PLANNING FOR BENEFICIARIES WHO MAY NEED LONG-TERM CARE

H. Clyde Farrell

PRESENTER AND CO-AUTHOR

Bliss Burdett Pak

CO-AUTHOR

FARRELL & PAK PLLC

1000 Mo-Pac Circle
Austin, TX 78746
www.txelderlaw.com

Estate Planning Council of Central Texas

November 15, 2016

Austin, Texas

H. CLYDE FARRELL

FARRELL & PAK PLLC
1000 MoPac Circle
Austin, Texas 78746
512/708-1977 (Fax) 512/323-2977 (Telephone) cfarrell@txelderlaw.com

BIOGRAPHICAL INFORMATION

EDUCATION

Certified as an Elder Law Attorney by the National Elder Law Foundation, 2000
CERTIFIED FINANCIAL PLANNER™ practitioner, 1987
J.D. Degree, The University of Texas School of Law, 1975
M.A. Degree (Political Science), The University of Wisconsin, 1971
B.A. Degree (Government), The University of Texas, 1970

PROFESSIONAL ACTIVITIES

Former Staff Attorney with Texas Rural Legal Aid in South Texas (1975-80)
Former Chief of Texas Attorney General's Consumer Protection Division and Elder Law Section (1983-93)
Small Firm Practitioner in Austin, Texas (1993-present)
Founding Board Member and Past President, Texas Chapter, National Academy of Elder Law Attorneys
Past President, Family Eldercare, Inc. (Austin)
Advisory Council, Planned Living Assistance Network of Central Texas

LAW-RELATED PUBLICATIONS, ACADEMIC APPOINTMENTS AND HONORS

Included in THE BEST LAWYERS IN AMERICA (2008-2016); BEST LAW FIRMS IN TEXAS-ELDER LAW, 2014, 2015, 2016; AMERICA'S TOP FINANCIAL PLANNERS (2008-2011, 2013, 2014)
Named a "TEXAS SUPER LAWYER" by TEXAS MONTHLY, each year 2003-2015
Recipient of the "TEXAS LEGEND" Award by South Texas College of Law in 2003
Co-Author, *Texas Elder Law* (Thomson-West Texas Practice Series) *Texas Elder and Disability Law Forms* (WestLaw Form Builder).
Co-Author (with Joe C. Fiore), Texas Consumer Law (1993), 3rd Ed.
Author/Speaker, State Bar of Texas Elder Law Courses (1996-2016); University of Texas School of Law Elder Law Courses (1997-2016); South Texas College of Law Elder Law Courses (2002, 2003); American Bar Association Estate Planning Institute (1998); Texas Chapter, National Academy of Elder Law Attorneys Elder Law Programs (1996-2016)
Editor, Elder Law Alert (newsletter of the Texas Chapter of the National Academy of Elder Law Attorneys), 1995 to 2011

PLANNING FOR BENEFICIARIES WHO MAY NEED LONG-TERM CARE

Table of Contents

Contents

PLANNING FOR BENEFICIARIES WHO MAY NEED LONG-TERM CARE

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

Estate planning for spouses, children, parents and other intended beneficiaries has always included elements of protection for the known and unknown possible behaviors and needs of the beneficiaries. While some structures and plans constitute a response to tax law and policy, with the primary goal to minimize income and transfer tax on the property involved, other structures are intended primarily to protect the beneficiary who has the current or possible future need for access to funding of healthcare expenses including long-term care. This paper outlines planning strategies inspired by 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.

Chances are high that as any individual or family undertakes long-term planning for the ultimate disposition of their estate, and for the long-term best interest of loved ones, long-term care will play a role in planning. 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 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).[2] 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.[3]

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

[1] 2016 Medicare & You, National Medicare Handbook, Centers for Medicare & Medicaid Services, available at www.medicare.gov/Pubs/pdf/10050.pdf

[2] See "Long Term Care Insurance Is Not Changed By Obamacare" from the American Association for Long-Term Care Insurance, available at www.aaltci.org/news/long-term-care-insurance-is-not-changed-by-obamacare; and

[3] See "The Demise of the CLASS Act," American Academy of Orthopaedic Surgeons, March 2012, available at http://www.aaos.org/news/aaosnow/mar12/advocacy4.asp: "On Sept. 21, 2011, the Senate Appropriations Committee deleted the entire $120 million that had been earmarked for the annual design and marketing of CLASS policies from the 2012 HHS budget. The deletion received no opposition from the White House, and within days, the HHS effectively disbanded the CLASS program office. Moreover, on October 14, 2012, HHS secretary Kathleen Sebelius announced that she was abandoning the program. The decision left the nation without a broad policy solution to the problem of financing long-term care."

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 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.

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: As of December 2012, 21% of Medicaid spending in Texas went to long-term care services and supports for roughly 400,000 aged and disabled Texas Medicaid enrollees. [4] With predictions that by 2050, one in five people in the United States will be elderly, the demand for and cost of these services will continue to expand.[5]

II. INTRODUCTION TO MEDICAID

Medicaid is the most comprehensive health insurance program available to Americans. As of February 2014, approximately 4.4 million Texans[6] (about 16.6% of our state population of about 26.5 million people[7]) were enrolled in a Medicaid benefit program.

Settling a personal injury case or planning an estate without taking it 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 sustain a decent quality of life. However, it is not intended to cover all the laws and forms needed for the practice of Medicaid planning and advocacy.

In general, "Medicaid" refers to Title 19 of the Social Security Act, 42 U.S.C. §1396 *et seq.* The Texas Health & Human Services Commission administers all Title 19 (Medicaid) programs in this state.

However, Title 19 provides for numerous distinct programs. For example, the Medicaid provided to all Supplemental Security Income (SSI) beneficiaries is available only to persons with countable incomes not exceeding $733 per month in 2016; but as discussed below, there is no absolute income limit on nursing home and waiver program Medicaid eligibility.

This section will identify the major Medicaid programs according to the names and categories most commonly used. For current income eligibility limits, see Appendix 1. However, almost all Medicaid programs have asset ("resource") limits as well; and they vary among themselves as to what counts as "income" and "resources."

The focus of this paper is on the first four categories of Medicaid discussed below: nursing home care, waiver home care, non-waiver home care and Medicare savings program Medicaid. Those are sometimes referred to as "long-term care Medicaid" programs. They are almost always the programs of interest to older Texans consulting

[4] Kaiser Health News, "State Health Facts: Texas : Medicaid and Chip," September 16, 2013, available at http://kff.org/state-category/medicaid-chip/?state=TX

[5] U.S. Census Document. "The Next Five Decades: The Older Population in The United States: 2010 to 2050." Available at: http://www.census.gov/prod/2010pubs/p25-1138.pdf.

[6] "Medicaid and CHIP: January and February Monthly Enrollment," a report by the federal government's Center for Medicare and Medicaid Services, available at http://medicaid.gov/AffordableCareAct/Medicaid-Moving-Forward-2014/Downloads/February-2014-Enrollment-Report.pdf

[7] U.S. Census Bureau estimate as of 2013 available at http://quickfacts.census.gov/qfd/states/48000.html.

with estate planning attorneys. The other Medicaid programs are utilized primarily by children and nonelderly adults with disabilities.

A. Medicaid for Nursing Home Care

Beneficiaries of nursing home Medicaid receive comprehensive medical insurance benefits, in addition to payment for nursing home care and related services.

The "income cap" for nursing home Medicaid in 2016 is $2,199 per month. However, as discussed below, it is not an absolute limit. A community spouse (spouse of a nursing home resident who is not in a nursing home or hospital) can have unlimited income, and complex rules apply as to the value of assets the couple can keep.

B. Medicaid "Waiver" Home Care Programs

Six Medicaid programs provide primarily home care (with a very small number of beneficiaries in Assisted Living Facilities). They are called "waiver" programs because the federal Medicaid agency has waived one or more requirements that ordinarily apply for receipt of Title 19 funds, under a procedure at Social Security Act §1915(c). They are Star+Plus Waiver (formerly Community Based Alternatives and the most important, which pays for a few beds in Assisted Living Facilities as well as home care), Community Living and Support Services (CLASS), Medically Dependent Children (MDCP), Home and Community-Based Services (HCS), Deaf Blind With Multiple Disabilities (DBMD) and Texas Home Living Program (TxHmLiv). Collectively, they are now referred to as the "Home and Community Services (HCBS) Waiver Programs." In general, these programs have the same asset and income requirements as nursing home Medicaid. However, they differ greatly among themselves as to the age and medical conditions required for eligibility, availability of funds and types of services offered. They are not entitlement programs (there is no federal requirement that all who meet eligibility requirements will be served), so they are subject to limits placed by the Texas Legislature and are generally underfunded. Therefore, they are available only after coming up on a state-run waiting list that varies from 4 months to more than seven years depending on the program; or applying a "bypass" strategy that involves qualifying first for Medicaid nursing home care, then filing a request for waiver program eligibility, and returning home after it is approved.

C. Medicaid "Non-Waiver" Home Care Programs

The major non-waiver home care programs are called "Community Attendant Services" and "Family Care." They are distinguished from the waiver programs in several ways:

- Benefits are limited to attendant care
- Number of hours per week is usually much lower than for the waiver programs
- Eligibility does not require "medical necessity" for nursing home care (but does require a need for significant help at home with activities of daily living)
- There is usually little or no wait for services for eligible applicants
- They have no transfer penalty
- They have no exception to the income limit ($2,199 per month in 2016), so those with higher incomes cannot qualify

D. "Medicare Savings Program" Medicaid

Low-income Medi*care* recipients who meet certain income and resource limits may be eligible for Medicaid programs known as the Medicare Savings Programs. The Qualified Medicare Beneficiary Program (QMB) pays the Medicare Part B premiums (usually $104.90 per month) and pays Medicare copayments and deductibles (essentially provides a free Medicare supplement insurance coverage). The Specified Low-Income Medicare Beneficiary (SLMB) Program pays only Medicare Part B premiums.

In addition, qualification for either QMB or SLMB automatically confers eligibility for Medicare Part D "Extra Help" (prescription coverage with no premiums and tiny copayments). However, eligibility for QMB or SLMB does not confer eligibility for the full range of regular Medicaid benefits.

The income and asset limits for QMB and SLMB are in Appendix 1.

E. SSI- or TANF-Linked "Community Medicaid"

This is the most common and important Medicaid program for persons with disabilities, usually (but not always) the non-elderly. Many beneficiaries receive Medicaid automatically because they qualify for Supplemental Security Income (SSI) or Temporary Assistance for Needy Families (TANF). For such clients, requirements for Medicaid eligibility are the same as for SSI or TANF.

In general, this kind of Medicaid is a comprehensive medical assistance program. It is broader in many respects than Medicare and does not require payment of premiums, deductibles and co-payments as does Medicare. Beneficiaries of nursing home and waiver Medicaid programs are entitled to the same Medicaid benefits, plus long-term care; but usually they are also eligible for Medicare, which is primary.

The most comprehensive listing of regular Medicaid benefits is in the current *Texas Medicaid Provider Procedures Manual*, at http://www.tmhp.com/Pages/Medicaid/Medicaid_Publications_Provider_manual.aspx (entire manual available for download). It should be consulted whenever an issue arises as to the scope of benefits available.

F. Medicaid for Children and Pregnant Women

Likewise, Medicaid is provided to beneficiaries of the Children and Pregnant Women Program. Generally, those are children under age 18 and pregnant women. The family income level required for eligibility depends on the age of the child. There are also family asset limits for children's Medicaid but none for pregnant women.

G. "Disabled Adult Child" Medicaid

This Medicaid program allows the adult child of a retired, deceased, or disabled worker to continue his or her eligibility for Medicaid even though the adult child is denied Supplemental Security Income (SSI) due to newly established entitlement to or increase in social security benefits (RSDI) based on the parent's earnings record. It comes into play when the parent dies, qualifies for Social Security Disability benefits or qualifies for Social Security Retirement benefits. To be eligible, an adult child must be at least 18 years of age; have a disability the onset of which was before age 22 years old; and meet current SSI criteria apart from the RSDI income. Because the Social Security Administration does not notify beneficiaries of this program, it is common to encounter "adult disabled children" who have suffered for years after their Medicaid benefits were needlessly cut off. (The Social Security Administration recently renamed its program “Childhood Disability Benefits,” but despite the misleading name, it is still available only to *adults* with onset of disability before age 22.)

III. MEDICAID’S “COUNTABLE” AND “EXEMPT” RESOURCES

Eligibility for Medicaid benefits is based in part on “means tests” which include limits on income and resources of the applicant and spouse, in the case of long-term care benefits. Each asset of a would-be beneficiary, therefore, must be evaluated for whether it “counts” as an available “resource” of the applicant (and if so, at what valuation) or whether it is “exempt” and therefore does not count (at any value) against the resource limit for eligibility. Any property that is a “resource” of the applicant, and does not fit into an exempt category, “counts.”

The limit for countable resources of a single Medicaid beneficiary is $2,000 in 2016 (and has been that amount for approximately 30 years); for one spouse in a marriage, see above. For spouses, Medicaid applies a formula for “protected resources” the community spouse can keep, within the range of $23,844 and $119,220 in 2016 (plus $2,000 for the institutionalized spouse; and a couple with incomes below a certain level can keep more).

This introduction defines “resources,” when they are “available” (or “accessible”) and which property is temporarily or permanently “exempt.” The following sections then define the exemptions for homesteads, mineral rights, business property and any real property that is “for sale.” Exemptions are also available for other types of assets such as vehicles, personal and household items and prepaid funeral arrangements, etc.[8]

A. Resources Defined

The value of a "resource" is counted in determining Medicaid eligibility unless it is within an exemption or exclusion. "Resources" include all real and personal property titled in the applicant or his/her spouse's name, or held in trust for benefit the applicant in a form that permits the distribution of trust property on demand of the applicant or otherwise to pay for his or her expenses of care. The Texas Administrative Code incorporates §1613 of the Social Security Act (42 U.S.C. §1382b) and 20 CFR §416.1201 regarding the general treatment of resources.[9] The Medicaid Eligibility for the Elderly and People with Disabilities Handbook[10] ("MEH" or "Medicaid Handbook") defines resources as "cash, other liquid assets, or any real or personal property or other nonliquid assets that a person, a person's spouse or parent could convert to cash to be used for his or her support and maintenance."[11]

This definition is essentially the same as applied by the Supplemental Security Income program at 20 C.F.R. §416.1201, except the Texas handbook definition refers to resources as what an applicant's parents can convert to cash. That is correct with regard to children's Medicaid but clearly does not apply to any other kind.

This distinction illustrates the importance of understanding the underlying law, in addition to applying the Medicaid Handbook. The federal Medicaid statute requires 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 under title XVI...methodology is considered to be 'no more restrictive' if, using the methodology, additional individuals may be eligible for medical assistance and no individuals who are otherwise eligible are made ineligible for such assistance."[12] Moreover, adherence by the states to the methodology adopted by the federal Medicaid agency has been required by the federal courts, at least since U. S. Supreme Court spoke on this in 1981.[13]

The current Texas Medicaid rules (adopted in September 2009) largely accomplish this result by making express reference repeatedly to the federal Medicaid and SSI statutes and the federal SSI rules and incorporating them by reference. While this makes for difficult reading, it makes immediately available to agency employees and those they serve, all the carefully crafted federal statutes and rules, which have been honed by national experience for many years.

However, not all the SSI rules have been expressly incorporated into the Texas Medicaid rules. The agency could simply have adopted as a rule the requirements of federal Medicaid law cited above, but it did not do so. Because federal law supersedes any contrary state rules or policies as discussed above, it is essential for all involved in applying the Texas rules and handbook to make reference to all the SSI rules and not just the ones expressly incorporated by reference.

Moreover, the federal statute expressly requires use of the methodology of the Supplemental Security Income *program*, not just its rules. Therefore, all the SSI rules *and* the program policy contained in the SSI Program Operating Manual System (POMS) may be cited as sources of law superseding any more restrictive Texas Medicaid rules and policies.

---

[8] See Medicaid for the Elderly and People with Disabilities Handbook Chapter F – Resources for a relatively complete list.

[9] 1 Texas Administrative Code Rules (Revision 09-4; Effective December 1, 2009) Division 2, Resources, Subchapter C, Financial Requirements: §358.321. General Treatment of Resources. Texas HHSC follows 20 CFR §416.1207 regarding the determination of resources. Resource determinations are made as of 12:01 a.m. on the first day of the month.

[10] Texas Health and Human Services Commission, Medicaid Eligibility for the Elderly and People with Disabilities Handbook (available at http://www.dads.state.tx.us/handbooks/mepd/index.htm) (hereinafter "MEH")

[11] MEH F-1210 Definition (Revision 09-4; Effective December 1, 2009).

[12] 42 U.S.C. §1396a(r)(2). This does not apply to states that have opted out of the SSI methodology. Texas has not opted out so is an "SSI state" bound by this requirement.

[13] Schweiker v. Gray Panthers, 453 U.S. 34 (1981).

That leaves us with the following hierarchy with regard to sources of Medicaid law in Texas. Notice that the Medicaid Handbook, which is the only source of authority known to Medicaid program personnel, carries the *least* weight legally. After the U. S. Constitution, we have the following sources of law, *in this order:*

1. Federal SSI and Medicaid statutes
2. Federal SSI rules
3. Federal SSI policy (the POMS)
4. Texas constitution
5. Texas statutes
6. Texas Health & Human Services Commission Medicaid rules
7. Texas Medicaid policy (in Texas Medicaid Handbook)

With such a broad definition of "resources," it is no surprise that the burden is on the Medicaid applicant to overcome a presumption that any asset "counts" and therefore must be liquidated, and the proceeds used to pay for nursing home expenses. The presumption of "counting" applies to real property as to other assets, despite the illiquid nature of most real property.[14] However, certain real property can be preserved by the applicant with a proper claim of exemption and provision of supporting evidence that the property meets the requirements for limited classes of exemptions.

