I. PROGRAM REQUIREMENTS

Medicaid is a joint federal and state medical insurance program sometimes referred to as Title XIX of the Social Security Act or medical assistance (MA). Eligibility is based on age, disability or family status, and financial need. Federal law provides the basic rules but allows states to make some choices in some areas.

A. Nonfinancial Requirements.

1. To be eligible the person must reside in Wisconsin and be a U.S. citizen or a lawfully admitted alien.

2. Certain aged, blind or disabled individuals are eligible for MA; for example individuals who receive Supplemental Security Income are automatically eligible as are some individuals who receive Social Security Disability.

3. Certain other low income individuals may qualify for some benefits. (e.g. Qualified Medicare Beneficiary "QMB" program; §503 cases etc.). In some instances the applicant is required to "spend down monthly income on medical expenses before being eligible.

B. Financial Requirements.

1. Exempt assets and financial eligibility for a single person.

   a. Automobile. *Can be of any value if used to go to medical appointments.*
   b. $1,500 face value whole life insurance policy.
   c. $3,000 irrevocable burial trust with interest also irrevocable.
d. "Burial spaces," headstone, plot, casket, vault, crypt, and other paid-up funeral expenses.  
   CAUTION: State limit applied for is $8,000 for items (b) through (d). Burial planning amounts must also be proven by a contract for or estimate of services. Instead of the above, consider using an irrevocable life insurance funded burial contract. If the estimated planning is equal to or less than the face value of the insurance policy, then the entire policy is exempt regardless of its value. Note: the policy proceeds must be irrevocably assigned to the designated funeral home.

e. Personal property and furnishings of reasonable value.

f. $2,000 in liquid assets (e.g., bank account, retirement funds, recreational property, cash value of whole life insurance, etc.)

g. Home if applicant intends to return to it or if a minor or disabled child or dependent relative (or spouse if married) lives there. This is subjective intent, not objective. Home equity is limited to $750,000.

2. Exempt assets and financial eligibility for a married person who has a qualified community spouse (defined as not receiving Medicaid benefits and living in the community).

   a. Both spouses can each own the exempt assets listed above except that they can only own one (1) home and one (1) car of unlimited value.
   b. The personal property can be of unlimited value.
   c. Plus they can own up to one half of the total assets they have at the time the person is admitted to a nursing home with a floor of $50,000 (assuming they have that much in resources) and a ceiling of $113,640 as for 2012, adjusted annually. (CSRA). This amount is in addition to the $2,000 that the Medicaid applicant can normally retain.
   d. The community spouse’s retirement funds are not counted. Any asset can be designated as a burial fund, provided that the couple provide an estimate from a funeral home that the total estimated funeral/burial costs for the couple are equal to or exceed the value of the designated asset. There is no requirement to actually use the designated asset for burial/funeral purposes.

3. Income Requirements.

   a. Categorically needy applicants (SSI, AFDC) are evaluated on the basis of the income standards of the program.
   b. If the applicant is not categorically needy, the income limit will depend on the type of MA applied for. Applicants for nursing home MA must show that their monthly income is less than the cost of medical care, including the cost of the nursing home. This is called medically needy. The rules are more complicated and restrictive for Family Care applicants, particularly if his or
her gross monthly income exceeds $2,094. This scenario is known as the dreaded Group C category.

C. Application Process.

1. Any person seeking MA benefits must complete a written application. A guardian, conservator, attorney-in-fact (power of attorney) or other authorized person may apply on behalf of someone who needs benefits.

2. ESS workers for each county process the applications by computer (system is called CARES). The application is made in the county in which the person resides. In the case of a nursing home resident, he or she is considered a resident of the county in which the nursing home is located. §HFS 102.01(3). The only exception to this rule applies if the applicant is under guardianship and protective placement in a different county than where the nursing home is located. In that case, the application must be submitted to the county overseeing the guardianship and protective placement.

3. The eligibility determination should be made within 30 days of the written request for assistance unless necessary information is not available. §HFS 102.04(1). Disability determinations must be made within 60 days. Id. Benefits are paid to the date of application, unless another eligibility date is requested.

4. The burden is on the applicant to prove eligibility and not on the county to prove that the applicant is not eligible.

5. Retroactive benefits may be available for the three months prior to the month of application assuming that the person meets all eligibility requirements, financial and nonfinancial, during that period. §HFS 103.08(1).

6. The written notice of the agency's decision regarding eligibility is generated by computer and should be sent to the applicant and may be sent to the nursing home. It should include the effective date of the decision and the reason(s) for the action, including reasons for denial, and information about the applicant's appeal rights §HFS 102.04(2).

7. If MA is approved for long term care, the worker should also send a form showing how much of the applicant's monthly income is to be paid towards the costs of care. This is known as the patient liability for nursing home Title 19 and the cost share for the Family Care program. For a married applicant with a spouse living at home or for an applicant having dependents, the notice should specify the amount (if any) of the community spouse income allowance or dependent allowance.

D. Covered and Noncovered Services.

1. See Wisconsin Administrative Code Chapter HFS 107.

2. Noncovered Services, see W.A.C. §HFS 107.03.
II. RESOURCE ISSUES

A. Availability of Resources.

1. To be considered at the time of application, assets must be "available" to the applicant. When determining a person's eligibility for Title 19, the Department of Health and Social Services may only consider those assets which are actually available, pursuant to §HFS 103.06, Wis. Adm. Code.

2. According to the Medical Assistance Handbook, §16.2.1
http://www.emhandbooks.wi.gov/meh-ebd/:

An asset is available when:

1. It can be sold, transferred, or disposed of by the owner or the owner’s representative, and

2. The owner has a legal right to the money obtained from sale of the asset, and

3. The owner has the legal ability to make the money available for support and maintenance, and

4. The asset can be made available in less than 30 days.

Consider an asset as unavailable if:

1. The member lacks the ability to provide legal access to the assets, and

2. No one else can access the assets, and

3. A process has been started to get legal access to the assets.

or

When the owner or owner’s representative documents that the asset will not be available for 30 days or more.

3. Available assets may include such things as real estate, trust assets, joint and solely held property and any property in which the applicant has an interest.

a. The full amount of joint bank accounts (and other jointly-held liquid resources) is presumed to be available to the applicant. Real estate is treated differently.
NOTE: OBRA '93 provides that any action that reduces or eliminates the individual's ownership or control of an asset will be treated as a transfer.
c. Contrary to the common misperception, the State or county cannot force an applicant to sell or transfer assets. The only recourse available to the State is to deny the application on the basis of excess resources.

4. Assets documented to be not actually available for 30 days or more are considered "unavailable" until actually available.

B. Valuation.

1. Assets are valued at fair market value. The MA Handbook, § 17.2.6, defines "Fair Market Value" as:

"Fair market value" is an estimate of the prevailing price an asset would have had if it had been sold on the open market at the time it was transferred.

2. For real property, the fair market value is that listed on the last property tax statement or a lower amount set by an appraisal.

3. A life estate in real estate is considered unavailable. The value of the life estate will not be considered until the property is sold. At that time the MA Handbook Appendix has instructions for valuation of the life estate based upon the table at §39.1.

