

**Presented:**

2021 CHANGES AND TRENDS AFFECTING SPECIAL NEEDS TRUSTS  
February 18-19, 2021  
Austin, Texas

**Protecting and Maximizing  
Public Benefits**

**H. Clyde Farrell with  
Christina Lesher & Bryn Poland**

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-authors contact information:

Christina Lesher  
5615 Kirby Drive, Suite 412  
Houston, TX 77005

[clesher@lawlesher.com](mailto:clesher@lawlesher.com)

713-529-5900

&

Bryn Poland  
2114 Massey Tompkins Road  
Baytown, Texas 77521

[poland@mayopoland.com](mailto:poland@mayopoland.com)

281-421-5774

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 2021 by H. Clyde Farrell

<b>I.</b>	<b>CHANGES AND TRENDS FOR 2021 .....</b>	<b>8</b>
<b>II.</b>	<b>OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES .....</b>	<b>9</b>
A.	TEXAS AGENCIES .....	9
B.	MEDICAID SERVICE DELIVERY MODELS.....	10
1.	<i>Historical Background in Texas</i> .....	10
2.	<i>Changes Should Not Adversely Affect Clients</i> .....	11
3.	<i>Changes in Program Names</i> .....	12
4.	<i>More Choices in Service Delivery</i> .....	15
5.	<i>Extension of Managed Care to Nursing Facilities</i> .....	16
C.	EQUAL PROTECTION FOR PARTNERS IN SAME-SEX MARRIAGES .....	19
<b>III.</b>	<b>SUPPLEMENTAL SECURITY INCOME (SSI) .....</b>	<b>20</b>
A.	ELIGIBILITY .....	21
1.	<i>“Categorical” Requirements: Aged, Blind or Disabled</i> .....	21
2.	<i>Citizenship/Immigration/Residency Status</i> .....	23
3.	<i>Income</i> .....	25
4.	<i>Resources</i> .....	33
B.	BENEFITS.....	34
1.	<i>Cash Benefits</i> .....	34
2.	<i>Medicaid Eligibility</i> .....	35
C.	TRUST RULES .....	35
1.	<i>Third-Party Settled Trusts</i> .....	35
2.	<i>Self-Settled Trusts</i> .....	36
3.	<i>Judicial Reformation of Wills</i> .....	46
4.	<i>Self-Settled Trusts-Key Provisions in 2018 POMS Revisions</i> .....	47
5.	<i>Restrictions on Early Termination Provisions in Self-Settled Trusts</i> .....	51
6.	<i>Factors Affecting Type of Trust and Selection of Trustee</i> .....	52
7.	<i>The Sole Benefit Rule</i> .....	56
8.	<i>Treatment of UTMA Accounts</i> .....	58
9.	<i>SSA's System for Evaluating SSI Trusts</i> .....	58
10.	<i>Texas to Implement the ABLE Act</i> .....	59
11.	<i>Child Support Paid from Self-Settled SNT is "Income" to the SNT Beneficiary</i> .....	63
12.	<i>Pooled Trust is Now an Alternative to a 142 Trust</i> .....	63
D.	TRANSFER RULES.....	64
E.	APPLICATION .....	66
F.	SSI SOURCES OF LAW .....	66
<b>IV.</b>	<b>CHILDHOOD DISABILITY BENEFIT &amp; DISABLED ADULT CHILD MEDICAID .....</b>	<b>67</b>
<b>V.</b>	<b>SOCIAL SECURITY DISABILITY INSURANCE (SSDI) .....</b>	<b>69</b>
A.	ELIGIBILITY .....	69
1.	<i>Work History</i> .....	69
2.	<i>Disability</i> .....	70
B.	BENEFITS.....	70
1.	<i>Cash Benefits</i> .....	70