To avoid the untimely and/or undesired sale of real property, the family must identify a recognized exemption and develop convincing evidence that the property is entitled to exemption. Likewise, property owned or managed in a legal structure that benefits the Medicaid applicant will be "counted" against the resource limit unless the structure makes the property unavailable upon demand or need of the beneficiary. Certain trusts do exempt the trust property from "counting" and also serve the intended purposes of benefitting a Medicaid applicant for long-term care benefits, but with certain important exceptions, they cannot be created by the applicant (a first-party or self-settled trust) to benefit the applicant; therefore they generally are not available as a near-term planning device when long-term care is needed in the immediate future.[15] The self-settled "exception trusts" are available only to Medicaid applicants under age 65 as discussed under the heading "Anyone Under Age 65 With a Disability Can Get Medicaid as Far as Assets Are Concerned."

Certain types of assets that would count as "resources" are exempt, based on meeting specific requirements in the Medicaid eligibility rules and (sometimes) pursuant to policies developed by Texas Health and Human Services Commission to address the context in which these exemptions may and may not be granted. Some exemptions are routinely awarded upon an application properly asserting a right to the exemption of the asset (e.g., homestead); some exemptions are almost always respected after passing through legal review, delaying the certification of eligibility but reliably protecting the asset (e.g., mineral rights worth less than $6,000 and producing at better than a 6% rate of return); and some exemptions are in the rules but do not so readily pass through the application process without an appeal to at least the "fair hearing" level (e.g., "business property" farms and ranches).

Planning for Medicaid eligibility often centers on the excludability of real property from the "resource" count. In addition to meeting the categorical or character requirements of the exemption rules, express valuation limits come into play for homesteads and producing minerals.

[14] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4210 Real Property definition

[15] For a guide to sole benefit trusts for disabled children, testamentary trusts for spouses and other forms of trusts that are useful in Medicaid planning to protect real property (with adequate lead time and the family members who are necessary parties to these structures/plans, such as a spouse or disabled child) see Thomas D. Begley, Jr. & Angela E. Canellos, Special Needs Trusts Handbook (Wolters Kluwer Law & Business 2015) and Molly Dear Abshire, H. Clyde Farrell, Patricia Flora Sitchler and Wesley E. Wright, Texas Elder Law (West 2015-6), at 513, Chapter 13: Special Needs Trusts.

B. Requirement of Accessibility

In "considering whether a person has the right, authority, or power to liquidate a property or the person's share of the property" Texas follows the federal SSI rules:[16] "A person's resource is property that: is owned, solely or in part, by the person; and is accessible to the person. If the person has the right, authority or power to liquidate the property or his share of it, the property is a resource.[17] The spouse's resources are counted along with the applicant's resources if the spouses live in the same household.[18]

Federal guidelines, and the state application of them, do not provide any leeway for hardship cases in determining the availability of resources. Illiquid, hard-to-sell or hard-to-value resources therefore still "count" and may need to be sold unless the applicant can prove through expert testimony that they are unmarketable at any price. See below for a discussion of how to have a property's value excluded while reasonable efforts to sell it are being made. Otherwise, unless the property can be exempted under the narrow categories described below, it "counts" and renders a prospective Medicaid beneficiary ineligible unless or until the property is liquidated and spent, or altered to meet the requirements of an exception.

1. Guardianship Estates and Accessibility

Unless a court has judged a person to be incompetent and a guardian or other agent is appointed to act for the person, the person has access to resources he owns.[19] Moreover, a client's resources are considered available to him or her when they are being managed by a legal guardian, agent under power of attorney or other fiduciary agent of the client, unless a court denies the guardian or agent access to the resources.[20] When the ward needs Medicaid benefits but assets must be marketed and sold in order to establish that eligibility, the guardian must seek a court order to make such sales and spend the proceeds to establish eligibility, or in the alternative, seek a court order prohibiting such a sale or use of the asset for the ward's benefit. The fact that property is under control of a guardian does not mean it is not a "resource." It will be excludable only if there is a court order that expressly "denies access" to the guardian.

2. Probate Estates and Accessibility

A potential Medicaid beneficiary may inherit property from a decedent, but while the property is in the probate estate does it count against the resource limit? And what about property inherited through the laws of intestacy? While the property is under the administration of an executor or administrator in a probate estate, the beneficiary ordinarily has no ability to compel distribution of his property. Heirship proceedings may be needed to identify and establish the heirs and their portion of property ownership. Such property is, as a practical matter, inaccessible for months. The Medicaid Handbook understands: "An individual may not have access to his inheritance pending legal action."[21]

---

[16] Texas Administrative Code §358.325: "Ownership Interest and Legal Right to Access a Resource. The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1201(a)(1)."

[17] Medicaid Eligibility for the Elderly and People with Disabilities Handbook § F-1220 Ownership and Accessibility

[18] Medicaid Eligibility for the Elderly and People with Disabilities Handbook § F-1410 Deeming for Spouses "If a married person lives in the same household with an ineligible spouse, HHSC counts both the ineligible spouse's and the person's resources and applies the couple resource limit to the combined countable resources. The spouse's resources are counted even if they are not available to the person." Spouses who separate for the purpose of qualifying one of them for Medicaid are treated as if they were still in the same "household." Medicaid Eligibility for the Elderly and People with Disabilities Handbook §J-1420.

[19] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-1220-F-1231; Social Security Administration Program Operations Manual System SI 01120.010.

[20] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-6300; Social Security Administration Program Operations Manual System SI 01120.010, SI 01120.020.

[21] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §E-3370. See also Social Security Administration Program Operations

It may be necessary to obtain a probate court order essentially confirming that the administrator or executor is "denied access" to the property for the improper purpose of distributing it to the client when, for example, the creditors have not yet been paid.[22] An intermediate step would be to make a written request to the administrator or executor and obtain a written response refusing to make the asset available.[23]

3. Co-Owners and Accessibility

Where co-owners do not wish to sell, "accessibility" for Medicaid purposes is murky. For property whose sale is being blocked by a co-owner, POMS SI 01120.010, SI 01120.020 and SI 00830.550A2 may be helpful: "Until an item or right has a value (i.e., it can be used to meet the heir's need for food or shelter), it is neither income nor a resource. The inheritance is income in the first month it has a value and can be used." Therefore, the key to exempting such property will be proving that it has no market value and cannot be sold. This can sometimes be accomplished with the written statement of a real estate professional to the effect that the property is unmarketable. If it can be sold, it is accessible and will count unless it fits into another exempt category, such as homestead or the $6,000/6% rules discussed below.

C. The Exempt Homestead

Excluding the applicant's residence because it meets the requirements of a "homestead" (or "home" in the Texas Medicaid Handbook) is probably the most reliable strategy for preserving significant value in a real property asset. Where the applicant has a "community spouse" or "dependent relative" living in the home, the value that is exempt is unlimited. For a single person, there is a limit on the value of home equity that is exempt – $552,000 in 2016.

Federal and state law are coordinated as follows: The Texas Health and Human Services Commission follows 20 CFR §416.1212 regarding the treatment of a home,[24] with this instruction in the Medicaid Handbook: "An exclusion to the home as a countable resource is possible if the person or spouse has ownership interest in the property and the property currently is the principal place of residence of either the person or the spouse."[25]

The following principles apply for exempting the equity value of real property as the applicant's homestead:

(1) *There Can Be Only One.* Only one principal place of residence is excluded.[26]

(2) *Intent to Return***.** The fact that the client lives in a nursing home does not preclude exempting the home from the countable resources. To get the exemption, the applicant must express his or her intent to return to the home on Form 1245, Statement of Intent to Return Home. If the client lacks capacity to do this, it can be done by a relative, representative payee, agent, legal guardian or physician (in which case the Medicaid Eligibility Worker must also obtain a corroborating statement from one of those persons). Neither the law nor the Texas agency's practice requires that there be any likelihood that the client will in fact be able to return home.[27] If a spouse or dependent relative (in certain specified degrees of kinship) lives in the

Manual System SI 00830.550A2, which is more specific: "Until an item or right has a value (i.e., it can be used to meet the heir's need for food or shelter), it is neither income nor a resource. The inheritance is income in the first month it has a value and can be used."

[22] Some probate judges may, however, refuse such orders to independent executors on the ground that they are not within the limited scope of judicial action available in an independent administration.

[23] The North Dakota Supreme Court seems to have grafted such a procedure onto the Medicaid rules, in *Opp v. Ward County Social Services Board*, No. 20010199 (N.D. Supreme Ct., March 12, 2002).

[24] Texas Administrative Code §358.348. Exclusion of a Home and Medicaid Eligibility for the Elderly and People with Disabilities Handbook § F-3100 The Home and Resource Exclusions and F-3110 Principal Place of Residence.

[25] Medicaid Eligibility for the Elderly and People with Disabilities Handbook § F-3000 Home definition.

[26] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-3110.

[27] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-3121.1.

home, it is excluded, apparently without any intent of the client to return.[28]

(3) *Previous Residency while Owning*. A home cannot be excluded as a residence if the applicant "has not resided in the property while having an ownership interest."29 Therefore, the possibility of exempting a home is based on having lived in the home – and at the same time owning at least a portion of the equity – prior to entering a nursing home and applying for benefits. This requirement has been successfully challenged in one state district court judicial review case as inconsistent with federal SSI law.30 HHSC did not appeal the decision and has never adopted this policy by rulemaking, but it has refused to apply the court's holding to any other case, and at this writing there is no appellate decision on this issue.

This policy change was accomplished by amendment of the Texas Medicaid Handbook (effective January 1, 2008). Previously, a Medicaid applicant could exempt an equity interest in a home purchased as part of a spend-down to eligibility--without ever having lived there. Likewise, the Medicaid beneficiary could inherit a home without losing benefits or being forced to sell the home and do something else with the (countable) proceeds, in order to maintain eligibility for Medicaid. In either scenario, the equity value in the home purchased or inherited could be made exempt as a "homestead" based solely on the applicant's intent to live there, if and when they may be able to leave the nursing home. While this was theoretical and provided a means to store value in real property primarily for the purpose of passing it on to the next generation (given that the nursing home resident in most cases could not return to the home to actually live there), it also worked to protect the family ownership of childhood homesteads, where the Medicaid beneficiary inherited the house he grew up in from his parents or other relatives.

Under the current rule, inheriting such a house in the form of individual, fee simple ownership (or any other form of marketable ownership, such as a life estate) creates Medicaid ineligibility. The solution is for the parent or other relative to leave the home in a testamentary "special needs" trust benefiting the Medicaid beneficiary subject to a discretionary distribution standard.[31] So structured, the childhood home is secure as a family legacy in trust, and Medicaid benefits are not lost to the would-be heir. Ideally, this is accomplished by coordinating estate plans of the title holder of the property with the needs and best interest of the beneficiary. Where the property is in fact of sentimental or other high value to the family, it is probable that the homeowner would cooperate in such straight-forward estate planning to save the home from a forced sale (generally to pay the nursing home, when the heir loses Medicaid eligibility due to the inheritance of countable property).

For cases in which the estate plan of a decedent fails to protect the beneficiary's eligibility by leaving a direct gift instead of an appropriate trust (or the trust in the will fails its purpose of providing adequate protection), consider seeking judicial reformation or modification of the terms of the will under the new Texas Estates Code § 255.451-455 effective September 1, 2015.[32] The

---

[28] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-3112, "Exclude the property as a home even if the person leaves the home without the intent to return as long as a spouse or dependent relative of the person continues to live in the property.".

[29] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-3110, by changes effective July 1, 2007 and January 1, 2008.

[30] *Estate of James w. Seffer, Amy Smith, Executor v. Texas Health and Human Services Commission*, No. D-1-GN-08-000790 in the 419th District Court of Travis County, Texas (2008). The judgment and correspondence from the Court (Judge Stephen Yelenosky) is available to members of the Texas Chapter of the National Academy of Elder Law Attorneys at www.texasnaela.com.

[31] For guidance on such trusts, see Thomas D. Begley, Jr. & Angela E. Canellos, SPECIAL NEEDS TRUSTS HANDBOOK (Wolters Kluwer Law & Business 2011) and Molly Dear Abshire, H. Clyde Farrell, Patricia Flora Sitchler and Wesley E. Wright, TEXAS ELDER LAW (West 2010), at 543, Chapter 13: Special Needs Trusts.

[32] For an overview of the new statute and procedural issues, see Pi-Yi Mayo and Bryn Poland, "Reforming a Will to Create a Special Needs Trust under Section 255.451 of the Estates Code," State Bar of Texas Advanced Elder Law Course, April 15, 2016, Dallas; see also Glenn M. Karisch, "2015 Legislative Update:

new statute specifically provides in the list of "circumstances under which a will may be modified or reformed… (2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for governmental benefits and is not contrary to the testator's intent."[33] See the Mayo & Poland article for the case that, absent an express prohibition on modifying the will to protect public benefits, such modification or reformation generally is consistent with and works in support of "the testator's desire to benefit the distributee to the greatest extent possible."[34]

Reformation is likely to be the necessary remedy in most cases, as it will relate back to the date of death, preserving benefits otherwise lost due to the inheritance. Commentators and a statement of the Regional Chief Counsel for the Social Security Administration appear to agree that reformation (but not modification) will apply retroactively to the date of death upon express order of the court. For the avoidance of confusion at the agency regarding the Medicaid requirement that the beneficiary of an exempt third party trust have no hand in establishing the trust or contributing his or her own property to it, the personal representative of the estate undertaking a petition to reform or modify a will under the new statute should not be the same person – i.e., if the Medicaid beneficiary is named or appointed executor of the estate, they are advised to resign and have another person serve as executor.

(4) *Texas Homes Only* (usually). To be excluded, a homestead must be in Texas unless it is occupied by a spouse; a home located outside Texas cannot otherwise be excluded from countable resources under the "homestead" exemption.[35] However, if a community spouse lives outside Texas, his or her home can be excluded for the purpose of initial eligibility, subject to the requirement that title be transferred to the community spouse before the first annual review.[36]

(5) *For Sale and Sold*. Placing the home on the market for sale does not make it a resource—i.e., it maintains its exemption as a homestead if it meets the homestead requirements, even when put up for sale. Moreover, residences outside Texas which are not otherwise exempt, become exempt when they are offered for sale. If the client is purchasing a replacement home, the proceeds of the sale of the original home remain exempt – and do not start to "count" – for three months (until the end of the third full calendar month following the month of their receipt).[37] Therefore, a "move-to-Texas" strategy involving the sale of the out-of-state home and purchase of a home in Texas would require that: (i) the out-of-state home is put on the market (immediately exempting it – and allowing eligibility if the owner meets all the other Medicaid eligibility criteria including residing in a Medicaid nursing home in Texas); (ii) when it sells, from the sale closing date, the future Medicaid applicant or spouse must reinvest the proceeds in a home in Texas, meaning the purchase closing must occur within three months after the sale closing; and (iii) the owner must reside in the home. HHSC has not set a minimum time limit for residence, but rather requires proof of intent to reside there indefinitely.

(6) *Not Titled in Revocable Trust***.** See "Revocable Trusts Often Prevent Medicaid Eligibility." Trusts probably can be used to avoid estate recovery against other assets: If there is a vehicle, family heirloom, business property or other valuable exempt property (not counted as a resource) that may otherwise be subject to the Medicaid estate recovery program, transfer it to a revocable trust. If it is already in a revocable trust, keep it there. However, if the client's residence is in the trust, have the trustee convey back the residence by deed.[38]

Legislation Affecting Probate, Guardianship and Trust Law in Texas," available at http://texasprobate.com/download-cle-articles and Gerry W. Beyer, "2015 Texas Estate Planning Legislative Update" August 2, 2015, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2638914

[33] TEX. ESTATES CODE §255.451 (2).

[34] Mayo & Poland, supra, at 4.

[35] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-3110 and F-4215 Nonliquid Resources Located Outside the State

[36] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-3110, F-3500.

[37] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §§F-3400, F-3130.

[38] State Medicaid Manual §3259.6F (stating CMS policy) expressly states that, with the exception of the home, "placement of an excluded asset in a trust does not change the excluded nature of that asset; it remains excluded."

(7) *Unlimited Equity Value*. There is a home equity value ceiling that generally applies to an exempt homestead. However, the home equity ceiling does not apply at all, and there is no limit to the value of a homestead that is exempt, if the homestead of the applicant is occupied by any of the following:

- The individual's spouse; or
- The individual's child under age 21; or
- The individual's child who is blind or disabled as defined by the Social Security Act.

Also, the equity limit can be waived "in the case of a demonstrated hardship." However, the right to present that defense may be cut off if it is not presented within the time limit the Medicaid Eligibility Worker provides on the notice of denial on that basis.[39]

(8) Net Equity Value – Limited. Unless the above occupancy or hardship rules allow unlimited equity value, there is a ceiling on the value of home equity that is exempt[40] – it is $552,000 in 2016.[41] "This policy does not prevent a person from using a reverse mortgage or home equity loan to reduce the person's total equity interest in the home."[42]

Even if the value of a homestead farm or ranch exceeds the equity value limit, it may still be excludable as "business property". However, unless an exception to estate recovery applies, it may have to be sold later to repay the Medicaid benefits.

