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**ESTATE PLANNING
FOR BENEFICIARIES WHO MAY NEED
LONG-TERM CARE**

**H. Clyde Farrell
Bliss Burdett Pak**

Author contact information:

H. Clyde Farrell
Bliss Burdett Pak
Farrell & Pak PLLC
1000 MoPac Circle
Austin, TX 78746
cfarrell@txelderlaw.com
bpak@txelderlaw.com
512-323-2977

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H. CLYDE FARRELL
FARRELL & PAK PLLC
1000 Mo-Pac Circle
Austin, TX 78746
Phone: (512) 323-2977
cfarrell@txelderlaw.com

BACKGROUND, EDUCATION AND PRACTICE

H. Clyde Farrell is senior partner of an award-winning small firm, FARRELL & PAK PLLC, in Austin, Texas (Best Law Firms in Texas-Elder Law, 2014 and 2015). His practice is concentrated in Elder Law, especially planning for long-term care, eligibility for Medicaid and other benefits, wills, trusts, powers of attorney and other legal documents. He is a co-author of West's TEXAS ELDER LAW and numerous professional articles and papers.

Each year 2003 through 2014, *Texas Monthly* has designated him a "Texas Super Lawyer" in the field of Elder Law. He has been included in THE BEST LAWYERS IN AMERICA (2008-2015) and AMERICA'S TOP FINANCIAL PLANNERS (2008-2011, 2013, 2014). In 2003, South Texas College of Law presented him the first "Texas Legend Award" for accomplishments and service in the field of Elder Law.

He received his B.A. and J.D. degrees from the University of Texas at Austin and his M.A. in Political Science from the University of Wisconsin at Madison. He is also a CERTIFIED FINANCIAL PLANNER™ practitioner and is Certified as an Elder Law Attorney by the National Elder Law Foundation.

Before going into private practice in 1993, he served as an Assistant Attorney General of Texas for ten years, during which he was Chief of the Consumer Protection Division. Previously, he was a staff attorney with Texas Rural Legal Aid in South Texas. Mr. Farrell established the first Elder Law unit of the Texas Attorney General's Office and served as its first Chief.

He is a founding member and past president of the Texas Chapter of the National Academy of Elder Law Attorneys; a past president of Family Eldercare, Inc. in Austin; and has served with numerous professional and community service organizations. He is a frequent speaker and writer at conferences on Elder Law sponsored by the State Bar of Texas, the University of Texas School of Law, the Texas Chapter of the National Academy of Elder Law Attorneys and other organizations.

BLISS BURDETT PAK
FARRELL & PAK PLLC
1000 Mo-Pac Circle
Austin, TX 78746
Phone: (512) 323-2977
bpak@txelderlaw.com

BACKGROUND, EDUCATION AND PRACTICE

Bliss Burdett Pak joined Mr. Farrell as junior partner of FARRELL & PAK PLLC, in Austin, Texas (Best Law Firms in Texas-Elder Law, 2014 and 2015) in 2010. Since then, her practice has been concentrated in Elder Law, especially planning for long-term care, eligibility for Medicaid and other benefits, wills, trusts, powers of attorney and other legal documents. She is a co-author with Mr. Farrell and other attorneys of numerous professional articles and papers. She comes to Elder Law and estate planning from a background in business law that includes private practice, research and teaching.

She served as Assistant Professor at Ewha Women's University in Seoul, Korea where she conducted research and teaching on corporate governance, business law and related topics; she also taught as adjunct faculty at the Singapore Institute of Management. She began law practice as a corporate law associate with Hughes & Luce LLP in Dallas (now K&L Gates) and KMZ Rosenman in Chicago.

Bliss received her J.D. degree (with honors) from the University of Texas at Austin, completing that degree as a visiting student at the University of Chicago in 1995-1996. She completed her undergraduate work at Trinity University in San Antonio, Texas in 1992, earning a B.A. Degree (Economics) and B.A. Degree (Russian).

