

Presented:

2018 CHANGES AND TRENDS AFFECTING SPECIAL NEEDS TRUSTS
February 15-16, 2018
Austin, Texas

**Protecting and Maximizing
Public Benefits**

**H. Clyde Farrell &
Christina Lesher**

Author contact information:
H. Clyde Farrell
Certified Elder Law Attorney
Farrell, Burdett, & Johnson, PLLC
1000 Mo-Pac Circle
Austin, TX 78746

cfarrell@txelderlaw.com
512-323-2977

Co-author contact information:
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 2018 by H. Clyde Farrell

PROTECTING AND MAXIMIZING PUBLIC BENEFITS

Contents

I. CHANGES AND TRENDS FOR 2018.....	9
II. OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES	10
A. Texas Agencies	10
B. Medicaid Managed Care Covers the State	11
1. Historical Background in Texas.....	11
2. Changes Should Not Adversely Affect Clients.....	11
3. Changes in Program Names.....	13
4. More Choices in Service Delivery	15
5. Extension of Managed Care to Nursing Facilities.....	16
C. Equal Protection for Partners in Same-Sex Marriages	19
III. SUPPLEMENTAL SECURITY INCOME (SSI).....	20
A. Eligibility	21
1. “Categorical” Requirements: Aged, Blind, or Disabled.....	21
2. Citizenship/Immigration/Residency Status	22
3. Income.....	24
4. Resources	32
B. Benefits	33
1. Cash Benefits	33
2. Medicaid Eligibility	33
C. Trust Rules	33
1. Third-Party Settled Trusts	34
2. Self-Settled Trusts.....	35
3. Restrictions on Early Termination Provisions in Self-Settled Trusts.....	43
4. Factors Affecting Type of Trust and Selection of Trustee	45
5. The Sole Benefit Rule.....	48
6. Revised POMS Trust Provisions and the Sole Benefit Rule	51
7. New System for Evaluating SSI Trusts.....	53
8. SSA Reverses Policy of Disapproving All Court-Created Trusts	54
9. Texas to Implement the ABLE Act.....	55
D. Transfer Rules	57
E. Application.....	59
F. SSI Sources of Law	59
IV. CHILDHOOD DISABILITY BENEFIT & DISABLED ADULT CHILD MEDICAID.....	60
V. SOCIAL SECURITY DISABILITY INSURANCE (SSDI)	62
A. Eligibility	62
1. Work History.....	62
2. Disability.....	62
B. Benefits	63

1. Cash Benefits	63
2. Medicare Benefits	63
C. Application	63
VI. REGULAR MEDICAID BENEFITS	64
A. Eligibility	64
B. Benefits	65
1. General Scope of Benefits	65
2. Texas Health Steps (THSteps)	66
3. Prescription Medications	67
C. Application	67
VII. MEDICARE	68
A. Eligibility	68
1. Eligibility at Age 65	68
2. Work Requirements	68
3. Eligibility in Connection With Social Security and Railroad Retirement Disability Benefits	68
4. Medicare Premiums	68
5. Continuation of Medical Coverage After Total Disability Ends	69
B. Benefits	69
1. Hospital Services	70
2. Nursing Facility Services	70
3. Home Health Services	71
4. Hospice Services	71
5. Physician Services and Other "Part B" Benefits	72
6. Prescription Drugs	72
7. Medicare Preventive Care Benefits	74
8. Medicare Improvement Standard Abrogated	74
C. Application	75
VIII. "LONG- TERM CARE" MEDICAID	76
A. Eligibility	76
1. Income	76
2. Resources (Countable Assets)	77
3. Medical Need Requirements	81
4. Citizenship/Immigration/Residence Status	82
5. Age, Blindness or Disability	82
B. Benefits	83
1. Nursing Home Medicaid	83
2. Home Care Under the "Community Care" Programs	83
3. Consumer Directed Services, Service Responsibility Option and Agency Staffing	84
4. Home and Community Care under the Medicaid "Waiver" Programs	85
5. The HCBS Waiver "Spousal Protected Resource Amount"	90
6. Rules When Both Spouses Apply	92
7. The HCBS Waiver Program Interest Lists	95
8. Bypassing the Interest Lists with "Money Follows the Person"	96
C. Trust Rules	98
1. Third-Party-Settled Trusts	98
2. Self-Settled Trusts Generally	98
3. Exceptions to General Rules Governing Trusts "Established By" The Client	101
D. TRANSFER ("GIFTING") RULES	103
1. Nature and Purpose	103
2. Rules for Calculating the Penalty Period	104