D. Adjacent Land

The definition of the exempt "home" includes "the "structure in which a person lives (including mobile homes, houseboats and motor homes)" as well as "other buildings and all adjacent land." **[43]** "Adjacent property is a part of the home even if there is more than one document of ownership (for example, separate deeds), the home was obtained at a different time from the rest of the land, or the holdings are assessed and taxed separately."**[44]**

E. Home Equity Limit

If there is a mortgage on real property owned by the applicant, only the equity in the property is counted. The Texas Medicaid program accepts the appraised value for property tax purposes as the presumptive fair market value of real property. Therefore, this value is always the starting point and HHSC's policy is to use any of the following valuation methods:

- Tax statement with current assessment, using 100% evaluation;
- Copy of the appraisal from the local taxing authority or appraisal district;
- Statement from a local knowledgeable source (for example, realtor); and/or
- Telephone contact with a previously listed source, using telephone contact documentation.[45]

In some cases it may be worthwhile to obtain an appraisal by a "knowledgeable source" (preferably a professional appraiser) to show that the market value is lower--e.g., where there should be a discount for an undivided interest, where the property is unmarketable at any price (in which case it has no countable value), or where the tax appraisal is too high for some other reason.

The following methods may be considered for lowering the value below the ceiling for exemption.

1. Home Equity or Reverse Mortgage Loans

These loans traditionally have been available to retirees on a "fixed income" who find that their expenses increasingly exceed their income, but their homes have built-up equity that

---

[39] Form H1226. This is also used to notify applicants of denial based on the transfer penalty, for which notice of a defense (such as non-Medicaid purpose or undue hardship) must be given within 10 days of the date on the notice. Therefore, it is likely the worker will use 10 days to compute the time within which exceptions to the home equity limit must be asserted.

[40] Medicaid Eligibility for the Elderly and People with Disabilities Handbook § F-3600 Home Equity Treatment

[41] The $543,000 dollar amount is increased, from year to year based on the percentage increase in the consumer price index for all urban consumers (all items; United States city average), rounded to the nearest $1,000.

[42] 42 U.S.C. §1396p(f)(3)

[43] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F 3000 The Home

[44] Id.

[45] Medicaid Eligibility for the Elderly and People with Disabilities Handbook Appendix XVI

they can mortgage for a loan. The Texas Constitution provides, for this purpose, "undisbursed funds under a reverse mortgage loan are considered equity in a borrower's home and not proceeds from a loan."[46] Funds disbursed in a lump sum would appear to count as resources even if they are proceeds of a reverse mortgage; but now that a line of credit is possible, this provision has meaning.

However, due to various abuses, these types of loans are now federally regulated and further subject to institutional policies of the lenders that generally require:

i. Owner occupancy in the home – sometimes even for the full term of the loan – meaning that the resident's relocation to a nursing home for an extended period of time leaves them ineligible for a loan, or in breach of the terms of the loan and technically subject to the lender calling the loan due[47]; and

ii. Participation of all owners in a "counseling course" (if they are to sign for themselves), or if a power of attorney is to be used, verification of "competence" at the time the power of attorney was signed, by a treating physician. Recent experience since the 2008-2009 recession has been great difficulty and delay for individuals or couples attempting to mortgage their homes with these products when a loan applicant has legal capacity to sign documents but not the level of "competence" required by lenders.

The traditional home equity loan or reverse mortgage therefore may not be available after an owner needs nursing home care, but may only be available before the need for Medicaid eligibility is apparent. Advance planning or changes in market conditions seem the most likely resolutions for the availability of mortgage loans to reduce the value of home equity; loosening of the regulatory environment for these loans appears to be unlikely, given the potential for elder exploitation (taking the cash from the home and using it for a third party's own purposes – not to benefit the home owner(s)) and experience of such sad cases that gave rise to these safeguards.

2. Sale or Transfer of Partial Equity to Others

Reduction of the percentage of equity value in the same home may exempt the equity value the Medicaid applicant retains. Of course the proceeds of sale must be spent before eligibility can be established, and any transfer for less than fair market value compensation (e.g., a gift to a client's son or daughter who does not have a disability) will result in a transfer penalty by Medicaid.

3. Reduction in Value of the Property

A lower value may be based on physical changes to the property or on the valuation method. A real estate appraiser may provide a fair market valuation that is lower than the most recent property tax appraisal, trumping the default source of value used by the Medicaid eligibility worker.[48]

F. Life Estates and Remainder Interests

If countable, these interests are presumptively valued according to the life estate holder's age and the equity value of the property, by application of a table of values in Appendix X to the Medicaid Handbook. The client may rebut this presumption.[49] It is surprising to note that the proportion of the value of a home allocated by the Medicaid program (based on the Social Security life expectancy tables) is significantly different than the proportion allocated by the IRS life table for the same life estate and the same transaction. The difference is so great that upon sale of a property titled in a life and remainder estate, the sellers must choose which percentage to apply in allocating the proceeds, with a negative consequence in either planning for Medicaid long-term during the next five years or in paying capital gains taxes on the sale. For example, a 75-year-old life estate owner may own 20% of the home's value for federal tax purposes (depending on interest rates at the time of

[46] TEX. CONST. Art. XVI §50(o).

[47] Texas Constitution Art. 16 Sec. 50(k)(6)(C) provides, "'Reverse mortgage' means an extension of credit...that is secured by a voluntary lien on homestead property...that requires no payment of principal or interest until...all borrowers cease occupying the homestead property for a period of longer than 12 consecutive months without prior written approval from the lender..."

[48] Medicaid Eligibility for the Elderly and People with Disabilities Handbook Appendix XVI

[49] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4212.

sale) and 52% of the home's value according to Medicaid Appendix X. If she sells the home and then needs to apply for Medicaid benefits during the transfer look-back period, she may suffer a penalty period (during which Medicaid will not pay, despite otherwise qualifying) based on the difference (that difference in this example is 32% of the net proceeds of sale) if she receives only the 20% the IRS assigns to her life estate. If she is planning to avoid – and cannot otherwise afford – the months of Medicaid ineligibility associated with that size penalty period, she should receive 52% of the proceeds of sale at the closing (i.e., the Medicaid Appendix X proportion). This does not save the remainder owner from owing capital gains tax according to the federal income tax table that, in this example, allocates 80% of the sale proceeds to the remaindermen – a tax bill that seems unfair as it does not match the cash distribution made according to the Medicaid/Social Security life estate table.

In addition, a purchase of a life estate in a home on or after February 8, 2006 is treated as a transfer of assets without consideration, until the purchaser has resided in the home for at least one year after the date of the purchase.[50]

In any of these situations, a Medicaid applicant may be able to avoid a transfer penalty by proving any of the following: (1) that the transfer was motivated exclusively by purposes other than Medicaid eligibility, or (2) that the applicant intended to receive fair market value, or (3) that imposition of a transfer penalty would cause "undue hardship."[51] However, establishing any of those affirmative defenses usually requires appealing a Medicaid denial to a hearing with an unpredictable result; and the "undue hardship" defense is almost never sustained.

G. Continuing Care Retirement Center Fees

Though the down payment or entrance fee is structured to feel like a home equity down-payment, the federal statute specifically addresses its character as follows: "an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that (A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care; (B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and (C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.[52]

Typically, the fee does not involve the purchase of equity in the owner company of the community, but rather a contract with the company. Therefore, these fees usually "count" and should be separately evaluated according to the specific terms of the contract. They usually cannot be categorized as "homestead" under state property law or the state or federal Medicaid rules. Typically, the CCRC contract anticipates the possibility of a purchaser depleting other assets and becoming unable to afford the monthly resident fee out of solely retirement income in the clause that provides for the CCRC to reduce the deposit balance in the amount necessary to cover an unpaid monthly fee. This type of provision demonstrates the availability of the deposit account to cover ongoing costs of care. The delay some residents have experienced in receiving a refund of the deposit has not historically exempted the countable asset for Medicaid purposes; rather it leaves the resident or former resident of the CCRC in a position of Medicaid ineligibility until the deposit is in fact refunded and spent on an exempt asset such as a homestead or otherwise depleted like any other financial asset that Medicaid counts.

H. Mineral Rights and other "Non-Business Property"

Texas' Medicaid eligibility rules provide that **"t**he Texas Health and Human Services Commission counts the equity value of a person's

[50] S. 1932 §6016(d), amending 42 U.S.C. §1396p(c)(1)(J); 1 T.A.C. §358.431(I).

[51] Medicaid for the Elderly and People with Disabilities Handbook I-3200.

[52] 42 U.S.C. 1396p (g) Treatment of Entrance Fees of Individuals Residing in Continuing Care Retirement Communities.

ownership of or interest in mineral rights as a resource, unless the mineral rights are: connected with property excluded as a home; or excluded as property essential to self-support under 20 CFR §§416.1220, 416.1222, and 416.1224.[53]

As to minerals owned together with the surface, it is clear that the minerals do not count if the surface contains the exempt homestead. Therefore, if the parcel contains the home, the fact that the property includes the mineral rights does not create the need to separately describe value and/or exempt the mineral interests. This is consistent with the treatment of all contiguous land (surface) as "part of" homestead property: both acreage attached to the home and mineral rights are exempt if the home is exempt. Both are physically and legally (under state property law) a component of the property bundle recognized as "the homestead" for Medicaid eligibility purposes. However, cash payments such as royalties based on the mineral rights are still counted as "income" by Medicaid, even if the mineral rights are part of an exempt home.

1. The de minimus rule - "$6,000 and 6%"

The Medicaid rules create a category of "property essential to self-support" that may be exempt, then make a critical distinction between business property (whose value is unlimited for purposes of exemption—discussed next below) and non-business property (whose exempt value is limited to $6,000, and must be producing income at the rate of at least a 6% net annual return based on equity value).[54] This "$6,000/6% Rule" applies to mineral rights and can be the basis for exemption for mineral interests whose ownership is severed from the surface. The rule also applies generally to any "non-business property that is producing income necessary to self-support" so long as the property is not "liquid."[55]

"Non-business" property such as rental property and income-producing mineral rights is excluded to the extent its equity value does not exceed $6,000, provided the client receives a net annual rate of return of at least 6% of the equity value. There is some flexibility if the rate of return drops below 6% due to "unusual or adverse circumstances."[56]

Because of the low value limit for this exemption, valuation is crucial and most real properties are now far more valuable than $6,000 by any measure. However, due to the small fractional interests commonly held in mineral rights through inheritance over generations or business arrangements involving multiple parties, the most commonly encountered example of exempt real property worth less than $6,000 is mineral rights.

2. Valuing Producing and Non-Producing Interests

The Medicaid handbook provides the following hierarchy for eligibility workers to use for valuing producing minerals ("land resources" – surface rights to grass or timber--would be similarly valued):

- Tax statement, if assessed.
- Contact a knowledgeable source in the community using telephone contact documentation. (Sources include oil and gas producers, tax assessors/collectors and petroleum lease agents – land men.)
- Form H1242, Verification of Mineral Rights, completed by an authorized employee of the producing company.
- IRS formula of 40 times the average monthly payout in assessing the value of mineral rights for inheritance purposes (to be used only when no other source is available).[57]

If the mineral rights are non-producing, it's easier: a "$100 'default value' should be assigned."[58] This default rule, combined with the $200 threshold for penalizable transfers, creates the opportunity to efficiently dispose of mineral rights

[53] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4213 Mineral Rights

[54] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4310 Nonbusiness Property – $6000/6%.

[55] Id. and Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4300.

[56] Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4312.

[57] Medicaid Eligibility for the Elderly and People with Disabilities Handbook Appendix XVI

[58] Id.

by transferring them to the intended heirs via gift deed prior to or during Medicaid eligibility. However, it is not clear that the default value will control a situation where an owner of mineral rights has reason to believe they are worth more than the Medicaid default valuation – for example, because he has received lease offers for substantially more or has leased the property and expects production in the foreseeable future. In the absence of official guidance in these circumstances, a third party appraisal is the most reliable basis for valuation.

The Medicaid eligibility worker is instructed to look at the following documentation and to "deduct any encumbrances such as mortgages or liens" in determining equity value.[59]

Sources for verifying income include:

- lease agreement;
- rent receipts;
- bank deposit slips;
- canceled checks and receipts from expense (to determine net income); and
- recent income tax return.

Sources for verifying the current market value include:

- copy of a mortgage or lien,
- copies of bills for repairs or services, and
- recent income tax return. [60]

I. Unlimited Value for Exempt Business Property

Texas follows the federal SSI rule on "property essential to self -support" pursuant to Texas Administrative Code §358.371 "Treatment of Other Resources."[61] Property used in the client's trade or business is excluded regardless of value or rate of return. The 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. It may be land and buildings, equipment and supplies, inventory, livestock, motor vehicles, and liquid assets needed for the business.[62] After proving a "valid business" exists, the critical question is whether the owner "materially participates" in the farm or other business. If so, the income should be reported on Schedule F (for a farm) or C (for another business) to the federal income tax return. Self-employment tax is due, and the property is exempt from consideration by Medicaid. However, if it is properly reported on Schedule E and Form 4835 as rental income, real property is not exempt for Medicaid purposes.[63]

If a lease or other business agreement contains one or more of the provisions in MEH §E-6100 defining "material participation" by the owner, and if the owner actually participates in the business that way, the requirements for "business property" are met, both for income tax and Medicaid purposes.

However, recent Medicaid applications in Texas and elsewhere have received initial denials of the business property characterization of land where any lease was involved, apparently on the theory that a hunting lease or a grazing lease transforms the family farm or ranch into a passive investment – even where substantial evidence of material participation was presented and the owner was operating a "trade or business." On appeal, the lease did not control and the fair hearing officer found a ranch to constitute exempt business property where, consistent with federal tax law, "periodic advice and consultation with the *tenant*…" was an element of "material participation" by an owner in a farm "business." The decisions of fair hearing officers in Medicaid eligibility appeals are not published and are not precedent.

J. Business Entity Interests Count

Estate planning with a family-controlled LLC or partnership structure can cause Medicaid ineligibility for an owner who needs long-term care benefits. Medicaid has no "look-through" treatment

---

59 Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4312.

60 Id.

61 20 C.F.R. Sections 416.1220, 416.1222, 416.1224 regarding property essential to self-support.

62 Medicaid Eligibility for the Elderly and People with Disabilities Handbook §F-4330. This is derived from the SSI law at 20 C.F.R. §416.1220.

63 Medicaid Eligibility for the Elderly and People with Disabilities Handbook §E-6100. This substantially tracks the IRS definition of "material participation" in a farming "business," sufficient to require reporting on Schedule F and payment of self-employment tax by the property owner. IRS Pub. 225, *Farmer's Tax Guide*, which is based on 26 U.S.C. §1402(a)(1) and 26 C.F.R. §1.1402(a)-4.

for tax exempt (or non-tax-exempt) business entities. The value of the ownership interest is "countable" for Medicaid purposes as a security – i.e., valued at the ownership level based on the percentage ownership of the entity and the value of the market capitalization of the entity as if it were liquid shares in a publicly traded company, with the possibility of a discount for minority shares. The nature of the business or assets owned by the LLC, partnership or other business entity is irrelevant. Therefore, a residence that might be exempt as homestead, contiguous land, a working farm or ranch or minerals otherwise exempt are transformed to countable assets when titled in a business entity.

For owners and part-owners of exempt businesses, the same is true: The form or ownership structure of businesses is, surprisingly, not addressed in the federal rules, Texas rules or policy statements in the eligibility handbook. Guidance therefore is limited to experience with applications and cases on appeal, with a variety of results from state to state.

In Texas, the prevailing theory applied by HHSC has been to look not to the substance of the use of property (e.g., "in a business" as opposed to "for investment" or "for leisure"), but to the form of the ownership. Where the applicant owns partnership interests or shares in a corporation, the asset has been characterized as "shares" and therefore as a countable resource. The result is the denial of the business property exemption to businesses organized in the usual and advisable business formats of partnerships or companies under state law; only sole proprietorships have been exempt businesses in Medicaid cases.

The practical effect of this policy may be the forced liquidation of the property held by small businesses in corporate form, triggering unnecessary capital gains tax for the companies where there is a taxable entity, and unnecessary and complex negotiation of the liquidation of partnership interests merely to transfer the business' property to individual title in the business owner so it can be granted business exemption – a strange result where it was "in" the business for good reason and producing income to support the applicant, and must be transferred "out" of the business in order to qualify as "business property."

Perhaps recognizing the inconsistency of this application of Medicaid's business property rules with the nature of valid businesses, several years ago a representative from HHSC responded affirmatively (several years ago) to an oral inquiry as to whether the assets of a small business in corporate form, where 100% of the shares are owned by a Medicaid applicant, could be exempt under the business property rules. This would be consistent with a ruling in Montana on this question, in which the Supreme Court of Montana reversed the state's treatment of assets held in "corporate or trust form as countable" simply for that reason, to violate equal protection standards.[64]

K. Property for Sale

A powerful eligibility planning tool, placing real property for sale immediately (potentially leading to eligibility as of the first day of the next month) exempts the real property from the resource count - temporarily. This relatively recent rule in Texas is perhaps the most dramatic effect of the 2009 revised Texas Medicaid rules, which incorporated by reference the Supplemental Security Income "conditional sale"[65] procedure, under which real property can be excluded as a resource while it is being offered for sale.

The Texas rule provides that "The Texas Health and Human Services Commission (HHSC) follows 20 CFR §416.1245 regarding the treatment of excess real property, except the property continues to be excluded for as long as: (1) the person continues to make reasonable efforts to sell it; and (2) including the property as a countable resource would result in a determination of excess resources."[66] That is implemented by the following administrative policy:

> Reasonable efforts to sell the property require the individual take all necessary steps to sell it. Reasonable efforts to sell property include:
>
> - listing the property with a local real estate agent; or

[64] See Timm v. Montana Dept. of Public Health and Human Services (Mont., No CDV 2005-289, April 21, 2008).

