MEDICAID ESTATE RECOVERY: WHAT CAN (AND CAN'T) THEY GET?

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BY: DAVID J. ZUMPANO, CPA/ESQ.

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Introduction

I have some simple goals in this article. To share with you the federal estate recovery rules and how they apply in different states. I will also analyze the states' interpretations and case law regarding very narrow federal rules. Many attorneys panic because Medicaid is so state specific. While it is state specific, it must fall within the federal guidelines. What makes it challenging is we have to balance federal law with the state's interpretations. With this article, I intend to show attorneys need not panic about estate recovery. As you will discover, there are only two or three key rules to know. I hope to relieve your fears and panic by sharing the rules and distinguishing how little Medicaid can recover from.

First, I will review the law authorizing Medicaid estate recovery. Then, I will address the constitutional authority and the federal preemption arguments. Since Medicaid is federal law, it preempts states' laws to the extent they conflict. I will address the federal requirements for recovery and what states are limited to recover against. Many state cases will be analyzed to show how states have identified who can be recovered against, specifically a spouse or third-parties and how estate recovery conflicts with long-standing common law, debtor/creditor law, contract law and trust law. Finally, I will address Medicaid's ability to recover against an individual retirement account (IRA) and discuss the attorney's role when doing Medicaid Planning and identify what can be done confidently. In my 22+ years of practice, I have never had a client write me a check for what I can't do. So, my goal is to help you discover what you can do and not be derailed by fear or misinformation. As attorneys, we have to be informed of the rules and how they apply and interact with the needs of clients to best support them in this critical need.

Authorization & Constitutionality

The first issue to examine is the authorization for estate recovery. The authorization for estate recovery comes from the Omnibus Budget Reconciliation Act of 1993 (OBRA '93). OBRA '93 is remembered for several changes including lengthening the look back period from 30 months to 36 months, adding a new set of rules for annuities to be "Medicaid Qualifying," and creating a 60 month look back period for transfers to trusts. OBRA '93 did a number of things that affected the Medicaid practice immediately, but we are just beginning to feel the effect of another provision that remained dormant until recently. OBRA '93 required states to seek adjustment or recovery from a Medicaid recipient's estate or upon the sale of the property subject to a lien imposed on account of Medicaid assistance paid on behalf of the individual (42 USC §1393p(b)(1)).

Slowly, cases emerged as states began implementing recovery programs. West Virginia had a notable case, West Virginia v. U.S. Dept. of Health & Human Services, 289 F.2d 281 (2002). This case alleged the federal requirement to recover infringed on the state's rights and that it was too overbearing and in violation of the Tenth Amendment. The U.S. Court of Appeals, in a clearly defined explanation, opined that normally if the federal government coerces and has so much restriction it prohibits a state's ability to make an independent decision, it would violate the Tenth Amendment, but since the Medicaid program was voluntary, the states did not have to participate and had the ability to opt out. As a result, it was held not to be a violation of the Tenth Amendment. This case is Precedent on the constitutionality of estate recovery. In re Estate of Turner, 391 N.W.2d 767 (1986), alleged a state recovery program was an unconstitutional denial of equal protection. Ultimately, the Supreme Court of Minnesota held the age specification for recovery of benefits paid to those over age sixty-five was rationally related to a legitimate state interest. Subsequently, the sixty-five year old age restriction was reduced to age fifty-five in OBRA '93. No other actions were noted to challenge the law on equal protection grounds.