2. Medicare Benefits .....	71
C. APPLICATION .....	71
<b>VI. REGULAR MEDICAID BENEFITS .....</b>	<b>71</b>
A. ELIGIBILITY.....	72
B. BENEFITS.....	73
1. General Scope of Benefits .....	73
2. Texas Health Steps (THSteps).....	74
3. Prescription Medications .....	75
C. APPLICATION .....	75
<b>VII. MEDICARE.....</b>	<b>76</b>
A. ELIGIBILITY.....	76
1. Eligibility at Age 65 .....	76
2. Work Requirements.....	76
3. Eligibility in Connection With Social Security and Railroad Retirement Disability Benefits.....	76
4. Medicare Premiums .....	76
5. Continuation of Medical Coverage After Total Disability Ends .....	77
B. BENEFITS.....	77
1. Hospital Services .....	78
2. Nursing Facility Services .....	78
3. Home Health Services.....	79
4. Hospice Services .....	79
5. Physician Services and Other “Part B” Benefits.....	80
6. Part B Deductibles and Co-Pays .....	80
7. Prescription Drugs.....	81
8. Medicare Improvement Standard Abrogated.....	83
C. APPLICATION .....	84
<b>VIII. “LONG- TERM CARE” MEDICAID.....</b>	<b>84</b>
A. ELIGIBILITY.....	85
1. Income.....	85
2. Resources (Countable Assets).....	87
3. Medical Need Requirements .....	93
4. Citizenship/Immigration/Residence Status.....	93
5. Age, Blindness or Disability.....	94
B. BENEFITS.....	94
1. Nursing Home Medicaid .....	94
2. Home Care Under the “Community Care” Programs .....	94
3. Home and Community Care under the Medicaid “Waiver” Programs.....	96
C. THE HCBS WAIVER “SPOUSAL PROTECTED RESOURCE AMOUNT”.....	102
1. Both Spouses at Home.....	102
2. One Spouse in a Nursing Home .....	104
D. ELIGIBILITY RULES WHEN BOTH SPOUSES APPLY .....	104
E. THE HCBS WAIVER PROGRAM INTEREST LISTS .....	107
1. Interest List Wait Times .....	107

2.	<i>Bypassing the Interest Lists with “Money Follows the Person”</i> .....	108
F.	TRUST RULES .....	109
1.	<i>Third-Party-Settled Trusts</i> .....	109
2.	<i>Benefits of a Testamentary Trust for a Spouse</i> .....	110
3.	<i>Self-Settled Trusts Generally</i> .....	110
4.	<i>Rules applying to revocable trusts established by the client</i> .....	111
5.	<i>Rules applying to irrevocable trusts established by the client</i> .....	111
6.	<i>Exceptions to General Rules Governing Trusts “Established By” The Client</i> .....	112
7.	<i>Exempt Assets Remain Exempt if Transferred to Revocable Trust—Except the Home</i> .....	115
G.	TRANSFER (“GIFTING”) RULES .....	116
1.	<i>Nature and Purpose</i> .....	116
2.	<i>Rules for Calculating the Penalty Period</i> .....	116
3.	<i>Treatment of Multiple Transfers</i> .....	117
4.	<i>How to Determine the “Start Date” of the Penalty Period</i> .....	117
5.	<i>Medicaid Programs Subject to the Transfer Penalty</i> .....	118
6.	<i>Disclaimers as Transfers</i> .....	119
7.	<i>What is “Compensation” Reducing a Transfer Penalty</i> .....	119
8.	<i>Cash Compensation or Returns of Transferred Assets</i> .....	120
9.	<i>Transfers by or to a Community Spouse</i> .....	124
10.	<i>Certain Transfers Excepted From Penalty</i> .....	125
11.	<i>Exception: Transfers Solely for Non-Medicaid Purpose</i> .....	127
12.	<i>Exception: Transfer Penalty Would Result in “Undue Hardship”</i> .....	128
13.	<i>Motor Vehicle Transfer on Death Avoids Transfer Penalty and MERP</i> .....	129
14.	<i>Gifts by Guardians</i> .....	130
15.	<i>Fees of Guardians Deductible From Copayment</i> .....	131
H.	APPLICATION .....	132
I.	AGREEMENTS OF EXCLUSIVITY BETWEEN ATTORNEYS AND SKILLED NURSING FACILITIES .....	132
J.	MEDICAID ESTATE RECOVERY PROGRAM .....	133
K.	LADY BIRD DEED .....	133
L.	TRANSFER ON DEATH DEED: THE NEW LADY BIRD DEED? .....	136
1.	<i>Features of the Transfer on Death Deed</i> .....	136
2.	<i>Comparison of TODD and LBD</i> .....	139
M.	ACA EXTENDS SPOUSAL IMPOVERISHMENT PROTECTIONS TO HCBS WAIVER PROGRAMS .....	146
N.	1915(C) IS NOW HCBS .....	147
O.	EFFECT OF COURT ORDERS TRANSFERRING ASSETS AND INCOME BETWEEN SPOUSES .....	147
P.	NON-WAIVER COMMUNITY-BASED LTC MEDICAID PROGRAMS .....	149
1.	<i>Community First Choice</i> .....	149
2.	<i>“Texas Dual Eligible Integrated Care Project” affects 6 counties</i> .....	150
<b>IX.</b>	<b>CHILDREN’S MEDICAID</b> .....	<b>150</b>
A.	ELIGIBILITY .....	151
1.	<i>Residence and Citizenship</i> .....	151