4. The applicant has the burden of establishing the value of assets using conventionally accepted methods (e.g. Blue book for a vehicle, appraisal for real estate etc.)

C. "Divestment."

1. According to the MA Handbook, §17.2.1, divestment is defined as:

"Divestment" is the transfer of income, non-exempt assets, and homestead (See 17.2.3.1 Homestead Property), which belong to an institutionalized person or his/her spouse or both:

1. For less than the fair market value of the income or asset by:

   a. An institutionalized person, or
   b. His/her spouse, or
   c. A person, including a court or an administrative body, with legal authority to act in place of or on behalf of the institutionalized person or the person's spouse, or
   d. A person, including a court or an administrative body, acting at the direction or upon the request of the institutionalized person or the person's spouse. This includes relatives, friends, volunteers, and authorized representatives.
2. It is also divestment if a person takes an action to avoid receiving income or assets s/he is entitled to. Actions which would cause income or assets not to be received include:

   1. Irrevocably waiving pension income.
   2. Disclaiming an inheritance.
   3. Not accepting or accessing injury settlements.
   4. Diverting tort settlements into a trust or similar device.
   5. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony.
   6. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate. Count the action as a divestment only if:
      a. The value of the abandoned portion is clearly identified, and
      b. There is certainty that a legal claim action will be successful.

This includes situations in which the will of the institutionalized person's spouse precludes any inheritance for the institutionalized person. Under Wisconsin law, a person is entitled to a portion of his/her spouse's estate. If the institutionalized person does not contest his/her spouse's will in this instance, the inaction may be divestment.

3. The purchase of certain types of assets, even at the fair market value, may be considered a divestment, including:

   1. The purchase of a life estate interest in another individual’s home on or after January 1, 2009, is a divestment unless the purchaser resides in the home for a period of at least 12 consecutive months after the date of purchase. See §17.10.3.
   2. The purchase of a promissory note, loan or mortgage, on or after January 1, 2009 is a divestment unless such note, loan or mortgage meets several criteria. See §17.2.2.
   3. The purchase of certain annuities may be considered a divestment. See §17.11.2.

2. The exchange of money for an asset having a fair market value equivalent to the price paid is not divestment.

3. **Look-back period.**

   a. When an individual applies for MA he or she is subject to a look-back period. This is the period of time during which the applicant is required to disclose any asset transfers.
b. Effective January 1, 2014, the look back period will be 60 months for all divestments whether from a trust or not. This look back period is being phased in, however. See 3.e. below.

d. Divestments made prior to January 1, 2009: For divestments made prior to January 1, 2009, the look back period is 36 months for non-trusts and 60 months for divestments involving trusts.

e. Divestments made after January 1, 2009: The look back period for all divestments made on or after January 1, 2009 is 60 months. The 60 month look back period for non-trust divestments was effective January 1, 2009. Because the policy can only be applied back to January 1, 2009 there is a phased in approach to the 60 month look back for these non-trust divestments.

   Phased in approach: From January 1, 2009 to January 1, 2014 the look back period for non-trust divestments is:
   • 36 months until 1/1/12
   • 37-59 months between 1/1/12-12/31/13
   • Effective 1/1/14: 60 months

4. There is now a potentially unlimited penalty period for large divestments.

   a. The penalty period is determined by dividing the amount divested by the average monthly cost of private paid nursing home care in Wisconsin (currently $6,554/mo for pre-2009 and $215.48/day for post-1/1/09.) The resulting number is the number of days in the penalty period, which can include fractions of a month.

   b. An unlimited penalty period can be avoided where the period would exceed 36 months (if the look-back period is only 36 months) by simply waiting to apply until after 36 months (or up to 60 months under the new law) have passed in which case the divestment will not have to be disclosed.

   c. Because the penalty period is the number of days obtained by dividing the amount divested by the average daily private pay nursing home cost, the period may now exceed 36 or even 60 months.

5. Multiple transfers are now aggregated to determine a single penalty period, Wis. Stat. §49.453(3).

   a. Under prior law, each month's transfers were aggregated and a separate calculation for each penalty period was run for each month of a divestment. The penalty periods were allowed to run concurrently.

   b. Under the rule, the transfers for all months in the look-back period that are in months that overlap or "touch" are added together to determine a single
penalty period. There is no longer any advantage in spreading transfers out over a period of months. There is now an advantage in transferring all of the intended amount on the earliest possible date.

6. With regard to jointly owned assets, an MA applicant is deemed to have transferred assets when any action is taken that reduces or eliminates the applicant's ownership or control of the asset, including transfers to a trust. §49.453(6).

7. If an authorized representative transfers, encumbers, leases, consumes or otherwise acts with regard to an asset so as to make it unavailable this will be considered divestment as to the applicant. §49.453(7).

8. The transfer rule has been expanded by OBRA '93 to include all transfers of "assets" as expressly defined. 42 USC Sec. 1396p(e)(1). This replaces the term "resources" for purposes of transfers. The term "assets" now includes income as well as resources. This provision is expected to create a great deal of confusion. How is income counted for this purpose? Is it capitalized, so that the value of the transfer is the present value of the anticipated income stream? Or is the rule simply intended to include transfers of income after its receipt in a particular month? This latter interpretation assumes that the inclusion of income is solely an attempt to plug a former loophole: the previous ability to transfer a large windfall of income in the month of receipt on the grounds that it was not yet a "resource."

a. For institutionalized individuals and some community programs the period of ineligibility is equal to the period determined as follows:

i. First, the total cumulative uncompensated values of all asset dispositions within the look-back period are aggregated;

ii. Second, the total combined amount (determined under a. above) is divided by the monthly or daily cost of nursing facility services in the State determined as of the date of application for benefits, not on the date(s) of transfer(s). The average figure in Wisconsin is deemed to be $6,554/mo for pre-2009 and $215.48/day for post-1/1/09.

iii. Third, the penalty period of ineligibility determined under the first two steps begins on the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility. In other words, transfers made in different months will add on consecutive periods of ineligibility.

vi. The penalty period will now start when the person is down to the title 19 asset limit and is otherwise eligible for benefits. This means that
the period of ineligibility commences some time in the future, which makes planning very difficult.

i. The fraction for a part of a month divested is no longer rounded down, but instead the fractional portion of a month will apply as a penalty period.

b. The period of ineligibility will end if the asset is returned, or if the person receives fair market value for it. There is also a provision that gives the agency discretion to end the disqualification in cases of extreme hardship, but the discretion has rarely been used. OBRA '93 asks the Secretary of Health and Human Services to establish criteria for the States to follow in determining undue hardship. The State has done so, but the rules are written very narrowly to allow few exceptions for hardship. See e.g.: Gorchals v. Wis. DHFS, 224 Wis. 2d 541, 591, N.W.2d 615 (Ct. App. 1999). Congressional intent was to encourage the States to use the hardship provision more leniently.

c. Any penalty period can be cured or shortened by returning the asset or the value of the asset to the Medicaid applicant. HOWEVER, if the divestment is only partially cured, the penalty period will be shortened if and only if the returned funds are used to pay for the applicant’s medical care or long term care costs.

