

Presented:

2016 ESTATE PLANNING, GUARDIANSHIP AND ELDER LAW

August 11-12, 2016

Galveston, Texas

Understanding Public Benefits Affecting the Elderly

**H. Clyde Farrell &
Christina Lesher**

Author contact information:

H. Clyde Farrell
Certified Elder Law Attorney
Farrell & Pak PLLC
1000 Mo-Pac Circle
Austin, TX 78746
cfarrell@txelderlaw.com
512-323-2977

Christina Lesher
5615 Kirby Drive, Suite 412
Houston, TX 77005
clesher@lawlesher.com
713-529-5900

This outline presents the law as of this writing, with the warning that many public benefits in Texas are presently in a state of change. 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.

Copyright 2016 by H. Clyde Farrell and Christina Leshner

Understanding Public Benefits Affecting the Elderly

Contents

I. SUPPLEMENTAL SECURITY INCOME (SSI)	1
A. Eligibility	2
1. “Categorical” Requirements: Disability, Age 65 or over, <i>or</i> Blindness	2
a) Disability	2
b) Age	3
c) Blindness	3
2. Citizenship/Immigration/Residency Status	3
a) Residency	3
b) Citizen or Entitled Alien	3
3. Income	5
a) General Rule	5
b) Rules applying to earned income	5
c) Rules applying to unearned income	6
d) “In-kind support and maintenance”	6
e) Deeming of Income	9
4. Resources	9
a) General rule	9
b) Definition of resources	9
c) Deeming of resources	10
B. Benefits	11
1. Cash Benefits	11
2. Medicaid Eligibility	11
C. Transfer Rules	11
D. Application	13
E. SSI Sources of Law	13
 II. MEDICARE	 14
A. Eligibility	14
1. Eligibility at Age 65	14
2. Eligibility in Connection With Social Security and Railroad Retirement Disability Benefits	14
3. Medicare Premiums	15
B. Benefits	15
1. Hospital Services	15
2. Nursing Facility Services	16
3. Home Health Services	16
4. Hospice Services	17
5. Medicare Improvement Standard Abrogated	17
6. Physician Services and Other “Part B” Benefits	18
7. Prescription Drugs	19
8. Medicare Preventive Care Benefits	20
C. Application	21
 III. “LONG TERM CARE” MEDICAID	 21
A. Eligibility	21
1. Income	21
a) Income limitation for an unmarried person	21
b) Income limitation for a married person with an ineligible spouse	21
c) Income limitation for a married couple, both of whom apply for	22
Medicaid	22
d) Reduction of countable income	22

