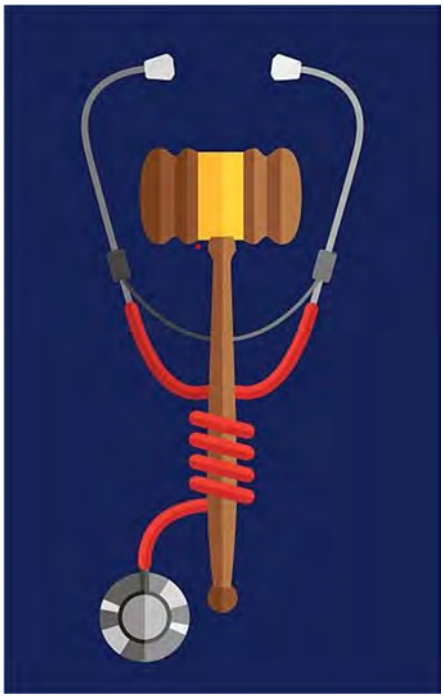
The NSBA's Elder Law and Special Needs Section presents:

Advanced Medicaid Planning Strategies



Wednesday, February 18, 2026

WEBCAST

Speaker: Nick Halbur, Koukol Johnson Schmit & Milone, LLC

Nick Halbur graduated from the University of St. Thomas School of Law in 2006 where he took and then helped teach the Elder Law Clinic. After 3 years of teaching Nick moved to Omaha and now practices elder law in Nebraska and his home state of Iowa. Since 2024 he has been practicing at Koukol Johnson Schmit & Milone where his practice includes elder law, estate planning, probate, Medicaid, and guardianships. Nick is a member of the Inns of Court, Omaha Estate Planning Counsel, NSBA, and is the current chair of the Elder Law and Special Needs Planning Section.

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KOUKOL JOHNSON SCHMIT & MILONE

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Elder Law and Special Needs Section Quarterly Webcast Series:

Advanced Medicaid Planning Strategies

By Nick Halbur, J.D.

February 18, 2026

Nick Halbur, J.D.

Partner

- Graduated from University of St. Thomas School of Law in 2006
- Member of the Nebraska and Iowa Bar Associations
- Member of WealthCounsel and Chair of the Elder Law and Special Needs Section of the NSBA
- Practicing Elder Law for Two Decades

Webinar Goals

- Build on basic knowledge of Medicaid eligibility and key issues (I put “advanced” in the title so we could remind you of basics and get moving).
- Familiarize you with key rules of Medicaid and long-term care planning strategies
- Enable you to include solid language in documents and identify planning opportunities.
- Understanding the potential benefits.
- Focus is at-need planning today.

MEDICAID ELIGIBILITY

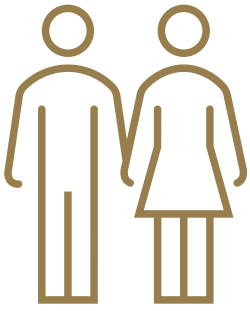
- Residency
- Medical or Physical Criteria
- Age 65 and older, *or*
- Younger than 65: blind or disabled
- Financial Criteria
- Income Test: “Medically Needy”
- Resource Types

Bad Ideas and Misunderstandings

- Annual Gift Tax Exclusion Confusion
- Medicaid will go back 3 months, right?
- Medicare v Medicaid
- Old Rules & Rules from other States
- The "Waiver" is for the State to Cover HCBS

Medicaid Advanced Planning: Married Couples

- When one spouse goes into care and the other remains at home (Community Spouse) the ASSETS of both spouses are considered when determining the eligibility of the ill spouse for Medicaid Assistance.
- INCOME of the applicant spouse is considered, but income of the Community Spouse can be unlimited and is not considered in determining eligibility for the ill spouse.
- Medicaid compliant annuities (MCAs): turning assets into income for the Community Spouse.



COMMUNITY SPOUSE RESOURCE ALLOWANCE
Timing Strategies are Key
SIMP = Spousal Impoverishment Medicaid Program

BEFORE CARE: If your clients are in your office before either goes into care consider strategies that will maximize the CSRA later. Keep assets countable.

SNAPSHOT DATE for ASSESSMENT OF RESOURCES IM-73: This is when the ill spouse first goes into care or gets HCBS. All countable assets in either or both spouses' name(s)

SMART SPENDDOWN: Preplan funeral, convert countable assets to exempt assets, upgrade existing exempt assets, reduce debt on exempt assets, consolidate duplicates, postpone downsizing

Best Plans Empower Future Preservation

Complete estate plans that anticipate future planning. POA with adequate gift powers, Will that puts assets into Trust, Informing the kids, Liquidity.

At the assessment of Recourses, help complete the IM-73, then think through the spenddown.

IM-73 is used to set the CSRA. IM-74 Designation of Assets divides rest between Spouses.

Move all possible assets to the Community Spouse, including the homestead. Medicaid Spouse has 1 account. Community Spouse Will.

GIFTING PENALTIES "DEPRIVATION"

Gifts by an applicant for LTC Medicaid must report gifts given in last 5 years (60 months) and will be penalized with a blackout of LTC Medicaid benefits for the amount of months equal to the total amount of the gifts divided by the private pay cost of their LTC.

