

person would be eligible for under MA, were it not for the divestment; and

b. For a person institutionalized in a SNF, ICF or inpatient psychiatric facility, the expended amount is the total cost of the institutional care.

(3) **DIVESTMENT OF HOMESTEAD PROPERTY.** (a) *Applicability.* Divestment by any person of his or her homestead property is a barrier to eligibility only if he or she is a resident of an SNF, ICF or inpatient psychiatric facility.

(b) *Amount of divestment.* A person who is a resident of an SNF, ICF or inpatient psychiatric facility who disposed of his or her homestead for less than fair market value on or after July 2, 1983, but within 2 years before or at any time after his or her most recent application for MA or any review of his or her eligibility for MA, shall have the amount of divestment determined in the same manner as in sub. (2) (a).

(c) *Divestment as a barrier to eligibility.* 1. Divestment of a homestead by any person residing as an inpatient in an SNF, ICF or inpatient psychiatric facility within 2 years prior to the date of his or her most recent application for MA or any review of his or her eligibility for MA, shall, unless shown to the contrary, be presumed to have been made in contemplation of receiving MA. Divestment bars eligibility for MA except as provided in subs. 2 and 3 and par. (d).

2. To rebut the presumption that divestment was made in contemplation of receiving aid, the applicant shall furnish convincing evidence to establish that the transaction was exclusively for some other purpose. For example, the applicant may rebut the presumption that the divestment was done in contemplation of receiving aid by showing by convincing evidence that, at the time of divesting, the applicant had provided for his or her future maintenance needs and medical care.

3. Divestment shall only be considered a barrier to eligibility when the net market value of all the resources disposed of exceeds the medically needy asset levels in s. 49.47 (4) (b)3, Stats.

4. Divestment does not occur in cases of division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments.

(d) *Removing divestment as a barrier to eligibility.* 1. Divestment of a homestead is no longer a barrier to eligibility for institutionalized persons:

a. If the amount of divestment to be expended for maintenance needs and medical care is less than the average MA expenditures for 24 months of care in an SNF, when the entire amount of the divestment is expended for this care, or 2 years has elapsed since the date of the divestment, whichever occurs first; or

b. If the amount of divestment to be expended for maintenance needs and medical care is greater than the average MA expenditure for 24 months of care in an SNF, when the entire amount of the divestment has been expended.

2. Expended amounts shall be determined, as long as the person is institutionalized, by using the average monthly MA expenditure, statewide, for care provided in an SNF.

3. An individual who is an inpatient in a SNF, ICF or inpatient psychiatric facility who has been determined to have divested a homestead, may be found eligible if:

a. It is shown to the satisfaction of the department that the individual can reasonably be expected to be discharged from the medical institution and return to that homestead;

b. The title to the homestead was transferred to the individual's spouse or child who is under age 21 or is blind or totally and permanently disabled according to a determination made by the department's bureau of social security disability insurance;

c. It is shown to the satisfaction of the department that the individual intended to dispose of the homestead either at fair market value or for other valuable consideration; or

d. It is determined by the department that the denial of eligibility would work undue hardship on the individual.

History: Cr. Register, February, 1986, No. 362, eff. 3-1-86; renum. from HSS 103.02 and am., cr. (1), Register, April, 1990, No. 412, eff. 5-1-90.

HSS 103.065 Divestment on or after August 9, 1989. (1) APPLICABILITY. This section applies to all institutionalized applicants for and recipients of MA who dispose of resources at less than fair market value on or after August 9, 1989, except for inter-spousal transfers occurring before October 1, 1989, and to all institutionalized applicants for and recipients of MA whose spouse disposes of resources at less than fair market value on or after July 1, 1990. Section HSS 103.063 applies to all applicants and recipients who divested before August 9, 1989 and to inter-spousal transfers occurring before October 1, 1989.

(2) **PURPOSE.** This section implements s. 49.45 (17), Stats., which provides for a period of restricted MA coverage when an individual who is institutionalized or becomes institutionalized, or the individual's spouse, disposes of resources at less than fair market value.

(3) **DEFINITIONS.** In this section:

(a) "Annuity" means a written contract under which, in return for payment of a premium or premiums, an individual or individuals have the right to receive fixed, periodic payments for life or up to a fixed point in time.

(b) "Community spouse" means a person who is legally married as recognized under state law to an institutionalized individual but is not himself or herself an institutionalized individual.

(c) "Expected value of the benefit" means the amount that an irrevocable annuity will pay to a primary annuitant or to joint annuitants during his or her expected lifetime.

