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Estate Planning Seminar

Spring 2026

Agenda

6:00 p.m. – 6:10 p.m. Welcome and Introduction

6:10 p.m. – 7:00 p.m. Estate Planning
Fundamentals
Estate Planning Risks and
Common Mistakes

Q&A

7:00 – 7:10 p.m. Break
complimentary coffee,
and cookies

7:10 p.m. – 8:00 p.m. Long-Term Care Planning

Q&A

Seminar Presenters

Kamryn K. Ramker
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Kamryn Ramker, an associate at Anderson O'Brien, focuses primarily on estate planning, probate, and elder law. Prior to joining the firm, she worked at the State Public Defender's Office, where her roles included serving as adversary counsel in adult guardianship cases. That experience gave her valuable insight into the complexities of elder and special needs law from a unique perspective.

Kamryn earned her Bachelor of Arts degree with distinction from the University of Minnesota – Twin Cities, and went on to receive her law degree from the University of Wisconsin – Madison.



David M. James
dmj@andlaw.com

David James, a partner at Anderson O'Brien, focuses primarily on Business Law and Estate Planning for business owners and high net worth families. When working with clients on their estate planning needs, he works to protect the client's assets with careful tax planning, while helping to ensure that their wishes are carried out.

Business clients can count on Dave at all stages of their business ventures from formation, through operations, to sale or family succession.



Seminar Presenters

Katherine A. Young

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Attorney Young graduated with highest honors from the University of Wisconsin-Madison in 2010. In May of 2013, she graduated with honors from the University of Wisconsin Law School. She started as an associate at Anderson O'Brien, in 2013 and was named a partner in 2022.

Her areas of practice are estate planning, wills, trusts, elder law, and probate. For Katie helping her clients with their estate plan is a chance to support their family's goals and contribute to the legacy they want to leave behind.



This outline is intended to provide general information regarding estate planning, insurance, nursing home, and Medicaid issues. It does not constitute legal advice. You should not act or refrain from acting on the basis of any content included in this outline, and presentation without seeking legal or other professional advice. Due to the rapidly changing nature of the law, information contained in the outline may become outdated.



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Anderson O'Brien, LLP

Estate Planning Seminar

April 20, 2026

Estate Planning Fundamentals

Attorney Kamryn K. Ramker

Estate Planning Risks and Common Mistakes

Attorney David M. James

Long-Term Care Planning

Attorney Katherine A. Young

UNDERSTANDING ESTATE PLANNING FUNDAMENTALS

AND

AVOIDING COMMON MISTAKES

PRESENTERS: ATTORNEYS KAMRYN RAMKER AND DAVID JAMES

I. INTRODUCTION: ESTATE PLANNING FUNDAMENTALS AND THE COST OF NOT PLANNING

A. What is Estate Planning?

Estate planning is the coordination of various documents to create a plan for the transfer, management, and disposition of your assets. Generally, it covers where assets go, how they get there, and who is in charge of that process. Estate plans may include a will, powers of attorney, beneficiary designations, and sometimes trust funds and other documents.

B. Overview of Wisconsin Estate Planning Landscape

Wisconsin operates under a marital property system that significantly affects estate planning. Understanding how Wisconsin law treats different types of property and transfers is essential for effective planning.

C. Common Misconceptions About Estate Planning

Many Wisconsin residents believe estate planning is only for the wealthy, that a simple will covers everything, or that joint ownership solves all problems. These misconceptions lead to inadequate planning and unintended consequences.

D. The Real Consequences of Not Having an Estate Plan

Without proper estate planning, Wisconsin residents face:

1. Assets passing to people other than preferred heirs under intestacy laws
2. Assets passing inefficiently or riskily through probate or directly to young beneficiaries
3. Lack of proper authorization for others to act during incapacity, leading to guardianship proceedings
4. Avoidable tax bills, including estate taxes, retirement account taxes, and missed tax-basis planning opportunities

II. DYING WITHOUT A WILL: WISCONSIN INTESTATE SUCCESSION

A. What is Intestacy?

Wisconsin law provides a default list of heirs if someone passes away without an estate plan. Contrary intent is not considered—the law does not care what "everyone knows Dad would have wanted." Some asset transfers under intestacy may cause problems, such as cash passing directly to someone unable to manage money or receiving public benefits.