Gift Penalty Exclusions

- SNT for disabled/blind child
- Spouse
- Children blind/disabled
- SNT of anyone 64 or younger

Gift Penalty Exclusions: Real Property

Community Spouse

Child Caregiver Exclusion (2y)

Co-owned property with a sibling (1y)

Children 20 or younger, blind/disabled

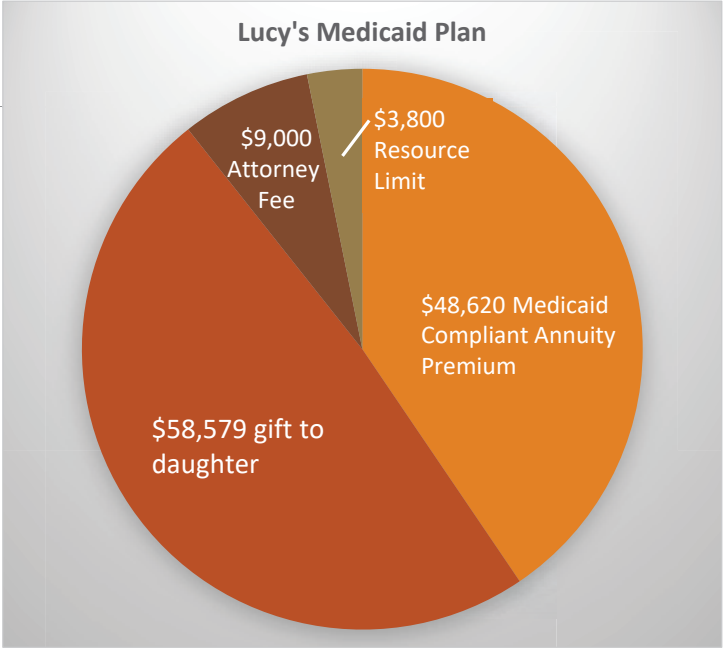
What comes next? Exceptions may not match client's wishes

Medicaid Advanced Planning: Gifting

- Planned gifting strategy which accelerates the date when Medicaid coverage will begin for individuals or both spouses in care
- Medicaid compliant annuities (MCAs): turning assets into income to pay through deprivation
- Gift of equity: Saving the home or family farm

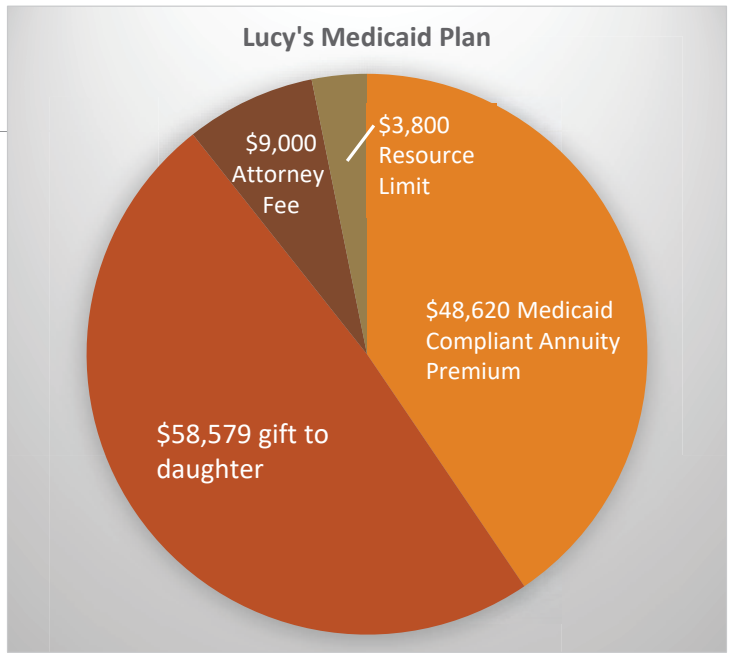
Medicaid Gifting Case Example

- Single 89-year-old nursing home resident
- Available resources of $120,000
- Monthly income of $1,700
- Gift client's daughter with $58,579
- Purchase a MCA for $48,620
- After attorney fees are paid, client is below $4,000 resource limit
- Accelerates Medicaid eligibility by 6 months
- Saved client almost $60,000 that otherwise would have been spent on care



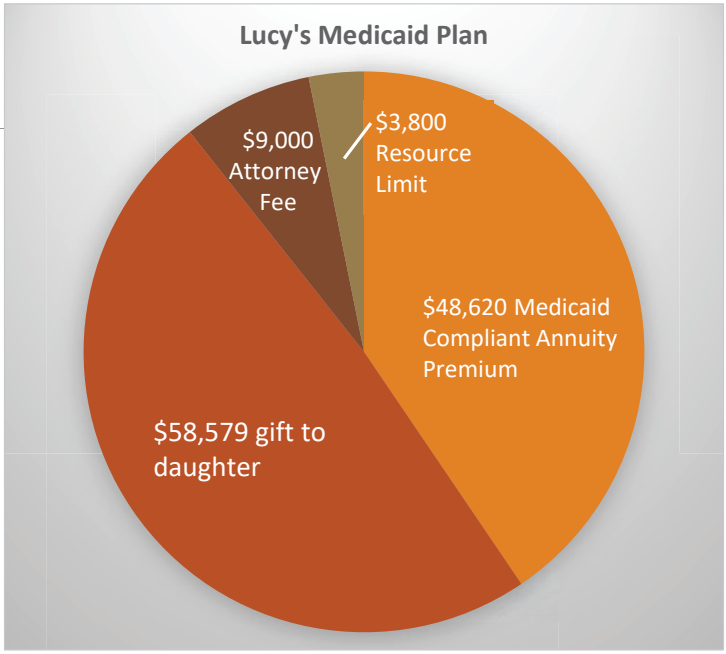
Cash? Equity?

