

PRESENTED AT

25th Annual Estate Planning, Guardianship and Elder Law Conference

August 10-11, 2023

Galveston, TX & Live Webcast

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

Meredith Ann Sullivan

and

H. Clyde Farrell

Author Contact Information:

Meredith Ann Sullivan & H. Clyde Farrell

Farrell & Johnson PLLC

Austin, TX

msullivan@txelderlaw.com

cfarrell@txelderlaw.com

512-323-2977

Nothing contained in this publication is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This publication is intended for educational and informational purposes only.

Copyright 2023 by H. Clyde Farrell and Meredith Ann Sullivan

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

Table of Contents

Contents

I. LONG-TERM CARE NEEDS: RISKS AND OPPORTUNITIES IN ESTATE PLANNING.....	1
II. INTRODUCTION TO MEDICAID	2
A. MEDICAID FOR NURSING HOME CARE	3
B. MEDICAID "WAIVER" HOME CARE PROGRAMS	3
C. MEDICAID "NON-WAIVER" HOME CARE PROGRAMS.....	4
D. "MEDICARE SAVINGS PROGRAM" MEDICAID.....	4
E. SSI- OR TANF-LINKED "COMMUNITY MEDICAID"	5
F. MEDICAID FOR CHILDREN AND PREGNANT WOMEN.....	5
G. "DISABLED ADULT CHILD" MEDICAID.....	5
III. MEDICAID'S "COUNTABLE" AND "EXCLUDED" RESOURCES	6
A. RESOURCES DEFINED	6
B. REQUIREMENT OF ACCESSIBILITY	9
1. Guardianship Estates and Accessibility	10
2. Probate Estates and Accessibility.....	10
3. Co-Owners and Accessibility.....	11
C. THE HOME.....	11
D. ADJACENT LAND.....	14
E. HOME EQUITY LIMIT	14
1. Home Equity or Reverse Mortgage Loans.....	15
2. Sale or Transfer of Partial Equity to Others	15
3. Reduction in Value of the Property	16
F. THE OPTION OF REFORMATION OF A WILL	16

G.	LIFE ESTATES AND REMAINDER INTERESTS.....	17
H.	CONTINUING CARE RETIREMENT CENTER FEES	18
I.	RETIREMENT ACCOUNTS	18
1.	Deferred Annuities in IRAs are Exempt	19
2.	IRAs With RMDs Are Exempt	19
J.	MINERAL RIGHTS AND OTHER “NON-BUSINESS PROPERTY”	22
1.	The de minimus rule - “\$6,000 and 6%”	23
2.	Valuing Producing and Non-Producing Interests.....	23
K.	UNLIMITED VALUE EXCLUDABLE FOR BUSINESS PROPERTY	24
L.	BUSINESS ENTITY AS EXEMPT BUSINESS PROPERTY	25
M.	REAL PROPERTY FOR SALE	25
IV.	REVOCABLE TRUSTS OFTEN PREVENT MEDICAID ELIGIBILITY	26
V.	THIRD-PARTY TRUSTS PROTECT MEDICAID ELIGIBILITY	28
A.	THE MEDICAID RULE GOVERNING THIRD-PARTY TRUSTS.....	28
B.	STRATEGY: TESTAMENTARY TRUST FOR THE SURVIVING SPOUSE.....	28
C.	STRATEGY: STANDBY TRUST FOR ANY PERSON WITH A DISABILITY	30
D.	STRATEGY: CONTINGENT TRUST FOR ANY PERSON WITH A DISABILITY	31
VI.	ANYONE UNDER 65 WITH A DISABILITY CAN GET MEDICAID AS FAR AS ASSETS ARE CONCERNED.....	32
A.	SSI--FOR LOW-INCOME PERSONS WITH DISABILITIES	32
1.	Individual Under-65 Self-Settled Trust.....	32
2.	Pooled Trust.....	33
B.	ANYONE NEEDING LONG-TERM CARE.....	34
C.	REQUIREMENT OF PAYING SUBROGATION AND LIEN CLAIMS FIRST	34
VII.	THERE IS NO REAL INCOME LIMIT FOR MOST LONG-TERM CARE MEDICAID	34
VIII.	ONE SPOUSE CAN SOMETIMES GET MEDICAID WITHOUT “SPENDING DOWN”	35

IX. BOTH SPOUSES IN NURSING HOME: ONE SPOUSE ELIGIBLE IF OTHER TRANSFERS ASSETS	38
X. ASSET TRANSFERS: MEDICAID PENALTIES AND EXEMPTIONS	39
A. SSI-LINKED MEDICAID	39
B. LONG-TERM CARE MEDICAID	40
C. DISCLAIMERS ARE MEDICAID TRANSFERS.....	41
D. AVOIDING THE “TRANSFER TRAPS”	42
XI. MEDICAID ESTATE RECOVERY CAN USUALLY BE AVOIDED OR REDUCED	44
A. MANY MEDICAID BENEFICIARIES ARE NOT SUBJECT TO ESTATE RECOVERY	44
1. Estate Recovery Applies Only to Long-Term Care Medicaid	44
2. Estate Recovery Applies Only to Beneficiaries Age 55 and Over	45
B. SOME BENEFICIARIES APPLIED BEFORE THE "GRANDFATHERING" DATE: MARCH 1, 2005	45
C. THERE ARE MANY EXCEPTIONS TO ESTATE RECOVERY	45
D. THERE ARE SEVERAL GROUNDS FOR WAIVER OF ESTATE RECOVERY.....	46
E. THERE ARE SEVERAL POTENTIAL OFFSETS AGAINST ESTATE RECOVERY	47
1. Home Maintenance, Property Taxes and Insurance	47
2. Direct Payment of the Costs of Care	47
XII. LADY BIRD DEEDS AND TRANSFER ON DEATH DEEDS	47
A. LADY BIRD DEED OVERVIEW.....	47
B. TRANSFER ON DEATH DEED OVERVIEW.....	49
C. COMPARISON OF TODD AND LBD	51
1. Effect on Medicaid Eligibility.....	51
2. Will a TODD Preserve Title Insurance Protection?	51
3. Which Type Deed to Use?	52
APPENDICES.....	54
APPENDIX 1: MEANS-TESTED ELIGIBILITY NUMBERS FOR 2023	54
APPENDIX 2: HOW TO OBTAIN MEDICARE & MEDICAID CLAIM INFORMATION	56

APPENDIX 3: CONTINGENT TRUST IN WILL PROTECTING DISABILITY BENEFITS.....58

APPENDIX 4: SAMPLE ENHANCED LIFE ESTATE (LADY BIRD) DEED60

APPENDIX 5: SAMPLE TODD WITH CPROS62

APPENDIX 6: REVOCABLE TRUST AS GRANTEE OF LBD OR TODD66

APPENDIX 7: MEDICAID CHECKLIST FOR SPENDING DOWN A LUMP SUM.....73

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

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

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

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

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

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

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

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

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

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

II. INTRODUCTION TO MEDICAID

Medicaid is the most comprehensive health insurance program available to Americans. As of June 2023, approximately 5.9 million Texans⁴ (about 19.6% of our state population of about 30 million people⁵) were enrolled in a Medicaid benefit program.

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

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

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

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

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

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

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

Also available as part of the eCourse

[What All Estate and Probate Attorneys Need to Know: Medicaid Estate Recovery and Medicaid Planning and Drafting](#)

First appeared as part of the conference materials for the
25th Annual Estate Planning, Guardianship and Elder Law Conference session
"What All Estate and Probate Attorneys Need to Know About Medicaid Planning and
Drafting"