9. OBRA '93 establishes a 60 month look-back for certain transfers involving trusts.

a. Payments to third parties from a revocable trust established by an applicant or spouse will be subject to the special 60 month look-back period. This is a nasty rule, since it is easily avoided by the well-advised, but a trap for the unwary. A well-advised person contemplating a Medicaid application will simply remove the asset from the trust before transferring it to someone else, subjecting it to the 36 month rule.

b. For assets that are unavailable because they have been transferred to an irrevocable trust, there is also a 60 month look-back period.

c. These look-back periods do not apply to testamentary trusts, certain trusts created for disabled individuals under the age of 65, income cap trusts, and pooled trusts for disabled individuals.

10. Certain other types of transfers for less than fair market value do not result in a period of ineligibility. The individual may transfer:

a. assets to his or her spouse (or to another person for the sole benefit of the spouse) or to a blind or disabled child without any penalty. A transfer from
an individual's spouse to another for the sole benefit of the individual's spouse will also not affect the applicant's eligibility;

b. assets to, (or to a trust established solely for benefit of), the individual's disabled child regardless of the child’s age;

c. assets to a trust established solely for the benefit of an individual under 65 years of age who is disabled;

d. home to a minor child (under age 21); to a brother or sister who has an equity interest in the home and has lived there for at least a year immediately before the person enters a care facility; or to a son or daughter who has lived in the home and provided care for at least two years immediately before the person is admitted to a care facility, which care kept the person from entering the institution; certain documentation is required for these transfers;

e. A divestment made other than for the purpose of receiving MA - must present evidence that shows the specific purpose and reason for making the transfer, and establish that the resource was transferred for a purpose other than to qualify for MA. Any of the following circumstances are sufficient (see § 17.4.1):
   • The applicant/member had made arrangements to provide for his/her long term care needs by having sufficient financial resources and/or long term care insurance to pay for long term care services for at least a five-year period at the time of the transfer.
   • An exception to this requirement is allowed if the individual had a life expectancy of less than five years at the time of transfer. If the individual’s life expectancy was less than five years at the time of the transfer, a divestment penalty is not applied if resources and/or insurance were sufficient to pay for his/her long term care services for his/her remaining life expectancy.
   • To measure “sufficient resources” use the average monthly nursing home cost of care in effect at the time of the divestment ($6,216/mo currently) multiplied by 60.
   • Taking into consideration the individual’s health and age at the time of the transfer, there was no expectation of long-term care services being needed for the next five years. For example, someone who was gainfully employed and 50 years old at the time of the divestment is not expected to have set aside sufficient resources for five years of long-term care
   • If an individual had a pattern of charitable gifting, or gifting to family members (i.e. birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15% of the individual’s or couple’s annual gross income. This exception is not limited to gifts made on traditional gift-giving occasions and does not preclude a
pattern of giving to assist family members with educational or vocational goals

• Resources spent on the current support of dependent relatives living with the individual are not considered to be divestments. The individual must either claim the relative as a dependent for IRS tax purposes, or otherwise provide more than 50% of the cost of care and support for the dependent relative.

**Practice Tip:** Transfers to avoid probate or for estate planning purposes generally do not fall within this exception of being solely for another purpose.

11. It is extremely important to know when the divestment occurred and what rules in Wisconsin applied at the time. The rules concerning divestment have changed radically in the last 5 years. It is no longer true that the rule in place at the time of the divestment will apply if the divestment occurs after 1/1/2009.

**D. Spending Down to the Resource Limits.**

1. A person who is otherwise eligible for MA can begin receiving benefits as soon as his or her excess resources are "spent down" to the $2,000 limit for a single person or the higher limit for a couple.

2. There is no requirement that the excess resources be spent for care or related needs.

3. Spend down options include:

   a. Paying for care and related costs, such as a wheelchair or adaptive equipment.

   b. Purchasing or improving exempt resources. This might include making home repairs, buying personal property (TV, clothing, books, etc.), trading in one’s current vehicle for a newer and more expensive one, purchasing burial "hard goods" and creating a funeral or burial fund of $2,000 (fund is different from pre-paid burial described above), use of a special needs or pooled trust such as WisPACT.

   c. Converting resources into income by buying a promissory note, selling property on a contract, etc. We no longer recommend the purchase of an annuity for this purpose.
Practice Tip: Remember that for a single person the income will be applied toward the person's care. Also, if the income from a resource conversion belongs to the community spouse it may reduce or eliminate that amount of income that the nursing home or waivers spouse can allocate to the community spouse.

d. Paying off debts or accounts, and pre-paying future expenses within reason.
e. Transferring assets and waiting out the penalty period of ineligibility.

E. Recovery by the State.

1. Estate claims. OBRA '93 now requires States to establish estate recovery programs. 42 USC §1396p. The law defines "estate" to include all real and personal property and other assets included within the individual's estate as defined for purposes of State probate law. The State of Wisconsin has had an aggressive estate recovery program in place for years. See §49.496. The estate recovery is for nursing facility services provided after October 1, 1991, home and community-based services and related hospital and prescription drug services provided to individuals age 55 or older provided after July 1, 1995. Estate recovery was expanded again in the last budget bill to include personal care services and family care services. Liens can now be obtained for certain hospital benefits and for previously received community benefits.

2. If there is a surviving spouse, or minor or disabled child, the estate claim is not collected. The State of Wisconsin takes the position that the claim survives, and can be made against the estate of the surviving spouse. However, federal law does not allow a claim against the surviving spouse for benefits paid to the decedent. This issue has been litigated with success by applicants. See DHSS v. Estate of Budney, 197 Wis. 2d 949, 541 N.W.2d 245 (Ct. App. 1995).

3. Under current law property held in joint tenancy or life estate is not subject to estate recovery, because it is not part of the probate estate of the individual. Some annuity contracts are be subject to estate recovery under the new law. See ¶IV.B.8. below. However, federal law now allows States, at their option, to include any real or personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including property passing by joint tenancy, survivorship, life estate, living trust or other arrangement. Wisconsin has not yet opted to extend recovery to these assets except for joint accounts and POD accounts, and to pursue liens on homes when transferred in summary assignment or summary settlement proceedings.
4. Further discussion of estate recovery and how to avoid it is beyond the scope of this outline.

F. Long Term Care Insurance Partnership. (MEH §35.1)

1. The Long Term Care Insurance Partnership, “LTCIP,” allows a person with a qualified long-term care insurance policy to have assets disregarded in the Medicaid eligibility determination, while at the same time protecting those assets from Medicaid estate recovery. Under the LTCIP, assets are disregarded when determining eligibility for Elderly Blind and Disabled Medicaid programs, or any of the programs for Medicare beneficiaries, up to the total amount of long-term care services paid by the qualified WI LTCIP policy on or after January 1, 2009. The amount paid out by the qualified LTCIP policy on or after January 1, 2009 is not counted toward the WI Medicaid asset limit, nor is it recoverable under the estate recovery program.

