Oregon's Experience with Asset Transfers and Estate Recovery: Successes and Impediments

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Oregon's nationally known estate recovery program is based on this premise: if someone uses taxpayer resources for long-term care and if assets remain in their estate upon their death, it is fair that these assets go back to the taxpayers who have been footing the bill. In 2003, Oregon recovered $20 million or 2.2% of its Medicaid long-term care expenditures; in contrast, Wisconsin recovered $17.6 million or 0.8% of its Medicaid long-term care expenditures. Oregon recovers about $14 for every dollar invested in the program using best practices such as expanding the definition of estate, pursuing claims against the estate of the surviving spouse for the spouse who died first, establishing the state as a priority creditor, and promptly notifying estate recovery staff of the client's death.

One of the most controversial policy levers for curbing long-term care costs is estate recovery. States are trying to get a handle on how to control the leakage in asset transfer and estate planning that some people, who otherwise would not qualify, use to become eligible for Medicaid long-term care or waivered services. Since 1993, states have been required by federal law to recover, at a minimum, the Medicaid dollars paid to nursing homes. In addition, some states have chosen to recover the cost of Medicaid waivered services. However, estate recovery has proven challenging, given the complexity of the issue and a number of political challenges.[1]

This chapter discusses why it is difficult to reform state laws regarding asset transfer and estate recovery, what are some of the most common interspousal transfers used to avoid estate recovery, and how the state of Oregon developed its estate recovery program. Oregon's program was recently cited by the American Bar Association as one of the most effective in the country.[2] The chapter concludes by contrasting some of the best practices that the state of Oregon has put into place with practices currently being used in Wisconsin.

What is Asset Transfer and Estate Recovery?

Asset transfer is simply the transfer of ownership of assets (i.e., property, cash, stocks, bonds) from one person to another. Of particular interest to policymakers is the federal law that allows unlimited transfer of assets to a spouse, a technique that allows the giving spouse to become eligible for Medicaid. Policymakers are also interested in divestment of assets, whereby assets are transferred for less than fair market value. These and other types of asset transfer transactions are used to "artificially impoverish" the giving spouse and allow him or her to qualify for Medicaid benefits.

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A second phase of "artificial impoverishment" is the avoidance of estate recovery to protect inheritances for the children of Medicaid recipients. In response, the federal government requires states to put in place estate recovery programs to recover funds from deceased Medicaid recipients' estates up to the amount spent by the state for all Medicaid services recoverable under applicable federal/state law. The exact rules about what assets are included and excluded, and when, if, and how this recovery will take place, are generally determined by the states in accord with federal guidelines; not surprisingly, these rules vary significantly from one part of the country to another.

Asset transfer and estate recovery are two sides of the same coin. Assets that are sheltered, transferred, or removed in some way on the front end are not available for recovery upon the death of the Medicaid recipient.[3]

Why is Reforming Asset Transfer and Estate Recovery Laws So Difficult?

Reforming asset transfer and estate recovery laws is difficult for a number of reasons, four of which will be mentioned here. First, some fear that reforms are being driven not by principle, but instead by the large financial stake that states have in the funding of long-term care. For example, for fiscal year 2004, the Kaiser Family Foundation reports that Wisconsin spent almost $1.9 billion on long-term care services, which was 42% of the total Medicaid expenditures.[4] Second, reform is difficult because the Government Accountability Office and others have concluded that there is little hard data on the extent of asset transfer that is occurring.[5] Third, asset transfer and estate recovery laws are one of those complicated issues in which the devil is in the details. Reforms entail addressing, not only broad statutory changes, but also the minutia of the day-to-day work of Medicaid eligibility workers.

Finally, the issue is politically challenging. Advocates on both sides of the issue see estate recovery as a matter of equity and fairness. Opponents to stricter asset transfer and estate recovery laws cite eligibility rules that already require patients to spend down most of their assets to about $2,000. Further restrictions, they argue, will primarily hurt the poorest citizens, who are the primary users of Medicaid long-term care services, and the least likely to seek out estate planning advice. Proponents say that if someone uses taxpayer resources for long-term care and if assets remain in their estate upon their death, it is fair that those assets go back to the taxpayers who have been footing the bill. Moreover, proponents contend that the nonpoor are spending down to qualify for Medicaid, which could result in the program becoming so expensive that it may no longer be available for those who need it most.

What are some of the Most Common Transfers Between Spouses to Avoid Estate Recovery?

Many types of transfers between spouses can occur to avoid estate recovery, four of which will be covered here. In several instances, I give examples from the state of Oregon.

The biggest loophole for Medicaid eligibility for long-term care is the penalty for the transfer of assets.

