

SSI and Medicaid and Housing Issues

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Introduction

The thrust of this presentation is much broader and more complete than just when a Special Needs Trust may purchase a residence for a trust beneficiary. Sometimes an unplanned inheritance includes real property that is thrust upon a disabled person, including real property that is not a residence or a home that will never become the disabled person's excludable principal residence. Sometimes receiving a dilapidated residence is more a headache than a benefit to the disabled person or the trustee of the person's SNT seeking to help the beneficiary keep eligibility.

Understanding national SSI rules is important because it is the floor for most Medicaid eligibility determinations. The Medicaid Act prohibits state Medicaid agencies from employing a methodology for determining income and resource eligibility that is more restrictive than the methodology which would be employed under the SSI program, as administered by the United States Social Security Administration (the "SSA"). See 42 U.S.C. §§ 1396a(a)(10)(C)(i), 1396a(r)(2). But even in 209b states, some SSI rules trump the state's position on many issues as the State of Connecticut found out in the Second Circuit Court of Appeals in *Simonsen v. Bremby*, No 15-cv-1399 (VAB), 2015 U.S. Dist. D. Conn. (Dec. 25, 2015), *aff'd* 679 Fed. Appx 57 (2d Cir. 2017).

Before we talk about housing, including real estate in any form (single family home, condo, raw land, etc.) and places of abode (sailboats, campers, mobile homes, etc.), we must understand the concept of when SSA and Medicaid may regard the real estate or home as a countable resource and when they may not. Several issues related to real estate require that we understand the important difference between an asset and a resource.

The discussion includes several issues, including when an unplanned inheritance names the SSI beneficiary of a home and when it counts and doesn't; the rules excluding replacement funds after the home is destroyed by natural disaster – e.g., fire, hurricane, flood; how to dispose of excess houses or real property while retaining SSI and Medicaid pending the sale by using SSA's conditional sales agreement; as well the pros and cons of holding title in the name of the disabled individual versus title retained in the special needs trust.

Initial considerations -Assets vs. Resources

In the Social Security Administration's (SSA) Program Operations Manual System (POMS)—specifically under **SI 01110.100, SI 01110.115, SI 01120.010 and SI 01120.020**—the distinction between an “**asset**” and a “**resource**” is a foundational concept for Supplemental Security Income (SSI) and Medicaid eligibility. While the terms are often used interchangeably in general finance, the POMS establishes a strict "a rectangle is a square, but a square isn't a rectangle" relationship: **all resources are assets, but not all assets are resources.**

Key Definitions

Concept	Definition in POMS	Core Principle
Asset	Any real or personal property that an individual has an ownership interest in.	Broad category: Includes everything you legally own, regardless of whether you can access, spend, or sell it.
Resource	Cash, or any other real/personal property, that an individual owns AND can convert to cash to use for their support and maintenance .	Subset of assets: Property that meets specific legal and operational criteria allowing it to be used for basic needs (food and shelter).

The Three-Part Criteria for an Asset to be a Countable Resource

For an **asset** to qualify as a **resource** for SSI and Medicaid purposes, it must meet **all three** of the following conditions (POMS SI 01110.100B.1):

1. **Ownership:** The individual (or their spouse) holds legal ownership or interest in the property.
2. **Liquidation Power:** The individual has the legal right, authority, or power to convert the property into cash (if it is not already cash).
3. **Usage Capability:** The individual is not legally restricted from using the property (or its liquidated proceeds) for their own support and maintenance (food or shelter).

If an item fails **any single one** of these criteria, it remains an asset but is **not** classified as a resource. That can make the difference between SSI and Medicaid eligibility or not. However, as you'll see, actions by third parties can make a non-countable resource into a countable resource, and actions by a claimant can cause a countable resource to be temporarily not countable with potential to last decades or longer.