Federal Pre-Emption

In addition to the foregoing, a number of cases began to emerge alleging the states rules were more restrictive than the federal rules and the state was recovering more than the federal law allowed. The legal argument is the state does not have a right to recover because it conflicts with the federal law of recovery, and therefore, federal law preempts state law and federal law controls. Each of the cases cited is based on conflict preemption, which results when compliance with both state and federal law is impossible. If conflict preemption occurs in any state, federal law preempts state law from being effective. Many of the court cases preempted the state law because the states' recovery was far broader than what the federal law allowed. Sorting through these cases, we are able to identify guidelines to follow. See: In re Estate of Barg, 752 N.W.2d 52 (2008), Idaho Dept. of Health v. Jackman, 970 P.2d 6 (1998), Bucholtz v. Belske, 114 F.3d 923 (1997), and Citizen's Action League v. Kizer, 887 F.2d 1003 (1989). When analyzed, preemption came down to how the state defined the word "estate" from which it recovers. The federal law is very limited on how "estate" can be defined for purposes of recovery. The federal law in 42 USC

§1396p(b)(4) specifically limits states to recover from (A) "all property, real and personal in the estate, as defined by state probate law." This is the default definition for states that have not expanded their definition in accordance with paragraph (B), which allows the states to include, *at their option*, "any other real or personal property and other assets an individual has any legal title or interest in at the time of death, including such assets conveyed to a survivor, heir or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement". The Idaho Supreme Court in Idaho Dept of Health & Welfare v. McCormick, 153 Idaho 468 (2012), ruled contrary to Barg, stating there is no state pre-emption to recover from assets that were not owned "at death" as indicated in 1396p(b)(4)(B). Some states have taken a position that "other arrangement" means annuities, while others have taken it to mean certain types of contracts. So you have to be aware of how your state defines "other arrangements."

As we look at estate recovery, the key question becomes whether your state has adopted an expanded definition of "estate" as allowed by 42 USC §1396p(b)(4)(B). The general rule in 42 USC §1396p(b)(4)(A) provides the state can only recover from the probate estate. So a simple revocable living trust would eliminate Medicaid's right to recover. For those in the 24 +/- states that do not have an expanded definition, don't get too comfortable. It is likely your state will expand their definition in the future. For those in the 26+/- states that have implemented an enhanced definition of "estate" for recovery, we have to look to each of the states expanded definition and compare it to ensure it's not broader than, or more restrictive than 42 USC §1396p(b)(4)(B). You also have to determine if your state is enforcing the expanded recovery adopted, as many states lack the necessary funding to even enforce it and institute recovery procedures. The good news is, even with an expanded definition, there are still many limitations on a state's right to recover from the Estate of a Medicaid recipient. I will outline the key areas to consider below.

<u>No Recovery During Life</u>

Recovery cannot occur during life except in very limited circumstances. 42 USC §1396p(a)(1) states no lien may be imposed against the property of an individual ***prior to his death*** (emphasis added) on account of Medicaid assistance paid. This is the general rule, but there are two exceptions. First, the state can then recover against the assets of a recipient because it was incorrectly paid, but only if the state gets a judgment from a court indicating such (42 USC §1396p(a)(1)). Secondly, this provision prohibits the state from attaching an interest on any real property during a recipient's life for benefits currently paid but allows an exception if the recipient does not have an intent to return home. If a Medicaid recipient goes in a nursing home and has an "intent to return home," the home will be exempt from recovery *during their life*. The only downside is when the recipient dies, it becomes a recoverable asset in the estate of the recipient (unless you live in a homestead state). However, there is an exception to the exception. Even if there is no intent to return home, there is no recovery against the home of a recipient if there is a spouse or blind, disabled or minor child that resides there or the property is owned with a sibling. A home co-owned by a sibling who has resided there for at least one year is protected. For married couples, transferring the house to the Community spouse is an exempt transfer and no recovery is allowed against it (see discussion below on ability to recover from spouse). To sum up, Medicaid cannot recover against anyone while they are alive unless benefits were incorrectly paid and a judgment is issued from a court, or if the recipient has real property, does not intend to return home, and there is no spouse, blind, disabled or minor child and no sibling co-owner. That's the rule and recovery is very limited.