(1) **Penalty or “Look Back” Period**. According to Brian Burwell of Medstat, the biggest loophole in Medicaid eligibility for long-term care is the penalty for the transfer of assets, specifically when the penalty begins. One of the easiest Medicaid planning devices is to transfer half of one’s assets immediately when one enters a nursing home. By the time the remaining half is spent, the penalty period is over and the person can remain in the nursing home and receive Medicaid coverage without a penalty. Hence, this estate planning strategy is aptly known as *half a loaf.* According to Burwell, the real asset limit for Medicaid for long-term care is not $2,000 for a single individual, but rather half of what you have in countable assets; actually, it is more than half if tax-exempt assets are included.[6]

(2) **Court Orders.** According to federal law, a Medicaid recipient can transfer an unlimited amount of assets to a spouse, and these assets will be excluded from determining Medicaid eligibility if the transfer is pursuant to a court order. Oregon law allows for these types of court orders for married couples. In Oregon, it is not unusual for a married couple to shelter on the front end up to $180,000 in assets over and above the family home and automobile.

What’s more, assets that are transferred from a Medicaid recipient during his/her lifetime are not available to the state on the back end. When the surviving spouse dies, property/asset transfers cannot be used to pay an estate recovery claim for a Medicaid recipient if the decedent did not have an ownership interest at the time of death. However, at least one state, North Dakota, has taken the position that assets traceable to the Medicaid decedent, even if they had no legal interest in the asset at the time of death, may be pursued to satisfy the Medicaid public assistance claim (see Estate of Wirtz, 2000 ND 59, 607 N.W. 2d 882).

(3) **Home.** According to Burwell, the home is one of the main assets available to states for recovery, because it is not counted in determining Medicaid eligibility and is often still in people’s estate when they die.[7] In Oregon, the Medicaid recipient frequently transfers his or her interest in the home to his or her spouse. Since the transfer occurred during the Medicaid recipient’s lifetime, the equity in the home will not be available to pay an estate recovery claim when the recipient’s spouse dies.

(4) **Annuities**. Federal law also allows excluding certain types of annuities in determining a Medicaid recipient’s eligibility. Frequently, Medicaid recipients transfer most or all of their assets to their spouse. The spouse can then use these assets to purchase annuities that are not counted in determining Medicaid eligibility. Again, because the transfer of assets occurs during the lifetime of the Medicaid recipient, the annuity cannot be tapped to pay an estate recovery claim when the spouse dies. Oregon has seen cases where $500,000 of assets or more have been sheltered in this way.

How Does Oregon's Estate Recovery Program Work?

Oregon is a small state with a population of about 3½ million and annual Medicaid expenditures of about $2 billion. Oregon has one of the oldest estate recovery programs in the country, starting before Medicaid even existed. In 1949, Oregon enacted legislation authorizing the state to recover the cost of cash assistance provided to the elderly. In 1975, legislation was enacted authorizing the State to recover the cost of Medical Assistance provided to persons 65 or older. In July 1995, Oregon expanded their definition of estate to include joint tenancy, tenancy in common, survivorship, life estate, living trust, or other similar arrangements (e.g., annuity).

In Oregon, we strive to increase estate recoveries, while protecting the personal and property rights of the people we serve. We aggressively seek to return assets transferred incorrectly, and also to preserve assets so that they are available for the current cost of care and the future estate.

What is the Track Record of the Oregon and Wisconsin Programs?

In Oregon the state makes a priority claim against the property, or any interest therein, belonging to the estate of a deceased Medicaid beneficiary. If there is a surviving spouse, no recovery occurs until the death of the surviving spouse. In response to two state court decisions, Wisconsin does not pursue a Medicaid claim against a surviving spouse's estate. In Oregon, the state does pursue the claim for the deceased Medicaid recipient's public assistance, but limits its claims against the surviving spouse's estate to property or other assets that were received through probate or operation of law at the time of the Medicaid beneficiary's death. We estimate that 10 to 15% of our recoveries involve a claim against the estate of the surviving spouse. The state does not make a claim when there is a surviving child of a beneficiary who is under age 21, blind, or permanently and totally disabled.

According to an American Bar Association study that compared estate recoveries across the nation, Oregon recovered $20 million in fiscal year 2003, which totaled about 2.2% of Medicaid long-term care expenditures. Wisconsin collected about $17.6 million from estate recovery efforts, totaling about 0.8% of its Medicaid long-term care expenditures.[8]

Oregon recovers approximately $14 for every dollar invested in their estate recovery program.

