

PRESENTED AT

26th Annual Estate Planning, Guardianship and Elder Law Conference

August 8-9, 2024
San Antonio, TX & Live Webcast

**Medicaid Update
and Other Hot Topics**

**H. Clyde Farrell
Marilyn G. Miller**

Author Contact Information:

H. Clyde Farrell
Farrell & Johnson PLLC
Austin, TX
cfarrell@txelderlaw.com
512-323-2977

Marilyn G. Miller
Attorney at Law
Dripping Springs, TX
marilyn@mgmillerlaw.net
512-894-0319

Copyright 2024 by H. Clyde Farrell and Marilyn G. Miller

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.

Medicaid Update and Other Hot Topics

Table of Contents

Contents

I. ANY HOME PURCHASED AFTER NURSING FACILITY ADMISSION IS A RESOURCE	1
II. MANAGING CLIENT COMMUNICATION	2
A. CLIENT MANAGEMENT AS A BUSINESS PROBLEM.....	2
B. CLIENT MANAGEMENT AS AN ETHICAL PROBLEM	3
C. MANAGING CLIENT EXPECTATIONS.....	7
D. SECURING AUTHORITY TO OBTAIN INFORMATION	8
E. HOW TO REQUEST INFORMATION SO CLIENTS WILL RUSH TO SEND IT	9
F. HOW TO SEND REMINDERS THAT (SOME) CLIENTS WILL APPRECIATE.....	9
G. HOW TO MAKE AN OFFER THE CLIENT (PROBABLY) CANNOT REFUSE	10
H. SUGGESTED FIRM GOALS REGARDING CLIENT COMMUNICATION.....	11
III. CHILDREN’S MEDICAID—A WHOLE OTHER WORLD.....	12
IV. PAYMENT FOR A MEDICAID BENEFICIARY’S FOOD IS NO LONGER “INCOME”--SOMETIMES	15
V. DEVELOPMENTS IN CONTINGENT TRUST PRACTICE.....	17
A. REDUCED NEED: WILL REFORMATION NOW POSSIBLE	18
B. INCREASED SCOPE: MORE CONTINGENCIES DEVELOPED.....	18
VI. MEDICAID POLICY ON IRAS.....	19

A.	SOURCES OF LAW	19
B.	DEFERRED ANNUITIES IN IRAS ARE EXCLUDED.....	21
C.	IRAS WITH RMDS ARE EXCLUDED.....	21
VII.	“VALID SIGNATURES” ON APPLICATIONS DEFINED	24
VIII.	USING A REVOCABLE TRUST FOR THE HOME TO MAXIMIZE THE SPRA 26	
IX.	THE WRIGHT CASE: CAUTION LIGHT ON LADY BIRD DEED SIGNED BY BOTH SPOUSES	27
A.	SUMMARY OF THE WRIGHT CASE	27
B.	MORAL OF THE WRIGHT CASE	28
C.	USING LADY BIRD DEED TO REDUCE THE VALUE OF HOMESTEAD PROPERTY TO A SURVIVING SPOUSE.....	28
X.	APPENDICES.....	30
	APPENDIX 1: BENEFIT ELIGIBILITY NUMBERS 2024.....	30
	APPENDIX 2: AUTHORIZATION FOR REPRESENTION	32
	APPENDIX 3: APPOINTMENT OF AUTHORIZED REPRESENTATIVE (FORM H1003).....	33
	APPENDIX 4: SAMPLE DOCUMENT REQUEST LETTER TO CLIENT	35
	APPENDIX 5: SAMPLE REMINDERS TO CLIENTS	43
	APPENDIX 6: SAMPLE CONTINGENT TRUST PROVISION.....	46
	APPENDIX 7: SAMPLE LBD WITH CPROS.....	48
	APPENDIX 8: SAMPLE TODD WITH CPROS.....	52

Medicaid Update and Other Hot Topics

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

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.

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: Medicaid Update and Other Hot Topics

Also available as part of the eCourse

[2024 Estate Planning, Guardianship and Elder Law eConference](#)

First appeared as part of the conference materials for the
26th Annual Estate Planning, Guardianship and Elder Law Conference session
"Medicaid Update and Other Hot Topics"