SSA Policy and Specific Examples of Assets That Are NOT Resources

Knowing SSA policy and understanding their examples expands your opportunities to help claimants achieve eligibility. In POMS SI 01120.010 SSA further expands their description of SSA “policy” with regard to the resource criteria:

- **Ownership Interest** – The claimant has to have some form of ownership interest. The fact that an individual has access to property or has a legal right to use it does not make it a resource if there is no ownership interest.
- **Legal Right to Access (Spend or Convert property)** – The claimant must have a legal right to access property; if the owner lacks the legal ability to access funds for spending or convert noncash property into cash it is not a countable resource.
- **Legal Ability to Use for Personal support and Maintenance** – Even if the claimant has an ownership interest and legal ability to access property, a legal restriction against the property's use for the owner's own support and maintenance (food and shelter, or ISM) means the property is not their resource.
- **Access via an Agent** – does not mean unrestricted use of property even though the can take action only through an agent such as a representative payee or a legal guardian or other person.
- **Access Only Via Litigation** – However, when litigation is required to sell property (e.g., a co-owner blocks sale) SSA does not require litigation to accomplish the sale, but that is not true for funds in a guardianship or conservatorship account, even if the guardian has to petition the court for access and the ability to withdraw funds for ISM expenses.

SSA examples. SSA then gives some very enlightening and surprising examples that most of us don't know or don't use when applying the policy expressed in the POMS above:

1. Lack of ownership:

Situation - In response to unstated income development, John Hart, an SSI recipient, explains that their sibling, Ted, who lives in an adjacent State, allows John access to Ted's bank account in emergencies. John Hart says John withdrew funds to pay an overdue utility bill to avoid shutoff.

The CR confirms that the account is titled "Ted Hart by Ted Hart or John Hart." John Hart states that John uses the funds solely for John's own benefit and not as an agent for their sibling.

Analysis - Even though John Hart has unrestricted access to the account and can use the funds at John's own discretion, the funds are not John's resources because John has no ownership interest in them. The title of the account clearly designates Ted Hart as sole owner. However, whatever funds John withdraws from Ted's account are John's income in the month of withdrawal.

2. Court Order Restricts Access:

Situation - At the time of their divorce in 1989, Thomas, an SSI recipient, was sole owner of the house in which their ex-spouse and their two young children are living. Under the terms of the divorce decree, Thomas must pay the taxes on the property and maintain it as a home for their ex-spouse and the children until the younger child reaches age 18 in 1997. The decree also specifies that they are free to sell the property only after the younger child's eighteenth birthday.

Analysis - Although Thomas clearly owns the property, they are legally barred from converting it to cash to be used for their own support and maintenance until 1997. Therefore, it is not their resource until the month following the month of their younger child's eighteenth birthday.

3. Binding Agreement Restricts Access:

Situation - As a gift from their parents, Tom Brown, an SSI recipient, and their ineligible sibling received some shares of stock valued at \$3,000. The stock certificates show that the siblings are joint tenants (SI 01110.510 C.2.), but the siblings have a legally binding agreement that one will not sell without consent of the other. The CR confirms that Tom's sibling will not consent to sell.

Analysis - Normally, the gift would be valued under the income rules in the month of receipt and the resources rules thereafter. However, since Tom's sibling will not consent to sale of the stock, Tom's share of the stock is not income in the month of receipt nor resources thereafter since it cannot be used for Tom's support and maintenance. If Tom's sibling consents to sell, Tom's share would be a countable resource beginning with the month following the month that consent was given.

4. Lack of Possession Restricts Ability to Use - Savings Bonds:

Situation - During a posteligibility review, the CR learns that George Jones, an adult SSI recipient, is co-owner along with their parent of U.S. Savings Bonds with a face value of \$3,500. The CR learns that George's parent bought the bonds over a period of years with

their own money and designated George as co-owner. The bonds are in the parent's safe deposit box to which they will not give George access under any circumstances.

