MEDICAID ISSUES IN A GUARDIANSHIP

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I. Introduction

It is unknown how many people are under a guardianship in Texas. What is known is that the number of people going into a guardianship is growing as our population ages and more and more people need the guidance and assistance of the Court administrated process. People are living longer, which means more are entering into long term care. http://www.aarp.org/research/ ppi/ltc/ltc-medicaid/articles/fs18r_medicaid_06.html. Once a Ward has depleted their resources, the only choice may be long term care and Medicaid.

Under the Texas Probate Code, guardianship is a dependent administration. *See* Texas Probate Code §774. The guardian may not act without court permission unless authorized by statute. The guardian may take very few actions independently. In essence, the guardian plays "mother may I" with the court.

When resolving conflicts between federal Medicaid laws and policy, state statutes, and Administrative Rules, there is a hierarchy of law in the United States legal system. Within the federal system, the process begins with the U.S. Constitution and follows with federal statutes, administrative regulations and the federal common law. Within the state judicial system, which is always inferior to the federal regulations, the analysis begins with the State Constitution then to state statutes, state administrative regulations, and then the state common law. *See* Barry E. Carter, Phillip R. Trimble & Allen S. Weiner, International Law 159 (5th ed. 2007).

II. General Medicaid Policy Toward Guardianships

Medicaid has set forth guidelines for the interaction of the guardian with the Medicaid process. Generally speaking, there is no conflict. However, the Medicaid Eligibility Handbook and the lack of legal background by the TDHHS workers can and does cause problems when the guardianship rules within the Probate Code contradict the Handbook and Administrative Rules. As more people are under guardianships and need Medicaid, the issues and conflicts will increase.

Under the Texas Probate Code §768:

> It is the duty of the guardian of the estate to take care of and manage the estate as a prudent person would manage the person's own property, except as otherwise provided by this chapter. The guardian of the estate shall account for all rents, profits, and revenues that the estate would have produced by such prudent management.

The Code also provides that the Guardian shall take possession and manage all the property belonging to the Ward. *See* Texas Probate Code §768.

Section 774 of the Texas Probate Code outlines the actions the Guardian *may* take without a court order. They are extremely limited and are as follows:

> (1) Release a lien on payment at maturity of debt secured by a lien;
> (2) Vote stocks by limited or general proxy;
> (3) Pay calls and assessments;
> (4) Insure the estate against liability in appropriate cases;
> (5) Insure property of the estate against fire, theft, and other hazards; and
> (6) Pay taxes, court costs, and bond premiums.
> Texas Probate Code §774(b)

Within thirty (30) days of appointment, the guardian must seek court approval of a monthly allowance under Texas Probate Code §776. The Section specifically states that the Guardian *must* seek approval for all expenditures above the net income of the Ward's estate which is not spent on education and maintenance. The Code goes on to state that when a Guardian has in good faith expended funds from the income and corpus of the estate of the Ward for support and maintenance, the Guardian shall seek Court approval if:

> (1) The expenditures were made when it was not convenient or possible for the Guardian to first secure court approval;
> (2) The proof is *clear and convincing* that the expenditures were reasonable and proper; (emphasis added)
> (3) The Court would have granted authority in advance to make the expenditures; and
> (4) The Ward received the benefit of the expenditures.
> Texas Probate Code §776(b)

This Section holds the guardian to an extremely high standard of proving by "clear and convincing" evidence that the expenditure was necessary if it is made prior to court approval. The Guardian's failure to seek Court permission may result in the Guardian's removal under Texas Probate Code §761. The Administrative Rules fail to follow these principles.

The Probate Code clearly states that the Guardian may not spend funds other than net income without a monthly allowance or an expense application granting Court approval, *except* when paying taxes and the bond. Should the Guardian spend funds without approval, they do so at their own peril. The purpose of the Guardian's bond is to guarantee that should the Guardian act without Court approval there is a way to make the Ward whole.

The Medicaid Eligibility Handbook rule on the other hand, states:

> A person's resources are available if the resources are being *managed* by a legal guardian, representative payee, power of attorney or fiduciary agent. If, however, a Court *denies* a guardian or fiduciary agent access to a person's resources, the resources are not considered available to the person.

