

Presented:

2019 CHANGES AND TRENDS AFFECTING SPECIAL NEEDS TRUSTS
February 7-8, 2019
Austin, Texas

**Protecting and Maximizing
Public Benefits**

**H. Clyde Farrell &
Christina Lesher**

Author contact information:
H. Clyde Farrell
Certified Elder Law Attorney
Farrell & 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 2019 by H. Clyde Farrell

I. CHANGES AND TRENDS FOR 2019	1
II. OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES.....	3
A. TEXAS AGENCIES	3
B. MEDICAID MANAGED CARE COVERS THE STATE.....	4
1. Historical Background in Texas	4
2. Changes Should Not Adversely Affect Clients	5
3. Changes in Program Names	6
4. More Choices in Service Delivery	9
5. Extension of Managed Care to Nursing Facilities.....	10
C. EQUAL PROTECTION FOR PARTNERS IN SAME-SEX MARRIAGES	13
III. SUPPLEMENTAL SECURITY INCOME (SSI)	13
A. ELIGIBILITY.....	14
1. “Categorical” Requirements: Aged, Blind, or Disabled.....	14
2. Citizenship/Immigration/Residency Status	16
3. Income.....	18
4. Resources	26
B. BENEFITS	27
1. Cash Benefits.....	27
2. Medicaid Eligibility.....	27
C. TRUST RULES.....	27
1. Third-Party Settled Trusts	28
2. Self-Settled Trusts	29
3. Judicial Reformation of Wills	37
4. Self-Settled Trusts-Key Provisions in 2018 POMS Revisions.....	38
5. Restrictions on Early Termination Provisions in Self-Settled Trusts	43
6. Factors Affecting Type of Trust and Selection of Trustee	44
7. The Sole Benefit Rule	48
8. Treatment of UTMA Accounts	52
9. SSA's System for Evaluating SSI Trusts	52
10. SSA Reverses Policy of Disapproving All Court-Created Trusts	53
11. Texas to Implement the ABLE Act.....	54
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)	61
A. ELIGIBILITY.....	61
1. Work History.....	61
2. Disability	62

B.	BENEFITS	62
1.	Cash Benefits.....	62
2.	Medicare Benefits	63
C.	APPLICATION	63
VI.	REGULAR MEDICAID BENEFITS	63
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).....	78
3.	Medical Need Requirements	82
4.	Citizenship/Immigration/Residence Status.....	82
5.	Age, Blindness or Disability	83
B.	BENEFITS	83
1.	Nursing Home Medicaid	83
2.	Home Care Under the “Community Care” Programs.....	83
3.	Home and Community Care under the Medicaid “Waiver” Programs.....	85

