THE BASICS OF WISCONSIN MEDICAID ELIGIBILITY PLANNING

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The Basics of Wisconsin Medicaid Eligibility Planning

I. General Definition and Misconceptions of Medicaid

A. **"Medicaid"** is a joint federal and state medical insurance program that covers the cost of long-term care, such as extensive nursing home stays as well as limited at home assistance to certain needy and low-income individuals.

B. The following terms are used and more extensively described in this outline:

i. "Activities of daily living" generally include: eating, bathing, dressing, continence, transferring, and toileting; long-term care services are generally necessary when an individual cannot perform two or more activities of daily living

ii. "Applicant" or "Medicaid recipient" is used to refer to an individual who has applied or may apply for Medicaid as well as an individual who is receiving Medicaid benefits

iii. "Applicant spouse" or "Medicaid spouse" is used to refer to the spouse who is applying for or receiving Medicaid benefits

iv. "Available assets" describes assets that an applicant can liquidate and use toward his or her cost of care

v. "Community spouse" or "healthy spouse" is used to refer to the spouse of an applicant or Medicaid recipient who is not in need of Medicaid benefits

vi. "Community Options Program—Waiver" or "Family Care" is a program operated by Wisconsin under a federal Medicaid waiver, which provides home and community-based services to Medicaid eligible individuals

vii. "Cost of care" describes the cost of an applicant's medical and institutional care plus allowable shelter expenses; it is also used to refer to the amount of income an institutionalized Medicaid recipient must contribute toward his or her care

viii. "Cost share" describes the amount of income that a Medicaid recipient who participates in a home or community-based Medicaid waiver program, such as Family Care, must contribute to his or her care

ix. "Countable assets" describes assets that are available to the applicant and are not exempt

x. "Divestment" is a transfer of certain income and assets in exchange for assets or services which are worth less than the fair market value of what was transferred

xi. "Exempt assets" describes certain assets that, while available to an applicant, are specifically exempted from countable assets

xii. "Ineligibility period" describes the period of time an applicant is ineligible for Medicaid because of a divestment

xiii. "Institutionalized person" describes a person who participates in a Wisconsin Medicaid community waiver program or a person who has resided in a medical institution for 30 or more consecutive days, or a person who is likely to reside in a medical institution for 30 or more days, as certified by the medical institution

xiv. "Long-term care" describes the care required for an individual who, due to a disability, whether by an illness, accident, cognitive impairment (such as Alzheimer's), or old age, needs assistance performing activities of daily living

xv. "Look-back period" describes the period of time prior to the date of a Medicaid application during which an applicant's finances are examined to determine if divestments have taken place

xvi. "Spousal impoverishment provisions" describes rules for married persons that are intended to prevent the impoverishment of a healthy spouse of a Medicaid recipient, by allowing the healthy spouse to retain substantial assets and income

C. Common Myths about Medicare and Medicaid:

Myth:	Reality:
It is unlikely that I will ever need long-term care	It is estimated that 50% of all Americans will need long-term care at some point in their lives
I can afford to pay for my own long-term care	Long-term care is extremely expensive A 2018 Genworth Financial Cost of Care Survey for Milwaukee, Wisconsin derived the following median costs: - Medicare certified home health care aide: $4,767 per month - One bedroom assisted living unit: $4,264 per month - Semi-private room and a private room in a nursing home: $9,555 and $10,448 per month, respectively

Medicare pays for all long-term care in a nursing home	Medicare coverage is limited as to duration and cost of care Co-payments are required for even limited coverage of Medicare
Joint accounts protect assets	All of the assets of a joint account may be considered "countable assets" of the Medicaid applicant A withdrawal from a joint account by a non-Medicaid applicant owner can constitute a divestment of the Medicaid applicant
Medicaid recipients receive less care than private pay individuals	Most nursing homes accept Medicaid recipients Federal law prohibits nursing homes from providing a different level of care to a resident based solely upon the resident's Medicaid eligibility
Putting a child's name on a home protects the home	Doing that may constitute a gift/divestment and result in an ineligibility period
You can qualify for Medicaid by giving away all of your assets	Giving away assets may constitute a gift/divestment and result in an ineligibility period
It is illegal to transfer assets in the five years prior to needing long-term care	It is not illegal but can result in an ineligibility period
A gift of more than $15,000 will be taxable to the person making the gift or the person receiving the gift	While a gift of more than $15,000 during a single year may constitute a taxable gift to the person making the gift, no gift tax will be due until this person has given away more than $11,400,000 million over his or her lifetime (according to the 2019 estate tax law); these numbers are adjusted annually for inflation
Small gifts may be made to family, friends and charities without negatively affecting Medicaid eligibility	With only limited exceptions, all gifts made within the look-back period can cause an ineligibility period
A person making a large gift is ineligible for Medicaid for five years	The five-year period describes the period in which gifts must be disclosed, not the penalty period resulting from such gifts In most cases the penalty period will be less than five years

Someone in a nursing home must spend down all of his assets on nursing home care before qualifying for Medicaid	Assets and income may be spent on things in addition to the cost of the nursing home Countable assets can be converted to exempt assets or unavailable assets Funds can be paid to family members as reasonable compensation for rendering personal services to the applicant
Once someone is in a nursing home, it is too late to do any Medicaid planning	Some Medicaid planning techniques may still be available after someone is admitted to a nursing home
All powers of attorney are the same	Medicaid Planning may require greater flexibility and grants of additional powers if the applicant becomes incapacitated Many of these additional powers are not included in standard power of attorney forms
A revocable trust will protect assets from Medicaid	Assets of a revocable trust are generally considered available and countable assets of the creator of the trust
Medicaid will take all of my assets including my house	Medicaid generally does not take assets; it only denies eligibility until available assets are spent down to a level of eligibility, i.e., $2,000 However, a Medicaid lien can be placed on a home of a Medicaid recipient under certain circumstances, but such liens are not generally foreclosed upon while the applicant is living

II. Medicare v. Medicaid

A. Medicare**:**

i. Medicare is an entitlement that provides broad eligibility based on a combination of a person's

1. Age (over 65),

2. Social security work credits,

3. Entitlement to social security for 24 months or more, and

4. Certain kidney patients

ii. A Medicare recipient is generally required to make a co-payment or a deductible payment, the amount of which depends on the benefit provided

iii. Medicare provides limited coverage for hospital and nursing home care

B. Medicaid:

i. Medicaid is not an entitlement

ii. Medicaid eligibility is limited based on medical and financial resources

iii. For those who are eligible, Medicaid provides broad medical coverage including long-term care in a hospital, nursing home, and in the community under Family Care

