

ELDER LAW OVERVIEW

Wesley E. Wright
Wright Abshire, Attorneys
4949 Bissonnet
Bellaire, Texas 77401

University of Texas
17th ANNUAL
ESTATE PLANNING, GUARDIANSHIP & ELDER LAW
CONFERENCE
August 6-7, 2015
Moody Gardens, Galveston, Texas

Wesley E. Wright
Wright Abshire, Attorneys PC
4949 Bissonnet, Bellaire, Texas 77401
Telephone: (713) 660-9595
Facsimile: (713) 660-8889
Wes@wrightabshire.com

BACKGROUND, EDUCATION AND PRACTICE

Wesley E. Wright is a native Houstonian, and has been practicing law in the Houston area since 1982. He is a graduate of the South Texas College of Law and the University of Houston.

Mr. Wright is a Board Certified attorney in Estate Planning and Probate Law by the Texas Board of Legal Specialization, and is a Certified Elder Law Attorney by the National Elder Law Foundation. His legal practice focuses exclusively in the areas of elder law, Medicaid planning, estate planning with an emphasis on the disabled and the use of special needs trusts, estate and trust administration, and guardianship.

He is an original founder of the Houston chapter of Disability and Elder Law Attorneys Association (DELAA), and served as President of that organization for its first two years. He has served as Chair for the Probate, Trusts, and Estates Section of the Houston Bar Association. He is President of the Texas Chapter of the National Academy of Elder Law Attorneys (NAELA) and served on the National Board of NAELA for two years. He has been listed a Texas Super Lawyer for Elder Law from 2006-2015.

He co-authors a monthly column in the *Houston Chronicle* called *Elder Law Notes* and he is a regular speaker on Elder Law topics. He is a co-author of *Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas*, a book on Medicaid Estate Recovery; and a co-author of West's *Texas Elder Law (Volume 51, Texas Practice Series)* written for lawyers.

TABLE OF CONTENTS

Nothing contained in this publication is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This publication is intended for educational and informational purposes only.

I.	ELDER LAW OVERVIEW	
A.	History and Development of Elder Law	1
B.	Scope of Elder Law	2
II.	PLANNING WITH MEDICAID BENEFITS	2
A.	Introduction	2
B.	Medicaid Long-Term Care Programs in Texas	2
	1. Program Administration and Sources of Law	2
	2. Focus of this Paper on Long-Term Care	3
	3. Notes on Program Terminology	3
	4. Long-term Care Medicaid Programs	3
	5. Medicaid Buy-in for Children	5
	6. Medicaid For Non-Elderly Individuals	6
	7. The Pickle Amendment Update	6
C.	Medicare and Medigap Rules	6
D.	Medicaid vs. Long-Term Care (“LTC”) Insurance	7
E.	Why Become Eligible for Medicaid?	8
	1. Unavoidable Impoverishment	8
	2. Protection of the “Community Spouse”	8
F.	Ethical Issues In Medicaid Planning	8
	1. Identify the Client	8
	2. Avoiding Fraud	9
	3. Diligent Representation	9
	4. Competent Representation	10
	5. Client Capacity and Gifting	11
	6. Medicaid Planning by Non-Attorneys	11
G.	Health Care Reform	13

ELDER LAW OVERVIEW AND MEDICAID ADMINISTRATION

This paper provides an overview of what constitutes the practice of elder law, as well as provides a summary of the long-term care Medicaid rules and programs in Texas.

I wish to acknowledge and recognize H. Clyde Farrell of Austin, Texas, for generously allowing his volume of work, *Financing Long Term Care in Texas*, to be used as the basis of this paper and Kelley M. Bentley, attorney with Wright Abshire, for updating it.

I. ELDER LAW OVERVIEW¹

A. History and Development of Elder Law

The genesis of current day elder law occurred in the mid-1960s when both lawmakers and society in general began to perceive senior citizens as a special class of individuals possessing unique needs. While an argument may be made that the beginning of elder law occurred upon the enactment of the Social Security Act in 1935, many believe that July 30, 1965 actually marks the beginning of this legal specialty when one of the shining pinnacles of the “Great Society” was established via legislation envisioned by President John F. Kennedy and continued into law by then-President Lyndon Baines Johnson.

On July 30, 1965, President Johnson signed into law two separate massive federal acts known as Medicare and Medicaid. President Johnson signed the ground-breaking legislation into law in the Independence, Missouri office of former President Harry S. Truman, in deference to a speech given by then-President Truman twenty years earlier regarding the need for a government sponsored health insurance program for the elderly and disabled.

