

Pulse Report:

Birth Cost Recovery in Wisconsin: **“It’s Not Child Support.”**

A policy investigation.



HealthWatch Wisconsin

32 N. Bassett St. Madison, WI | healthwatchwisconsin.org



Introduction

Our ongoing research and investigation illustrates that Birth Cost Recovery (BCR) policy in Wisconsin systemically hinders statewide efforts to promote improved birth outcomes, reduce infant mortality, drives families further into poverty, and discourages unmarried fathers to play an important and supportive role in their children's lives.

BCR is Not Child Support

The policy does not support children; rather it supports child support offices. BCR is a collections process directed by the State of Wisconsin and implemented by County Child Support Agencies (CSAs) that aggressively pursues the recovery of Medicaid supported birthing costs from unmarried, often non-custodial fathers. ABC for Health has advocated—and continues to advocate—for Wisconsin to abandon the practice altogether as most other states already have. At a minimum, Wisconsin should refocus the approach to lessen the unintended negative consequences on children and families.



A Review – What is BCR? How is it Implemented in Wisconsin?

The Social Security Act created a federal system to collect child support payments from non-custodial parents.⁽¹⁾ As such, the system requires states to locate unmarried parents, establish paternity for non-marital children, and establish orders to collect financial support. The system also *allows* states to recover Medicaid related pregnancy and birth costs from unmarried fathers after the birth of a child. However, the vast majority of states do not pursue birth costs from unmarried parents.

Wisconsin follows a dangerous path that interferes with prompt access to prenatal care for pregnant women. Typically, when an unmarried pregnant woman applies for BadgerCare Plus, she is asked to name the father. The father's name is ultimately forwarded to the CSA, which will attempt to recover birth related expenses from the father. The BCR process is linked to child support obligation payments and the required repayment obligation is set by a judge or court commissioner in family court.



According to the Wisconsin Department of Children and Families, under federal rules, CSAs will ask the court to set the repayment amount to the lower of the following options:

- 5% of the father's monthly income over a 36 month period, or
- Half of the regional average amount for birth costs, or
- Half the actual birth costs up to the full regional amount for birth costs ⁽²⁾

For reference, the projected Medicaid HMO birth costs for live births (no additional costs for multiple or cesarean births) vary between \$3,996 to \$6,177 among Wisconsin's 6 regions.⁽³⁾

If a pregnant mother does not provide the name of the father of her child, she may be deemed "non-cooperative" and can be sanctioned by losing BadgerCare Plus benefits 60 days after the birth of her child. However, a mother who chooses not to identify the father of her child can request a "Good Cause Exemption."

State records show that between 2011 and 2015, an annual average of 512 Good Cause Exemption requests were filed by unmarried mothers. Of these, an average of only 144 or 28% were granted each year.⁽⁴⁾ The County Income Maintenance Agency determines if good cause exists to grant the exemption.

The required documentation to prove good cause can be steep for an unmarried mom—which may explain why so few exemptions are approved. The CSA may request the mother to submit a written statement from a health care provider about her emotional or physical health, law enforcement records to establish facts, or written statements from friends, neighbors, or social workers familiar with the circumstances.⁽⁵⁾

Few low-income mothers can meet the complex standards necessary to prove good cause. Because almost all mothers are without legal representation in their attempts to prove good cause, they are considerably less likely to successfully influence the ultimate decision. If the father does not pay, he may have his wages garnished, taxes intercepted, or have some public benefits denied or revoked.

One Family's Story

Ariel is a 25-year-old woman who recently returned to school to pursue a degree. Over the summer, she moved in with her 28-year old partner of 3 years, Nick. Recently, the couple found out they are expecting and are ecstatic to add a new member to their family. Ariel and Nick plan to marry down the road after they save up some money, but the financial priority will be on the new baby, Ariel's schooling, and the family. Ariel is unable to work while she attends school, while Nick struggles to make their ends meet on a single income. Nick strives to support the family, but they both realize that Ariel will need BadgerCare Plus to cover mom and baby's current and future health insurance needs.

Ariel works through a BadgerCare Plus application, but stops when she sees a question asking her to name an "absent parent." She is confused, as Nick is not absent, they are simply unmarried. Ariel has heard that some of her unmarried friends and neighbors encountered issues when listing the dad as an "absent parent," ending up with a court date for the dad. Nick would be upset, even angry to have to go to court and the family cannot afford a lawyer. Ariel worries; she knows that if she does not list Nick, she could be sanctioned and ultimately lose her BadgerCare benefits after the baby is born. But she also knows that if she lists Nick, the county will take him to court to cover the costs of the birth—an expense she is positive he cannot pay while he pays their normal bills. Ariel realizes that if Nick pays monthly BCR payments, he would be less able to help care for her and her child. Ariel is afraid to call Nick and tell him, afraid of causing him more tension or worry. She puts down her phone and starts to consider other options. Her child has not even been born yet; BCR is already driving a wedge between a happy and intact couple.



Ariel feels the stress and anxiety growing as she considers her third option; to forget about the application completely. She could simply wait to get prenatal care, or pay out of pocket and avoid the expenses that BadgerCare would cover. Her partner would not have to pay for BCR at all! She wonders if this is an option for her baby.

Ariel feels the pressure of this situation and even more confusion. How is she supposed to choose between potentially harming her child or hurting her relationship with Nick? Stuck in a lose-lose situation, she thinks of their child. She hopes Nick understands and can somehow afford the stress and expenses related to a BCR judgment and still provide a comfortable life for their child and new family.