Analysis - The CR questions George's parent and confirms that they will not give George the bonds under any circumstances. George's parent states that, under the terms of their will, George can take possession of the bonds only after they (the parent) dies. Generally, lack of physical possession of an otherwise liquid resource does not affect its status as a resource. However, physical possession of savings bonds is a legal requirement for cashing them. Although George is a legal owner, they cannot legally redeem the bonds for their own use. Therefore, they are not their resources.

5. Insurance Settlement Restricts Use

Situation - Bob Warfield, an SSI recipient, was injured in an automobile accident. A court awarded them damages of \$10,000 to be used solely for medical expenses related to the accident.

Analysis - Although Warfield owns the funds and has direct access to them, they are not legally free to use them for their own support and maintenance. Therefore, the award funds are neither income nor resources.

6. State Law Restricts Use

Situation - Barbara Bradley, resident of a State institution, receives SSI payments of \$30 per month through their representative payee. Bradley has \$8,460 in a bank account which includes conserved SSA funds. The account title shows Bradley as owner with access to the funds through their representative payee. However, Bradley's payee is also an officer of the institution where Bradley lives and State law prohibits use of the funds for support and maintenance provided by a State institution under these circumstances unless the agent (payee) is also the individual's legal guardian.

Analysis - Since Bradley cannot use the funds for their own support and maintenance, either directly or through their representative payee, the funds are not their resources. The accumulated funds would become their resources and would be included in determining their resource eligibility beginning with the month following that in which:

Bradley's payee also becomes their legal guardian; Bradley becomes their own payee or acquires a payee who is not an officer of the institution; or •Bradley moves out of the institution into the community.

The accumulated funds would **not** be counted as income in the month Bradley first becomes able to use the funds for their own support and maintenance, since Bradley does not "receive" new funds. Instead, they obtain the right to use an asset for their support and maintenance, making that asset a resource for SSI purposes.

7. No Access Without Litigation

Situation - Andrea Matthews, a disabled SSI recipient, has been separated from their ineligible spouse for 5 years. Matthews and their spouse own a summer cottage in another State as tenants-by-the-entirety. Their spouse lives in the cottage and refuses to sell.

Analysis - If Matthews were to take action to dissolve the marriage, they would, as a tenant-in-common, have the right to market their interest in the property without their ex-spouse's consent. However, since we do not require litigation to obtain access, the property is not a resource unless their spouse changes their mind about the sale. Therefore, the cottage is not Matthews' resource.

Even if Matthews could market their ownership interest in the cottage, the cottage would be excluded from countable resources if its sale would cause undue hardship for their spouse due to loss of housing ([SI 01130.130](#)).

8. Funds Held In A “Conservatorship” Account (See [SI 01140.215](#)).

Situation - Art Tyler, a disabled SSI recipient, has \$5,000 in a savings account. Tyler's legal guardian informs the CR that the guardian must petition the court whenever they wish to withdraw funds for Tyler's care. The guardian adds that the court has never denied them permission to withdraw funds on Tyler's behalf.

Analysis - The CR refers to regional instructions on “conservatorship” accounts. The instructions confirm that State law requires that funds in such accounts be made available for the care and maintenance of the incapable owner, that the guardian must act in a way consistent with State law, and that the court is exercising its oversight responsibility appropriately.

The CR properly concludes that the funds are accessible by petition (as opposed to litigation) and so are Tyler's resources.

Some of the examples above deal very specifically with real property and others could be applied to ownership of real property. For example, examples 2 (divorce and court order applying exclusive use and possession of marital home) and 7 (long separated couple co-owns cottage that spouse refuses to sell) but there are situations where many of the examples could apply to real property.

Unprobated Estates that may contain real property – when do they become countable resources

General SSI Rule: An inheritance from a deceased relative where the estate remains in probate—and the beneficiary does not yet have legal title, possession, or the right to sell or transfer their share—is an asset, but it **does not become a resource** until the probate process completes and ownership rights legally vest.