C. Medicare Benefit Coverage:

i. Medicare Part A – Hospital Insurance: Provides limited coverage for hospitals, skilled nursing facilities, hospice care, and some health care services; Part A requires deductible payments and co-pay obligations

ii. Medicare Part B – Supplemental Medical Insurance: Provides substantial coverage for outpatient physician and other medical services and procedures, ambulances, emergency room, tests, and durable medical equipment; Part B generally requires monthly premium payments, deductibles and a 20% co-pay

iii. Medicare Part C – Medicare Advantage or Health Plans: Private provider coverage that is equal to or greater than coverage under Medicare Parts A and B and may include prescription drug coverage; Part C requires premium payments and co-pays

iv. Medicare Part D – Prescription Drug Coverage: Private provider coverage of prescription drugs; Part D requires premium payments and co-pays

v. For more detailed information, see publications of the Coalition of Wisconsin Aging Groups ("CWAG"), entitled "*What You Should Know Before You Turn 65*" and "*Understanding Your Medicare Options*" available at their website: www.cwagwisconsin.org.

D. Limited Medicare Coverage for Long Term Care Under Medicare Part A:

i. Medicare pays certain costs for hospitalization (2019 numbers) based on the number of days of hospitalization, as follows:

1. First 60 days – Medicare pays all but $1,364 total

2. 61st - 90th day – Medicare pays all but $341 per day

3. 91st - 150th day – Medicare pays all but $682 per day

4. Beyond 150 days – Medicare pays nothing

ii. Medicare pays certain costs of skilled nursing facility stays (2019 numbers) based on the number of days of a nursing home stay, as follows:

1. First 20 days – Medicare pays 100% of approved amount

2. Additional 80 days – Medicare pays all but $170.50 per day

3. Beyond 100 days – Medicare pays nothing

4. In order to qualify for Medicare skilled nursing facility benefits, an individual must have been hospitalized for at least three days prior to entering the skilled nursing facility

iii. Home Health Care – Medicare pays for the first 100 visits of qualified medical professionals for post-institutional home health care

iv. Hospice Care – Medicare pays 100% of costs for as long as a physician certifies the need, but Medicare may not cover the related costs of institutional care in a nursing home

E. Medical Services Provided by Medicaid:

i. Comprehensive coverage for medical services

ii. Examples: physician services, inpatient and outpatient hospital services, dental services, nursing home services, home health services, prescription drug services, mental health services and physical therapy services

iii. Distinct from Medicare

1. Medicaid covers unlimited skilled care in a nursing home, two levels of intermediate care and, under Family Care, certain care in the home

2. Medicare covers only skilled care and only for a limited time

III. Four Aspects of Medicaid Eligibility: A determination of Medicaid eligibility requires the following:

A. The Applicant's Medical Need – whether the applicant meets the non-financial requirements;

B. The Applicant's Income – whether the applicant's income is below the threshold of the "cost of care;"

C. The Applicant's Assets – whether the applicant's "countable assets" are below the threshold amount; and

D. The Applicant's Transfers/Divestments – whether an "ineligibility period" must be imposed upon the applicant because of a "divestment" made within the "look-back period."

IV. Medical Need – Non-Financial Requirements – An applicant for Wisconsin Medicaid must satisfy a combination of the following non-financial requirements:

A. If the applicant is a qualified recipient of Supplemental Security Income, then the applicant automatically qualifies for Medicaid

B. The applicant must apply for all eligible non-need-based public benefits such as insurance benefits

C. The applicant must cooperate with medical support liability and third party liability, and pay any cost share required

D. The applicant must be a U.S. citizen or have a "qualified alien" status

E. The applicant must be a Wisconsin resident and be aged (65 years of age or older), blind or a disabled individual

F. Functional Eligibility for Medicaid: The applicant must be functionally eligible for Medicaid, which means that he or she must be:

i. In need of skilled nursing/medical care or custodial care, meaning that he or she needs help with certain activities of daily living, such as:

1. Eating,

2. Dressing,

3. Bathing,

4. Toileting,

5. Transferring, or

6. Moving about.

ii. Nursing Home Care: The applicant must have a long-term or irreversible condition that is expected to:

1. Last at least 90 days, or

2. Result in death within one year, and

3. Require care, assistance, or supervision.

iii. Non-Nursing Home Care: The applicant must have a condition that is expected to:

1. Last at least 90 days, or

2. Result in death within one year, and

3. Cause the applicant to be at risk of losing independence unless he or she receives assistance.

V. Medicaid Income Eligibility:

A. Income requirements depend on the "cost of care" and the applicable Medicaid program.

B. The applicant's "net income" (gross income less certain allowable disregards and shelter costs) must be below the applicant's "cost of care."

C. The applicant's "net income" must be spent on his or her cost of care, and Medicaid pays the difference, if any (i.e., co-pay situation).

D. For example, if an applicant has $3,000 of monthly net income and his or her cost of care is $6,000 per month, then the applicant will have to expend $3,000 per month towards the cost of care, and Medicaid will pay the balance.

E. There are very detailed program-specific rules for determining "net income," which are beyond the scope of this outline.

VI. Medicaid Asset Eligibility: Depends on the value of "countable assets" an applicant has at the time of application

A. "Countable assets" are all assets owned by an applicant and his or her spouse except for certain "unavailable assets" and "exempt assets."

B. An unmarried applicant or an applicant whose spouse is already receiving Medicaid can have <u>only</u> $2,000 in countable assets.

C. Certain "Spousal Impoverishment Protections" are afforded to a married applicant who has a spouse who is not in need of Medicaid, i.e., a "community spouse."

D. Countable assets in excess of the allowable minimum amount must be "spent down" before the applicant is eligible for Medicaid.