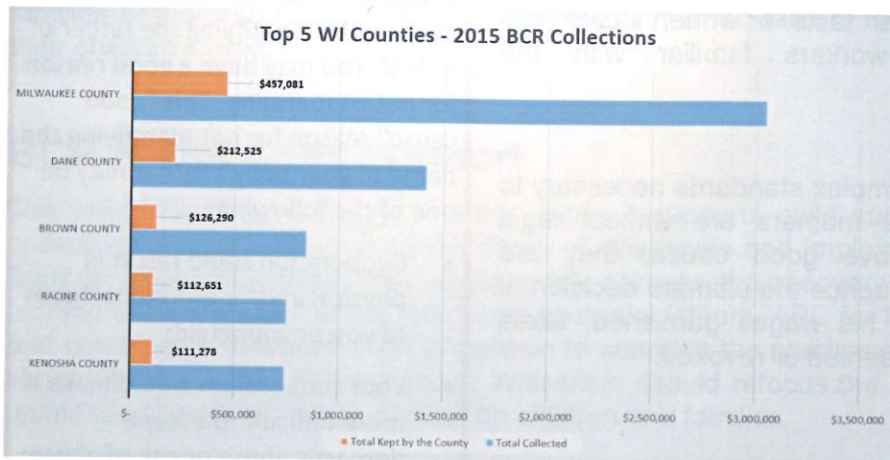
What is Good Cause?

Pregnant women are asked to cooperate with child support agencies by identifying the father of a child. You may have a good reason for not cooperating. This "good cause" reason for not identifying the name of your baby's father may be one of the following:

- Cooperation could result in physical and/or emotional harm to you or your child;
- Your cooperation would make it more difficult to escape domestic abuse or risk of abuse;
- Your child was born as a result of sexual assault or incest;
- A petition for adoption of your child is filed or you are working with an agency that is helping you decide if you will place your child for adoption.⁽⁶⁾

Why is BCR So Critical to Address?

BCR policy affects a significant proportion of Wisconsin's most vulnerable families—unmarried women, fathers, infants—but most often, minority families in poverty.



In 2015, BadgerCare Plus supported 37% of the 67,004 births in Wisconsin. Of the BadgerCare supported births, 69% were to unmarried moms, which means 17,106 fathers were potential candidates for BCR judgments. Furthermore, birth cost judgments disproportionately affects black mothers and families; in 2015, MA/BadgerCare supported 5,114 births to Black/African American women and 90% of the mothers were unmarried.⁽⁷⁾

Between 2011 and 2016, Wisconsin collected nearly \$106 million in BCR judgments.⁽⁸⁾ Unlike child support, not a nickel of those collections went to support Medicaid eligible moms and infants in need; \$15,883,236 went to CSAs, and the remainder went to the state and federal governments.

BCR may increase infant mortality.

In the “2016 America’s Health Rankings”, the United Health Foundation indicated that Wisconsin’s black/white infant mortality ratio of 2.9 is among the highest in the nation.⁽⁹⁾ Research by Dr. Meghan Pesko in a MPH Capstone project at the UW School of Medicine and Public Health makes the cogent case that BCR policy may be a significant contributor to infant mortality. The unintended consequences of Wisconsin’s BCR policy—such as perpetuating family poverty, contributing to parental discord, lack of paternal support, increase in chronic stress, and delayed entry into prenatal care—may contribute to infant mortality (death of an infant before age 1). Dr. Pesko concludes that “elimination of BCR policy should be considered as part of a multi-faceted effort to reduce health disparities in infant mortality in our state.”⁽¹⁰⁾

Excessive birth cost judgments negatively impact child support payments.⁽¹¹⁾

The number of single parent households in the U.S. has risen from approximately 9% in 1960 to greater than 26% today.⁽¹²⁾ Therefore, the role of child support payments has become even more critical to lift single moms and children out of poverty. Large BCR judgments compromise resources from financially strapped dads that could otherwise be used to support the family. Strong enforcement measures by CSAs often do not result in increased payments but instead keep fathers from participating in the system.⁽¹³⁾

BCR makes unmarried dads less likely to take an active role in their infant’s life.

BCR judgments can become 30% of an under or unemployed non-custodial father’s income.⁽¹⁴⁾ The fear of inability to pay, the potential for court action, contempt of court charges, loss of a job, etc. can act as an incentive for a father to disengage and run. At the very least, the weight of obligations associated with BCR can cause family conflict and can keep fathers—and precious financial resources—away from the families and children. Anecdotally, some unmarried fathers will not attend the birth of their own child because they do not want to be identified and forced to pay for the birth costs; this is troubling because research has shown that paternal absence may widen the black/white gap in infant mortality almost four-fold.⁽¹⁵⁾ Remember, no dollars recovered under BCR go to the family.

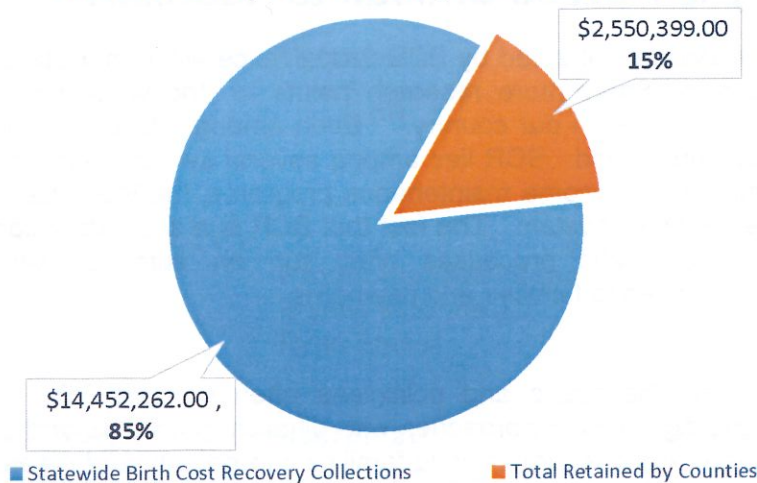
Again, none of these collections go to children and families. Federal child support laws incentivize CSAs to maximize collections by their ability to keep 15% of collections for the support of their county agency budget. The remaining 85% is returned to the Wisconsin Department of Health Services and the federal government for repayment of Medicaid costs.

Wide variation exists with respect to BCR policy among the states. However, because there is little federal oversight of BCR within the U.S. Department of Health and Human Services, comprehensive state-to-state comparison data is nonexistent.

