

Presented:

2022 CHANGES AND TRENDS AFFECTING SPECIAL NEEDS TRUSTS
February 10-11, 2022
Austin, Texas

**Protecting and Maximizing
Public Benefits**

**H. Clyde Farrell &
Christina Leshner**

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 Leshner
Law Office of Christina Leshner, P.C.
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 2022 by H. Clyde Farrell

I.	OVERVIEW OF TEXAS HEALTH & HUMAN SERVICE AGENCIES	1
A.	TEXAS AGENCIES	1
B.	MEDICAID SERVICE DELIVERY MODELS.....	2
1.	<i>Historical Background in Texas</i>	2
2.	<i>Changes Should Not Adversely Affect Clients</i>	2
3.	<i>Changes in Program Names</i>	4
4.	<i>More Choices in Service Delivery</i>	6
5.	<i>Extension of Managed Care to Nursing Facilities</i>	7
C.	EQUAL PROTECTION FOR PARTNERS IN SAME-SEX MARRIAGES.....	9
II.	SUPPLEMENTAL SECURITY INCOME (SSI).....	10
A.	ELIGIBILITY	11
1.	<i>“Categorical” Requirements: Aged, Blind or Disabled</i>	11
2.	<i>Citizenship/Immigration/Residency Status</i>	13
3.	<i>Income</i>	14
B.	BENEFITS	24
1.	<i>Cash Benefits</i>	24
2.	<i>Medicaid Eligibility</i>	24
C.	TRUST RULES.....	24
1.	<i>Third-Party Settled Trusts</i>	25
2.	<i>Self-Settled Trusts</i>	25
3.	<i>Judicial Reformation of Wills</i>	33
4.	<i>Self-Settled Trusts-Key Provisions in 2018 POMS Revisions</i>	34
5.	<i>Restrictions on Early Termination Provisions in Self-Settled Trusts</i>	38
6.	<i>Factors Affecting Type of Trust and Selection of Trustee</i>	39
7.	<i>The Sole Benefit Rule</i>	42
8.	<i>Treatment of UTMA Accounts</i>	44
9.	<i>SSA’s System for Evaluating SSI Trusts</i>	44
10.	<i>Texas Implements the ABLE Act</i>	45
11.	<i>Child Support Paid from Self-Settled SNT is “Income” to the SNT Beneficiary</i>	48
12.	<i>Pooled Trust is Now an Alternative to a 142 Trust</i>	49
D.	TRANSFER RULES.....	49
E.	APPLICATION	51
F.	SSI SOURCES OF LAW	52
III.	CHILDHOOD DISABILITY BENEFIT & DISABLED ADULT CHILD MEDICAID	52
IV.	SOCIAL SECURITY DISABILITY INSURANCE (SSDI)	54
A.	ELIGIBILITY	54
1.	<i>Work History</i>	54
2.	<i>Disability</i>	55
B.	BENEFITS	55
1.	<i>Cash Benefits</i>	55
2.	<i>Medicare Benefits</i>	56
C.	APPLICATION	56
V.	REGULAR MEDICAID BENEFITS.....	56
A.	ELIGIBILITY	56
B.	BENEFITS	57
1.	<i>General Scope of Benefits</i>	57
2.	<i>Texas Health Steps (THSteps)</i>	58
3.	<i>Prescription Medications</i>	59
C.	APPLICATION	60

