PRESENTED AT

25th Annual Estate Planning, Guardianship and Elder Law Conference

August 10-11, 2023

Galveston, TX & Live Webcast

What All Estate and Probate Attorneys Need to Know About Medicaid Planning and Drafting

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WHAT ALL ESTATE AND PROBATE ATTORNEYS NEED TO KNOW ABOUT MEDICAID PLANNING AND DRAFTING

I. LONG-TERM CARE NEEDS: RISKS AND OPPORTUNITIES IN ESTATE PLANNING

This paper outlines planning strategies that focus on the need to preserve the option of eligibility for various long-term care benefits programs generally referred to as "Medicaid" and administered through the Texas Health and Human Services Commission with joint federal-state funding.

For most individuals and families, long-term care will play a role in estate and financial planning if it is done properly. CMS estimates that "at least 70 percent of people over 65 will need long term care services and support at some point in their lifetime,"[1] and reminds consumers that Medicare health insurance and supplement plans do not cover most long-term care services, in the home or in a facility. Nor do under-65 health insurance plans – something that did not change under the 2010 federal Patient Protection and Affordable Care Act (ACA). A provision of the ACA that would have created a government-run program providing partial ($50/day) reimbursement for individuals' long-term care expenses was repealed before the law came into effect.

Medicare covers up to 100 days of nursing home care and skilled home care services in very limited circumstances. The Department of Veterans Affairs and state veterans programs also finance a small amount of long-term care. Otherwise, outside of Medicaid's various programs, all of which are means-tested (with income and, usually, resource limits), no health insurance program includes long-term care coverage. Only privately purchased long-term care insurance policies cover these costs (of home attendant care and/or assisted living or nursing home care facilities), and the ACA did not regulate them. Medical underwriting is a required part of applying for long-term care insurance in the U.S. and a condition likely to result in an applicant's needing long-term care services is likely to result in a denial of coverage or prohibitively expensive coverage. In our practice, we have seen many clients exhaust the term of their long-term care insurance policies (new lifetime coverage is now unavailable) or convert existing policies to lower levels of coverage that are more quickly exhausted as premiums rise and they feel the premiums are unaffordable in their advanced years.

Does estate planning then always need to include Medicaid planning for beneficiaries? Not necessarily. If sufficient assets are available to support long-term care needs in the care setting preferred by the family for each possible beneficiary, and the person leaving gifts of his or her estate is not averse to the use of that property to pay for long-term care

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[1] 2023 Medicare & You, National Medicare Handbook, Centers for Medicare & Medicaid Services, available at https://www.medicare.gov/publications/10050-LE-medicare-and-you.pdf

expenses, then that use of an inheritance need not be avoided by preserving potential Medicaid eligibility when a trust is drafted or a beneficiary is named. Private-pay options should always be presented as an option during the estate planning process, if possible. Private-pay facilities are, for the most part, more comfortable with more amenities and therapies available than Medicaid-accepting facilities. It is important that clients understand all options for long-term care services available in their particular circumstances. Medicaid need not be the focus of every estate planning conference.

However, failure to provide for a third-party supplemental needs trust for a beneficiary with a known disability may constitute negligence. Best practice includes using a contingent trust for a remote contingent beneficiary whose condition (financial, medical and mental) cannot be known at the time of planning.

We do expect the need for long-term care planning as an element of estate planning to grow in the near future. The number of Texans accessing the Medicaid program to help cover their long-term care expenses is vast and growing. In fiscal year 2021, Texas Medicaid spent $45.9 billion, of which 63% was for seniors and persons with disabilities for roughly 800,000 aged and disabled enrollees.[2] The Census Bureau predicts that by 2060, the population age 65 and older is expected to more than double from 43.1 million to 92 million.[3]

II. INTRODUCTION TO MEDICAID

Medicaid is the most comprehensive health insurance program available to Americans. As of June 2023, approximately 5.9 million Texans[4] (about 19.6% of our state population of about 30 million people[5]) were enrolled in a Medicaid benefit program.

Settling a personal injury case or planning an estate without taking Medicaid into account would place an attorney at high risk for a professional liability claim and/or a suit for payment of the Medicaid subrogation claim. This paper will guide attorneys who are not Medicaid specialists to understand better the scope and complexity of the various Medicaid programs. It will identify some "traps for the unwary" and some strategies for winning superb results for clients, qualifying them for the safety net of government-provided medical insurance and long-term care benefits, when private resources are inadequate to

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[2] Kaiser Health News, "State Health Facts: Texas: Medicaid and Chip," 2023, available at http://kff.org/state-category/medicaid-chip/?state=TX

[3] U.S. Census Document. "U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now." Available at: http://www.census.gov/prod/2010pubs/p25-1138.pdf .

[4] "Medicaid in Texas," a report by the Kaiser Foundation, available at https://files.kff.org/attachment/fact-sheet-medicaid-state-TX .

[5] U.S. Census Bureau estimate as of 2022 available at https://www.census.gov/quickfacts/fact/table/TX,US.