These instructions to the worker clearly contradict the statutory mandates to a guardian and fail to acknowledge the difference between a power of attorney and a guardianship. The Medicaid Eligibility Handbook goes on to state:

> (1) If a person's guardianship papers do not show that a legal guardian is prohibited access, and the Court has not subsequently ruled a prohibition, resources are considered available.
> (2) A guardian's routine need to petition the Court for permission to dispose of a person's resources is not a prohibition.
> (3) When the court rules on a petition to dispose of a person's resources, the resources are considered available only to the extent to which the Court has made the resources available for the person's benefit.
>
> Medicaid Eligibility Handbook D-4110; Texas Administrative Code §358.327(b)
> Note: Sections two and three contradict themselves.

In the Handbook discussing the above referenced Administrative Code section, Texas Department of Health and Human Services' policy states it is the duty of the Guardian to manage the estate as a prudent person. However, beyond this standard the rules lack an overall understanding of a dependent administration.

First, the general rule fails to acknowledge the difference between the agent under power of attorney or a guardianship. An agent under a power of attorney is acting through an agreement with the principal and can act independent of the court. The Guardian, on the other hand, is serving at the direction of the Court in a dependent administration. The policy absolutely fails to follow the statute which supersedes it stating the Guardian must seek court orders. In essence, the policy instructs the workers to ask the Guardian to ignore the law.

Under the Medicaid Handbook, an applicant's assets are determined at 12:01 a.m. on the first day of the month. With Medicaid's strict rules of determining assets at 12:01 a.m. on the first of the month, the inability to spend resources without a court order can be fatal. *See* Medicaid Eligibility Handbook F-1000; Texas Administrative Code §358.321. This rule combined with the guardianship policy is in complete contradiction with the Texas Probate Code outlined above. A Guardian cannot spend resources and does not have access to resources without a court order. Thus the resources are unavailable by statute but considered available by

policy.

As a practical matter, the Handbook is placing the worker, who has no legal background, in the position of reviewing the court order. Further, the majority of guardianship orders are fairly plain granting the Guardian full access to the Ward's estate. The orders do not outline the Probate Code requirements placed upon the Guardian when accessing funds.

Further, guardianship letters are a one-page document which establish the office of Guardian, but usually do not grant the Guardian permission to spend money. *Access does not equal permission to spend.* As with any good Texas process, it is a two step. Medicaid policy and Administrative Rules doe not recognize this law.

The Administrative Code which states that the mere need to seek a routine order does not prohibit access to a resource is extremely troubling. For example, in a Medicaid situation, when a Guardian is trying to qualify a Ward at the first of the month, if a court order is pending, the Guardian does not have permission to expend the resources beyond net income. Yet the Medicaid Handbook says the Guardian is to be considered as having access.

Further, the statute states if the Guardian expends the resources, they must expend them on something the court would otherwise order by *clear and convincing* evidence. Should the Guardian expend funds and the court not approve the expenditures, the Guardian places himself and his bond at risk. He further places himself in the position for removal by the court.

The Administrative Code and Handbook are in dire need of clarification and reform to bring them in line with the statutory standards of what is available and what is not available to the Guardian. This will clarify the law for the worker and reduce the necessity for interpretation, the potential for mistakes, and the need for costly appeals. The Administrative Code fails to acknowledge the dependent nature of a guardianship and the very fact that the Guardian cannot expend funds without court permission. This can be quite critical and damaging to the Ward.

III. Types of Administration

The overreaching Medicaid policy which considers funds to be available merely with the appointment of the Guardian is more troubling when the process of the guardianship creation and the types of guardianships and administrations are reviewed. There are four types of Court actions affected by this policy: (1) the Guardian of the Person; (2) the Guardian of the Estate; (3) Temporary Guardians; and (4) Community Administrations.

Prior to creating a guardianship, it is assumed that a person has capacity to handle their own affairs. *See Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App. –Amarillo 2001, no writ). The process of creating a non-emergency guardianship takes between three and six weeks. There can

be a serious delay qualifying a person for Medicaid when there is no access to funds, there is no guardianship, and the person does not have capacity. It takes fast agile movements to create the guardianship and qualify someone for Medicaid in a timely fashion.