VI. MEDICARE	61
A. ELIGIBILITY	61
1. Eligibility at Age 65.....	61
2. Work Requirements	61
3. Eligibility in Connection With Social Security and Railroad Retirement Disability Benefits	61
4. Medicare Premiums.....	61
5. Continuation of Medical Coverage After Total Disability Ends.....	62
B. BENEFITS	62
1. Hospital Services.....	63
2. Nursing Facility Services.....	63
3. Home Health Services	64
4. Hospice Services.....	64
5. Physician Services and Other “Part B” Benefits	65
6. Part B Deductibles and Co-Pays.....	65
7. Prescription Drugs	65
8. Medicare Improvement Standard Abrogated	67
C. APPLICATION	68
VII. “LONG- TERM CARE” MEDICAID.....	69
A. ELIGIBILITY	69
1. Income	70
2. Resources (Countable Assets)	71
3. Medical Need Requirements	76
4. Citizenship/Immigration/Residence Status	77
5. Age, Blindness or Disability	77
B. BENEFITS	77
1. Nursing Home Medicaid.....	77
2. Home Care Under the “Community Care” Programs	78
3. Home and Community Care under the Medicaid “Waiver” Programs	79
C. THE HCBS WAIVER “SPOUSAL PROTECTED RESOURCE AMOUNT”	83
1. Both Spouses at Home.....	83
2. One Spouse in a Nursing Home.....	85
D. ELIGIBILITY RULES WHEN BOTH SPOUSES APPLY	85
E. THE HCBS WAIVER PROGRAM INTEREST LISTS	88
1. Interest List Wait Times	88
2. Bypassing the Interest Lists with “Money Follows the Person”	89
F. TRUST RULES.....	90
1. Third-Party-Settled Trusts.....	90
2. Benefits of a Testamentary Trust for a Spouse	91
3. Self-Settled Trusts Generally.....	91
4. Rules applying to revocable trusts established by the client	91
5. Rules applying to irrevocable trusts established by the client.....	92
6. Exceptions to General Rules Governing Trusts “Established By” The Client.....	93
7. Exempt Assets Remain Exempt if Transferred to Revocable Trust—Except the Home	95
G. TRANSFER (“GIFTING”) RULES	96
1. Nature and Purpose.....	96
2. Rules for Calculating the Penalty Period	97
3. Treatment of Multiple Transfers	97
4. How to Determine the “Start Date” of the Penalty Period	98
5. Medicaid Programs Subject to the Transfer Penalty.....	99
6. Disclaimers as Transfers	99
7. What is “Compensation” Reducing a Transfer Penalty.....	99
8. Cash Compensation or Returns of Transferred Assets	101

9.	<i>Transfers by or to a Community Spouse</i>	104
10.	<i>Certain Transfers Excepted From Penalty</i>	105
11.	<i>Exception: Transfers Solely for Non-Medicaid Purpose</i>	107
12.	<i>Exception: Transfer Penalty Would Result in “Undue Hardship”</i>	107
13.	<i>Motor Vehicle Transfer on Death Avoids Transfer Penalty and MERP</i>	109
14.	<i>Gifting by Guardians</i>	110
15.	<i>Fees of Guardians Deductible From Copayment</i>	110
H.	APPLICATION	111
I.	AGREEMENTS OF EXCLUSIVITY BETWEEN ATTORNEYS AND SKILLED NURSING FACILITIES	111
J.	MEDICAID ESTATE RECOVERY PROGRAM.....	112
K.	LADY BIRD DEED.....	112
L.	TRANSFER ON DEATH DEED: THE NEW LADY BIRD DEED?.....	115
1.	<i>Features of the Transfer on Death Deed</i>	115
2.	<i>Comparison of TODD and LBD</i>	118
M.	ACA EXTENDS SPOUSAL IMPOVERISHMENT PROTECTIONS TO HCBS WAIVER PROGRAMS.....	123
N.	1915(C) IS NOW HCBS.....	125
O.	EFFECT OF COURT ORDERS TRANSFERRING ASSETS AND INCOME BETWEEN SPOUSES	125
P.	NON-WAIVER COMMUNITY-BASED LTC MEDICAID PROGRAMS	126
1.	<i>Community First Choice</i>	126
2.	<i>“Texas Dual Eligible Integrated Care Project” affects 6 counties</i>	127
VIII.	CHILDREN’S MEDICAID	128
A.	ELIGIBILITY	128
1.	<i>Residence and Citizenship</i>	128
2.	<i>Age 18 or Under</i>	128
3.	<i>Resources</i>	128
4.	<i>Income</i>	129
B.	BENEFITS	130
C.	TRUST AND TRANSFER RULES.....	130
IX.	PREGNANT WOMEN’S MEDICAID	130
A.	ELIGIBILITY	130
1.	<i>Residence and Citizenship</i>	130
2.	<i>Resources</i>	130
3.	<i>Income</i>	131
B.	BENEFITS	131
C.	TRUST AND TRANSFER RULES.....	131
X.	PARENTS & CARETAKER RELATIVES MEDICAID	131
A.	HISTORY AND RELATION TO TANF	131
B.	ELIGIBILITY	132
1.	<i>Relationship to Dependent Child</i>	132
2.	<i>Resources</i>	132
3.	<i>Income</i>	132
C.	BENEFITS	133
D.	TRUST AND TRANSFER RULES.....	133
E.	APPLICATION	133
XI.	MEDICALLY NEEDY PROGRAM	134
A.	ELIGIBILITY	134
1.	<i>Age & Gender</i>	134
2.	<i>Income</i>	134
3.	<i>Resources</i>	135