E. Value of assets:

i. Medicaid eligibility depends on the "value" of assets.

ii. The value of assets for Medicaid purposes is an estimate of the price for the asset on the open market, i.e., what a willing buyer would pay for the asset and what a willing seller would take for the asset.

iii. For example:

1. Real property – the estimated value on a real estate tax bill or an appraised value.

2. Marketable securities – the quoted stock price is generally used.

F. Available Assets:

i. For an asset to be "countable," it must be "available" to the applicant.

ii. An asset is available for Medicaid purposes when

1. It can be sold by the applicant or his or her representative,

2. The applicant has the legal right to the sales proceeds,

3. The applicant has the ability to make the money available for his or her support and maintenance, and

4. The sale can be made within 30 days.

iii. Except for certain exempt assets, all available assets are "countable assets."

iv. "Unavailable assets" are assets that are not actually available to the applicant or convertible to cash by or for the applicant for at least 30 days.

v. The applicant must prove that an asset is unavailable.

vi. Examples of available assets include

1. Bank accounts, IRAs, 401(k) and other retirement accounts,

2. Full balance of joint accounts unless an exception applies,

3. Certain annuities, promissory notes, and land contracts,

4. Entrance fees paid to a ***continuing care retirement community*** that can be used towards the applicant's cost of care if the fee does not create an ownership interest and the applicant is entitled to a refund of the fee, even if only at death,

5. Assets held in the name of an applicant's revocable trust,

6. Assets owned by an irrevocable trust to the extent "available" to the applicant (e.g., to the extent a distribution from the trust can be compelled by or for the applicant), and

7. Cash value of life insurance policies with a death benefit exceeding $1,500.

vii. Examples of unavailable assets include

1. Property listed for sale but not sold,

2. Life estate interests in real estate,

3. Certain annuities and promissory notes, and

4. Certain irrevocable trusts, e.g., supplemental needs trusts.

G. Exempt Assets:

i. These assets do not count towards the value of an applicant's total "countable assets" for Medicaid eligibility purposes

ii. Exempt assets for a single applicant include

1. Total of $2,000 in cash or investment assets,

2. Reasonable value of personal property and furnishings,

3. Wedding rings regardless of value,

4. One car of no more than $4,500 in value, or unlimited value if the car is used to go to medical appointments,

5. Cash value of life insurance with a death benefit of $1,500 or less,

6. Certain burial and funeral funds,

7. Property used in a trade or business (may include farm or rental property),

8. Certain equity value of the home, and

9. Assets in a supplemental needs trust when properly set up.

iii. Exempt assets of married applicants – Spousal Impoverishment Protections described in more detail below

iv. Home Exemption - Certain equity value of a home is exempt

1. The equity value of the home is exempt up to $750,000 if:

a. The applicant has the subjective intent to return to the home, and

b. Proof of this intent is provided (proof should be in writing and signed by the applicant or an authorized representative of the applicant).

2. An unlimited equity value of the home if the applicant's spouse, minor, or disabled child lives in the home

3. "Equity value"

a. Is the market value of the home minus any mortgage or other encumbrance on the home

b. For most people, the equity value can be determined by subtracting the outstanding balance of the mortgage and/or home equity loan from the estimated value of the home provided on the real property tax bill

4. Homes can still be subject to a Medicaid lien for a reimbursement of long-term care costs paid by the State

H. Exempt assets of married applicant – Spousal Impoverishment Protections

i. Both spouses can retain the exempt assets of a single individual, except that:

1. They can have only one home and only one car of unlimited value, and

2. The institutionalized spouse must be allocated $2,000 of countable assets

ii. Medicaid permits the healthy spouse (i.e., "community spouse") of a Medicaid applicant to retain certain additional assets and income to permit the community spouse to maintain financial independence

iii. Additional assets that the community spouse may retain:

1. Tangible personal property of unlimited value, e.g., furniture and furnishings,

2. All tax deferred qualified retirement funds (e.g., IRA or work related pension funds) of the community spouse, and

3. Community Spouse Resource Allowance (CSRA)

iv. The balance of the couple's countable assets must be spent down on daily living expenses, the applicant's nursing home cost of care, outstanding bills and other permitted expenditures until the couple has only the CSRA plus $2,000 allocated to the applicant

v. For a more detailed discussion of Spousal Impoverishment Protections, see the Wisconsin Department of Health Services website at www.dhs.wisconsin.gov/medicaid/publications/p-10063.htm.

vi. Calculation of the Community Spouse Resource Allowance (CSRA)

1. The CSRA is calculated as of first day of the applicant's "continuous institutionalization" – i.e., the "snapshot date", which is the earlier of the 30th day in a nursing home and the day of first request for community care,

2. As of January 2019, the CSRA equals the greater of:

    a. One half of the value of a couple's total combined "countable assets" up to $252,840 (i.e. $126,420), and

    b. Up to $50,000 of the value of the couple's total countable assets

3. The CSRA is adjusted annually to reflect inflation

4. The CSRA can be increased if the income of the community spouse is less than the minimum monthly maintenance allowance, which is described below

5. Examples of the determination of the CSRA

    a. For a couple with $300,000 of countable assets, the CSRA is $126,420;

    b. For a couple with $150,000 of countable assets, the CSRA is $75,000;

    c. For a couple with $120,000 of countable assets, the CSRA is $60,000;

    d. For a couple with $75,000 of countable assets, the CSRA is $50,000;

    e. For a couple with $50,000 of countable assets, the CSRA is $50,000;

    f. For a couple with $45,000 of countable assets, the CSRA is $45,000; and

    g. For a couple with $30,000 of countable assets, the CSRA is $30,000.

vii. Minimum Monthly Maintenance Allowance (MMMA)

1. A community spouse is entitled to an MMMA to maintain the spouse's independence in the community

2. The amount of MMMA is set annually according to federal poverty guidelines

3. The MMMA is $2,743.34 as of January, 2019, but can be raised to as much as $3,160.50 to cover certain "shelter expenses"

4. The community spouse can keep income in excess of the MMMA

5. If the community spouse's income is less than the MMMA, then

a. The excess income of the Medicaid spouse can be allocated to the community spouse, and/or

b. The CSRA of the community spouse may be increased, so that the community spouse has sufficient resources to maintain his or her independence in the community

I. Exceptions for long term care insurance

i. Wisconsin Long Term Care Partnership

ii. Intended to encourage the purchase of private long-term care insurance

iii. The applicant is permitted to protect one dollar of his or her other assets for every dollar of qualified long-term care policy proceeds paid for the applicant's care

iv. If the applicant has $100,000 in total long-term care coverage, then the applicant may be able to shelter up to $100,000 in other assets from Medicaid spend down

v. The amount of benefits paid from the policy determines the amount of the applicant's other assets that can be sheltered

vi. The applicant must have been a Wisconsin resident at the time the policy was issued, and the policy must meet certain State requirements to qualify

vii. More information is available, including a list of qualified policies, at the website of the Wisconsin Insurance Commissioner, https://oci.wi.gov/Pages/Consumers/LongTermCare.aspx