Once Medicare and Medicaid were established, a multitude of bureaucratic agencies necessary to administer the new programs blossomed. In addition to these new agencies, a new set of administrative rules regarding appeals and legislation were created. Navigating these new laws introduced the “elder law attorney.” The first elder law attorneys worked primarily for government-funded legal services programs to ensure that the states were fair in the administration of the Medicare and Medicaid programs.

In recent years, the demand for elder law attorneys has greatly increased due to the increase in the elderly population in general. Even though the elderly have always been with us, due to improvements in health care and facilities for the elderly, elderly individuals have a longer life span. Additionally, the parents of the baby-boomer generation, and now the baby-boomers themselves, are reaching retirement age and correspondingly increasing the need for age-related services. This is a need that will continue to increase as more and more baby-boomers reach retirement age. Other factors giving rise to an increasing demand for elder law attorneys are the complications of accessing Medicaid, the high cost of nursing home care, the lack of access to long-term health care and guardianship reform.

In the late 1980s and early 1990s, the need for highly specialized attorneys in the area of elder law resulted in the formation of organizations addressing the emerging field of elder law. In 1988, the National Academy of Elder Law Attorneys (NAELA) was formed and has grown in size to over 4,000 attorneys dedicated to assisting elderly people with an array of legal needs. Following the establishment of NAELA, state organizations aligned with NAELA, such as the Texas chapter of NAELA began to develop. Another organization, established in 1991, is the Disability and Elder Law

¹ This section is based upon Chapter 1 from *Texas Elder Law* (Texas Practice Series), published by Thompson West Publishing, 2014.

Attorneys Association (DELAA) located in Houston, Texas. Motivated by nationwide guardianship reform, the attorneys who originally established DELAA were seeking greater knowledge and accountability in the assistance of the elderly and disabled.

B. Scope of Elder Law

While the practice of elder law may have been inaugurated by the creation of Medicare and Medicaid, the practice of elder law is the only area of law defined by a population rather than a discipline of law. Therefore, an elder law attorney may address issues including estate planning, guardianship, long-term care insurance, housing, Medicare, Medicaid, private pensions, Social Security retirement, disability, poverty issues, exploitation, neglect and abuse. This is not an exhaustive list. This focus on the elderly results in a higher degree of positive results for the client than would have been achieved had it not been for the intensification of effort made by the attorneys practicing in the area of elder law.

Many elder law practitioners disagree as to what constitutes an elder law practice. Some elder law attorneys practice solely in the area of estate planning, which can include Medicaid planning. Some practitioners focus on guardianship and elder advocacy issues, while others focus on estate planning, trusts (including special needs trusts) and probate. A practice in the field of elder law can be tailored to fit the needs and desires of the attorney, as well as the area in which he or she is servicing. When assessing whether or not it is viable to practice in the area of elder law, an attorney will want to consider the following questions: What level of expertise does the attorney feel comfortable with? What are the needs for services in the attorney's geographical area? What state does the attorney live in and what are the costs associated with long-term nursing home care in that state? What possible areas of law does an elder law practice consist of and what areas will allow the practitioner to develop and maintain an economically viable firm?

II. PLANNING WITH MEDICAID BENEFITS

A. Introduction

This section of the paper summarizes the long-term care Medicaid rules in Texas and discusses planning strategies for clients. This paper presents the law as it is as of the time of this writing. Be warned that everything in this paper is subject to change at any time.

B. Medicaid Long-Term Care Programs in Texas

1. Program Administration and Sources of Law

The Medicaid program is administered in Texas by the Texas Health and Human Services Commission ("HHSC") which has final authority and responsibility for the program. Long-term care ("LTC") Medicaid eligibility determinations were formerly the responsibility of the Department of Human Services ("DHS"). The DHS enabling statute, regulations and agency handbook (the Medicaid for the Elderly and People with Disabilities Eligibility Handbook or "MEPD") are important sources of law and policy for the program. Effective September 1, 2004, however, DHS ceased operations pursuant to the reorganization of health and human services as mandated by House Bill ("HB") 2292 enacted by the 78th Texas Legislature in June 2003. Beginning September 1, 2004, responsibility for LTC Medicaid eligibility policy development and LTC Medicaid eligibility determinations was transferred to HHSC. Consequently, the term "HHSC" is henceforth substituted for "DHS" wherever appropriate in this paper.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Elder Law Overview

Also available as part of the eCourse

[Elder Law Overview; plus the "Senior Industrial Complex"](#)

First appeared as part of the conference materials for the
17th Annual Estate Planning, Guardianship and Elder Law Conference session
"Elder Law Overview"