In 2010, the National Council of Child Support Directors Member Survey indicated that only a small minority of states even continue to practice BCR. ⁽¹⁶⁾ Wisconsin was then found to be one of only eight states that still practice and implement BCR policy—and among those states, Wisconsin appeared to have the most aggressive enforcement posture.

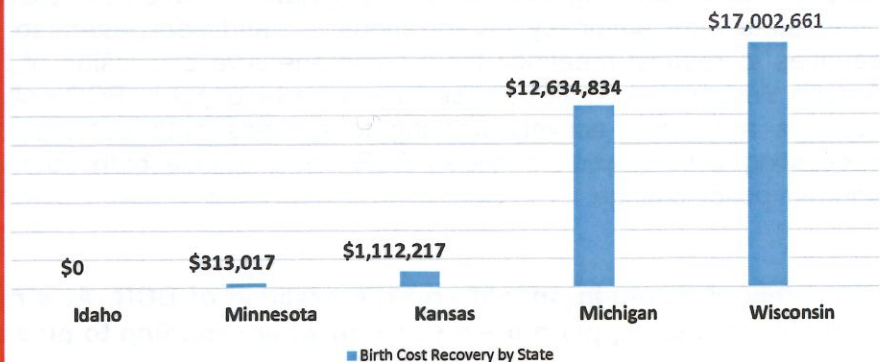
Although the federal law has not changed at all, most states have abandoned the practice of BCR after realizing that it is not in the best interest of the family.

Birth Cost Recovery Collections & Payments to Counties 2015



BCR collects significant resources from families— in excess of \$100 million between 2011-2016 in WI alone.

Birth Cost Recovery Amount Collected in 2015



Wisconsin has 58.2% of the population of Michigan yet has collected almost \$4.4 million more in BCR.

This chart is based on information ABC collected in Fall 2017 via Freedom of Information Requests to the **eight states known to still recover birth costs as of 2010**. In 2014, Idaho discontinued BCR practices from Medicaid-covered births entirely, with a district court decision that found the State's application of Idaho's Medicaid reimbursement statute violated constitutional equal protection rights.

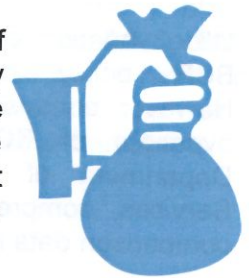
Wisconsin's neighbor, Minnesota, still continues to pursue recovery of Medicaid birth costs from non-custodial parents, but experienced a significant decrease in the cases pursued in the past 15 years. In 2015, Minnesota only collected about \$300,000, compared to Wisconsin's 2015 collection of \$17 million. The Minnesota Department of Human Services informed us that Minnesota practices extreme discretion when deciding whether to pursue the recovery of birth costs.

Minnesota concluded that the best interest of the family is compromised by imposing a birth cost judgment when the father is unable to pay. Also, the administrative costs to obtain the judgment may exceed what the county or state can recover from the father.

Why is BCR so Difficult to Address?

The individuals affected by BCR lack a voice within our state policy making structure. This is not unique to Wisconsin. Sadly more research points to “the widening gulf in political voice and power along socio-economic lines” in our country.⁽¹⁷⁾ Even among advocates, the issue is often lost because it is complex and poorly understood. BCR lies among several systems—the county child support enforcement agency, family courts, county income maintenance programs, the Wisconsin Department of Children and Families, and the State Medicaid system. The fact that BCR is a secondary consideration in the Child Support System means that bureaucratic processes often run on autopilot without full consideration of potential negative consequences to families and newborns.

Moreover, the public and politicians often conflate BCR with child support instead of recognizing unique approaches with different outcomes and consequences. Instead, policy misinterpretations further drive families into poverty and create family instability. Finally, the opportunity for counties to retain 15% of BCR payments creates an incentive to maximize BCR judgments to fund Child Support Enforcement operations. County governments might be resistant to change as they collectively received almost \$16 million toward their budgets between the years 2011 through 2016.



What Happens Next?

ABC for Health has long advocated for a review of Wisconsin’s BCR policy. Recently, ABC teamed up with 13 other state-wide advocacy organizations⁽¹⁸⁾ and sent letters to the Executives of Milwaukee and Dane counties to request meetings for a comprehensive discussion of the county level approach to BCR policy. Among Wisconsin counties, these two ranked highest in BCR collections for the period 2010 to 2016. Both counties are also actively working to address birth outcome disparities, and we hope that research suggesting a connection between BCR and negative birth outcomes might prompt a good faith effort to address policy change.

Ultimately, Wisconsin should end the practice of BCR. At a minimum, CSAs and Economic Support (ES) offices must apply more discretion when deciding to pursue actions against absent parents.

The overwhelming majority of states either abandoned or never used the practice of BCR. The practice is not required by federal law, does not support the child, and is not in the best interest of families.

- Common sense dictates that CSAs should not pursue a birth cost judgment when the father is a member of an intact family unit at the time of paternity establishment and contributes to the support of the mother and child through income or in-kind services.
- CSAs should not seek a birth cost judgment against a Medicaid or BadgerCare Plus eligible father.
- The decision to pursue a birth cost judgment should review a father’s current and future ability to pay, including factors such as employment and earnings history, job skills, educational attainment, availability of suitable jobs in the local economy, and other barriers to employment.
- CSAs and ES offices must promote significantly improved education and outreach related to Good Cause exceptions for pregnant women, health care providers and other advocates
- Community stakeholders must help inform and assist pregnant women to secure evidence that supports Good Cause requirements and terminate the need to identify the father as not in the best interests of the mother or child

Wisconsin leads the country in the pursuit of absent parents for Medicaid birth expenses; this practice fails to support families. Through elimination of BCR actions against absent parents, Wisconsin will demonstrate its actual commitment to the support and well-being of children and families.