C.	THE HCBS WAIVER “SPOUSAL PROTECTED RESOURCE AMOUNT”	90
1.	Both Spouses at Home	90
2.	One Spouse in a Nursing Home	92
D.	ELIGIBILITY RULES WHEN BOTH SPOUSES APPLY	93
E.	THE HCBS WAIVER PROGRAM INTEREST LISTS	95
1.	Interest List Wait Times	95
2.	Bypassing the Interest Lists with “Money Follows the Person”	96
F.	TRUST RULES	98
1.	Third-Party-Settled Trusts	98
2.	Self-Settled Trusts Generally	99
3.	Exceptions to General Rules Governing Trusts “Established By” The Client	101
G.	TRANSFER (“GIFTING”) RULES	103
1.	Nature and Purpose	103
2.	Rules for Calculating the Penalty Period.....	104
3.	Treatment of Multiple Transfers	105
4.	How to Determine the “Start Date” of the Penalty Period	105
5.	Medicaid Programs Subject to the Transfer Penalty	106
6.	Disclaimers as Transfers	106
7.	What is “Compensation” Reducing a Transfer Penalty.....	106
8.	Cash Compensation or Returns of Transferred Assets	108
9.	Transfers by or to a Community Spouse	111
10.	Certain Transfers Excepted From Penalty.....	112
11.	Exception: Transfers Solely for Non-Medicaid Purpose.....	114
12.	Exception: Transfer Penalty Would Result in “Undue Hardship”.....	115
13.	New Motor Vehicle Transfer on Death Avoids Transfer Penalty and MERP	117
14.	Giftng by Guardians.....	118
15.	Fees of Guardians Deductible From Copayment.....	118
H.	APPLICATION	119
I.	AGREEMENTS OF EXCLUSIVITY BETWEEN ATTORNEYS AND SKILLED NURSING FACILITIES	119
J.	MEDICAID ESTATE RECOVERY PROGRAM.....	120
K.	LADY BIRD DEED.....	120
L.	TRANSFER ON DEATH DEED: THE NEW LADY BIRD DEED?	123
1.	Transfer on Death Deed Overview	123
2.	Comparison of TODD and LBD	124
M.	ACA EXTENDS SPOUSAL IMPOVERISHMENT PROTECTIONS TO HCBS WAIVER PROGRAMS	126
N.	1915(C) IS NOW HCBS	127
O.	INCOME TAX WITHHOLDING NO LONGER DEDUCTIBLE FROM COPAYMENT.....	127
P.	EFFECT OF COURT ORDERS TRANSFERRING ASSETS AND INCOME BETWEEN SPOUSES	128
Q.	NEW LTC MEDICAID PROGRAMS.....	129
1.	Community First Choice	129
2.	“Texas Dual Eligible Integrated Care Project” affects 6 counties	130

R. LIFE SETTLEMENTS	130
1. Introduction to Life Settlements.....	131
2. Definitions of Life Settlements	131
3. “Traditional” Life Settlements	132
4. Long-Term Care Benefit Plan Conversion Life Settlements.....	133
5. Using the New Life Settlements for Medicaid Planning.....	135
IX. CHILDREN’S MEDICAID.....	136
A. ELIGIBILITY.....	136
1. Residence and Citizenship.....	136
2. Age 18 or Under.....	137
3. Resources	137
4. Income.....	137
B. BENEFITS	138
C. TRUST AND TRANSFER RULES.....	139
X. PREGNANT WOMEN’S MEDICAID.....	139
A. ELIGIBILITY.....	139
1. Residence and Citizenship.....	139
2. Resources	139
3. Income.....	139
B. BENEFITS	140
C. TRUST AND TRANSFER RULES.....	140
XI. PARENTS & CARETAKER RELATIVES MEDICAID	140
A. HISTORY AND RELATION TO TANF	140
B. ELIGIBILITY.....	140
1. Relationship to Dependent Child.....	140
2. Resources	141
3. Income.....	141
C. BENEFITS	142
D. TRUST AND TRANSFER RULES.....	142
E. APPLICATION	142
XII. MEDICALLY NEEDY PROGRAM.....	142
A. ELIGIBILITY.....	143
1. Age & Gender	143
2. Income.....	143
3. Resources	144
B. BENEFITS	144
C. TRUST RULES.....	144
D. TRANSFER RULES.....	144
E. APPLICATION	144

