PRESENTED AT

UT Law Estate Planning, Guardianship, and Elder Law

August 5, 2021
Webcast

Business Property Exclusion in Medicaid Cases

Co-Presenters:
Benecia Flores, Petrosewicz Law Firm, P.C.
Wesley E. Wright, Wright Abshire Attorneys, P.C.

Author Contact Information:
Theresa A. Clarke
Wright Abshire, Attorneys, P.C.

Benecia Flores
Petrosewicz Law Firm, P.C.

Wesley E. Wright
Wright Abshire, Attorneys, P.C.

Acknowledgments:
Thank you to Amanda E. George and Molly Dear Abshire for their contributions, and to Summer Williamson and Sierah Caisey for helping with the production of this paper. Also, the authors wish to give a special thank you to Clyde Farrell for his insights and writings on the topic and for his collaboration on this paper.

I. INTRODUCTION

This paper and attendant presentation will examine the use of the business property exclusion option as a means to protect certain assets of a potential Medicaid recipient. It demonstrates how the practitioner can be an invaluable guide in helping a client traverse the often-complicated rules regarding business property and its exclusion in Medicaid cases. The authors define and explain the elements of the relevant law and rules using examples from the authors' experience, including two based on successful appeals to the Texas Health and Human Services Commission (HHSC). The paper guides the attorney through the important questions to ask and the necessary evidence to compile for the Medicaid application. Included in the Appendices are case summaries (see Appendix A), and helpful forms.

All Medicaid applicants must meet financial and non-financial categorical requirements to qualify for Medicaid. Examples of non-financial requirements include medical necessity for nursing home care, age or disability status, U.S. citizenship or approved alien status, and Texas residency. Those applying for long-term care Medicaid benefits must also satisfy income and resource requirements. This paper focuses on the resource treatment of a business owned by a long-term care Medicaid applicant or the applicant's spouse.

Property used in the applicant's or applicant's spouse's trade or business is not a countable resource, regardless of value or rate of return. The business property must be in current use, or it must have been used previously and there must be a reasonable expectation of its being used again. Excluded business property includes land, buildings, equipment and supplies, inventory, livestock, motor vehicles, and liquid assets needed for the business.[1]

II. BUSINESS PROPERTY VS. NON-BUSINESS PROPERTY EXCLUSIONS

Cases and materials about excluded business property also frequently refer to exclusions related to *non-business* property. This is because the federal regulations include both types of property within the same rules.[2] While excluded non-business property is outside the scope of this paper, the Medicaid rule is summarized as follows: "Non-business property, such as rental property (where no property management company is used), leased farm property, and income-

[1] Medicaid for the Elderly and People with Disabilities Handbook (MEPD HB) § F-4330 Business Property.
[2] 20 C.F.R. §§ 416.1220, 416.1222.

producing mineral rights, is excluded to the extent its equity value does not exceed $6,000, and the applicant receives a net annual rate of return of at least six percent of the equity value."[3]

III. LEGISLATIVE HISTORY: LAW, REGULATIONS, AND POLICY

When assessing Medicaid eligibility, HHSC staff rely primarily on the Medicaid for the Elderly and People with Disabilities (MEPD) Handbook. While the MEPD Handbook includes references to the Texas Administrative Code (TAC)[4] and the federal laws and regulations that govern the Texas Medicaid program, it is important for practitioners to know and understand the underlying law. The federal Medicaid statute compels state Medicaid programs to employ methodology in administering the means test that "may be less restrictive, and shall be no more restrictive, than the methodology ... under the supplemental security income program ..."[5] First, not all parts of the referenced federal statutes and rules are expressly incorporated into the Texas Medicaid rules. Moreover, the federal Medicaid statute refers to the Supplemental Security Income (SSI) *program*, not just its rules. Therefore, all of the SSI rules *and* the program policy contained in the SSI Program Operating Manual System (POMS) supersede any more restrictive Texas Medicaid rules and policies. It is still sometimes necessary to refer to the SSI statutes, rules, and POMS policies to protect a client's rights with regard to Medicaid in Texas.[6]

A. Medicaid Law Hierarchy

That leaves us with the following hierarchy with regard to sources of Medicaid law in Texas. After the U.S. Constitution, we have the following sources of law, in this order:

1. Federal SSI and Medicaid statutes (The Social Security Act, 42 U.S.C. Titles XVI, XIX)
2. Federal SSI rules (20 C.F.R. Part 416)
3. Federal SSI policy (the POMS)
4. Texas Constitution
5. Texas statutes (Texas Government Code Chapter 531)
6. Texas rules (Texas Administrative Code)
7. Texas Medicaid policy (MEPD Handbook)

See Appendix B for a chart of the most relevant laws, regulations, and policies.

---

[3] Abshire, Molly Dear; Farrell, F. Clyde; Sitchler, Patricia F.; Wright, Wesley E., 51 Tex. Prac., Elder Law § 1:1 (2020 ed.); *See* MEPD HB § F-4310 Nonbusiness Property - $6000/6%. Note also that the $6,000/6% rule, as it is known, was a regulation promulgated by the Social Security Administration in 1985 based on a 1972 study. At least one court has held this rule "arbitrary and capricious." *See* Maine Ass'n of Interdependent Neighborhoods v. Petit, 659 F.Supp.1309 (D. Me. 1987).

[4] The Texas Medicaid eligibility rules are found in Chapter 358 of Title 1 of the Texas Administrative Code.

[5] 42 U.S.C. § 1396a(r)(2). Note: some states, not Texas, have opted out of the SSI methodology.

[6] Abshire, Molly Dear; et al., 51 Tex. Prac., Elder Law § 8:1 (2020 ed.).

Title search: Business Property Exclusions in Medicaid Cases

Also available as part of the eCourse
2021 Estate Planning, Guardianship, and Elder Law eConference

First appeared as part of the conference materials for the
23rd Annual Estate Planning, Guardianship and Elder Law Conference session
"The Medicaid Exclusion for Business Property: Protecting Clients' Farms, Ranches and Other Businesses"