- This strategy is easiest to implement with a highly liquid client. Attorney Fee, the asset limit, and the annuity should all be cash.
- Clients can either liquidate slowly and pay it all to care, liquidate quickly and preserve assets, or get creative.
- HOME: often the key asset, calculate equity as tax assessed value *minus* mortgage debt. Lower value is often better.
  - If selling, then price to sell, each month costs you a month of care ($10k+)
  - If home equity matches the gift, deed the house.
  - If home equity exceeds the gift, kid pays or borrows the difference.
  - If home equity is less than the gift, add cash.



Cash? Equity?

- Medicaid only examines the real estate transaction directly involving the applicant, so a child receiving title in any of these scenarios is free to live there, fix it up and sell, or make a further gift.
- Similar principles can apply to the family farm or a life insurance policy.
- In Life Insurance Cases the cash value is the available asset and therefore also the gift amount, so if you can transfer a policy as a gift the child can cash it out or get the full death benefit when their parent dies.
- There is an upper limit to this strategy, if the length of the gift calculated is longer than the 5-year lookback period, then gifting (likely into an Irrevocable Medicaid Asset Protection Trust)



WHAT IS NEW?
Deprivation Penalty Exemption Per DHHS Email

Change Effective 2/1/2025:

Individuals who have income below 100% FPL and request waiver services will now be exempt from the deprivation review process. This includes those individuals receiving waiver services at home and those receiving waiver services in a residential facility. Any person who resides, or will likely reside, in a medical facility (Hospital, Nursing Facility, or ICF) for more than one full calendar month will still be subject to a deprivation of resources review.

The following eligibility groups will not be subject to a deprivation of resources review if waiver services are requested:

100% FPL Aged and Disabled;

*However, these eligibility groups will still be subject to a deprivation of resources review if they transition into a medical facility for more than one full calendar month (referenced above). *Similarly, these eligibility groups would become subject to a deprivation review while receiving waiver services if there is a change in circumstance which moves them into a different eligibility group, like medically needy. It is important to narrate if you are aware of any potential deprivation of resource issues in the event that they become subject to a deprivation review.

WHAT IS NEXT?
LB867: Eliminating Spousal Impoverishment

DHHS's "clean up bill" presented to the Legislature's HHS Committee would "outright repeal" §§68-921, 68-922, 68-923, 68-924, 68-925.

These sections were enacted in 1988 following creation of Spousal Impoverishment Rules in USC.

DHHS has stated to interest groups alarmed by the bill that this only eliminate unnecessary duplication of federal statute and that the SIMP rules and DHHS practice would not change.

The bill would also eliminate several sections that reference the repealed section, including in section 1 deleting the protection from criminal prosecution for abandonment, neglect, or refusal to maintain a spouse or child. Why not change the reference from NRS 68-922 to 42 USC 1396r-5(f)(2) or even to 477 NAC 26?

Tomorrow, Feb. 19, 2026 is the deadline to designate priority bills, so please consider raising any concerns with your Senator or members of the HHS Committee.

Effect on federal Medicaid dollars, silver divorce, bringing frail individuals home AMA?

WHAT IS NEXT?
Big Beautiful Bill Act

- Home Equity Exclusion for LTC applicants will increase to $1Million January 1, 2028.
- Retroactive eligibility reduced from 3 months to 2 months January 1, 2027
- CMS Streamlining Medicaid; Medicare Savings Program Eligibility Determination and Enrollment final rules suspended until 2035.
- CMS final rule Medicare and Medicaid Programs; Minimum Staffing Standards for LTC Facilities delayed to Sept. 30, 2034.
- New $$$ for HCBS and rural hospitals
- Increases the limits on contributions to ABLE Accounts, which is already in force.

Questions?

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Outline with Select Quotations from NAC 477 & USC

A. Medicaid Generally

- Medicaid was established by Title XIX (19) of the Social Security Act and states can choose to participate, which requires that they:
    - Pass enabling legislation
    - Provide matching funds,
    - Establish a State Plan, and
    - Administer the program
- The Federal DHHS oversees State administration of Medicaid programs (variously called Medical Assistance, Medicaid, MediCAL, etc.) through the Center for Medicare & Medicaid Services (abbreviated CMS to save up on Ms). The "State Plan" is binding on the state and major changes to the administration of Medicaid may require a State Plan Amendment (SPA) to be submitted to CMS.
- On a daily basis the Medicaid workers who process applications are referring to the most specific, and least authoritative, law, Title 477 of the Nebraska Administrative Code, this is also the default source of law used in fair hearings when you disagree with a Notice of Action by DHHS. If the worker has doubts about what action to take, or disagrees with you, they will "ask Policy" and follow directives.
- Application process:
    - Apply online at ACCESSNebraska (being careful not to apply your client for insurance on the HealthCare.gov marketplace)
    - Then you have 90 days to get your "verifications" (aka documentation that proves eligibility) into DHHS which can be submitted online or via email to: dhhs.andicenter@nebraska.gov
    - DHHS provides a Notice of Action setting the date for the start which programs your client is eligible for along with any other determinations necessary (e.g. client share of cost).
    - Procedure for appealing is included with every notice, 90 days to request a fair hearing before an ALJ.
- Principles for Learning Medicaid:
    - Think in months.
    - Forget every other law you know (or at least never assume that the Medicaid rules will follow suit).
    - Don't trust logic.

B. Medical Eligibility & Residency Issues

- Medical Eligibility is in the name of the program: AABD, Assistance for the Aged, Blind & Disabled. Aged = 65+, Blind = 20/200, Disabled = the Social Security definition.

NE DHHS 477 NAC 23-003.04(F)

The focus of these materials are clients in a "Specified Living Arrangement":

(i) A nursing home;
(ii) Receiving skilled level of care in a hospital;
(iii) Receiving Home and Community-Based Services, including an assisted living waiver, Program of All-Inclusive Care for the Elderly, or requesting and meeting the criteria for such services; or An intermediate care facility for persons with a developmental disability.