B. How Wisconsin Distributes Your Estate Without a Will

1. Distribution to Spouse and Children Under Wis. Stat. § 852.01

- (a) Entire estate to spouse if all children are issue (descendants) of both spouses
- (b) Only one-half of non-marital property to spouse if decedent has children from another relationship
- (c) The surviving spouse retains one-half interest in marital property

2. Distribution When No Spouse Survives - Under Wis. Stat. § 852.01, the estate passes in the following order:

- (a) To issue per stirpes
- (b) To parents if no issue
- (c) To siblings and their issue
- (d) To grandparents and their issue
- (e) Escheat to the state when no heirs exist

C. The 120-Hour Survivorship Requirement

Heirs must survive the decedent by 120 hours to inherit under Wis. Stat. § 852.01 (Intestate Succession in Wisconsin). This requirement has significant implications for simultaneous deaths, such as in accidents involving multiple family members.

D. Why Intestacy Is Particularly Problematic

- 1. Complete loss of control over asset distribution
- 2. Potential for significant family conflict over who receives what
- 3. Assets passing to unintended beneficiaries, including estranged relatives
- 4. No ability to provide for stepchildren or non-relatives
- 5. No protection for beneficiaries who cannot manage money

III. UNDERSTANDING PROBATE AND WHY IT MATTERS

A. What is Probate?

Probate is the court-supervised process of administering a deceased person's assets after death. A personal representative is appointed by the court to manage affairs and

transfer assets to heirs. Probate is typically required if someone dies intestate but can occur even with a will.

B. Why Avoid Probate?

1. Cost

Probate can be burdensome and more costly than avoidance-based plans, with court fees, attorney fees, and personal representative compensation.

2. Privacy

Probate is a public court process, meaning anyone can access information about your assets, debts, and beneficiaries.

3. Speed

Probate can take from six months to two years to complete, delaying the release of funds to heirs who may need immediate access.

4. Flexibility

Probate is unsuitable for complex or long-term plans, such as providing for minor children over time or protecting assets from beneficiaries' creditors.

C. Probate vs. Non-Probate Assets

Not all assets pass through probate. Understanding the distinction is critical:

1. Probate assets: Assets titled in the decedent's name alone with no beneficiary designation
2. Non-probate assets: Assets that pass by operation of law, including:
 - (a) Payable-on-death (POD) accounts
 - (b) Beneficiary designations on life insurance and retirement accounts
 - (c) Joint tenancy property
 - (d) Trust-owned assets
 - (e) Survivorship marital property
 - (f) Property passing pursuant to a "Washington Will Provision" in a marital property agreement.

IV. LAST WILL AND TESTAMENT

A. What a Will Does

1. Provides instructions to the probate court on asset distribution
2. Nominates a guardian for minor children
3. Appoints a personal representative to administer the estate
4. Governs only assets subject to probate

B. What a Will Does NOT Do

1. Does not avoid probate
2. Does not override beneficiary designations

C. Wisconsin-Specific Requirements for Valid Wills

1. Must be in writing
2. Signed by the testator in the presence of two witnesses
3. Witnesses must also sign the document

A will must be notarized for it to be “self-proving”

4. Testator must have capacity to execute the will

V. BLENDED FAMILY PITFALLS

A. The Stepchild Problem Under Wisconsin Law

1. No Automatic Inheritance Rights as only biological and legally adopted children inherit under Wis. Stat. § 852.01
2. Potential for Conflict
3. This creates potential for conflict between stepchildren and stepparents, especially in families where relationships may already be strained

B. The "Mirror Will" Trap

1. Many couples use "mirror wills," leaving everything to each other
2. The Problem

After one spouse dies, the surviving spouse has no legal obligation to leave assets to stepchildren and can change their will at any time, potentially disinheriting the deceased spouse's children.

C. Marital Property Complications in Blended Families

Wisconsin is a marital property state. The distinction between marital property and separate property significantly affects estate planning for blended families.

1. Surviving Spouse's Rights

The surviving spouse retains one-half interest in all marital property. This interest is not subject to administration and passes automatically to the surviving spouse.

2. Spouse receives only one-half of non-marital property

3. Children receive the balance

This can create unexpected results where the surviving spouse receives less than anticipated.