2. The maximum amount that can be disregarded for the purpose of Medicaid eligibility, or protected from estate recovery, is the verified amount of benefits paid out by the qualified WI LTCIP policy on or after January 1, 2009.

3. The disregarded asset amount is still counted in the Asset Assessment when determining the Community Spouse Asset Share in a Spousal Impoverishment case. However, the disregarded asset amount is not counted in the individual’s eligibility determination.

4. The disregarded amount is exempt from divestment policies, i.e., transferring assets for less than fair market value up to the LTCIP payout amount will not result in a divestment penalty. However, a divestment may result in a reduction or elimination of the Medicaid eligibility and estate recovery protections under the LTCIP.

5. A “qualified LTCIP policy” must meet all relevant requirements of federal and state law. Qualified LTCIP policies are certified by the Wisconsin Office of the Commissioner of Insurance (OCI). OCI certification of the policy must be verified by assuring that the policy is listed on the OCI website, accessible via the following link: http://oci.wi.gov/oci_home.htm

6. The insured must have been a Wisconsin resident when the qualified LTCIP policy was issued. This must also be verified. In addition, the amount paid out by a qualified LTCIP policy must be verified before it can be disregarded for Medicaid eligibility or estate recovery purposes. The qualified LTCIP policy carrier must document the amount paid for benefits on or after January 1, 2009 using the appropriate OCI approved form (OCI 26-114) and provide verification of the pay out amount upon request.

III. SPOUSAL IMPOVERISHMENT

A. The Law
1. The Medicare Catastrophic Coverage Act of 1988 (MCCA) created protection for both income and assets (resources) of the community spouse. 42 U.S.C. §1396r-5.

2. Wisconsin law incorporated the provisions of MCCA in Wisconsin Statutes §49.455; Wisconsin Administrative Code §HFS 103.075.

3. The policy provisions implementing the spousal impoverishment statutes and regulations are found in the Medical Assistance Handbook in the Appendix in Section 18.

B. Community Spouse Resource Allocation (Wis. Stats. §49.455)

1. Spousal impoverishment rules apply only to:
   a. Married couples.
   b. One spouse must be institutionalized in a nursing home, a community waiver program, or hospitalization expected to last more than 30 days, while the other spouse is living in the community and not receiving or applying for Medicaid benefits.
   c. Spousal impoverishment applies only if the nursing home admission date was after September 30, 1989. Admissions prior to that date are not governed by spousal impoverishment rules; the community spouse is allowed to keep all of his or her assets without any test as to maximum spousal share.

2. Spousal impoverishment does not apply to SSI-eligible institutionalized spouses.
   a. Medical Assistance (MA/Title 19) is automatically available to SSI recipients.
   b. Younger disabled spouses with no Social Security earnings who are not eligible for Social Security Disability may qualify for SSI Disability.
   c. After the first thirty days of institutionalization, the couple is no longer treated as a married couple as to assets or income under the SSI rules.
   d. The non-disabled spouse may keep all of his or her assets.

Caution: SSI now has rules to penalize divestment.

1. Marital or community property rules are disregarded when computing resources as are Marital Property or Pre-Nuptial Agreements.

2. All assets of both spouses, regardless of form of ownership or classification, are counted toward the institutionalized spouse's eligibility.

3. Resources excluded as exempt under SSI rules are exempt under Title 19 rules.
   a. The home of any value, so long as the community spouse, a minor or disabled child occupies it.
   b. One car of any value.
   c. Each spouse may have one or more whole life insurance policies with a total face value not exceeding $1,500; if the face value of all life insurance policies for a spouse exceeds $1,500, then the total cash surrender value of all such policies is counted toward the community spouse resource share.
   d. Personal property and household furnishings of unlimited value.
   e. "Burial Spaces" for each spouse which may include a $3,000 irrevocable burial trust, a cemetery plot or crypt, a headstone or marker, a casket, a vault, and prepaid charges for opening and closing the grave site. See ¶1.B. above.
   f. The retirement assets in the name of the community spouse are also exempt under a case called Keip v. Wisconsin Department of Health and Family Services, 2000 WI App 13, 232 Wis. 2d 380, 606 N.W.2d 543 (Ct. App. 2000), rev. den., 612 N.W.2d 733 (4/26/00).

4. In addition to the exempt assets, the couple may have other assets worth a maximum of $115,640; this consists of a $2,000 limit for the institutionalized spouse and an additional $113,640 for the community spouse if they had at least twice that amount the first time the spouse went into a nursing home or hospital for 30 days for more.

5. Under the rules presently in effect, the assets are tested at the time the Title 19 application is made.
   a. If the community spouse's assets increase in value after the date of application, the continued eligibility of the institutionalized spouse is not affected.
   b. Additional resources received by the community spouse from any source after the eligibility of the institutionalized spouse has been established are not counted; for example, the community spouse may inherit assets, may win the lottery, or may accumulate savings and none of these additions to the
community spouse resource share affect the eligibility of the institutionalized spouse.

c. If the institutionalized spouse inherits or otherwise receives assets after eligibility is established, he or she may transfer those assets to the community spouse who may then keep those additional assets; if the institutionalized spouse does not transfer such assets to the community spouse and if the institutionalized spouse's non-exempt assets exceed $2,000, he or she will lose eligibility.

d. The resources of the community spouse are tested only at the time of the initial Title 19 eligibility. Wis. Stats. §49.455(5)(d). However, if the infirm spouse’s recoveries and benefits are terminated, a new application will require a new assessment.

D. Enlarging the Community Spouse Resource Share.

1. If the community spouse resource allowance does not generate enough income to provide the community spouse with the minimum monthly maintenance needs allowance (see G. below), then the community spouse may request a fair hearing.

2. The DHFS must establish an amount of resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance.

3. Wisconsin requires that the institutionalized spouse first make available to the community spouse the maximum supplement to the income to bring the community spouse's income up to the maximum monthly income allowance before any additional resources are allocated to the community spouse to raise the income.

   a. Challenges in other states have resulted in determinations that the state cannot require that the income supplement be made before the resource allowance is increased. These challenges have been successful in Ohio and Massachusetts.

   b. Another issue at fair hearing is whether non-productive or non-income producing assets may be transferred as part of the community spouse resource allowance. There is at least one fair hearing decision in Wisconsin holding that non-productive assets may not be transferred to increase the community spouse resource allowance.

E. Transfers of Assets by Spouses
1. Transfers between spouses are not treated as divestment. MA Handbook §17.4.7.
   and 8.

2. Exempt resources may be transferred to anyone without penalty, with the exception
   of the homestead which is governed by special rules (see ¶II.C.10.(d) above).

3. The institutionalized spouse must transfer to the community spouse all but his or her
   $2,000 liquid asset limit within one year of initial Title 19 eligibility. Wis. Stats.
   §49.455(6)(a) provides that the transfer must be made "as soon as practicable", but
   the Handbook requires transfer before the next scheduled review, which is normally
   twelve months after the date of the initial application.