NE DHHS 477 Ch. 23

- **23-*003.05(B)(iii)(1)* Definition of Home:** Home is defined as any shelter which the individual owns and uses as his/her principal place of residence. The home includes any land on which the house is located and any related outbuildings necessary to the operation of the home.
- **23-*003.05(B)(iii)(4)* Removal from Home:** If the individual moves away from the home and does not plan or is unable to return to it, it must be determined when the home becomes an available resource in accordance with the following provisions. The home continues to be exempt as a resource while it is actually occupied by the client's spouse or dependent relative.

NE DHHS 477 Ch. 2

- Medicaid is open to US Citizens and Legal Permanent residents along with a host of narrower exceptions to the citizenship requirement.
- A resident of a state is an individual living in the state voluntarily with the intent of making it his/her home.

C. Medicaid Eligibility: Financial Tests

- **Income Eligibility**

States have 2 options for evaluating income eligibility for Medicaid.

- Nebraska is a "Medically Needy State" for income, sometimes referred to as a "Spenddown State". The income level used for Medicaid purposes is equal to the applicant's income each month minus medical expenses each month, therefore most people receiving LTC have an effective income of zero. 477 NAC 25.
- Iowa and Colorado are "Miller Trust" States who enforce an "income cap" but will allow an applicant to use a "Qualified Income Trust" for excess income following Miller v. Ibarra, 746 F.Supp. 19 (D. Colo. 1990). If a client has over a certain amount of income, then you must

set up a Miller Trust for the income to go through. You can establish the trust and then change the name on the account to the trust, but until the month when you do so the client will not be eligible. There are two income numbers to know, the amount at which the client must establish a Miller Trust to qualify (300% of the maximum SSI benefit), and the maximum amount of income at which they cannot qualify even with the Miller Trust (state average cost of nursing home care).

- **Monthly Income While Eligible**
    - Once on Medicaid the client's income will be tightly regulated and where it goes is subject to a set priority. These rules are essentially the same in both types of states above, but in one you have to have the income pass through the Miller Trust.
    - PNA or Personal Needs Allowance comes out first, which is $75 in Nebraska or $55 in Iowa, for the Medicaid recipient to use (notice I didn't say keep because if you keep your PNA every month and don't spend it, then you end up going over resources eventually).
    - Payment to a Community Spouse to bring them up to their Monthly Maintenance Needs Allowance. The Community Spouse is guaranteed a minimum income (again, a number that changes annually) and they can draw from the income of the Medicaid recipient to meet that income. This MMNA can be increased by showing the community spouse's living expenses esp. rent/mortgage/utility expenses.
    - Past Medical Bills. Some states are great about allowing Medicaid recipients to pay off their old Medical bills, Nebraska is not.
    - The Medicaid recipient will make a Contribution to Care, aka "Share of Cost" on the Notice of Action. That is essentially the amount that the recipient must pay to the facility.

- Resource Eligibility: Assets/Resources are Exempt, Unavailable, or Countable.
    - **Exempt** assets include the home (above), burial, one car & personal property.
    - **Unavailable Assets** are those that the client cannot liquidate to pay for care, resources for which there is no market (e.g. a life estate in land).
        - What is **"Countable"** or counts toward the asset limit is going to be everything else, everything that the client has liquid or that can be liquidated to pay for care before Medicaid will pay. Many assets can fit into this category and surprise clients e.g. the cash value of life insurance, that 2nd car that hasn't run for 10 years, or the IRA that they think is protected.

- **23-*003.10* Maximum Available Resources:** The established maximums for available resources which the client may own and still be eligible are as follows:
    1. One member unit $4,000;
    2. Two member unit or family $6,000;
    3. Three member unit or family $6,025;
    4. Each additional individual + $25.

- **Maximum Available Resource Levels For AABD/MA:** The established maximum for available resources which the client, or the client and responsible relative, may own and still be considered eligible for Medicaid, according to unit size, are as follows:
    1. One member unit-client only $4000. If a couple has a valid designation of resources and-
    a. There is an eligible spouse and an ineligible spouse, the resource level for the eligible spouse is $4,000; or
    b. The ineligible spouse later becomes eligible; each spouse is allowed $4,000.
    2. Two-member unit-$6000
        a. Client and eligible spouse;
        b. Client and ineligible spouse; or
        c. Client and ineligible spouse who have designated resources, but the client returns home or no longer is eligible for waiver services.----------

D. Spousal Impoverishment 477 NAC 26

- When an applicant spouse is in a "specified living arrangement" and a Community Spouse remains off of Medicaid the Community Spouse can keep resources separate from the Applicant/Recipient Spouse.
- This eligibility criteria has been mandatory for Nursing Home Spouses since passed in 1988 and expanded to be mandatory for HCBS and waivers since the Affordable Care Act in 2015. Most states were already using Spousal Impoverishment rules in the waiver programs at that time.
- The amount that is reserved for the Community Spouse is known as the Community Spouse Resource Allowance (CSRA). The couple completes an IM 73 Assessment of Resources to report the assets that they had in the month when the Applicant Spouse first was in need of LTC.
- The total of the Countable Assets on the IM 73 are then divided by 2.
- That half is then the CSRA, unless it is outside of the range. The maximum and minimum amounts change annually. If assets are under-reported on the IM 73 the client is supposed to be required to go to fair hearing to prove additional resources and get the CSRA increased, but it is possible for

eligibility workers to fix these errors.