The General Statement focuses on *formal legal title* and *final administration* of probate, treating the asset as “frozen” (and thus non-countable) while probate is open. However, the Regional Chief Counsel in many regions of the country has analyzed whether state law grants the heir an **alienable or assignable interest** (even an equitable or undivided share) at death that the heir could legally sell or transfer before probate closes. If state law

permits the heir to assign or sell that underlying interest, **the interest becomes a countable resource the month following receipt of income**, despite ongoing probate proceedings.

However, the general rule may be over-ruled by a RCC opinion in your state. The opinions are found in the POMS at **PS - Title XVI Legal Opinion Precedents**. Instead, RCC precedents hold that in many states, an heir acquires an immediate equitable or legal ownership interest in inherited property at the exact moment of the decedent's death—even while the estate is still in probate.

RCC opinions generally agree that an unprobated estate may **NOT** a resource under exceptions:

1. **Active Will Contests or Litigation:** Where a will is actively contested in probate court, clear title cannot pass, rendering the value indeterminate and unliquidatable (PS 01805.008).
2. **Co-Owner Consent Barriers:** In states where inherited property passes to multiple co-heirs as tenants-in-common, and state law requires the consent of all co-heirs to partition or sell the property, if another heir refuses to consent, the asset is not a resource until probate finishes (POMS SI 01120.215B.3 / PS 01805.043).
3. **Estate Debts Exceeding Assets (Abatement):** If the estate's liabilities exceed its assets, the heir's interest has zero net equity value (PS 01805.008).

If those situations don't apply, some Regional Chief Counsels have issued precedents (legal opinions) based on individual states' local statutes, that vest real property at the moment of death of the decedent even though the SSI claimant does not receive legal title to sell the property.

For example, in the RCC precedents for Region VII, the Kansas City Region, the Regional Chief Counsel for Missouri, Iowa, Kansas, and Nebraska found that under state laws across the Kansas City region, equitable title or ownership rights in real and personal property **vest immediately upon the death of the decedent**, rather than upon the completion of probate. POMS PS 01810.028 (Missouri) and POMS PS 01810.018 (Iowa).

The RCC noted that in Missouri (citing *Trenton Motor Co. v. Watkins*) and Iowa (citing *DeLong v. Scott*), an heir has the legal right to assign, sell, or mortgage their underlying interest in the estate immediately upon death without waiting for probate to finalize. Therefore, the property **is evaluated as a countable resource** the month following death/receipt, unless the will is actively contested or co-owners withhold legally required consent to sell.

In Region I the RCC concluded that for Massachusetts, Connecticut, Rhode Island, Maine, New Hampshire, and Vermont(POMS PS 01805.008 - Region I Synopsis that a beneficiary possesses an alienable property interest (at minimum, an assignable beneficial interest in the estate) as of the decedent's date of death, and that even though full legal title is not complete until the fiduciary's final account is allowed by the probate court, the beneficiary's right to share in the estate vests at death and can be assigned or sold under state equity rules. Thus, the interest is not categorically excluded during probate; its valuation may be adjusted for debts or co-ownership, but it remains a potential resource unless blocked by an active will contest.

In Region IV (Atlanta) and specifically for Florida, the SSA Regional Chief Counsel issued precedents that do NOT follow general SSI law on unprobated estates, including inheriting real property.

While general SSI guidelines suggest that inherited property in an unprobated estate is not a resource until probate finishes, Florida property and probate statutes dictate that title vests in the beneficiary immediately upon the decedent's death, making the inherited asset a countable resource prior to the completion of probate per Florida statutes, Fla. Stat. § 732.514 & § 732.101. Upon the death of a decedent, title to devises (real property willed) and intestate shares vests immediately in the heirs or devisees. Even though a personal representative is appointed to administer the estate and pay debts, the heir holds an immediate vested legal and equitable interest in the property from the exact moment of death. Under Florida equity rules, an heir or beneficiary has the immediate power to assign, mortgage, or convey their vested underlying interest in an unprobated estate to a third party.