Contributors

Research and Writing Team

Bobby Peterson JD
Mike Rust
Richard Lavigne Jr JD
Anna Kaminski
Claire Culver

Legal Interns

Julia Walsh
Lydia Hartlaub
Sam Hutchinson

Volunteers

Tom Seiger

Production Assistance

Bryne McBride JD
Ryan Stasel

Visit our full directory of BCR research at:

[HealthWatchWisconsin.Org](https://www.healthwatchwisconsin.org)

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18. List of 13 statewide partner organizations



*Advocacy & Benefits Counseling for Health, Inc.
Serving Wisconsin Families Since 1994*

Birth Cost Recovery

ABC for Health, Inc. opposes the practice of Birth Cost Recovery

1. **The Birth Tax Should be Eliminated:** Dane County has eliminated birth cost recovery collections, effective January 1, 2020. This is a huge step for Dane County – and one other counties across Wisconsin can emulate. We hope this change will help close the gaps in racial and economic disparities in our community, but there is still much more work to do. Some Families still have outstanding Birth Tax judgments and collection actions that remain from previous years. The judgments lead to tax intercepts of refunds, garnished wages, or sanctions on a mother's Medicaid because of this policy.
2. **In Milwaukee and other low income communities,** the Birth Tax disproportionately affects low income black and other minority families and likely contributes to infant mortality and morbidity.
 - a. **Race Disparities.** Data show that Medicaid birth cost recovery disproportionately affects Wisconsin's most vulnerable families, including members of racial minority groups and low income rural residents. In Milwaukee County, for example, more than half of all births in 2015 were to mothers enrolled in Medicaid. Whereas only 22% of births to white mothers were covered by Medicaid, the rate jumps to 74% and 77% respectively for births to Hispanic and African-American mothers. Among all Medicaid-covered births in Milwaukee County in 2015, 78% were to unmarried mothers.
 - b. **Prenatal Care Deterrence.** Our research identifies that Medicaid birth cost recovery may cause mothers to forego prenatal care, discourages voluntary establishment of paternity, and reimburses the State at the expense of additional support that might go to the child.
 - c. **Infant Mortality.** The Birth Tax may contribute to Wisconsin having the nation's highest infant mortality rates for African-American babies and the nation's largest gap in mortality rates between white and black infants. Both the public health departments for Madison and Dane County and the Milwaukee Health Department have identified the repeal of Medicaid birth cost recovery as a strategy to improve birth outcomes. (Milwaukee Health Dept., City of Milwaukee 2015 Infant Mortality Rate (IMR): Data Brief 4, (June 14, 2016) and 2016 Infant Mortality Rate (IMR): Data Brief 4 (May 22, 2017).)
3. **Equal Protection Violations?** A case in Idaho used Equal Protection arguments to invalidate Birth Cost recovery. ABC for Health met with ACLU attorneys in Wisconsin and nationally to review equal protection guarantees that may be violated by the birth cost recovery practice.
4. **CMS Recoupment?** CMS may seek recoupment on funds inappropriately collected by the state as enhanced matching, in light of the guidance shared in response to Michigan's inquiry.

More information on the Birth Tax is available at <https://safetyweb.org/healthwatchwi/Birth%20Cost%20Recovery.html>

Phone: (608)261-6939
Fax: (608)261-6938

ABC for Health, Inc.
32 N. Bassett St.
Madison, WI 53703

Email: info@safetyweb.org
Online: abcforhealth.org

Medicaid Birth Cost Recovery: New Rules Affect Unmarried Parents

Lawyers who work with low-income clients can make a meaningful difference by being aware of opportunities to challenge or reduce Medicaid birth cost judgments.

RICHARD LAVIGNE

During the past four decades, the number of unmarried parents in America has increased fourfold.¹ Over that time, changing attitudes toward marriage have contributed to a rise in the percentage of unmarried parents who are cohabiting with a partner. Today, more than one-third of unmarried parents living with a child also live with a partner.² Cohabiting unmarried parents tend to be younger and less educated and to have lower household incomes than married parents.³ Lower household incomes, combined with more generous Medicaid eligibility policies for pregnant women, increase the likelihood that medical expenses for births to unmarried cohabiting parents will be covered by Medicaid.

In Wisconsin, state law allows the government to recoup a portion of those birth expenses from unmarried fathers. As a consequence, many unmarried couples are exposed to birth cost recovery orders in paternity proceedings. Regardless of whether ongoing child support obligations are imposed, these couples may enter into parenthood bearing an instant burden of support arrearages.

Fortunately, recent changes to Wisconsin's medical support rules offer a new opportunity to mitigate debt burdens for families receiving Medicaid or BadgerCare Plus benefits. A revision to Wis. Admin. Code section DCF 150.05 advises child support agencies that birth cost orders should not be sought in paternity cases involving cohabiting parents.

Overview of Medicaid Birth Cost Recovery

Wisconsin stands among a small minority of states that interpret the third-party liability provisions of federal Medicaid law⁴ to impose direct liability on unmarried or absent fathers for costs of pregnancy and childbirth paid by the state's Medicaid program. Other states, such as Minnesota, have largely discontinued Medicaid birth cost recovery efforts over concerns that the policy adversely affects children. Idaho discontinued its birth cost recovery program after a trial court held that the practice violated constitutional equal-protection guarantees.⁵



Richard Lavigne, U.W. 2007, is the Managing Attorney for ABC for Health Inc., a Madison based nonprofit organization dedicated to ensuring access to health care for Wisconsin families and children with special health care needs.