She currently serves on the board of the Texas Chapter of the National Academy of Elder Law Attorneys; previously served as a board member of Family Eldercare, Inc. in Austin; and is a member of the State Bars of Texas and Illinois. She speaks to community groups on Elder Law topics and has written articles and given presentations for professional conferences sponsored by the State Bar of Texas, the University of Texas School of Law, the Texas Chapter of the National Academy of Elder Law Attorneys and other organizations since moving to Austin in 2010.

Outside the office, Bliss enjoys triathlon, playing oboe, concert-going and travel with her husband and daughter from their home base in Austin.

ESTATE PLANNING FOR BENEFICIARIES WHO MAY NEED LONG-TERM CARE

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ESTATE PLANNING FOR BENEFICIARIES WHO MAY NEED LONG-TERM CARE

I. LONG-TERM CARE NEEDS: RISKS AND OPPORTUNITIES IN ESTATE PLANNING

Estate planning for spouses, children, parents and other intended beneficiaries has always included elements of protection for the known and unknown possible behaviors and needs of the beneficiaries. While some structures and plans constitute a response to tax law and policy, with the primary goal to minimize income and transfer tax on the property involved, other structures are intended primarily to protect the beneficiary who has the current or possible future need for access to funding of healthcare expenses including long-term care. This paper outlines planning strategies inspired by the need to preserve the option of eligibility for various long-term care benefits programs generally referred to as “Medicaid” and administered through the Texas Health and Human Services Commission with joint federal-state funding.

Chances are high that as any individual or family undertakes long-term planning for the ultimate disposition of their estate, and for the long-term best interest of loved ones, long-term care will play a role in planning. CMS estimates that “at least 70 percent of people over 65 will need long term care services and support at some point in their lifetime,”¹ and reminds consumers that Medicare health

insurance and supplement plans do not cover long-term care services, in the home or in a facility. Nor do under-65 health insurance plans – something that did not change under the 2010 federal Patient Protection and Affordable Care Act (ACA).² A provision of the ACA that would have created a government-run program providing partial (\$50/day) reimbursement for individuals’ long-term care expenses was repealed before the law came into effect.³

Medicare covers up to 100 days of nursing home care and skilled home care services in very limited circumstances. The Department of Veterans Affairs and state veterans programs also finance a small amount of long-term care. Otherwise, outside of Medicaid’s various programs, all of which are means-tested (with income and, usually, resource limits), no health insurance program includes long-term care coverage. Only privately purchased long-term care insurance policies cover these costs (of home attendant care and/or assisted living or nursing home care facilities), and the ACA did not regulate them. Medical underwriting is a required part of applying for long-term care insurance in the U.S. and a condition likely to result in an applicant’s needing long-term care services is likely to result in a denial of coverage or prohibitively expensive coverage. In our practice, we have seen many clients exhaust the term of their long-term care insurance policies (new lifetime coverage is now unavailable) or convert existing policies to lower levels of coverage that are more quickly exhausted as premiums rise and they feel the premiums are unaffordable in their advanced years.

Does estate planning then always need to include Medicaid planning for beneficiaries? Not necessarily. If sufficient assets are available to

¹ 2014 Medicare & You, National Medicare Handbook, Centers for Medicare & Medicaid Services, available at www.medicare.gov/Pubs/pdf/10050.pdf

² See “Long Term Care Insurance Is Not Changed By Obamacare” from the American Association for Long-Term Care Insurance, available at www.aaltci.org/news/long-term-care-insurance-news/long-term-care-insurance-is-not-changed-by-obamacare; and

³ See “The Demise of the CLASS Act,” American Academy of Orthopaedic Surgeons, March 2012,

available at <http://www.aaos.org/news/aaosnow/mar12/advocacy4.asp>: “On Sept. 21, 2011, the Senate Appropriations Committee deleted the entire \$120 million that had been earmarked for the annual design and marketing of CLASS policies from the 2012 HHS budget. The deletion received no opposition from the White House, and within days, the HHS effectively disbanded the CLASS program office. Moreover, on October 14, 2012, HHS secretary Kathleen Sebelius announced that she was abandoning the program. The decision left the nation without a broad policy solution to the problem of financing long-term care.”

support long-term care needs in the care setting preferred by the family for each possible beneficiary, and the person leaving gifts of his or her estate is not averse to the use of that property to pay for long-term care expenses, then that use of an inheritance need not be avoided by preserving potential Medicaid eligibility when a trust is drafted or a beneficiary is named.