Recovery during life was further outlined in the U.S. Supreme Court case Arkansas Dept. of Health & Human Services v. Albhorn, 547 US 268 (2006). The Albhorn case is very interesting because at first glance it doesn't appear to apply to Medicaid recovery, but it has some very relevant analysis throughout. It's not too often Medicaid cases get to the U.S. Supreme Court. This case was related to a tort settlement where an individual was injured in an accident and was awarded a personal injury settlement. Medicaid asserted a lien against 100% of the settlement to be compensated for all medical benefits paid on behalf of the recipient. The U.S. Supreme Court held while the state may recover, they are limited to that portion of the lawsuit proceeds attributable to medical expenses associated with the injury and nothing else. The court cited 42 USC §1396k(a)(1) in support of their position, thus limiting recovery from the settlement to past medical expenses incurred from the care associated with the lawsuit and not any future costs anticipated. Medicaid was prohibited from recovering from any award designated as pain and suffering, lost income or punitive or any other part of the recovery. They were only allowed to recover from the medical reimbursement part of the settlement. Interestingly, Medicaid was free to disqualify the individual from receiving benefits upon receipt of the balance of the settlement, but the right of recovery for past services does not permit recovery during life. Accordingly, Albhorn is a significant decision and is a call to Medicaid lawyers to partner up with personal injury lawyers to protect the remaining proceeds of personal injury settlements. So, the Albhorn decision sets significant limits on Medicaid's ability to recover during the recipient's lifetime.

<u>Community Spouse Survives Recipient/Medicaid Spouse</u>

The general rule is the state can only recover from the estate of a surviving spouse of a Recipient if the asset in the estate of the Recipient Spouse can be traced back to the Recipient Spouse having ***ownership at his/her death*** (emphasis added). An example is if a husband and wife own a home together. The husband goes into a nursing home and is receiving Medicaid benefits, but the home remains in joint name. A year later, the Institutionalized husband dies with the Community Spouse still living in the home. The Community Spouse dies a year later. Can the state go after the Community Spouse's estate for benefits it paid for the Institutionalized husband? Generally, no, but since the Community Spouse's assets can be tied to an asset the Recipient Spouse had an ownership interest in *at his death*, the state can recover. Conversely, if the Community Spouse died first, the house would become an asset of the Institutionalized husband and fully recoverable unless there is an intent to return home, or a disabled, blind, or minor child is living in the home. Had the Community Spouse removed the husband's name from the deed after he entered the nursing home, but before he died, there would be no recovery. The rationale is consistent with the expanded definition in the statute because it allows recovery from the assets of a Medicaid recipient that were held in "joint account" or other. So, anything held jointly by the Recipient Spouse, at death, would be a recoverable asset under the expanded definition. Proper Medicaid planning ensures the Community spouse owns everything in his or her own name prior to applying for Medicaid, so, at the death of the Recipient Spouse, recovery can be avoided.

In re Estate of Barg, 752 N.W.2d 52 (2008), provides a summary of many different states analysis of the recovery rules. It provides a very logical analysis of various states' laws that assert assets cannot be recovered from a Community Spouse who dies after the Recipient Spouse. The analysis includes a discussion of cases in New York, North Dakota, Tennessee, Missouri, Minnesota and Ohio. In Minnesota, In re Estate of Jobe, 590 N.W.2d 162 (1999), Medicaid was allowed to recover from all joint assets owned during the marriage, not just the assets owned by the Recipient Spouse at death, that went to the Surviving Spouse. In re Estate of Gullberg, 652 N.W.2d 709 (2002), however, overruled Jobe and only permitted the assets owned that were converted at death by reason of joint ownership. Similarly, the 2012 McCormick case in Idaho held that any asset owned by the institutional spouse at anytime after 1993 that was later transferred to the community spouse was recoverable. In Iowa: In re Estate of Laughhead, 696 N.W.2d 312 (2005), Illinois: Hines v. Dept. of Public Aid, 850 N.E.2d 148 (2006), Missouri: In re Estate of Shuh, 248 S.W.3d 82 (2005), Pennsylvania: In re Estate of Bruce, 260 S.W.3d 398 (2008), and Wisconsin: In re Estate of Budney, 541 N.W.2d 245 (1995), each support the proposition that recovery is even limited if the expanded definition is enacted. But the Hines case, as well as the Budney case, prohibits Medicaid from any recovery from the estate of a Surviving Spouse. Statutorily there's no permission for it in the federal statute. Both cases are from the highest courts in those states. Thus, in Illinois or Wisconsin, there is no recovery from the spouse.