VII. Medicaid Spend Down: To the extent an applicant's "countable assets" or "net income" exceed the allowable amounts, assets and/or income must be spent down before the applicant can qualify for Medicaid

A. Generally, assets must be spent on daily living expenses, costs of long-term care, such as nursing home costs or community care, outstanding bills or other permitted expenditures

B. Funds can be spent for the benefit of the applicant, the applicant's spouse, and minor or disabled children

C. To the extent possible, countable assets can be converted to exempt assets by the purchase of exempt assets, e.g., funeral costs, or contribution to the cost of exempt assets, by, among other things, paying down a mortgage on the applicant's home or spending funds on the maintenance and repair of the applicant's home

D. Funds can be expended to cover the cost of necessary services, such as legal, accounting, medical, and dental services, as well as personal and professional services provided by relatives who have served as a power of attorney or have provided assistance with the activities of daily living

E. Funds may also be contributed to a “supplemental needs payback trust” or a “pooled trust account”

F. Excess countable assets or income can<u>not</u> be given away without potential negative consequences, e.g., a “divestment” causing an “ineligibility period”

VIII. Transfer of Assets

A. Medicaid eligibility requires an examination of certain transfers made by the applicant

B. This analysis requires an understanding of the following key terms:

i. Divestments,

ii. Look-back period,

iii. Ineligibility period, and

iv. Ineligibility period start date

C. Divestments: The transfer of income, non-exempt assets, or homestead property in exchange for assets or services that are worth less than the fair market value of what was transferred

i. A divestment is the making of a gift

ii. The penalty for a divestment is the imposition on an applicant of a period of time of ineligibility for Medicaid benefits

iii. Examples of potential divestments:

1. Outright gift of money or property,

2. Selling something for less than what it is worth,

3. Transfers to certain irrevocable trusts,

4. Adding another person’s name to real estate,

5. Creating a life estate interest in real estate,

6. Charitable contributions,

7. Paying someone else’s bills even if for health care and/or education,

8. Lending money without adequate interest or with other very favorable terms,

9. Forgiving debt,

10. Disclaiming or refusing an inheritance or gift,

11. Irrevocably waiving pension income,

12. Not accepting or accessing an injury settlement,

13. Refusing to take legal action to obtain a court-ordered payment that is not being paid, such as child support or alimony,

14. Refusing to take action to claim the statutorily required portion of a deceased spouse's or parent's estate,

15. Purchasing certain annuities, and

16. Paying a family member too much for services rendered by the family member

iv. Certain transfers are not considered divestments, such as:

1. Transfers and purchases in arm's length transactions,

2. Transactions between family members in which fair market value is exchanged,

3. Payment of a fair amount of money for services rendered,

4. Transfers from an applicant to his or her community spouse,

5. Transfers of home to certain specified individuals,

6. Transfers to the applicant's minor or disabled children,

7. Transfers to certain supplemental needs trusts,

8. The purchase of certain qualified annuities,

9. The loaning of money in exchange for a qualified promissory note, and

10. An "intent exception" for certain transfers made with no intent to become eligible for Medicaid

v. Exceptions for the Transfer of a Home: An applicant's transfer of his or her home does not constitute a divestment if the home is transferred to:

1. The applicant's spouse;

2. The applicant's child, who is under age 21, blind or permanently or totally disabled;

3. The applicant's sibling who has an ownership interest in the homestead and who has resided in the home for at least 12 months; or

4. Caregiver Child: A child of the applicant who

a. Has resided in the home for at least two years immediately before the applicant's institutionalization,

b. Provided care to the applicant at home prior to his or her institutionalization, and

c. By providing such care, permitted the applicant to remain at home for a longer period of time than the applicant would have been able to without such care.

D. Intent Exception: the transfer is not a divestment if, at the time of the transfer, one of the following applied:

i. The applicant had sufficient resources to cover the anticipated applicant's cost of care for 5 years;

ii. The applicant's age and health made long-term care in the following 5 years unlikely;

iii. The applicant had a pattern of giving, and the gifts did not exceed 15% of the applicant's annual gross income;

iv. The transfers were made for the support of a dependent relative living with the applicant; or

v. Other circumstances exist which evidence that the transfer was made for a purpose other than a qualification for Medicaid. For example, a person may be able to show that a transfer to a dependent relative not living at home was made for a purpose other than qualifying for Medicaid.

E. Look-back Period: Describes the period of time preceding the date of a Medicaid application during which the applicant's finances are examined to determine if divestments were made

i. The look-back period is currently the 60-month period immediately preceding the date of the Medicaid Application

ii. Divestments during the look-back period cause an "ineligibility period"

iii. Depending on the amount of gifts, the applicant may have to wait 60 months following a divestment before applying for Medicaid

F. Ineligibility Period: The period of time an applicant is ineligible for Medicaid because of a divestment

i. The period is expressed in terms of a number of days (e.g., a 350-day ineligibility period)

ii. The period is calculated by dividing the value of the asset divested (i.e., gifted) by the "statewide average daily nursing home cost to a private pay patient"

iii. The average daily rate as of July 2018 is $286.15

iv. Example calculations:

1. A gift of $100,000 results in an ineligibility period of 395 days ($100,000/$286.15 = 349.47)

2. A gift of $45,000 results in an ineligibility period of 178 days ($45,000/$286.15 = 157.26)

G. Ineligibility Period Start Date:

i. The most problematic aspect of a Medicaid ineligibility period is the date on which it starts

ii. The ineligibility period does not start until an applicant is otherwise eligible for Medicaid:

1. For a single applicant, this is the first month the applicant is in a nursing home, the value of countable assets is $2,000 or less, and he or she does not have sufficient income to cover the cost of his or her care

2. Essentially, an ineligibility period does not begin until the person is in need of medical care in a nursing home and the person lacks the resources to pay for it

3. In other words, when you most need Medicaid, the ineligibility period begins

H. Limited Relief with Hardship Waivers – Under certain circumstances a divestment penalty/ineligibility period may be waived:

i. If the imposition of the penalty period would deprive the applicant of medical care such that the applicant's health or life would be endangered, or

ii. It would deprive the applicant of food, clothing, shelter, or other necessities of life

iii. Hardship waivers were rarely granted; thus, they should not be relied upon

I. Divestments can be cured: An ineligibility period imposed because of a divestment can be eliminated if the entire divested resource or equivalent value is returned to the individual; the entire penalty period is nullified

J. For a more detailed discussion of Divestment, see the CWAG's publication entitled: "*Answering Your Questions About Divestment,"* which is available at http://cwagwisconsin.org.