2.	<i>Age 18 or Under</i> .....	151
3.	<i>Resources</i> .....	151
4.	<i>Income</i> .....	151
B.	BENEFITS.....	153
C.	TRUST AND TRANSFER RULES.....	153
<b>X.</b>	<b>PREGNANT WOMEN’S MEDICAID</b> .....	<b>153</b>
A.	ELIGIBILITY.....	153
1.	<i>Residence and Citizenship</i> .....	153
2.	<i>Resources</i> .....	153
3.	<i>Income</i> .....	154
B.	BENEFITS.....	154
C.	TRUST AND TRANSFER RULES.....	154
<b>XI.</b>	<b>PARENTS &amp; CARETAKER RELATIVES MEDICAID</b> .....	<b>154</b>
A.	HISTORY AND RELATION TO TANF.....	154
B.	ELIGIBILITY.....	155
1.	<i>Relationship to Dependent Child</i> .....	155
2.	<i>Resources</i> .....	155
3.	<i>Income</i> .....	156
C.	BENEFITS.....	156
D.	TRUST AND TRANSFER RULES.....	157
E.	APPLICATION.....	157
<b>XII.</b>	<b>MEDICALLY NEEDY PROGRAM</b> .....	<b>157</b>
A.	ELIGIBILITY.....	157
1.	<i>Age &amp; Gender</i> .....	157
2.	<i>Income</i> .....	157
3.	<i>Resources</i> .....	158
B.	BENEFITS.....	158
C.	TRUST RULES.....	159
D.	TRANSFER RULES.....	159
E.	APPLICATION.....	159
<b>XIII.</b>	<b>THE TEXAS CHILDREN’S HEALTH INSURANCE (CHIP) PROGRAM</b> .....	<b>159</b>
A.	ELIGIBILITY.....	159
1.	<i>Age</i> .....	159
2.	<i>Residence/Citizenship</i> .....	159
3.	<i>Waiting Period</i> .....	160
4.	<i>Income</i> .....	160
5.	<i>Resources</i> .....	161
6.	<i>Exclusions</i> .....	161
B.	BENEFITS AND COSTS.....	161
C.	TRUST RULES.....	162
D.	TRANSFER RULES.....	162

E.	APPLICATION .....	162
<b>XIV.</b>	<b>THE AFFORDABLE CARE ACT .....</b>	<b>162</b>
A.	INTRODUCTION .....	162
B.	CHANGES PUT INTO EFFECT BEFORE 2013.....	163
1.	<i>The “Federal Risk Pool”</i> .....	163
2.	<i>“Money Follows the Person”</i> .....	163
3.	<i>Coverage for Children With Pre-Existing Conditions</i> .....	164
4.	<i>Coverage for Children Until Age 26</i> .....	164
5.	<i>Medicare Part D “Donut Hole” Reduction</i> .....	164
6.	<i>Part D Cost-Sharing Eliminated for Waiver Program Beneficiaries</i> .....	164
7.	<i>Nursing Home Disclosures Required</i> .....	164
C.	CHANGES EFFECTIVE JANUARY 1, 2014 .....	164
1.	<i>No Pre-Existing Condition Requirement</i> .....	165
2.	<i>Sliding-Scale Premiums Based on Income</i> .....	165
3.	<i>Sliding-Scale Cost Sharing Based on Income</i> .....	166
4.	<i>Spousal Impoverishment Rules Apply to Waiver Programs</i> .....	167
5.	<i>No Annual or Lifetime Caps</i> .....	168
6.	<i>Medicaid Coverage Based on Low-Income</i> .....	168
7.	<i>Effect of the ACA on Special Needs Practices</i> .....	168
<b>XV.</b>	<b>EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS .....</b>	<b>170</b>
A.	ELIGIBILITY.....	170
B.	BENEFITS.....	170
<b>XVI.</b>	<b>QMB AND OTHER MEDICARE SAVINGS PROGRAMS .....</b>	<b>170</b>
A.	ELIGIBILITY AND BENEFITS .....	171
1.	<i>Qualified Medicare Beneficiaries (QMB)</i> .....	171
2.	<i>Specified Low-Income Medicare Beneficiaries (SLMB)</i> .....	172
3.	<i>Qualifying Individuals (QI)</i> .....	172
4.	<i>Qualified Disabled and Working Individuals (QDWI)</i> .....	172
5.	<i>Income &amp; Resource Methodology</i> .....	173
B.	TRUST AND TRANSFER RULES .....	173
C.	APPLICATION .....	174
<b>XVII.</b>	<b>MEDICAID BUY-IN PROGRAM.....</b>	<b>174</b>
A.	ELIGIBILITY.....	174
1.	<i>Disability</i> .....	174
2.	<i>Income</i> .....	175
3.	<i>Resources</i> .....	176
4.	<i>Calculation of Monthly Premium</i> .....	177
B.	BENEFITS.....	177
C.	APPLICATION .....	177
<b>XVIII.</b>	<b>MEDICAID BUY-IN FOR CHILDREN PROGRAM.....</b>	<b>177</b>