In contrast in North Dakota, In re Estate of Wirtz, 607 N.W.2d 882 (2000), ruled recovery from a spouse includes all assets the Medicaid Recipient Spouse transferred to a Community Spouse or owned jointly with the Community Spouse ***anytime during the marriage*** (emphasis added). So, in North Dakota they have a more expanded rule than the general rule, but it appears to be beyond the federal rule, which clearly limits recovery to assets owned at death.

So in general, Medicaid cannot recover from the Surviving Spouse of a Medicaid recipient unless the Medicaid recipient had an ownership interest in the asset at his or her death that was conveyed to the Community spouse by the Medicaid Spouse's death. The only noted exception being North Dakota, which permits recovery from any assets owned during the marriage.

Community Spouse Dies First

If the Community Spouse dies before the Recipient Spouse, there are additional issues to consider. If the Recipient Spouse was qualified for Medicaid, it is likely the Community Spouse had assets exempted in determining the Recipient Spouse's eligibility. While federal Medicaid law does not address recovery from exempted assets in its recovery statute, it does in its qualification rules. As a condition of receiving Medicaid, the recipient assigns to Medicaid all of their rights, now and in the future, to any income or assets. So, whatever rights the Recipient Spouse has to his deceased Community Spouse's assets, Medicaid has (42 USC §1396p(b)(4)). In most states, if a Community Spouse dies and disinherits a Surviving Recipient Spouse, the Surviving Recipient Spouse has the right of election or dower, thus Medicaid would, by virtue of the assignment, obtain those rights on behalf of the recipient spouse.

A primary case addressing the states right to recovery from a deceased Community Spouse is DeMartino v. Division of Medical Assistance and Health Services, 373 N.J. Super 210 (App.

Div. 2004). In deliberating, Medicaid asserted a claim after the death of the Recipient Spouse from a trust created by the pre-deceased Community Spouse with an elective amount for the Recipient Spouse. The Community Spouse died first and set up a Supplemental Needs trust for the Recipient Spouse with the elective share, which provided for any balance to distribute to her children at the Recipient Spouse's death. The DeMartino court ruled the Community Spouse, who died first, could set up an elective share as a special needs trust for DeMartino during his life, but, when he died, the court allowed Medicaid to recover from the trust because it had the right to do so the day she died. The court held that the postponed recovery allowed access from the SNT to the Recipient Spouse, but when the Recipient Spouse is deceased, the federal law requires payback. The court treated the spousal benefit payment as a first-party trust.

Similarly, in Idaho Dept of Health & Welfare v. McCormick, the Idaho Supreme Court ruled recovery applies not only to the Medicaid recipient, but also to the estate of the recipient's spouse. In McCormick, the court allowed recovery against the estate of a deceased community spouse of property owned by the institutionalized spouse but transferred to the community spouse before applying for Medicaid. The McCormick court distinguished Barg by indicating it address the term "Estate" for recovery purposes, but not the term "Assets" for recovery purposes and held the federal definition of estate under 42 USC §1936(h)(1) included "assets" of the individual or spouse. The court further noted the property of the deceased community spouse was recoverable for the institutional surviving spouse, including the home. While the court referenced it being "community property," it was not a significant factor in its determination.

To summarise this point, the DeMartino decision is consistent with federal law and practitioners must plan around it. The McCormick decision however, is a unique holding and must be respected in its jurisdiction but does not seem to have any other courts referencing it. The general rule is the estate of a Community Spouse who dies first is available up to the right of election amount. The only way to avoid recovery from a Community Spouse's estate is if your state doesn't have a right of election or you do not trigger a right of election. For example, in many states a right of election is triggered by a probate proceeding. So, if a revocable living trust is used, probate is avoided and the mechanism to commence a right of election is lost. As the estate recovery law develops further, I believe states are going to get more sophisticated and track it more closely. There is an absolute right for Medicaid to assert a right of election against a Community Spouse that dies first. You may opt to create an SNT like in DeMartino, to delay recovery so there are resources for the Recipient Spouse for the remainder of his/her life.

