

# One Step Ahead:

## Resource Planning for People with Disabilities who Rely on SSI and Medical Assistance (2005 Version)

Roy Froemming, JD

[royfroemming@froemminglaw.com](mailto:royfroemming@froemminglaw.com)

608/663-2747

### Important Update: July, 2009

#### **A. Department of Health Services**

The Department of Health and Family Services has been split into multiple agencies. The new Department of Health Services now has responsibility for MA, state SSI and home and community-based waiver programs. Their website is at <http://dhs.wisconsin.gov>. Many of the website references in *One Step Ahead* can be used by changing “dhfs” to “dhs” in the website address.

#### **B. Cost-of-Living Changes**

Each year, most payment amounts and income eligibility tests increase with the cost of living. On page 41 of *One Step Ahead* there is a list of internet resources that you can use to get current information on payment amounts and eligibility tests. The best single source of updated information is the *COP Information: An “At-A-Glance” Summary of Most Financial Eligibility/Rates in Long Term Support*. The 2009 version is available at [http://dhs.wisconsin.gov/LTC\\_COP/AtAGlance2009.pdf](http://dhs.wisconsin.gov/LTC_COP/AtAGlance2009.pdf).

#### **C. Reissue and Renumbering of Medicaid Eligibility Handbook**

The State of Wisconsin *Medicaid Eligibility Handbook (MEH)*, which contains the eligibility provisions applied by county workers who process MA, applications, was reissued in 2008. The *MEH* for people who are eligible for MA based on being elderly, blind or disabled is now at <http://www.emhandbooks.wi.gov/meh-ebd/>. There is now a separate manual for BadgerCare Plus, for people who qualify for MA in other ways, e.g., low-income children and families. Many of the sections referred to in the footnotes to *One Step Ahead* have been renumbered in the new *MEH*. Readers will need to use the *MEH*'s table of contents or search feature to locate these provisions.

#### **D. Changes to MA Asset and Divestment Policies for People who Apply for Long-Term Support Services**

Effective on January 1, 2009, the Wisconsin Department of Health Services (DHS) made several changes to its policies on the way assets are counted, and on penalties for giving away assets. Most of the changes apply only to people who receive or apply for *MA long term care* services, which for this purpose includes *nursing home*

*care, home and community-based waiver services (CIP, COP-W, and Brain Trauma and Children's Waivers), Family Care, Partnership* and similar programs. MA home health care and MA personal care services are not affected by the changes. The changes are in BEM/DFS Operations Memo 09-01, *Divestment and Other Medicaid Asset Policy Changes Required Under the Deficit Reduction Act of 2005*, available on the DHS website at <http://dhs.wisconsin.gov/em/ops-memos/2009/pdf/09-01.pdf> (referred to below as Ops Memo 09-01). Some of these changes are discussed below.

#### **E. Part IV.C.: Change to Home Exclusion for People Who Apply for or Receive Long-Term Care Services**

There is a limit of \$750,000 on the amount of equity in a home that you can exclude, if you apply for MA long-term care services after January 1, 2009. This limit does not apply to you:

- If you were eligible for MA long-term care on January 1, 2009, and remain continuously eligible.
- If your spouse, minor child, or adult disabled child lives in the home.

Wis. Stat. § 49.47(4)(bc)1.; Ops Memo 09-01

#### **F. Part IV.C. and V.D.: Treatment of Grants, Scholarships or Gifts Set Aside for Educational Expenses**

If you receive a grant, scholarship or other gift that you then set aside for educational purposes (other than room and board costs), receipt of the gift should not count as income for SSI, and you can hold the funds received for up to 9 months without having the funds counted as a resource. However, using the funds for any purpose other than educational expenses will count as income in the month you use the funds.

20 CFR §§ 416.1124(b) and 416.1250; POMS §§ [SI 00830.455](#) and [SI 01130.455](#). (This change should apply to people who are not on SSI but do get Wisconsin MA, but it has not yet been included in the *Medicaid Eligibility Handbook*.)

