

PRESENTED AT

13th Annual Changes and Trends Affecting
Special Needs Trusts

February 9-10, 2017
Austin, Texas

Protecting and Maximizing Public Benefits

**H. Clyde Farrell &
Christina Leshner**

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

Co-author contact information:

Christina Leshner
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 2017 by H. Clyde Farrell

PROTECTING AND MAXIMIZING PUBLIC BENEFITS

Contents

I.	CHANGES AND TRENDS FOR 2017	9
II.	OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES	11
A.	Texas Agencies	11
B.	Medicaid Managed Care Covers the State	11
1.	Historical Background in Texas	11
2.	Changes Should Not Adversely Affect Clients	12
3.	Changes in Program Names	13
4.	More Choices in Service Delivery	16
5.	Extension of Managed Care to Nursing Facilities	16
C.	Equal Protection for Partners in Same-Sex Marriages	19
III.	SUPPLEMENTAL SECURITY INCOME (SSI)	19
A.	Eligibility	20
1.	“Categorical” Requirements: Disability, Age 65 or over, or Blindness	20
2.	Citizenship/Immigration/Residency Status	21
3.	Income	23
4.	Resources	30
B.	Benefits	31
1.	Cash Benefits	31
2.	Medicaid Eligibility	31
C.	Trust Rules	31
1.	Third-Party Settled Trusts	31
2.	Self-Settled Trusts	32
3.	Restrictions on Early Termination Provisions in Self-Settled Trusts	41
4.	Factors Affecting Type of Trust and Selection of Trustee	42
5.	The Sole Benefit Rule	46
6.	Revised POMS Trust Provisions and the Sole Benefit Rule	49
7.	New System for Evaluating SSI Trusts	51
8.	SSA Reverses Policy of Disapproving All Court-Created Trusts	52
9.	Texas to Implement the ABLE Act	53
D.	Transfer Rules	55
E.	Application	57
F.	SSI Sources of Law	57
IV.	REGULAR MEDICAID BENEFITS	58
A.	Eligibility	58
B.	Benefits	60
1.	General Scope of Benefits	60
2.	Texas Health Steps (THSteps)	60
3.	Prescription Medications	61
C.	Application	62
V.	SOCIAL SECURITY DISABILITY INSURANCE (SSDI)	63
A.	Eligibility	63

1. Work History.....	63
2. Disability.....	63
B. Benefits	64
1. Cash Benefits	64
2. Medicare Benefits	64
C. Application.....	64
VI. MEDICARE.....	65
A. Eligibility	65
1. Eligibility at Age 65	65
2. Eligibility in Connection With Social Security and Railroad Retirement Disability Benefits	65
3. Medicare Premiums	65
4. Continuation of Medical Coverage After Total Disability Ends.....	66
B. Benefits	66
1. Hospital Services.....	67
2. Nursing Facility Services	67
3. Home Health Services.....	68
4. Physician Services and Other "Part B" Benefits	69
5. Prescription Drugs.....	69
6. Medicare Preventive Care Benefits.....	71
7. Medicare Improvement Standard Abrogated	71
C. Application.....	72
VII. "LONG TERM CARE" MEDICAID.....	73
A. Eligibility	73
1. Income.....	73
2. Resources (Countable Assets).....	74
3. Medical Need Requirements	78
4. Citizenship/Immigration/Residence Status	79
5. Age, Blindness or Disability	79
B. Benefits	79
1. Nursing Home Medicaid	79
2. Home Care Under the "Community Care" Programs	80
3. Consumer Directed Services, Service Responsibility Option and Agency Staffing	80
4. Home and Community Care under the Medicaid "Waiver" Programs.....	81
5. The HCBS Waiver "Spousal Protected Resource Amount".....	86
6. Rules When Both Spouses Apply	89
7. The HCBS Waiver Program Interest Lists	91
8. Bypassing the Interest Lists with "Money Follows the Person"	92
C. Trust Rules.....	94
1. Third-Party-Settled Trusts.....	94
2. Self-Settled Trusts.....	94
3. Exceptions to General Rules Governing Trusts "Established By" The Client	96
D. TRANSFER ("GIFTING") RULES.....	99
1. Nature and Purpose	99
2. Rules for Calculating the Penalty Period	100
3. Treatment of Multiple Transfers	101
4. How to Determine the "Start Date" of the Penalty Period	101
5. Medicaid Programs Subject to the Transfer Penalty	103
6. Disclaimers as Transfers	103
8. The "Return of Transferred Asset" Rule	106
9. Transfers by a Community Spouse	108
10. Certain Transfers Excepted From Penalty.....	109

