouse have in an annuity that was purchased on or after February 8, 2006, or an annuity purchased before February 8, 2006, for which a transaction occurred on or after February 8, 2006, regardless of whether the annuity is irrevocable or is treated as an asset. The bill provides that the application or recertification form include a statement that the state becomes a remainder beneficiary under any such annuity in which the individual or their spouse has an interest by virtue of the provision of MA. Require the individual to take action within 30 days from the time DHFS receives their application or recertification to make the state a remainder beneficiary. DHFS is directed to notify the issuer of an annuity disclosed by applicants and recipients of the state's right as a remainder beneficiary, and request that the insurer notify DHFS of any changes to or payments made under the annuity contract. Require that an insurer who receives such a request must comply, and notify DHFS of any changes to or payments made under the annuity contract.

The bill specifies that the purchase of an annuity by an institutionalized individual or their community spouse (or anyone acting on their behalf) on or after February 8, 2006, will not be treated as a divestment if any of the following apply: (a) the state is named as the remainder beneficiary in the first position for at least the total amount of MA benefits paid on behalf of the institutionalized individual; or (b) the state is named as a beneficiary in the second position behind a community spouse, a minor, or a disabled child and the state is named in the first position if the spouse or the child's representative disposes of any remainder for less than fair market value.

An annuity purchased on or before February 8, 2006, by or on behalf of an individual who has applied for MA for nursing facility or other long term care services may be considered a transfer of assets for less than market value unless either of the following apply: (1) the annuity is either an annuity described in section 408 (b) or (q) of the Internal Revenue Code (generally individual and qualified employer retirement annuities), or was purchased with the proceeds of an account or trust described in section 408 (a), (c), or (p) of the Internal Revenue Code (generally personal, employer-sponsored, or simple retirement accounts), or the proceeds of a simplified employee pension (described in section 408 (k) of the Internal Revenue Code), or the proceeds from a Roth IRA; or (2) the annuity is irrevocable and non-assignable, actuarially sound, and provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.

The bill provides that provisions regarding the treatment of annuities apply both to annuities purchased on or after February 8, 2006, and to annuities purchased before February 8, 2006, for which a transaction has occurred on or after February 8, 2006. Define a "transaction" as it relates to divestment as any action that changes the course of payments to be made or the treatment of income or principal of an annuity, including all of the following: (a) an addition of principal; (b) an elective withdrawal; (c) a request to change the distribution of the annuity; (d) an election to annualize the contract; and (e) a change in ownership. The bill defines a "community spouse" as the spouse of either the institutionalized person or the non-institutionalized person.

DHFS is required to establish a hardship waiver process 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 under the bill. The bill specifies that "undue hardship" exists if the finding of ineligibility as a result of divestment or the imposition of a penalty period would deprive the individual 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. The bill specifies that a facility in which the individual resides is permitted to file an application for undue hardship on behalf of the individual with their consent, or the consent of their authorized representative.

The bill provides that changes related to determining eligibility (including home equity limits, the inclusion of certain entry fees paid to continuing care communities as available resources, and the disclosure of annuities) would first apply to individuals who apply for or are recertified for MA upon the effective date of the bill.

The bill provides that divestment changes (including extending the look back period from three to five years, eliminating the rounding down of partial months when determining penalty periods, the effective date of the penalty period, the requirement to name the state as a beneficiary to certain annuities, standards for annuities to not be considered transfers of assets for less than fair market value, standards for the purchase of notes, loans, or mortgages to not be considered divestments, and changes to regulations regarding the purchase of life estates) would first apply to individuals who apply for or are receiving MA for nursing facility or other long-term care services on the effective date of the bill. Provide that the remaining provisions would take effect on October 1, 2007, or on the first day of the fourth month beginning after the publication of the bill, whichever is later.