

Presented:

2020 CHANGES AND TRENDS AFFECTING SPECIAL NEEDS TRUSTS
February 13-14, 2020
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 2020 by H. Clyde Farrell

I.	CHANGES AND TRENDS FOR 2020	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	4
3.	Changes in Program Names	6
4.	More Choices in Service Delivery	8
5.	Extension of Managed Care to Nursing Facilities.....	9
C.	EQUAL PROTECTION FOR PARTNERS IN SAME-SEX MARRIAGES.....	12
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.....	28
C.	TRUST RULES	28
1.	Third-Party Settled Trusts	28
2.	Self-Settled Trusts	29
3.	Judicial Reformation of Wills	39
4.	Self-Settled Trusts-Key Provisions in 2018 POMS Revisions.....	40
5.	Restrictions on Early Termination Provisions in Self-Settled Trusts	44
6.	Factors Affecting Type of Trust and Selection of Trustee	45
7.	The Sole Benefit Rule	49
8.	Treatment of UTMA Accounts	52
9.	SSA's System for Evaluating SSI Trusts	53
10.	SSA Reverses Policy of Disapproving All Court-Created Trusts	54
11.	Texas to Implement the ABLE Act.....	55
12.	SSA Policy on SNT Attorney Fee Approval Uncertain	58
13.	Disabled Adult Child Support May Be Ordered Paid to a Special Needs Trust	58
14.	Pooled Trust is Now an Alternative to a 142 Trust	60
15.	Child Support Paid from Self-Settled SNT is "Income" to the SNT Beneficiary	60
D.	TRANSFER RULES	60
E.	APPLICATION	62
F.	SSI SOURCES OF LAW.....	63
IV.	CHILDHOOD DISABILITY BENEFIT & DISABLED ADULT CHILD MEDICAID.....	63
V.	SOCIAL SECURITY DISABILITY INSURANCE (SSDI)	65
A.	ELIGIBILITY	65

1.	Work History	65
2.	Disability	66
B.	BENEFITS	66
1.	Cash Benefits.....	66
2.	Medicare Benefits	67
C.	APPLICATION	67
VI.	REGULAR MEDICAID BENEFITS	68
A.	ELIGIBILITY	68
B.	BENEFITS	69
1.	General Scope of Benefits.....	69
2.	Texas Health Steps (THSteps).....	70
3.	Prescription Medications	71
C.	APPLICATION	71
VII.	MEDICARE.....	72
A.	ELIGIBILITY	72
1.	Eligibility at Age 65	72
2.	Work Requirements.....	72
3.	Eligibility in Connection With Social Security and Railroad Retirement Disability Benefits.....	72
4.	Medicare Premiums.....	72
5.	Continuation of Medical Coverage After Total Disability Ends	73
B.	BENEFITS	74
1.	Hospital Services.....	74
2.	Nursing Facility Services	75
3.	Home Health Services	75
4.	Hospice Services	75
5.	Physician Services and Other “Part B” Benefits	76
6.	Prescription Drugs.....	77
7.	Medicare Preventive Care Benefits	79
8.	Medicare Improvement Standard Abrogated	79
C.	APPLICATION	80
VIII.	“LONG- TERM CARE” MEDICAID.....	80
A.	ELIGIBILITY	81
1.	Income.....	81
2.	Resources (Countable Assets).....	83
3.	Medical Need Requirements	88
4.	Citizenship/Immigration/Residence Status.....	89
5.	Age, Blindness or Disability	89
B.	BENEFITS	90
1.	Nursing Home Medicaid	90
2.	Home Care Under the “Community Care” Programs.....	90
3.	Home and Community Care under the Medicaid “Waiver” Programs.....	92
C.	THE HCBS WAIVER “SPOUSAL PROTECTED RESOURCE AMOUNT”	97
1.	Both Spouses at Home	97
2.	One Spouse in a Nursing Home	99