Wisconsin, by comparison, has been described as having "the strictest birth-cost recovery policy in the nation"⁶ and remains "one of the two most aggressive" states collecting Medicaid birth costs.⁷ From 2011 to 2016, Wisconsin child support agencies collected nearly \$106 million in Medicaid birth cost judgments from affected fathers.⁸ Federal law authorizes incentive payments to county child support agencies equal to 15 percent of amounts collected, with the remainder going to the state and federal governments as reimbursement of Medicaid program expenses.⁹

Medicaid birth cost judgments arise in the context of paternity actions. Under Wisconsin law, every paternity judgment must include “[a]n order establishing the amount of the father’s obligation to pay or contribute to the reasonable expenses of the mother’s pregnancy and the child’s birth.”¹⁰ The state becomes a “real party in interest” to a paternity action whenever a parent has requested child support assistance or the parent or child has requested or received certain types of public benefits.¹¹

As a condition of eligibility for Medicaid benefits, applicants must assign to the state “any rights to medical support or other payment of medical expenses from any other person.”¹² Department of Health Services (DHS) policy instructs regional Medicaid agencies to refer cases to child support agencies upon receipt of an application for Medicaid or BadgerCare benefits (or the addition of a new child to an existing Medicaid case) for unmarried mothers, married mothers not living with their husbands, and cohabiting nonmarital parents when paternity has not been legally established.¹³

According to agency policy, the appearance of the father’s name on a Wisconsin birth certificate should be treated as evidence that paternity has been legally established.¹⁴ This policy, however, does not appear to be consistently followed. As a result, cohabiting nonmarital parents have been subjected to birth cost judgments, even when the father’s income provides primary support for the household and the repayment of birth cost orders would directly reduce income available for the support of the mother and the child. A recent change to Wisconsin child support regulations seeks to address that specific situation.

Birth Cost Rule Update

Federal regulations require states receiving federal child support enforcement funding to review state child support guidelines at least once every four years.¹⁵ Wisconsin’s most recent child support guidelines advisory panel convened in February-August 2015. One of the outcomes of the panel’s discussions was a recommendation for the Department of Children and Families (DCF) to propose a rule protecting nonmarital co-parents against the loss of household income that results from Medicaid birth cost repayment orders. The proposed rule was submitted to the Legislative Council Clearinghouse in November 2016. In February 2018, Gov. Scott Walker approved the final rule, which took effect July 1, 2018.¹⁶ The text of the final rule adds the following language to Wis. Admin. Code section DCF 150.05(2)(a):

“Recovery of birth costs is inappropriate in cases where the alleged father is a member of an intact family that includes the mother and the subject child at the time paternity or support is established, and the father’s income, if any, contributes to the support of the child.”

Under Wis. Admin. Code section DCF 150.02(17), an *intact family* is “a family in which the child or children and the payer reside in the same household and the payer shares his or her income directly with the child or children and has a legal obligation to support the child or children.” That definition might cause some confusion as to whether a father is a member of an intact family, given that the definition of *payer*, under Wis. Admin. Code § DCF 150.02(24), is “the parent who incurs a legal obligation for child support as a result of a court order.” A father who establishes paternity by voluntary acknowledgment will not necessarily have incurred a support obligation as a result of a court order.

Nonetheless, a properly filed statement acknowledging paternity should be deemed to “be of the same effect as a judgment” of paternity.¹⁷ Because a paternity judgment can generally be expected to establish a legal support obligation for both parents, even when no actual payment is currently required, a reasonable harmonization of the birth cost rules with the applicable definitions would recognize a father who voluntarily acknowledges paternity as a member of an intact household.

Medicaid Birth Cost Judgment Amounts

Wisconsin law limits the amount of a birth cost judgment to "one-half of the total actual and reasonable pregnancy and birth expenses."¹⁸ Although the law requires the issuance of a birth cost order in every paternity judgment, nothing in the law limits the court's discretion to set the judgment amount at zero dollars. In practice, the DCF uses one of four methods to determine the amount it will seek in a Medicaid birth cost judgment:

1. Five percent of the father's monthly income multiplied by 36 months;
2. For low-income fathers, a fixed amount based on income as a percentage of the federal poverty level;
3. One-half the "regional average amount for birth costs"; or
4. One-half the actual birth costs up to the full regional average amount.

The first two methods are authorized by Administrative Code regulations with the low-income payment caps adjusted annually.¹⁹ The second two methods appear to be a product of agency-level policy.²⁰ One-half the regional average birth cost appears to be the method most commonly pursued.

Whatever method is proposed, an appropriate birth cost order should be based on the method that yields the lowest judgment amount.²¹ State law, *Wis. Stat. section 49.45(19g)(c)*, also provides that when a mother is enrolled in a Medicaid HMO, as virtually all BadgerCare Plus members will be, the "birth expenses that may be recovered ... are the birth expenses incurred by the health maintenance organization." Given the range of different amounts that may result from the application of available methodologies, lawyers representing fathers in paternity actions involving Medicaid birth cost claims can provide a valuable service by taking the time to investigate whether the method proposed results in the lowest judgment amount.

The threshold inquiry should be whether the proposed judgment amount exceeds one-half the actual and reasonable expenses associated with pregnancy and childbirth. The second line of inquiry should examine whether a proposed birth cost judgment amount represents the lowest among the applicable methodologies. (See sidebar, "[Determining Actual Birth Expenses](#).")

Determining Actual Birth Expenses

For a mother enrolled as a fee-for-service (non-HMO) Medicaid or BadgerCare member, a good measure of actual expenses may be the amounts actually paid by the Medicaid program to health care providers. Those amounts may be determinable if the mother, or her authorized representative, contacts the appropriate income maintenance agency to request a copy of her claims history.²²

It is more challenging to determine the actual expenses of pregnancy and childbirth for Medicaid managed care members. Participating HMOs receive a per-member-per-month capitation fee to provide the majority of Medicaid covered services to each enrolled member.²³ In addition, HMOs are paid a one-time "kick payment" for each covered maternity claim. Capitation fees and kick payment amounts are derived from actuarial analysis of prior years' claims encounters, including reimbursements paid under Wisconsin's Medicaid fee schedule and amounts paid directly by HMOs to service providers.

Wisconsin's 2018 rate schedule, for example, is based on projected expenses derived from 2015 and 2016 claims data. Rates vary across six different regions of the state and are adjusted to allow for profit margin and administrative expenses. These regional rates represent the "regional average amount for birth costs" frequently relied on as the basis of the proposed amount for birth cost orders. One may justifiably question how these projected rates reflect

either the actual and reasonable expenses associated with any given childbirth or the expenses actually incurred by the HMO. In some cases, the regional average amount might exceed the amounts billed to the HMO by hospitals and other health care providers or paid by the HMO to service providers.