11. Exception: Transfers Solely for Non-Medicaid Purpose.....	111
12. Exception: Transfer Penalty Would Result in "Undue Hardship".....	112
13. Gifting by Guardians.....	113
14. Fees of Guardians Deductible From Copayment.....	114
E. Application.....	114
F. Agreements of Exclusivity Between Attorneys and Skilled Nursing Facilities.....	114
G. Medicaid Estate Recovery Program.....	115
H. Lady Bird Deed.....	116
I. Transfer on Death Deed: The New Lady Bird Deed?.....	118
1. Transfer on Death Deed Overview.....	118
2. Comparison of TODD and LBD.....	119
J. ACA Extends Spousal Impoverishment Protections to HCBS Waiver Programs.....	122
K. 1915(c) is now HCBS.....	123
L. Income Tax Withholding No Longer Deductible from Copayment.....	123
M. New LTC Medicaid Programs.....	123
1. Community First Choice.....	123
2. "Texas Dual Eligible Integrated Care Project" affects 6 counties.....	124
N. Life Settlements.....	125
1. Introduction to Life Settlements.....	125
2. Definitions of Life Settlements.....	125
3. "Traditional" Life Settlements.....	126
4. Long-Term Care Benefit Plan Conversion Life Settlements.....	127
5. Using the New Life Settlements for Medicaid Planning.....	129
VIII. CHILDREN'S MEDICAID.....	130
A. Eligibility.....	130
1. Residence and Citizenship.....	130
2. Age 18 or Under.....	131
3. Resources.....	131
4. Income.....	131
B. Trust and Transfer Rules.....	132
IX. PREGNANT WOMEN'S MEDICAID.....	132
A. Eligibility.....	132
1. Residence and Citizenship.....	132
2. Resources.....	133
3. Income.....	133
B. Benefits.....	133
C. Trust and Transfer Rules.....	133
X. PARENTS & CARETAKER RELATIVES MEDICAID.....	133
A. History and Relation to TANF.....	133
B. Eligibility.....	134
1. Relationship to Dependent Child.....	134
2. Resources.....	134
3. Income.....	135
C. Benefits.....	135
D. Trust and Transfer Rules.....	135
E. Application.....	135
XI. MEDICALLY NEEDY PROGRAM.....	136
A. Eligibility.....	136

1. Age, Gender & Resources.....	136
2. Income.....	136
3. Resources.....	137
B. Benefits.....	137
C. Trust Rules.....	137
D. Transfer Rules.....	137
E. Application.....	137
XII. THE TEXAS CHILDREN'S HEALTH INSURANCE (CHIP) PROGRAM.....	137
A. Eligibility.....	137
1. Age.....	137
2. Residence/Citizenship.....	138
3. Waiting Period.....	138
4. Income.....	138
5. Resources.....	139
6. Exclusions.....	139
B. Benefits and Costs.....	139
C. Trust Rules.....	139
D. Transfer Rules.....	139
E. Application.....	140
XIII. THE AFFORDABLE CARE ACT	140
A. Introduction.....	140
B. Changes Put Into Effect Before 2013.....	140
1. The "Federal Risk Pool".....	140
2. Improvements to "Money Follows the Person".....	141
3. Coverage for Children With Pre-Existing Conditions.....	141
4. Coverage for Children Until Age 26.....	141
5. Medicare Part D "Donut Hole" Reduction.....	141
6. Part D Cost-Sharing Eliminated for Waiver Program Beneficiaries.....	141
7. Nursing Home Disclosures Required.....	141
C. Changes Effective January 1, 2014.....	141
1. No Pre-Existing Condition Requirement.....	142
2. Sliding-Scale Premiums Based on Income.....	142
3. Sliding-Scale Cost Sharing Based on Income.....	143
4. Spousal Impoverishment Rules Apply to Waiver Programs.....	144
5. No Annual or Lifetime Caps.....	144
6. Medicaid Coverage Based on Low-Income.....	144
7. Effect of the ACA on Special Needs Practices.....	145
XIV. THE TEXAS HEALTH INSURANCE RISK POOL	146
XV. EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS.....	147
A. Eligibility.....	147
B. Benefits.....	147
XVI. QMB AND OTHER MEDICARE SAVINGS PROGRAMS.....	147
A. Eligibility and Benefits.....	148
1. Qualified Medicare Beneficiaries (QMB).....	148
2. Specified Low-Income Medicare Beneficiaries (SLMB).....	148
3. Qualifying Individuals.....	149