2. Resources (Countable Assets).....	22
a) Resources for an unmarried applicant.....	22
b) Resources for a married couple, with an ineligible spouse not living in a medical institution.....	23
c) Resources for a married couple, both in a nursing home and applying for Medicaid.....	23
d) Resources for a married couple, both in nursing home, only one applying for Medicaid.....	23
e) Limit of \$552,000 equity in residence.....	23
f) Limit on Purchasing Life Estate in a Residence.....	24
g) Exclusion of Unmarketable Assets.....	24
h) Deferred Annuities in IRA's are Exempt.....	25
3. Medical Need Requirements.....	26
a) Nursing Home and HCBS Waiver Programs.....	26
b) Home care.....	27
4. Citizenship/Immigration/Residence Status.....	27
5. Age, Blindness or Disability.....	27
B. Benefits.....	27
1. Nursing Home Medicaid.....	27
2. Home Care Under the "Community Care" Programs.....	28
3. Home and Community Based Services under the Medicaid "Waiver" Programs.....	28
C. Trust Rules.....	30
1. Third-Party-Settled Trusts.....	30
2. Self-Settled Trusts.....	30
a) Benefits of a Testamentary Trust for a Spouse.....	30
b) Rules applying to revocable trusts established by the client.....	30
c) Rules applying to irrevocable trusts established by the client.....	31
3. Exceptions to General Rules Governing Trusts "Established By" The Client.....	32
a) Under-65 Supplemental Needs Trusts.....	32
b) Miller Trusts (Qualified Income Trusts).....	32
D. Transfer ("Gifting") Rules.....	33
1. Nature and Purpose.....	33
2. Rules for Calculating the Penalty Period.....	34
3. Treatment of multiple transfers.....	35
4. How to Determine the "Start Date" of the Penalty Period.....	36
5. Medicaid Programs Subject to the Transfer Penalty.....	37
6. Disclaimers as Transfers.....	38
7. The Post-DRA Rules Pertaining to Annuities.....	38
8. The Pre-DRA Texas Rules Pertaining to Annuities.....	42
9. The "Return of Transferred Asset" Rule.....	43
10. What is "Compensation" Reducing a Transfer Penalty.....	46
11. Certain Transfers Excepted From Penalty.....	47
12. Exception: Transfers Solely for Non-Medicaid Purpose.....	49
13. Exception: Transfer Penalty Would Result in "Undue Hardship".....	50
14. Gifting by Guardians.....	51
15. Fees of Guardians Deductible From Copayment.....	52
E. Application.....	52
F. Agreements of Exclusivity Between Attorneys and Skilled Nursing Facilities.....	52
G. Medicaid Estate Recovery Program.....	53
H. Lady Bird Deed.....	53
I. Transfer on Death Deed: The New Lady Bird Deed?.....	55
1. Transfer on Death Deed Overview.....	55
2. Comparison of TODD and LBD.....	57
3. Effect on Medicaid Eligibility.....	57
4. Will a TODD Preserve Title Insurance Protection?.....	58
5. Which Type Deed to Use?.....	58
 IV. QMB AND OTHER MEDICARE SAVINGS PROGRAMS.....	61
A. Eligibility and Benefits.....	61
1. Qualified Medicare Beneficiaries (QMB).....	61

2. Specified Low-Income Medicare Beneficiaries (SLMB).....	62
3. Qualifying Individuals	62
4. Qualified Disabled and Working Individuals (QDWI)	62
B. Trust and Transfer Rules	63
C. Application	63

V. TIPS FOR NEW ELDER LAW PRACTITIONERS63

A. Contact Information for Texas Health and Human Services Commission.....	63
B. Tips for a Successful Medicaid Application	64
1. Frequently Asked Questions	64
C. Tips for Qualified Income Trusts (Miller Trusts).....	65
1. Qualified Income Trust (QIT) Checklist.....	65

VI. APPENDICES.....66

Appendix 1: Benefit Eligibility Numbers	66
Appendix 2: How to Calculate "Pro Rata Share"	68
Appendix 3: Sample Instructions for Trust Distributions	69
Appendix 4: Limits on Eligibility of Aliens for Public Benefits in Texas.....	71
Appendix 5: Sources of Free and Reduced Price Prescription Medications.....	73
Appendix 6: Selected Bibliography	74
Appendix 7: Transfer on Death Deed	77
Appendix 8: Enhanced Life Estate Deed (Lady Bird Deed).....	80
Appendix 9: Medicaid for the Elderly and People with Disabilities (MEPD) Managers and Supervisors.....	83
Appendix 10: Health and Human Services Commission Organizational Chart	90

Understanding Public Benefits Affecting the Elderly

INTRODUCTION

This is an overview of the most significant public benefits for persons age 65 and over in Texas. It is intended to assist attorneys and other benefits counselors to answer clients' questions about such benefits and to identify benefits clients may need but do not know about.

The benefits fall into two major categories:

- **Social insurance benefits** (financed by taxes paid by beneficiaries, available regardless of wealth or income): Social Security Retirement and Medicare
- **Means-tested benefits** (available only to those with assets and income below certain levels): Supplemental Security Income, Medicaid, Medicare Savings Programs (QMB, SLMB, Part D Extra Help)

This paper does not cover benefits available primarily to individuals under age 65—for example, Social Security Disability Insurance, under-65 Special Needs Trusts, Medicaid for children and pregnant women, and intellectual disability benefits. Those programs are covered in a longer paper by the authors.¹

Although Social Security Retirement is a public benefit affecting the elderly, there is very little demand for attorney services with regard to that benefit. Therefore, it is not covered in this paper. There are very good summaries available, such as Joseph F. Stenken, *Social Security & Medicare Facts* and the Social Security website at www.ssa.gov.