B.	BENEFITS	135
C.	TRUST RULES.....	135
D.	TRANSFER RULES.....	135
E.	APPLICATION	135
XII.	THE TEXAS CHILDREN’S HEALTH INSURANCE (CHIP) PROGRAM.....	135
A.	ELIGIBILITY	136
1.	<i>Age</i>	136
2.	<i>Residence/Citizenship</i>	136
3.	<i>Waiting Period</i>	136
4.	<i>Income</i>	136
5.	<i>Resources</i>	137
6.	<i>Exclusions</i>	137
B.	BENEFITS AND COSTS	137
C.	TRUST RULES.....	138
D.	TRANSFER RULES.....	138
E.	APPLICATION	138
XIII.	THE AFFORDABLE CARE ACT	138
A.	INTRODUCTION	138
B.	CHANGES PUT INTO EFFECT BEFORE 2013	139
1.	<i>The “Federal Risk Pool”</i>	139
2.	<i>“Money Follows the Person”</i>	139
3.	<i>Coverage for Children With Pre-Existing Conditions</i>	139
4.	<i>Coverage for Children Until Age 26</i>	139
5.	<i>Medicare Part D “Donut Hole” Reduction</i>	139
6.	<i>Part D Cost-Sharing Eliminated for Waiver Program Beneficiaries</i>	140
7.	<i>Nursing Home Disclosures Required</i>	140
C.	CHANGES EFFECTIVE JANUARY 1, 2014.....	140
1.	<i>No Pre-Existing Condition Requirement</i>	140
2.	<i>Sliding-Scale Premiums Based on Income</i>	140
3.	<i>Sliding-Scale Cost Sharing Based on Income</i>	141
4.	<i>Spousal Impoverishment Rules Apply to Waiver Programs</i>	142
5.	<i>No Annual or Lifetime Caps</i>	142
6.	<i>Medicaid Coverage Based on Low-Income</i>	142
7.	<i>Effect of the ACA on Special Needs Practices</i>	143
XIV.	EMERGENCY ASSISTANCE TO UNDOCUMENTED ALIENS	144
A.	ELIGIBILITY	144
B.	BENEFITS	144
XV.	QMB AND OTHER MEDICARE SAVINGS PROGRAMS	145
A.	ELIGIBILITY AND BENEFITS.....	145
1.	<i>Qualified Medicare Beneficiaries (QMB)</i>	145
2.	<i>Specified Low-Income Medicare Beneficiaries (SLMB)</i>	146
3.	<i>Qualifying Individuals (QI)</i>	146
4.	<i>Qualified Disabled and Working Individuals (QDWI)</i>	146
5.	<i>Income & Resource Methodology</i>	146
B.	TRUST AND TRANSFER RULES.....	147
C.	APPLICATION	147
XVI.	MEDICAID BUY-IN PROGRAM.....	147
A.	ELIGIBILITY	148