- The assets are then listed again on the IM 74 Designation of Resources, divided between the Applicant Spouse and the Community Spouse. The couple has 90 days after approval of the application to re-title any assets to get them aligned with the IM 74. This is actually advantageous to the couple as the re-titling provides some asset protection from Estate Recovery.

- **26-003** Ownership of the home, one automobile, and all essential property (business property and $6,000 equity in non-business property used to produce goods for home consumption) may be transferred to the community spouse…

  26 - 003.01(c) Treatment of Resources Not Included on Assessment: Since the resource assessment is completed only once, the total value of countable resources which are owned by either or both spouse and which are acquired, discovered, or lose their exclusion after completion of the assessment and before the designation are considered available resources and cannot be used to increase the community spouse's resource allowance calculated at the time of the assessment. Examples of resources which may lose their exclusion are the home when the community spouse no longer resides in it or business property in which the community spouse is no longer actively engaged in operating.

- **Transfer of Ownership:** Once it's been determined that the alternate care spouse is otherwise eligible, the case is approved without waiting for completion of the transfer. The client must be advised of the 90-day period. If the couple fails to complete the transfer within 90 days, the case is closed. Transfers of countable resources from the alternate care spouse to the community spouse are not considered a deprivation of resources as long as the amount transferred to the community spouse, when added to his/her own resources, does not exceed the amount the community spouse is allowed to reserve as calculated at the time of assessment.

E. The Lookback Period and Potential Penalty Issues

- An Applicant can be penalized for giving things away as well as transfers for less than fair market value in the 5 years (60 months, remember, always think in months) prior to applying for benefits.
  - The penalty is based on the total value of all gifts given in the last 5 years, divided by the applicant's monthly cost of care in Nebraska. In Iowa they have a divisor based on the average cost of care per month, which changes annually.
- The penalty begins in the first month after the Applicant has applied and established that they are/were eligible.

- **23- *003.04(G):* - Look Back Period** To determine if a client or his/her spouse deprived himself/herself of a resource to qualify for Medicaid, the agency must look back 60 months before the month of application. The look back is triggered when the individual first applies for Medicaid and is in a specified living arrangement or is on Medicaid and enters a specified living arrangement.

  When an individual applies for Medicaid more than once, the look back period is based on the first date the individual meets both requirements. To determine the countable value disposed of, the Department:

  1. Takes the equity the client has in the resource (equity equals fair market value minus encumbrances);
  2. Subtracts any compensation received by the client; and
  3. Subtracts the allowable resource level shown above from the result of step 2 if this is the first disposal.

- **23- *003.04(H)* Period of Ineligibility***:*** If it is determined that an individual disposed of a resource, the applicant or recipient is ineligible for the number of months determined by dividing the countable value of the resource by the actual monthly cost of care in the specified living arrangement at the current private pay rate.

  The period of ineligibility begins:
  1. If the individual is on Medicaid, with the month of entry into a specified living arrangement; or
  2. If the individual is not on Medicaid, the month of application if in a specified living arrangement.

F. Estate Recovery

- States must attempt to recoup benefits paid from the probate estates of individuals who received Medicaid benefits & may expand estate recovery beyond the probate estate. 42 USC 1396 establishes the requirement on the states and the scope of possible recovery.

- **42 USC 1396(b)(4):**

  (4) For purposes of this subsection, the term "estate", with respect to a deceased individual—

  (A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

  (B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other

assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), 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.

- Nebraska's Estate Recovery statutes have gone through several changes, originally including only the minimum recovery from probate assets under (4)(A). Nebraska moved to expanded recovery in 2015, reforms in 2017, 2019, and 2021.
- I summarized the statutory history along with the planning strategies for several scenarios in "Nebraska Medicaid Estate Recovery" in the March/April 2024 issue of the Nebraska Lawyer.

THANK YOU AND HAVE A GREAT DAY

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Nebraska Medicaid Estate Recovery

by Nick Halbur

Medicaid Estate Recovery in Nebraska has seen massive changes, starting with an aggressive expansion of the scope of possible recovery and additional procedures, then revision of the most problematic provisions in later bills. Though the most pervasive impact on estate administrations has been purely procedural (since most probate and trust administrations do not involve a Medicaid recipient), the aim of estate recovery can significantly impact families who do face an estate recovery claim against the legacy of their deceased relatives. All of the extra forms and procedures are aimed at capturing more funds to fulfill Nebraska's obligation under federal law to have a Medicaid Estate Recovery program.

The language in the current Nebraska statute is often sweeping but with a frequent refrain that the scope of recovery is to the full extent allowed by federal law. Though federal preemption may make those refrains legally redundant, they allude to the wide variety of interpretations of the scope of recovery found across the country. That variety leaves a number of unanswered questions for families seeking counsel from probate attorneys as they face an estate recovery claim in Nebraska. Any change in law brings some of uncertainty, and in this area the varied interpretations of the maximum scope of estate recovery allowed under federal law leave a wide range of possibilities open but provide little clarity for planning for or administering estates facing an estate recovery claim.

By examining the legislative history here in Nebraska and attending to the risks to client assets presented by the reasoning in estate recovery cases in other jurisdictions, attorneys can arrive at best practices that will serve their clients well.

Under 42 U.S.C. § 1396p, all states participating in the Federal Medicaid program (which is all states) must have a program to recover benefits paid after Medicaid recipients die. The exact implementation of this requirement varies significantly from state to state. Here in Nebraska, the state statute governing the process of estate recovery and the scope of assets subject to estate recovery (primarily Neb. Rev. Stat. § 68-919) has significant recent amendments. Generally, federal law allows recovery of benefits correctly paid when the Medicaid recipient was 55 years of age or older. States must recover benefits paid for nursing home or other long-term care services but may expand what can be recovered to include all Medicaid benefits paid while the Medicaid recipient was 55 years of age or older. The recovery cannot occur until the Medicaid recipient has passed away (hence the inclusion of the term "Estate" in Medicaid Estate Recovery), or if the recipient was married, then after the death of both spouses. The minimum scope of assets subject to estate recovery is the probate estate but may be expanded to "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest)."