(d) "Institutionalized individual" means an applicant or recipient who is an inpatient in an SNF or ICF, an inpatient in a medical institution and with respect to whom payment is made based on a level of care

provided in an SNF or ICF, or receiving home and community-based care MA services under ss. 49.46 and 49.47, Stats.

(e) "Joint annuitants" means the institutionalized individual and his or her spouse named as the payees under an annuity.

(f) "Medical assistance" or "MA" means payment for services provided to a resident of an SNF or ICF under s. HSS 107.09 (2) and (4) (a), payment to a medical institution as defined under 42 CFR 435.1009 for care based on a level of care provided in an SNF or ICF, or payment for services provided under a home and community-based care waiver program authorized under 42 USC 1396n (c).

(g) "Medical assistance card services" means the services covered under ch. HSS 107, except for services reimbursed as institutional care, as defined by s. HSS 107.09 (2) and (4) (a), services received in an SNF or ICF or a medical institution and services reimbursed under a home and community-based care waiver program authorized under 42 USC 1396n (c).

(h) "MA eligibility handbook" means the medical assistance program handbook issued by the department's division of economic support for use by agencies in determining eligibility for MA.

(i) "Primary annuitant" means the first individual, which may be either the institutionalized individual or his or her spouse, to receive payment from an annuity.

(j) "Resource" has the meaning given in 42 USC 1382b, except that the home, as defined in s. HSS 101.03 (75), is a nonexempt resource.

(4) DIVESTMENT. (a) *Divestment resulting in ineligibility.* An institutionalized individual or someone acting on behalf of that individual who disposes of resources at less than fair market value within 30 months immediately before or at any time after the individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not receiving MA on that date, within 30 months immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. A divestment results in ineligibility for MA for the institutionalized individual unless made to an exempt party under par. (b) or (c) or when one of the circumstances in par. (d) exist. An institutionalized individual may also be determined ineligible for MA if his or her spouse disposes of resources at less than fair market value on or after July 1, 1990. In this paragraph, "receiving" means entitled to receive as well as actually receiving, in the same way that "recipient" as defined in s. HSS 101.03 (150) means a person who is entitled to receive benefits under MA as defined under s. HSS 101.03 (95).

Note: The department advises that when the transfer for less than fair market value has been made by the spouse of the institutionalized applicant or recipient, the determination of whether or not the transfer will be treated as a divestment will be made pursuant to both the divestment provisions under s. 49.45 (17), Stats., and the spousal impoverishment prevention provisions under s. 49.455, Stats.

(am) *Transfer of resources within same month.* In determining the amount of the divestment to be satisfied, the agency shall consider all transfers by either the institutionalized individual or his or her community spouse at less than fair market value that occur within a calendar month as one divestment.

(at) *Transfer of resources to an irrevocable annuity on or after October 1, 1993.* 1. Whenever an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, transfers funds on or after October 1, 1993, to an irrevocable annuity in an amount that exceeds the expected value of the benefit, the institutionalized individual or his or her spouse shall be determined to have divested.

2. The agency shall determine the amount of the divestment under subd. 1 by:

a. Determining the life expectancy of the primary annuitant or joint annuitants using the life expectancy tables included in the MA eligibility handbook. Table I shows the age at which the male or female institutionalized individual chose the settlement option for annuitization, life expectancy for an individual of that age, and estimated remaining years of life based on the age at which the institutionalized individual chose the settlement option. Table II shows the ages at which both the male and female joint annuitants chose the settlement option for annuitization, life expectancy for each individual of that individual's age, and estimated remaining years of life based on the ages at which the joint annuitants chose this settlement option; and

b. Adding together the amount of all the payments from the irrevocable annuity scheduled to be made after the month in which the primary annuitant's age or joint annuitants' ages exceed the estimated remaining years of life. The divested amount is the sum of all the payments to be made from the irrevocable annuity after the month in which the primary annuitant's age or joint annuitants' ages exceed the estimated remaining years of life.

Note: For a copy of the life expectancy tables included in the MA eligibility handbook, write the Bureau of Welfare Initiatives, Division of Economic Support, P.O. Box 7935, Madison, WI 53707.

3. If the agency receives a physician's statement which states that the primary annuitant or joint annuitant had a diagnosed medical condition which would shorten his or her life expectancy and that the medical condition was diagnosed before the institutionalized individual, his or her spouse, or someone acting on behalf of the institutionalized individual or his or her spouse transferred funds to an irrevocable annuity, the agency shall determine the expected value of the benefits based upon the physician's statement instead of using a life expectancy table as provided under subd. 2.