4. Transfers of non-exempt assets and assets not part of the community spouse resource
   allowance by the community spouse affect the eligibility of the institutionalized
   spouse.

   a. Transfers before the initial eligibility date of the institutionalized spouse are
      counted against that spouse's eligibility, whether made by that spouse or by
      the other spouse.

   b. Transfers made by the community spouse after eligibility is obtained for the
      institutionalized spouse may not adversely affect the institutionalized spouse:

      i. A transfer of the homestead by the community spouse may not affect
         the eligibility of the institutionalized spouse.

      ii. The community spouse is also allowed to transfer his or her resource
          allocation without affecting the eligibility of the institutionalized
          spouse.

      iii. However, an asset received by the institutionalized spouse and
          transferred to the community spouse may not be divested by the
          community spouse without adverse affect to the institutionalized
          spouse.

      iv. It is uncertain whether for assets transferred by the institutionalized
          spouse to the community spouse, the community spouse may divest
          those assets at a rate less than the monthly multiple used in the
          divestment penalty formula as they could in the past. The daily rate
          that is used may make this more difficult, but the reporting period
          would still permit some divestment (e.g. 10 x $215.48/day)
          Such a transfer will affect the community spouse’s later eligibility for
          Title 19 benefits.

F. Transfers from an Incompetent Institutionalized Spouse.
1. If there is a General Durable Power of Attorney for the incompetent institutionalized spouse, the agent may transfer assets to the community spouse.

2. If there is no General Durable Power of Attorney for the institutionalized spouse, it will be necessary to establish a guardianship of the estate of the institutionalized spouse in order to be able to transfer excess assets to the community spouse.
   
a. Once a guardianship has been established under Chapter 54 of the Wisconsin Statutes, the guardian may petition the Court to permit the transfer of assets from the institutionalized spouse to the community spouse. See Statute §54.21.
   
b. The guardian of the estate of a married person is authorized to exercise all of the ward's property rights; but transfers must be approved by the Court. See Statute §54.20.
   
c. Under the holding of Guardianship of F.E.H., 154 Wis. 2d 576, 453 NW2d 882 (1990), the Court should permit the transfer of the assets if the transfer will be in the best interest of the ward, the ward's estate or the ward's immediate family.

G. Income Protections for Community Spouse

1. Marital property law is disregarded in determining the income available to each spouse.
   
a. Income is attributed to the spouse in whose name the income is received (name on the instrument rule).
   
b. Income of the community spouse is not deemed available to the institutionalized spouse. Wis. Stats. §49.455(3).
   
c. Income paid in the name of both spouses jointly is considered available one-half to each.

2. Treatment of income after eligibility is established.
   
a. The community spouse is allowed to keep all of his or her own income.
   
b. The institutionalized spouse is allowed to keep the first $45.00 ($90.00 for a veteran) of his or her own income as a personal needs allowance.
   
c. The community spouse is then allowed to transfer some of his or her monthly income to the community spouse to supplement the community spouse's
income to bring it up to the minimum monthly maintenance needs amount, currently $2,521.67 per month ($2,841.00 if allowed if the community spouse has at least $756.50 in monthly housing expenses.)

d. The institutionalized spouse is allowed to make payments for dependent relatives. In some instances, a support order may be required.

e. The institutionalized spouse is also allowed to retain any remaining income to the extent of expenses for non-Title 19 covered medical or remedial care expenses. Wis. Stats. §49.455(4)(a)4. This would include Medicare supplement insurance premiums.

f. How the policy is implemented in Wisconsin.

   i. If the community spouse's income is less than $2,521.67 per month, then the institutionalized spouse may pay an allowance to raise the community spouse to the level of $2,521.67 per month ($2,841.00 allowed if the community spouse has at least $756.50 in monthly housing expenses.)

   ii. Any excess in the institutionalized spouse's income (after applying the rules in ¶G. 2. above) must then be paid to the nursing home as a patient responsibility amount.

   iii. If the total income of the couple is less than $2,521.67 per month, there is no cash supplement from the state to bring the income up to the minimum maintenance needs amount.

   iv. If the community spouse's income exceeds $2,521.67 per month, that spouse will receive no income from the institutionalized spouse.

1. The county case worker may ask for a contribution to the cost of the institutionalized spouse's nursing home care. If the community spouse refuses to make a contribution, the case worker cannot deny Title 19 eligibility, nor can the case worker require that a contribution be made.

2. The pursuit of a community spouse for a contribution to the cost of the institutionalized spouse's nursing home care is a contradiction to the policy in the federal law of not deeming income from the community spouse to the nursing home spouse. Chippewa County Dept. of Human Services v. Bush, 305 Wis.2d 181, 738 N.W.2d 562 (App 2007).

3. A higher monthly income allowance may be established for the community spouse.
The amount of the income allowance may be increased by a Court order for support of the community spouse from the institutionalized spouse. Wis. Stats. §49.455(4)(b)2.

The monthly income allowance may be increased through a fair hearing by showing that exceptional circumstances would result in financial duress unless the minimum monthly maintenance needs allowance is increased. Wis. Stats. §49.455(8)(c).

IV. SPOUSAL IMPOVERISHMENT

A. Changes to Resource Allowance of Community Spouse.

The resource allowance is one-half of the couple's total assets on the date of admission to the institution for 30 days or more or the date of first request for waivers, but not less than the first $50,000 of combined assets and not to exceed the amount of $113,640. Wis. Stats. §49.455(6) (1995).

B. Strategies.

1. The assessment of the assets of a couple at the date of admission to the institution (hospital or nursing home) for 30 days or more takes on new importance because of the provision allowing the community spouse to keep one-half of the total assets determined as of the admission date to the institution. Wis. Stats. §49.455(5). For community waivers programs such as Family Care, the assessment date is the date that the couple first requested waiver services from the County.

2. The strategy under previous law was to reduce total assets of the couple down to the asset limit plus $2,000 for the institutionalized spouse.

a. The current strategy to maximize the assets allowed to be retained by the community spouse is to increase the assets to an amount equal to two times the maximum amount of resource allowance ($113,640 x 2 = $227,280) as of the first date of nursing home or hospital admission for 30 days or more or first date of request of waiver services.

b. Taking a loan prior to the institution admission date to increase the total assets will increase the community spouse resource allocation by one-half of the amount borrowed.

c. Loans may be repaid after the nursing home admission date.
d. Loans may be repaid before Title 19 application date in order to reduce the resources to the maximum community spouse resource allowance provided under the law.

3. The annuity strategy may still work for the community spouse, but most individuals will not want to name the state as the first or contingent beneficiary. Most planners are now using a Promissory Notes to accomplish the annuity strategy.

a. For example, if the couple has $200,000 in assets before the institutionalized spouse is admitted to the nursing home, then the community spouse will be allowed to keep a maximum of $100,000 and the institutionalized spouse will be allowed to keep $2,000.

b. A couple can then liquidate assets equal to $98,000 and lend the excess amount to a family member under a Promissory Note. The community spouse can then keep the monthly payments made on the Note in her name. Special rules apply to the method of payment and the rate of return, however.