A. Guardian of the Person

In general, the Guardian of the Person has the power to take charge of the person physically and establish their residence. Additionally, the Guardian has the duty to provide care, supervision and to protect the Ward. The Guardian of the Person may **not** consent to inpatient psychiatric treatment but may consent to other medical and surgical treatments. *See* Texas Probate Code §767(a)(4). The Guardian of the Person also has the authority to create and establish a Qualified Income Trust. *See* Texas Probate Code §767(a)(5). Under Texas Probate Code §782, the Guardian of the Person has the power to receive funds from governmental sources as long as they do not exceed $12,000 in any twelve month period. The Guardian of the Person does not have the authority to take charge of income from funds other than from governmental sources. Non-governmental funds include military pension, Civil Service pension, private pensions, private annuities, IRAs, savings bonds, etc. While a Civil Service and military pension may be from a governmental source, the funds from these two pensions are not generally released to Guardians of the Person. To take charge of these sorts of funds, a Guardian of the Estate must usually be appointed.

Once the Guardian of the Person or Estate has been appointed, the Guardian must qualify to serve as Guardian by filing their oath, bond, and other court information sheets as required by local courts. *See* Texas Probate Code §§699, 700,702.

B. Guardian of the Estate

The Guardian of the Estate takes charge of the Ward's financial affairs. The Guardian of the Estate has the power to collect all property, belongings, debts, claims, and obligations of the Ward. It is the Guardian of the Estate's duty to manage the estate as a prudent person would manage their own affairs. *See* Texas Probate Code §768. Generally, it is the Guardian of the Estate who marshals the assets and income. Most often a guardianship has been created because all other avenues of relief have failed. When a Guardian has been appointed, it is not uncommon to find the Ward's records in shambles or non-existent. As with the Guardian of the Person, the Guardian of the Estate must also qualify by filing their bond, oath, and local documents. *See* Texas Probate Code §§699, 700, 702. The Guardian then begins a treasure hunt. It is an arduous process to marshal the assets, accessing pensions and income sources, file the proper inventories, expense applications, and monthly allowances with the court. It can be very difficult to assess the Ward's potential eligibility for public benefits in the time frame dictated by Medicaid. Valuing life insurance policies, accounts, and clarifying ownership of an asset can take months.

The best approach is to apply for Medicaid to protect the eligibility date while assets and income are being reviewed.

C. Temporary Guardianship

In an emergency, a temporary guardianship may be established. *See* Texas Probate Code §§874-879. To create a temporary guardianship there must be imminent danger to property or person. The extent of imminent danger dictates the power granted. The court's willingness to create temporary guardianships varies from county to county. A temporary guardianship could be created to handle a small amount of resources for a limited time. The emergency being that the Ward will not be able to receive care if the guardianship is not in place. The temporary Guardian is granted only the powers necessary to handle the emergency. The Guardian may exercise *only* the powers given to him/her in the order. Third parties, like banks and TDHHS, are then left to interpret the order to determine if the Guardian may perform specific tasks and have access to funds. It would be wise to define in the temporary order the acts which the Guardian may take to accomplish qualifying the Ward for Medicaid.

D. Community Administration

The final method for handling resources through a court process is a community administration. This can only be done by the incapacitated person's spouse. When one spouse is incapacitated, the other spouse, under Section 883 of the Texas Probate Code, may serve as the community administrator for the community estate. The community administrator has the power to manage all of the community property during the incapacity of the other spouse. *See* Texas Probate Code §883(1). However, if there is separate property, a guardianship of the estate must be established. *See* Texas Probate Code §768. For many people, all of the property is community thereby making the community administration a cost effective method of handling business affairs of an incapacitated spouse.

Medicaid rules do not recognize the difference between community and separate property. However, both community administrations and guardianships require that community and separate property be identified. This issue may become important where dependent support orders are requested. Further, if there is a second marriage and only a part of the assets may be protected, it would be wise to seek court instruction as to which and what proportions the assets are to be protected.

III. Support and Income Allowances/Monthly Allowances

Under the Medicaid Eligibility Handbook, H-1500, Medicaid establishes the personal needs allowance of $60.00 for a nursing home resident. This amount is to pay for all of the Ward's expenses not covered by Medicaid.

Under the guardianship provisions of the Texas Probate Code, the Guardian is to establish a monthly allowance for the Ward. Under §776 of the Code the Guardian must file the monthly allowance within thirty (30) days after the Guardian has qualified. The monthly allowance must outline specifically how the Guardian is to expend all of the Ward's resources. Theoretically, the monthly allowance is only for those items over and above the net income of the estate. However, it is much more efficient to plan for all of the expenditures in the Ward's estate in the monthly allowance.