4. Qualified Disabled and Working Individuals (QDWI)	149
B. Trust and Transfer Rules	150
C. Application	150

XVII. MEDICAID BUY-IN PROGRAM.....150

A. Eligibility	150
1. Disability.....	150
2. Income.....	151
3. Resources	152
4. Calculation of Monthly Premium.....	153
B. Benefits	153

XVIII. MEDICAID BUY-IN FOR CHILDREN PROGRAM.....153

A. Eligibility	153
1. Nonfinancial Requirements.....	153
2. Income.....	154
3. Resources	157
B. Benefits	157
C. Premiums	157
D. Trust and Transfer Rules	158
E. Application.....	158

XIX. HELP WITH INSURANCE PREMIUMS - THE HIPPI PROGRAM158

XX. FOOD STAMPS (SNAP)159

A. Eligibility	159
1. Resources	159
2. Transfer Rules.....	160
3. Income.....	161
4. Citizenship/Immigration Status.....	161
5. Work Requirements	161
B. Benefits	162
C. Application.....	162

XXI. TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS162

A. Eligibility	162
1. Medicaid-Funded Services.....	162
2. Non-Medicaid-Funded Services.....	163
B. Benefits	165
1. Mental Health Facilities	165
2. Intellectual Disability Services.....	165
3. Community Services.....	165
4. Group Homes	167
C. Trust Rules	167
D. Transfer Rules	169

XXII. LOCAL MEDICAL ASSISTANCE PROGRAMS & OTHER BENEFITS170

A. Local Medical Assistance Programs	170
B. Emergency Room Assistance.....	171
C. Indigent-Care Responsibilities of Hospitals	171

D. Local Nonprofit Agencies	171
E. Property Tax Exemptions.....	171
F. Unlisted Agencies & Benefits	172

XXIII. BREAST CANCER & CANCER CONTROL SERVICES AND THE TEXAS BREAST AND CERVICAL CANCER TREATMENT ACT	172
A. The Breast & Cervical Cancer Control Services (BCCCS).....	172
A. The Texas Breast and Cervical Cancer Treatment Act	172

XXIV. TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS PRACTITIONERS	173
A. Contact Information for Texas Health and Human Services Commission.....	173
B. Tips for a Successful Medicaid Application	174
1. Frequently Asked Questions	174
C. Tips for Qualified Income Trusts (Miller Trusts).....	175
1. Qualified Income Trust (QIT) Checklist.....	175

XXV. APPENDICES	177
Appendix 1: Benefit Eligibility Numbers	177
Appendix 2: How to Calculate "Pro Rata Share"	179
Appendix 3: Sample Instructions for Trust Distributions.....	180
Appendix 4: Limits on Eligibility of Aliens for Public Benefits in Texas.....	182
Appendix 5: Sources of Free and Reduced Price Prescription Medications.....	184
Appendix 6: Selected Bibliography.....	185
Appendix 7: Medicaid for the Elderly and People with Disabilities (MEPD) Managers and Supervisors.....	190
Appendix 8: Health and Human Services Commission Organizational Chart	197

PROTECTING AND MAXIMIZING PUBLIC BENEFITS

INTRODUCTION

This is an overview of the most significant public benefits for persons with disabilities in Texas. It is intended to assist attorneys and other benefits counselors to identify the major benefits to which such clients may be entitled.