4. To escape being treated as divestment, irrevocable annuities and other repayment instruments must include periodic payments which include both principal and interest that, at the time the transfer is made, must include interest of at least one of the following:

   a. Interest at the applicable federal rate required under Section 1274(d) of the Internal Revenue Code, as defined in sec. 71.01(6), Wis. Stats., or

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

5. The terms of the instrument must provide 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 in the payments is caused exclusively by fluctuations in that rate.

6. A variable annuity that is tied to a mutual fund that is registered with the federal securities and exchange commission does not need to meet the applicable federal rates for interest, nor does it need to meet the 1.5% below the applicable federal rate for a guaranteed life annuity.

7. The Department of Health and Family Services is directed by statute to promulgate rules specifying the method to be used in calculating the expected value of the benefit, as under the prior statute.
a. The statute, §49.453(4)(c) now specifies a method for calculating the amount of a divestment when the transfer does not meet the rules for excluding it as a divestment.

b. The statute specifies that the payments made to the transferor in any years subsequent to the year in which the transfer is made shall be discounted to the year in which the transfer was made by using the applicable federal rate in effect at the time of the transfer.

8. Changes to annuities under the new law effective January 1, 2009. A new section of federal Medicaid divestment was created to deal with annuities, 1396p(e) which requires:

a. Disclosure of a description of the interest an individual or community spouse has in an annuity, regardless of whether it is irrevocable or is treated as an asset.

b. The application or recertification form must include a statement that the State becomes a remainder beneficiary of the annuity by virtue of the provision of Medicaid.

1. The State is required to notify the issuer of the annuity of the State’s right as a preferred remainder beneficiary.

NOTE: While in the past it was often advisable for the client to have the annuity pay out over a long period of time to assist in his or her support, there is now an incentive to have the annuity pay out quickly so there is no remainder.

c. Perhaps the most troubling provision of the new annuity section is the statement: “Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).” Paragraph (1) requires merely disclosure of the annuity and does not describe any particular type of annuity. I think the principle of “availability” is an over-arching requirement before any income or resource can be counted and is not overridden by Section 6012.

d. Section 1396p(c)(1) also requires that the purchase of an annuity be treated as disposal of an asset for less than fair market value unless the State is named as the remainder beneficiary in first position for at least the total amount of Medicaid paid on behalf of the annuitant or that the State is name in second position after the community spouse or minor or disabled child and is named in first position if the spouse or representative of the child disposes of the remainder for less than fair market value. This
would seem to be a nightmare to administer, both for the State and the issuer of the annuity.

e. Section 1396p(c)(1) includes annuities in the rules for asset transfers unless the annuity is:

i. an individual retirement annuity under IRC 408(b) or (q); or

ii. purchased with proceeds from an IRA, a Simple IRA established by the employer, a SEP IRA or a Roth IRA; or

iii. is irrevocable and nonassignable, is actuarially sound and provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments.

NOTE: These provisions provide clear authority for converting IRAs to individual retirement annuities and not having the conversion counted as divestment. I believe this is also possible under existing State law, but the new federal provision makes it crystal clear.

These provisions also give a basis for doing away with the requirement of obtaining 3 letters stating that an irrevocable nonassignable annuity is actually irrevocable and nonassignable and, as such, has no available cash value other than the stream of periodic payments.

f. The provisions on annuities apply to transactions (including the purchase of an annuity) occurring on or after the date of enactment of DRA ‘05 (1/1/09).

C. Other Strategies

1. Divestment is now a problem for applicants as it will result in a period of ineligibility that will not start until the person is out of money and eligible for Title 19. This means that gifts that are made for reasons other than to qualify for title 19 will likely make individuals ineligible for benefits for some period of time after they have spent down and would otherwise be eligible for Title 19. If possible, funds should be returned to “cure” the divestment.

2. The state has implemented rules to determine when a hardship would occur if the divestment penalty is applied under the new law. Practitioners expect many more appeals based on hardship than in the past.

a. In the case of spouses the MA Handbook § 18.4.5 states:
The institutionalized person will not be denied MA if the IM Agency determines that the ineligibility caused by excess assets creates undue hardship for him/her. Undue hardship means an immediate, serious impairment to the institutionalized person's health.

b. In the MA Handbook at § 17.4.6 it states:

The IM worker must verbally inform the person of this undue hardship provision if the IM worker has determined the person has divested. The undue hardship notice must be included on all manual Medicaid institution denials and [dis]closures due to divestment.

3. The use of a joint bank account with children or other trusted family members no longer works to achieve eligibility. The account will be counted for eligibility purposes as all owned by the title 19 applicant and his or her spouse if the funds in the account were put there by them.

4. Conserve funds in retirement plans.

a. For the community spouse, all retirement plans in his or her own name are disregarded and not counted as assets.

i. This includes qualified retirement plans held by employers in trusteed plans, such as 401(k), 403(b), profit sharing, money purchase pension plan, ESOP, etc.

ii. Also not counted are all IRA’s of any kind, including traditional and ROTH IRA’s, SEP IRA’s and any other form of retirement IRA.

b. For a nursing home resident, retirement assets are available unless the plan prohibits the resident from liquidating the asset.

5. Use Promissory Notes for eligibility. Some practitioners are using promissory notes to transfer funds and accomplish eligibility. This strategy is similar to the annuity strategy, however, the applicant or his or her spouse does not need to name the State of Wisconsin as the beneficiary either directly or as a contingent beneficiary.

6. For couples with assets totaling $52,000 or less, no advance planning is necessary to maximize the community spouse resource share.

V. CAUTION: CHANGES AS OF JANUARY 1, 2009
A. Changes in Federal Law

1. Changes are incorporated in the federal level that are effective on January 1, 2009. The changes include:

   a. The extended look back period of 60 months, phased in, instead of thirty-six months for applicants after the effective date, except for divestments made before the effective date as discussed above at ¶ II.C.3. above.

   b. The most punitive change in the divestment rule, however, is the **delayed start of the penalty period**.

   i. Transfers made on or after 1/1/09 have a penalty period calculated as under prior federal law (divide amount divested by average cost of privately paid skilled nursing care to determine number of days of penalty).

   ii. The start date of the penalty period is the later of:

       1. The first day of a month during or after which assets have been transferred for less than fair market value, or

       2. The date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care but for the application of the penalty period; and

       3. Which does not occur during any other period of ineligibility.

   iii. Hardship waivers procedures are required for each state to develop. The new law defines hardship to exist when application of the transfer of assets provisions would deprive an individual of: 1. Medical care so that the individual’s health or life would be endangered, or 2. Food, clothing, shelter or other necessities of life. But see IV.C.2. above for the MA Handbook provisions on hardship.

   iv. The state must provide notice to recipients that undue hardship waivers exist, provide a timely process for determining whether a waiver will be granted, and an appeal process for adverse determinations.
v. Nursing homes are permitted to file undue hardship waiver requests with consent of the individual or his/her personal representative (agent).

vi. Bed holds of up to 30 days are permitted to be paid for hardship waiver applicants who meet criteria to be specified.

c. Divestment penalties to run from date of institutionalization, not from date the gift was made.

d. Change the method for calculating divestment, no rounding down, accumulate all divestments during the look back period.

e. Estate recovery against annuities. The state must be names as the alternate beneficiary on an annuity if there is a spouse, or as the primary beneficiary if there is no spouse.

f. The States are now required to impose fractional periods of a month of ineligibility for divestment. Difficulties reprogramming the State’s CARES computer system and manual calculations and notices by ES workers can be anticipated to cause problems.

g. Notes, loans and mortgages are included among the assets tested for divestment. See Sec. IV.C. 5. above. To escape divestment, the instrument must:

i. Have a repayment term that is actuarially sound;

ii. Provide payments in equal amounts during the term of the loan, with no deferral or balloon payments; and

iii. Prohibit cancellation of the balance on the death of the lender.