#### **G. Part V.D.: Income Exclusion for Small Gifts of Cash**

A provision that went into effect in September, 2006, gives people more flexibility to give you small cash gifts, without affecting your SSI benefits. A gift of cash that is considered *infrequent* or *irregular* does not count as income if the total value of gifts you receive in a calendar quarter adds up to no more than \$60. A gift will be considered “infrequent” if the same person did not make another gift in the same calendar quarter, or in the month before or the month after the gift. The gift should be considered “irregular” if you had no reason to expect that it would be made.

20 CFR § 416.1124(b); POMS § [SI 00810.410](#).

## H. Part VII.A: Stricter Restrictions on Purchase of Annuities and Promissory Notes

### 1. New Restrictions on Annuities

The possible use of annuities as a way of reducing countable resources if you have excess resources is mentioned in Part VII.A. of *One Step Ahead*. Ops Memo 09-01 puts new restrictions on use of excess resources to buy an annuity. The new policies apply:

- To an annuity that you or your spouse purchase after January 1, 2009.
- To an annuity that you purchased before January 1, 2009, if you take an action that the state considers a significant change, e.g., changing ownership, or changing the way the annuity pays out benefits.

Under the new law, money you or your spouse used to purchase an annuity that is payable either to you or your spouse will be considered a divestment of assets (see Part H, below), and will subject you to a period of ineligibility for MA long-term care, unless the annuity provides that any remaining payment due from the annuity after the death of the annuitant will be paid to the state. There is an exception if that allows you to name a spouse, a minor child, or a child with a disability as the first remainder beneficiary, but only if the state is named as the secondary remainder beneficiary.

In addition, purchase after January 1, 2009, of an annuity you own, and that is not considered to be an available resource, will be considered a divestment, unless the annuity meets three requirements:

1. Provides that it cannot be cashed in or sold to anyone else;
2. Is actuarially sound (meaning that it is expected to pay out all funds during your life expectancy); and
3. Provides for equal payments over time. (For example, has no balloon payments at the end of the annuity period.)

These three requirements do not apply to individual retirement annuities, and to other annuities that are purchased with certain retirement assets.

Wis. Stat. § 49.453(4m); 42 U.S.C. § 1396p(c)(1)(J); Ops Memo 09-01

- **NOTE:** State policy says that the state may count an annuity as a resource, even if the contract says that you cannot sell it, if there is a company that will buy it from you. It is not clear whether a policy like this is allowed under the federal law, or how it will apply to an annuity that is required to name the state to receive any payments after your death. **Consult an attorney with expertise in MA annuity policy before buying an annuity, or making a significant change in an annuity you already own.**

## 2. Promissory Notes and Loans

If you make a loan after January 1, 2009 and receive a promise to pay in return, or buy a promissory note, the transaction will be considered a divestment unless all the following tests are met:

1. The repayment terms are actuarially sound (meaning that it will be repaid during your life expectancy).
2. Payments are made in equal monthly payments, with no balloon or deferred payments.
3. The note, loan, or mortgage is not cancelled at your death.

Wis. Stat. § 49.453(4c); 42 U.S.C. § 1396p(c)(1)(I); Ops. Memo 09-01

### I. Part VII.B: Stricter Restrictions on Access to Long-Term Care Services for People who Give Away Assets, or Sell Something for Less than Market Value

Giving away assets, or selling assets for less than market value, as a way of becoming eligible for MA-funded long-term care benefits, is often called *divestment*. Ops Memo 09-01 makes several changes that make it much more difficult and risky for you to give away resources or income that you own, if you may need MA-funded long-term care within the next five years. These changes became effective on January 1, 2009. The old policy that existed before the changes continues to apply to any transfer of property that you made before January 1, 2009. (see *One Step Ahead*, Part VII.B.) Under the new policy:

- The MA program will ask about and consider any gift, or transfer for less than market value, that you made after January 1, 2009, and **within 5 years before the application** for MA long-term support services. This is called the *look-back period*.
- If you made a gift or transfer for less than market value during the look-back period, as a way of becoming eligible for MA, the MA program will impose a *penalty period*. During the penalty period, you will be ineligible to get MA payment for long-term care (although you can continue to get MA for other kinds of services, like physician services, drugs and personal care). The length of the penalty period is based on the total value of the gifts that you made during the look-back period. In 2009, every \$6259 that you gave away during the look-back period adds one month to the penalty period. A transfer of less than \$6259 will result in a partial month penalty, e.g, a gift of \$3130 would result in a half-month penalty.
- The most important change is that the *start date for the period of ineligibility* that results from a transfer that happens after January 1, 2009 will be **the first date on which you would have otherwise been eligible for MA long-term care**. This means that you will have to make an application for MA long-term care, be in need of long-term care, and be financially eligible, in terms of income and resources, before the penalty period will start to run. The penalty period if you are seeking nursing home care only begins to run if you are actually in the nursing

home and eligible in every other way for MA coverage of long-term care. For community-based long-term care (CIP, COP-W, Family Care, Partnership, etc.), you must make an application and be eligible for care, but the penalty period can begin to run even if the you are still on a waiting list for services.

- Transfers you make while you are already receiving MA long-term care are also supposed to be reported, and may result in a penalty period during which you will be ineligible for MA long-term care services. **It is to the advantage of ongoing recipients of long-term care to report transfers promptly**, because, if reporting requirements are met, the MA program will not try to recover benefits for parts of the penalty period that have started to run before the person's change in benefit status can be implemented.

A gift or transfer will not be treated as a divestment that results in a penalty if the MA program determines that you made it **exclusively for a purpose other than qualifying for MA long-term care**. This *intent exception* is much broader than it was under the old policies, but many transfers made for legitimate purposes (like helping relatives) may still result in penalty periods. The state may also decide that a penalty period should not be imposed because it would result in an *undue hardship*, meaning deprivation of needed medical care, food or shelter.

**Because of the severity of the new penalties, it is more important than ever to get advice from an expert before giving things away, or transferring them for less than they are worth.**

Wis. Stat. § 49.453; 42 U.S.C. § 1396p(c); Ops. Memo 09-01.

#### **J. Part VIII.F.: Availability of Pooled Trusts**

As of 2009, three Wisconsin trusts have been recognized by Social Security as pooled trusts that can be created by the individual or his or her representative, and funded with his or her own money: the WisPACT Trust I, managed by WisPACT, Inc., the WISH Trust, managed by Movin' Out, Inc., and the ARC Milwaukee community trust. Contacts for the pooled trusts are: WisPACT, Inc. (608) 268-6006 or [www.wispact.org](http://www.wispact.org); Movin' Out, Inc. (608) 251-4446; ARC Milwaukee, (414) 774-6255.

#### **K. Part IX.D.: New Restriction on Purchasing a Life Estate in a Home**

If you buy a life estate in a home after January 1, 2009, the purchase will be considered a divestment by you, and be subject to a penalty period of ineligibility, if you do not live in the home for a period of 12 consecutive months after the purchase.

Wis. Stat. § 49.453(4m); 42 U.S.C. § 1396p(c)(1)(J); Ops. Memeo 09-01

#### **L. Part IX.I. and J.: Use of a Trust to Own a Home for a Person on SSI May Result in In-Kind Income to the Beneficiary**

Part IX.I. and J. of *One Step Ahead* (pages 38-39) discuss ownership of a home by a trust for your benefit, where the trust then rents the home to you. Under a policy

interpretation made by Social Security that affects people on SSI, if you live in a home that belongs to a trust, and you are the beneficiary of the trust, the difference between the expenses paid by the trust for shelter costs related to the home, and the amount you pay to live in the home, can be counted as your income for SSI purposes, up to the presumed maximum value. This policy means that use of a trust for you will not work well, if you need SSI, unless you can afford to pay enough rent to cover the shelter costs of owning the home, or can afford to take the reduction in SSI that will result from receiving in-kind shelter. It may be better for a family member to own the home directly, and rent to you. (See Part V.E. of *One Step Ahead* for a discussion of *in-kind shelter* and the *presumed maximum value*.)