Nick Halbur

Nick Halbur practices elder law with Koukol Johnson Schmit & Milone, serving seniors, adults with disabilities and fiduciaries. Nick earned his Bachelor's Degree from Creighton University in 2003 before becoming a student and then Clinical Teaching Fellow with the Elder Law Clinic at the University of St. Thomas School of Law where he graduated in 2006. Nick has been in private practice in Omaha since 2011.

Nebraska Legislative Reforms

Prior to 2015, Nebraska only recovered assets from the probate estate of deceased Medicaid recipients (which is the minimum requirement of participation in Medicaid). In 2015, LB72 expanded the scope of assets against which the state could recover, making Nebraska an "expanded recovery state." The scope of the initial changes, and the breadth of their impact on every probate and trust administration, coupled with serious concerns that the lien provisions would result in cloud on real estate title, lead to a number of the later reforms. The more elaborate and burdensome procedural requirements of the initial bills have given way to manageable notice requirements for probate administrations and stand-alone proceedings for the determination of inheritance tax.

The substantive and procedural changes to the estate recovery law of Nebraska began with Senator Schumacher's LB72 (2015), which expanded recovery from only the probate estate to also include any "revocable trust which has become irrevocable by reason of the death of the trustor." LB72 also imposed a prohibition against trustees of those same trusts making basic distributions to heirs without DHHS first certifying that there was no estate recovery claim against the decedent. Extremely few revocable trusts would still be holding the assets of a Medicaid recipient at their passing because DHHS routinely requires that such trusts be revoked before they grant eligibility to the grantor.

Next, LB268 (2017) stated that it expanded Medicaid Estate Recovery "to the full extent authorized in 42 U.S.C. § 1396p(b)(4)(B)."[1] Assets exposed to recovery by LB268 included joint tenancy property, transfer on death deeds, "or other arrangements," all of which were included in an expansive definition of "estate" for Medicaid Estate Recovery purposes. LB268 created zombie life estates (estate recovery against a property a dead Medicaid recipient had held a life estate in) implying that a life estate interest had value after the measuring life ended and demanding that any stream of income off the property pay the estate recovery debt of the deceased life tenant. Estate recovery claims were also given a longer statute of limitations than general creditor claims, a full five years after the death of the Medicaid recipient (or the death of their widow/er).

The procedural impact of these bills was reduced by LB593 (2019), which eased the requirements on estates where the decedent had never been enrolled in Medicaid. This bill including the end of a mandate for a DHHS Waiver before a trustee could distribute from a trust following the death of a grantor. Finally, LB501 (2021) reduced the window for zombie life estates to 60 months after the recording of the life estate deed and eliminated recovery from the stream of income after the measuring life. This makes the five-year lookback for gifts and estate recovery against life estates run at the same time. While DHHS is allowed to assert its claims against an estate five years after the death of the Medicaid recipient, an "estate" for Medicaid Estate Recovery purposes, does not include life estate interest 60 months after the recording of the life estate deed.

Though the five-year lookback and the time for recovery against life estate deeds now line up in Nebraska, be careful not to confuse the five-year lookback and protection of an asset from estate recovery. Without the provision protecting life estate property five years after recording, they might be exposed indefinitely (which is the problem that provision of LB501 solved). Contrast Nebraska's statutory provisions regarding life estates deeds with *Estate of Peterson*[2] where Mr. Peterson filed a life estate deed to his daughter in 2001. He received Medicaid before he passed, the state claimed the actuary value of his life estate just before his death in the probate, but the court awarded the state the full value of the real property 13 years after the deed was recorded. Life estate deeds didn't always work well with Medicaid here in Nebraska, and they apparently offer no protection at all for real estate in Idaho, but currently they are a valuable pre-planning tool in Nebraska.

The Family Home and Caregivers

Most Medicaid recipients pass away with few or no assets, so estate recovery is simply not relevant. Other recipients of benefits can exempt key properties or receive a windfall late in life and so the impact of Medicaid Estate Recovery claims is necessarily uneven and requires a confluence of factors to

become a disputed issue. Significant exposure to estate recovery can occur when an individual owns assets that are exempt when an individual applies but are not exempt from estate recovery after they pass away. The most significant example is the family home. If an individual lives in a home that they own but is otherwise impoverished, then the value of the home is exempt, or not considered, for the purposes of determining that individual's eligibility for Medicaid coverage. The home of a Medicaid recipient can be exempted from consideration at application, but there is a significant risk of losing any protection after the recipient passes. Keeping such a home in a family presents a special challenge, and one where the clients may lack the means or liquidity to pay for representation.

Not every home that was exempt for eligibility purposes will be lost because there are a few narrowly drawn exemptions that can protect the home from estate recovery. The regulation on Medicaid Estate Recovery provides the grounds for undue hardship waivers that are a "rare an extraordinary remedy intended to prevent the impoverishment of the deceased recipient's family."[3] Hardship is not established simply because the Medicaid Estate Recovery claim will exhaust nearly all of the estate assets.[4]

The general hardship standard is very difficult to meet, but there are categorical hardships within the regulation at 471 NAC 38-004.03. An heir (as defined by the probate code) who lived with the recipient of benefits for two years and provided unreimbursed care that delayed entry to a nursing home or the need for Medicaid services has a categorical protection. An heir who would become eligible for public assistance absent a waiver is also protected, along with an heir who could end public assistance if a waiver is given.

