

Answering Your Questions About Divestment
February 2021

This publication provides a general overview of how divestment can affect Medicaid eligibility for individuals in nursing homes, institutional settings, and community based long-term care programs.

Divestment is a very complicated issue, and it may negatively impact an individual's eligibility for long-term care MA. This brochure highlights the most frequently asked questions regarding this topic. If you have specific questions about transfers of income, assets or property please consult with an elder law attorney with estate and long-term care planning experience.

What is Divestment?

Divestment is defined as the transfer of income, assets, or property for less than fair market value for the purpose of becoming eligible for a long-term care Medicaid programs.



Who is eligible for Medicaid?

Generally, an individual applicant must have no more than \$2,000 in countable assets to be eligible for Medicaid. (Note: a married person applying for long-term care Medicaid can have \$50,000 or more in countable assets.)

The following do not count towards this asset limit:

- The home and its adjoining land (if intend to return home or if the person/spouse live there),
- One vehicle (regardless of its value),
- Life insurance policy with a face value of \$1,500 or less,
- Personal effects,
- Household goods (unless deemed expensive, for example: a rare art collection),
- No more than \$4,500 in an irrevocable burial trust,
- Prepaid funeral arrangements - Irrevocable Life Insurance Funded Burial Contract,
- Business assets, and
- IRA of a spouse not applying for Medicaid.

How can divestment impact Medicaid?

A divestment can adversely affect one's application to receive long-term care Medicaid in Wisconsin. If an applicant owns assets over the eligibility limit, he or she may think the solution is to give away assets in order to become eligible for MA; however, this is not the case. An individual should always receive fair market value for any items transferred or sold. Even paying a family member for their care and time assisting you with various chores can be seen as a divestment, *unless* there is a notarized contract in place before the duties have begun. Some other examples include avoiding income, such as waiving pension income, disclaiming an inheritance, not accepting injury settlements, etc.



Do divestment rules apply to all Medicaid Participants?

No. Divestment rules do *not* apply to Medicaid participants who only receive medical insurance card services and/or supplies in the community. Individuals who participate in the Medicare Savings Programs (QMB, SLMB, SLMB+) are likewise *not* subject to divestment rules.

Which Medicaid participants should be concerned about divestment rules?

Applicants for long-term care Medicaid and those who are currently eligible long-term care MA participants who reside in nursing homes or certain other institutional settings or who receive services through a long-term care Medicaid program are subject to divestment rules. Institutional settings include hospitals, nursing homes, intermediate care facilities, community based residential facilities, and skilled nursing facilities. In these situations, the MA program covers many of the costs related to the individual's long-term care. Individuals who participate in the state long-term care Medicaid programs are also subject to divestment rules. Long-term care Medicaid includes Family Care, IRIS, the Wisconsin Partnership Program, PACE, and Institutional Medicaid.

Do rules governing other public benefit programs include divestment penalties?

Yes. Although this publication focuses on long-term care Medicaid, you should also be aware that divesting income, assets or property can affect eligibility for the Supplemental Security Income (SSI) program. Medicaid and SSI have different rules relating to divestment.

What are the consequences of divestment?

As of January 1, 2014, the divestment look back period is 60 months. This means that income maintenance staff will look back 60 months (5 years) prior to the date of a Medicaid application to determine whether any income or assets have been given away or transferred for less than fair market value. Any gifts or transfers for less than fair market value may trigger a divestment penalty and a period of ineligibility for Medicaid.



How long will someone remain ineligible for Medicaid if they divest?

The divestment penalty period is calculated by dividing the amount given away for less than fair market value by \$303.38. The \$303.38 figure is the current average daily nursing home cost for a private pay resident. The period of ineligibility begins on the date the person applies for Medicaid benefits and is otherwise eligible, but for the divestment penalty. There is no limit on how long a divestment penalty period can last. The length of time depends on the value of the gifts made or item(s) given away.

Example: *Mrs. Hopkins is in a nursing home. On 3/23/20, Mrs. Hopkins transfers ownership of \$30,000 in CD's and stocks to her son and receives nothing in return. On 1/1/21, Mrs. Hopkins applies for institutional Medicaid. Her period of Medicaid ineligibility is calculated by dividing the amount divested (\$30,000) and by the average daily nursing home cost for a private pay resident (\$303.38). The result is 98.89 days of ineligibility. Partial days are rounded down, so she will have 98 full days of ineligibility beginning with the day she was otherwise eligible, but for the penalty.*

What are the alternatives to divestment?

The Medicaid program allows applicants and participants to retain a certain amount of assets and still receive coverage for institutional care. The Income Maintenance Consortium that determines Medicaid eligibility in your county will only count certain types of assets when determining whether you own assets in excess of program limits.

If a Medicaid applicant owns assets in excess of the asset limit, he or she may consider spending those assets on permitted expenditures until the value of the assets has dropped below the asset limit. For example, applicants may choose to set up a pre-planning burial fund, make needed home repairs or modifications, or make payments on outstanding medical bills, credit card debt, or other loans in order to attain eligibility. It is important to keep receipts of big ticket items when spending down those assets.