3.	Treatment of Multiple Transfers	104
4.	How to Determine the "Start Date" of the Penalty Period	105
5.	Medicaid Programs Subject to the Transfer Penalty	107
6.	Disclaimers as Transfers	107
8.	The "Return of Transferred Asset" Rule	110
9.	Transfers by a Community Spouse	112
10.	Certain Transfers Excepted From Penalty.....	113
11.	Exception: Transfers Solely for Non-Medicaid Purpose.....	115
12.	Exception: Transfer Penalty Would Result in "Undue Hardship".....	115
13.	Gifts by Guardians.....	117
14.	Fees of Guardians Deductible From Copayment	117
E.	Application.....	118
F.	Agreements of Exclusivity Between Attorneys and Skilled Nursing Facilities	118
G.	Medicaid Estate Recovery Program	119
H.	Lady Bird Deed	119
I.	Transfer on Death Deed: The New Lady Bird Deed?	121
1.	Transfer on Death Deed Overview.....	121
2.	Comparison of TODD and LBD	123
J.	ACA Extends Spousal Impoverishment Protections to HCBS Waiver Programs.....	125
K.	1915(c) is now HCBS	126
L.	Income Tax Withholding No Longer Deductible from Copayment.....	126
M.	New LTC Medicaid Programs	127
1.	Community First Choice	127
2.	"Texas Dual Eligible Integrated Care Project" affects 6 counties.....	128
N.	Life Settlements	128
1.	Introduction to Life Settlements.....	128
2.	Definitions of Life Settlements	129
3.	"Traditional" Life Settlements	129
4.	Long-Term Care Benefit Plan Conversion Life Settlements.....	131
5.	Using the New Life Settlements for Medicaid Planning.....	132
 IX. CHILDREN'S MEDICAID		134
A.	Eligibility	134
1.	Residence and Citizenship	134
2.	Age 18 or Under.....	134
3.	Resources	134
4.	Income.....	134
B.	Benefits	136
C.	Trust and Transfer Rules	136
 X. PREGNANT WOMEN'S MEDICAID.....		136
A.	Eligibility	136
1.	Residence and Citizenship	136
2.	Resources	136
3.	Income.....	136
B.	Benefits	137
C.	Trust and Transfer Rules	137
 XI. PARENTS & CARETAKER RELATIVES MEDICAID		137
A.	History and Relation to TANF	137
B.	Eligibility	138
1.	Relationship to Dependent Child	138
2.	Resources	138

3. Income.....	138
C. Benefits	139
D. Trust and Transfer Rules	139
E. Application	139

XII. MEDICALLY NEEDY PROGRAM.....139

A. Eligibility	140
1. Age & Gender	140
2. Income.....	140
3. Resources	141
B. Benefits	141
C. Trust Rules	141
D. Transfer Rules	141
E. Application.....	141

XIII. THE TEXAS CHILDREN'S HEALTH INSURANCE (CHIP) PROGRAM.....141

A. Eligibility	142
1. Age.....	142
2. Residence/Citizenship	142
3. Waiting Period	142
4. Income.....	142
5. Resources	143
6. Exclusions	143
B. Benefits and Costs.....	143
C. Trust Rules	144
D. Transfer Rules	144
E. Application.....	144

XIV. THE AFFORDABLE CARE ACT144

A. Introduction	144
B. Changes Put Into Effect Before 2013	145
1. The "Federal Risk Pool".....	145
2. "Money Follows the Person".....	145
3. Coverage for Children With Pre-Existing Conditions.....	145
4. Coverage for Children Until Age 26	145
5. Medicare Part D "Donut Hole" Reduction	145
6. Part D Cost-Sharing Eliminated for Waiver Program Beneficiaries	145
7. Nursing Home Disclosures Required.....	145
C. Changes Effective January 1, 2014	146
1. No Pre-Existing Condition Requirement	146
2. Sliding-Scale Premiums Based on Income	146
3. Sliding-Scale Cost Sharing Based on Income	147
4. Spousal Impoverishment Rules Apply to Waiver Programs	148
5. No Annual or Lifetime Caps	148
6. Medicaid Coverage Based on Low-Income	148
7. Effect of the ACA on Special Needs Practices	149
D. ACA and the Tax Cuts and Jobs Act of 2017	150

