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**PROTECTING HOMES, FARMS AND RANCHES,  
AND OTHER BUSINESSES  
UNDER THE MEDICAID RULES**

**H. Clyde Farrell**

**Bliss Burdett Pak**

Author contact information:

H. Clyde Farrell  
Bliss Burdett Pak  
Farrell & Pak PLLC  
1411 West Avenue Suite 100  
Austin, TX 78701  
[cfarrell@txelderlaw.com](mailto:cfarrell@txelderlaw.com)  
[bpak@txelderlaw.com](mailto:bpak@txelderlaw.com)  
512-323-2977

# **PROTECTING HOMES, FARMS AND RANCHES, AND OTHER BUSINESSES UNDER THE MEDICAID RULES**

## **Table of Contents**

<b>I.</b>	<b>INTRODUCTION TO EXEMPT ASSETS FOR MEDICAID PURPOSES.....</b>	<b>1</b>
<b>A.</b>	<b>RESOURCES DEFINED .....</b>	<b>1</b>
<b>B.</b>	<b>REQUIREMENT OF ACCESSIBILITY .....</b>	<b>5</b>
1.	Guardianship Estates and Accessibility .....	5
2.	Probate Estates and Accessibility.....	6
3.	Co-Owners and Accessibility.....	6
<b>II.</b>	<b>THE HOMESTEAD .....</b>	<b>7</b>
<b>A.</b>	<b>REQUIREMENTS FOR EXEMPTION .....</b>	<b>8</b>
<b>B.</b>	<b>ADJACENT LAND.....</b>	<b>12</b>
<b>C.</b>	<b>VALUING HOME EQUITY.....</b>	<b>12</b>
<b>D.</b>	<b>LIFE ESTATES AND REMAINDER INTERESTS.....</b>	<b>14</b>
<b>E.</b>	<b>CONTINUING CARE RETIREMENT CENTER FEES .....</b>	<b>14</b>
<b>III.</b>	<b>MINERAL RIGHTS AND “NON-BUSINESS PROPERTY” .....</b>	<b>15</b>
<b>A.</b>	<b>MINERAL RIGHTS AND STATE PROPERTY LAW .....</b>	<b>15</b>
<b>B.</b>	<b>NON-BUSINESS PROPERTY AND THE INTERNAL REVENUE CODE.....</b>	<b>16</b>
<b>C.</b>	<b>VALUING PRODUCING AND NON-PRODUCING INTERESTS.....</b>	<b>18</b>
<b>IV.</b>	<b>BUSINESS PROPERTY .....</b>	<b>19</b>
<b>A.</b>	<b>VALID TRADE OR BUSINESS.....</b>	<b>19</b>
<b>B.</b>	<b>MATERIAL PARTICIPATION .....</b>	<b>20</b>
<b>C.</b>	<b>BUSINESS STRUCTURE.....</b>	<b>21</b>

<b>V. PROPERTY FOR SALE .....</b>	<b>22</b>
<b>VI. ESTATE PLANNING &amp; EXEMPTION FROM MERP .....</b>	<b>24</b>
<b>VII. ETHICAL CONSIDERATIONS AND LIMITS ON REAL PROPERTY PRESERVATION FOR MEDICAID APPLICANTS.....</b>	<b>25</b>
<b>VIII. APENDICES .....</b>	<b>28</b>
<b>APPENDIX A: MINERAL DEED .....</b>	<b>28</b>
<b>APPENDIX B:“LADY BIRD” DEED .....</b>	<b>30</b>

# **PROTECTING HOMES, FARMS AND RANCHES, AND OTHER BUSINESSES UNDER THE MEDICAID RULES**

## **I. INTRODUCTION TO EXEMPT ASSETS FOR MEDICAID PURPOSES**

Eligibility for Medicaid benefits is based in part on “means tests” which include limits on income and resources of the applicant and spouse, in the case of long-term care benefits. Each asset of a would-be beneficiary, therefore, must be evaluated for whether it “counts” as an available “resource” of the applicant (and if so, at what valuation) or whether it is “exempt” and therefore does not count (at any value) against the resource limit for eligibility. Any property that is a “resource” of the applicant, and does not fit into an exempt category, “counts.” The limit for countable resources of a single Medicaid beneficiary is \$2,000 in 2011 (and has been that amount for approximately 30 years); for one spouse in a marriage, there is a formula ranging from \$21,912 to \$109,560 in 2011 (plus \$2,000 for the institutionalized spouse; and a couple with incomes below a certain level can keep more).