D. Planning Solutions for Blended Families

1. Specific Provisions for Both Biological and Stepchildren

Estate plans should explicitly address both biological and stepchildren to ensure fair treatment.

2. Use of Trusts to Ensure Fair Treatment

Trusts can provide for the surviving spouse during their lifetime while ensuring assets ultimately pass to the deceased spouse's children.

3. Importance of Clear Communication

4. Discussing estate plans with family members can help avoid surprises and disputes

5. Regular Review and Updates After Life Changes

Family situations change, and estate plans should be reviewed regularly, especially after significant life events such as remarriage, birth of children, or death of family members.

VI. ASSET PROTECTION FAILURES

A. Spendthrift Provisions

1. A spendthrift provision is valid under Wisconsin law if it meets certain criteria. Specifically, the beneficiary must not be the settlor or treated as the settlor under Wis. Stat. § 701.0505, unless the trust is for an individual with a disability.
2. A valid spendthrift provision restrains both voluntary and involuntary transfers of the beneficiary's interest in the trust. Wis. Stat. § 701.0502. This means that creditors generally cannot attach, garnish, or execute on the beneficiary's interest or distributions before the beneficiary receives them.

B. Creditor Protections

1. Wisconsin law provides significant protections for trust beneficiaries against creditors, subject to certain exceptions:
 - (a) General Rule: Creditors cannot reach a beneficiary's interest in a trust protected by a valid spendthrift provision. This includes both present and future distributions. - Wis. Stat. § 701.0502, Wis. Stat. § 701.0503
 - (b) Mandatory Distributions: Even if a trust contains a spendthrift provision, creditors may reach mandatory distributions if the trustee fails to make the distribution within a reasonable time after the designated distribution date. Wis. Stat. § 701.0506
 - (c) Discretionary Trusts: A beneficiary's interest in a discretionary trust does not constitute an enforceable property right, even if the trustee abuses discretion. Creditors cannot compel distributions or attach the beneficiary's interest in such trusts. Wis. Stat. § 701.0504
 - (d) Trustee Liability: A trustee is not liable to a beneficiary's creditors for distributions made to or for the benefit of the beneficiary if the trust contains a valid spendthrift provision or is a trust for an individual with a disability. Wis. Stat. § 701.0501

C. Exceptions to Creditor Protections

1. Certain exceptions allow creditors to reach a beneficiary's interest in a trust, even if a spendthrift provision exists:
 - (a) Child Support and Public Support Obligations: Courts may order trustees to satisfy claims for child support or public support obligations from trust distributions, including discretionary distributions. Wis. Stat. § 701.0503
 - (b) Settlor as Beneficiary: If the settlor is also a beneficiary, creditors may reach the trust assets to the extent of the settlor's contributions to the trust. This applies even if the trustee has discretion over distributions
 - (c) Attorney Fees and Equitable Discretion: Courts may allocate costs, such as attorney fees, to a beneficiary's trust share under equitable principles, even if the trust contains spendthrift provisions. This does not constitute a seizure of the trust share but effectuates legislative intent

2. Special Protections for Trusts for Individuals with Disabilities

Trusts established for individuals with disabilities are afforded additional protections. Such trusts are generally exempt from creditor claims, including claims for public support or child support

D. Limitations on Creditor Remedies

1. Creditors are limited in their ability to reach trust assets. For example, they cannot force the judicial sale of a beneficiary's interest or compel the trustee to make distributions, even if the trustee abuses discretion
2. Additionally, assets exempt under other statutes remain protected from creditor claims

E. Summary. Wisconsin law provides robust protections for trust beneficiaries through spendthrift provisions, while also carving out specific exceptions for certain creditor claims, such as child support and obligations of settlor-beneficiaries. These protections are subject to the terms of the trust and the equitable discretion of the courts.