A.	PROGRAM DESCRIPTION .....	177
B.	ENABLING STATUES.....	178
C.	ELIGIBILITY REQUIREMENTS .....	178
1.	<i>Financial requirements</i> .....	178
2.	<i>Non-financial requirements</i> .....	179
D.	MBIC PREMIUM AMOUNTS .....	180
1.	<i>No ESI</i> .....	180
2.	<i>ESI with State-Paid HIPP</i> .....	180
3.	<i>ESI and No State-Paid HIPP</i> .....	180
E.	EXEMPTIONS AND WAIVERS .....	180
<b>XIX.</b>	<b>HELP WITH INSURANCE PREMIUMS—THE HIPP PROGRAM.....</b>	<b>181</b>
<b>XX.</b>	<b>FOOD STAMPS (SNAP) .....</b>	<b>182</b>
A.	ELIGIBILITY .....	183
1.	<i>Resources</i> .....	183
2.	<i>Trust Rules</i> .....	184
3.	<i>Transfer Rules</i> .....	184
4.	<i>Income</i> .....	185
5.	<i>Citizenship/Immigration Status</i> .....	185
6.	<i>Work Requirements</i> .....	186
B.	BENEFITS.....	186
C.	APPLICATION .....	186
<b>XXI.</b>	<b>TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS..</b>	<b>186</b>
A.	ELIGIBILITY .....	187
1.	<i>Medicaid-Funded Services</i> .....	187
2.	<i>Non-Medicaid-Funded Services</i> .....	188
B.	BENEFITS.....	190
1.	<i>Mental Health Facilities</i> .....	190
2.	<i>Intellectual Disability Services</i> .....	190
3.	<i>Community Services</i> .....	191
4.	<i>Group Homes</i> .....	192
C.	TRUST RULES .....	192
D.	TRANSFER RULES.....	195
<b>XXII.</b>	<b>LOCAL MEDICAL ASSISTANCE PROGRAMS &amp; OTHER BENEFITS.....</b>	<b>195</b>
A.	LOCAL MEDICAL ASSISTANCE PROGRAMS .....	195
B.	EMERGENCY ROOM ASSISTANCE .....	197
C.	INDIGENT-CARE RESPONSIBILITIES OF HOSPITALS .....	197
D.	LOCAL NONPROFIT AGENCIES.....	197
E.	PROPERTY TAX EXEMPTIONS .....	197
F.	UNLISTED AGENCIES & BENEFITS .....	198
<b>XXIII.</b>	<b>BREAST CANCER &amp; CANCER CONTROL SERVICES AND MEDICAID.....</b>	<b>198</b>