Oregon handles nearly 7,700 estate recovery cases each year, despite the fact that 40% of the deceased Medicaid recipients have circumstances where no recovery is possible or exemptions exist that require that we waive or defer recovery from their estate. On average, we collect about $4,000 for every case that has assets the state can legitimately pursue. Wisconsin attempted recovery from 5,800 estates, with an average recovery of $3,034. Overall, Oregon recovers approximately $14 for every dollar invested in the program—a return rate that we are proud of. Also, in Oregon, all Medicaid recoveries that revert to the state are used to sustain programs that serve living, low income senior and disabled Medicaid clients. This provision bolsters legislative support as well as the support for the estate recovery program in the field units that establish eligibility and provide services. Similarly, Wisconsin's estate recoveries are also used to support ongoing Medicaid programs.

What Best Practices Have Oregon and Wisconsin Put into Place?

One of the reasons that our program has been successful is that we have been doing it for a long time. Over the last 57 years, Oregon has developed a number of best practices. The success of our program is due to how the program is set up, its staffing, training, public education, and administration.

What Best Practices have both Oregon and Wisconsin Implemented?

Oregon has implemented a number of business practices that alleviate, in part, many of the previously mentioned problems inherent in pursuing estate recovery. Wisconsin already has implemented a number of these best practices including:

- Training on estate recovery in regions around the state.
- Training on estate recovery to new eligibility workers who will be implementing the Medicaid program.
- Using estate recovery staff to review probates filed in counties to ensure a public assistance claim may be submitted where the decedent was a Medicaid recipient.
- Securing statutory authority for the state Medicaid agency to be a priority creditor under state probate law.
- Notification of all probates filed in the state.
- The ability to nominate a personal representative for the client's estate when appropriate.
- Including with all Medicaid applications an estate recovery brochure that clearly and concisely outlines the estate recovery process and provides a toll-free number for interested parties to ask further questions.

Oregon's definition of estate includes survivorship interests, life estate interests, living trusts, and remainder interests in client-created annuities.

What Other Best Practices has Oregon Implemented?

Below are some of the best practices based on our experience in Oregon that differ from what is currently happening in Wisconsin.

- Since 1995, Oregon has used the "expanded" definition of estate that allows for the recovery of survivorship interests, life estate interests, living trusts, and remainder interests in client-created annuities. Wisconsin does not use this expanded definition. This change is allowable under federal law. This allows the state, and only the state, to recover assets that would otherwise transfer by operation of law and not be probated. Based on my experience in Oregon, changing this definition could increase recovery by an estimated 20% to 25%.
- Oregon pursues the claim against the estate of the surviving spouse for Medicaid assistance provided to the spouse who died first. Wisconsin does not. As mentioned earlier in the report, Wisconsin could expect Medicaid recoveries to increase 10 – 15% if claims could be presented in the estate of the surviving spouse.
- When a beneficiary dies and the heirs want to keep the home, farm, or other real property, Oregon is willing to take a mortgage on that

Oregon will take a mortgage to allow the heirs to buy back the home, farm, or other real property.

property and have the family pay us back in installments. Technically, the heirs/devisees are able to execute a note and trust deed on the property and make payments to the state over time to pay off any claim to the estate. Wisconsin generally does not encourage this practice, although the state appears to have the authority to do so. In Oregon, we have found that implementing practices that allow keeping the family home in the family, when that is the family's wish, are an important component of eliciting political and public support for our efforts.

- Wisconsin utilizes TEFRA liens (i.e., pre-death liens) on real estate property for those clients entering nursing facilities. I consider this a best practice. However, Oregon has chosen to utilize the claims process exclusively and made changes in its probate statutes so that the state is a priority creditor, thereby ensuring that the public assistance claim will be paid prior to general creditors like charge cards.
- Wisconsin's undue hardship waiver criteria appear to allow for more categories of hardship situations than Oregon's. For example, Wisconsin may waive a claim if the beneficiary or heir of the estate is receiving food stamps, even if the condition may be short-term. Additionally, Wisconsin may waive a claim if the decedent's real property is used as part of the waiver applicant's business and would result in the applicant losing their livelihood; this occurs even if a portion of the business proceeds could, over time, be used to satisfy the state's claim. Oregon's criteria are broader and generally require that the applicant be eligible for public assistance and homelessness *unless* the claim is waived.
- Oregon has a very sophisticated death notification process that allows estate recovery staff to receive notice of the client's death within 10 working days of the field unit's notification. The entire electronic case file for the decedent is transferred to the estate recovery unit. The case file is fully screened and immediate actions are taken to claim (a) client bank account funds (under state banking statutes) and (b) personal incidental funds being managed by providers. Other assets like real property that the client had an interest in are also identified and the representative for the estate is contacted to inform them of the public assistance claim. This proactive screening and recovery process is possible because of the number of staff afforded the estate recovery unit. Wisconsin generally is informed of the client's death when the client's estate is probated or a notice of an affidavit is filed with the state, which may in some instances be months after the client has died.
- Oregon has statutory authority to file a "Request for Notice" with the county clerk asking that the state be informed whenever a piece of real property in which our client has an interest is transferred or encumbered. This notice is not a lien, but it does allow the unit to identify transfers and sales of real property that the field unit may not be aware of that affect ongoing Medicaid eligibility. It has also been helpful in identifying instances of financial exploitation of our clients

before the funds are expended. Wisconsin does not have similar authority.

