Attorney Timothy P. Crawford, CPA, CELA*, CAP**
wants to share this information with you.

MEDICAID ALERT: THE REACH OF WISCONSIN'S NEW MEDICAID ESTATE RECOVERY AND PLANNING SOLUTIONS ARE CLARIFIED.

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The Elder Law Section of the Wisconsin State Bar met for its annual conference on January 21 and 22, 2016. The number one topic at the conference was Wisconsin's new *expanded* Medicaid Estate Recovery program: its reach, traps, hardship and solutions. Although Wisconsin's new Estate Recovery started on August 1, 2014, the details of its enforcement and the realization of its impact on Wisconsin families are just coming into focus.

The basic idea of Medicaid Estate Recovery is for the State to recapture its Medicaid payments made on behalf of a nursing home resident from whatever interest in property the resident owned at the time of his or her death. The new law extends recovery to reach the *expanded* estate of not only a nursing home resident but also the surviving spouse if the nursing home resident was married. The *expanded* estate concept goes far beyond a probate estate, as described below.

RECOVERY AGAINST THE UNMARRIED MEDICAID RECIPIENT'S ESTATES

Homestead – Upon death of an unmarried person, expanded estate recovery goes against the deceased person's homestead in his or her own name alone, the value of his or her life estate, share of a joint tenancy of his or her homestead, or his or her homestead in a revocable living trust.

Joint accounts – The State will pursue the entire amount of any joint account which contains the name of the decedent. This is because the decedent had 100% access to the account.

Unspent funeral accounts – The State will pursue any funds in a funeral account that are left unspent after the funeral.

Vehicle – The State will pursue the decedent's vehicle.

Death benefit of life insurance – The State will pursue the death benefit of a life insurance policy the Medicaid recipient purchased after August 1, 2014 (when expanded estate recovery became effective) – even though certain loved ones are named as designated beneficiaries.

Enforcement actions – The State has expanded methods to enforce the new estate recovery: liens against the homestead at the time of Medicaid application, probate claims and affidavit procedures against the expanded estate.

> **Example:** Mary, a widow, enters a nursing home and wants to apply for Medicaid. She has a home, a $1000 joint bank account with her daughter, $10,000 funeral account, a vehicle, and a $15,000 life insurance policy with a cash value of $1000. Mary added her daughter's name to the home 10 years ago. The life insurance policy was purchased on January 1, 2015 and names her daughter as the only beneficiary. Since Mary's countable assets are $2000, and her other assets are exempt from Medicaid, she can immediately qualify for Medicaid benefits. Assume that Mary resides in the nursing home for two years and then dies with the same asset picture as when she entered. Assume also that only $5000 of the funeral account is spent for her funeral, leaving $5000 unspent. Under new expanded estate recovery, the State will pursue recovery against Mary's vehicle, the $1000 in the joint account, the unspent $5000 from the funeral account and the $15,000 life insurance death benefit, even though it was earmarked for her daughter.

The good news is that with proper advance legal and ethical planning, loss of most of the above assets to estate recovery can be avoided.

RECOVERY AGAINST MARRIED COUPLES

Wisconsin's new expanded estate recovery imposes its reach against a married couple's probate and non-probate estate of the spouse who dies last – even if that spouse is the Community Spouse (that is the spouse living at home).

Another punitive restriction is that the couple's assets are frozen during the period that the nursing home spouse is alive - not to exceed five years after the nursing home spouse begins to receive Medicaid. This means that the Community Spouse cannot make any gifts or transfers during this five year period.

If gifts or transfers are made, they disqualify the nursing home spouse from Medicaid. Such a disqualifying transfer is known as a divestment.

If the Community Spouse fails to report a divestment, Medicaid will be retroactively denied and he or she may be subject to a claim of fraud against the community spouse.

The intent of these draconian measures is to treat the Medicaid benefits provided to the nursing home spouse as a family loan to eventually be repaid upon death of the surviving spouse.
The good news is that the new law does offer some limited protective rules for the Community Spouse and there are legal and ethical strategies that can increase asset protection for the Community Spouse and other beneficiaries.

So, how do these rules work in a married couple situation?

1. **Five Year Frozen Asset Rule.**

During the nursing home spouse's lifetime - not to exceed five years after a nursing home spouse begins to receive Medicaid - the couple's assets are frozen. This means that any gifts or transfers made by the Community Spouse (called divestments) will result in the disqualification of the nursing home spouse from the Medicaid program until the gifts are returned. The Community Spouse is free to spend as much money as she or he wants on personal expenses for both spouses.

If the Community Spouse is healthy enough, she or he may wish to purchase life insurance which names the couple's children as beneficiaries or long-term care insurance for herself or himself. These purchases are not gifts or transfers to children and would not be subject to estate recovery upon death of the Community Spouse.