Although much of the law discussed is federal law, many rules are state-specific. Accordingly, with regard to cases governed by the law of jurisdictions other than Texas, it must be used, if at all, with great caution.

This outline is intended as a "bridge" to help the practitioner better understand and use the voluminous statutes, rules and agency operating instructions applying to each program. Therefore, although it seeks to cover the most important rules, it cannot include every benefit, exclusion, exemption, etc. contained in the numerous sources of law, which are cited for further reference. We also cite (and list in the Resources appendix) some books, papers and websites we have found helpful.

I. SUPPLEMENTAL SECURITY INCOME (SSI)

¹ Farrell and Leshner, *Protecting Public Benefits*, University of Texas School of Law conference Changes and Trends Affecting Special Needs Trusts (February 4-5, 2016).

It is relatively rare to find a senior who is eligible for SSI, because most have Social Security or other income exceeding its income maximum (\$753 per month for an unmarried person, \$1,100 per month for a married couple in 2016). However, it occasionally happens, and SSI can be especially valuable because in addition to a cash income, it carries with it eligibility for full Medicaid and food stamps (SNAP benefits). Moreover, the SSI “methodology” for identifying and valuing countable assets and income is used in other programs more frequently encountered in Elder Law practice—most notably, the Medicare Savings programs (QMB, SLMB, QI-1) and Medicare Part D Extra Help (very cheap prescriptions) discussed below. Therefore, this section on SSI can be used as a reference for determining whether a Medicare beneficiary has low enough assets and income to qualify for programs that eliminate or greatly reduce the premiums, copayments and deductibles associated with Medicare. And in those rare cases in which a client over age 65 does not have Medicare, the Medicaid associated with SSI can be critical.

Supplemental Security Income (SSI) is often confused with Social Security Disability Insurance (abbreviated SSDI or SSD) and other Social Security benefits for retirees, dependents and survivors, because some of those programs also have disability criteria and because SSI is also administered by the Social Security Administration (SSA). Even the telephone operators at SSA occasionally use the terms interchangeably and incorrectly. It is, therefore, imperative to distinguish which program applies to the circumstances of a given individual. A simple way to remember the most important difference is: SSI is a needs-based program (hence the name: *supplemental ... income*); and SSDI is the program that most workers “buy” into to insure themselves in the event of a disability that renders them unable to work (hence the name: *Social Security Disability Insurance*). A person becomes eligible for SSDI upon the completion of a certain work history and a qualifying determination of disability, irrespective of financial need. In many instances, a person who has a disability and the requisite work history, but a small SSDI benefit, may be eligible for both SSI and SSDI, which would also entitle the individual in question to both Medicaid and Medicare respectively.

Another important distinction between SSI and the other Social Security benefits is that the latter are paid for through the Social Security taxes paid for by workers; whereas SSI is not paid for by Social Security taxes but rather from the general funds of the United States Treasury.²

A. Eligibility³

1. “Categorical” Requirements: Disability, Age 65 or over, or Blindness
 - a) Disability

We’ll skip over the disability requirement, because it does not apply to individuals age 65 or over. They need to meet only the asset and income requirements. Therefore, when you encounter a person who has reached age 65 and has very low income (discussed below), consider whether

² See Social Security Handbook, http://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2105.html (last visited Dec. 20, 2015).

³ See Social Security, <http://www.socialsecurity.gov/ssi/text-eligibility-ussi.htm> (last visited Dec. 20, 2015).

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: Understanding Public Benefits Affecting the Elderly

Also available as part of the eCourse

[Understanding Public Benefits Affecting the Elderly](#)

First appeared as part of the conference materials for the
18th Annual Estate Planning, Guardianship and Elder Law Conference session
"Understanding Public Benefits Affecting the Elderly"