IX. Consideration of Certain Specific Assets in Medicaid Planning:

A. Joint Ownership of Assets and Accounts:

i. Do not protect assets from Medicaid spend down

ii. The entire account balance of jointly held cash or investment accounts may be considered a "countable asset" of the applicant

iii. Limited exception for "convenience accounts"

1. Accounts including assets of the applicant and a third party created for the convenience of both parties

2. Requires written evidentiary support

iv. Transfers or withdrawals from a joint account may be considered a divestment by the applicant even if made by another account owner

v. The value of jointly held real property is apportioned between the owners according to their ownership interests

vi. If jointly held real estate is unsalable because of the unwillingness of a joint owner to sell, the creation of the joint ownership may be considered a divestment

B. Life Estate Interests:

i. The State of Wisconsin considers a life estate interest in real estate to be an "unavailable asset" – i.e., a "non-countable asset"

ii. Life estates are created by deed

iii. A life estate is a split in ownership between a "life tenant" and a "remainderman"

iv. "Life tenant"

1. Has the right to live on the property or to receive all income from the property during his or her lifetime

2. Normally, the life tenant is the senior generation, i.e., parents or grandparents

v. Remaindermen

1. Receives the property upon the death of the life tenant

2. Normally, the remaindermen are the children or grandchildren of the life tenants

vi. A life estate created in a residence removes the value of the residence from the life tenant applicant's available assets/countable assets

vii. A life estate created before August 1, 2014 removes the residence from the Wisconsin Medicaid estate recovery program upon the death of the life tenant applicant; Wisconsin recently changed the law so that life estates created on or after August 1, 2014, may be available for estate recovery purposes

viii. The creation of a life estate may constitute a divestment

ix. The sale of real estate subject to a life estate:

1. Requires a division of the sales proceeds between the life tenant and remainderman according to their actuarial interests

2. May cause an income tax liability of the life tenant and/or remainderman

C. Annuities:

i. The purchase of an annuity may be considered a "divestment," unless the annuity meets the following requirements:

1. The annuity is irrevocable and non-assignable;

2. The term of the annuity is actuarially sound (it does not extend beyond the applicant's life expectancy); and

3. The annuity provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payments to be made.

4. Alternatively, the purchase of an annuity will not be considered a divestment if the annuity is purchased with funds from:

a. A traditional IRA,

b. A qualified employer retirement plan,

c. Accounts or trusts that are treated as traditional IRAs,

d. A simplified retirement account,

e. A simplified employee pension, or

f. A Roth IRA.

ii. Additional requirements for annuities purchased or modified on or after January 1, 2009:

1. The annuity must be disclosed to the State upon the owner's application for Medicaid,

2. The State must be named as the first remainder beneficiary of the annuity for at least the total amount of medical assistance paid on behalf of the annuitant, except

a. Where community spouse and/or minor or disabled child is named as the first remainder beneficiary.

b. In such cases, the State must be named as remainder beneficiary in the second position

c. Annuities may still be valuable planning vehicles for married applicants or applicants with minor or disabled children

iii. The principal value of an annuity will be considered an available/countable asset, unless:

1. The term of the annuity does not extend beyond annuitant's actuarial life expectancy;

2. The annuity provides for equal payments and adequate interest rate;

3. The annuity is non-assignable, irrevocable, and non-transferrable; and

4. The applicant may need to demonstrate that he or she has made reasonable attempts to obtain a fair market price for the annuity by offering it for sale to companies active in the annuity market

iv. Annuity payments, once made, are considered income of the applicant that must be used for the applicant's cost of care

v. Annuities may be used to convert available assets into an income stream

1. The income stream can create a co-pay situation through which the cost of care is paid proportionately between Medicaid and the applicant

2. Because of Medicaid discounts for care, the total amount paid in a co-pay situation may be substantially less than sole payment by the applicant

3. A portion of the balance of the annuity on the death of the applicant may pass to the children

D. Promissory Notes:

i. The transfer of cash and other property in exchange for a promissory note may constitute a "divestment" unless the promissory note:

1. Has a term that does not exceed the lender's life expectancy;

2. Includes an adequate interest rate (the applicable federal rate);

3. Is payable in equal installments of principal plus interest with no lump sum payments of principal;

4. Does not provide by its terms for the cancellation of the balance due upon the death of the lender; and

5. To be considered an unavailable and non-countable asset, the promissory notes must prohibit assignment, sale or transfer.

ii. The Payment of interest or principal on a promissory note, which is considered to be an unavailable asset because it cannot be assigned, sold or transferred, is treated as income to the Medicaid applicant that must be used for the applicant's cost of care

E. Land Contract:

i. A land contract is a seller financing arrangement in which the seller keeps legal title to the property until the land contract is completely paid

ii. The purchaser builds equity in the property through the payments he or she makes on the land contract

iii. A land contract is considered an available asset for the seller and buyer, which can be sold and converted to cash for support and maintenance, unless it can be shown that either:

1. The terms of the land contract prohibit its sale, transfer or assignment, or

2. No one is willing to purchase the land contract

a. When the claim is that no one will purchase the land contract, it must be offered for sale to at least one individual or organization active in the land contract purchasing market

b. A written statement from such an individual or organization in the market of purchasing land contracts that they will not buy the land contract is generally sufficient to establish that the land contract is an unavailable asset

iv. The treatment of payments made on a land contract depends upon whether the payment is interest or principal:

1. Interest payments are considered unearned income in the month they are received and, as income, they must be used for the applicant's cost of care

2. Principal payments are considered to be assets of the applicant that are not required to be used toward the applicant's cost of care, but they could cause the applicant to have too much in assets to qualify for Medicaid

3. If the land contract cannot be sold because it is not considered to be negotiable, assignable, enforceable, and marketable, any payments of principal or interest on the loan is to be counted as income.