D.	ELIGIBILITY RULES WHEN BOTH SPOUSES APPLY	100
E.	THE HCBS WAIVER PROGRAM INTEREST LISTS.....	102
1.	Interest List Wait Times	102
2.	Bypassing the Interest Lists with “Money Follows the Person”	103
F.	TRUST RULES	105
1.	Third-Party-Settled Trusts	105
2.	Benefits of a Testamentary Trust for a Spouse.....	105
3.	Self-Settled Trusts Generally	106
4.	Rules applying to revocable trusts established by the client	106
5.	Rules applying to irrevocable trusts established by the client	107
6.	Exceptions to General Rules Governing Trusts “Established By” The Client	108
7.	Exempt Assets Remain Exempt if Transferred to Revocable Trust— Except the Home	111
G.	TRANSFER (“GIFTING”) RULES	111
1.	Nature and Purpose	111
2.	Rules for Calculating the Penalty Period.....	112
3.	Treatment of Multiple Transfers	113
4.	How to Determine the “Start Date” of the Penalty Period	113
5.	Medicaid Programs Subject to the Transfer Penalty	114
6.	Disclaimers as Transfers	114
7.	What is “Compensation” Reducing a Transfer Penalty.....	115
8.	Cash Compensation or Returns of Transferred Assets	116
9.	Transfers by or to a Community Spouse	120
10.	Certain Transfers Excepted From Penalty	121
11.	Exception: Transfers Solely for Non-Medicaid Purpose.....	123
12.	Exception: Transfer Penalty Would Result in “Undue Hardship”	124
13.	New Motor Vehicle Transfer on Death Avoids Transfer Penalty and MERP	125
14.	Gifts by Guardians	126
15.	Fees of Guardians Deductible From Copayment.....	127
H.	APPLICATION	128
I.	AGREEMENTS OF EXCLUSIVITY BETWEEN ATTORNEYS AND SKILLED NURSING FACILITIES	128
J.	MEDICAID ESTATE RECOVERY PROGRAM	129
K.	LADY BIRD DEED	129
L.	TRANSFER ON DEATH DEED: THE NEW LADY BIRD DEED?	132
1.	Features of the Transfer on Death Deed	132
2.	Comparison of TODD and LBD	135
M.	ACA EXTENDS SPOUSAL IMPOVERISHMENT PROTECTIONS TO HCBS WAIVER PROGRAMS	142
N.	1915(C) IS NOW HCBS.....	143
O.	INCOME TAX WITHHOLDING NO LONGER DEDUCTIBLE FROM COPAYMENT	143
P.	EFFECT OF COURT ORDERS TRANSFERRING ASSETS AND INCOME BETWEEN SPOUSES.....	143
Q.	NEW LTC MEDICAID PROGRAMS.....	145
1.	Community First Choice	145
2.	“Texas Dual Eligible Integrated Care Project” affects 6 counties	146

R.	LIFE SETTLEMENTS	146
1.	Introduction to Life Settlements	147
2.	Definitions of Life Settlements	147
3.	“Traditional” Life Settlements	148
4.	Long-Term Care Benefit Plan Conversion Life Settlements	149
5.	Using the New Life Settlements for Medicaid Planning	151
IX.	CHILDREN’S MEDICAID	152
A.	ELIGIBILITY	153
1.	Residence and Citizenship	153
2.	Age 18 or Under	153
3.	Resources	153
4.	Income	153
B.	BENEFITS	155
C.	TRUST AND TRANSFER RULES	155
X.	PREGNANT WOMEN’S MEDICAID	155
A.	ELIGIBILITY	155
1.	Residence and Citizenship	155
2.	Resources	155
3.	Income	156
B.	BENEFITS	156
C.	TRUST AND TRANSFER RULES	156
XI.	PARENTS & CARETAKER RELATIVES MEDICAID	156
A.	HISTORY AND RELATION TO TANF	156
B.	ELIGIBILITY	157
1.	Relationship to Dependent Child	157
2.	Resources	157
3.	Income	158
C.	BENEFITS	158
D.	TRUST AND TRANSFER RULES	159
E.	APPLICATION	159
XII.	MEDICALLY NEEDY PROGRAM	159
A.	ELIGIBILITY	159
1.	Age & Gender	159
2.	Income	159
3.	Resources	160
B.	BENEFITS	160
C.	TRUST RULES	161
D.	TRANSFER RULES	161
E.	APPLICATION	161
XIII.	THE TEXAS CHILDREN’S HEALTH INSURANCE (CHIP) PROGRAM	161
A.	ELIGIBILITY	161
1.	Age	161
2.	Residence/Citizenship	161