Once the Ward goes onto Medicaid, the monthly allowance should allocate the payment of the monthly needs allowance, currently $60.00, the payment of any spousal or dependent support if applicable, and finally the payment to the nursing home. Once the monthly allowance is in place, the Guardian may only spend funds as outlined in the order.

Under the Texas Rules of Civil Procedure, the court order takes effect immediately. Thus, the funds should be considered encumbered by the monthly allowance (or an expense application). Until recently, TDHHS had followed the Rules of Civil Procedure, (see Lynch Memo attached). Recently, TDHHS has taken the position that the court order is merely a guide and funds are not encumbered by the order. This is now an appeal in district court.

The need for a guardianship may continue even though the resources of the guardianship are depleted. One of the most difficult issues is to manage the pension checks of the Ward, as the guardianship is usually required by the military, Civil Service, and private pension plans.

IV. Dependent Allowance

Section 776(a) of the Texas Probate Code allows the Guardian to pay for the education and maintenance of the Ward's spouse or dependent. The Guardian must make application to the court to set an allowance. In setting the allowance, the court is to consider the circumstance of the Ward, the Ward's spouse, the Ward's dependents, the ability of the Ward's spouse to support himself or herself and the Ward's dependents, the size of the Ward's estate, any interest the Ward or the Ward's spouse has in a trust, and the existing estate plan of the Ward. *See* Texas Probate Code §776(a). When making this application, the Guardian is to notify all interested persons. The Probate Code defines interested persons as:

> An heir, devisee, spouse, creditor or any other person having a property right in or claim against, the estate being administered or the person interested in the welfare of an incapacitated person, including a minor. Texas Probate Code §601(15)

Under federal rules, the spouse in the community is entitled to a minimum monthly

maintenance needs allowance (MMMNA). This minimum income allowance is established based on the poverty level, currently it is $2,739.00 per month. Under Texas Medicaid Eligibility Handbook, sections J-6210 and J-6410, the spouse in the community is allowed to receive a portion of the institutionalized spouse's income to supplement his or her income up to the MMMNA amount. If the combined income of the two spouses is not enough to generate the MMMNA amount, the community spouse may protect resources to generate the income to bring the income each month up to the MMMNA threshold.

For example, if the community spouse had an income of $400.00 and the institutionalized spouse had an income of $800.00, the combined total would be only $1,200.00. The resources would be set aside to generate the difference between the spousal allowance of $2,739.00 and $1,200.00. The income generated is theoretically based on the interest rate of a one-year CD. So, if the couple had $300,000.00 in assets, and a one-year CD was earning .025%, it would generate $7,500.00 per year or $635.00 per month. Thus, the entire savings could be protected.

The increased MMMNA can be satisfied by diverting the nursing home spouse's income if available, then if the income is not adequate, by protecting resources. Under the Medicaid rules, the spouse must first look to income and may protect assets only when the income has been used. Medicaid Eligibility Handbook J-1100; Texas Administrative Code Rule §358.420(c). A complete discussion of this is beyond the scope of this paper. Clyde Farrell's handbook, Financing Long Term Care in Texas, Edition 15.0(2010 draft) outlines the process for calculating the MMMNA. Appendix A is a motion by Clyde Farrell to set aside resources for the community spouse which outlines the law and can be adapted to the MMMNA situation.

However, it is imperative that the practitioner understand fundamentals of the MMMNA, how to calculate the Medicaid maximum set aside to create the MMMNA, the spousal impoverishment rule, and the interplay between the MMMNA and spousal impoverishment to ensure that the client protects as much as possible for the community spouse.

The Guardian may, and probably must, seek a spousal support order in these situations. While the Centers for Medicare and Medicaid Services set the MMMNA used in Texas, it is possible through a guardianship to increase the support for the community spouse. Appendix B by Patricia Sitchler, is an application by a Guardian who sought and was granted an expanded MMMNA which reflected the actual needs of the community spouse. (This procedure is done in other states by administrative hearing.) If it can be demonstrated that there is actual need above the MMMNA, a practitioner should weigh the cost of establishing a guardianship against the potential increase for the community spouse.

V. Resources

The Medicaid rules articulate the specific situations when Medicaid will allow the consideration of a dependent. The Medicaid Eligibility Handbook defines the dependent family member as a person's child (minor or adult) or a parent or a sibling (including half-sibling, step-sibling, or adopted sibling) of either member of the couple. The dependent family member must be living in the Medicaid applicant's home before the absence of the applicant, must continue to live with the community spouse, and must be unable to support himself outside the home because of medical, social or other reasons. *See* Medicaid Eligibility Handbook H-1600.