[65] 20 CFR §416.1245

[66] 1 T.A.C. §358.349 Exceptions to Treatment of Excess Real Property. See also Medicaid for the Elderly and People with Disabilities Handbook F-3130.

- advertising in local media, placing a "For Sale" sign on the property, conducting open houses, and showing the property to interested parties.

An individual must accept an offer to buy the property that is at least two-thirds of the current market value of the property. If an offer is rejected, the individual must present evidence that proves the offer is unreasonable and that the individual is continuing to make reasonable efforts to sell the property.[67]

The value of the resource is not counted until the proceeds of the sale are available. See Section F-1260, Conversion of Resources, for treatment from the proceeds of a sale of a resource. Determination of resources is completed as of 12:01 a.m. on the first day of the month. However, if the individual 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.[68]

It is expected that property listed for sale will sell at some price, unless it can be shown by expert opinion to be unmarketable. When it does sell, or if the Medicaid beneficiary makes any other change affecting his or her assets and eligibility status such as taking the property off the market, a 10 day deadline applies for reporting the change to Texas HHSC.

The Social Security Administration's Program Operations Manual[69] provides a more detailed procedure in the context of Supplemental Security Income (SSI) benefits, including execution of an agreement to repay SSI payments received during the sale period, once the property has sold. However, the federal procedure does not require repaying Medicaid benefits, only SSI (cash) benefits. Such an agreement is not required by the Texas rules, because there are no cash payments for the beneficiary to agree to repay.

IV. REVOCABLE TRUSTS OFTEN PREVENT MEDICAID ELIGIBILITY

Prior to December 1, 2006, a trustee of a revocable trust could own the home while retaining its exempt character for Medicaid eligibility provided the home did not exceed the Deficit Reduction Act of 2005 value limitation (which was then \$500,000, increased to \$552,000 in 2016).

Therefore, before December 1, 2006, conveying a residence to a revocable trust appeared to be sufficient to avoid the Medicaid estate recovery program. It was treated as exempt with regard to the transferor's Medicaid eligibility as if he or she owned it outright, and it passed outside the probate estate at death.

However, effective December 1, 2006, a residence held by a revocable trust is *not* treated as exempt.[70] The following rules apply:

- An application by a person whose residence is in a revocable trust will be denied if the value of the residence gives him or her (or the couple, if there is a community spouse) more than the allowable amount of resources. However, if the property is "removed from the trust" (presumably, conveyed by the trustee to the applicant personally), eligibility can be established--but not until the first day of the first calendar month after the conveyance has occurred.

---

[67] In the author's opinion, this was not intended to require selling at less than fair market value. I believe the intent is that rejecting an offer of at least two-thirds of a real estate agent's estimate of fair market value—that is, perhaps, two-thirds of the offering price—establishes a rebuttable *presumption* that the price rejected is fair market value. That interpretation is based on the underlying SSI law (which expressly says it is only a presumption) and on the law providing for a transfer penalty (again, subject to defenses) for *accepting* an offer below fair market value. The agency cannot simultaneously require and penalize accepting such an offer, and I do not believe that is the intent.

[68] Medicaid for the Elderly and People with Disabilities Handbook F-3130

[69] POMS SI 01150.200 et seq. (found at https://secure.ssa.gov/apps10/poms.nsf/lnx/0501150200!opendocument).

[70] Medicaid Eligibility for the Elderly and People with Disabilities Handbook § F-3210.

- When eligibility is redetermined (usually annually), the original application and other documents in the case will be reviewed to determine whether there is a residence in a revocable trust. If so, a notice will be sent to the client that the residence will be counted as a resource. Unless the residence is removed from the trust before the re-determination due date (12 days after the date on the notice that redetermination is required), eligibility will be terminated.
- Both upon initial application and in the annual review, the HHSC worker will determine whether the equity in the residence exceeds the value limit. If so, the client will be notified and given a "rebuttal process."

Loss of exemption of the home is not the only disadvantage of revocable trust planning for a Medicaid applicant. In addition, a revocable trust has the following potential disadvantages as an estate planning device if the grantor (or either spouse) ever applies for Medicaid:

- A trust established in the revocable trust for the institutionalized spouse at the death of the community spouse may be counted as a resource (although it should not be if established by will, as discussed below in Section III.B.).
- Withdrawals of corpus are treated as "income."
- If the trust becomes irrevocable upon the incapacity of the settlor, or upon the death of the spouse, then the corpus will count as a resource, but the settlor will not have the legal authority to revoke the trust and engage in Medicaid planning or other estate planning (such as gifting).
- When a Medicaid eligible person has a spouse who is not on Medicaid, assets must be removed from the trust and titled in the community spouse's name before the first annual review after eligibility is established. After that time the institutionalized spouse cannot have more than $2,000 in countable resources in her or his name.

If the Medicaid planning client already has a revocable trust, consider carefully whether one or more of these considerations indicate it should be revoked and replaced with a will-based estate plan. If that is not currently necessary, be sure someone has a power of attorney giving the agent the authority to revoke the trust, and/or reconvey assets to the settlor, in the event this becomes advisable in the future.

Alternatively, consider conveying the home out of the revocable trust then back to the same trust using an Enhanced Life Estate Deed.

Where a trust is necessary for management during the life of a community spouse (the beneficiary), but a spousal Medicaid scenario is likely or imminent such that the trust property is best protected if it is partitioned to separate property of the community spouse and then passes through that spouse's will into a testamentary trust for the surviving spouse (where the inheritance will not disqualify the surviving, Medicaid eligible spouse but benefits him or her), such property is best (i) distributed out of the revocable trust previously established by both spouses, then (ii) partitioned to the community spouse, then (iii) contributed to a new revocable trust that benefits only the community spouse, and terminates and distributes to the estate of the community spouse beneficiary at the death of that spouse, so that it passes into the testamentary trust for the benefit of the Medicaid-eligible spouse. The need for protection must be significant for most clients to comprehend and tolerate this many steps to get property from a countable revocable trust into an exempt trust for the surviving spouse, but where capacity is not a barrier and Medicaid is the only solution to pay for long-term care, this approach may be justified. For a more complete discussion of the basic underlying strategy, see the section below titled "Strategy: Testamentary Trust for the Surviving Spouse."

V. THIRD-PARTY TRUSTS PROTECT MEDICAID ELIGIBILITY

The previous section referred to revocable trusts established by an individual or couple, in which both settlor(s) and beneficiary(ies) are the same persons. The Medicaid program treats much more favorably trusts that are settled by someone (anyone) other than the Medicaid applicant. Such trusts are generally referred to as "third-party trusts."

A. The Medicaid Rule Governing Third-Party Trusts

The Texas Medicaid program will not count the corpus of a third-party-settled trust as a resource, so long as the beneficiary is not the trustee and distributions are made only in the discretion of the trustee.[71] That is, the beneficiary does not have authority under the terms of the trust to control the distributions.[72] This important rule supports the following Medicaid planning strategies that every estate planner needs to know.

B. Strategy: Testamentary Trust for the Surviving Spouse

When a Medicaid beneficiary (institutionalized spouse) has a spouse who is not also on Medicaid (community spouse), the Medicaid rules require that all countable assets of the institutionalized spouse exceeding $2,000 in value must be titled in the name of the community spouse no later than the first annual review.[73] There is no requirement that the property be conveyed to the community spouse as his or her separate property. Therefore, for example, if the property consists of interests in joint accounts, the funds or other assets can simply be transferred from the joint accounts to one or more accounts titled only in the name of the community spouse.

However, if the institutionalized spouse has the capacity or has appointed an agent with authority to convey without consideration to the community spouse, the couple may elect to convert all the community property of the institutionalized spouse to separate property of the community spouse, as well as transferring separate property of the institutionalized spouse to the community spouse.[74] That was done even before the advent of estate recovery, primarily to allow the community spouse to direct all the property away from the institutionalized spouse in his or her estate plan--either to a testamentary Supplemental Needs Trust for the benefit of the institutionalized spouse or to the children--to avoid disqualifying the institutionalized spouse for Medicaid in case she or he is the survivor. Now it is even more important, because community property retained by the institutionalized spouse will not only disqualify him or her after the death of the community spouse but will be subject to estate recovery if any is left after the death of the institutionalized spouse—e.g., a one-half community property interest in the home.

Some states seek to impose a lien on property of the institutionalized spouse and/or to trace property into the estate of the surviving spouse. Therefore, this strategy now has the additional advantage, even if the community spouse is the survivor, of emptying the estate of the institutionalized spouse so as to avoid the risk that Texas Medicaid may someday attempt to impose a lien on it and/or to trace it into the estate of the surviving spouse. Although a lien cannot be imposed on the survivor's homestead without a constitutional amendment, the Medicaid agency could seek to trace non-homestead property, such

[71] 1 T.A.C. §358.336; Medicaid Eligibility for the Elderly and People With Disabilities Handbook §F-6100.

[72] In the authors' experience, the Medicaid program has routinely approved third-party trusts with the word "discretion" or a derivative in the distribution powers. Arguably, a trust that requires distributions according to an ascertainable standard may give the beneficiary power to control distributions (by filing suit). For example, language like the following clearly allows a court to determine that the trustee should make different or additional distributions upon suit by a beneficiary: "Trustee shall make distributions for the health, education, maintenance and support of the beneficiary." However, a Texas court probably can determine that a trustee of a discretionary trust has abused that discretion, also upon suit of the beneficiary. Therefore, in the authors' opinion, even "mandatory HEMS" language in a third-party trust should not make the trust's assets "available" to the beneficiary under the Texas Medicaid rules, as long as the trust instrument does not by its terms give the beneficiary any control over distributions.

[73] The first annual review is supposed to be one year after the date of the notice certifying eligibility of the institutionalized spouse. Medicaid Eligibility for the Elderly and People with Disabilities Handbook §§J-4000, J-5100.

[74] Renee Lovelace, "Spousal Care Protection Trusts: Special Needs Trusts for the Surviving Spouse," State Bar of Texas Advanced Elder Law Course, March 10, 2006, Dallas.

as the institutionalized spouse's community interest in financial accounts, if they are merely retitled in the name of the community spouse without effective agreement of the institutionalized spouse.

If the property involves low-basis assets, both spouses should be advised that making it separate property of the community spouse involves loss of the step-up in basis on the death of the first spouse to die.

As indicated, the next step ordinarily is to provide in the will of the community spouse a testamentary Supplemental Needs Trust for the institutionalized spouse, to be established only if the institutionalized spouse is the surviving spouse. Then if it comes to pass that the community spouse dies first, the following will occur:

- Medicaid eligibility of the institutionalized spouse will continue without interruption, because he or she continues to have less than $2,000 in countable assets.
- Assets of the trust can be used for any needs of the institutionalized spouse—for example, medical care not paid by Medicaid or any other benefit, products and services to make life more comfortable, maintenance of the home.
- Assets of the trust—usually including the residence if any—pass under the terms of the trust at the death of the institutionalized spouse, outside his or her estate. Therefore, they pass free of estate recovery. If the institutionalized spouse had maintained ownership of his or her interest in the residence (usually a community property interest), it would be subject to estate recovery, even if the community spouse made someone else (such as children of the couple) beneficiaries of the will. Therefore, conveyance of the homestead to the community spouse, via a deed that includes marital property partition language, as well as transfer of all other assets in a marital property agreement, should be considered when the spouses are planning for one of them to receive Medicaid benefits.

This result can be obtained with confidence *only* with a *testamentary* trust (established in the will of the community spouse). That is because the federal Medicaid statute provides that a trust is to be considered self-settled (and therefore its assets are counted as assets of the Medicaid beneficiary who is also beneficiary of the trust) if it was established with assets of the beneficiary's spouse "other than by will."[75]

Therefore, a revocable trust established by either or both spouses will not provide this protection, even if it is funded entirely with separate property of the community spouse. Likewise, a standby trust for the institutionalized spouse will not protect the assets, even if it is funded by a provision in the will of the community spouse. Unless it is a testamentary trust, its assets can be treated as assets of the surviving spouse who is the beneficiary.

A note on which marriages are recognized in Texas in relation to these estate planning techniques as well as the myriad Medicaid eligibility and estate recovery rules and policies that differ based on marriage (e.g., Medicaid has two separate systems for both the assets and income of married persons and unmarried persons): following the U.S. Supreme Court's June 26, 2015 decision in *Obergefell*[76], the following statement of policy was issued by the Texas Health and Human Services Commission:

For all programs, the policies and procedures that apply to opposite-sex marriages now apply to same-sex marriages, effective June 26, 2015.[77]

C. Strategy: Standby Trust for Any Person with a Disability

However, as long as the beneficiary of a third-party trust is *not* the spouse of the settlor, there is no requirement that it be established by will. Therefore, providing for a child of the settlor (or anyone other than the settlor's spouse) in an inter-vivos revocable trust, or providing for a

---

[75] 42 U.S.C. §1396(d)(1)(2)(A). There have been recent reports of Texas Health and Human Services Commission treatment of inter vivos trusts as if they were testamentary for this purpose, but those should not be relied on for planning purposes.

[76] Obergefell v. Hodges, 576 U.S. __ (2015).

[77] MEPD Policy Bulletin 16-01, page 5, at http://www.dads.state.tx.us/handbooks/mepd_policy/09-18-15_16-%2001.pdf .

bequest in a will to such a trust, will protect the assets under the third-party trust rules discussed above.

In fact, providing for such trusts in estate planning has become fundamental to the point of being an ethical requirement. A Maine attorney received a six-month suspension of his license for, among other omissions, failing to include a Supplemental Needs Trust in a client's will that would have avoided disqualifying the beneficiary for Medicaid.[78]

Mechanically, the authors have found that a "standby" trust (funded only with a $1 or $10 bill) for a non-spouse beneficiary has several advantages over a testamentary trust:

- Clients understand it better because there is a separate trust instrument.
- Financial institutions administering retirement accounts and life insurance understand it better for the same reason, which reduces substantially the time and frustration required to change beneficiary designations of those accounts.

Such trusts can usually be standby (only nominally funded), because there is rarely a need for a trustee during the settlor's lifetime. Both the Medicaid and SSI rules are now clear that help by an individual is governed by the same "income" rules as help by a trustee. Therefore, for example, the parent of a child with a disability can simply continue to help the child personally rather than enduring the complexity of a trust. Unless an independent trustee is to be appointed, there is no potential income tax advantage to using a trust during the settlor's lifetime. Therefore, there is no need to make the standby trust irrevocable.

We conclude that a revocable standby trust, named as beneficiary in the will(s) and/or beneficiary designations, is usually the best vehicle for estate planning for a person with a disability—as long as that person is *not* the spouse of the settlor.

[78] Board of Overseers of the Bar v. Ralph W. Brown, Esq, Docket No. Bar-01-6 (Maine, October 25, 2002).

D. Strategy: Contingent Trust for Any Person with a Disability

Taking it one step further, what if a will or revocable trust beneficiary who is in perfect health at time of execution later develops a disabling condition for which SSI and/or Medicaid benefits are available? We routinely provide for a "contingent trust" for any beneficiary deemed too young to manage their own financial affairs or lacking that capacity due to mental impairment. Why not add need for disability benefits as an additional "trigger" for a contingent trust?

Appendix 3 illustrates one way of drafting such "trigger" language, which adds also the contingency of a beneficiary's being in bankruptcy.[79]

VI. ANYONE UNDER 65 WITH A DISABILITY CAN GET MEDICAID AS FAR AS ASSETS ARE CONCERNED

This section deals exclusively with self-settled trusts. In contrast to the "third-party" trusts discussed above, these are trusts involving the same individual as both the contributor of the assets of the trust and a beneficiary.

By definition this is not an "elder law" topic, because such trusts can be used to qualify the settlor-beneficiary for Medicaid only if he or she is under 65 years of age at the time of the transfer.

A. SSI--For Low-Income Persons with Disabilities

If a person with a disability has less than $733 per month (in 2016) in countable income, he or she can qualify for SSI (and therefore for Medicaid) once he or she has countable assets below $2,000. The need to title assets exceeding

[79] This form is based on Prof. Stanley Johanson's "Howard Brown Will," which he has generously placed in the public domain. Note that important parts of the trust, such as appointment and powers of the trustee, are found in various parts of the will form and are not included in our appendix. Addition of disability as a trigger is the authors' suggestion.

this limit typically arises when such a person wins a judgment or settlement in a personal injury case or receives a distribution from an estate or trust.

Sometimes the "asset problem" can be solved by buying "exempt" property like a residence, a vehicle, business property, a prepaid funeral contract and personal and household items. However, if more assets must be "disposed of," they can always be transferred to a trust as described below – but only for a transferor who is under age 65.

1. Individual Under-65 Self-Settled Trust

Under legislation effective as to trusts created on or after January 1, 2000, if a trust is established with assets of the individual (SSI applicant) or the individual's spouse, and the trustee can under any circumstances make any payment to the individual or the individual's spouse, the corpus will be treated as a resource of the individual. If assets are titled in an irrevocable trust created/funded by an SSI applicant of which the applicant is not a beneficiary, the transfer will be penalized, with a 36-month look-back period. However, the assets of a self-settled trust will not count as resources of the individual if the trust provides for repayment of Medicaid benefits after the beneficiary's death and meets certain other requirements.[80]

Specifically, the trust must meet the following requirements:

- *Who "establishes" the trust*: Established for the benefit of the SSI applicant ("client") by a parent, grandparent, legal guardian, or a court. By definition, however, these trusts are funded with assets belonging to or controlled by the beneficiary, so even where a parent or grandparent establishes the trust, the settlor provides only a nominal contribution (typically, a $10 bill attached to the trust instrument). If none of those settlers is available, the SSI applicant can use a "pooled trust" (discussed below) or a trust created under Texas Estates Code §1301.051 et seq.[81]

- *"Payback provision":* The State will receive all amounts remaining in trust upon the death of the SSI applicant, up to an amount equal to the total Medicaid payments made for the beneficiary.