Conflict of Laws - Joint Interests

Since the Medicaid expanded definition allows recovery from any interest or legal title at the time of death, including interests conveyed to a survivor through joint tenancy, tenancy in common, survivorship, life estate, living trust or other agreement, it appears they can recover against life insurance proceeds, individual retirement accounts (IRA), any joint ownership or right of survivorship, any beneficiary designated account, payable on death, or transfer on death accounts. Further, while recovery from a life estate is an oxymoron (how do you recover against a life estate when you're dead), as I will analyze, Medicaid can.

The Medicaid recovery rules create a conflict of laws issue. Common law, contract law and real property law have been longstanding, for centuries. A jointly owned property goes to a surviving owner "by operation of law". On what grounds does Medicaid have the right to trump hundreds of years of established law? Well, they do, or at least courts have consistently allowed it based on holding that the federal law allows it. It's that simple. 42 USC §1396p(b)(4) permits recovery to include, at the option of the state, those things conveyed to a survivor through joint tenancy, tenancy common, or survivorship, and view a life estate as a measurable survivorship interest. The federal law specifically authorizes recovery. So, that's the rule and we appear to be bound by it.

To understand this conflict of laws, we see similar application under federal tax law. Specifically the transferee liability rules under the Internal Revenue Code §6901, which authorizes the IRS to recover unpaid taxes against a transferee of property for tax liability of a taxpayer that had an interest in the property transferred at death or by operation of law. The IRS's attachment was upheld in Alexander v. Commissioner of Internal Revenue, 304 US 577 (1938). So, there is federal precedent. If you examine the transferee liability statute, you will note the transferee's liability is limited. I believe a similar limitation can be applied in Medicaid recovery. Under IRC §6901 the transferee liability is authorized by federal law, but the ability to access it is based on state law. So, it could be good or bad depending if you're in a very conservative state or a very liberal state. When we look at the estate recovery authorized by federal law in 42 USC §1396p(b)(1), the actual recovery is based on the state law's definition of "estate", which 42 USC §1396p(b)(4)(A) or (B), which is the probate definition or the expanded definition.

The other critical issue is the amount recoverable from the life insurance policy, jointly owned property, or right of survivorship property. And what seems to be extremely clear in the cases is recovery is limited to the maximum amount to which the recipient could have had. This is consistent with the transferee liability statute in tax law. For example, if your joint tenancy laws provide each owner owns 100% of the whole (i.e. tenant by the entirety) are likely protected since state law does not allow recovery from a surviving spouse's interest. Most states provide a joint tenancy is an undivided 50% interest in the whole. Therefore, if you own a piece of property worth $100,000 jointly and your Medicaid lien is $100,000, Medicaid can only recover against your joint interest (up to your $50,000 interest). It is critically important you understand your state law rules on ownership. You must know how your state law treats joint tenancy beneficiary designations and payable on death or transfer on death accounts. Once identified, you will have a greater understanding of what Medicaid would be able to recover.

Joint interest by a Medicaid recipient at time of death is recoverable as outlined in Hines, Grote, Shah, Bruce and Thompson. And in Missouri there is also, In re Estate of Jones, 280 S.W.3d 647 (2009), which allows joint interest to be recovered against.

Life Estates

How can Medicaid recover from life estates that are worth zero after your death? The cases consistently value the life estate immediately prior to death, which is consistent with the methodology of valuing joint interests. A stand out exception to the general rule was created by the Idaho Supreme Court in Idaho Dept. of Health & Welfare v. Peterson (Docket No. 40615, Aug.