For example, using the five percent of income methodology, the birth cost judgment amount for a father making only \$20,000 per year would be \$3,000. That amount is greater than one-half the regional average amount for birth costs in four out of the six rate regions. Conversely, for a father making \$24,000 per year, using one-half the regional average birth cost amount for any of the six rate regions would result in a smaller judgment amount than the five percent of income method.

History and Implications of Medicaid Birth Cost Recovery

Opponents of Medicaid birth cost recovery have long expressed concerns about the unintended consequences of the policy. Chief among those concerns are the financial effects on low-income families as well as indications that the policies cause some mothers to forego Medicaid enrollment and lose access to adequate prenatal care, potentially increasing the likelihood of adverse maternal and child health outcomes.

The financial effects of Medicaid birth cost repayment orders on cohabiting unmarried parents are readily apparent, but research also suggests that birth cost recovery orders can be financially detrimental to mothers and fathers who do not cohabit. Studies in Wisconsin demonstrate a connection between birth cost orders and reduced compliance with traditional child support obligations among fathers outside the formal employment sector – those not subject to compulsory wage garnishment.

Compounding that problem, research further indicates that birth cost orders reduce fathers' participation in the formal employment sector, particularly among younger fathers in the process of establishing an early presence in the labor market. A corresponding study shows birth cost orders assessed against 74 percent of fathers with children eligible for W-2 program benefits.²⁴

Taken together, the evidence suggests that birth cost recovery orders are disproportionately assessed against lower income fathers with the least likelihood of access to employer-sponsored health insurance, and that the negative economic and child support compliance consequences disproportionately affect lower income mothers and children.

Simple logic dictates that Medicaid birth cost recovery policies likely contribute to Wisconsin having the nation's highest infant mortality rates for African-American babies and the nation's largest gap in mortality rates between white and black infants.

Disparate Impact. Demographic data further support the conclusion that Medicaid birth cost recovery disproportionately affects Wisconsin's most vulnerable families, including members of racial minority groups and residents of economically challenged rural areas. In Milwaukee County, for example, more than half of all births in 2015 were to mothers enrolled in Medicaid. Whereas only 22 percent of births to white mothers were covered by Medicaid, the rate jumps to 74 percent and 77 percent, respectively, for births to Hispanic and African-American mothers. Among all Medicaid-covered births in Milwaukee County in 2015, 78 percent were to unmarried mothers.

The disparate effects of Medicaid birth cost recovery are not restricted to Milwaukee. In 2015, the rates of Medicaid coverage for childbirth in Ashland, Barron, Marinette, and Rock Counties were 54 percent, 44 percent, 42 percent,

and 45 percent, respectively. The ratio of Medicaid births to unmarried mothers in those counties ranged from a low of 51 percent (Ashland) to a high of 73 percent (Rock).

By comparison, in relatively affluent Dane County, only 22 percent of all births in 2015 were to mothers enrolled in Medicaid. Regardless, racial disparities continued to factor prominently, with 63 percent of births to Hispanic mothers and 81 percent of births to African-American mothers involving Medicaid. Altogether, 70 percent of Dane County births covered by Medicaid were to unmarried mothers.²⁵ At the time, roughly 25 percent of Hispanic households and 40 percent of African-American households in the city of Madison met Census Bureau criteria for income below the poverty line.²⁶

Medicaid birth cost recovery disproportionately affects Wisconsin's most vulnerable families, including members of racial minority groups and residents of economically challenged rural areas.

Effects on Prenatal Care. Concerns about deterrent effects on low-income mothers' access to prenatal care arose soon after the passage of the Deficit Reduction Act of 1984, which included provisions requiring custodial parents to assign medical support rights, "including any rights to medical support arising out of a divorce decree or child support order," to the state as a condition of Medicaid eligibility.²⁷ In 1990, Congress responded to those concerns by eliminating Medicaid child support cooperation requirements for women during pregnancy and for 60 days after the end of pregnancy.²⁸ Despite acknowledging that child support cooperation requirements presented "a potential barrier to prenatal care for high-risk, low income women that would most benefit from it,"²⁹ Congress did not specifically address Medicaid birth cost recovery, leaving the door open for some states to continue to engage in the practice.

In 2000, a Medical Child Support Working Group, jointly established by the Secretaries of the Department of Labor and the Department of Health and Human Services, concluded that Congress had expressed "a clear public policy that recognized that the value of encouraging mothers to seek and receive prenatal care far outweighed the potential cost recoupment from non-marital fathers."³⁰

Finding evidence that Medicaid birth cost recovery causes mothers to forego prenatal care, discourages voluntary establishment of paternity, and "reimburses the State at the expense of additional support that might go to the child," the working group recommended that state child support enforcement agencies "not seek reimbursement of Medicaid-covered birthing costs."³¹ The federal Office of Child Support Enforcement failed to formally adopt the working group's recommendations.

In the same year, a legislative attempt to prohibit Medicaid birth cost recovery passed Congress by a nearly unanimous vote but proceeded to languish in the hands of the Senate Committee on Finance.³² Seven years later, another attempt to end Medicaid birth cost recovery would be made by then-Sen. Barack Obama with cosponsorship from Sen. Evan Bayh, but both the Senate bill and a companion House bill failed to pass.³³

Despite a lack of quantitative research, anecdotal evidence from health care professionals and Medicaid program staff tends to validate concerns about prenatal care deterrence.³⁴ Although more research is needed, simple logic dictates that Medicaid birth cost recovery policies likely contribute to Wisconsin having the nation's highest infant mortality rates for African-American babies and the nation's largest gap in mortality rates between white and black infants.³⁵

That association has been acknowledged by the public health departments for Madison and Dane County.³⁶ In recent years, the Milwaukee Health Department has explicitly recommended the repeal of Medicaid birth cost recovery as a strategy to improve birth outcomes.³⁷ Nonetheless, Dane and Milwaukee counties aggressively pursue Medicaid birth cost judgments. In 2015, Milwaukee County collected nearly \$500,000 in birth costs, more than double Dane County's total collections of \$212,525.³⁸