Example: *Ms. Cruz is entering a nursing home and is applying for institutional Medicaid. She is unmarried, and she intends to return to her home after her nursing home stay. The Medicaid asset limit for an unmarried individual is \$2,000. Ms. Cruz has \$6,000 in her savings account. If Ms. Cruz purchases an irrevocable burial trust for a total value of \$2,500, and spends \$1,700 on home repairs, she will have spent her assets down below the \$2,000 limit and will qualify for Medicaid. If Ms. Cruz had instead given away \$500 to each of her 8 grandchildren, that would have been a divestment and would cause a divestment penalty period.*

What about joint accounts or jointly-owned property?

When a person adds another person's name onto a deed as a joint owner that reduces the person's share or ownership interest in the property. Instead of owning 100% of the property, the person now owns a 50% share in the property. Therefore, if the new person added onto the deed did not pay for the ownership interest, then that would qualify as a divestment.

Example: *After Sarah's husband passed away, Sarah becomes the sole owner of her home. Several years later, Sarah decides to add her daughter, Jill, to the title of her property so that Jill will own it when she passes away. Now Sarah and Jill own the property together. Adding Jill's name to the deed as a co-owner is a divestment if Jill does not purchase the ownership interest from her mother for fair market value.*

A similar rule applies to joint bank accounts. A joint bank account means that either owner can access the funds in the account. If a joint bank account is owned by two people, and only one of those people is applying for or on Medicaid, then any money removed from that account by the non-Medicaid owner will be considered a divestment.

Example: *Elizabeth just turned 80 years old. Since she no longer drives, she added her son, Sam, onto her bank account as a joint owner. This way, Sam can help his mom with her banking. If Sam takes any money out of that account for himself, it will be a divestment.*

Example: *Sylvia and her brother Jack are very close. Jack is sick and decides to add Sylvia onto his bank account as a joint owner so she can help him pay his bills. The following year, Sylvia has a stroke and needs to move into the nursing home and apply for Medicaid. The income maintenance consortium which processes her Medicaid application will assume the money in the joint bank account with Jack is an available asset, and it will count any money in that bank account towards the Medicaid asset limit. Sylvia will need to prove that she did not contribute any money to the account and that she was only added to the account for convenience purposes only. This is sometimes difficult to prove.*

NOTE: There are several alternatives to consider instead of adding someone as a joint account holder. A power of attorney for finances document would give a person the authority to help another person with banking, but would not be a divestment.

Can I drop the sale price of my home and not have it count as a divestment?

Yes, in certain circumstances. Homeowners who are looking to sell their home and are unable to (after a reasonable period of time) may drop the asking price of their home. This should not count as a divestment if there was good faith in trying to sell the home for fair market value, and the home is ultimately sold to an unrelated buyer. The fair market value of a home is also based on the condition the home is in at the time of sale, any needed repair work, and the overall marketability of the home.

Example: *According to her property tax statement, the fair market value of Katie's home is \$90,000. Unfortunately, Katie suffered from a stroke and had to move into an assisted living facility immediately without advance notice. Her home needs repair work, fresh paint, new flooring, and a new roof. Katie needs to sell her home quickly because she cannot afford the*

upkeep anymore. Her realtor recommends that she put it on the market for \$80,000 due to all of the repair work it needs. Ultimately, Katie sells her home to an unrelated buyer for \$75,000 in “as-is” condition. This transaction should not count as a divestment because \$75,000 is likely a reasonable price considering the condition of the home, the fact that Katie needed to sell quickly, and that it was close to the realtor’s suggested pricing. Katie may need to show photos, repair estimates, and statements from the realtor to prove the condition and marketability of the home.

Will donating money to a church count as a divestment?

Yes. Donating sums of money to a religious institution, like a church, can qualify as a divestment, especially if it is a large sum of money.

The Medicaid handbook states that it may disregard gifts *already* made to charities if two conditions are met:

1. The person can show a pattern or practice of charitable gifting *prior* to the 5 year lookback period; **and**
2. The total annual gifted amount does not exceed 15% of the person/couple’s gross income.

Example: *Timothy has donated \$400 to his church every month for the past 6 years. Timothy enters a nursing home and applies for Medicaid. His total gross income per year is \$25,000 from Social Security retirement. Since his total donation to the church was \$4,800 per year, which is more than 15% of his gross income, the entire amount of the donations will be considered a divestment, and a penalty period will be calculated and imposed.*

I have more questions about Medicaid and divestment. Who can help me?

Wisconsin’s Benefit Specialist program can provide information about the consequences of divestment. Benefit Specialists cannot advise clients on how to shelter or deplete assets, except through the use of clearly defined exempt assets, such as burial trusts, making improvements or modifications to the home, and paying off outstanding debts. If you wish to further discuss divestment, or set up a special needs trust, you should contact an elder law attorney with experience in long-term care planning.

How do I find an attorney?

For more information about divestment and elder law, please consult a private attorney.

The State Bar of Wisconsin

Lawyer Referral and Information Service (LRIS)

www.wisbar.org

Telephone: (800) 362-9082

The National Academy of Elder Law Attorneys (NAELA)

www.naela.org (type in your zip code to find an attorney near you)

Telephone: (703) 942-5711