The caregiver provisions found in 471 NAC 38 are similar but distinguishable from protections for clients found in 477 NAC 23 (gift penalty rules) and federal statute. If the "heir" is also a child of the Medicaid recipient, then the superior route is to have the house transferred to the caregiver child under the exception to the gifting rules at 477 NAC 23-003.04(K). However, if the caregiver is an heir but not a child, the lifetime transfer exception will not apply. The lifetime transfer rule also lacks the term "unreimbursed" so the nephew and heir who provides care for two years can't get paid if he wants to receive title to the home per the hardship waiver to estate recovery and has to wait until his uncle dies to gain protection of any Medicaid regulation. There is substantial risk that the house will not be in the uncle's name when he passes.

In contrast, a child can get paid by their parent for the two years of care and get the house while their parent is still alive (n.b. have a written contract in advance of the care the child is to be paid for to avoid being caught by a different gifting rule). There are also federal statutory versions of these protections at 42 U.S.C. § 1396p(a)(2) which apply to the child (no use

of the term heir) and lack any requirement that the care be unreimbursed. The federal law also protects a sibling living in the home for a year without any caregiving requirement. You should always examine all sources of law for helpful authority for your client, but expect that DHHS will follow their own regulations (NAC) and be prepared that application of federal law will likely require an appeal to District Court in Lancaster County. (You might say that these narrowly drawn exceptions and inconsistencies between similar rules are arbitrary and unfair. I agree, but I use them when they work for my clients.)

Inheritance

Inheritances (or other windfall) can also cause significant exposure to Medicaid Estate Recovery. When a Medicaid recipient receives any significant inheritance, they will have assets in excess of the $4,000 resource limit. Without additional efforts, the heir will lose Medicaid coverage. The inherited assets can quickly start to be consumed by the cost of the medical services that had previously been covered by Medicaid. Any amount of the inheritance remaining when the Medicaid recipient dies is then exposed to estate recovery.

Medicaid recipients can be written out of family members' wills to eliminate this problem, but a superior solution is for the family member to incorporate a properly structured irrevocable trust for the benefit of the Medicaid recipient into their estate plans. These testamentary trusts are known as Supplemental Needs Trusts and have many of the same terms as a Special Needs Trust (SNT), but, since the Medicaid recipient was never directly entitled to the assets, Medicaid cannot impose the condition that a payback provision being included in the trust terms. Such advanced planning allows the wishes of the decedent to be honored without jeopardizing Medicaid coverage for their loved one or exposing the assets to estate recovery.

Without pre-planning there are still options to maintain benefits. Before distributing to a Medicaid recipient, a Personal Representative and their attorney ought to consider establishing a SNT for the Medicaid recipient, but a trust funded by the assets of the Medicaid recipient (which probate distributions are) only maintain lifetime benefits because a SNT must make provision for repayment to DHHS after the beneficiary passes. Payment by a SNT is not technically Medicaid Estate Recovery, it is part of the federal law creating such trusts, but the impact is the same. Spending all of the SNT assets on the beneficiary before they die does eliminate the repayment and can be a lot of fun. The federal Program Operations Manual System (POMS) provides a safe harbor for funding of a SNT if the assets are irrevocably assigned by a judge (this safe harbor applies to tort settlements and other possible sources of assets headed toward a Medicaid recipient in addition to inheritances). The beneficiary must be under 65 years old to establish the SNT.

While the SNT solution maintains benefits if executed correctly, that type of trust is simply not a good fit for all beneficiaries and the eventual repayment to the state means that you may just be kicking the can down the road. Another option is to report the inheritance, accept that the beneficiary will lose benefits, and then construct a plan for a carefully calculated gift of some of the inheritance to the beneficiary's own heirs. That planned gift is coupled with a Medicaid Compliant Annuity, which pays for care during the penalty. This is the same type of plan that I would provide for a single client who had not yet used Medicaid, but not all scenarios are as favorable. For the recipient of an inheritance who was already on Medicaid, the payback provision required in a Medicaid Compliant Annuity exposes the annuity funds to repayment of prior benefits where a client who is just entering care would be able to have any remaining value of the annuity go to their heirs if they die during the term of the annuity.

Another type of inheritance that may go to a Medicaid recipient is from their spouse. The rules that apply here are entirely different, but there is also a chance that pre-planning may be in place. Many individuals on Medicaid also have a spouse on Medicaid, but that is less often true for long-term care residents. Many couples will have only one spouse on Medicaid when one spouse requires long-term care but the other does not. The spouse without long-term care needs typically remains in the family home and is known in Medicaid-speak as the "Community Spouse," but I prefer the term "Spouse-

in-the-house" because it rhymes. The Community Spouse is afforded basic financial protections referred to as "Spousal Impoverishment Rules" that allow them to keep some assets while their spouse obtains Medicaid. Those basic protections can be significantly enhanced with aggressive Medicaid planning to eliminate most of the financial loss to the couple's overall wealth. The Community Spouse should shift any and all allowed and exempt assets (the house and a vehicle) to the name of the Community Spouse alone during this process.

Some specific rules apply to a new widow/er in long-term care. Medicaid requires that the Medicaid Spouse receive their elective share of the augmented estate (failing to receive the elective share is considered a gift that can be penalized).[5] Having shifted assets to the Community Spouse to obtain eligibility, if the Community Spouse then passes away first, then the assets could return to the name of the Medicaid Spouse and eliminate eligibility. Without additional planning, the returning assets are available to pay for care or (after the death of the widow/er) the estate recovery claim. I have been successful at maintaining benefits for the Medicaid spouse in this situation by structuring the Community Spouse's Will to allocate the elective share to a Testamentary Supplemental Needs Trust for the benefit of their spouse on Medicaid. These trusts have been approved by DHHS without a payback provision in the Testamentary Trust.