VII. TRUSTS

A. What is a Trust?

A trust is a separate legal entity that owns and controls property for a beneficiary:

1. The "Settlor" creates the trust and transfers assets into it
2. A "Trustee" controls the assets according to trust instructions
3. The "Beneficiary" receives benefits but doesn't control assets

One person can serve as Settlor, Trustee, and Beneficiary, depending on the trust type

B. Benefits of Trusts

1. Probate avoidance: Trust-owned assets don't need to go through probate, providing privacy
2. Control: Trusts can control funds for individuals without giving them direct control (e.g., young beneficiaries, those with disabilities or addictions)
3. Asset protection: Certain trusts offer creditor protection
4. Flexibility: Trusts are adaptable tools for different estate planning goals

C. Example: Trust for a Young Beneficiary

A trust may hold funds for a beneficiary under a set age, with the Trustee paying for health, education, and support needs. The Trustee can approve necessary payments (tuition, rent) but deny frivolous requests. If the beneficiary is sued or divorces before receiving the funds, the Trustee can withhold assets from creditors.

D. Joint Revocable Trusts

1. Common for married couples in Wisconsin:
2. The couple creates the trust and transfers assets into it
3. The trust is fully revocable and under their control during their lifetimes
4. Upon death, a successor Trustee follows their instructions for asset distribution, bypassing probate
5. Provides continuity of management if one spouse becomes incapacitated

VIII. BENEFICIARY DESIGNATION DISASTERS

A. The Failure to Update Problem

Failing to update beneficiary designations is one of the most common estate planning mistakes.

B. Post-Divorce Complications

Marital settlement agreements often require parties to change beneficiary designations.

C. Coordination with Overall Estate Plan

1. Ensuring Beneficiary Designations Align with Estate Planning Goals

All beneficiary designations should be reviewed to ensure they work together with your will and trust.

2. Regular Review of All Beneficiary Designations

Beneficiary designations should be reviewed regularly, especially after major life events.

D. Understanding That Beneficiary Designations Override Will Provisions

No matter what your will says, beneficiary designations control the distribution of those assets.

IX. BENEFICIARY DESIGNATIONS & OTHER NON-PROBATE TRANSFERS

A. Many assets allow a beneficiary designation to bypass probate, including:

1. Bank accounts (POD designations)
2. Life insurance policies
3. Investment and retirement accounts
4. Real estate (transfer-on-death deeds)

Critical Point: Will updates do not override old beneficiary designations!

B. Marital Property Agreements

1. Apply only at death and help avoid probate when the first spouse passes
2. Don't cover all assets, so some may require beneficiary designations

The survivor should review the plan after the first death to ensure proper second-death planning.

X. EXECUTOR AND FIDUCIARY SELECTION MISTAKES

A. Not Naming an Executor

1. Court Appointment Process

When no executor is named, the court must appoint a personal representative.

2. Potential for Family Conflict

Without clear designation, family members may disagree about who should serve, leading to court disputes.

B. Choosing the Wrong Person

1. Selecting Based Solely on Relationship Rather Than Capability

Choosing an executor based solely on their relationship to you rather than their ability to handle the responsibilities is a common mistake.

2. Necessary Qualities for Effective Executors

Executors should be trustworthy, organized, financially responsible, and able to handle conflict.

C. Multiple Agents/Co-Executors

1. Common Mistake of Naming Multiple Agents

One mistake frequently seen is clients who want to name multiple agents to administer their estate.

2. Potential for Deadlock and Conflict

Multiple executors can lead to issues where there are disagreements, causing delays and increased costs.

3. When Co-Executors May Be Appropriate

In some situations, such as when children from different marriages need representation, co-executors may be appropriate with proper planning.

XI. FAILURE OF BENEFICIARIES

A. What Happens When All Named Beneficiaries Predecease

1. Common "Failure of Beneficiaries" Clause

Estate plans normally include a clause that if all named beneficiaries predecease the testator, the estate will be divided equally among the testator's intestate heirs under Wisconsin law.

2. Default to Intestate Heirs Under Wisconsin Law

Under Wis. Stat. § 853.60, if the testator has not made an effective disposition of the residuary estate, the personal representative distributes it to the testator's heirs at law according to Wisconsin intestacy laws.

B. Planning for Contingencies

1. Considering Whether Intestate Heirs Are Desired Beneficiaries

Some clients might prefer to leave their estates to their spouses' relatives or to charitable devisees rather than to blood relations with whom they have had no meaningful contact.

2. Alternative Beneficiaries: Spouse's Relatives vs. Charities

The estate plan should specify alternative beneficiaries if the default intestacy rules don't align with the client's wishes.

