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Medicaid Update and Other Hot Topics

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I. ANY HOME PURCHASED AFTER NURSING FACILITY ADMISSION IS A RESOURCE

In 2022, the Texas Third Court of Appeals (Austin) held that the decision of HHSC that the Medicaid applicants in the case did not have intent to reside in the home was not supported by substantial evidence. On May 3, 2024, the Texas Supreme Court reversed that decision, holding that as a matter of law, a home purchased after admission of a Medicaid applicant to a nursing facility cannot be excluded from the resources of the applicant countable by Medicaid.[1] The Supreme Court majority opinion summarizes its holding as follows:

> We hold that a "home" is the applicant's principal place of residence before the claim for Medicaid assistance arises, coupled with the intent to reside there in the future. A property interest purchased with qualifying resources after the applicant moves to a skilled-nursing facility is an available resource for determining Medicaid eligibility under federal eligibility rules, as the property was not the applicant's principal place of residence at the time the claim for benefits arose.

Chief Justice Nathan Hecht filed a dissenting opinion, joined by two other justices.

The reasoning of the dissenting opinion, together with the Court of Appeals decision, provides a strong basis for distinguishing between the law applying to a home purchased *after* admission to a nursing facility from that applying to a home purchased *before* admission. If the purchase is after admission, the Medicaid applicant's intent is irrelevant and the property cannot be excluded as a home. If the purchase is before admission, the law as we have long understood it continues to apply: intent to return is presumed and the agency has a high burden of proving otherwise.

Another notable feature of the case is that the majority opinion acknowledges that "Texas' methodology for determining income and resource eligibility must be 'no more restrictive than the methodology…under the [federal] supplemental security income program."[2] Although that has been well established in the federal case law at least since 1981, it is still possible to find numerous provisions in in Texas' Medicaid for the Elderly and People With Disabilities Handbook, and a few in its Medicaid rules, that are still not in compliance with

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[1] *Texas Health and Human Services Commission v. Estate of Clyde L. Burt, Tex. Health & Human Servs. Comm'n v. Estate of Burt*, 644 S.W.3d 888 (Tex. App.—Austin [3rd Dist.] April 21, 2022), reversed, No. 22-0437, Supreme Court of Texas (May 3, 2024) at https://caselaw.findlaw.com/court/tx-supreme-court/116132401.html .

[2] *Id.,* at page 6. See also *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981).

the federal law. It would seem reasonable to hope that acknowledgment by the Texas Supreme Court that the federal law preempts inconsistent state policies will encourage agency representatives to accept more quickly and consistently our advocacy based on the federal law. For an example of an opportunity for such advocacy, see part IV. below explaining a recently adopted SSI rule (effective September 30, 2024) that has not yet been incorporated into the Texas Medicaid rules or policies.

The *Burt* case did not involve the policy that "If a person is purchasing a replacement home, the proceeds of the sale of the original home are not countable resources for three full months following the month of receipt."[3] HHSC has consistently permitted nursing home residents to sell an excluded home and reinvest the proceeds in another home in which they have an intent to live. Nothing in this case indicates a change in that policy.

II. MANAGING CLIENT COMMUNICATION

The post-pandemic "unwinding" of Covid-era Medicaid eligibility has made Medicaid applications (especially "renewal" applications) a larger than usual part of elder law practice. Therefore, one suggestion for a "hot topic" at the planning committee meeting for this conference was to discuss the critical part of that application process involving client communication, which is not covered to a great extent in the literature on Medicaid applications. Therefore, mindful that it is not a new development, we offer this discussion of a "hot topic."

When referring to "the client" in this discussion, we are aware that at least half the time elder law attorneys are not dealing directly with the client but, in most contacts, with a family member or friend who usually is the client's power of attorney agent. Therefore, our references to "the client" should be read as "the client or their representative," with regard to these management issues. Of course, our primary duty is always to the client; and it is especially important to keep that in mind when their representative is driving us crazy.

Another kind of shorthand we are using is the term "elder law." The missions of NAELA and Texas NAELA include *disability* law, which we consider to be included when we refer to "elder law."

A. CLIENT MANAGEMENT AS A BUSINESS PROBLEM

Advising and motivating clients and their representatives to do what they must do to accomplish Medicaid planning and eligibility, and estate planning, is critical to every elder

[3] Medicaid for the Elderly and People With Disabilities Handbook F-3400.

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