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MEDICAID UPDATE

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Medicaid Update

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I. INTRODUCTION TO ESTATE PLANNING FOR BENEFICIARIES WHO MAY NEED 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.”

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. The federal Centers for Medicare & Medicaid Services 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 or any of the recent proposals to amend or replace it.

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 2013, Medicaid covered 15 percent of Texas residents; from 2000 to 2012, this figure had increased by 6.3 percentage points.³ In 2010, 55 percent of Texas Medicaid spending was categorized as “on the elderly and disabled” who made up 22 percent of Medicaid enrollees in Texas – an allocation that is typical of most states.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 The high lifetime cost of care and the structure of the eligibility program that constitutes

¹ 2016 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.AALTCL.ORG/NEWS/LONG-TERM-CARE-INSURANCE-NEWS/LONG-TERM-CARE-INSURANCE-IS-NOT-CHANGED-BY-OBAMACARE; AND

³ According to a 2014 report by the Pew Charitable Trusts, “State Healthcare Spending on Medicaid” available at http://www.pewtrusts.org/~media/Data-Visualizations/Interactives/2014/Medicaid/downloadables/State_Health_Care_Spending_on_Medicaid.pdf?la=en.

⁴ Id. , and 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>.

the long-term care insurance plan most accessed to cover these costs (Medicaid) alters the path of many families' financial fortunes and likewise creates opportunities and significant risks for the estate planning advisor.

II. INTRODUCTION TO MEDICAID

Medicaid is the most comprehensive health insurance program available to Americans. In general, "Medicaid" refers to Title 19 of the Social Security Act, 42 U.S.C. §1396 *et seq.* The Texas Health & Human Services Commission administers all Title 19 (Medicaid) programs in this state.

However, Title 19 provides for numerous distinct programs. For example, the Medicaid provided to all Supplemental Security Income (SSI) beneficiaries is available only to persons with countable incomes not exceeding \$735 per month in 2017; but as discussed below, there is no absolute income limit on nursing home and waiver program Medicaid eligibility.

Settling a personal injury case or planning an estate without taking Medicaid into account would place an attorney at high risk for a professional liability claim and/or a suit for payment of the Medicaid subrogation claim. This paper will serve as an update to the following longer works on which the authors of this paper are co-authors: "Planning for Beneficiaries Who May Need Long-Term Care," from the State Bar of Texas Advanced Estate Planning & Probate Conference, June 24, 2016 (Chapter 34) and Molly Dear Abshire, H. Clyde Farrell, Patricia Flora Sitchler and Wesley E. Wright, *TEXAS ELDER LAW* (Thomson-Reuters 2016-7), at 513, Chapter 8: Long-Term Care Medicaid.

Please note aspects of Medicaid that impact estate planning and that have not changed in recent history, reviewed in more depth in the above-listed publications:

- All "available" resources "count" against the asset limit (which remains \$2,000 for unmarried persons), with the burden on the applicant for Medicaid benefits to identify, establish valuation, prove exemption where possible and overcome the presumption of availability and marketability with respect to all assets of any nature, including illiquid real properties, hard-to value assets (time shares, unique land and collectibles) and private company interests.
- Even though tangible property used in a business is exempt, the same property when owned through a business entity is not exempt. The entity must be dissolved and the assets distributed to the owners to establish a "business property" exemption, as all partnership interests and corporate shares "count" as if they were publicly traded.

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