- The Oregon estate recovery office also has statutory authority to subpoena deceased client bank records and/or other legal documents that may have a bearing on the disposition of client assets when there is evidence of possible Medicaid fraud. The Wisconsin estate recovery program does not have similar authority.

Staffing

The success of our program is due, first and foremost, to the skills, attitude, and commitment of the employees who implement our program. To deliver such a complex and multifaceted program, our staff of 22 possesses a diverse mix of backgrounds in legal and paralegal education, and experience in such areas as title transfer, Medicaid eligibility, collections, and service delivery. We also utilize the skills of several highly trained attorneys that work for our Department of Justice. Put simply, our staff is highly skilled and well paid. Because of that, there is little staff turn-over and high consistency in how the program is implemented

In Oregon, we have invested in specialized staff who have proven to be cost effective. For example, we recently hired an asset change specialist, whose primary responsibility is to research electronic narratives completed by field units when assets have dropped off during the re-determination of client eligibility. Because of eligibility staff turnover in the field, this position is sometimes able to identify the liquidation of assets that may require the Medicaid recipient to become private pay or allow for a voluntary reimbursement of past assistance to maintain Medicaid eligibility.

Training

Our success is due, not only to the quality of the staff, but also to the training that we provide. There is no substitute for hands-on training in the field to explain the estate recovery process and also to answer questions. Support of the estate recovery program in the field by case managers and eligibility specialists is critical. They provide the information upon which all subsequent estate recovery activities are based.

We train our estate recovery staff, and we also involve estate recovery staff in the training of local eligibility workers around the state who will be implementing the Medicaid program. This training helps ensure that our local staff understand and have a commitment to the program goals, and helps ensure that clients and their families receive accurate, consistent, and uniform information.

Any training should try to raise sensitivity to the families the program serves such as the stress long-term care decisions can place on families, what ways professionals can work effectively with family members during difficult times, and how to partner with families to reach program goals. Agency procedures should be examined to determine how family friendly they are. For example, in establishing Medicaid eligibility do families have to travel to different sites, fill out countless applications, and file multiple verification forms? Implementing

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family-centered agency procedures and staff practices can help ensure that Medicaid eligibility forms are accurately completed, clients are informed of estate recovery, and issues are resolved prior to legal action.

Public Education

No Medicaid client or his/her family should be surprised that the state will try to recover the costs of public assistance.

Based on my experience in Oregon, any successful estate recovery program is built on information, information, and information. Also critical is a positive working relationship with all the stakeholders (e.g., field unit staff that establish eligibility and provide services, client advocacy groups, elder law attorneys, health care providers, and, of course, legislators). I also recommend developing a brochure that describes the estate recovery program in a forthright, open manner and provides a toll-free number for further information. No Medicaid client or his/her family should ever be surprised that the state will try to recover the costs of public assistance provided to them.

Administration of the Program

In Oregon, the estate recovery unit must be notified of a client's death within 10 working days from the time the field unit is informed of the death. This timely notification process allows the estate recovery unit to initiate actions that safeguard client assets before they may be used for purposes not in accord with probate law. In recovery efforts, time is of the essence. All newly referred cases are screened for identifiable assets (e.g., bank accounts, real property or stocks) and, depending on the type of asset, an initial letter is generated to the appropriate party informing them of the state's priority claim and its interest in the asset.

Depending on the circumstances, the estate recovery unit may a) negotiate a payment of the public assistance claim, b) nominate a personal representative (a private attorney under contract with the state) to probate the client's estate if the family is unwilling to assume that responsibility, c) refer the case to the state Department of Justice to initiate a legal action, or d) take any other legal action necessary to safeguard our interest.

Perhaps one of the major differences between Oregon's and Wisconsin's estate recovery programs is that Oregon's program has branches throughout the state, but is generally state administered, whereas Wisconsin's program is county administered. Conceivably, this could have some effect on such aspects of the program as the training of staff, public education efforts, and notification procedures, although the state provides each county with a basic model and guidelines.

Summary

Our experience has shown that good estate recovery practices can be sensitive to families as they grieve the loss of their loved ones and still ensure the state does not pay more than its share of long-term care services. Estate recovery will probably never balance a state's budget. However, Oregon's estate recovery program has been successful in working with families and in returning dollars to the state coffers by paying attention to how the program is set up, the quality of its staff, training, public education, and program administration.

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