Its focus is primarily on the "means-tested" benefits, which are available only to persons with assets and income below certain limits. Therefore, particular attention is paid to rules relating to trusts and transfers of assets to assist attorneys and other professionals with estate planning for family members and with planning for dispositions of personal injury awards, inheritances and other assets of persons with disabilities.

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.

The authors gratefully acknowledge the contribution of Chris DeWitt, an attorney with much experience in the fields of Medicaid and disability, who updated the whole publication and expanded the discussion of state programs and laws in 2009.

I. CHANGES AND TRENDS FOR 2017

What follows is a listing of the major changes in the 2017 edition of this paper.

Topic	Summary of Change	Page
Medicaid Applications	If a Medicaid application is delayed or contains a mistake, the Office of Eligibility Service has a dedicated a unit to help.	174
ABLE Act	Texas has not fully implemented the ABLE program but, in certain states, accounts are available for out-of-state residents.	53
21 st Century Cures Act	An individual with a disability who has the intellectual capacity to establish his or her own self-settled account similar to a Special Needs Trust can now do so, effective December 13, 2016.	34

Long-Term Care Medicaid – HCBS Programs	Updated HCBS program information	81
Long-Term Care Medicaid – HCBS Programs	HHSC has updated their policies on “Spousal Protected Resource Amounts” and the “Personal Needs Allowance” for waiver programs	86
Long-Term Care Medicaid – HCBS Programs	Introduction to special rules when both spouses apply for long-term care	89
Long-Term Care Medicaid – Money Follows the Person	The “Money Follows the Person” program has been extended through August 2017.	92
Long-Term Care Medicaid – Transfer Rules	HHSC Officials have confirmed HCBS programs do not have a start date to begin the transfer penalty period	101
Long-Term Care Medicaid – Transfer Rules	HHSC has clarified transfer penalties on transfers by a Community Spouse	108

II. OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES

A. Texas Agencies

The Texas Health and Human Services Commission (HHSC) administers the Texas Medicaid program, the Children’s Health Insurance Program (CHIP), Family and Community Services (e.g., Family Violence Program, Refugee Affairs Program, and education and outreach relating to social services), Special Nutrition Programs, Lone Star Business Programs, Texas Works (which includes the Food Stamp Program, Medical Assistance Programs for Families and Children, and Temporary Assistance for Needy Families (TANF)), and Disaster Assistance programs.

HHSC is also responsible for the administrative functions of the other four health and human service (HHS) agencies of Texas:

Department of State Health Services (DSHS) – responsible for health and mental health services (including state mental health facilities and hospitals), as well as substance abuse programs;

Department of Aging and Disability Services (DADS) – responsible for intellectual disability (ID) services and State Supported Living Centers (residential intellectual disability) programs, nursing homes, community care services, and aging and long-term care services for the elderly (but not responsible for determining *financial* eligibility for Medicaid, which is done by HHSC);

Department of Assistive and Rehabilitative Services (DARS) – responsible for rehabilitation services, disability determination services, services for the deaf, blind, and visually impaired, and early childhood intervention services; and

Department of Family and Protective Services (DFPS) – responsible for adult and child protective services, investigations of abuse and neglect in homes and state facilities, the licensing and regulating of child care facilities, and prevention and early intervention services for child maltreatment and juvenile delinquency.

B. Medicaid Managed Care Covers the State

1. Historical Background in Texas

With the approval of the 2011 Texas Legislature, the Texas Health & Human Services Commission applied for a new Medicaid waiver program that was approved by the federal Centers for Medicare & Medicaid Services December 12, 2011. By that approval, CMS “waived” certain requirements of federal Medicaid law, most notably the prohibition on payment of certain Medicaid funds to hospitals serving large numbers of low-income patients, when the

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: Protecting and Maximizing Public Benefits

Also available as part of the eCourse

[2017 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
13th Annual Changes and Trends Affecting Special Needs Trusts session
"Maximizing Public Benefits"