Because an heir in Florida has an immediate assignable property interest upon the decedent's death, the Atlanta Regional Chief Counsel and Florida Regional POMS precedents apply the following rules:

- **Resource Countability:** An inheritance or unprobated estate interest in Florida becomes a countable resource starting the first day of the month following receipt/vesting (unless specifically excluded under another rule).
- **Probate Delays Do Not Toll Resource Status:** The fact that the estate is open in a Florida Circuit Court (Probate Division), or that letters of administration have not yet been granted, does **not** stop the Social Security Administration from counting the heir's share as an available asset.

There are two exceptions under Florida Law one of which is somewhat unique to Florida. The first is Homestead Property as defined in the Florida Constitution, Fla. Const. Art. X, § 4 / Fla. Stat. § 732.401. If the inherited real estate was the decedent's protected

Florida homestead and the SSI beneficiary moves into it or uses it as their primary residence, it becomes completely excluded as a primary residence under POMS SI 01130.100, regardless of probate status. Secondly, if a co-heir refuses to consent per POMS SI 01120.215B.3 to its sale, assignment, or mortgage and multiple heirs inherit real property as tenants-in-common, and the SSI beneficiary cannot sell or partition their individual share without the joint consent of the other co-heirs, if any co-heir refuses in writing to consent to the sale, the property is barred from liquidation and is not counted as a resource during probate.

Conditional Benefits & Reasonable Efforts to Sell (POMS SI 01130.140)

So, if all else fails and the real property the claimant acquires or has at the time of filing an application for SSI and SSI-related Medicaid is countable and puts the beneficiary over the \$2,000 resource limit, what can be done? The beneficiary can request **Conditional Benefits from SSA** while attempting to sell the property.

The beneficiary agrees in writing to make continuous, reasonable efforts to sell the real estate at market value. A listing agreement with a reputable real estate sales agent is sufficient.

- SSI cash payments continue for up to 9 months (with potential extensions without limits) while the property is listed for sale. Often, it is not the issue of just continuing to receive the SSI cash benefit, but more importantly, it is continuing SSI to trigger SSI-related Medicaid health insurance. And some properties will just never find a buyer.
- Once the property sells, the real estate closing document describes the gross proceeds and the net cash received. The net is used to reimburse the SSA for conditional payments made during the disposition period.

At that point, regular opportunities to spend down, transfer the excess cash to a Special Needs Trust, or other techniques like prepaying ISM for a term of years or for a lifetime, become available and useful for maintaining SSI and Medicaid.

Every house is not an excluded Home – the Home Exclusion

Under Social Security Administration (SSA) rules for Supplemental Security Income (SSI), a person's primary residence, their home, is usually excluded from counting as a resource. However, real property can lose its "home" status — meaning it becomes a countable resource that can cause an individual to exceed the SSI resource limit—when it fails to meet specific regulatory criteria.

The Supplemental Security Income Policy Operating Manual System (POMS) outlines the precise rules where a property stops being considered a home resource.

1. Loss of Intent to Return

POMS Citation: SI 01130.100 (*The Home Exclusions*)

Rule: A home is excluded from resources only if the SSI recipient resides in it, or if they do not reside in it, they maintain an **intent to return** to the home.

Why it makes a house not a home: If an individual leaves the home (e.g., enters a nursing facility, moves into an adult family care home, or moves in with a relative) and no longer intends to return to the property, the property immediately loses its home status and becomes a countable resource as non-home real property on the first day of the following month.

2. Absence Without Intent to Return or Lacking One of the Protection Exceptions

POMS Citation: SI 01130.100 B.1 & SI 01130.100 B.5

Rule: If the owner lives elsewhere, the property retains its "home" status **only** if one of the following conditions is met:

- The owner states in writing that they intend to return.
- A spouse or dependent relative continues to reside in the property.
- Institutionalization is temporary and intent to return remains, even if unlikely, as long as the recipient asserts the intent.