If the instrument does not meet the requirements, the outstanding balance due on date of Medicaid application is the available asset. Apparently, if the instrument meets the requirements, the purchase of it will not be treated as a divestment and, perhaps, the instrument will also be treated as unavailable.

h. It is now treated as a divestment to purchase a life estate in the home of another person unless the purchaser lives in the home for at least 1 year after the date of purchase.

i. The new amendments do not apply to Medicaid provided for services furnished before the date of enactment, or as to assets disposed of on or before the date of enactment, or as to trusts established on or before the date of enactment.
j. However, the amendments apply to payments made under Title 19 for calendar quarters beginning on or after the date of enactment, without regard to whether final regulations to carry out the amendments have been promulgated by that date.

k. For State plans that require State legislation to implement the federal law, the plans shall not be considered to fail to meet these requirements before “the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of enactment.” (Two-year legislative sessions are deemed to have separate sessions each year.) This date for Wisconsin is 1/1/08. Wisconsin proceeded to implement the changes effective 1/1/09 and did not go retroactive to the federal law effective date.

B. Other Significant Changes.

1. “Income First” rule required.

   Section 6013 mandates that the states use the “income first” rule when an applicant or recipient seeks to increase the maximum community spouse resource allowance where a couple has significant assets but not enough income for the community spouse to reach the Minimum Monthly Maintenance Needs Allowance. This rule is already applied in Wisconsin. See 49.455(8), Wis. Stats.

2. Home equity limitation

   Home equity for eligible individuals is limited to $750,000. These rules do not apply if the home is occupied by a spouse, or a child who is disabled, under 21 or blind. A home equity loan or reverse mortgage could be used to reduce the equity.

3. Changes to Continuing Care Retirement Community Contracts.

   a. The changes permit CCRCs to include provisions that require residents to spend their assets declared on their admission information/application on their care. This would effectively prohibit otherwise lawful divestment for residents of CCRCs.

   b. Entrance fees to CCRC can be treated as available if:
i. The entrance fee could be used to pay for care if all other sources are exhausted, or

ii. The individual can get a refund of the fee if he or she dies or terminates the contract or leaves the community, or

iii. The entrance fee does not “create an ownership interest” in the community.

Query: Will the entrance fee be treated as available even if the resident cannot get it unless her or she dies or leaves? Will a life lease be considered and “ownership” interest and be treated as equity under these rules?

VI. STATE FUNDING ISSUES AND THE FAMILY CARE CAP

A. General Overview.

On July 1, 2011, the State of Wisconsin imposed a cap on several home based and community waivers programs, including the Family Care program, Partnership, PACE and IRIS. The cap limited the amount of slots for the Family Care and other waivers program to the number of recipients in each county as of June 20, 2011. In 2012, the Federal government instructed the State of Wisconsin that it could not impose this cap as it was not part of its Federal Waiver. Despite this mandate, not all eligible individuals are being enrolled in Waiver programs and the State of Wisconsin has not expanded the Family Care to those counties that did not have it at the time of the original cap.

VI. USING IRREVOCABLE TRUSTS IN LONG TERM CARE PLANNING.

A. Trusts In General.

1. OBRA '93 made a number of changes that affect the use of trusts. The applicable Wisconsin rule is §49.454. Generally speaking, restrictions on the use of distributions from trusts will be disregarded. The portion of the trust that could be used for the benefit of the individual is considered available.

2. Assets placed in revocable trusts are still treated as being available to the individual and his or her spouse.

3. For assets that are unavailable because they have been transferred to an irrevocable trust, and for payments that have been made to others from a revocable trust, there is a special look-back period of 60 months rather than 36 months. After that time, the transferred assets are not considered available for MA eligibility and the client can apply and receive benefits (if otherwise eligible). See Artac v. DHFS, 2000 WI App.88, 234 Wis. 2d 480, 610 N.W.2d 115. (Court of Appeals concluded that Ms.
Artac had not divested assets when the trustee made a distribution from an irrevocable trust pursuant to the terms of the trust.)

4. Caution: Irrevocable trust planning is now influx due a recent Court of Appeals Decision. In Hedlund v. Wisconsin Dep’t of Health Servs., 2011 WI App 153, 337 Wis.2d 634, 807 N.W.2d 672 (App. 2011), the Court of Appeals held that an irrevocable trust set up by Medicaid applicant’s children for the support of the parent was the available asset of the parents. Although this case had very unique facts, the State of Wisconsin Medicaid program is applying this decision to all irrevocable trusts.

B. Testamentary Trusts.

1. Family members wishing to benefit an elderly or disabled individual may leave a share in a testamentary special needs trust, and thereby preserve the individual's eligibility for MA. This trust would limit distributions to special needs. Special needs include many types of goods and services, such as supplemental nursing care not provided by public assistance programs, recreation and transportation, experimental medical treatments and psychological support services. Distributions cannot be made for basic living expenses including food and shelter.

C. Irrevocable Income-Only Trusts.

1. Assets in an income-only trust created by an individual with his or her own assets for his or her own benefit or that of the spouse will not be considered available. There will be a 60 month look-back period, and the income will be considered available.

2. A variation on the income-only trust is to incorporate a special power of appointment allowing a third party to distribute all or part of the trust's principal to identified classes of beneficiaries. This provides some flexibility.

D. Income Cap Trusts.

1. A trust created to divert the income in excess of the income eligibility limit in an income cap state is allowed. Wisconsin is not an income cap state.

E. Trusts Created by Third Parties.

1. Special needs trusts created by third parties with funds of a third party are still viable under the law.
2. Living trusts set up by nominal third parties such as a court, a fiduciary, or someone at the request of an individual or his or her spouse are all treated as being set up by the individual. (It is generally believed that Congress intended to render donee trusts ineffective. Donee trusts are trusts voluntarily created and funded by donees following gifts to the donee by the trust beneficiary. However, some aggressive advocates believe that donee trusts created with funds originally owned by the donor are still viable, because after the gift to the donee the assets are no longer the assets of the donor. Other advocates are considering an approach in which the donee creates and funds a trust with his/her own funds, preferably before receiving any gift from the beneficiary). However, there are two important exceptions:

a. A trust containing the assets of an individual under the age of 65 who is disabled, and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or court, if the State will receive all amounts remaining in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on the individual's behalf.

b. A trust containing the assets of a disabled individual of any age, and which is established and managed by a non-profit association, if the State will receive the amounts remaining in the account upon the death of the beneficiary equal to the total medical assistance paid on the individual's behalf or the assets will remain in the pooled trust. In Wisconsin, there are two pooled trusts for use by disabled individuals. The pooled trusts are WisPACT (“Wisconsin Pooled and Community Trust”) and ARC of Southeastern Wisconsin.