XIII. THE TEXAS CHILDREN’S HEALTH INSURANCE (CHIP) PROGRAM	144
A. ELIGIBILITY.....	145
1. Age.....	145
2. Residence/Citizenship	145
3. Waiting Period.....	145
4. Income.....	145
5. Resources	146
6. Exclusions	146
B. BENEFITS AND COSTS.....	146
C. TRUST RULES.....	147
D. TRANSFER RULES.....	147
E. APPLICATION	147
XIV. THE AFFORDABLE CARE ACT.....	147
A. INTRODUCTION.....	147
B. CHANGES PUT INTO EFFECT BEFORE 2013	148
1. The “Federal Risk Pool”.....	148
2. “Money Follows the Person”	148
3. Coverage for Children With Pre-Existing Conditions.....	148
4. Coverage for Children Until Age 26	148
5. Medicare Part D “Donut Hole” Reduction.....	148
6. Part D Cost-Sharing Eliminated for Waiver Program Beneficiaries	149
7. Nursing Home Disclosures Required	149
C. CHANGES EFFECTIVE JANUARY 1, 2014.....	149
1. No Pre-Existing Condition Requirement.....	149
2. Sliding-Scale Premiums Based on Income.....	149
3. Sliding-Scale Cost Sharing Based on Income	151
4. Spousal Impoverishment Rules Apply to Waiver Programs	152
5. No Annual or Lifetime Caps	152
6. Medicaid Coverage Based on Low-Income	152
7. Effect of the ACA on Special Needs Practices.....	153
D. ACA AND THE TAX CUTS AND JOBS ACT OF 2017.....	154
XV. EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS	154
A. ELIGIBILITY.....	154
B. BENEFITS	154
XVI. QMB AND OTHER MEDICARE SAVINGS PROGRAMS.....	155
A. ELIGIBILITY AND BENEFITS.....	155
1. Qualified Medicare Beneficiaries (QMB).....	156
2. Specified Low-Income Medicare Beneficiaries (SLMB).....	156
3. Qualifying Individuals.....	156
4. Qualified Disabled and Working Individuals (QDWI)	156

5. Income & Resource Methodology.....	157
B. TRUST AND TRANSFER RULES.....	157
C. APPLICATION	158
XVII. MEDICAID BUY-IN PROGRAM.....	158
A. ELIGIBILITY.....	158
1. Disability	158
2. Income.....	159
3. Resources	160
4. Calculation of Monthly Premium.....	160
B. BENEFITS	161
C. APPLICATION.....	161
XVIII. MEDICAID BUY-IN FOR CHILDREN PROGRAM.....	161
A. ELIGIBILITY.....	161
1. Nonfinancial Requirements.....	161
2. Financial.....	162
B. PREMIUMS.....	163
1. MBIC Premium Amounts	163
2. Exemptions and Waivers.....	164
C. TRUST AND TRANSFER RULES.....	164
D. APPLICATION	164
XIX. HELP WITH INSURANCE PREMIUMS—THE HIPP PROGRAM	164
XX. FOOD STAMPS (SNAP).....	165
A. ELIGIBILITY.....	166
1. Resources	166
2. Transfer Rules	166
3. Income.....	167
4. Citizenship/Immigration Status	167
5. Work Requirements.....	168
B. BENEFITS	168
C. APPLICATION	168
XXI. TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS.....	168
A. ELIGIBILITY.....	169
1. Medicaid-Funded Services	169
2. Non-Medicaid-Funded Services.....	170
B. BENEFITS	171
1. Mental Health Facilities	171
2. Intellectual Disability Services.....	171
3. Community Services	172

4. Group Homes	173
C. TRUST RULES.....	174
D. TRANSFER RULES.....	176
XXII. LOCAL MEDICAL ASSISTANCE PROGRAMS & OTHER BENEFITS	176
A. LOCAL MEDICAL ASSISTANCE PROGRAMS	176
B. EMERGENCY ROOM ASSISTANCE	178
C. INDIGENT-CARE RESPONSIBILITIES OF HOSPITALS.....	178
D. LOCAL NONPROFIT AGENCIES	178
E. PROPERTY TAX EXEMPTIONS.....	178
F. UNLISTED AGENCIES & BENEFITS.....	178
XXIII. BREAST CANCER & CANCER CONTROL SERVICES AND MEDICAID.....	179
A. THE BREAST & CERVICAL CANCER CONTROL SERVICES (BCCCS).....	179
B. MEDICAID FOR BREAST AND CERVICAL CANCER	179
XXIV. TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS PRACTITIONERS.....	180
A. CONTACT INFORMATION FOR TEXAS HEALTH AND HUMAN SERVICES COMMISSION.....	180
B. TIPS FOR A SUCCESSFUL MEDICAID APPLICATION - FREQUENTLY ASKED QUESTIONS	180
C. QUALIFIED INCOME TRUST (QIT) CHECKLIST(MILLER TRUSTS)	182
APPENDIX 1: BENEFIT ELIGIBILITY NUMBERS	184
APPENDIX 2: HOW TO CALCULATE “PRO RATA SHARE” OF HOUSEHOLD EXPENSES.....	186
APPENDIX 3: TRUST DISTRIBUTIONS WHERE BENEFICIARY IS ON SSI - SAMPLE INSTRUCTIONS	187
APPENDIX 4: LIMITS ON ELIGIBILITY OF ALIENS FOR PUBLIC BENEFITS IN TEXAS	189
APPENDIX 5: SOURCES OF FREE AND REDUCED PRICE PRESCRIPTION MEDICATIONS.....	191
APPENDIX 6: SELECTED BIBLIOGRAPHY	192
1. Treatises & Forms	192
Internet Resources	193
2. Agency Manuals.....	195
APPENDIX 7: HHSC REGIONAL DIRECTORS	197
APPENDIX 8: HEALTH AND HUMAN SERVICES COMMISSION ORGANIZATIONAL CHART	199