Why it makes a house not a home: If an individual moves out, states they do not intend to return, and no qualifying spouse or dependent relative resides in the home, the house ceases to be an excluded home resource.

3. Out-of-State and Out of Country Real Property

POMS Citation: SI 01130.100 A.1

Rule: A home is defined as property in which the individual has an ownership interest and that serves as their **principal place of residence**. One cannot live in a home out of state nor out of the country.

Why it makes a house not a home: If an SSI recipient owns residential property in a state or foreign country other than where they actually live and reside, the secondary property cannot qualify as an exempt home. It is classified as non-home real property and its net equity value counts against the resource limit.

4. Property Purchased Without Intent to Occupy

POMS Citation: SI 01130.100 C.1

Rule: Real property purchased with the intention of becoming a home is treated as an excluded home only if the recipient intends to occupy it within a reasonable period.

Why it makes a house not a home: If an individual buys a residence but does not move into it, and lacks a plan or intent to occupy it as a principal residence, it is treated as a countable non-home real property resource from the time of purchase.

5. Transfer of Ownership Interest

POMS Citation: SI 01130.100 B.6

Rule: For property to be excluded as a home, the SSI recipient (or their spouse) must retain an equitable or legal ownership interest in the real property.

Why it makes a house not a home: If an individual transfers or gives away their legal title to the property while continuing to live there, the property is no longer "their" home for resource exclusion purposes. Furthermore, transferring a non-excluded home for less than fair market value triggers transfer-of-resources penalty rules under SI 01150.001.

Summary Table of Exclusions vs. Non-Home Status

Scenario	Retains "Home" Exclusion?	Primary POMS Reference
Living in the property as principal residence	Yes (Excluded)	SI 01130.100 A.1
In a nursing home, but states intent to return	Yes (Excluded)	SI 01130.100 B.1
Absent, no intent to return, but spouse/dependent lives there	Yes (Excluded)	SI 01130.100 B.5
Absent, no intent to return, no qualifying family inside	No (Countable Resource)	SI 01130.100 B.1
Owning real estate not used as principal residence	No (Countable Resource)	SI 01130.100 A.1

Property destroyed by natural disaster – fire, hurricane, flood, etc.

Disaster strikes! Sometimes to a whole community or area, sometimes just to the SSI claimant. When an SSI recipient receives insurance payouts or disaster assistance money from the government to repair or replace an excluded home (or other excluded property), the Social Security Administration (SSA) provides specific rules to prevent those funds from disqualifying the claimant from SSI and Medicaid.

How Insurance Payouts Are Classified

Not Treated as Income

Cash received from private property insurance or disaster grants to repair or replace an excluded resource (like your primary residence) is **not counted as income**. The money is placed under an initial **9-month resource exclusion period** starting from the month of receipt. As long as the intent remains to use those funds to rebuild or repair the property, the payout will not count toward the \$2,000 individual resource limit during this window.

What Happens When Rebuilding Takes a Long Time

Because construction delays, permit backlogs, and contractor shortages are common, the SSA allows extensions if you can show **good cause**:

First 9-Month Extension (Up to 18 Months Total)

If repair or replacement cannot be completed within the initial 9 months due to reasons beyond your control (e.g., contractor delays, zoning issues, permit delays, or supply shortages), you can request a 9-month good cause extension. This brings the total exclusion window to **18 months**.

Presidentially Declared Major Disasters (Up to 30 Months Total)

If the home was damaged or destroyed in an officially declared major disaster, SSA rules allow an **additional 12-month good cause extension**. This provides a **maximum exclusion period of up to 30 months** from the date the insurance money was received.

Key Requirements & Best Practices

Keep Funds Segregated

Do not mix disaster insurance payouts with everyday checking or savings accounts. Keep the funds in a separate, dedicated bank account to maintain clear accounting for SSA.

Document "Good Cause"

To secure extensions beyond 9 months, maintain written evidence showing active attempts to rebuild. This includes contractor estimates, architectural plans, permit applications, delay notices, or communication logs with insurance adjusters/builders.