C. Special Considerations

1. Step-Grandchildren and Extended Family

Many times, a child will marry or remarry and the spouse will have children from a prior relationship, leaving the client to consider whether to include step-grandchildren in the list of potential beneficiaries.

2. Estranged Relatives with No Meaningful Contact

Clients should consider whether they want estranged relatives with whom they have no meaningful contact to inherit.

XII. DIGITAL ASSETS AND MODERN ESTATE PLANNING

A. Digital assets often go overlooked during the estate planning process:

1. Online accounts and social media profiles
2. Email accounts
3. Cryptocurrencies

B. Planning for Digital Asset Management

1. Create an inventory of digital assets
2. Provide access instructions for fiduciaries
3. Grant legal authority to manage digital property

XIII. DIY ESTATE PLANNING DANGERS

A. The Template Trap

1. Online DIY Will Templates

People often try to save time and money by using an online DIY template or software. Often this ends up costing more time and money in the end.

2. Why One-Size- DOES NOT -Fit-All

Pre-made templates often fail to address Wisconsin-specific requirements and individual circumstances that an estate planning attorney would be able to address.

B. Wisconsin-Specific Requirements to Make a Valid Will

1. Formal requirements for valid wills
2. Two-witness requirement
3. Notary requirement in the event of potential conflict

C. When Templates Create More Problems Than They Solve

1. Failure to address Wisconsin marital property law
2. Inadequate provisions for complex family situations
3. Missing critical tax planning opportunities

XIV. FAILURE TO FOLLOW THROUGH

A. The Implementation Gap

1. Meeting with Attorney But Not Completing Planning
2. Signing Documents But Not Funding Trusts
3. Creating a trust is only the first step—assets must be transferred into the trust for it to be effective.
4. Updating beneficiary designations to match the plan.

B. Creating an Estate Plan But Never Updating It

Estate plans become outdated as circumstances change. Review your estate plan every 3-5 years or as life events require. Life events where a review is often warranted include:

1. Marriage or divorce
2. Birth or adoption of children
3. Death of beneficiaries or fiduciaries
4. Significant changes in assets
5. Changes in tax law

XV. WHAT HAPPENS WITHOUT POWERS OF ATTORNEY: THE GUARDIANSHIP TRAP

A. What is Guardianship?

If someone is incapacitated and lacks a proper Power of Attorney, decisions still need to be made. A loved one usually petitions the court to become the guardian.

B. The Guardianship Process

1. Filing a petition with the court
2. Notice to interested parties
3. Investigation by court-appointed guardian ad litem
4. Medical and psychological evaluations
5. Court hearing
6. Ongoing court supervision

C. Burdens of Guardianship

1. Guardianship powers are limited and require court approval for many actions
2. Annual reporting requirements to the court
3. Significant costs including attorney fees, guardian ad litem fees, and court costs
4. Loss of privacy through public court proceedings
5. Process can take weeks or months, delaying critical decisions

D. Why Powers of Attorney Are Helpful

1. Powers of attorney may help avoid guardianship.
 - (a) They allow you to choose your agent
 - (b) Provide immediate authority when needed
 - (c) Maintain your privacy
 - (d) Avoid court costs and supervision
 - (e) Grant broader powers than court-appointed guardians

XVI. POWERS OF ATTORNEY

A. Financial Power of Attorney (Durable General Power of Attorney)

1. Grants a trusted person the power to handle your finances (pay bills, file taxes)
2. May grant the power to make certain gifts
3. Can be effective immediately or only upon incapacitation

B. Healthcare Power of Attorney

1. Allows your healthcare agent to make medical decisions only if you are incapacitated
2. Grants decision-making authority but not knowledge of your wishes—communication is essential

Without this document, Wisconsin's statutory hierarchy determines who makes decisions under Wis. Stat. § 155.20

XVII. CONCLUSION: THE PATH FORWARD

A. Key Takeaways

1. Estate planning is not optional—intestacy is a plan, just not your plan
2. Blended families require special attention and cannot rely on default rules
3. Asset protection must be proactive, not reactive
4. Coordination of all estate planning documents and beneficiary designations is essential
5. Powers of attorney are critical to avoid guardianship
6. Regular review and updates are necessary as circumstances change