The more common scenario is that the spouse on Medicaid will pass first. As noted above, there is no Medicaid Estate Recovery until both spouses have died. Courts have found that federal law protects varying portions of the Community Spouse's estate when they are the second to die. "[O]f the courts that have interpreted federal law to allow direct claims against the estate of a surviving spouse, only one has construed that authority to extend to assets that were transferred before the death of the Medicaid recipient…"[6] Minnesota's estate recovery claim failed because the predeceased spouse who had received Medicaid "had no interest in assets at the time of her death that were part of a probate estate or an expanded estate definition permissible under federal law, and therefore there is no basis for the County's claim against the estate."[7] The sole exception to the rule followed by *Barg* at that time was *Estate of Wirtz*.[8]

Assets that were designated to the Community Spouse in the Spousal Impoverishment process are not exposed to Medicaid Estate Recovery.[9] In light of § 68-923, Nebraska should follow the reasoning in *Barg*; therefore, the best practice to protect against future estate recovery is to make sure that the designation of assets is completed correctly at the application phase and that the Medicaid spouse is not on title to any assets when they pass away, except the bank account where their income goes.

Planned Gifting

Some clients are in a position to attempt to gift with a goal of avoiding a Medicaid application for the full five-year lookback period found in the gift penalty rules. I currently employ life estate deeds for real property (because of LB501) or an irrevocable trust for other types of assets and in cases where the client wants to be able to stop receiving income from the real property, which a life estate deed does not provide for. To allow for the stream of income to be ended in the future, I recommend a property structured irrevocable trust that receives title to the real property and then hires the grantor to manage the property. My analysis of the suitability of these plans boils down to the client's health and wealth; they need some of each and preferably a whole lot of at least one. These trust plans run the risk that they will be successful at allowing the client to obtain eligibility, but later be exposed to estate recovery, like Mr. Peterson's life estate deed in Idaho.

The trust in *Boruch v. Nebr. DHHS* provided for net income to the grantor, which was enough to rule that the entire corpus of the trust was available to Mr. Boruch, preventing him from obtaining Medicaid coverage.[10] So, the Boruch trust failed to obtain eligibility and therefore never faced the separate question of whether the assets would have been available to satisfy an estate recovery claim. Note that DHHS refers to its regulations throughout the application process and generally disregards references to federal law or case law. DHHS regulations do not follow *Boruch*, distinguishing between income distributions and access to principal.[11]

A pair of trusts that allowed the grantors to access Medicaid coverage, but failed to protect from estate recovery were found in *Estate of Melby*.[12] The *Melby* trusts were funded with a farm and the grantors' son served as Trustee. The grantors received income from the trusts, but over five years after funding the trusts their long-term care expenses exceeded that income and they were able to obtain Medicaid coverage. After the grantors both died, Iowa Estate Recovery claimed they could recover from the trusts. Iowa lost at the District Court but ultimately prevailed under a three-step analysis regarding whether trust assets are exposed to estate recovery claims: (1) Trust Classification, especially "the extent to which the assets of a trust are actually available to a trust beneficiary;" (2) The Medicaid Recipient's interest in the trust (here specifically the payment of their debts after they pass and the existence of the estate recovery debt as payments were made by Medicaid to be satisfied after the recipient passes); (3) The Medicaid Recipient's interests at the time of death (emphasizing the availability of trust principle to pay "any indebtedness owed" by the trustors). Therefore, to protect from estate recovery after obtaining eligibility, the terms of an irrevocable trust cannot make the assets available to general creditors of the grantors, which will include estate recovery.

I hope that this review of our recent legislative history, exploration of likely scenarios, and examination of some estate recovery jurisprudence assists in the development of planning strategies and best practices. When an estate with sufficient assets faces a substantial estate recovery claim, a thorough examination of all of these issues is necessary to afford the clients whatever protections are available in this developing area of Nebraska law.

For further discussion of many of these issues and a detailed legislative history, see the NSBA's *2022 Elder Law Handbook*, specifically Chapter 18.

Author's Note: I would like to acknowledge that I was previously listed as the author on the title page of Chapter 18 by mistake. I was, in fact, the editor of that chapter, having the pleasure of working with authors Frank Heinisch and Brittney Holley. Thank you, Frank and Brittney, for all of your work on the *2022 Elder Law Handbook*.

Editor's Note: The NSBA apologizes for the Chapter 18 title page error in the *2022 Elder Law Handbook*, which occurred during the outsourced formatting process and has since been corrected. We thank Mr. Heinisch and Ms. Holley for their excellent work on this chapter!

Endnotes

1 Neb. Rev. Stat. 68-919(4)(b)(i)(B).

2 340 P.3d 1143 (Idaho 2014).

3 471 NAC 38-004.01.

4 *In Re Estate of Vollmann v. Nebr. DHH*S, 296 Neb. 659, 667 (2017).

5 477 NAC 23-003.04(A)(i).

6 *Estate of Barg*, 752 NW2d 52 (Minn. 2008).

7 *Id*. at 72.

8 607 NW2d 882 (ND 2000).

9 Neb. Rev. Stat. 68-923 (4 and 5).

10 659 NW2d 848 (Neb. App. 2003).

11 477 NAC 23-003.05(A)(vi)(2)(g)(ii).

12 841 NW2d 867 (Iowa 2014).