

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 Leshner & 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
512-323-2977

Co-authors contact information:

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

clesher@lawlesher.com

713-529-5900

&

Bryn Poland
2114 Massey Tompkins Road
Baytown, Texas 77521

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

I. CHANGES AND TRENDS FOR 2021	8
II. OVERVIEW OF TEXAS HEALTH AND HUMAN SERVICE AGENCIES	9
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
III. SUPPLEMENTAL SECURITY INCOME (SSI)	20
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
IV. CHILDHOOD DISABILITY BENEFIT & DISABLED ADULT CHILD MEDICAID	67
V. SOCIAL SECURITY DISABILITY INSURANCE (SSDI)	69
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
VI. REGULAR MEDICAID BENEFITS	71
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
VII. MEDICARE	76
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
VIII. “LONG- TERM CARE” MEDICAID	84
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
IX.	CHILDREN’S MEDICAID	150
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
X.	PREGNANT WOMEN’S MEDICAID	153
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
XI.	PARENTS & CARETAKER RELATIVES MEDICAID	154
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
XII.	MEDICALLY NEEDY PROGRAM	157
A.	ELIGIBILITY.....	157
1.	<i>Age & 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
XIII.	THE TEXAS CHILDREN’S HEALTH INSURANCE (CHIP) PROGRAM	159
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
XIV.	THE AFFORDABLE CARE ACT	162
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
XV.	EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS	170
A.	ELIGIBILITY	170
B.	BENEFITS	170
XVI.	QMB AND OTHER MEDICARE SAVINGS PROGRAMS	170
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 & Resource Methodology</i>	173
B.	TRUST AND TRANSFER RULES	173
C.	APPLICATION	174
XVII.	MEDICAID BUY-IN PROGRAM	174
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
XVIII.	MEDICAID BUY-IN FOR CHILDREN PROGRAM	177

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
XIX.	HELP WITH INSURANCE PREMIUMS—THE HIPP PROGRAM.....	181
XX.	FOOD STAMPS (SNAP)	182
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
XXI.	TEXAS MENTAL HEALTH AND INTELLECTUAL DISABILITY PROGRAMS..	186
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
XXII.	LOCAL MEDICAL ASSISTANCE PROGRAMS & OTHER BENEFITS.....	195
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
XXIII.	BREAST CANCER & CANCER CONTROL SERVICES AND MEDICAID.....	198

A.	THE BREAST & CERVICAL CANCER CONTROL SERVICES (BCCCS)	198
B.	MEDICAID FOR BREAST AND CERVICAL CANCER	199
XXIV.	TIPS FOR NEW ELDER LAW AND SPECIAL NEEDS PRACTITIONERS	199
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
XXV.	COVID-19-RELATED LEGISLATION.....	203
A.	FISCAL RELIEF	203
B.	EXPANDED COVERAGE FOR COVID TESTING	204
C.	INCREASED CARE SETTING FLEXIBILITY	204
D.	MEDICAID DEMONSTRATION PROGRAM EXTENSION	205
XXVI.	COVID-19-RELATED MEDICAID POLICIES.....	205
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
	APPENDICES.....	209
	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	As always, we provide at Appendix 1 the new Medicaid and Medicare eligibility and benefit numbers 210

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).¹

¹ 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

[Special Needs Trusts Basics and Best Practices \(2021\)](#)

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