13, 2014). The Peterson court ruled that not only did the state have the right to recover the life estate value retained, but also the remainder interest that was conveyed to a third party (the daughter,) prior to the Medicaid recipients application for Medicaid benefits! This is a disturbing case on many levels and hopefully will be appealed at the federal level (at the writing of this, the case has not reached its appeal statute of limitations.) Generally, Medicaid treats the conveyance at death as a transfer of an interest by survivorship. Further, they value the transfer at the life estate value immediately prior to death. They then seek recovery from the transferee of the real estate, but only up to the life estate value. For example, if mom has a $100,000 house and she transfers the house to the kids when her life estate value is worth 35%, her retained interest in that house is $35,000. If she dies five years later, when her life estate is deemed to a 29% interest, then Medicaid can only recover a maximum of $29,000. If Medicaid's lien is only $12,000 they can't take $29,000. They can only take up to the $12,000. But if Medicaid's lien was $100,000 they can't get more than the $29,000. See: Oregon v. Willingham, 136 P.3d 66(2006); Cook v. Ohio Dept. of Jobs & Family Services, 2003-Ohio-3479 (2003); and In re Estate of Strohe, 791 N.Y.S.2d 818 (2005). But see: Gruber v. Ohio Dept. of Jobs & Family Services, 2003-Ohio-2528 (2003). Gruber is interesting because Ohio is a very aggressive recovery state. Gruber is an appellate court case and held the Ohio Department of Child and Family Services ***could not recover against a life estate*** (emphasis added) that was not assignable and inalienable. Under this ruling, a transfer of real estate with a limited reserved life estate prohibiting any right to assign it and inalienable only to the holder would appear to decrease the value of the life estate to zero or close to it, since it would have no value to anyone to sell. Logically it would follow that the conveyance would be an uncompensated transfer of the full value of the home for which penalty would be assessed, but I imagine Medicaid could assert a position that the decrease in value to the remainder caused by the retained life estate would be the value of the life estate. Does it ever end?

Trusts

It is well established that revocable living trusts can be recovered against. See Belshe v. Hope, 38 Cal.Rptr.2d 917 (1995) and Bucholtz v. Belshe, 114 F.3d 923 (1997), which follows the recovery rules *but only if* your state has the expanded definition of recovery under 42 USC §1396p(b)(4)(B). If your state follows the default recovery rule under 42 USC §1396p(d)(4)(A) recovery is limited to the probate estate. Since assets in a revocable trust are not in the probate estate; it could not be recovered against but, if you're in a state that has adopted the expanded definition, it can.

Can Medicaid recover from an irrevocable trust? Generally the rule is no. Once you transfer assets to an irrevocable trust it cannot be recovered against. Why? Because you have already been penalized for that transfer and it's already been recognized in the application process. But Medicaid will look for any other way to penetrate an irrevocable trust. For example in Iowa, In re Barkema Trust, 690 N.W.2d 50 (2004), the court allowed recovery under asset protection standards. The court in Barkema allowed Medicaid to invade an irrevocable trust because there was no spendthrift provisions prohibiting it and therefore it was available to <u>general creditors</u> under state law. Obviously this was a poorly drafted trust.

The Barkema case highlights that the question of recovery from an irrevocable trust is an asset protection question. I thoroughly reviewed the asset protection and Medicaid protection rules in my law review article "Irrevocable Pure Grantor Trust: the Estate Planning Landscape has Changed" (Syracuse Law Review Vol. 1 Fall 2010). I provide a thorough analysis of Medicaid planning, asset protection planning, and the use of irrevocable trusts in Medicaid planning. I clearly show how an Irrevocable Pure Grantor Trust® is superior to traditional asset protection trusts. Practitioners must remember, Medicaid is a general creditor so all general asset protection laws apply. But, protection from Medicaid requires a higher standard than asset protection because under general asset protection laws if one conveys an asset to an irrevocable trust and gives up the right to the asset, that asset is protected when funded (barring a fraudulent conveyance). Further, the asset protection rules for self-settled trusts (specifically UTC §505, Restatement 2nd of Trusts §156, 42 USC §1396p(b)(4)), they all provide whatever the grantor has rights to, his creditors have rights to. While this is true for asset protection, Medicaid has two additional requirements for it not to be considered available in determining Medicaid eligibility.