(b) *Permitted divestment to an exempt party — homestead property.* Transfer of homestead property at less than fair market value is not divestment resulting in ineligibility under this section if the individual transferred title to the homestead property to:

1. The spouse of the institutionalized individual on or after October 1, 1989;

2. A child of the institutionalized individual who is under age 21 or who meets the SSI definition of total and permanent disability or blindness under 42 USC 1382c;

3. A sibling of the institutionalized individual who has an equity interest in the homestead and who was residing in the institutionalized individual's home for at least one year immediately before the date the indi-

vidual became an institutionalized individual. In this subdivision, "equity interest" means ownership interest in a homestead by one or more persons who pay or have paid all or a portion of mortgage or land contract payments, expenses for upkeep and repair or payment of real estate taxes. The institutionalized individual shall provide documentation to verify the sibling's equity interest in the homestead; or

4. The child, other than a child described in subd. 2, of the institutionalized individual who was residing in the institutionalized individual's home for a period of at least 2 years immediately before the date the individual became an institutionalized individual and who provided care to the institutionalized individual which permitted him or her to reside at home rather than in an SNF, ICF or medical institution which receives payment based on a level of care provided in an SNF or ICF. The institutionalized individual shall provide a notarized statement to the agency from his or her physician or another person or persons who have personal knowledge of the living circumstances of the institutionalized individual stating that the individual was able to remain in his or her home because of the care provided by the child. A notarized statement only from the child does not satisfy the requirements of this subdivision.

(c) *Permitted divestment on or after August 9, 1989, but before July 1, 1990, to an exempt party — non-homestead property.* For transfers that occurred on or after August 9, 1989, but before July 1, 1990, transfer of a non-homestead resource at less than fair market value is not divestment resulting in ineligibility under this section if the individual transferred the resource to one of the following individuals:

1. Beginning October 1, 1989, to the community spouse or to another individual for the sole benefit of the community spouse after the individual became an institutionalized individual;

2. To a minor or adult child of the institutionalized individual who meets the SSI definition of total and permanent disability or blindness under 42 USC 1382c; or

3. Beginning October 1, 1989, to the individual's spouse or to another person for the sole benefit of the individual's spouse before the individual became an institutionalized individual. Such a transfer is not considered divestment resulting in ineligibility for as long as the individual's spouse does not transfer the resource to another person other than his or her spouse at less than fair market value. The individual's spouse shall report any transfer of the resource to the agency within 10 days after the transfer is made as required under s. 49.12 (9), Stats. Failure of the institutionalized individual's spouse to report the transfer may be fraud under s. 49.49 (1) (a) 3, Stats.

(cm) *Permitted divestment on or after July 1, 1990, to an exempt party — non-homestead property.* Transfer of a non-homestead resource at less than fair market value on or after July 1, 1990, is not divestment resulting in ineligibility under this section to the extent that the resource was transferred:

1. To or from the individual's spouse or to another individual for the sole benefit of the spouse; or

2. To a minor or adult child of the institutionalized individual who meets the SSI definition of total and permanent disability or blindness under 42 USC 1382c.

(d) *Circumstances under which divestment is not a barrier to eligibility.* An institutionalized individual who has been determined to have made a prohibited divestment under this section shall be found ineligible for MA as defined under s. HSS 101.03 (95) unless:

1. The transfer of property occurred as the result of a division of resources as part of a divorce or separation action, the loss of a resource due to foreclosure or the repossession of a resource due to failure to meet payments; or

2. It is shown to the satisfaction of the department that one of the following occurred:

a. The individual intended to dispose of the resource either at fair market value or for other valuable consideration;

b. The resource was transferred exclusively for some purpose other than to become eligible for MA;

c. The ownership of the divested property was returned to the individual who originally disposed of it; or

d. The denial or termination of eligibility would work an undue hardship. In this subparagraph, "undue hardship" means that a serious impairment to the institutionalized individual's immediate health status exists.

(5) **DETERMINING THE PERIOD OF INELIGIBILITY.** An institutionalized individual who has made a prohibited divestment under this section resulting in ineligibility or whose spouse has made a divestment under this section resulting in ineligibility on or after July 1, 1990, as determined by the agency, without a condition under sub. (4) (d) existing, shall be ineligible for MA as defined in this section for, beginning with the month of divestment, the lesser of:

(a) Thirty months; or

(b) The number of months obtained by dividing the total uncompensated value of the transferred resources by the statewide average monthly cost to a private pay patient in an SNF at the time of application. In this paragraph, "total uncompensated value of the transferred resource" means the difference between the compensation received for the resource and the fair market value of the resource less any outstanding loans, mortgages or other encumbrances on the resource.