1.	<i>Disability</i>	148
2.	<i>Income</i>	148
3.	<i>Resources</i>	149
4.	<i>Calculation of Monthly Premium</i>	149
B.	BENEFITS	150
C.	APPLICATION.....	150
XVII.	MEDICAID BUY-IN FOR CHILDREN PROGRAM	150
A.	PROGRAM DESCRIPTION.....	150
B.	ENABLING STATUES.....	151
C.	ELIGIBILITY REQUIREMENTS.....	151
1.	<i>Financial requirements</i>	151
2.	<i>Non-financial requirements</i>	151
D.	MBIC PREMIUM AMOUNTS	152
1.	<i>No ESI</i>	152
2.	<i>ESI with State-Paid HIPP</i>	152
3.	<i>ESI and No State-Paid HIPP</i>	152
E.	EXEMPTIONS AND WAIVERS	152
XVIII.	HELP WITH INSURANCE PREMIUMS—THE HIPP PROGRAM	153
XIX.	FOOD STAMPS (SNAP)	154
A.	ELIGIBILITY	154
1.	<i>Resources</i>	154
2.	<i>Trust Rules</i>	155
3.	<i>Transfer Rules</i>	156
4.	<i>Income</i>	156
5.	<i>Citizenship/Immigration Status</i>	156
6.	<i>Work Requirements</i>	157
B.	BENEFITS	157
C.	APPLICATION	157
XX.	TEXAS MENTAL HEALTH & INTELLECTUAL DISABILITY PROGRAMS	158
A.	ELIGIBILITY	159
1.	<i>Medicaid-Funded Services</i>	159
2.	<i>Non-Medicaid-Funded Services</i>	159
B.	BENEFITS	161
1.	<i>Mental Health Facilities</i>	161
2.	<i>Intellectual Disability Services</i>	161
3.	<i>Community Services</i>	162
4.	<i>Group Homes</i>	163
C.	TRUST RULES.....	163
D.	TRANSFER RULES.....	165
XXI.	LOCAL MEDICAL ASSISTANCE PROGRAMS & OTHER BENEFITS	166
A.	LOCAL MEDICAL ASSISTANCE PROGRAMS	166
B.	EMERGENCY ROOM ASSISTANCE	166
C.	INDIGENT-CARE RESPONSIBILITIES OF HOSPITALS	167
D.	LOCAL NONPROFIT AGENCIES	167
E.	PROPERTY TAX EXEMPTIONS.....	167
F.	UNLISTED AGENCIES & BENEFITS	167
XXII.	BREAST CANCER & CANCER CONTROL SERVICES AND MEDICAID	167
A.	THE BREAST & CERVICAL CANCER CONTROL SERVICES (BCCCS)	167

B.	MEDICAID FOR BREAST AND CERVICAL CANCER.....	168
XXIII.	TIPS FOR NEW ELDER LAW & SPECIAL NEEDS PRACTITIONERS.....	168
A.	CONTACT INFORMATION FOR TEXAS HEALTH AND HUMAN SERVICES COMMISSION	168
B.	TIPS FOR A SUCCESSFUL MEDICAID APPLICATION - FREQUENTLY ASKED QUESTIONS.....	169
C.	QUALIFIED INCOME TRUST (QIT) CHECKLIST (MILLER TRUSTS)	171
XXIV.	COVID-19-RELATED LEGISLATION.....	171
A.	FISCAL RELIEF	171
B.	EXPANDED COVERAGE FOR COVID TESTING.....	172
C.	INCREASED CARE SETTING FLEXIBILITY	172
D.	MEDICAID DEMONSTRATION PROGRAM EXTENSION	173
XXV.	COVID-19-RELATED MEDICAID POLICIES.....	173
A.	MEDICAID COVERAGE MAY NOT BE TERMINATED	173
B.	MEDICAID ANNUAL RECERTIFICATIONS INVOLVE UNCERTAINTY	173
C.	STIMULUS PAYMENTS USUALLY DO NOT AFFECT BENEFITS.....	174
D.	“BEST AVAILABLE” INCOME VERIFICATION IS SOMETIMES GOOD ENOUGH.....	175
E.	SOURCES OF INFORMATION ON COVID-19 MEDICAID POLICY	175
F.	MEDICARE	176
G.	MEDICAID	177
APPENDIX 1:	2022 BENEFIT ELIGIBILITY NUMBERS.....	178
APPENDIX 2:	HOW TO CALCULATE “PRO RATA SHARE” OF HOUSEHOLD EXPENSES.....	180
APPENDIX 3:	TRUST DISTRIBUTIONS WHERE BENEFICIARY IS ON SSI - SAMPLE INSTRUCTIONS	181
APPENDIX 4:	LIMITS ON ELIGIBILITY OF ALIENS FOR PUBLIC BENEFITS IN TEXAS.....	183
APPENDIX 5:	SOURCES OF FREE AND REDUCED PRICE PRESCRIPTION MEDICATIONS	185
APPENDIX 6:	SELECTED BIBLIOGRAPHY.....	186
APPENDIX 7:	HHSC REGIONAL DIRECTORS.....	190
APPENDIX 8:	HHSC ORGANIZATIONAL CHART	192
APPENDIX 9:	CHECKLIST FOR TERMINATION OF SPECIAL NEEDS TRUST WITH MEDICAID PAYBACK PROVISION	193
APPENDIX 10:	DRAFTING FOR USE OF POOLED TRUSTS	195
APPENDIX 11:	LIST OF MEANS-TESTED PUBLIC BENEFIT PROGRAMS IN TEXAS	197
APPENDIX 12:	SOCIAL SECURITY CLAIM NUMBER SUFFIXES	214
APPENDIX 13:	SOURCES OF LAW.....	215