Maintain Intent to Rebuild

The resource exclusion remains active only while you intend to use the money for repair or replacement. If you change your mind and decide not to rebuild, the remaining insurance money immediately becomes a countable resource in the following month.

Report Changes to SSA

Notify the local Social Security field office when the claimant receives the payout and provide updates before each 9-month window expires to request an extension under POMS SI 01130.630. It can take a lot of time to repair an individual home when a whole community is in the same boat. Our office has never encountered a refusal by the local SSA offices to extend the 9 month window many times as long as the repair funds were held in a separate bank account.

Homes and Real Property owned in SNTs – the Pros and Cons

Preface:

42 U.S.C. § 1396p(d)(4)(A) governs individual (first-party) special needs trusts, allowing assets to be excluded when determining eligibility for means-tested government benefits like Medicaid and Supplemental Security Income (SSI)

Upon the death of the beneficiary or the termination of the trust, any remaining funds must be used to reimburse the state for Medicaid benefits paid on the beneficiary's behalf, up to an amount equal to that assistance before any payments to residual beneficiaries.

Third-Party Trusts: Trusts funded with assets belonging to someone other than the disabled beneficiary (such as parents or grandparents leaving an inheritance) are governed under general trust and federal Medicaid/SSI guidelines and are not required to contain the (d)(4)(A) payback rules.

Medicaid lien in d4A SNT v. Probate lien

First party d4A SNT

As stated above upon the death of the beneficiary or the termination of the trust, any remaining funds must be used to reimburse the state for Medicaid benefits paid on the beneficiary's behalf, up to an amount equal to that assistance before any payments to residual beneficiaries.

There are no exceptions to this mandate based on the “quality” of the property, be it intangible or real property. If there are insufficient liquid funds to satisfy the mandatory lien, the real property, even what would otherwise be considered homestead property, if owned outright by the beneficiary (discussed below), will need to be sold to provide funds

for satisfaction of the lien. Under Florida Statute 409.9101(10), Florida Medicaid will not accept the transfer of real property to the State in satisfaction of a lien.

Estate Recovery Mandate: Federal law requires State Medicaid programs to seek recovery from the estates of deceased recipients who were 55 or older (or in some states institutionalized) to recoup payments for nursing facility services, home and community-based services, and related hospital and prescription drug services.

Along with the lack of estate recovery for an individual who dies under the age of 55, if the individual is over age 55 at the time of death, under **42 U.S.C. § 1396p(b)(2)** and related federal guidelines, states **cannot** enforce or pursue estate recovery while certain protected family members are still alive:

- **Surviving Spouse:** Recovery must be deferred (or is barred) during the lifetime of a surviving spouse.
- **Minor Children:** A child who is under the age of 21.
- **Blind or Disabled Children:** A child of any age who is blind or permanently and totally disabled (under Social Security definitions).
- **Caretaking Adult Children:** An adult child who resided in the home for at least two years immediately prior to the Medicaid recipient's institutionalization and provided care that delayed nursing home admission.
- **Siblings with Equity Interest:** A sibling who lived in the home for at least one year prior to the recipient's institutionalization and has an equity interest in the property.

Homestead protection against creditors

In Florida, constitutional homestead protection shields an individual's home from general creditors, including Medicaid recovery, if upon the death of the individual the property passes directly to a statutory "heir-at-law" (such as a spouse, child, or sibling).

What constitutes homestead in Florida: among other requirements, the primary requirements to receive homestead protection from creditors at death, including Medicaid, is that:

- 1) Legal title to the property must be in the name of the individual at the time of their death,
- 2) The individual must be residing in that property as the permanent residence, with certain exceptions such as residing in a nursing home or assisted living facility with the intent to return to the homestead, and

3) The home must be being inherited by an heir that is considered a homestead heir, meaning they are within the group of people that would be possible intestate heirs of the individual.