If a conveyance is made within 60 months, Medicaid can use the transfer to make you ineligible for benefits as opposed to general asset protection which protects the asset upon funding. An additional requirement in Medicaid planning that is not a concern in asset protection planning is a spouse's access to the trust. In a general asset protection trust one can create an irrevocable trust and name a spouse as income and principal beneficiary. As long as the grantor is not a beneficiary, the trust assets are protected from the grantor's creditors and predators and from the spouse beneficiary's creditors and predators because it's a third-party trust. Medicaid law however, provides any trust created by the applicant ***or spouse*** will be deemed to be an available resource to the applicant. While this does not make the proceeds of the trust available to Medicaid, it does give Medicaid grounds to disqualify a spouse by including the trust assets as available in determining the spouse's eligibility. So all general asset protection rules apply to Medicaid, plus these two additional standards.

In the Barkema case, since it was a discretionary trust without a spendthrift provision it was available to general creditors. The same was held In re Estate of Gist, 763 N.W.2d 561 (2009), but it is clear if you comply with your state's asset protection rules it will be safe from recovery. When using irrevocable trusts, it is critical you design your trust to ensure the grantor or spouse does not have any circumstances to have access to the trust assets. If so, Medicaid will absolutely have access to it under the asset protection rules. A prime example of this was the Daughrity case in Massachusetts, In re Estate of Daughrity, 166 S.W.3d 185 (2009), where the trust authorized the trustee to terminate the trust if it was no longer practical to maintain it. Upon termination, the trust would distribute to the grantor and other beneficiaries. The court held since the trustee had the "authority" to terminate the trust, and in doing so, it would distribute to the grantor, the trust assets were reachable to the creditor, in this case, Medicaid.

To avoid recovery from irrevocable trusts, you also need a clear understanding of your state's treatment of support trusts and the discretionary standard granted to the trustee. The Gist case invaded a support trust with spendthrift provisions by distinguishing "pure" support trusts from "discretionary" support trusts. The court based its decision however on a state law exception to spendthrift trusts to "pay for necessities". In this case state law required a discretionary trust be used to pay for necessities and they were deeming Medicaid to be a necessity. Therefore they invaded it. It was not under the Medicaid laws that they did this. It was under the state's own definition of spendthrift and discretionary and asset protection rules for the state. It is critical you be familiar with your state asset protection rules. While this may seem overwhelming, it really isn't. These cases are the only ones cited and generally there is absolutely no recovery. While I outlined these two cases, it is important to note it is based on minute exceptions in other obscure areas of the state law and only appears to show up in Gist, so you don't want to assume this case is the standard, it is a rare exception. In summary, if your state's asset protection rules allow access to the trust, Medicaid can recover from it. The Barkema case didn't rely on Medicaid law. It relied on state asset protection law. Remember, Medicaid can only recover from assets the Medicaid recipient had an interest in "at death" (42 USC §1396p(b)(4)(B)) which would apply to any interest held in an irrevocable trust, but only if your state has adopted the expanded definition of recovery.

Individual Retirement Accounts (IRA)

Can Medicaid recover against an IRA after death? It appears on the face of the statute Medicaid can, but there are solid arguments against it. There are no federal regulations and the law allows states to interpret recovery, but I believe attempting to recover from an IRA would conflict directly with federal tax law. The laws and regulations under IRC §401 and §403 are clear in stating that in order to defer taxation, the IRA owner can be the only individual entitled to benefit during his life. For Medicaid to assert it had an interest at death would disqualify every qualified plan. This can be supported by the federal government special exception under the Deficit Reduction Act of 2005 (DRA '05). When DRA '05 was enacted, it further restricted annuities by requiring all annuity contracts to name the state the irrevocable beneficiary to be "Medicaid qualifying annuities." But there was an absolute exception in the federal law if a Medicaid qualifying annuity was in an IRA (42 USC §1396p(b)(5)(G)). DRA '05 specifically exempted IRAs from the requirement that the state be named the irrevocable beneficiary. It appears states are staying away from IRA's to avoid a big quagmire. I hope they continue to stay away from them. While it is clear an IRA is an available resource during life (depending on your states position), I do not see them making any attempt to go after the beneficiaries of an IRA similar to how Medicaid would pursue any other joint or beneficiary designated account.