The probate code does not specifically define a dependent in either §601 of the definitions or when using the term in §776(a) the sums allowable for the education and maintenance of the Ward, spouse or dependent.

In an abundance of caution, when qualifying a Ward with dependents for Medicaid, the practitioner should seek protection for the dependents by defining in their motion who is a dependent. If there is a conflict between Medicaid policy and a court defined dependent, the court order supersedes the administrative rule. *See* Barry E. Carter, Phillip R. Trimble & Allen S. Weiner, International Law 159 (5th ed. 2007).

Strategically speaking, if there is a community spouse with extenuating circumstances or any dependent person, it would be worthwhile to petition the court to set aside resources and income for the spouse or dependent persons which may exceed the minimum amount established under the Medicaid rules.

VI. Spousal Impoverishment

In 1988, Congress passed the "Spousal Impoverishment Provisions" of the Medicare Catastrophic Coverage Act (MECCA. 42 U.S.C.A. §1396r-5). These provisions were alluded to above in the discussion regarding protected resources. For a full discussion of these please see Clyde Farrell's paper Financing Longterm Care in Texas, Edition 15.0(2010 draft) pages 89-103. For purposes of this discussion, the general principles of MECCA are that when a spouse enters the nursing home, Medicaid will take a snapshot of the resources (not income). If at the snapshot the resources are below a federally established cap currently $109,506.00, and a combined resource total of $218,000.00, the spouse in the community may set aside up to one-half of those resources ($109,560.00) for their personal use. This is over and above the MMMNA. As noted earlier, this amount can be expanded by the court.

In a guardianship, to ensure that the spouse maximizes the resource set aside, it is important that the Guardian make application to the Court as part of the spousal and dependent allowance under §776(a). Failure to apply for the proper protective resources could result in the Guardian being sued by the community spouse or removed as Guardian for failure to protect the ward's estate.

VII. Dual Institutionalized Spouses

Under the Medicaid Eligibility Handbook, Appendix XX, if both spouses are institutionalized, each person applies for Medicaid individually. When this is done, each application is considered on its face. Under the federal and state rules, there are no penalties for transfers between spouses. What this means is that all of the assets can be transferred to one spouse's name, thus impoverishing the other spouse. The impoverished spouse qualifies for Medicaid while the other spouse pays privately. When the practitioner uses this strategy, it is necessary to make a calculated risk. A careful review of both applicants' health and financial resources must be made. It is important to remember that the priority in the guardianship is the care of the Ward. *See* Texas Probate Code §805. Thus, when making the application and assumptions, it is important to review and provide the court with the rationale that shows this is in the best interest of the Ward or that the Ward will not be hurt in any way by impoverishing them and qualifying the Ward for Medicaid while privately paying for the other spouse.

Attached as Appendix C is an application used to impoverish one spouse and qualify them for Medicaid while private paying for the second spouse.

When viewing a guardianship, unlike other Medicaid planning, post death considerations are not taken into account. Thus, the primary focus in the guardianship is the Ward themselves. It is imperative that the Guardian consider whether or not these actions could open them up to post death lawsuits for tortuous interference with an estate. If this is a second marriage or the wills of the Ward and their spouse leave property differently, the Guardian could be opening them up to litigation.

Further, when planning in a guardianship, it is always important to look at account titling and review whether there are joint accounts or payment on death accounts. Anything which changes the titling of the account at the inception of the guardianship should be reviewed with the court. Court instructions should be sought if there is more than one owner or payment on death on an account. All of this could impact the decision to impoverish one spouse over the other.

VIII. Gifting

For a complete discussion on Medicaid rules with regards to giving, please see Clyde Farrell's handbook, Financing Long Term Care in Texas, Edition 15.0(2010 draft). For purposes of this paper it is important to understand some fundamentals which can be found at 42 U.S.C.A. §1396p(c)(1)(E). Under the Medicaid rules, there is a five year or sixty-month, look back for any gifts that are made prior to a Medicaid applicant being otherwise qualified for Medicaid (for gift transfers prior to February 8, 2006, it is a thirty-six months rule). The amount of the gift will be divided by a factor of $130.88. This number will give the exact penalty period by the number of days that an applicant is not eligible for Medicaid. (It is important to note that the IRS rules for gifting are not the same as Medicaid rules which are not the same as guardianship rules. Each area has its own set of regulations. Most clients do not realize the distinction.)

