

PRESENTED AT

22nd Annual Estate Planning, Guardianship and Elder Law Conference

July 30-31, 2020

Webcast

Medicaid Update

**H. Clyde Farrell
Marilyn G. Miller**

Author Contact Information:

H. Clyde Farrell
Farrell & Johnson PLLC
Austin, Texas
cfarrell@txelderlaw.com
512-323-2977

Marilyn G. Miller
Attorney at Law
Dripping Springs, Texas
marilyn@mgmillerlaw.net
512-894-0319

Copyright 2020 by H. Clyde Farrell and Marilyn G. Miller

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.

Medicaid Update

Contents

I. INDIVIDUAL RETIREMENT ACCOUNT POLICIES.....	1
A. DEFERRED ANNUITIES IN IRA’S ARE EXEMPT	1
B. IRAS WITH RMDS ARE EXEMPT.....	2
II. COVID-19-RELATED MEDICAID POLICIES	4
A. MEDICAID COVERAGE MAY NOT BE TERMINATED	4
B. MEDICAID ANNUAL RECERTIFICATIONS ARE NOT REQUIRED	4
C. STIMULUS PAYMENTS USUALLY DO NOT AFFECT BENEFITS.....	5
D. “BEST AVAILABLE” INCOME VERIFICATION IS SOMETIMES GOOD ENOUGH	5
E. SOURCES OF INFORMATION ON COVID-19 MEDICAID POLICY	5
III. FILING MEDICAID APPLICATIONS THROUGH THE PORTAL .	7
IV. LADY BIRD DEEDS AND TRANSFER ON DEATH DEEDS	11
A. LADY BIRD DEED	11
B. TRANSFER ON DEATH DEED	14
C. COMPARISON OF TODD AND LBD	17
1. Effect on Medicaid Eligibility.....	17
2. Will a TODD Preserve Title Insurance Protection?	18
3. Will a LBD Give Better Protection from Creditors?.....	18
4. Effect of Divorce.....	20
5. Which Type Deed to Use?	21
V. APPENDICES.....	24
APPENDIX 1: BENEFIT ELIGIBILITY NUMBERS	24
APPENDIX 2: SAMPLE LADY BIRD DEED	26
APPENDIX 3: SAMPLE TRANSFER ON DEATH DEED	29
APPENDIX 4: COMPARISON OF LBD AND TODD.....	34
APPENDIX 5: SUMMARY OF MEANS-TESTED PUBLIC BENEFIT PROGRAMS IN TEXAS	35

Medicaid Update

I. INDIVIDUAL RETIREMENT ACCOUNT POLICIES

A. *DEFERRED ANNUITIES IN IRA'S ARE EXEMPT*

At a conference in February 2015, Shari Nichols, a representative of the Texas Health and Human Services Commission addressed the question, "If funds in an IRA are held in a Certificate of Deposit or other countable investment product and then used to purchase an annuity, are the IRA funds exempt? Her oral answer, in a word, was "Yes."

The only place that has so far been reduced to writing was in the agency's slide at this conference in August 2015, which read as follows:

According to 42 USC 1396p(c)(1)(G), the purchase of an annuity by an individual applying for Medicaid (or the community spouse) is not considered a transfer of assets if:

- The annuity purchased is an IRA annuity [IRC 408(a), 26 USC 408(a)] or
- The annuity was purchased with the proceeds of an IRA, or a Roth IRA [IRC 408A, 26 USC 408A]

If the individual uses the funds in the IRA to purchase the IRA annuity, no transfer penalty would be imposed, and the value of the IRA annuity would not be counted in the resource calculation for that individual.

The purchase of an IRA annuity is not considered a transfer of assets.

According to current HHSC policy, the funds in the IRA annuity are not counted in the resource calculation for the individual.

See MEPD Handbook Section F-7210 and F-7220. ¹

In her oral presentation in August 2015, Ms. Nichols commented that the annuity provision of the federal Medicaid statute is generally construed to apply only to the transfer penalty and not to create a new resource exemption for deferred annuities.² Therefore, the Texas Medicaid program is not required by federal law to have this exemption, and it is subject to being withdrawn at any time.

¹ Shari Nichols, *The View from HHSC*, University of Texas School of Law, 17th Annual Estate Planning, Guardianship and Elder Law Conference (August 6–7, 2015).

² 42 U.S.C. §1396p(c)(1)(G); DRA of 2005 § 6012(c).

Another source of uncertainty is that the only written statements as to agency policy on retirement accounts are the PowerPoint presentations cited herein. None of these changes have been noted in the Medicaid for the Elderly and People With Disabilities Handbook, policy bulletins or rules. That is why this paper cites only those presentations and anecdotal experiences of the authors and colleagues in the Texas Chapter of the National Academy of Elder Law Attorneys. Those are the closest to “sources of law” we have at this time. Texas Health and Human Services Commission has not published a final or proposed rule regarding long-term care Medicaid eligibility (1 T.A.C. Chapter 358) since November 2016.

B. IRAS WITH RMDs ARE EXEMPT

Exemption of assets other than deferred annuities that are held in retirement accounts is a more recent change and is logically a separate topic. Therefore, we discuss it under a separate heading. However, that issue is intertwined with deferred annuities in retirement accounts, and current policies regarding both issues are so far being withheld from public view by the agency. Therefore, this section will discuss both together, thus overlapping to some extent with section A above.

Until an oral announcement by the HHSC legal staff in August 2018, assets in tax-deferred retirement accounts were counted by the Medicaid program as "resources," unless they were invested in deferred annuities as discussed above.³ The change in that policy was explained further in a PowerPoint presentation by the same agency representative on February 7, 2019.⁴ The following summary is drawn from the latter presentation, except as indicated otherwise:

- For individuals who are receiving Required Minimum Distributions (RMDs), IRAs are excluded from countable resources.

Note: This has changed in two ways in the last few months: (1) Under the SECURE Act, the year in which RMDs begin was raised from age 70 1/2 to age 72, for individuals reaching that age on or after January 1, 2020 (that is, individuals born on or after July 1, 1949); and (2) A member of the TXNAELA listserv recently reported that in the course of an appeal to a fair hearing, HHSC Medicaid policy officials announced that only IRAs (Individual Retirement Accounts) will be given this favored treatment, not other retirement accounts with RMDs as previously announced.

³ Shari L. Nichols, oral presentation at the University of Texas School of Law, *Estate Planning, Guardianship and Elder Law* (August 2018).

⁴ Shari L. Nichols, University of Texas School of Law, "A View from HHSC," *Changes and Trends Affecting Special Needs Trusts* (February 2019).

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: Medicaid Update

Also available as part of the eCourse

[Overview of Medicaid Planning and 2020 Medicaid Updates](#)

First appeared as part of the conference materials for the
22nd Annual Estate Planning, Guardianship and Elder Law Conference session
"Medicaid Update"