A.	THE BREAST & CERVICAL CANCER CONTROL SERVICES (BCCCS) .....	198
B.	MEDICAID FOR BREAST AND CERVICAL CANCER .....	199
<b>XXIV.</b>	<b>TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS PRACTITIONERS .....</b>	<b>199</b>
A.	CONTACT INFORMATION FOR TEXAS HEALTH AND HUMAN SERVICES COMMISSION .....	199
B.	TIPS FOR A SUCCESSFUL MEDICAID APPLICATION - FREQUENTLY ASKED QUESTIONS .....	200
C.	QUALIFIED INCOME TRUST (QIT) CHECKLIST(MILLER TRUSTS).....	202
<b>XXV.</b>	<b>COVID-19-RELATED LEGISLATION.....</b>	<b>203</b>
A.	FISCAL RELIEF .....	203
B.	EXPANDED COVERAGE FOR COVID TESTING .....	204
C.	INCREASED CARE SETTING FLEXIBILITY .....	204
D.	MEDICAID DEMONSTRATION PROGRAM EXTENSION .....	205
<b>XXVI.</b>	<b>COVID-19-RELATED MEDICAID POLICIES.....</b>	<b>205</b>
A.	MEDICAID COVERAGE MAY NOT BE TERMINATED .....	205
B.	MEDICAID ANNUAL RECERTIFICATIONS INVOLVE UNCERTAINTY .....	206
C.	STIMULUS PAYMENTS USUALLY DO NOT AFFECT BENEFITS .....	207
D.	“BEST AVAILABLE” INCOME VERIFICATION IS SOMETIMES GOOD ENOUGH.....	207
E.	SOURCES OF INFORMATION ON COVID-19 MEDICAID POLICY .....	208
<b>APPENDICES.....</b>		<b>209</b>
APPENDIX 1:	2021 BENEFIT ELIGIBILITY NUMBERS.....	210
APPENDIX 2:	HOW TO CALCULATE “PRO RATA SHARE” OF HOUSEHOLD EXPENSES.....	212
APPENDIX 3:	TRUST DISTRIBUTIONS WHERE BENEFICIARY IS ON SSI - SAMPLE INSTRUCTIONS.....	213
APPENDIX 4:	LIMITS ON ELIGIBILITY OF ALIENS FOR PUBLIC BENEFITS IN TEXAS .....	215
APPENDIX 5:	SOURCES OF FREE AND REDUCED PRICE PRESCRIPTION MEDICATIONS.....	217
APPENDIX 6:	SELECTED BIBLIOGRAPHY.....	218
APPENDIX 7:	HHSC REGIONAL DIRECTORS.....	223
APPENDIX 8:	HEALTH AND HUMAN SERVICES COMMISSION ORGANIZATIONAL CHART .....	225
APPENDIX 9:	CHECKLIST FOR TERMINATION OF SPECIAL NEEDS TRUST WITH MEDICAID PAYBACK PROVISION.....	226
APPENDIX 10:	DRAFTING FOR USE OF POOLED TRUSTS.....	228
APPENDIX 11:	LIST OF MEANS-TESTED PUBLIC BENEFIT PROGRAMS IN TEXAS .....	231
APPENDIX 12:	SOCIAL SECURITY CLAIM NUMBER SUFFIXES .....	244

# **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 2021**

What follows is a listing of the major changes in the 2021 edition of this paper.

TOPIC & SUMMARY OF CHANGE	PAGE
IRAs with RMDs and annuities within IRAs are exempt	90
COVID related Medicaid policies	205
2021 Eligibility Numbers	210

As always, we provide at Appendix 1 the new Medicaid and Medicare eligibility and benefit numbers

## II. OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES

### A. TEXAS AGENCIES

The Texas Health and Human Services Commission (HHSC) administers the government programs Special Needs Trust beneficiaries need the most often:

- Long-Term Care Medicaid (nursing home and home care programs)
- Medicaid for children and their caregivers
- SNAP (food stamps)
- TANF (cash assistance for families)
- Behavioral Health Services
- Intellectual Disability Services
- Women's Health Services.

HHSC also licenses long-term care facilities, certifies certain nursing facilities as Medicaid providers. HHSC licenses all childcare providers within the state. They also operate all state-supported living centers (residential facilities for persons with intellectual disability) and state hospitals (residential centers for persons receiving behavioral health services).<sup>1</sup>

---

<sup>1</sup> In 2016-2017 the Texas Health and Human Services agencies went through a massive reorganization. The Department of Aging and Disability Services (DADS)'s functions were transferred to direct control of HHSC and DADS was abolished. HHSC took on the childcare facility licensing, previously done by the Texas Department of Family and Protective Services (DFPS), and DFPS became its own independent agency. See TEX. HEALTH & HUMAN SERVICES COMM'N, Agencies & Departments, <https://hhs.texas.gov/about-hhs/agencies-departments>. Similarly, responsibilities of the Department of Assistive and

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: Maximizing Public Benefits: Basics and Updates

Also available as part of the eCourse

[2021 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the  
17<sup>th</sup> Annual Changes and Trends Affecting Special Needs Trusts session  
"Maximizing Public Benefits: Basics and Updates"