In a guardianship, the Texas Probate Code limits the circumstances in which a Guardian may make gifts. A Guardian may make gifts only with the approval of the court and after giving proper notice. *See* Texas Probate Code §§865-866. Under §866, a Guardian may make charitable contributions under certain specific rules. The contributions cannot exceed twenty percent of the Ward's net income for a calendar year. The contributions must be made to a charity or nonprofit or community chest and cannot exceed $25,000.00. More than likely the contribution will result in a tax reduction for the Ward. The court must review and resolve all of these issues before being authorized to make a gift.

A Guardian may make tax motivated gifts to individuals under §865 of the Texas Probate Code. Under this section, the Guardian must apply to the Court, post notice, and satisfy the court that the Ward, the Ward's spouse and dependents are not likely to need the funds given during the Ward's lifetime. The gifts must be made to the Ward's spouse, dependents, or other persons related to the Ward by blood or marriage who are identifiable at the time of the order, or who are in what is anticipated to be the Ward's last will, trust, or other beneficial instrument.

Though gifting plans may be common and prudent in non-guardianship Medicaid cases, the Probate Code requires that the Guardian look to supporting the Ward first and gifting second. *See* Texas Probate Code §865. The gifting statute in Texas has been strictly construed and it is not likely that a probate court will allow gifting for Medicaid planning. The better strategy would be to seek support for a spouse or dependent through the dependent support allowance provisions in §776(a).

One instance where gifting may be possible is if at the inception of the guardianship, accounts are titled jointly. In such instances it may be possible to seek the Court's approval to remove the Ward's name from the account. For Medicaid purposes, the account is considered the Medicaid applicant's account if the applicant could withdraw funds. Medicaid Eligibility Handbook F-1221. (To claim otherwise, the joint account holder must show their contribution.) If the funds are the Medicaid applicant's but the Court would allow a "gift" or the joint account holder to withdraw the funds, which legally the account holder is entitled to do, it would enable the joint account holder to begin a gifting plan, ultimately protecting some resources. This is a rather speculative method, but one that may be applicable in certain instances.

IX. Trusts

In a guardianship, there are four types of trusts that may be established for a Ward: Qualified Income Trust (QIT or Miller Trust); the Self-Settled Special Needs Trust created through the guardianship; a general support trust created by the guardianship; and a pooled trust through a joinder agreement in a guardianship.

A. Qualified Income Trust

Texas is an income cap state, which means if you have more than a certain amount of income each month, currently $2,022.00, you are automatically disqualified for Medicaid. To prevent the gap between income and cost of care, people who have an income over the cap may create a QIT. *Miller v. Ibarra*, 746 F.Supp.19 (D. Colorado 1990); 42 U.S.C.A. 1396p(d)(4)(B). The sole purpose of this trust is to capture the income and redistribute it out to the Medicaid recipient and their spouse if there is one, and thereby legally lowering the Medicaid recipient's income. Under the statute, the QIT must be irrevocable, must hold *only* income, and must be zeroed out each month. The residuary beneficiary must be the State of Texas. 1 PAC. §358.339.

A Guardian, with a court order, may create a QIT. *See* Texas Probate Code §774(a)(8). The QIT may be created by a Guardian of the Person as well as a Guardian of the Estate. *See* Texas Probate Code §767(5). To create the trust, the Guardian must make application to the court providing the court with a copy of the proposed trust document. Once approved, the Guardian may sign and fund the trust.

It can be very frustrating when a guardianship goes into effect as the Guardian may not have complete information as to the Ward's total income. When calculating the Ward's income, it is extremely important to look at what the gross income is, not the net. Medicaid will look at the gross income including payments for Medicare, supplemental insurance, and other automatically deducted expenses.

The QIT must be in place in the month the Ward would otherwise qualify for Medicaid. It is advisable to establish a QIT early to prevent someone from inadvertently being disqualified from Medicaid if there is a possibility that the income will exceed the Medicaid cap. There is no harm in having the trust in place and having the income of the Ward flow through the bank account which is set up as the trust account. However, the harm in not having the QIT set up may mean the proposed Ward is disqualified for several months when he or she would otherwise be eligible for Medicaid.