X. Wisconsin Estate Recovery Program:

A. The Wisconsin Medicaid Estate Recovery Program seeks repayment for the cost of certain long-term care services paid for by Medicaid

B. The State seeks repayment through:

i. Liens against a home,

ii. For a life estate created on or after August 1, 2014, a lien may be placed on the life estate interest,

iii. Claims against an estate, affidavits of transfer, and

iv. Voluntary recoveries

C. For a more detailed discussion of estate recovery, see the Wisconsin Department of Health Services website at www.dhs.wisconsin.gov/medicaid/erp.htm, as well as CWAG's publication entitled: "Overview of Medical Assistance Lien Law & Estate Recovery Program Wis. Stats. § 49.496 Wis. Admin. Code § HFS 108.02(10)-(12)," which is available online at www.cwagwisconsin.org.

D. Liens on the Home:

i. Under certain circumstances, the State can file a lien on the home of a Medicaid recipient even if the home is placed in a revocable trust

ii. The State cannot file a lien on:

1. Real property not used as the applicant's home,

2. Life estate or remainder interest in a home created before August 1, 2014,

3. A Home sold by a land contract,

4. Real property outside of Wisconsin, and

5. A mobile home or the land on which it sits when the applicant does not own the land

iii. Before the State can put a lien on an applicant's home, the following must be established:

1. The applicant lives in a nursing home and is required to contribute to the cost of his care,

2. The applicant is not reasonably expected to return to live at the home, and

3. A spouse, child under the age of 21, or a child who is disabled or blind does not live in the home

iv. If the applicant returns to the home, then the lien must be released

v. A return home for hospice care can cause the lien to be released

vi. The State cannot foreclose on a lien on a home:

1. While the institutionalized applicant expresses intent to return to the home,

a. The intent does not need to be reasonable

b. The intent does not have to be currently expressed, but it must be documented

2. Caretaker Child Exception: While a child of the institutionalized applicant lives at the home, if the child lived with the institutionalized individual for two years prior to his or her admission to the nursing home, and by doing so, the child postponed the institutionalized applicant's admission to the nursing home, or

3. Sibling Exception: While a sibling resides in the home, if the sibling holds an ownership interest in the home and the sibling resided in the home for at least 12 months before the applicant's admission to the nursing home

E. Claims in an Estate:

i. The State can file a claim in the probate estate of a Medicaid recipient and obtain recovery for the cost of certain Medicaid benefits received

ii. The personal representative of the estate of a Medicaid recipient is duty bound to inform the State of the probate of the estate

iii. The State must also be informed and compensated in a summary probate proceeding, such as a "transfer by affidavit"

iv. The State cannot file a claim in the probate estate of a spouse of a Medicaid recipient; except that, for spouses passing away after August 1, 2014, the State may file a claim in the probate estate of the surviving spouse of a Medicaid recipient to recover against property of the Medicaid recipient that passed to the surviving spouse on the Medicaid recipient's death

v. The State will generally not enforce a claim against an estate in which the beneficiary is:

1. A surviving spouse,

2. A disabled or blind child, or

3. A child under age 21

vi. If the home of the Medicaid recipient is included in the probate estate, the State can file a lien on the home and foreclose on it subject to the surviving spouse, minor or disabled child exception, caretaker child exception and sibling exception set forth above

vii. Hardship Waiver: Under certain very limited conditions an estate can obtain a "hardship waiver" to an estate recovery; for example:

1. If the waiver applicant is on government benefits, or

2. If the property subject to the recovery is a business asset necessary to the waiver applicant's livelihood (e.g., farm property)

F. Recovery Against Non-Probate Transfers at Death:

i. The State has authority to recover from joint bank accounts and payable on death accounts to the same extent it may recover through a probate estate; as of August 1, 2014, this authority also extends to life estate interests and revocable trusts

ii. Current planning opportunity: Estate recovery can be avoided by transferring assets via Marital Property Agreements. This transfer device, however, does not affect an applicant's eligibility for Medicaid; the assets transferred by a Marital Property Agreement are still available to the applicant during a Medicaid recipient's life

XI. Medicaid Considerations and Common Estate Planning Instruments:

A. Common estate planning instruments often do <u>not</u> reflect important Medicaid considerations

B. For example, the following documents need to be drafted with careful consideration towards future Medicaid eligibility planning:

i. Durable Powers of Attorney,

ii. Revocable Living Trusts,

iii. Marital Property Agreements,

iv. Last Wills and Testaments, and

v. Supplemental needs Trusts

C. Durable Powers of Attorney (DPOA): Through a DPOA a person (referred to as the "principal") designates an individual, usually a family member, to manage the principal's assets as power of attorney in the event of the principal's incapacity

i. A DPOA can be a valuable instrument for implementing Medicaid planning in cases in which the Medicaid application is incompetent or has physical limitations

ii. Medicaid Planning often involves any one or more of the following:

1. Transferring assets between spouses;

2. Creating or terminating a revocable trust;

3. Transferring assets to a revocable trust or withdrawing assets from a revocable trust;

4. Making gifts of assets to a spouse or children;

5. Disinheriting a spouse who is receiving Medicaid benefits,

a. By classifying assets as individual property of the healthy spouse,

b. Changing the beneficiary designations on life insurance policies, IRAs, 401(k)s and annuities of the healthy spouse, and

c. Disclaiming assets

6. Providing for a surviving spouse through a testamentary supplemental needs trust

iii. A well-drafted DPOA can provide the flexibility and the necessary powers to do this planning

iv. The problem is that standard form DPOAs often exclude such essential powers

v. State law may prohibit a power of attorney from exercising such powers unless otherwise specifically provided in the DPOA

vi. Without such powers a guardian may need to be appointed to exercise such powers, or assets may need to be spent down unnecessarily because the assets cannot be transferred away from a Medicaid applicant

D. Revocable Living Trusts (RLT):

i. RLTs are increasingly common estate planning vehicles

ii. RLTs are commonly used as will and guardianship substitutes to set forth the desires of the person creating the RLT (the "grantor") for the management and disposition of the grantor's assets following the death or incapacity of the grantor

iii. The benefits of a RLT include avoiding court involvement in a probate or guardianship proceeding

iv. With respect to Medicaid planning, the following considerations of RLT need to be made:

1. Assets of a RLT are not shielded from the grantor's required Medicaid spend down;

2. Assets held in the name of a RLT are available and, unless otherwise exempt, are countable assets of the grantor of the RLT;

