

**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](mailto:cfarrell@txelderlaw.com)  
512-323-2977

Co-author contact information:  
Christina Lesher  
5615 Kirby Drive, Suite 412  
Houston, TX 77005

[clesher@lawlesher.com](mailto: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

<b>I.</b>	<b>CHANGES AND TRENDS FOR 2020 .....</b>	<b>1</b>
<b>II.</b>	<b>OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES.....</b>	<b>3</b>
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
<b>III.</b>	<b>SUPPLEMENTAL SECURITY INCOME (SSI).....</b>	<b>13</b>
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
<b>IV.</b>	<b>CHILDHOOD DISABILITY BENEFIT &amp; DISABLED ADULT CHILD MEDICAID.....</b>	<b>63</b>
<b>V.</b>	<b>SOCIAL SECURITY DISABILITY INSURANCE (SSDI) .....</b>	<b>65</b>
A.	ELIGIBILITY .....	65

1.	Work History .....	65
2.	Disability .....	66
B.	BENEFITS .....	66
1.	Cash Benefits.....	66
2.	Medicare Benefits .....	67
C.	APPLICATION .....	67
<b>VI.</b>	<b>REGULAR MEDICAID BENEFITS .....</b>	<b>68</b>
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
<b>VII.</b>	<b>MEDICARE.....</b>	<b>72</b>
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
<b>VIII.</b>	<b>“LONG- TERM CARE” MEDICAID.....</b>	<b>80</b>
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
<b>IX.</b>	<b>CHILDREN’S MEDICAID .....</b>	<b>152</b>
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
<b>X.</b>	<b>PREGNANT WOMEN’S MEDICAID .....</b>	<b>155</b>
A.	ELIGIBILITY .....	155
1.	Residence and Citizenship .....	155
2.	Resources .....	155
3.	Income .....	156
B.	BENEFITS .....	156
C.	TRUST AND TRANSFER RULES .....	156
<b>XI.</b>	<b>PARENTS &amp; CARETAKER RELATIVES MEDICAID .....</b>	<b>156</b>
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
<b>XII.</b>	<b>MEDICALLY NEEDY PROGRAM .....</b>	<b>159</b>
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
<b>XIII.</b>	<b>THE TEXAS CHILDREN’S HEALTH INSURANCE (CHIP) PROGRAM .....</b>	<b>161</b>
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
<b>XIV.</b>	<b>THE AFFORDABLE CARE ACT .....</b>	<b>164</b>
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
<b>XV.</b>	<b>EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS .....</b>	<b>172</b>
A.	ELIGIBILITY .....	172
B.	BENEFITS .....	172
<b>XVI.</b>	<b>QMB AND OTHER MEDICARE SAVINGS PROGRAMS .....</b>	<b>172</b>
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
<b>XVII.</b>	<b>MEDICAID BUY-IN PROGRAM.....</b>	<b>176</b>
A.	ELIGIBILITY .....	176
1.	Disability .....	176
2.	Income.....	177
3.	Resources .....	178
4.	Calculation of Monthly Premium.....	179

B.	BENEFITS .....	179
C.	APPLICATION.....	179
<b>XVIII.</b>	<b>MEDICAID BUY-IN FOR CHILDREN PROGRAM.....</b>	<b>179</b>
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
<b>XIX.</b>	<b>HELP WITH INSURANCE PREMIUMS—THE HIPP PROGRAM.....</b>	<b>184</b>
<b>XX.</b>	<b>FOOD STAMPS (SNAP) .....</b>	<b>185</b>
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
<b>XXI.</b>	<b>TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS.....</b>	<b>189</b>
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
<b>XXII.</b>	<b>LOCAL MEDICAL ASSISTANCE PROGRAMS &amp; OTHER BENEFITS.....</b>	<b>198</b>
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
<b>XXIII.</b>	<b>BREAST CANCER &amp; CANCER CONTROL SERVICES AND MEDICAID .....</b>	<b>201</b>
A.	THE BREAST & CERVICAL CANCER CONTROL SERVICES (BCCCS).....	201
B.	MEDICAID FOR BREAST AND CERVICAL CANCER.....	201
<b>XXIV.</b>	<b>TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS PRACTITIONERS.....</b>	<b>202</b>
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
	<b>APPENDICES .....</b>	<b>206</b>
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.

<b>TOPIC</b>	<b>SUMMARY OF CHANGE</b>	<b>PAGE</b>
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  
16<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"Maximizing Public Benefits (Basics)"