B. The Estate Planning Process

1. Schedule an appointment and complete an estate planning questionnaire
2. Meet with an attorney to discuss your family, assets, and goals
3. Review draft documents and provide feedback
4. Sign documents at a formal signing appointment
5. Distribute signed copies and update beneficiary designations

6. Fund trusts if applicable

C. Action Steps for Attendees

1. Schedule comprehensive estate planning review
2. Gather information on all assets and beneficiary designations
3. Consider family dynamics and potential conflicts
4. Work with experienced Wisconsin estate planning attorney
5. Follow through on implementation and funding
6. Commit to regular reviews and updates

D. The Cost of Inaction

1. Family conflict and litigation
2. Unintended beneficiaries receiving your assets
3. Loss of assets to creditors or taxes
4. State control over your legacy
5. Guardianship proceedings for incapacity
6. Probate delays and expenses

Estate planning is not just about documents—it's about protecting your family, preserving your legacy, and ensuring your wishes are honored. The pitfalls are real, but they are also avoidable with proper planning and professional guidance.

LONG-TERM CARE COSTS

PRESENTER: ATTORNEY KATHERINE YOUNG

I. MEDICAL ASSISTANCE LAW

A. What is Medical Assistance?

Medical Assistance (M.A.) or Medicaid is a health care program for lower income and disabled individuals.

B. Objectives

1. Provide payments for M.A. to low-income persons who are age 65 or older, blind, disabled, or members of families with dependent children or qualified pregnant women or children.
2. Designed to pay for skilled nursing facility expenses and other medical expenses for individuals who have minimal assets and inadequate income to pay for these expenses. M.A. supplements the individual's own payments.

C. Medical Assistance, Marital Property and Tax Law

Medical Assistance law, marital property law, and tax law are not consistent, so it is important to understand how the different laws interact.

D. Married Couples

For married couples where one spouse resides in a nursing home and needs M.A., there are income and asset protections for the spouse still living in the community.

II. ELIGIBILITY REQUIREMENTS AND SPOUSAL PROTECTIONS

A. Non-Financial Eligibility Requirements

1. U.S. citizen or qualifying immigrant.
2. Age (65 or older), blind or disabled.

B. Financial Eligibility Requirements

1. Income Test

- (a) "Categorically Needy." Receipt of Supplemental Security Income (SSI), or income below the SSI federal benefit rate, will qualify an individual for the program.
- (b) "Medically Needy." Non-institutionalized individuals with income above the SSI federal benefit rate, but whose excess income is consumed by medical costs, and institutionalized individuals whose income is lower than the monthly private pay rate at the institution qualify for the program.

2. Asset Test

- (a) An individual cannot retain more than \$2,000 in “countable assets,” plus certain exempt assets.
- (b) The total countable assets are determined as of the earlier of the first date of institutionalization or hospitalization for more than thirty days or the date the person was first determined functionally eligible for the Home and Community-Based Waivers program.
- (c) “Exempt assets” include a vehicle, personal property, certain pre-paid funeral arrangements and life insurance if the death benefit is less than \$1,500.
- (d) If an individual applying for M.A. is married to a spouse still living at home, there are certain “spousal impoverishment protections” for the non-institutionalized spouse, who is referred to as the “Community Spouse.”

C. Spousal Impoverishment Protections.

A Community Spouse can retain certain assets in addition to the exempt assets listed above, as follows:

- 1. Community Spouse Resource Allowance (“CSRA”). This is the value of countable assets the Community Spouse is allowed to keep, determined as follows:
 - (a) If the couple’s combined countable (nonexempt) assets are \$100,000 or less, the Community Spouse may retain up to \$50,000.
 - (b) If the couple’s combined countable (nonexempt) assets are between \$100,000 and \$325,320, the Community Spouse may retain one-half of the countable assets.
 - (c) If the couple’s combined countable (nonexempt) assets are greater than \$325,320, the Community Spouse may retain \$162,660.
 - (d) These amounts are adjusted annually.
- 2. Additional Exempt Assets. Apart from the CSRA and in addition to the other exempt assets described above, the Community Spouse is allowed to retain the homestead and retirement assets in his or her name.