This introduction defines “resources,” when they are “available” (or “accessible”) and what it means for property to win approval as “exempt.” The following sections then define and present the exemptions for homesteads, mineral rights, business property and any real property that is “for sale.” The scope of this article is limited to addressing real property that can be exempt for Medicaid eligibility purposes. It does not address exemptions available for other types of assets such as vehicles, personal and household items, prepaid funeral arrangements, etc. The authors intend to provide a guide to the current “state of the art” in preserving the value of real property for Medicaid applicants and their families where possible, and warnings as to the limits of the practical availability of the exemptions adopted into the federal and state rules that govern Medicaid benefits for long-term care.<sup>1</sup>

### ***A. RESOURCES DEFINED***

The value of a “resource” is counted in determining Medicaid eligibility unless it is within an exemption or exclusion. “Resources” include all real and personal property titled in the applicant or his/her spouse’s name, or held in trust for benefit the applicant in a form that permits the distribution of trust<sup>2</sup> property on demand of the applicant or otherwise to pay for his or her

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<sup>1</sup> The same “resource” definitions and exemptions apply to SSI benefits (with minor exceptions) and Children’s Medicaid. Because this paper is for an Elder Law course, its focus is on Medicaid long-term care benefits available to adults in Texas.

<sup>2</sup> Trusts funded with assets of persons other than the applicant can be structured to prevent trust property from “counting” as available resources, by making the trust property truly unavailable to the beneficiary upon demand; usually a discretionary third-party-settled trust is sufficient to render the trust property unavailable; please note that transfer by the applicant of his or her own property to a trust either accomplishes nothing (where the settlor is the

expenses of care. The Texas Administrative Code incorporates §1613 of the Social Security Act (42 U.S.C. §1382b) and 20 CFR §416.1201 regarding the general treatment of resources.<sup>3</sup> The Medicaid Eligibility for the Elderly and People with Disabilities Handbook<sup>4</sup> (“MEH”) defines resources as “cash, other liquid assets, or any real or personal property or other nonliquid assets that a person, a person’s spouse or parent could convert to cash to be used for his or her support and maintenance.”<sup>5</sup>

This definition is essentially the same as applied by the Supplemental Security Income program at 20 C.F.R. §416.1201, except the Texas handbook definition refers to resources an applicant’s parents can convert to cash. That is correct with regard to children’s Medicaid but clearly does not apply to any other kind.

This illustrates the importance of understanding the underlying law, in addition to applying the Medicaid Eligibility for the Elderly and People with Disabilities Handbook. The federal Medicaid statute requires state Medicaid programs to employ methodology in administering the means test that “may be less restrictive, and shall be no more restrictive, than the methodology ...under the supplemental security income program under title XVI...methodology is considered to be ‘no more restrictive’ if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance.”<sup>6</sup> Moreover, adherence by the states to the methodology adopted by the federal Medicaid agency has been required by the federal courts at least since U. S. Supreme Court spoke on this in 1981.<sup>7</sup>

The current Texas Medicaid rules (adopted in September 2009) largely accomplish this result by making express reference repeatedly to the federal Medicaid and SSI statutes and the federal SSI

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applicant) or it is in fact a transfer of beneficial interest to another person (where the trust is irrevocable and benefits a family member, for example) in which case a transfer penalty will apply for transfers made during the look-back period, currently five years. It is possible for a person under age 65 to protect assets in a self-settled “exception trust” that designates the Medicaid program as a remainder beneficiary. Such trusts are outside the scope of this paper. With regard to third-party trusts, 1 Texas Administrative Code §358.336 provides: “Resources in a testamentary or inter vivos trust are countable to a person if the person is the trustee and has the legal right to revoke the trust and use the money for the person’s own benefit.

(1) If a person does not have access to the trust, then the trust is not counted as a resource.

(2) If a person’s access to a trust is restricted (that is, only the trustee (other than the person) or the court may withdraw the principal), then the value of the trust as a resource is not counted, even if:

(A) the person’s legal guardian is the trustee;

(B) the trust provides a regular, specified payment to the person; or

(C) the trust provides for discretionary withdrawals by the trustee.”

<sup>3</sup> 1 Texas Administrative Code Rules (Revision 09-4; Effective December 1, 2009) Division 2, Resources, Subchapter C, Financial Requirements: §358.321. General Treatment of Resources. Texas HHSC follows 20 CFR §416.1207 regarding the determination of resources. Resource determinations are made as of 12:01 a.m. on the first day of the month.

<sup>4</sup> Texas Health and Human Services Commission, Medicaid Eligibility for the Elderly and People with Disabilities Handbook (Revision: 10-2; Effective: June 1, 2010) (hereinafter “MEH”)

<sup>5</sup> MEH F-1210 Definition (Revision 09-4; Effective December 1, 2009).

<sup>6</sup> 42 U.S.C. §1396a(r)(2). This does not apply to states that have opted out of the SSI methodology. Texas has not opted out so is an “SSI state” bound by this requirement.

<sup>7</sup> *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981).

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