B. 867 Trusts: Support and Special Needs Trust

Under a guardianship, an 867 Trust may be created for the management of the Ward's assets. *See* Texas Probate Code §867. In creating the trust, the trust can be one for health, education, maintenance and support, or under §868(d) the court is allowed to create a Special Needs Trust for the Ward. The Probate Code provisions for Special Needs Trusts are superseded by Federal statute 42 U.S.C.A. 13p(d)(4)(A). The Federal statute requires that the person for whom the Special Needs Trust is created must be under the age of sixty-five (65). If a Ward is under the age of sixty-five (65), needs Medicaid, and has assets, an unexpected inheritance, or other resources, it may be prudent to consider whether to create a Special Needs Trust to hold the Ward's funds. The Special Needs Trust can provide a higher quality of life for the Ward by preserving assets to enhance the quality of life.

A Special Needs Trust under federal law 42 U.S.C.A. §1396p(d)(4)(A), would enable the Ward to qualify for Medicaid for nursing homes, group homes, and community based waiver programs. This can be a significant benefit in planning for a Ward who is under the age of sixty-five (65) and has resources.

By federal law, the trust must be created by a Guardian (or other statutory designated people), be irrevocable, and must have provisions for paying back any benefits which the ward receives from state or federal entities. *See* 42 U.S.C.A. 1396p(d)(3)(B). Generally speaking the trustee must be a corporate fiduciary unless the trust is less than $150,000. *See* Texas Probate Code §867(d)(e).

The creation and scope of a Special Needs Trust is far beyond the scope of this paper. Entire seminars are devoted to this topic. However, it would behoove the Guardian to seek expert advice on the creation of these trusts if the Ward could qualify for Medicaid when significant care and supervision is needed, is under sixty-five (65), and has resources.

C. Pooled Trusts

Under federal law 42 U.S.C.A. 1396p(d)(4)(C)(ii), assets may be transferred to a pooled trust. A pooled trust is a trust which holds the assets of many people and takes many small accounts to create one large one. This can be a good solution when resources are limited and a trusted family member or corporate trustee can not be found.

Like the Qualified Income Trust and the Special Needs Trust, the pooled trust must be approved by the court prior to funding.

At the creation of the guardianship it is extremely important that the Guardian quickly

review the Ward's age, income, assets, and resources and determine whether or not a trust should be created for Medicaid purposes.

X. Real Estate

A. Homestead

Under the Medicaid rules, the homestead is an exempt asset. As long as the nursing home resident intends to return home, which all do, the asset remains an exempt asset. *See* Medicaid Eligibility Handbook F-3120.

Owning real property not occupied by the Ward who needs Medicaid benefits can be quite problematic in a guardianship. Generally speaking, once the Ward qualifies for Medicaid there are no resources to pay for the upkeep, taxes, insurance, and maintenance of the home. Additionally, more and more seniors are presenting with home equity loans or mortgages which mean that their home is not paid for and on top of the maintenance, taxes, utilities, and insurance, there are also mortgage payments.

Under the Medicaid rules, the Medicaid resident may rent the home on a net-zero lease. This means that the home is rented with a tenant who agrees to pay all of the expenses of the home (taxes, insurance, utilities, and maintenance) directly without passing the funds through the hands of the nursing home resident. *See* Medicaid Eligibility Handbook E-3340.

However, if the nursing home resident has a mortgage, any payments made toward the mortgage are considered income to the Medicaid recipient. This is a catch 22. The income is being received, but it is being received by the mortgage company not the nursing home. Under the Medicaid rules, it would be a part of the applied monthly income and must go to the nursing home. This makes it extremely difficult to keep the property.

Clyde Farrell's paper discusses an informal work-around for paying the mortgage through a third party. Financing Long Term Care in Texas, Edition 15.0(2010 draft). However, because of the guardianship accounting requirements, it is not likely that this is a valuable solution in a guardianship.

B. Renting Property

In a guardianship, a Guardian may rent the property without court approval if the lease is less than one year. However it is always prudent to seek Court permission to prevent future liability. *See* Texas Probate Code §839.

One strategy if there are resources and trusted family members, who can live in the

house, would be to seek Court permission to pay off the mortgage with available resources, thus creating an exempt asset and allow a family member to live in the house under a rental agreement.

C. Sale of Real Property

If the Guardian decides it is appropriate to sell the home instead of renting it, the Guardian must seek court permission. To accomplish this, they must go through a four part process of making application, obtaining an order, reporting the sale or rental, and having the sale approved. The application for sale cannot be filed prior to the inventory. There are mandatory notices and postings which must run before the judge can consider the application to sell or the report of sell. *See* Texas Probate Code §§820,825,827-829.