Effects on Fathers. Proponents of Medicaid birth cost recovery assert that the policy holds fathers accountable for responsibilities related to the birth of their children and that the funds recovered play a significant role in supporting Wisconsin's Medicaid and child support programs.³⁹ (See sidebar, "[Birth Cost Recovery and Medicaid Solvency](#).") When it comes to fathers' responsibilities, the sparse available evidence seems to indicate that birth cost judgments tend to have the effect opposite to promoting parental responsibility. The evidence suggests that birth cost judgments tend to reduce workforce participation, compliance with traditional child support obligations, and paternal engagement with the mother and the child.⁴⁰

Birth Cost Recovery and Medicaid Solvency

It seems clear that birth cost recovery is far from crucial to the solvency of Wisconsin's Medicaid programs. From each dollar recouped through birth cost judgments, county child support agencies receive a 15 percent incentive payment.⁴¹ The state's Medicaid expenditures are reimbursed from the balance, and the remainder is returned to the federal government.⁴² In 2017, Wisconsin's total Medicaid expenditures amounted to roughly \$8.2 billion.⁴³

Federal matching funds accounted for 58.5 percent of total expenditures,⁴⁴ leaving the state's share at about \$3.4 billion. Statewide birth cost collections, in total, amounted to about \$15.2 million.⁴⁵ Just short of \$2.3 million from those collections would have gone to child support agencies. Another \$6.6 million would have been returned to the federal government, leaving about \$6.3 million to reimburse state Medicaid expenditures.

Thus, birth cost reimbursements to Wisconsin's Medicaid funding pool in 2017 amounted to less than two-tenths of one percent of total state Medicaid expenditures. At the end of 2018, the DHS projected a state Medicaid budget surplus of nearly \$213 million for the 2017 -2019 biennium.⁴⁶

Conclusion

Wisconsin's Medicaid birth cost recovery policies can profoundly affect low-income families, who are among the least likely to have representation in paternity proceedings. Lawyers who work with low-income clients or are looking for pro bono opportunities can make a meaningful difference by being aware of opportunities to challenge or reduce Medicaid birth cost judgments.

While the recent changes to Wis. Admin. Code section DCF 150.05 should help eliminate situations in which birth cost orders deplete income from intact nonmarital households, other approaches to help reduce the debt burden of birth cost orders might also mitigate adverse effects for custodial and noncustodial parents alike. Lawyers representing fathers in paternity actions should examine whether birth cost claims reasonably represent actual costs related to childbirth and whether caps on maximum judgment amounts for low-income fathers are properly applied.

Reducing the financial impact of birth cost orders can help advance the goals of child support enforcement by increasing fathers' likelihood and ability to comply with traditional support obligations.

Endnotes

¹ Gretchen Livingston, *The Changing Profile of Unmarried Parents*, Pew Research Center, April 25, 2018.

² *Id.*

³ *Id.*

⁴ See, e.g., 42 U.S.C. §1396a(25)(H).

⁵ *Idaho Dept of Health & Welfare v. Cua Barrios*, No. CV-2014-7359 (Kootenai Cty. Dist. Ct. March 7, 2016).

⁶ Emmanuel M. Ngui et al., *Relationship of Paternity Status, Welfare Reform Period, and Racial/Ethnic Disparities in Infant Mortality*, 9 Am. J. Men's Health 350, 356 (2015).

⁷ Thomas Schlenker et al., *The Effect of Prenatal Support on Birth Outcomes in an Urban Midwestern County*, 111 WMJ No. 6, 267, 272 (Dec. 2012); Meghan Pesko et al., *Birth Cost Recovery and the Infant Mortality Puzzle*, HealthWatch Wis. Reporter (Feb. 27, 2012).

⁸ HealthWatch Wis., *Birth Cost Recovery in Wisconsin: "It's Not Child Support."*

⁹ 42 C.F.R. § 433.153.

¹⁰ Wis. Stat. § 767.89(3).

¹¹ Wis. Stat. § 767.205(2).

¹² Wis. Stat. § 49.45(19)(a)

¹³ Wis. Dept. of Health Services, *BadgerCare Plus Eligibility Handbook* § 5.1.2; *Medicaid Eligibility Handbook* § 8.1.3.

¹⁴ *Id.*

¹⁵ 42 C.F.R. § 302.56(e).

¹⁶ Wis. Admin. Reg., June 2018, No. 750B.

¹⁷ Wis. Stat. § 767.805(1).

¹⁸ Wis. Stat. § 767.89(3)(e).

¹⁹ Wis. Admin. Code § DCF 150.05(2)(b).

²⁰ See, e.g., Wis. DCF, *Your Guide to Repaying Birth Costs*, Pub. No. DCF-P-DWSC11777 (May 2017).

²¹ Wis. Admin. Code § DCF 150.05(2)(b).

²² List of regional income maintenance agencies.

²³ Current capitation rate reports and regional projected birth expenses averages.

²⁴ Judi Bartfeld, *Arrearages, Lying-in Orders, and Child Support Compliance among Fathers of W-2 Children in Wisconsin*, U.W.-Madison Institute for Research on Poverty (Feb. 2005); Maria Cancian et al., *Does Debt Discourage Employment and Payment of Child Support? Evidence from a Natural Experiment*, U.W.-Madison Institute for Research on Poverty, Discussion Paper No. 1366-09 (July 2009); Judi Bartfeld, *Forgiveness of State-Owed Child Support Arrears*, U.W.-Madison Institute for Research on Poverty, Special Report No. 84 (Feb. 2003).

²⁵ Source data from WISH (Wisconsin Interactive Statistics on Health) Query System.

²⁶ *Madison City Snapshot 2016*, City of Madison.

²⁷ Carmen Solomon-Fears, *Medical Child Support: Background and Current Policy*, Congressional Research Service Report No. R43020 at 14 (Dec. 18, 2013); *21 Million Children's Health: Our Shared Responsibility*, Medical Child Support Working Group Report to the Secretary of U.S. Dep't of Health & Human Servs. & Secretary of U.S. Dep't of Labor, p. 3-29 (June 2000).