3. The State can impose a Medicaid lien on a home owned by a RLT;

4. A supplemental needs trust for a non-spousal beneficiary can be established through a RLT;

5. A supplemental needs trust for a spouse of the grantor cannot be established through a RLT without causing a divestment;

6. RLT must provide flexibility to ensure the ability to transfer assets for Medicaid planning if a grantor becomes incapacitated; and

7. Assets in a RLT created before August 1, 2014, may avoid estate recovery through claims filed in the probate estate of a Medicaid recipient upon the death of the grantor; estate recovery was expanded to include assets in a RLT created on or after August 1, 2014

E. Marital Property Agreements (MPA):

i. Commonly used by couples to classify assets as marital or individual property under Wisconsin law

ii. Can be used as a Will substitute to avoid probate as well as Wisconsin estate recovery upon the death of a Medicaid recipient

iii. Cannot be used to avoid Medicaid spend down while both spouses are living

iv. Medicaid is governed by Federal law which preempts state law, including Wisconsin marital property law

v. Pre-Medicaid Eligibility:

1. All of the assets of a married couple are generally considered together for determining if either spouse is eligible for Medicaid;

2. Assets of both spouses may need to be spent down before either spouse can qualify for Medicaid;

3. May cause significant problems in second marriage situations; and

4. MPA cannot alter the Medicaid treatment of the couple's combined property prior to one of the couple's qualification for Medicaid

vi. Post-Medicaid Eligibility:

1. Once a spouse qualifies and is receiving Medicaid, the assets of each spouse are considered separately;

2. The spouse receiving Medicaid (the "Medicaid spouse") can transfer his assets to the spouse who is not receiving Medicaid (the "healthy spouse");

3. The healthy spouse may want to disinherit the Medicaid spouse so the assets of the healthy spouse are not subject to a Medicaid spend down if the healthy spouse dies first

4. For the healthy spouse to disinherit Medicaid spouse,

a. A MPA must be executed to classify all assets as the individual property of the healthy spouse;

b. Otherwise the disinheritance of the Medicaid spouse could constitute a divestment by the Medicaid spouse;

c. This concept is referred to as "divestment through disinheritance"

5. In addition, to avoid estate recovery on the assets of the estate of the surviving healthy spouse, a MPA can be used to classify all of the assets of the couple as the individual property of the healthy spouse so that if the Medicaid spouse passes away first, there are no assets in his or her estate which pass to the surviving healthy spouse

F. Last Wills and Testaments:

i. Commonly used to provide for the distribution of assets upon the death of the testator (e.g., the maker of the will), and the designation of a guardian for minor children and a personal representative of the testator's estate

ii. Married couples commonly provide for an outright distribution of all or substantially all of their assets to the surviving spouse

iii. Problem with this plan is that it exposes the assets of the first spouse to die to a potential Medicaid spend down of the surviving spouse

iv. This problem can be avoided by including a "discretionary trust" for the benefit of the surviving spouse in the couple's will in lieu of providing for an outright transfer to the spouse

v. A spouse can only establish a discretionary trust for the other spouse through provisions in the spouse's will (See 42 U.S.C. 1396p(d)(2)(A) and Wis. Stat. § 49.454(1))

G. Supplemental needs Trusts (SNT) For Medicaid Recipients:

i. Trusts that manage resources for the benefit of a Medicaid recipient while permitting the recipient to meet asset and income limitations of Medicaid

ii. The assets are managed by a Trustee, who is someone other than the Medicaid recipient, and who has absolute discretion as to the distributions of trust assets and income

iii. The assets of SNTs are generally intended to supplement a Medicaid recipient's government benefits

iv. SNTs can provide a valuable vehicle for safeguarding assets while providing funds to supplement a Medicaid recipient's care

v. SNTs can be Third Party Trusts or Self-Settled Trusts

vi. Third Party Trust:

1. Created for a Medicaid recipient with the assets of a third party

2. If the third party is not the Medicaid recipient's spouse, then the SNT can be created by a will, RLT or lifetime irrevocable trust

3. If the third party is the Medicaid applicant's spouse, then the SNT can only be created by a will of the third party spouse; and

4. The balance of the SNT upon the death of the Medicaid applicant can be distributed to remainder beneficiaries designated by the third party

vii. Self-Settled Trust, i.e., "payback trusts"

1. Created for a Medicaid recipient with the assets and/or income of the Medicaid recipient

2. For SNT established on or after December 13, 2016, the SNT may be established by the Medicaid recipient or the Medicaid recipient's parents, grandparents, legal guardian or a court

3. The SNT must be irrevocable

4. The beneficiary of the SNT normally needs to be under the age of 65 at the time the SNT is established and funded, except in the case of a Pooled Trust

5. The State must receive all amounts remaining in the trust at the Medicaid recipient's death, up to the total amount of certain public benefits paid on behalf of the applicant, before any distribution can be made to any other remainder beneficiary

viii. The following website provides more detailed information related to supplemental needs trusts, including pooled supplemental needs trusts: www.wispact.org.

H. Medicaid Asset Protection Estate Plan for a Married Couple

i. **Goals to Plan**: This estate plan is designed to accomplish the following goals

1. Preserve flexibility and authority to implement additional asset protection strategies in the event one or both spouses become incompetent and require expensive long term care;

2. Avoid the common problem of all assets passing to a surviving spouse and being exposed to a Medicaid spend down if surviving spouse later needs expensive long term care; and

3. Provide for the surviving spouse through a discretionary testamentary trust designed to maintain the surviving spouse's standard of living while sheltering assets of the first spouse to die from a Medicaid spend down, i.e., surviving spouse does not need to spend down assets of a discretionary testamentary trust before he or she can qualify for Medicaid

ii. **Appropriate Clients**: A married couple:

1. Of advanced age;

2. For whom the premiums of long-term care insurance are cost prohibitive; and

3. Who desire to provide for the surviving spouse and to pass assets to their heirs

iii. **Operative Documents**: The plan generally involves the following documents:

1. **Health Care Powers of Attorney**:

a. Appoint trusted loved ones to make health care decisions for you when you are unable to do so, and

b. Set forth specific health care desires

2. **Durable Financial Powers of Attorney**:

   a. Appoint trusted loved ones to make financial decisions for you when you are unable to do so;

   b. Grant broad powers to financial agent for potential Medicaid planning, including the powers: to make gifts, to transfer assets to spouse or to other beneficiaries, to change beneficiary designations, to enter into a marital property agreement or to amend an existing marital property agreement, and to make loans; and

   c. Indicate that financial agent is entitled to reasonable compensation and that financial agent can retain family members to perform personal services in exchange for reasonable compensation