3.	Waiting Period.....	162
4.	Income.....	162
5.	Resources	163
6.	Exclusions	163
B.	BENEFITS AND COSTS.....	163
C.	TRUST RULES	164
D.	TRANSFER RULES	164
E.	APPLICATION	164
XIV.	THE AFFORDABLE CARE ACT	164
A.	INTRODUCTION	164
B.	CHANGES PUT INTO EFFECT BEFORE 2013	165
1.	The “Federal Risk Pool”.....	165
2.	“Money Follows the Person”	165
3.	Coverage for Children With Pre-Existing Conditions.....	166
4.	Coverage for Children Until Age 26	166
5.	Medicare Part D “Donut Hole” Reduction	166
6.	Part D Cost-Sharing Eliminated for Waiver Program Beneficiaries	166
7.	Nursing Home Disclosures Required	166
C.	CHANGES EFFECTIVE JANUARY 1, 2014.....	166
1.	No Pre-Existing Condition Requirement.....	167
2.	Sliding-Scale Premiums Based on Income.....	167
3.	Sliding-Scale Cost Sharing Based on Income	168
4.	Spousal Impoverishment Rules Apply to Waiver Programs	169
5.	No Annual or Lifetime Caps	170
6.	Medicaid Coverage Based on Low-Income	170
7.	Effect of the ACA on Special Needs Practices.....	170
XV.	EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS.....	172
A.	ELIGIBILITY	172
B.	BENEFITS	172
XVI.	QMB AND OTHER MEDICARE SAVINGS PROGRAMS	172
A.	ELIGIBILITY AND BENEFITS.....	173
1.	Qualified Medicare Beneficiaries (QMB).....	173
2.	Specified Low-Income Medicare Beneficiaries (SLMB).....	174
3.	Qualifying Individuals (QI).....	174
4.	Qualified Disabled and Working Individuals (QDWI)	174
5.	Income & Resource Methodology.....	175
B.	TRUST AND TRANSFER RULES.....	175
C.	APPLICATION	176
XVII.	MEDICAID BUY-IN PROGRAM.....	176
A.	ELIGIBILITY	176
1.	Disability	176
2.	Income.....	177
3.	Resources	178
4.	Calculation of Monthly Premium.....	179

B.	BENEFITS	179
C.	APPLICATION.....	179
XVIII.	MEDICAID BUY-IN FOR CHILDREN PROGRAM.....	179
A.	PROGRAM DESCRIPTION	179
B.	ENABLING STATUES	180
C.	ELIGIBILITY REQUIREMENTS.....	180
1.	Financial requirements	180
2.	Non-financial requirements.....	181
D.	MBIC PREMIUM AMOUNTS.....	182
1.	No ESI.....	182
2.	ESI with State-Paid HIPP.....	182
3.	ESI and No State-Paid HIPP	182
E.	EXEMPTIONS AND WAIVERS.....	182
F.	THE HIPP PROGRAM	183
2.	Cost-Sharing.....	184
XIX.	HELP WITH INSURANCE PREMIUMS—THE HIPP PROGRAM.....	184
XX.	FOOD STAMPS (SNAP)	185
A.	ELIGIBILITY	186
1.	Resources	186
2.	Trust Rules	187
3.	Transfer Rules	187
4.	Income.....	188
5.	Citizenship/Immigration Status.....	188
6.	Work Requirements.....	189
B.	BENEFITS	189
C.	APPLICATION	189
XXI.	TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS.....	189
A.	ELIGIBILITY	190
1.	Medicaid-Funded Services.....	190
2.	Non-Medicaid-Funded Services.....	191
B.	BENEFITS	193
1.	Mental Health Facilities	193
2.	Intellectual Disability Services.....	193
3.	Community Services	194
4.	Group Homes	195
C.	TRUST RULES	195
D.	TRANSFER RULES	198
XXII.	LOCAL MEDICAL ASSISTANCE PROGRAMS & OTHER BENEFITS.....	198
A.	LOCAL MEDICAL ASSISTANCE PROGRAMS	198
B.	EMERGENCY ROOM ASSISTANCE.....	200
C.	INDIGENT-CARE RESPONSIBILITIES OF HOSPITALS.....	200
D.	LOCAL NONPROFIT AGENCIES	200
E.	PROPERTY TAX EXEMPTIONS	200