APPENDIX 9: CHECKLIST FOR TERMINATION OF SPECIAL NEEDS TRUST WITH MEDICAID PAYBACK PROVISION	200
APPENDIX 10: DRAFTING FOR USE OF POOLED TRUSTS	202

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 2019

What follows is a listing of the major changes in the 2019 edition of this paper.

Note: The pdf version of this paper contains updates to the income eligibility numbers effective March 1, 2019 that are not included in the printed version distributed at the conference on February 7, 2019: Children's Medicaid, Pregnant Women's Medicaid and Children's Health Insurance Program. The pdf version also includes corrected resource limits for the QMB, SLMB, QI-1, all shown as \$7,730 unmarried and \$11,600 couple in MEPS and Texas Works Bulletin (February 1, 2019), effective March 1, 2019.

TOPIC	SUMMARY OF CHANGE	PAGE
Retirement Accounts	We expect a major announcement soon (perhaps at this conference) that HHSC exempts the assets of IRAs and other retirement accounts from counting as "resources." However, that policy has not yet been reduced to writing, so we do not discuss it in this paper.	

TOPIC	SUMMARY OF CHANGE	PAGE
Self-Settled SNTs	SSA announced in 2018 a major revision of its policies on permissible ways of drafting, establishing and managing self-settled SNTs	38
Disabled Adult Child Medicaid	HHSC has addressed the problem of loss of Medicaid benefits when SSI is lost due to the Childhood Disability Benefit, with "Gap Medicaid."	60
Long-Term Care Insurance and Medicaid	Medicaid policy now requires that all long-term care insurance benefits should be paid directly from the insurance company to the nursing home.	77
Transfers	A transfer from one spouse to the other never results in a transfer penalty	112
Transfers	Current transfer penalty policy creates uncertainty regarding a simple "transfer and return" strategy. Therefore, that strategy should be avoided, in favor of using an algorithm to determine the optimal amount to transfer and paying the rest to the facility, buying an annuity or returning it to the transferor after start of the transfer penalty period.	110
Transfers	Start date of the transfer penalty period for HCBS Waiver programs is now same as for nursing home Medicaid: the date when the applicant meets all the requirements for initial eligibility, but for the transfer penalty	105
Transfers/MERP	The new "Beneficiary Designation of a Motor Vehicle" (form VTR-121) allows a vehicle to pass free of Medicaid estate recovery <i>and</i> does not create a transfer penalty	117
Terminating Self-Settled Trusts	It is no longer necessary to obtain Medicaid claims from all three possible Texas payers (TMHP, HHSC, MCOs). Now you can get them all from TMHP.	200
Income	The authors propose an interpretation of HHSC's policies pertaining to treatment of alimony and community	128

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Protecting and Maximizing Public Benefits

Also available as part of the eCourse

[2019 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
15th Annual Changes and Trends Affecting Special Needs Trusts session
"Maximizing Public Benefits"