VI. USE OF SERVICES CONTRACTS

A. Payments to relatives for services (services contracts) are allowed under certain circumstances.

1. The contract must be in writing with signatures notarized in advance of services if the amount paid exceeds 10% of the amount of the CSRA and the contract must specify the services, the terms of payment and payment must and be a reasonable amount at FMV for similar services in the community.

2. If the amount is less than 10% of the CSRA, then the contract need not be in writing. It is still advisable for the arrangement to be:

   a. Contemporaneous with the services rendered.
   
   b. Payment of a reasonable amount as measured by the fair market value of similar services in the community.
c. Documentation kept by the applicant to verify the amounts paid and the hours, value and type of services that have been compensated.

Note: MEH Decision MDV-16/107 now mandates the use of a written service contract or agreement in advance of a elderly person’s payment of compensation to a relative for care or services regardless of the amount to be paid.

B. Disadvantage to such contracts include:

1. The small amount of money that may be transferred in comparison to the amount that may be divested each month.
2. The payments for such services are taxable income to the recipient and FICA may apply for the payer.
3. Liability if employee is injured on the job. Workmen’s compensation issues.

C. Advantages include:

1. Ability to transfer money without a divestment.
2. If caretaker is providing full time or substantial services, larger amounts can be transferred.

VII. ESTATE PLANNING

Medicaid planning should always be done in connection with estate planning in order to completely meet the needs of a family dealing with the illness or disability of a family member. The standard estate planning documents, applied to the client's unique circumstances, should be considered: Wills, testamentary trusts, revocable living trust, Powers of Attorney for Finances and Health Care.

A. Power of Attorney for Finances.
B. Power of Attorney for Health Care.
C. Declaration to Physicians.
D. Estate Plan of Community Spouse.

1. Incorporate Special Needs Trust. The community spouse should consider changing his/her estate plan to include a special needs trust for the benefit of the spouse who needs care, so that if he/she dies first the spouse who is receiving MA will not be adversely affected. Distributions would be allowed for special needs. In the
alternative, the spouse can be disinherited with specific explanation in the Will that this was done to protect the ill spouse's eligibility for public benefits.

**NOTE:** When an elderly person is receiving care in an extended care facility and the community spouse sees no benefit to creating a special needs trust for the institutionalized spouse, then one option is to leave the entire estate to descendants or other beneficiaries. Query: Can the State require the institutionalized spouse to make a claim for his/her spousal share or marital property? The client should be advised that this may happen. See: Tannler v. DHSS, 206 Wis. 2d 386 (Ct. App. 1996) (nursing home spouse's failure to make a claim in the estate of the community spouse was divestment)

**PRACTICE TIP:** A marital property agreement relinquishing such rights is advisable where the institutionalized spouse has the capacity to sign, or a power of attorney can be used, or a motion in a guardianship action can be brought to approve such an agreement.

2. **Including First and Second Families.** Since joint assets may be shifted to the community spouse, in his/her name alone, it is important that he/she have a plan that includes the institutionalized spouse's descendants (or other intended beneficiaries) at death. Medicaid planning is not usually intended to cut out heirs. It may be advisable to obtain a clear written statement from the spouse who needs care about his/her desires so that there will be no questions after death. For example, should heirs be prepared to receive nothing if the surviving spouse (perhaps a step-parent) depletes the estate? Should the surviving spouse be required to leave a particular amount or percentage or a specific asset go to his/her children? The couple may even want to make a contract to make a Will which includes special provisions protecting all heirs.

E. **Beneficiary Designations.**

As with all estate planning, it is critical to insure that the client has coordinated all beneficiary designations with the plan. For example, if all or a portion of the estate is intended to be paid to a special needs trust, then the client must name the trustee of the trust or the estate itself as beneficiary.

F. **Marital Property Agreement.**

These are useful tools to arrange the client's affairs AFTER eligibility has been obtained.

**VIII. PLANNING TECHNIQUES STILL AVAILABLE.**
A. Use of annuities to protect assets has become more difficult. Consider the use of promissory notes instead.

B. Purchase of exempt assets, including payment of debts, purchase of or improvements to residence and funding of an irrevocable special needs or pooled trust.

C. Use of services contracts.

D. Increase the CSRA when income less than the minimum allowance.

E. Spend down assets.

F. Divestment is probably not advisable unless an exception applies.

G. Divorce as a last resort.

1. **WARNING** concerning Wis. Stat. §767.10(2)(b) that provides:

   A court may not approve a stipulation for a division of property that assigns substantially all of the property to one of the parties in the action if the other party in the action is in the process of applying for medical assistance or if the court determines that it can be reasonably anticipated that the other party in the action will apply for medical assistance within 30 months of the stipulation. (Emphasis supplied.)

   a. Note that the amended statute does not prohibit the court from ordering a property division assigning substantially all of the property to one of the parties; it merely prohibits a stipulation. If there is a trial, even though both sides are in agreement, and the court orders substantially all of the property to one of the parties, this statute section is not violated.

   b. The impact of this statute can be especially harsh in a situation with a younger person who is severely disabled, for example, with multiple sclerosis or early onset Alzheimer's disease, where the disabled spouse needs nursing home care.

   c. One way to avoid the effect of the statute when there are minor children would be to award one-half of the property to the healthy spouse and place the other half in a trust for the children to be used for a combination of child support and possible funding of post-high school education for the children.

2. Note that the statute prohibits approving a stipulation only in two circumstances, (1) If one party is in the process of applying for Medical Assistance (a short period of possibly a month), or, (2) if it can be reasonably anticipated that the other party will apply for Medical Assistance within 30 months of the stipulation (often very difficult to determine).
3. Query: Must the judge in every case now inquire as to whether either of the parties is in the process of or plans to apply for Medical Assistance?

4. Note that the period of 30 months refers to the look back period under prior law which is now 36 months and phasing in to 60 months under the Federal law.

IX. WATCH OUT FOR ESTATE RECOVERY

A. Liens on homesteads.
B. Claims in probate estates.
C. States may pass laws to recover from nonprobate transfers. Wisconsin has done so as to joint accounts, pay-on-death accounts and annuity beneficiary designations, Estate planning for the community spouse must be considered along with effect on her future Title 19 eligibility.
D. Avoiding estate recovery is an entire presentation in itself. It can be done though. Clients should be told to consult an informed attorney.

WARNING: The information in this outline is in summary form and is current as of the date presented. Title 19 law historically has changed drastically, frequently, and rapidly. If any significant amount of time passes between this presentation and your need for information concerning Title 19 benefits, it is imperative that you check on the law before advising clients.