This overview of the most significant public benefits for persons with disabilities in Texas 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.

I. OVERVIEW OF TEXAS HEALTH & 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.

Within HHSC, the Texas Department of State Health Services (DSHS) manages birth and death records, gathers and shares public health data, collects data to monitor for chronic and infectious disease, provides emergency response services for health emergencies, regulates producers of consumer health goods and service providers that pose potential danger to public health.

Other agencies that do not fall under HHSC’s umbrella but are still important to know include:

- Texas Department of Family and Protective Services (DFPS) - responsible for adult and child protective services.¹
- Texas Workforce Commission (TWC) - responsible for workforce development including providing training and employment services to people with disabilities.²

B. MEDICAID SERVICE DELIVERY MODELS

1. HISTORICAL BACKGROUND IN TEXAS

Medicaid is funded by federal and state government but is administered by the state. Typically, a state provides through a fee-for-service model (“traditional” Medicaid) or a pay-per-patient model (“managed care” Medicaid). In 2011, the Texas Health & Human Services Commission applied for a new Medicaid waiver program that moved away from the “traditional model” towards the “managed care” model. The U.S. Centers for Medicare & Medicaid Services (CMS) approved the new waiver program on December 12, 2011. By that approval, CMS “waived” certain requirements of federal Medicaid law, most notably the prohibition on payment of certain Medicaid funds to hospitals serving large numbers of low-income patients, when the hospitals participate in Medicaid managed care.³ This is a five-year “demonstration program,” scheduled to end in September 2016 but has been extended several times and is currently approved through September 2022.

Over the last 10 years, most Medicaid programs have been integrated into the STAR managed care model including long-term care recipients, children with intellectual and developmental disabilities, children in state conservatorships, and those receiving services under 1915(c) waiver programs.⁴

A few categories of individuals remain eligible for “traditional Medicaid” benefits, as discussed below. The switch to managed care does not affect (1) long-term care programs without comprehensive medical coverage, such as non-waiver home care programs like Community Attendant Services, or (2) Medicare Savings Programs (QMB, SLMB, QI-1).

2. CHANGES SHOULD NOT ADVERSELY AFFECT CLIENTS

There is an inherent conflict when the delivery of a public benefits is entrusted to a for-profit organization that is paid a “capitated” rate per member.⁵ There is an obvious financial incentive to

¹TEXAS DEPARTMENT OF FAMILY AND CHILD PROTECTIVE SERVICES, *About DFPS*, https://www.dfps.state.tx.us/About_DFPS/default.asp.

² TEXAS WORKFORCE COMMISSION, *About Texas Workforce*, <https://www.twc.texas.gov/about-texas-workforce>.

³ These “demonstration program” is sometimes referred to as the “1115 Transformation Waiver” because CMS’s authority derives from Social Security Act §1115, 42 U.S.C. §1315.

⁴ See Tex. Health & Human Services Comm’n, *Demonstration Extension Application Section 1115(a), Appendices A-E*, (July 2021), available for download at <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/83231> (application pending approval as of January 11, 2022).

⁵ “Capitated” managed care is required by Texas statute for acute-care Medicaid generally, unless the HHSC determines that another arrangement, including a traditional fee-for-service arrangement, would be “more cost-

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

[2022 Special Needs Trusts eConference](#)

First appeared as part of the conference materials for the
18th Annual Changes and Trends Affecting Special Needs Trusts session
"Maximizing Public Benefits"