- *Satisfaction of subrogation claims:* Any Medicaid subrogation claim must be satisfied before the trust is funded, and any Medicare, insurance subrogation and hospital liens must be satisfied as well.

- *Source of funds:* Although the statute allows funding of the trust with any property owned by the beneficiary, agency representatives in some states allow such trusts to be funded only with personal injury awards and not with inheritances and property owned by the beneficiary. The Texas Medicaid program has not adopted any such limitation on the source of funds, nor is there any provision in the federal law permitting such limits.

- *Irrevocability:* The trust must be irrevocable.

- *Trustee*: A trust created under Property Code §142.005 (by a trial court, typically in a personal injury case) or under Texas Estates Code §1301.051 et seq. (in a guardianship or for an incapacitated person, or for any person with a disability) must have a corporate trustee. (This requirement does not apply if the trust's principal is under $150,000 or if it can be shown that no financial institution is willing to serve as trustee; nor is it required if the trust is "established" by a parent or grandparent under 42 U.S.C. §1396p(d)(4)(a).)

- *Distribution standards:* Although the statute is silent as to provisions for distributions to or for the beneficiary, such trusts usually either require that such distributions either be entirely discretionary with the trustee, or limited to distributions that will "supplement and not supplant" public benefits. Another variation is to provide for absolute discretion, with a statement of intent that the distributions be used to "supplement and not supplant" public benefits. Yet another option, to avoid the ambiguity of the latter type, is

---

[80] Foster Care Independence Act of 1999, H.R. 3443, P.L. 106-169, §205, amending Social Security Act §1613, 42 U.S.C. §1382b, POMS SI 01120.203B.

[81] Formerly Texas Probate Code §867. Texas Probate Code §867(a)(7) (now Texas Estates Code §1301.057) was added in 2011 to permit establishment by a guardianship court of a trust for a person with only a physical disability. Therefore, there is no longer a need to show mental incapacity nor to establish any level of guardianship for the court to create such a trust.

to provide expressly that the trustee may make distributions that disqualify the beneficiary for benefits, if the trustee in its discretion determines that would be in the beneficiary's best interests.

2. Pooled Trust

An additional option is provided by "pooled trusts" as authorized by 42 U.S.C. §1396p(d)(4)(c). They must meet essentially the same requirements discussed above for an individual self-settled Medicaid trust. Such pooled trusts are available in most states. Forms and brochures may be found and downloaded at the website of The Arc of Texas at http://www.thearcoftexas.org/. On the home page click on Programs and Services, and on the page that comes up, scroll down and click on Master Pooled Trust.

B. Anyone Needing Long-Term Care

Individuals with disabilities frequently cannot qualify for SSI because they have income (such as Social Security Disability on their own work record) that is too high. However, if they need nursing home care or home care, their income usually will not disqualify them for Medicaid benefits providing that kind of care. In that case, they can always solve the "asset problem"--until age 65--by transferring their assets to one of the types of trust discussed above.[82]

Use of a trust is not always indicated. For other ways of spending down, see Appendix 6 to this paper.

C. Requirement of Paying Subrogation and Lien Claims First

Before funding any of the types of trust discussed above--indeed, before the proceeds are distributed out of an attorney's trust account to anyone--it is necessary to pay any subrogation or "lien" claims of Medicare, Medicaid, hospitals, insurance companies and perhaps other creditors. Those important issues are not covered in detail in this outline, but the contact information for determining the amount to be paid is in Appendix 2.

VII. NO REAL INCOME LIMIT FOR MOST LONG-TERM CARE MEDICAID

In calendar year 2016, the long-term care Medicaid "income cap" in Texas is $2,199 per month in "countable" income of the Medicaid applicant. This amount changes on January 1 of every year with inflation.

The "income cap" for establishing eligibility for a married person is the same as for a single person. The critical question is how the income is apportioned between the spouses, i.e., whose "name is on the check," regardless of community property status of the income. Because countable income can be reduced by running it through a "Qualified Income Trust" (discussed below, sometimes called a "Miller Trust"), income never has to be a disqualifying factor for (a) nursing home Medicaid or (b) waiver program Medicaid.

After eligibility of one spouse is established, the income of the eligible spouse is paid to the ineligible spouse (the spouse at home), to the extent necessary to provide a spousal allowance ($2,980.50per month in 2016).[83]

Most states have no "income cap," so Medicaid simply supplements the client's income to the extent necessary without requiring the "Miller Trust" procedure discussed below. The same result can be reached in Texas, but it takes some work. It is necessary to establish a "Miller Trust" (which HHSC calls a "Qualified Income Trust"). For an unmarried client, this has the effect of allowing for eligibility for the Medicaid nursing home and waiver programs, provided that all the client's income above the usual personal needs allowance ($60) and other deductions (usually health insurance premiums) is paid to the nursing home. Likewise, for a married client with a community spouse, this has no effect on how the income is treated after eligibility. That is, it allows for eligibility of the institutionalized spouse, and the community spouse receives enough total income (if available) to give her/him the $2,980.50 (in 2016) spousal allowance.

[82] 42 U.S.C. §1396p(d)(4)(a),(c)(Medicaid "OBRA 93").

[83] Medicaid for the Elderly and People with Disabilities Handbook §J-7200.

A "Qualified Income Trust" can be used to reduce countable income for nursing home Medicaid and the Medicaid "waiver" programs discussed above. It cannot be used for SSI, so it does not apply to the Medicaid benefits linked to (automatically awarded with) SSI enrollment. It is likewise ineffective for the non-waiver home care programs, variously known as Primary Home Care, Family Care and other names (e.g., “Community Attendant Services,” part-time Medicaid-funded attendant care for a person requiring help with the activities of daily living and assets below $2,000).

Investment and some forms of pension income for a married client can be reduced by transferring to the spouse all assets, including income streams. For qualified retirement benefits being paid as annuity (pension) benefits, this requires a court order in the form of a Qualified Domestic Relations Order (QDRO). Transfer of assets and/or changing the pension payee via QDRO should always be used instead of a "Qualified Income Trust" if that will preserve more income for the community spouse. The Medicaid rules ignore the community property nature of the institutionalized spouse’s assets and pension, as well as lifelong retirement planning by couples. However, the exemption of transfers of assets and income to the community spouse enables the limited preservation of long-standing financial plans with appropriate guidance based on the Medicaid rules.

In summary, because of the Miller Trust and QDRO strategies, too much income is never in itself a reason not to apply for nursing home Medicaid or a Medicaid waiver program. These strategies are essential for the client’s well-being where income is not sufficient for the care needed, and assets are limited. However, if income is sufficient for current expenses—including nursing home, Assisted Living Facility or other long-term care--and particularly if there is no community spouse--it is important to question closely whether Medicaid eligibility is really in the client’s best interests.

VIII. LOW INCOME COUPLES: ONE SPOUSE ON MEDICAID WITHOUT “SPEND DOWN”

When only one spouse (the "institutionalized spouse") needs institutional care, some special rules go into effect to prevent "spousal impoverishment" of the other spouse ("the community spouse"). In the usual case, all resources of both spouses are combined. A "protected resource amount" for the community spouse is then determined, according to the rules discussed below, and the couple must "spend down" to that amount before they can establish eligibility for the community spouse. Then, within the first year of eligibility, all countable assets in excess of $2,000 must be transferred to the community spouse.

However, “spending down” is not always necessary. The following is a summary of the specific rules, showing, for example, how a couple with combined Social Security incomes of $2,400 per month may be able to keep $589,200 in assets in the low-interest-rate environment as of this writing (assuming a 1-year CD rate of 1.0%).

HHSC takes a "snapshot" of all the countable resources of both spouses, as of 12:01 a.m. of the first day of the month in which the first continuous period of institutionalization began (on or after September 30, 1989). Hospitals, as well as nursing homes, are "medical institutions," and a move from one institution directly to another does not stop the clock running on the 30-day period. Therefore, if a spouse goes into a hospital on November 30, moves to a nursing home on December 1, and stays in the nursing home at least 28 more days, the "snapshot date" will be November 1.

All property is included, without regard to its characterization as community or separate. The PRA is the *greater* of

- One-half the couple's combined countable resources, not to exceed the maximum set by federal law ($119,220 in 2016) *or*
- The minimum set by federal law ($23,844 in 2016).

For example, if on the snapshot date:

total resources=$300,000, PRA= $119,220.
total resources =$100,000, PRA = $50,000.
total resources=$20,000, PRA = $23,844.

However, if the spouses' combined incomes are low enough, the amount of assets they can keep may be increased above what this formula would indicate. The lower the one-year CD rate, the higher the value of resources protected under the “expanded PRA” rules, but this is an opportunity the applicant must specifically claim in the application process.

(1) The spousal allowance. Federal law provides for a "minimum monthly maintenance needs allowance" for the community spouse, which in 2016 is $2,980.50 per month if the other spouse is in a nursing facility. If the community spouse's income (including that spouse's investment income but not including any income of the institutionalized spouse) is less than that amount, the community spouse is entitled to keep a "spousal allowance" consisting of enough of the income of the institutionalized spouse to give the community spouse the full spousal allowance. The rest of the income of the institutionalized spouse, if any, goes to incurred medical expenses (usually medical insurance premiums), the $60 per month personal needs allowance, and co-payment (i.e., to the nursing home).

(2) The right to a PRA increase to provide for the spousal allowance. In some cases, all the income of both spouses together is insufficient to give the community spouse the full spousal allowance. If either spouse establishes this, HHSC is required to increase the PRA to an amount sufficient to provide the full minimum monthly needs allowance, calculating investment income based on the current one-year CD rate.

The calculation is done as follows:[84]

- The total resources that can be protected are equal to cost of a one-year CD that will produce enough interest, when added to the couple's total *noninvestment* countable income, to give the community spouse a total of $2,980.50per month income (in 2016).
- The formula is: annual income needed X 100 divided by interest on one-year CD = maximum dollar amount of resources to be protected.
- The interest rate to be assumed in doing the calculation is the rate of a one-year CD as published in the local paper or as provided by a local bank.
- This formula is used regardless of the actual income paid by the couple's resources; and they need not actually buy a one-year CD.
- In determining the amount to be paid from the institutionalized spouse's income to the community spouse after eligibility, the Medicaid worker uses the actual dollar amount being produced by the investments if it is in excess of the amount a one-year CD would produce; but if it is *less* than that amount, the Medicaid worker uses the amount a one-year CD would produce. However, in determining how much the "Protected Resource Amount" will be, only the CD rate is used, regardless of whether actual income is more or less.
- Until eligibility is certified, the total protected may not exceed the total of the couple's resources on the "snapshot date."

Example: The total of the noninvestment incomes (e.g., Social Security and pension incomes) of both spouses is $2,400 per month. After the $60 per month personal needs allowance, $2,340 is left. A bank in which the couple has an account offers one-year CD's with an interest rate of 1.0% per annum.

Income needed = $2,980.50 - $2,440 = $540.50 /month X 12 = $6,486 /year

Potential **PRA** = $6,486 ÷ .01 = $648,600

In applications for “waiver” home care by married persons, the home care personal needs allowance of $2,199 per month is substituted in these calculations for the $60 personal needs allowance permitted to nursing home residents.[85] Therefore, it is very common for a couple to be able to protect all their assets in that situation.

IX. BOTH SPOUSES IN NURSING HOME: ONE SPOUSE ELIGIBLE IF OTHER TRANSFERS ASSETS

When *both* spouses reside in medical institutions, whichever of them applies for Medicaid is treated as if he or she were unmarried, and only assets titled in his or her name are treated

[84] Medicaid for the Elderly and People with Disabilities Handbook §J-6100-6310, Appendix XXVII.

[85] MEPD § J-6300 to J-6310 (effective September 1, 2015); MEPD Bulletin #16-01. This was required by §2404 of the Affordable Care Act.

as "resources." Community property laws are disregarded, and there is no transfer penalty for transfers between spouses. Therefore, all that is required to qualify one spouse for nursing home Medicaid is to title all accounts, cash value life insurance, real property other than residence, etc. in the name of the other spouse. This is true regardless of whether both spouses are in the same nursing home, or they are in different nursing homes, or one is in a nursing home and the other in a hospital. Even if the spouse applying for Medicaid does not need to be in a nursing home and is staying there only to accompany the other spouse, the transfer of assets by the Medicaid applicant spouse to the private-pay spouse is effective to qualify the spouse with "medical necessity" for nursing home Medicaid, at least in terms of the asset limit.

Most Medicaid eligibility workers are not aware of this rule. Therefore, when it applies, the author routinely includes the following paragraph in the letter transmitting the Medicaid application:

Please notice that «Client Name»'s spouse also resides in a nursing facility. Therefore, the "spousal impoverishment" rules do not apply. Resources and income of the non-applicant spouse are not deemed to the applicant spouse because they are not regarded as living in the same "household." Therefore, the resource limit for the spouse applying for Medicaid is $2,000, and the non-applicant spouse can have unlimited resources. Regarding deeming of resources, see Medicaid Handbook F-1410: "In situations where an institutionalized person has an ineligible spouse also living in a facility, only the person's resources are counted against the individual resource limit." Regarding deeming of income, see Medicaid Handbook G-6120. Since there is no penalty for transfer of assets between spouses, either spouse can qualify by transferring all but a maximum of $2,000 in countable resources to the other. Medicaid Handbook I-3000.

When this is done, the ineligible spouse does not have a right to any of the income of the Medicaid-eligible spouse. That is, there is no $2,980.50 spousal allowance (as there is when one spouse is not in a nursing home) and the eligible spouse will co-pay all monthly income to the nursing home after the $60 personal needs allowance and medical insurance premiums. However, getting to keep all the assets is usually a better deal.

X. ASSET TRANSFERS, MEDICAID PENALTIES, AND EXEMPTIONS

A. SSI-Linked Medicaid

An individual may be subject to a period of ineligibility for having transferred (or disposed of) assets or resources prior to applying for Supplemental Security Income (SSI) that would otherwise have disqualified the applicant. This is known as a "transfer penalty" or "look-back period."

When an individual applies for SSI, the agency asks if any uncompensated transfers occurred within the 36 months prior to the date of application or the date of the transfer, whichever is later (this is the "look-back period"). If not, there is no penalty, regardless of how much was transferred. If so, then unless an exception to the transfer penalty applies (as discussed below), an ineligibility period is determined by dividing the total uncompensated values of all resources disposed of during the look-back period, by the maximum monthly SSI benefit (including any state supplement, of which there is none in Texas) effective on the date of application. Fractions are rounded to the nearest whole month, and the entire calendar month in which the transfer was made is included as a penalty month. Ineligibility begins on the first day of the calendar month of the transfer.[86]

For example, if an application is filed in year 2016, a transfer of $2,000 on September 14, 2016 will result in a penalty period of $2,000 ÷ $733 = 2.73, rounded down to 2 months. Ineligibility will begin September 1, 2016, and end October 31, 2016.

If there are multiple transfers with overlapping penalty periods, the amounts transferred are added together and treated as one transfer, occurring on the date of the first of the overlapping transfers.

The maximum penalty period is 36 months from the date of the transfer. Unlike the Long Term Care Medicaid transfer penalty for transfers

[86] Social Security Act §1613(c)(1)(C), 42 U.S.C. §1382b.

on or after February 8, 2006, the SSI law still begins the penalty period on the first day of the calendar month in which the transfer is made, not at some time in the future when the applicant would have been eligible but for the transfer.

The SSI transfer penalty does *not* apply to the following:

- Transfers to a trust that is considered a resource of the settlor (in which case the settlor will be disqualified by the existence of the trust as long as the corpus treated as a resource exceeds $2,000)
- Transfers to the spouse of the transferor or to another for the sole benefit of the spouse, or from the transferor's spouse to another for the sole benefit of the transferor's spouse (e.g., in trust)
- Transfers to, or to a trust (including an "Under 65 Special Needs Trust" under 42 U.S.C. §1396p(d)(4)) established solely for the benefit of, the transferor's child who is blind or has a disability
- Transfers to a trust established solely for the transferor if he or she is under age 65 and has a disability, and the trust is created under 42 U.S.C. §1396p(d)(4)(a),(c) (self-settled under-65 SNT's and pooled trusts, discussed above)
- Transfers proven by the individual to have been with intent to receive fair market value
- Transfers proven by the individual to have been transferred exclusively for a purpose other than to qualify for SSI
- Transfers in which all resources transferred have been returned to the transferor
- Transfers of a residence of the transferor to any of the following:
  1. Transfers of the residence to the spouse of the transferor
  2. Transfers of the residence to a child of the transferor under 21 years of age, or who is blind or has a disability
  3. Transfers of the residence to a sibling of the transferor who has an equity interest in the residence and who was residing in the residence for at least a year immediately before the date the transferor became an institutionalized individual
  4. Transfers to a son or daughter of the transferor who was residing in the residence for at least two years immediately before the date the transferor became an institutionalized individual, and who provided care permitting the transferor to reside at home

Social Security may waive denial of eligibility for a transfer on a finding that it would work an "undue hardship" under criteria established by the agency.