If the Community Spouse makes gifts or transfers but fails to timely disclose them to the Medicaid agency, retroactive denial of Medicaid will eventually happen and the State may impose a fraud claim against the Community Spouse.

2. **Community Spouse Dies First.**

A recommended legal and ethical solution is for the Community Spouse to set up a Will that includes a special support trust for the nursing home spouse rather than to name the couple's children as heirs under a Will, trust or beneficiary designation.

This type of Will-based trust is called a Testamentary Supplemental Needs Trust (TSNT). This strategy requires the probate court to set up the TSNT from special language inside of the Will.

Such a trust will prevent loss of Medicaid for the nursing home spouse and provide her or him with supplemental needs above Medicaid support. Because the trust only supplements Medicaid assistance and does not replace it, most of the principal of the trust will be preserved for the couple's children after the nursing home spouse later dies.

A TSNT is exempt from estate recovery upon the nursing home spouse's later death.

This strategy is allowed by the federal and state law as an exception to divestment as well as an exception from estate recovery when a nursing home spouse later dies. Another necessary document to this strategy is an agreement between the spouses that opts-out of marital property.

3. **Death of the Community Spouse After the Death of the Nursing Home Spouse.**

In the event the Community Spouse survives the nursing home spouse and then later dies, the bad news is that the draconian post-death recovery rules of the new law continue to hang over and reach the Community Spouse's probate and non-probate assets.

As mentioned earlier in the unmarried recipient case, the State can reach the Community Spouse's interest in her or his home, unspent funeral account, vehicle, and joint account. But the State can also reach the special exempt assets that prevent the Community Spouse's impoverishment, including her or his resource allowance and IRA.

The first way to legally circumvent these rules is for the Community Spouse to transfer (after the death of the spouse in the nursing home) at-risk assets into an irrevocable trust for the couple's children. This is referred to as an "Asset Protection Trust." This is not viewed as a divestment that would affect benefits of the deceased nursing home spouse since she or he has died and no longer needs Medicaid. This is a divestment for the community spouse but she or he is not yet on benefits so would not be a problem unless she or he applies for benefits within 5 years.

The second method to avoid recovery is for the Community Spouse to have some fun spending the excess assets if she or he prefers not to establish an Asset Protection Trust. Consideration should be given to the purchase of long-term care insurance.

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CONCLUSION

Please keep in mind that the biggest financial risk faced by seniors is the catastrophic cost of a long-term care admission to a nursing home which can cost between $8,000 and $10,000 per month.

Wisconsin's new expanded Estate Recovery rules are some of the most punitive and complicated in the country.

As described above, there are legal and ethical crisis strategies that can circumvent many aspects of the new law, but they should only be attempted with the guiding hand of an experienced Elder Law Attorney, preferably by an attorney certified in the elder law practice.

Rather than rely on these crisis strategies, its better to seek out long-term care insurance and other legal pre-planning measures, such as an Asset Protection Trust which takes 5 years to implement along with updated and comprehensive powers of attorney and advance directives.

If you have not already done planning to protect your home and assets, please call our office at 262-634-6659 to get started.

"Those Who Plan Ahead Win.
Those Who Don't Plan Ahead Lose."

This article is for informational purpose only and is not intended as legal advice. It is recommended that you call Timothy P. Crawford for a free conference to discuss your situation in more detail. Attorney Crawford can be reached at 1-262-634-6659. Please refer to this article when you call.

*Attorney Timothy P. Crawford is a Nationally Board **C**ertified **E**lder **L**aw **A**ttorney (**CELA**). He has been Board Certified by the National Elder Law Foundation which has been approved as the Sole Certifying Organization for Elder Law Attorneys by the American Bar Association.

Timothy P. Crawford was invited to join the **Council of **A**dvanced **P**ractitioners (**CAP**) of the **N**ational **A**cademy of **E**lder **L**aw **A**ttorneys (**NAELA**) in August of 2005. **CAP** is a small group of premier elder law attorneys, all of whom have been members of

NAELA for at least 10 years, are certified as elder law attorneys by the National Elder Law Foundation, and are AV rated by Martindale Hubbell, a service that provides an independent rating of the quality of attorneys, as one of the top attorneys in the nation.

Attorney Timothy P. Crawford has been selected as a **Fellow** of NAELA. **Fellow** is the highest honor bestowed by the Academy. Selection as a **Fellow** signifies that his peers recognize the lawyer as a model for others and as an exceptional lawyer and leader.

Attorney Timothy P. Crawford has a superb rating of 10 out of 10 with A V V O.

A V V O has awarded to Attorney Timothy P. Crawford the A V V O Client's Choice Award.

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"A majority of text has come from an article prepared by Robert C. Anderson CELA & Attorney, friend of Attorney Timothy P. Crawford, and is used here with permission."