XV. EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS150

A. Eligibility	150
B. Benefits	151
XVI. QMB AND OTHER MEDICARE SAVINGS PROGRAMS	151
A. Eligibility and Benefits.....	151
1. Qualified Medicare Beneficiaries (QMB).....	152
2. Specified Low-Income Medicare Beneficiaries (SLMB).....	152
3. Qualifying Individuals	152
4. Qualified Disabled and Working Individuals (QDWI)	153
5. Income & Resource Methodology	153
B. Trust and Transfer Rules	154
C. Application.....	154
XVII. MEDICAID BUY-IN PROGRAM.....	154
A. Eligibility	154
1. Disability.....	154
2. Income.....	155
3. Resources	156
4. Calculation of Monthly Premium.....	157
B. Benefits	157
XVIII. MEDICAID BUY-IN FOR CHILDREN PROGRAM.....	157
A. Eligibility	157
1. Nonfinancial Requirements.....	157
2. Income.....	158
3. Resources	160
B. Benefits	160
C. Premiums	160
D. Trust and Transfer Rules	161
E. Application.....	161
XIX. HELP WITH INSURANCE PREMIUMS - THE HIP PROGRAM.....	161
XX. FOOD STAMPS (SNAP)	162
A. Eligibility	163
1. Resources	163
2. Transfer Rules.....	164
3. Income.....	164
4. Citizenship/Immigration Status.....	164
5. Work Requirements	165
B. Benefits	165
C. Application.....	165
XXI. TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS	165
A. Eligibility	166
1. Medicaid-Funded Services.....	166
2. Non-Medicaid-Funded Services.....	167
B. Benefits	168

1. Mental Health Facilities	168
2. Intellectual Disability Services.....	169
3. Community Services.....	169
4. Group Homes	170
C. Trust Rules	171
D. Transfer Rules	173

XXII. LOCAL MEDICAL ASSISTANCE PROGRAMS & OTHER

BENEFITS	174
A. Local Medical Assistance Programs	174
B. Emergency Room Assistance	175
C. Indigent-Care Responsibilities of Hospitals.....	175
D. Local Nonprofit Agencies	175
E. Property Tax Exemptions.....	175
F. Unlisted Agencies & Benefits	175

**XXIII. BREAST CANCER & CANCER CONTROL SERVICES
AND THE TEXAS BREAST AND CERVICAL CANCER
TREATMENT ACT.....**

.....	176
A. The Breast & Cervical Cancer Control Services (BCCCS).....	176
B. The Texas Breast and Cervical Cancer Treatment Act	176

**XXIV. TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS
PRACTITIONERS.....**

.....	177
A. Contact Information for Texas Health and Human Services Commission.....	177
B. Tips for a Successful Medicaid Application	177
1. Frequently Asked Questions	177
C. Tips for Qualified Income Trusts (Miller Trusts).....	179
1. Qualified Income Trust (QIT) Checklist.....	179

APPENDIXES.....

.....	180
Appendix 1: Benefit Eligibility Numbers	180
Appendix 2: How to Calculate "Pro Rata Share"	182
Appendix 3: Sample Instructions for Trust Distributions	183
Appendix 4: Limits on Eligibility of Aliens for Public Benefits in Texas	185
Appendix 5: Sources of Free and Reduced Price Prescription Medications	187
Appendix 6: Appendix 6: Selected Bibliography.....	188
Appendix 7: Medicaid for the Elderly and People with Disabilities (MEPD) Managers and Supervisors	193
Appendix 8: Health and Human Services Commission Organizational Chart.....	200
Appendix 9: Checklist for Termination of Special Needs Trust with Medicaid Payback Provision.....	201
Appendix 10: Drafting for Use of Pooled Trusts	203

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 2018

What follows is a listing of the major changes in the 2018 edition of this paper.

Topic	Summary of Change	Page
ABLE Act	Texas announced Texas ABLE launching in early 2018	55
Social Security— Childhood Disability & Disabled Adult Children	Updated Information on these programs	60
Long-Term Care Medicaid – Money Follows the Person	The “Money Follows the Person” program update	96

Affordable Healthcare Act	ACA and the Tax Cuts and Jobs Act of 2017	150
Medicare Savings Programs Eligibility	Updated Income & Resource Methodology	153
Medicaid Estate Recovery Provisions	New Appendix - Checklist for Termination Of Special Needs Trust With Medicaid Payback Provision	201
Special Needs Trusts - Drafting	New Appendix - Drafting for Use Of Pooled Trusts	203

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,
- 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,
- 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.

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

[2018 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
14th Annual Changes and Trends Affecting Special Needs Trusts session
"Maximizing Public Benefits"