B. Long-Term Care Medicaid

The long-term care Medicaid transfer rules are essentially the same as the SSI rules, with the following important exceptions:

- The divisor for calculating the period of ineligibility is much higher, resulting in a shorter period of ineligibility. Instead of being the maximum SSI benefit rate (one month for every $733 transferred), it is the average cost of nursing home care (one month for every $4,755.34 transferred, expressed as one day for every $156.34 transferred).
- The lookback period is 5 years for long-term care Medicaid rather than 3 years for SSI.
- The start date for the penalty period is not first day of the calendar month of the transfer. Instead, it is the first day the transferor *would* meet all the requirements for Medicaid nursing home care, but for the transfer. That is, the transferor must actually be residing a Medicaid nursing home, meet the asset and income and “medical necessity” requirements, file an application, and be denied. Then, the period of ineligibility starts as of the first date he or she would have qualified for nursing home payment but for the transfer penalty. (Actually, the application is "certified," but only for benefits other than payment of nursing home care, such as free Medicare Part D prescription medications and Medicaid payment of Medicare copayments and deductibles.)

C. Disclaimers as Transfers

For purposes of federal gift tax and rights of creditors, property subject to a qualified disclaimer is treated as if it had never been owned by the disclaiming party. However, the long-term care Medicaid rules treat such property as if it was received by the disclaimant and immediately transferred.[87]

If Medicaid is available as a result of SSI eligibility, though, a disclaimer may not be treated as a transfer. According to one Social Security official, a disclaimer is not a transfer if it is filed before the resource is "constructively received"—that is, before the earlier of two dates: (a) the date it is "available" (or is alleged by the beneficiary to be available) and (b) the date the estate is closed.[88]

Reminder: Disclaimers often do not direct property to the desired recipients. For that reason, as well as their being treated as assignments under Medicaid law, they should almost always be avoided where Medicaid eligibility is a concern of the disclaimant.

D. Avoiding the "Transfer Traps"

Clients sometimes create great barriers to Medicaid eligibility by commingling their assets and/or income with those of other family members (usually their children). When Child puts money in Parent's bank account, that money is "income" to Parent. This is a problem only if Parent is trying to qualify for Medicaid in the same month. However, any assistance from Parent to Child (that is, from any Medicaid applicant to anyone else, unless a transfer penalty exception applies) is treated as a "transfer" potentially subject to the transfer penalty discussed above if it is within the five-year "lookback period." Typically, this problem arises when a parent pays for a car that is titled in a child's name, or makes a child's mortgage payment to avoid foreclosure, or buys improvements for the child's home, or pays a grandchild's college tuition. If the parent applies for long-term care Medicaid within five years after the calendar month of the "transfer," it must be disclosed and explained.

Here are some guidelines to share with clients for minimizing this problem, whenever there is a concern that Medicaid may be needed at some point:

- *Avoid commingling* the client's funds with assets of anyone else. It is all right to have a joint account allowing management by both parties, but put only one party's assets into it and never use the assets for the benefit of the other party. Typically, Parent will allow Child to be a party to a bank account and/or investment account whose assets were contributed entirely by Parent. That is OK but never put any of Child's assets into that account and never pay Child's bills from it. Medicaid presumes any joint account is owned entirely by the Medicaid applicant, so avoid any commingling.
- *Avoid using client assets for the benefit of anyone else* unless it is at a time when the client has no apparent need for long-term care and the purpose of the transaction can be documented as entirely other than qualifying for Medicaid. Keep receipts and all other paperwork.
- *Consider restraining the generosity of family members* who are willing to help, if that will only serve to postpone Medicaid eligibility. For example, if Parent is spending principal for Assisted Living Facility care, Child may consider saving his or her potential contribution in case nursing home Medicaid is needed. That will maximize the assets available for supplemental care such as paying the extra cost of a private room or of a personal attendant.

The following is advice we routinely give Medicaid planning clients in this regard. It incorporates some more specific advice contained in the Medicaid rules and policy:[89]

---

[87] 42 U.S.C. § 1396p(h)(1); Medicaid for the Elderly and People with Disabilities Handbook § E-3372.

[88] Reba Collins, "Questions Regarding Trusts and Other SSI Issues," University of Texas School of Law Special Needs Trusts Conference 2011. The SSI statute at 42 U.S.C. §1382b(c)(1)(A)(i) provides for a transfer penalty if a beneficiary "disposes of resources" but does not have the specific language of the long-term Medicaid statute at 42 U.S.C. § 1396p(h)(1) defining "assets" to include income or resources to which the individual or spouse is entitled but does not receive due to action by the individual or spouse.

[89] Except as otherwise indicated, these planning principles are based on Medicaid Eligibility for the Elderly and People with Disabilities Handbook §§I-4000 – I-4160.

Because of the rules against making gifts, it is essential to avoid inadvertently making "transfers" that could disqualify you for Medicaid benefits. Even if you actually have no intent to qualify for Medicaid at the time you make a gift (that is, a transfer for less than full consideration), such intent is presumed when you apply for Medicaid within 5 years thereafter. For example, the following "transfers" are considered to be "without consideration" and are presumed to be for the purpose of Medicaid qualification:

- An agreement to provide something in the future that has not yet been provided. For example, if you pay a family member $10,000 in advance for rent for ten months, at least part of the payment will be a transfer without compensation until the whole ten months has passed.
- Payment for services that the government later determines "would normally be provided by a family member." Examples of such services are house painting or repairs, mowing lawns, grocery shopping, cleaning, laundry, preparing meals, and transportation to medical care. However, if a family member quits a job to provide care for you, then you can pay for the care up to the amount of gross wages given up to provide the care.
- Repayment of your expenses that have been paid by someone else, if you do not have documentation such as receipts to prove (perhaps years later) that the other person actually paid the expenses. For example, if someone in the family charges the cost of your medications on their own credit card and you later reimburse them with checks, keep the receipts, the credit card statements and copies of the checks.
- Repayment of your expenses that have been paid by someone else, if there is not a *previous* agreement that you are to repay them. For example, if a family member pays for your hospital stay, your reimbursement of the payment will be treated as "without compensation" if you cannot prove you agreed *before* the payment was made to reimburse it.
- Payment by you for anyone else's expenses. For example, if you pay for college tuition for a grandchild or medical bills for your own child, in the event you need to apply for Medicaid within the next five years after making the payment, you will have to prove to the Medicaid program that you were not motivated even in part to pay it in order to qualify for Medicaid.
- Making loans not fully secured by real estate. Even if the borrower signs a legally binding unsecured note, it will probably not be treated as fair market value for the loan because it probably cannot be sold.
- Taking a note, even if it is secured by real estate you have conveyed. Almost all such notes are subject to a “transfer penalty” to the same extent as if you made a gift of the property you sold (unless you can prove an exception to the transfer penalty exists)[90]

Here are examples of some payments you can make, even to family members, that will not lead to a Medicaid "transfer penalty" if they are carefully documented:

- Reimbursement of actual expenses according to a previous agreement. For example, if there are four people in the household and everyone agrees, you can pay your share of the household's expenses for shared food, utilities, property taxes, insurance, rent, mortgage payments, etc. (The previous agreement may be oral, but it will be easier to prove, and you may be able to avoid a an appeal hearing, if it is in writing.)
- Payment of rent according to a rental agreement. However, bear in mind that, to

[90] Medicaid for the Elderly and People with Disabilities Handbook I-6220. For example, that section treats any note that does not “prohibit the cancellation of the balance upon the death of the lender” as being worthless. The author has never seen a note with that language and believes the intent was merely to penalize making a note cancellable on death; but eligibility workers and even agency attorneys applied it literally in one case, forcing an appeal to prove lack of Medicaid intent.

the extent the amount of rent exceeds the actual expenses deductible for income tax purposes, this creates taxable income for the "landlord."

- Payment of lost wages of a person (including even a family member) who quits work to care for you. This is "for compensation," up to the amount of income the person was making immediately before quitting their work.
- Payment of your own legal obligations such as child support, court-ordered payments from a divorce, or payments on a note you signed in exchange for a loan.

A common mistake, sometimes made even by financial advisers, is to assume that the Medicaid program has the same exemption for gifts as the gift tax law. It does not. Under the gift tax law, at present you can give $14,000 per person per calendar year that is not counted for any purpose. However, the same $14,000 gift will cost you three months of ineligibility for Medicaid, unless it happens to be within one of the few exceptions to the transfer penalty.

XI. MEDICAID ESTATE RECOVERY CAN USUALLY BE AVOIDED OR REDUCED

A. Many Medicaid Beneficiaries Are Not Subject to Estate Recovery

1. Estate Recovery Applies Only to Long-Term Care Medicaid

The Medicaid estate recovery program can recover the cost of only the following Medicaid benefits:[91]

- Nursing facility services;
- Intermediate Care Facilities for the Mentally Retarded (ICF-MR);
- Home and Community-Based Services ("waiver" Medicaid home care) and Community Attendant Services (aka Primary Home Care); and
- Related costs of hospital and prescription drug services for beneficiaries of the above three types of program

Therefore, the following Medicaid services are *not* subject to reimbursement under the Medicaid estate recovery program:

- Medicaid linked to SSI or TANF
- Medicare Savings Programs (QMB, SLMB, QI-1)
- Disabled Adult Child Medicaid
- Medicaid for Children and Pregnant Women

Note, however, that all Medicaid services for persons of any age are subject to the "payback" requirement of a self-settled Special Needs Trust--including even services provided before the trust was funded. Likewise, recoveries from a third party liable for medical expenses paid by Medicaid (typically, expenses paid by insurance coverage) are also subject to the Medicaid subrogation claim in all cases. Those are grounds of recovery entirely separate from the Medicaid estate recovery program.

2. Estate Recovery Applies Only to Beneficiaries Age 55 and Over

Estate recovery applies only to the cost of services provided to persons age 55 years or older at the time the services were received. Therefore, the estate of a person who dies before age 55 cannot be subject to estate recovery; and the estate of a person who dies at or after age 55 will not have to reimburse services provided before his or her 55th birthday.

B. Some Beneficiaries Applied Before the "Grandfathering" Date: March 1, 2005

Anyone who filed an application for a kind of Medicaid subject to the Medicaid estate recovery program before March 1, 2005, and who was certified eligible as a result of that application, is not subject to estate recovery. That is true even if he or she lost eligibility later and was re-certified after a gap in eligibility.[92]

---

[91] 1 T.A.C. §373.103(c).

[92] 1 T.A.C. §373.103(a)(2).

C. There Are Many Exceptions to Estate Recovery

If the decedent was survived by any of the following, the Medicaid estate recovery program does not apply:

- Spouse
- Decedent's child under age 21
- Decedent's child of any age with blindness or a disability
- Decedent's unmarried adult child residing continuously in the decedent's homestead for at least one year immediately before death, who intends to continue to reside in the home

D. There Are Several Grounds for Waiver of Estate Recovery

Estate recovery should be waived if it is shown to be a potential cause of "undue hardship," including the following:[93]

(1) The estate property subject to recovery has been the site of the operation of a family business, farm, or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees, and produces 50 percent or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income;

(2) Estate distributees would become eligible for public and/or medical assistance if a recovery claim were made;

(3) Allowing one or more survivors to receive the estate will enable him or her or them to discontinue eligibility for public and/or medical assistance;

(4) The Medicaid recipient received medical assistance as the result of a crime, as defined by Texas law, committed against the recipient; or

(5) “Other compelling reasons.”

If a homestead is involved, then to the extent the estate's equity does not exceed $100,000, the interest of a distributee of the estate with income less than three times the federal poverty level can be set aside under a waiver request.[94]

E. There Are Several Potential Offsets Against Estate Recovery

1. Home Maintenance, Property Taxes and Insurance

MERP rules allow deduction of the cost of home maintenance, property taxes and insurance from the estate recovery claim, provided adequate records are maintained.[95] DADS officials have stated they interpret this as follows, in written responses to questions at the University of Texas School of Law, *Estate Planning, Guardianship and Elder Law Conference*, August 10-11, 2007:

DADS interprets this provision to mean that home maintenance costs are allowed and limited to the expenses incurred for *vacant* homes of *institutionalized* individuals. *With the exception of property taxes and homeowner’s insurance*, MERP does not permit claim deductions when a family member is residing in the recipient’s home." (emphasis added)

2. Direct Payment of the Costs of Care

MERP rules also allow the following deduction from estate recovery:[96]

An amount equal to the necessary and reasonable expenses for the direct payment of the costs of care (including payment of personal attendant care) provided for a deceased Medicaid recipient that enabled the recipient to remain in his or her home and thereby delayed the institutionalization of the Medicaid recipient may be deducted from the MERP claim, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees.

---

[93] 1 T.A.C. §373.209(c).

[94] 1 T.A.C. §209(d).

[95] 1 T.A.C. §373.213(a).

[96] 1 T.A.C. §373.213(b).

XII. TRANSFER ON DEATH DEED: THE NEW LADY BIRD DEED?

A. Lady Bird Deed Overview

The "Enhanced Life Estate" or "Lady Bird" Deed adds to the reservation of a life estate, the reservation of the power to take away from the remainder owner(s) the rights given them in the deed and give those rights to someone else, as well as the right to sell without liability to the remainder beneficiary.[97] It has the following benefits in addition to the benefits of reserving a life estate:

- If a remainder owner displeases the grantor, his or her interest can be taken away.
- If creditors of a remainder owner threaten action affecting the property, the grantor can protect his or her interests by appointing the remainder to someone else. This would not be a fraudulent transfer if the life tenants are not "debtors" as to the creditors.[98]
- Of most interest to this discussion, under the policy cited next below, the conveyance creates no Medicaid transfer penalty; and at the death of the grantor, title will pass under such a deed outside the grantor's probate estate and will therefore not be subject to Texas estate recovery under the current state law.

The Medicaid Handbook provides as follows:[99]

Transfer of the person's home does not result in a penalty when the title is transferred to the person's…children, siblings, etc., if the deed is an enhanced life estate [sic] and has been approved by the regional attorney…

The following definition is important:[100]

> **Enhanced Life Estate Deeds** — A legal document (sometimes known as a Lady Bird Deed) in which one transfers property to their heirs while at the same time retaining a life estate with powers including the right to sell the property in their lifetime.
>
> Since the life estate holder retains the power to sell the property, its value as a resource is its full equity value. If you see a document that appears to transfer property to heirs while retaining a life estate with powers, contact the regional attorney to determine the value of any transfer. The full value of the asset is treated as a countable resource to the individual, unless it is a resource that is otherwise excluded, such as a home to which the individual intends to return.
>
> All Enhanced Life Estate Deeds must be reviewed by the regional attorney.

Attached as Appendix 4 is a sample Enhanced Life Estate Deed.

Notice that under the Medicaid Handbook definition above, unless the property conveyed by an Enhanced Life Estate Deed is exempt, its full value is treated as a resource of the Medicaid applicant, because he or she retains the power to sell it and convert it to cash. Therefore, it is clear that you cannot use a Lady Bird Deed to make property exempt. Its only function with regard to Medicaid is to protect the property from estate recovery. For example, it will not make a farm or ranch exempt if the property cannot be exempted either as a residence or as "business property." Likewise, if a residence is worth more than $552,000, conveying it by Enhanced Life Estate Deed will not solve the problem that (subject to certain exceptions) the value over $552,000 counts as a resource.

However, the following could interfere with the "ideal" operation of this strategy:

---

[97] For a more comprehensive discussion of the Enhanced Life Estate Deed and other real estate issues affecting Medicaid eligibility, see Kristen Quinney Porter & Patricia A. Sitchler, *Where Real Estate and Estate Planning Collide*, State Bar of Texas 2014 Advanced Elder Law Course.

[98] Tex. Bus. & Comm. Code §24.005.

[99] Medicaid for the Elderly and People with Disabilities Handbook I-3100. See also State Medicaid Manual §3258.9A.

[100] Medicaid for the Elderly and People with Disabilities Handbook Glossary.

- Some title companies are not comfortable with insuring a title based solely on such a deed. If such an objection is encountered, it may be necessary to change title companies or to do "cleanup work" such as probating a will or developing a family settlement agreement.
- It may be difficult or impossible to refinance a mortgage or take out a reverse mortgage. An attorney reported recently that a reverse mortgage application was denied on the basis that the grantee of the Enhanced Life Estate Deed was under 62 years of age, so a reverse mortgage would violate federal rules pertaining to such loans.
- The Medicaid program could seek to change its rules so as to make this device no longer effective.
- The Texas Legislature could adopt "expanded estate recovery," thus possibly bringing property so held within the scope of estate recovery, as has happened in many states.[101]

However, the issue most pertinent to this discussion is whether, in some if not all cases, the same functions may be performed more reliably by a Transfer on Death Deed under the new statute creating that instrument.

B. Transfer on Death Deed Overview

The 2015 Legislature added a new Chapter 114 to the Texas Estates Code to provide for a Transfer on Death Deed.[102] Effective September 1, 2015, it provides for a statutory form under which "An individual may transfer the individual's interest in real property to one or more beneficiaries effective at the transferor's death.[103] Such a deed has the following features:

- A deed is governed by Chapter 114 only if it is "authorized under this chapter," and that description "does not refer to any other deed that transfers an interest in real property on the death of an individual."[104]
- It must be "executed and acknowledged on or after September 1, 2015, by a transferor who dies on or after September 1, 2015."[105]
- The new statute "does not affect any method of transferring real property otherwise permitted under the laws of this state."[106]
- A "beneficiary" of the deed may be any "person."[107] "Person" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.
- It is revocable.[108] Revocation may be effected by a subsequent inconsistent Transfer on Death Deed or by an instrument expressly revoking it. The subsequent deed or revocation must be acknowledged by the transferor after the acknowledgment of the deed being revoked and recorded in the county where the deed being revoked is recorded.[109] However, a will may not revoke or supersede it.[110] A judgment of divorce between transferor and beneficiary revokes it automatically if notice of the judgment is recorded before the transferor's death in the county where the deed is recorded.
- It is "a nontestamentary instrument."[111] That is, although it performs a function similar to a will, it is not subject to the

[101] Bonta v. Burke, 98 Cal.App.4th788, 120 Cal.Rptr.2d 72 (2002) held that property conveyed by this type of deed is subject to estate recovery in California, which has an expanded definition of estate recovery (including nonprobate assets).