While IRA's still appear to be safe from attack, the US Supreme Court in Clark v. Rameker 573 U. S. ____ (2014) held in June 2014, that in "inherited IRA" is not protected as a "retirement" asset under the bankruptcy law. I believe this opens the door to Medicaid to assert an inherited IRA is an "available resource" in determining one's Medicaid eligibility. This supports the planning proposition that trusts should be named beneficiary of IRA's. (For a complete legal analysis and strategic approach, go to goo.gl/i6ibXU)

Lifetime Transfers

Can Medicaid recover from beneficiaries of lifetime gifts or gifts in the irrevocable trust? I think it's pretty clear that if we make a transfer during life to an individual or an irrevocable trust, it is considered an uncompensated transfer under 42 USC §1396p(b)(5) and the applicant is penalized in determining eligibility. Since the law prohibits being penalized twice on a single transfer, outright gifts and gifts to irrevocable trusts cannot be recovered from (except as outlined above). Notwithstanding, a holding consistently applied to income only irrevocable trusts allow recovery only to the extent of the undistributed income that was not received by the recipient at the time of death. For example, if income is paid quarterly, and you died in January, Medicaid can receive all the income from the first quarter up to your date of death.

What Is Safe From Recovery

There are many options to plan without concern of recovery. The lifetime gifts option is a viable planning tool that protects assets from recovery as well. Gifts to irrevocable trusts with no right to principal. Gifts to irrevocable trusts with rights to principal that is a third-party trust and not self-settled, (created by the beneficiary) as long as it is a pure support trust and recognized by your state law is also safe. Some states, Ohio for example, require the trust be wholly discretionary as opposed to pure support trusts. So for example, if you allow distributions pursuant to ascertainable standards in Ohio the trust assets are not protected but if the trust grants sole and absolute discretion for the trustee to distribute principal or income among the class of beneficiaries as the trustee shall solely determine, it would be a purely discretionary trust and completely protected under Ohio law. I do not intend to teach you Ohio asset protection law but am attempting to outline the issue for you to be aware of your state asset protection laws. There should be no way Medicaid can recover unless it is a support trust and your state does not permit support trusts. Again, there are only a handful of states that do not permit support trusts and so it is very narrow. I keep narrowing it down, but I don't want you all to assume that that means you can't do this. The general rule is you absolutely can and you just have to know if you're in one of those exception areas, which is very few. Again, for that I recommend my aforementioned law review article.

Conclusion

Analyzing estate recovery in its entirety has a very narrow application primarily because once someone becomes eligible for Medicaid, the only assets to recover against are those assets that were exempt at the time of qualification, which is minimal. Next, the default federal rule is that only probate estates can be recovered from and in the few states that have expanded their definition of "estate," then recovery is authorized as confirmed by the Hines, Laughead, Grote, Shuh, Bruce, Thompson, Smith, Barg, Bucholtz, and Kizer cases, supra. Even if all these narrow conditions are met, recovery is restricted further because Medicaid cannot recover from the Surviving Spouse of a Medicaid recipient unless the Medicaid recipient had an ownership interest in the asset at his or her death that was conveyed to the Community spouse by the Medicaid Spouse's death. The only noted exception being North Dakota, which permits recovery from any assets owned during the marriage and Idaho which allows recovery on all assets owned after 1993 and recovery of the remainder interest transferred before application for benefits. If a Community Spouse survives, it is virtually impossible to recover and if the Community Spouse predeceases, then Medicaid is limited to the right of election amount. Finally, if recovery is sought from third-parties, then Medicaid is limited to the value the recipient had in the asset at death.