²⁸ 42 U.S.C. §1396k(a)(1)(B); 42 C.F.R. § 433.145(a)(2).

²⁹ H. Rpt. No. 101-881, 101st Cong. 2d Sess. 106-07 (1990).

³⁰ *21 Million Children's Health: Our Shared Responsibility*, *supra* note 27, at 3-30.

³¹ *Id.* at 3-31.

³² Rep. Nancy Johnson (R-Conn.), Child Support Distribution Act of 2000, H.R. 4678, 106th Cong.

³³ Responsible Fatherhood and Healthy Families Act of 2007, S. 1626, H.R. 3395, 110th Cong.

³⁴ Susan C. Antos & Ellen M. Yacknin, *What One Hand Giveth, the Other Hand Taketh Away: How New York's Pregnancy-Related Medicaid Recoupment Policy Hurts Low-Income Families*, Greater Upstate Law Project Inc. (Feb. 2000); Amanda Leipold, *An Action Oriented Community Diagnosis of Maternity Care in Wisconsin*, MPH Capstone Research Poster, U.W.-Madison (2012).

³⁵ Schlenker et al., *supra* note 7, at 272; Meghan Pesko, *Wisconsin's Birth Cost Recovery Policy: Implications for Health Disparities in Infant Mortality*, MPH Capstone Thesis, U.W.-Madison (2012); Ngui et al., *supra* note 6, at 356.

³⁶ *Dane County Fetal Infant Mortality Review 2011-2012*, Public Health Madison & Dane County (2014).

³⁷ Milwaukee Health Dep't, *City of Milwaukee 2015 Infant Mortality Rate (IMR): Data Brief 4*, (June 14, 2016); Milwaukee Health Dep't, *City of Milwaukee 2016 Infant Mortality Rate (IMR): Data Brief 4* (May 22, 2017).

³⁸ *Birth Cost Recovery in Wisconsin: "It's Not Child Support,"* *supra* note 8, at 4.

³⁹ See, e.g., *Letter from Wis. Child Support Enforcement Ass'n to Legis. Study Comm. on Child Placement & Support* (Nov. 12, 2018).

⁴⁰ Bartfeld, *supra* note 24; Cancian, *supra* note 24.

⁴¹ 42 C.F.R. § 433.153(b).

⁴² 42 C.F.R. § 433.140(c).

⁴³ *State Health Facts, Total Medicaid Spending*, Henry J. Kaiser Family Foundation.

⁴⁴ U.S. Dep't of Health & Human Servs., *FY2017 Federal Medical Assistance Percentages* (Dec. 29, 2015).

⁴⁵ Letter, *supra* note 39.

⁴⁶ *Report from Secretary of Wis. DHS to Wis. Joint Comm. on Finance* (Dec. 28, 2018).



Wisconsin Public Health Association
Wisconsin Association of Local Health
Departments and Boards



563 Carter Court, Suite B, Kimberly, WI 54136
920-882-3650 · 877-202-4333

To: Milwaukee County Board of Supervisors
From: Wisconsin Public Health Association & Wisconsin Association of Local Health Departments & Boards
Date: January 29, 2020
Re: Milwaukee County Birth Cost Recovery Policy

Honorable Supervisors,

The Wisconsin Public Health Association (WPHA) and the Wisconsin Association of Local Health Departments and Boards (WALHDAB) strongly urge you to eliminate the practice of “birth cost recovery” (BCR) in Milwaukee County. As the largest and most recognized membership association for over 600 public health professionals in Wisconsin, the mission of the Wisconsin Public Health Association (WPHA) is to build a healthier, safer Wisconsin through policy and partnership. The Wisconsin Association of Local Health Departments and Boards (WALHDAB) is a membership organization of 100% of local health departments and boards, whose mission is to be a statewide leader and voice for local governmental public health. Our organizations believe in striving toward the elimination of health disparities and that the achievement of racial and health equity is important for improving health for all and are committed to supporting collective advocacy for policy change that makes Wisconsin the healthiest state – of which there is significant evidence that BCR worsens health outcomes for infants, and worsens racial disparities in preterm birth and other measures of infant health.

BCR collects a significant amount of money from poor fathers - \$16 million across the state in 2016 – money which could otherwise be used by these fathers to help support their partners and their infants. Sadly, this money does not go back to the mothers to provide financial support for them and their children.

Because BCR forces poor fathers to pay for birth-associated costs covered by Medicaid for poor mothers, it drives a wedge between poor mothers and poor fathers. It provides mothers with the perverse and undesirable incentive to minimize or sever ties with the fathers of their newborns, whereas it would be much better for the health of the infant to have a policy that supports *increased* (rather than decreased) paternal involvement.

According to research done at the UW School of Medicine and Public Health in 2012, BCR interacts with several key risk factors for preterm birth. Not only is preterm birth the #1 driver of infant mortality, is also a serious problem in its own right. There are well over 1000 preterm births in Milwaukee County every year, about 11% of all births in Milwaukee are preterm. For African-Americans, however, the rate in Milwaukee County is closer to 16%. Infants born preterm are much more likely than full-term infants to face significant challenges throughout their life, ranging from medical problems like asthma to developmental issues and learning disabilities.

While BCR remains legal under federal law, most states have abandoned the practice for the reasons listed above. In Wisconsin, Dane County recently eliminated collections under BCR, citing its adverse effects on birth outcomes generally and on racial disparities in birth outcomes specifically.

Milwaukee County has the opportunity now to follow suit, and to support the health of infants by eliminating a policy that does not provide child support, but instead essentially subverts the intent of Medicaid by levying an additional tax on new parents who are poor. WPHA and WALHDAB urge Milwaukee to eliminate BCR within the county.

Sincerely,

Linda Conlon, WPHA/WALHDAB Public Affairs Committee Co-Chair
Maureen Busalacchi, WPHA/WALHDAB Public Affairs Committee Co-Chair