D. Treatment of Income

- 1. Income Rules for Single Individuals. All of the individual’s monthly income must be applied to the cost of care, with the following exceptions:
 - (a) \$45 personal needs allowance;

- (b) Monthly cost of supplemental health insurance (this includes Medicare Supplement and Medicare Prescription Drug insurance premiums); and
 - (c) Certain non-MA-covered medical expenses.
- 2. **Income Rules for Married Individuals.** As part of the spousal impoverishment protections, income in the name of one spouse alone is counted as his or her own income, and the Community Spouse generally will not be required to contribute his or her own income to the institutionalized spouse's cost of care. Furthermore, some of the institutionalized spouse's income may be allocated to the Community Spouse if such spouse's income does not meet the minimum level set by the program. The maximum allocation is the lesser of \$4,066.50, or \$3,525.00 plus excess shelter allowance (shelter costs that are greater than \$1,057.50). These amounts are adjusted annually.

III. DIVESTMENT AND TRANSFER PENALTY PROVISIONS

A. Divestment

The disposing of assets for less than fair market value.

1. If an applicant for M.A. has divested assets within the five (5) years before they apply, a disqualification period may result.
2. The transfer of assets between spouses is not a divestment.
3. The transfer of assets from one or both spouses to children is generally considered a divestment.

B. Assets

"All income and resources of the individual or the individual's spouse, including any income or resources which the individual or such individual's spouse is entitled to but does not receive. . . ." 42 U.S.C. § 1396p(e)(1).

C. Exceptions

There are a number of exceptions to the divestment rules, but eligibility for such exceptions depends on the specific facts and circumstances of the asset transfer. Three important exceptions include:

1. The institutionalized person or his/her spouse divests homestead property to his/her: (a) spouse, (b) child who is under 21 years of age or blind or permanently and totally disabled, or who has been residing in the institutionalized person's home for at least two years immediately before the person became institutionalized, and provided care to him/her which permitted him/her to reside at home rather than in the institution, or (c) sibling who was residing in the institutionalized person's home for at least one year immediately before the date the person became institutionalized and has a verified equity interest in the home.

2. The institutionalized person or his/her spouse divests a non-homestead asset or assets to their spouse or a child of any age of either spouse who is either blind or permanently and totally disabled or both.
3. Income or assets determined to be exempt (except homestead property) are not subject to divestment rules. Assets can be permanently or temporarily exempt. The transfer of temporarily exempt assets is not subject to divestment rules during the time they are exempt.

D. Look-Back Period

The look-back period is a period of time prior to application.

1. A divestment that has occurred in the look-back period or any time thereafter can cause the applicant to be ineligible for coverage.
2. The current look-back period is five years (60 months).

E. Penalty Period

1. If there was a divestment during the look-back period or any time after, and if none of the above exceptions apply, the institutionalized person must be determined ineligible for a period of time.
2. During this penalty period M.A. will not pay the institutionalized person's daily care rate in the nursing home.
3. The penalty period is calculated by dividing the total divested amount by the statewide average nursing home cost of care (currently \$352.06 per day; increases annually) in effect at the time of the application. This number is the number of days of disqualification.

F. Start of Ineligibility Period

The start date for the period of ineligibility will only begin after the person: is institutionalized or is functionally eligible for Home and Community-Based Waiver programs, has applied for M.A., and is otherwise eligible for the program.

G. Restrictions on Gifts by Spouse of Medicaid Recipient

If the spouse of a recipient gives away assets within five years after the institutionalized spouse qualifies for Medicaid, it will be considered a divestment that will cause the institutionalized spouse to lose his or her benefits.

IV. ESTATE RECOVERY

A. What is Estate Recovery?

1. Federal law requires every state to have an estate recovery program allowing for recovery of amounts paid on behalf of recipients for certain benefits, including long-term care services, hospital services, and other benefits.
2. Federal law requires states to seek reimbursement from assets that pass through the recipient's probate estate.
3. Beyond that, federal law permits states to determine whether non-probate assets may also be subject to recovery and generally allows states to set the scope of the estate recovery program.

B. Wisconsin's Estate Recovery Program:

1. Wisconsin law provides that any property of a decedent that is transferred by a person who has possession of the property at the time of the decedent's death is subject to the right of the Department of Health Services (DHS) to recover the value of the decedent's interest in the property. The interest in the property or value equal to the same is to be transmitted to the DHS.
2. "Property of a decedent" includes all real and personal property to which the recipient held any legal title or in which the recipient had any legal interest immediately before death, to the extent of that title or interest, including assets transferred to a survivor, heir, or assignee through joint tenancy, tenancy in common, survivorship, life estate, revocable trust, or any other arrangement, excluding an irrevocable trust.
3. There is a presumption, which may be rebutted, that all property of a deceased surviving spouse was marital, and therefore, a deceased surviving spouse's property is also subject to these requirements.