However, failure to provide for a third-party supplemental needs trust for a beneficiary with a known disability may constitute negligence. Best practice includes using a contingent trust for a remote contingent beneficiary whose condition (financial, medical and mental) cannot be known at the time of planning.

We do expect the need for long-term care planning as an element of estate planning to grow in the near future. The number of Texans accessing the Medicaid program to help cover their long-term care expenses is vast and growing: As of December 2012, 21% of Medicaid spending in Texas goes to long-term care services and supports for roughly 400,000 aged and disabled Texas Medicaid enrollees.⁴ With predictions that by 2050, one in five people in the United States will be elderly, the demand for and cost of these services will continue to expand.⁵

II. THE AFFORDABLE CARE ACT

A. Introduction

The two bills known jointly as the Patient Protection and Affordable Care Act (ACA) were passed by Congress in March 2010.⁶

Constitutionality of the essential features was upheld by the U. S. Supreme Court on June 28, 2012. However, the same opinion held unconstitutional the sanction of withholding of federal Medicaid funds

from states refusing to adopt the expanded Medicaid coverage permitted by the legislation.⁷

This landmark legislation may be thought of as a major "program" offering persons with disabilities new choices, most importantly including, for some, the option of avoiding Medicaid eligibility entirely by buying into the same health insurance available to other Americans.

The ACA contained relatively few provisions directly impacting Medicaid and Medicare services for the over-65 population. In fact, it is notable for what it did not change: "medical underwriting" and "guaranteed issue" rights limited to certain situations (e.g., switching from Medicare Advantage to traditional Medicare; the insured moving out of old insurer's service area; insurer bankruptcy, etc.) are still permissible in this market according to the current description of consumer rights for over-65 Medicare insured people on www.medicare.gov (the official U.S. government website explaining Medicare to consumers).

Therefore, it appears that Americans who have experienced ACA-regulated health insurance will be surprised at the protections they do not have when they become Medicare eligible, unless the protections of the ACA prohibiting denial of coverage based on pre-existing conditions are applied to the Medicare supplement industry in the future.

Likewise, it appears, that Medicare supplement insurers still may exclude coverage of pre-existing conditions if the condition was treated or diagnosed within 6 months before Medicare supplement coverage starts, or may refuse to cover out-of-pocket costs for pre-existing health conditions for up to 6 months.⁸ It will be interesting to observe whether the next generation accepts inaccessibility to insurance

⁴ Kaiser Health News, "State Health Facts: Texas : Medicaid and CHIP," September 16, 2013, available at <http://kff.org/state-category/medicaid-chip/?state=TX>

⁵ U.S. Census Document. "The Next Five Decades: The Older Population in The United States: 2010 to 2050." Available at: <http://www.census.gov/prod/2010pubs/p25-1138.pdf>.

⁶ Patient Protection and Affordable Care Act of 2010 (ACA), signed by the President on March 23, 2010, and

Health Care and Education Reconciliation Act of 2010 (HCERA) signed on March 30, 2010.

⁷ *National Federation of Independent Business v. Sebelius*, 2012 U.S. LEXIS 487 (2012), <http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf>

⁸ Medicare Facts. "When can I buy Medigap?" Available at: <http://www.medicare.gov/supplement-other-insurance/when-can-i-buy-medigap/when-can-i-buy-medigap.html#collapse-2257>.