(6) **AGENCY RESPONSIBILITIES.** (a) The agency shall determine if an applicant or recipient who is ineligible for MA under this section is eligible for MA card services. The applicant or recipient's income eligibility shall be determined using the standards under s. HSS 103.04 (4).

(b) The agency shall monitor retention of assets by the non-institutionalized spouse for those transfers that occur on or after October 1, 1989, but before July 1, 1990, under sub. (4) (c) 3 at each application or review of eligibility for the institutionalized spouse.

History: Cr. Register, March, 1990, No. 412, eff. 5-1-90; am. (1), (2), (4) (a) and (c) (intro.), (5) (intro.) and (6) (b), cr. (4) (cm), Register, May, 1991, No. 426, eff. 6-1-91; am. (2), (3) (a) and (4) (a), cr. (4) (am), Register, March, 1993, No. 447, eff. 4-1-93; emerg. renum. (3) (a) to (e) to be (3) (b), (d), (f), (g) and (j), cr. (4t), eff. 1-1-94; renum. (3) (a) to (e) to be (3) (b), (d), (f), (g) and (j), cr. (4t), Register, August, 1994, No. 464, eff. 9-1-94.

Register, August, 1994, No. 464

HSS 103.07 Income. (1) SPECIAL SITUATIONS OF INSTITUTIONALIZED PERSONS. (a) *Support received by institutionalized persons.* 1. Any financial support or contribution received by an institutionalized person shall be considered available when determining the eligibility of that person for MA.

2. The income and assets of the parents of children under age 18 who reside in institutions shall be evaluated by the department to determine whether, pursuant to s. 46.10 (14), Stats., collections may be made from one or both parents. If the child is residing in an institution not specified in s. 46.10 (14), Stats., but the institution is approved to receive MA payments, the parental liability shall be the same as that provided in s. 46.10 (14), Stats., and collected in the same manner.

3. The agency shall decide if the spouse of an institutionalized applicant or recipient should be referred for support action under s. 49.90, Stats. When deciding whether to refer for support action, the agency shall consider the spouse's basic essential needs and present and future expenses. In no case may support from the spouse of an institutionalized applicant or recipient be pursued when the spouse's assets, not counting homestead property and a motor vehicle, or, if applicable, not counting assets excluded under s. HSS 103.075 (5) (a) 2, are less than the amount provided under s. 49.47 (4) (b) 3g, Stats., or, if applicable, the spousal asset share under s. 49.455 (6) (b), Stats., and when the spouse's income is less than the spousal monthly income allowance under s. 49.455 (4) (b), Stats.

(b) *Allocation of institutionalized person's income to dependents outside the institution.* Except as provided under s. HSS 103.075 (6), no allocation may be made from an institutionalized applicant's or recipient's income to a spouse who is eligible for SSI but who refuses to obtain SSI. Except as provided under s. HSS 103.075 (6), no allocation may be made to a spouse or to minor children under the spouse's care if the spouse or any of the children are receiving AFDC or SSI. Otherwise, allocations shall be made as follows:

1. If the spouse is caring for a minor child for whom either the institutionalized person or the spouse is legally responsible, the AFDC assistance standard plus expenses that would be allowed under s. HSS 103.04 (3) shall be used to determine the need of the spouse and children. If their total net income is less than their need, income of the institutionalized person shall be allocated in an amount sufficient to bring the spouse's and children's income up to their monthly need. In this subdivision, "total net income" means income equal to unearned income plus net earned income, and "net earned income" means income equal to gross earned income minus work-related expenses according to requirements of AFDC. Income disregards of the AFDC program under 45 CFR 233.20 (a) shall be used as appropriate in computing income.

2. If the spouse is not caring for a minor child, the SSI payment level for one person living in that person's own household shall be used to determine the spouse's monthly need. The spouse's earned income shall be netted by subtracting the work-related expenses according to sub. (3) and \$20 from earned or unearned income or both. If the spouse's net income is less than the spouse's monthly need, income of the institutionalized person may be allocated in an amount sufficient to bring the spouse's income up to monthly need. Income disregards of the SSI program under

20 CFR 416.1112 and 416.1124 shall be used as appropriate in computing income.

3. The following amounts shall be excluded when computing the income of the spouse and children under subd. 1 or the spouse alone under subd. 2:

Next page is numbered 47