3. **Marital Property Agreement:**

   a. Classify all property of both spouses as marital property so that each spouse is deemed to own one-half of total assets;

   b. Eliminate all survivorship interests of surviving spouse so that property of first spouse to die can pass to a supplemental needs trust for surviving spouse;

   c. Provide automatic classification to individual property of the Community Spouse upon the Medicaid eligibility of the Institutionalized Spouse to minimize estate recovery;

   d. Provide for contingent options in Washington Will provision to allow for the funding of a supplemental needs trust for the surviving spouse in the predeceasing spouse's will; and

   e. Allow for amendment of agreement by duly appointed financial power of attorney

4. **Last Will and Testament with a Discretionary Trust for the Surviving Spouse**:

   a. Instead of providing for all assets to transfer outright and free of trust to surviving spouse, a discretionary trust for the sole benefit of the surviving spouse is the sole beneficiary of the first spouse to die;

   b. A discretionary trust can provide for surviving spouse during his or her lifetime while sheltering assets of the deceased spouse from a Medicaid spend down;

c. Children or other beneficiaries are named as the beneficiaries of the balance of the assets of the discretionary trust following the death of the surviving spouse; and

d. Trusted individuals are named as personal representatives of the deceased spouse's estate and as trustees of the supplemental needs trust.

5. **Personal Service Contract with Children**:

a. The parents and trusted children execute a written agreement in which the children agree to perform personal services for the parents in exchange for reasonable compensation;

b. The agreement must be in writing, signed and notarized, and compensation must be at or below market prices for similar services provided by a third party; and

c. This allows the parents to pass assets to the children without a divestment.

iv. Basic Medicaid Asset Protection Estate Plan for a Single Individual

1. **Goals to Plan**: This estate plan is designed to accomplish the following goals

a. Preserve flexibility and authority to implement additional asset protection strategies in the event individual becomes incompetent and requires expensive long-term care, and

b. Protect certain assets from a Medicaid spend down

2. **Appropriate Clients**: A single individual

a. Of advanced age but not in need of long-term care in the near future;

b. For whom the premiums of long-term care insurance are cost prohibitive; and

c. Who desires to pass assets to his or her heirs

3. **Operative Documents**: The plan generally involves the following documents:

a. **Health Care Power of Attorney**:

i. Appoint trusted loved ones to make health care decisions for you when you are unable to do so, and

ii. Set forth specific health care desires

b. **Durable Financial power of Attorney**:

i. Appoint trusted loved ones to make financial decisions for you when you are unable to do so;

ii. Grant broad powers to financial agent for potential Medicaid planning, including the power to make gifts, to transfer assets to beneficiaries, to change beneficiary designations, to make loans; and

iii. Indicate that financial agent is entitled to reasonable compensation and that financial agent can retain family members to perform personal services in exchange for reasonable compensation

c. **Irrevocable Trust**:

i. Assets of an individual can be sheltered for Medicaid purposes by contributing the assets to an irrevocable trust;

ii. If properly drafted and funded, the assets of an irrevocable trust are not considered owned by the individual for Medicaid purposes, and the assets are not subject to a Medicaid lien or estate recovery upon the death of the individual;

iii. The trust must be irrevocable (cannot be changed by the creator of the trust) because assets of a revocable trust (a trust that can be changed) are considered to be available to the individual who created the trust;

iv. The trust may provide the individual with only an income interest in the assets of the trust because if an individual has a right to the assets of the trust, these assets will be considered available for Medicaid purposes;

v. An income interest in a trust should be limited to only the right to all interest, dividends and rents earned by assets of the trust as well as the right to live in a house or cottage owned by the trust, i.e., an individual can contribute his or her house and cottage to a trust and continue to use the properties;

vi. Conversely, funds received from the sale of trust assets, e.g., capital gains, are generally not considered trust income;

vii. The creation and funding of an irrevocable trust constitutes a divestment by the individual creating the trust which may affect Medicaid eligibility if an application is made within five years of the trust funding, hence this technique should be reserved for an individual with no immediate need for Medicaid;

viii. Advantages of this technique include: protecting assets from the cost of long-term care, allowing ongoing use of the assets by the individual creating the trust, avoiding probate on trust assets following the death of the individual, avoiding estate recovery or a Medicaid lien, and providing creditor protection for the next generation; and

ix. Disadvantages of this technique include: a reduction in control and access to assets contributed to the trust, the transfer of assets to the trust may constitute a divestment, which can create a Medicaid ineligibility period, and additional administration and accounting costs during the life of the individual creating the trust, but potentially less such costs after his or her death.

d. **Personal Service Contract with Children**:

i. Client and the trusted children or other beneficiaries execute a written agreement in which children agree to perform personal services for client in exchange for reasonable compensation;

ii. Agreement must be in writing, signed and notarized, and compensation must be at or below market for similar services provided by a third party; and

iii. This allows Client to pass assets to children without a divestment

e. **Gift or Sale of Remainder Interest in Real Property to Children or Trust**:

i. A home, cottage or other real property can be protected for Medicaid purposes by converting ownership to a life estate and remainder interest;

ii. As discussed above, a life estate interest allows a parent the right to live or obtain all income from the property during his or her life while providing for the transfer of the property to the children at his or her death;

iii. Life estate interests are not counted for Medicaid eligibility purposes, and the State cannot put a lien on a life estate interest or seek estate recovery against a life estate interest created before August 1, 2014;

iv. The recipient of a remainder interest may be individuals, e.g., children, or a trust for the benefit of such individuals;

v. If a life estate and remainder interest is created by a gift, then its creation constitutes a divestment which can cause an ineligibility period for Medicaid purposes, hence, this technique should be reserved for an individual with no immediate need for Medicaid;

vi. Conversely, if a parent sells a remainder interest to his or her children, the creation of the life estate interest may not constitute a divestment;

vii. An advantage of a life estate remainder interest is the ease of its creation and its acceptance as a means of sheltering a home, cottage, or other real property for Medicaid purposes;

viii. The disadvantage is that, if a life estate remainder interest is created by gift, it is a divestment which could cause an ineligibility period for Medicaid if an application is made within five years of the creation; and

ix. Life estates created on or after August 1, 2014 may be subject to estate recovery.