F.	UNLISTED AGENCIES & BENEFITS.....	200
XXIII.	BREAST CANCER & CANCER CONTROL SERVICES AND MEDICAID	201
A.	THE BREAST & CERVICAL CANCER CONTROL SERVICES (BCCCS).....	201
B.	MEDICAID FOR BREAST AND CERVICAL CANCER.....	201
XXIV.	TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS PRACTITIONERS.....	202
A.	CONTACT INFORMATION FOR TEXAS HEALTH AND HUMAN SERVICES COMMISSION.....	202
B.	TIPS FOR A SUCCESSFUL MEDICAID APPLICATION - FREQUENTLY ASKED QUESTIONS	203
C.	QUALIFIED INCOME TRUST (QIT) CHECKLIST(MILLER TRUSTS)	205
	APPENDICES	206
APPENDIX 1:	BENEFIT ELIGIBILITY NUMBERS	207
APPENDIX 2:	HOW TO CALCULATE “PRO RATA SHARE” OF HOUSEHOLD EXPENSES	209
APPENDIX 3:	TRUST DISTRIBUTIONS WHERE BENEFICIARY IS ON SSI - SAMPLE INSTRUCTIONS	210
APPENDIX 4:	LIMITS ON ELIGIBILITY OF ALIENS FOR PUBLIC BENEFITS IN TEXAS.....	212
APPENDIX 5:	SOURCES OF FREE AND REDUCED PRICE PRESCRIPTION MEDICATIONS	214
APPENDIX 6:	SELECTED BIBLIOGRAPHY	215
APPENDIX 7:	HHSC REGIONAL DIRECTORS	220
APPENDIX 8:	HEALTH AND HUMAN SERVICES COMMISSION ORGANIZATIONAL CHART	222
APPENDIX 9:	CHECKLIST FOR TERMINATION OF SPECIAL NEEDS TRUST WITH MEDICAID PAYBACK PROVISION.....	223
APPENDIX 10:	DRAFTING FOR USE OF POOLED TRUSTS	225
APPENDIX 11:	LIST OF MEANS-TESTED PUBLIC BENEFIT PROGRAMS IN TEXAS.....	228
APPENDIX 12:	SOCIAL SECURITY CLAIM NUMBER SUFFIXES.....	241

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 2020

What follows is a listing of the major changes in the 2020 edition of this paper.

TOPIC	SUMMARY OF CHANGE	PAGE
Attorney Fees	SSA is considering requiring its approval of attorney fees for draft Special Needs Trusts, even when the attorney is not representing the beneficiary in a claim before the agency.	58
Retirement Accounts	In a new policy not yet reduced to writing, HHSC exempts the assets of IRAs from counting as "resources": (1) those with RMDs and (2) those invested in annuities (including deferred annuities).	87
Adult Child Support to Special Needs Trust	The Texas Family Code has been amended to provide expressly that child support for an adult child with a disability may be paid to a Special Needs Trust in a case in which the state does not have a Title IV-D claim. However, that does not prevent such an order in a case involving support of a minor child.	58
ACA Extensions	Money Follows the Person and the extension of spousal impoverishment protections to married applicants for HCBS Waiver programs have been extended through May 31, 2020.	165 169
Child Support Paid by SNT is "Income" to Beneficiary	Payments of child support on behalf of an SNT beneficiary with a duty of support are treated as income to the SNT beneficiary, as if the beneficiary had received money then paid it as child support	60
Transfer on Death Deeds and Lady Bird Deeds	The 2019 Legislature repealed the statutory form for a Transfer on Death Deed. However, it was never mandatory. We summarize recent developments affecting the selection and uses of those deeds.	132
Texas v. United States	If the District Court again determines the entire Affordable Care Act is unconstitutional, and that is upheld by the Supreme Court, virtually every page of this paper will have to be revised. But we aren't going there just yet.	165

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

[2020 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
16th Annual Changes and Trends Affecting Special Needs Trusts session
"Maximizing Public Benefits (Basics)"