[102] S.B. 462.

[103] Texas Estates Code §114.051.

[104] Texas Estates Code §114.002(a)(6).

[105] Texas Estates Code §114.003.

[106] Texas Estates Code §114.004.

[107] Texas Estates Code §114.002(1)(4), 114.051; Government Code §311.005.

[108] Texas Estates Code §114.052.

[109] Texas Estates Code §114.057(a)

[110] Texas Estates Code §114.057(b)

[111] Texas Estates Code §114.053.

requirements as to formalities of execution of a will.

- It may not be created through use of a power of attorney.[112]
- During the transferor's life, the transferor retains all rights in the property, including the right to transfer or encumber it, homestead rights and property tax exemptions.[113]
- It does not "affect the transferor's or designated beneficiary's eligibility for any form of public assistance, subject to applicable federal law."[114]
- The beneficiary's interest lapses if the beneficiary fails to survive the transferor by 120 hours.[115]
- Concurrent interests are transferred in equal and undivided shares with no right of survivorship; but the share of a beneficiary who predeceases the transferor passes as if the deed were a devise made in a will.[116]
- "A Transfer on Death Deed transfers real property without covenant of warranty of title even if the deed contains a contrary provision."[117]
- In general, with regard to creditors of the transferor, the property is treated in probate as if it had passed under a will,[118] except it is liable for claims against the estate only to the extent the estate is insufficient to satisfy them.[119]
- However, the property transferred is "not considered property of the probate estate for any purpose, including for the purposes of Section 531.077, Government Code.[120] That section authorizes the Medicaid Estate Recovery Program, and its exclusion was added to the legislation in a committee substitute bill to ensure that it would not be construed to extend the scope of estate recovery beyond the probate estate. Section 114.106 includes other rights of creditors not included in this summary.

C. Comparision of TODD and LBD

1. <u>Effect on Medicaid Eligibility</u>

With both types of deeds, the interest transferred is unmarketable, so there is no transfer penalty; and it passes outside the probate estate, so there it is not subject to the Medicaid Estate Recovery Program. Therefore, "For MEPD [Medicaid eligibility] purposes, the Transfer on Death Deed will be treated like an Enhanced Life Estate Deed [Lady Bird Deed]."[121]

2. <u>Will a TODD Preserve Title Insurance Protection?</u>

As indicated above, the Transfer on Death Deed statute expressly provides that such a deed is not a warranty deed—even if it purports to be. On the surface, that seems favorable to the estate of the transferor because it precludes liability of the estate to a beneficiary or an owner later in the chain of title if a title problem arises.

However, under some if not all title policies, it cuts off protection the transferor paid for and probably wants for the beneficiary. That is because it is not clear whether the beneficiary of this new type of deed—unforeseen by the drafters of title policy forms and the statutes that govern them--is within the definition of "insured" under the policy or is otherwise entitled to the policy's protection. The purchaser of the policy is entitled to its protection in the event the purchaser is found liable on a warranty of title. This is why well-informed attorneys ordinarily use a warranty deed when conveying property to a revocable trust, limited partnership or family member—so if a title problem later develops, the grantee can assert a

[112] Texas Estates Code §114.054(b).

[113] Texas Estates Code §114.101(1). The right to a school tax freeze is not mentioned expressly but may be construed to be included with property tax "exemptions."

[114] Texas Estates Code §114.101(4).

[115] Texas Estates Code §114.114.103(a).

[116] Texas Estates Code §114.103(a)(3), (4).

[117] Texas Estates Code §114.103((d).

[118] Texas Estates Code §114.114.104.

[119] Texas Estates Code §114.106(a).

[120] Texas Estates Code §114.106(b).

[121] HHSC attorney Shari Nichols, "The View from HHSC," University of Texas School of Law Estate Planning, Guardianship and Elder Law Course (August 7, 2015).

claim against the grantor, and *that claim will be covered by the title insurance*. That would not be the case if conveyance were by a quitclaim deed or a deed without warranty.[122]

The same problem appears to arise when a Transfer on Death Deed is used. Different title policies have different provisions as to what claims are covered, and those provisions are beyond the scope of this paper. However, it appears that some if not all title policies will not extend protection to the beneficiary of a Transfer on Death Deed, even indirectly through the policy purchaser's warranty of title.

3. Which Type Deed to Use?

Here is a summary of some considerations in deciding whether to use a Lady Bird Deed or a Transfer on Death Deed:

- From what we know at this point, it appears either a Lady Bird Deed or Transfer on Death Deed will pass the transferor's title to the transferee and will protect real property from the Medicaid Estate Recovery Program.
- A Lady Bird Deed has the advantage, for the moment, of being more familiar both to Medicaid program personnel and to title companies. In addition, it allows creation of a general warranty of title for protection of the beneficiary, in case a title problem later arises. That might take the form, for example, of drilling equipment arriving under a lease signed by a previously unknown owner of mineral rights, or a claim by an heir whose right was not extinguished earlier in the chain of title.
- A Transfer on Death Deed has the advantage of a clear statutory declaration that it is not "testamentary" and therefore need not have witnesses nor admission to probate to be effective. We almost certainly have such a statute already applying to an Enhanced Life Estate Deed at Estate Code §111.052(a) (formerly in Probate Code §450), which provides, "This code does not invalidate…(1) any…conveyance of property…effective as a contract, gift, conveyance or trust, stating that:… (A) money or other benefits under the instrument due to or controlled by a decedent shall be paid after the decedent's death, or property that is the subject of the instrument shall pass, to a person designated by the decedent in the instrument…(b) A provision described by Subsection (a)(1) is considered nontestamentary." However, this is not a model of clear draftsmanship regarding a major issue of public policy. By contrast, the effect of a Transfer on Death Deed appears to be well defined in a carefully drafted statute based on a uniform law adopted by several states. So far there is no case law on this point, and title companies can be quite conservative as to the risks they will accept. Moreover, the title industry presumably may have a special fondness for deeds drafted under it because they definitely cut off all possible claims on title policies by owners taking title after the death of the purchaser.
- A Transfer on Death Deed will not, by statute, trigger a "due-on-sale" clause.[123] Although there is no clear reason in logic or law that a Lady Bird Deed should do so, there has been at least one report of a lender's taking that position.[124]
- A Transfer on Death Deed will not, by statute, give any rights to the grantee's creditors.[125] Therefore, there is clearly no basis for concern by a potential creditor of the grantor if he or she applies for a mortgage on the property, which reportedly has occurred when a Lady Bird Deed was involved.[126]

---

[122] For an excellent discussion of this issue, see D'Ana H. Mikeska and Michael A. Wren, *Conveyancing Techniques to Preserve Title Insurance in Real Estate Transactions*, State Bar of Texas 22nd Annual Advanced Real Estate Drafting Course (2011).

[123] Texas Estates Code §114.101(5).

[124] Lucy Wood, *Transfer on Death Deeds in Texas: High Time for the TODD*, State Bar of Texas Advanced Elder Law Course (April 15, 2016).

[125] Texas Estates Code §114.101(8).

[126] Lucy Wood, *supra.*

Future events may determine that one type of deed or the other is preferable in all cases. At this writing in April, 2016, that is not clear, so the best we can do is to apply the limited and preliminary information presented above to the facts of each case--and be alert to additional information that will no doubt become available in the future.

XIII. APPENDICES

Appendix 1: Means-Tested Eligibility Numbers for 2016

Changes since 2015 are in bold print.

Medi*caid* & SSI
Dollar Amounts Effective as of January 1, 2016

	2015	2016
Medicaid Single Income/Mo.	$2,199	$2,199
Medicaid Couple Income/Mo.	$4,398	$4,398
SSI Single Income/Mo.	$733	$733
SSI Couple Income/Mo.	$1,100	$1,100
Protected Resource Amt. Min.	$23,844	$23,844
Protected Resource Amt. Max.*	$119,220	$119,220
Spousal Monthly Allowance	$2,980.50	$2,980.50
Gift Penalized**	$156.34/day	**$162.41/day**
Personal Needs Allowance	$60	$60
Maximum Residence Value (with exceptions)	$552,000	$552,000

*When combined incomes of both spouses are below the Spousal Monthly Allowance, the Community Spouse can usually keep more than the Protected Resource Amount Maximum.

****For case actions before 9/1/15, the divisor is $156.34/day; on or after 9/1/15 it is $162.41/day.**

Medi*care* & Social Security & VA
Dollar Amounts Effective as of January 1, 2016*

	2015	2016
Part A Premium/Mo.[127]	$426	**$411**
Part B Premium/Mo.[128]	$104.90	$104.90
Skilled Nursing Facility Copayment	$157.50	**$161.00**
Hospital Stay (Part A) Deductible	$1,260	**$1,288**
Hospital Copayment, Days 61-90	$315	**$322**
Hospital Copayment, Days 91-150	$630	**$644**
Part B (Medical) Annual Deductible	$147	**$166**
QMB max income single (gross incl. $20 exempt amt)	$993*	$993*
QMB max income couple (gross incl. $20 exempt amt)	$1,333*	$1,333*
SLMB max income single (gross incl. $20 exempt amt)	$1,187*	$1,187*
SLMB max couple (gross incl. $20 exempt amt)	$1,593*	$1,593*
QI-1 max income single (gross incl. $20 exempt amt)	$1,333*	$1,333*
QI-1 max income couple (gross incl. $20 exempt amt)	$1,790*	$1,790*
QDWI max income single (gross incl. $20 exempt amt)	$1,965*	$1,965*
QDWI max income couple (gross incl. $20 exempt amt)	$2,642*	$2,642*
"Substantial Gainful Activity" (Non-Blind)	$1,090	**$1,130**
Max Earnings Taxed for SS	$118,500	$118,500
Retirement Test Earnings/Yr, Under 65	$15,720	$15,720
Retirement Test Earnings in 1st Yr of Full Retirement Age**	$41,880	$41,880
Quarterly earnings for 1 Social Security credit	$1,220	$1,220
VA Pension With "Aid & Attendance"—Married	$2,120	$2,120
VA Pension With "Aid & Attendance"--Unmarried Vet	$1,789	$1,789
VA Pension With "Aid & Attendance"--Widow(er)	$1,149	$1,149

VA Pension that is A&A (not counted by Medicaid) in 2015: $716/mo. (or for surviving spouse, $430/mo.)

*Numbers with * effective 3/1/2015 to 2/28/2016 (dependent on Federal Poverty Guidelines, next page)

**Full Retirement = 65 and 10 months if born in 1942 or age 66 if born in 1943-1954. Full retirement age will gradually increase to age 67 for those born in 1960 and later.

2015 Social Security & VA Cost of Living Allowance (COLA): 1.7%; 2016 COLA: 0%

---

127 99% of Social Security beneficiaries have sufficient Medicare covered quarters that they pay no Part A premium.

128 The Part B premium is more for those with over $85,000 income (individual return) or $170,000 (joint return) for the year 2 years before the year of the premium being calculated.

Planning for Beneficiaries Who May Need Long-Term Care

FEDERAL POVERTY GUIDELINES **2015-2017** **Excluding Alaska & Hawaii**

Family Size	100% Annual	100% Monthly	120% Monthly	133% Monthly	135% Monthly	150% Monthly	158% Monthly	185% onthly	200% Monthly	300% Monthly	19%
1	$11,770	$981	$1,177	$1,308	$1,324	$1,471	$1,550	1,815	$1,962	$2,943	$186
2	$15,930	$1,328	$1,593	$1,770	$1,792	$1,991	$2,097	2,456	$2,655	$3,983	$252
3	$20,090	$1,674	$2,009	$2,232	$2,260	$2,511	$2,645	3,097	$3,348	$5,023	$318
4	$24,250	$2,021	$2,425	$2,694	$2,728	$3,031	$3,193	3,739	$4,042	$6,063	$384
5	$28,410	$2,368	$2,841	$3,157	$3,196	$3,551	$3,741	4,380	$4,735	$7,103	$450
6	$32,570	$2,714	$3,257	$3,619	$3,664	$4,071	$4,288	5,021	$5,428	$8,143	$516
7	$36,730	$3,061	$3,673	$4,081	$4,132	$4,591	$4,836	5,663	$6,122	$9,183	$582
8	$40,890	$3,408	$4,089	$4,543	$4,600	$5,111	$5,384	6,304	$6,815	$10,223	$647
Each Add'l:	$4,160	$347	$416	$462	$468	$520	$548	641	$693	$1,040	$66

Programs with Poverty-Level-Related Income Limits
(*Above amounts effective 3/1/15-2/28/17*. Multiples of poverty level income are rounded in Excel. Agencies may round differently, creating a difference of $1.00 one way or the other in actual income limits.)

QMB:*	100% of poverty + $20 ($7,160 resources unmarried, $10,750 married)
SLMB:*	120% of poverty + $20 ($7,160 resources unmarried, $10,750 married)
QI-1*	135% of poverty +$20 ($7,160 resources unmarried, $10,750 married)
QDWI*	200% of poverty + $20 ($4,000 resources unmarried, $6,000 married)
Part D Full Sub.*	135% of poverty + $20 ($8,580 resources unmarried, $13,620 married)
Part D Other*	150% of poverty + $20 ($13,300 resources unmarried, $26,580 married)
MERP Waiver	300% of poverty (up to $100,000 tax appraised residence value, for shares of low-income descendants)
CPWUnder 1**	194.25% of poverty (185% FPL plus 5% income disregard) (No resource limit effective 01/01/2014)
CPW Preg W**	194.25% of poverty (185% FPL plus 5% income disregard) (no resource limit)
CPW 1-18**	139.65% of poverty (133% FPL plus 5% income disregard) (No resource limit effective 01/01/2014)
CHIP 1-18**	210% of poverty (200% FPL plus 5% income disregard) (No resource limit effective 01/01/2014)

***The following "methodology" applies to the programs marked * above (but not to the others, which do not allow the same income "disregards" and have different "resource" definitions):**

"Income" is defined the same as under the SSI program, except for the Part D programs, for which in-kind support and maintenance (food and shelter supplied in kind) are not counted. All the SSI income "disregards" apply: $20 per month of any income, $65 per month of earned income, half of the rest of earned income, etc. Therefore, numbers in the table can safely be increased by $20 in every case; and if there is earned income, only half the amount over $65 is countable.

"Resources" (countable assets) are defined the same as for the SSI program, except as follows for the Part D programs: (a) any life insurance policy is excluded, and (b) only "liquid" assets and non-exempt real estate are counted.

****CPW = Children & Pregnant Women Medicaid**. Effective 01/01/2014, Modified Adjusted Gross Income methodology applies to CPW Medicaid and CHIP; SSI methodology applies to the other programs as discussed at * above.

Appendix 2: How to Obtain Medicare & Medicaid Claim Information

Because public benefits issues often come to attorneys in connection with personal injury litigation, probate and trusts in which the Medicaid program is a remainder beneficiary, the following information is provided.

Before any personal injury suit is settled, in which an injured party received any assistance from Medicare or Medicaid for injuries involved in the case, the plaintiff's attorney must determine how much has been paid by those programs as a result of such injuries. That is because both programs are "subrogated to" any claims resulting from the injuries; and any person (including an attorney) through whose hands the funds to pay the claim have passed will be liable to the program if they fail to pay the subrogation claim. Likewise, the "hospital lien" must be satisfied out of the settlement or judgment. For cites to the relevant laws and a clear summary, see Randall Kauffman, *The War of the Cockatrice*, 60 Texas Bar Journal 310 (April 1997).

It is sometimes possible to negotiate waivers of part or all of these subrogation claims. See Susan G. Haines, "Structuring Personal Injury Settlements for Claimants Receiving Public Benefits," seminar paper for National Academy of Elder Law Attorneys Year 2000 Symposium; and Kathleen A. Miller, "Handling Liability Cases Involving Medicare," seminar paper for the State Bar of Texas Elder Law Institute (1996).

Because the Texas contact information for both Medicare and Medicaid has changed since publication of Mr. Kauffman's article, the following is offered to supplement it. This information is subject to change at any time.

For *Medicare* Parts A & B
(any Texas resident):
Medicare Tort Dept.
866-677-7220
Starting point: http://www.cms.hhs.gov/COBGeneralInformation/
(Call first if you are not familiar with this process)
Powerpoint: www.msprc.info

For *Medicaid* Subrogation & Special Needs Trust Claims (See below for Qualified Income Trusts & Estate Recovery)--Any beneficiary of Texas Medicaid must check with all 3 of the following:

For Medicaid hospital, physician services., etc ("acute care") paid by the state (not by a Managed Care Organization) Texas Medicaid & Healthcare Partnership ATTN: Tort Customer Service P. O. Box 202948 Austin, TX 78720-2948 Phone: 512-506-7546 or 800-846-7307 Option 3 Fax 512-514-4225 **NOTE**: Medicaid providers have 95 days from the date of service to submit their claims to TMHP. Consequently, TMHP is unable to provide an accurate amount until the expiration of that period.	**For Medicaid long-term care expenses paid by the state (not by a Managed Care Organization)** Texas Department of Aging and Disability Services Third Party Recovery Unit (E-400) P.O. Box 149081 Austin, Texas 78714-9081 Phone 512-438-2219 Fax 512-438-3400	**Managed Care Organizations** now have a right of subrogation for the Medicaid benefits provided to an individual with a right to recover medical expenses from a third party. Diane Broadhurst is the contact person in the Office of Inspector General. Her contact information is: Texas Health & Human Services Commission Third Party Resources, Office of Inspector General 4900 N. Lamar Blvd. Austin, Texas 78751 512.424.6500 diane.broadhurst@hhsc.state.tx.us Also, TMHP can provide MCO contact information.