C. Life Estates

1. While life estates were previously considered exempt from estate recovery, life estates created after August 1, 2014 are now subject to a claim by DHS upon the transfer of the property.
2. The fractional value of the claim will be based on the life estate-remainderman tables used by the DHS to value life estates.
3. The value will be determined as of the Medicaid recipient's date of death, as though he or she is still alive.

V. PLANNING OPPORTUNITIES

A. Early Planning

Since the current look-back period is five years, individuals and couples should begin the planning process early, so as to accomplish any desired gifts well before M.A. is needed.

B. Irrevocable Trusts

One way to reduce countable assets is to transfer them to a properly drafted irrevocable trust.

1. A trust is an arrangement where funds or property of a person (referred to as a "settlor") are delivered to a trustee and the trustee is to manage the funds or property for the benefit of one or more trust beneficiaries. A trust is normally in the form of a written agreement between the settlors and one or more trustees. An "irrevocable trust" is a trust created by settlors while living that may not be revoked or modified by the settlors once signed.
2. An irrevocable trust for M.A. planning is very different from another common type of trust, a "revocable" trust. A revocable trust is a trust created by a settlor while living that may be revoked or modified by the settlor at any time, acting without the consent of any other person. Revocable trusts are often used to avoid the need for a probate proceeding upon death, but do not protect the assets transferred to the trust in the event the settlor needs long-term care.
3. To protect assets for M.A. purposes, an irrevocable trust must restrict the settlor's ability to withdraw the assets once they are transferred to the trust.
4. Since the trust legally owns the assets rather than the underlying trust beneficiaries directly, the assets are protected if the trust beneficiaries experience creditor issues, divorce or other liability concerns.

C. Long-Term Care Insurance

1. As more stringent income and asset eligibility requirements continue to be put in place, long-term care insurance may be an option for some individuals to provide funds to pay for their long-term care.
2. However, due to factors such as a person's health and financial status, such insurance policies may be prohibitively expensive and are not appropriate for all individuals.
3. When considering long-term care insurance, it is important to carefully evaluate the policy and the company issuing it to determine its financial soundness and its ability to meet the individual's potential care needs.

D. Asset Spend-Down

1. One method that is often used to reduce the amount of countable assets in order to qualify for the program is to purchase assets that do not count for eligibility purposes.

2. As indicated above, a certain pre-paid funeral plans are not countable, nor are vehicles and personal property. Funds can also be used to improve non-countable assets, such as the residence if the Community Spouse resides there.

E. Contractual Payments

1. Gifts to family members may be replaced by contractual payments for services performed by family or friends.
2. Most long-term care is provided by family members, friends and neighbors.
3. However, in order to not be considered a divestment, such payments must be made pursuant to a written contract that meets certain M.A. requirements.

F. Increase the Community Spouse Resource Allowance

1. As discussed above, if a Community Spouse's income is below a certain level (the "minimum monthly maintenance needs allowance"), some or all of the institutionalized spouse's income may be allocated to that spouse to raise his or her income up to that level.
2. If that income allocation is not sufficient, then either spouse may request an increase in the community spouse resource allowance (CSRA) above the standard allowance for the purpose of protecting assets that generate income.
3. This increase can only be accomplished through a fair hearing before a state administrative law judge.
4. While the protected assets must be income producing, this planning technique can be used to shelter additional assets for a Community Spouse.

G. Planned Divestment

1. Transferring assets for less than fair market value during the look-back period may result in a period of ineligibility.
2. However, if the actual cost of the applicant's long-term care is less than the statewide average nursing home cost of care (currently \$352.06 per day) used to determine the length of the penalty period, divestment prior to applying for M.A. may result in a net benefit to the applicant.
3. This planning technique is not appropriate for everyone and is dependent on an individual's particular circumstances at the time they are considering applying for M.A. It should only be undertaken after careful consultation with a knowledgeable professional.

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