Florida Homestead protections against creditors at death, including Medicaid, are not available for a property owned within a Special Needs Trust.

Equitable ownership for property tax purposes (Florida)

To secure a Florida homestead property tax exemption for a beneficiary for property owned in a trust, including a first party d4A special needs trust or a third party trust, the trust agreement or the deed to the trust must be explicitly structured to grant the beneficiary an equitable title and a permanent right to reside on the property for life.

Under Florida Statute §196.041(2), a trust beneficiary can claim the exemption only if they hold a **beneficial interest for life** and a **present possessory interest** in the real estate, and states in part:

“A person who otherwise qualifies by the required residence for the homestead tax exemption ... shall be entitled to such exemption where the person’s possessory right in such real property is based upon an instrument granting to him or her a beneficial interest for life, such interest being hereby declared to be “equitable title to real estate,” ... and such person shall be entitled to the homestead tax exemption”

Liability issues (d4A vs. 3rd party)

d4A Special Needs Trusts: While this is a very state specific issue, assets held in d4A special needs trust are generally not exempt from the creditors of the beneficiary. The common law and uniform trust code agree that first party or self settled trusts do not include credit in protection in spite of the fact the beneficiary has no control or dominion over the asset.

The uniform trust code states:

SECTION 505. CREDITOR’S CLAIM AGAINST SETTLOR

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

Florida and many states have enacted this statutory language in recent years.

Third party Special Needs Trusts: Third party Special Needs Trusts generally have creditor protections created under state law, provided there is a valid spendthrift clause. This is not a universal protection however as public policy considerations have created some exceptions for things such as child support, or alimony.

The uniform trust code states:

SECTION 504. DISCRETIONARY TRUSTS; EFFECT OF STANDARD

(a) In this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another State.

(b) Except as otherwise provided in subsection (c), whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

- (1) the discretion is expressed in the form of a standard of distribution; or
- (2) the trustee has abused the discretion.

(c) To the extent a trustee has not complied with a standard of distribution or has abused a discretion:

(1) a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child, spouse, or former spouse; and

(2) the court shall direct the trustee to pay to the child, spouse, or former spouse such amount as is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

Minor or diminished capacity/incapacitated beneficiaries

In a situation where the beneficiary of the trust may be incapacitated or a minor leads to certain challenges for the special needs trust trustee. The decision of either to continue to title a home in the trust or to the beneficiary raises issues such as guardianship or

conservatorship, the absence of a Medicaid estate lien on someone who passes under the age of 55 or with one of the aforementioned exceptions, or even perhaps the beneficiary is at risk of exploitation or creating their own financial or benefits eligibility harm by selling or mortgaging the home or adding a co-owner.

All of these factors create real challenges in balancing the pros and cons of whether the trust will own the beneficiary's home or it is deeded to the beneficiary.

Pros and Cons of Special Needs Trust Owning Home

Issue	Pro	Con
Medicaid Trust Lien	Irrelevant with a Third Party SNT	d4A is always subject to Medicaid lien, may be forced to sell property to satisfy if insufficient other funds available. If owned by beneficiary many federal exemptions to Home included in Estate Recovery, also Florida Homestead creditor protection
Tax exemptions – Florida	Available for both d4A and Third Party trusts	Exact language requirement in trust instrument and/or deed for the exemption to apply
		Beneficiary has equitable title and right to live on property for life, possibly limiting trustee's options to sell property if necessary
Creditor's ability or inability to	With a third party trust: if valid spendthrift clause very difficult to force third party trust	With a d4A trust: No creditor protection under UTC, no Homestead creditor protection under Florida Law

Issue	Pro	Con
attach to property	trustee to satisfy claims, with exceptions	
Minor beneficiary	No guardianship /conservatorship and its related expenses court intervention required.	
Diminished or incapacitated beneficiary	Property is financially maintained, taxes paid etc.	
	Protection from beneficiary harming themselves financially including, selling or mortgaging the home, adding a co-owner	