For Qualified Income Trust trustees paying remainder to Medicaid: Be sure the nursing home and all other medical providers have been paid. Pay balance of the account by check (or indorsement of check from bank) to "TXDADS" and mail to TXDADS-Provider Claims, P. O. Box 149030, MC E400, Austin, TX 78714 with a letter explaining it is final distribution from a Qualified Income Trust.

For the Medicaid Estate Recovery Program (MERP):

- Some probate judges now require in applications to probate a will as a muniment of title, a certification to the effect that property in the estate is not subject to a claim by the Medicaid estate recovery program. One way of demonstrating this is with a "release" from MERP. You can make a request for a release, or the amount of the MERP claim, by filling out the form at http://www.dads.state.tx.us/services/estate_recovery/TXMERPCertificationForm.pdf and faxing it back to the number at the bottom of the form.
- MERP collects premiums paid by the state to a Managed Care Organization, but DADS subrogation claims do not include those premiums. However, each MCO has a subrogation claim for its own expenses.
- Health Management Systems, Inc. (HMS), which contracts with DADS to manage certain MERP functions, can be reached as follows: DADS Recovery Unit, HMS-The Texas Medicaid Estate Recovery Contractor, 5615 High Point Drive-Suite 100, Irving, TX 75038, Telephone 800-641-9356, Fax 214-560-3918, http://www.hms.com/
- Questions about MERP can be sent to DADS by email to Merp@dads.state.tx.us or you can call 800-641-9356.
- The DADS MERP website is http://www.dads.state.tx.us/services/estate_recovery.
- Make MERP checks payable to: Texas Department of Aging and Disability Services

A. Appendix 3: Contingent Trust in Will Protecting Disability Benefits[129]

Contingent Trusts. Any executor or trustee appointed under the provisions of this will shall create a Contingent Trust by distributing to a trustee, instead of to the beneficiary directly, any portion of my estate, or of a trust estate upon the trust's termination, which would be distributable to a beneficiary (a) who is under age «Age for Distribution»; or (b) who lacks the mental capacity to manage his or her own financial affairs, as determined by my Executor; or (c) who has filed a petition for protection under the Bankruptcy Code within 180 days before my death or **(d) who has a disability as defined by the Social Security Administration and who needs benefits for which he or she might qualify if distribution is to a trust, as determined by my Executor.** Each beneficiary's portion so distributed shall be held and administered as a separate trust for the beneficiary. In the alternative, my executor may transfer the interest of any beneficiary under the age of 21 into an account established under the Uniform Transfers to Minors Act as it exists under Texas law at the time of the transfer, appointing as custodian my executor or any other person my executor may designate.

1. **Distributions to Beneficiary**. The trustee may distribute to or for the benefit of the beneficiary, from time to time, so much or all of the trust estate as, in the trustee's discretion, is in the beneficiary's best interests.
2. **Interests of Remainder Beneficiaries Secondary.** The trustee is authorized to expend all principal as well as interest for the benefit of the primary beneficiary and may never be liable to remainder beneficiaries for doing so.
3. **Termination of the Trust**. The trust shall terminate when the beneficiary under age «Age for Distribution» attains that age or dies before that age; or, in the case of a beneficiary who lacks the mental capacity to manage his or her own financial affairs, when the beneficiary regains that capacity, as determined by my trustee, or the beneficiary dies; or, in the case of a beneficiary who has filed a bankruptcy petition or has a disability, when the beneficiary dies or the trustee in his or her absolute discretion determines that trust termination would be in the beneficiary's best interest. Upon termination, the trust estate shall be distributed as follows:
   - To the beneficiary, but if the beneficiary is not then living, to or for the benefit of any persons the beneficiary may appoint in his or her will or in a trust, other than the beneficiary, the beneficiary's creditors, or the creditors of the beneficiary's estate. Such appointment to be effective must refer expressly to this trust. In the absence of such appointment, upon the beneficiary's death, the trustee shall distribute the remaining trust property as follows:
     - To the beneficiary's descendants.
     - If none of the beneficiary's descendants is then living, to my descendants.
     - If none of my descendants is then living, to the individuals or trustees who would have taken my residuary estate under this will, in the portions they would have received, had I died at the time of termination of the trust.
4. **Maximum Term of Trust**. Notwithstanding any other provision herein, no trust shall continue for a period longer than 21 years after the death of the last to die of all the descendants of my parents and grandparents «IF Married»and my «Gender of Client:wife/husband»'s parents and grandparents «END IF»who were living at my death. Any trust still in force at that time shall terminate, and the trust estate shall be distributed to the beneficiary.

---

[129] *This form is based on Prof. Stanley Johanson's "Howard Brown Will," which he has generously placed in the public domain. Note that important parts of the trust, such as appointment and powers of the trustee, are found in various parts of the will form and are not included in our appendix. Addition of disability as a trigger is the authors' suggestion.*

5. **Protection of Trust Assets (Spendthrift Provision).** No beneficiary shall have the power to anticipate, encumber or transfer his or her interest in the trust estate in any manner. No part of any trust estate shall be liable for or charged with any debts, contracts, liabilities or torts of a beneficiary or subject to seizure or other process by any creditor of a beneficiary.
6. **Supplemental Needs Trust.** It is not my intention to displace public or private financial assistance that may otherwise be available to any beneficiary. Distributions shall be limited so that no beneficiary is disqualified from receiving public benefits to which he or she is otherwise entitled, and this trust shall be administered so as to supplement and not supplant such benefits. Provided, the trustee may, in the trustee's sole, absolute, complete and unfettered discretion, make any distributions in the beneficiary's best interests even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance.

Appendix 4: Enhanced Life Estate Deed

GENERAL WARRANTY DEED
RESERVING ENHANCED LIFE ESTATE

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

Date:	The ___ day of ____________________, 20____
Grantor:	JANE B. GRANTOR, a single person
Grantor's Address:	1 Fracking Way, Depletion, Texas 70000, Lone Ranger County
Grantee:	TRUSTY I. BET, as trustee of The Grantee Family Trust, established the same date as this deed
Grantee's Address:	10 Tumbleweed Alley, Weatherbeaten, Texas 78888, Black Gold County
Consideration:	**This is a deed of gift.**

Property (including any improvements):

[Legal Description]

Reservations From and Exceptions to Conveyance and Warranty:

Grantor reserves, for Grantor and Grantor's assigns, a reservation of the full possession, benefit, and use of the Property for the remainder of the life of Grantor, as a life estate.

Grantor further retains complete power, without the joinder of any person, to mortgage, sell, and convey the Property, in whole or in part, and to spend any proceeds; to exchange it for other property; to lease the surface and subsurface of the Property; to execute and deliver oil, gas, and other mineral leases for any term of years and for a term based on the continuing production of oil, gas, or other minerals from the Property, ending either before or after Grantor's death; to grant any interest in the Property, by gift, sale or otherwise, so as to terminate the interests of Grantee, as Grantor in Grantor's sole discretion shall decide; to invest and reinvest all proceeds from the sale or other disposition of the Property; and to possess and consume all proceeds from the sale or other disposition of the property to the exclusion of Grantee. This life estate carries with it the right to possess and consume all bonuses, delay rentals, royalties, and other benefits payable on any mortgage, sale, or conveyance under oil, gas, and other mineral leases covering the Property at the inception of this life estate without any duty to the remainderman and without liability for waste.

Grantor further reserves the right to cancel this deed by further conveyance, even to Grantor, which may destroy any and all rights which Grantee may possess under this deed.

Grantee shall hold a remainder interest in the Property and upon the death of Grantor, if the Property has not been previously disposed of prior to Grantor's death, all right, title and interest to the Property remaining shall fully vest in Grantee, subject to any liens and encumbrances existing at that time.

[*Optional broad reservations/exceptions, to be used only if the property is not protected by title insurance.] In that case, consider the alternative of using a Special Warranty Deed or Deed Without*

Warranty: This conveyance is made, delivered and accepted subject to all restrictions, covenants, easements, rights-of-way and prescriptive rights, whether of record or not; any outstanding royalty and mineral reservations, conditions and recorded instruments affecting said property; and any and all zoning laws, regulations and ordinances of municipal and/or other governmental authorities affecting said property.

Conveyance and Warranty:

Grantor, for the consideration stated herein and subject to the reservations from and exceptions to conveyance and warranty, grants, sells, and conveys to Grantee the property, together with all and singular the rights and appurtenances thereto in any wise belonging, to have and hold unto Grantee, Grantee's heirs, executors, administrators, successors, or assigns forever. Grantor binds Grantor and Grantor's heirs, executors, administrators, and successors to warrant and forever defend all and singular the property to Grantee and Grantee's heirs, executors, administrators, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the reservations from and exceptions to conveyance and warranty.

When the context requires, singular nouns and pronouns include the plural.

____
JANE B. GRANTOR

THE STATE OF TEXAS
COUNTY OF LONE RANGER

SUBSCRIBED AND ACKNOWLEDGED before me by JANE B. GRANTOR on this ______ day of ___________________, 20____ at ____________ ______M.

____
Notary Public, State of Texas

After recording please return to:
[Law Firm]

The reservation language above was provided by Neal A. Kennedy, an attorney in Marble Falls, Texas, and is used with his permission. For a more complete discussion of enhanced life estate deeds and the reservation language, see Patricia F. Sitchler and Kristen Quinney Porter, WHERE REAL ESTATE AND ESTATE PLANNING COLLIDE, 2012 Texas Land Title Institute (also presented to CLE programs of the State Bar of Texas and University of Texas School of Law), with a recent update at the State Bar of Texas Advanced Elder Law Conference on April 3, 2014.

Appendix 5: Revocable Trust As Grantee of Enhanced Life Estate Deed

THE GRANTEE FAMILY TRUST

This trust agreement is made by and between JANE B. GRANTOR ("Settlor") of 1 Fracking Way, Depletion, Texas 70000, Lone Ranger County, as Settlor and TRUSTY I. BET ("Trustee"), of 10 Tumbleweed Alley, Weatherbeaten, Texas 78888, Black Gold County, as Trustee, in order to create a Trust (the "Trust") for the primary benefit of the descendants of the Settlor (referred to herein as "my descendants").

1. **Transfer to Trust.** Settlor is transferring to Trustee a remainder interest in her residence and adjoining property (referred to herein as her "residence") by deed executed the same date as this trust instrument, after signing of this trust instrument, as the initial trust estate. The Trustee accepts such property. Additional property acceptable to the Trustee may be transferred to the Trust from time to time by anyone and added to the trust estate.

2. **Trust Revocable.** This Trust may be revoked or amended in whole or in part by Settlor or her agent during Settlor's lifetime. After Settlor's death, this Trust shall become irrevocable.

3. **Distributions During Term of Trust**. The primary purpose of this trust is to provide for sale of Settlor's residence after her lifetime and distribution of the proceeds, and of any other assets of the trust, according to her wishes. Therefore, the Trustee is not authorized to make distributions to beneficiaries during Settlor's lifetime but only thereafter, as provided below.

4. **Termination of Trust**. The Trust shall terminate after the death of the Settlor, when the residence has been sold and the proceeds of sale have been distributed. As soon as practicable after the Settlor's death, the Trustee shall sell the residence for cash and distribute the proceeds, after payment of all lawful expenses of the trust and all claims to which the trust's assets are subject, as provided below.

5. **Distribution Upon Termination of Trust**. Upon termination of the Trust, the Trustee shall distribute the principal and any undistributed income of the Trust in equal shares to Settlor's five children: TRUSTY I. BET, CAND O. KID, RELY A. BELL, JANE B. GRANTEE and DARE WE ASK. The share of any beneficiary who does not survive the Settlor shall be distributed to the descendants of that beneficiary as defined below, if any. If there be no descendant, that share shall be distributed equally to the other beneficiaries and their descendants.

6. **Supplemental Needs Trust.** Any distribution upon termination of the trust that would be distributable to any of the following shall not be distributed directly to the individual but instead shall be distributed to a trustee for administration as provided below: any individual (a) who is under age 25; or (b) who lacks the mental capacity to manage his or her own financial affairs, as determined by the trustee; or (c) who has filed a petition for protection under the Bankruptcy Code within 180 days before the distribution; or (d) who has a disability as defined by the Social Security Administration and who needs benefits for which he or she might qualify if distribution is to a trust, as determined by the trustee. Each beneficiary's portion so distributed shall be held and administered as a separate trust for the beneficiary under the same terms as provided herein for the original trust except as follows:

   - **Distributions to Beneficiary**. The trustee may distribute to or for the benefit of the beneficiary, from time to time, so much or all of the trust estate as, in the trustee's discretion, is in the beneficiary's best interests.

- **Trustee. Trustee of any Supplemental Needs Trusts shall be Settlor's child** TRUSTY I. BET**. Alternate trustees shall be in the following order:** CAND O. KID, then RELY A. BELL.

- **Other Trust Provisions.** Except to the extent they are inconsistent, the provisions of this trust instrument shall apply to each Supplemental Needs Trust established hereunder.

- **Termination of the Trust**. Any Supplemental Needs Trust shall terminate when the beneficiary under age 25 attains that age or dies before that age; or, in the case of a beneficiary who lacks the mental capacity to manage his or her own financial affairs, when the beneficiary regains that capacity, as determined by my trustee, or the beneficiary dies; or, in the case of a beneficiary who has filed a bankruptcy petition or has a disability, when the beneficiary dies or the trustee in his or her absolute discretion determines that trust termination would be in the beneficiary's best interest. Upon termination, the trust estate shall be distributed to the beneficiary, if the beneficiary is then living. Otherwise the trust estate shall be distributed to the same persons who would have received the residuary estate of this trust if it had been distributed on that date, in the same shares they would have received.

7. **Trustee Fees and Expenses.** The trustee shall be entitled to receive reasonable compensation for services actually rendered. The normal and customary fees in the published fee schedule of a corporate trustee shall be deemed reasonable for this purpose. The trustee may also receive reimbursement from the trust for any actual and reasonable expenses incurred as trustee.

8. **Protection of the Trustee**. This instrument always shall be construed in favor of the validity of any reasonable act by or omission of the trustee, and an individual trustee serving without compensation shall not be liable for any act or omission except in the case of gross negligence, bad faith or fraud.

9. **Powers of Trustee**. The Trustee shall have all of the powers of Trustees under the Texas Trust Code. The terms and provisions of the Texas Trust Code shall apply to this Trust, to the extent they are not in conflict with the terms of this instrument.

10. **Cotrustees**. The trustee (acting jointly if more than one) may appoint one or more cotrustees. When cotrustees are serving, they may divide trustee functions between or among themselves. For example and without limitation, an individual trustee may appoint a corporate fiduciary as cotrustee, and they may agree between themselves as to the functions to be performed by each cotrustee.

11. **No Bond Required**. The Trustee shall serve without giving a bond.

12. **Successor Trustees**. If the Trustee resigns, dies or for any reason is unable or unwilling to continue to serve, CAND O. KID, of 111 Really High Street, Oaktree Park, TX 78666 shall become successor Trustee. If CAND O. KID resigns, dies or for any reason is unable or unwilling to serve or continue to serve, RELY A. BELL, of 1234 Rocky Road, Austin, TX 78704, become successor Trustee. Each successor Trustee shall have all of the rights, powers and duties of the Trustee.

13. **Appointment of Successor Trustee by Trustee**. At any time after qualifying as trustee, any trustee may appoint a successor trustee to act in his or her place, either immediately or in the future upon any stated contingency, and may thereby supersede the provisions for successor trustees herein.

14. **Spendthrift Trust**. To the extent permitted by law, the interest of my descendants shall be held subject to a spendthrift trust as provided in Section 112.035 of the Texas Property Code.

Signed the ____ day of ____________________, 20____.

____
JANE B. GRANTOR
Settlor

____
TRUSTY I. BET
Trustee

THE STATE OF TEXAS
COUNTY OF LONE RANGER

SUBSCRIBED AND ACKNOWLEDGED before me by JANE B. GRANTOR and TRUST I. BET, on this _________ day of ____________________, 20____ at ___________ ______M.

____
Notary Public, State of Texas

Appendix 6: Medicaid Checklist For Spending Down A Lump Sum

If under 65: Discuss Arc Trust, pvt SNT or guardian-created SNT	
Items & services client needs: phone, computer, TV, hospital bed, wheelchair, hearing aids, glasses, dentures, therapies, nutrition, clothing – anything purchased but no prepaid contracts other than for funeral and burial services (if irrevocable) and for nursing facility expenses.	
Legal debts to pay	
Irrevocable prepaid funeral contract or trust (including burial space items for "immediate family")	
Homestead improvement or purchase	
Vehicle to buy or replace	
Spouse to whom to transfer	
Any person under 21 client wants to benefit with UTMA transfer	
Client's child of any age with disability to whom to transfer	
Any person under 65 with disability who could be beneficiary of a sole benefit trust	