The conflict between guardianship statutes and Medicaid policy is that Medicaid considers the asset available but in the guardianship there is a lag time between the filing and court approval. A homestead is not a problem as it is an exempt asset. However, it is other real estate, like the miscellaneous lot, which Medicaid considers an available asset even if there is not a court order needed to sell. In a guardianship the Guardian must seek court permission before listing the real estate for sale. Thus, it is imperative that a Guardian apply for the sale of real estate immediately if it is likely the Ward will need to qualify for Medicaid. The value of real property listed for sale is not counted if the Guardian has listed the property for sale. This exclusion continues until the proceeds of the sale are available to the applicant. *See* Medicaid Eligibility Handbook F-3130.

XI. Estate Recovery

For a complete discussion on estate recovery, again please see Clyde Farrell's paper on Financing Long Term Care in Texas, Edition 15.0(2010 draft). It is important to know that estates can be settled through the guardianship process without a probate procedure. Assets may pass directly from the guardianship estate to the designated beneficiaries under a Will or an Affidavit of Heirship. *See* Texas Probate Code §752.

To close a guardianship and distribute directly, the Guardian must completely administer the estate including all creditor claims. Under §786 of the Texas Probate Code, a claim can be presented in a guardianship at any time, as long as the estate has not been closed. Theoretically, estate recovery claims could be made through the guardianship prior to the closing of the guardianship.

The guardianship claim process is similar to the probate claim process in that the claimant must first submit the claim to the court, it must be approved or disapproved by the Guardian, then approved by the court, and finally if rejected the claimant may bring suit. Once the claims have been established, as in the probate, there is a priority of claims. Texas Probate

Code §805 spells out the order of the payment of claims. This is a very troubling statute as it outlines first that the Guardian must first pay for the care, maintenance, and education of the Ward, then the funeral expenses, then the expenses of administration, and finally other claims against the Ward's estate.

Theoretically, an estate recovery claim would be a priority in the guardianship. Thus, it appears it is extremely important for the Guardian to quickly wrap up the Ward's affairs in the guardianship and open a probate administration which has a more favorable claim process for the Ward's estate.

XII. Attorney Fees

Any person who makes an application in good faith, which is later granted, may be awarded attorney fees under the Texas Probate Code §665B. Further, the Guardian is entitled to legal representation. The attorney representing the Guardian may be paid after filling the proper application. To be awarded attorney fees, application must be presented to the court with an itemized bill and an affidavit outlining the hours spent, the rates charged, the attorney's experience, and the reasonableness of the fees. Standard forms are available through the Texas Bar's Guardianship Guide.

In this past legislative session, a floor amendment was offered with the potential to radically change the guardianship fees for Medicaid residents. There is now a special section with specifically applies to guardianships when the Ward is on Medicaid. *See* Texas Probate Code §670. In the past, once the fee application was granted, the application would be submitted to the Texas Department of Health and Human Services and the Medicaid worker would adjust the applied monthly income to reimburse for guardianship fees and expenses. These included attorney fees and the Guardian's commission. Under §670 of the Texas Probate Code, the guardianship of a Medicaid recipient has a specific provision limiting the Guardian's fees and attorney fees, without regard to the work or needs of the Ward. The Guardian's fees are now set at $175.00 per month. The attorney's fees and expenses are not to exceed $1,000.00. Then the statute goes on to state that there is an administrative cost allowed for up to $1,000.00 over a three-year period which includes the ad litem fees. Wards who need Medicaid are now second class citizens who have a different standard than other Wards and who will have limited access to legal services.

Under §670(c), the statute allows that the cost ordered to be paid may exceed $1,000.00 if the costs in excess of that amount are supported by documentation "acceptable to the court and the costs are approved by the court." *See* Texas Probate Code §670(c). It appears that this final sentence allows the court discretion if guardianship fees and commissions and the attorney fee applications are carefully crafted and supported. The concern is the complete lack of understanding by the Medicaid agency of the work and expense of a guardianship and that there appears to be a feeling that attorney fees and Guardian fees should be limited by statute rather

than being established by the court after viewing the individual circumstances. It will be very important in the coming legislative session to make sure these provisions are not further limited.

XIII. Conclusion

In general, Guardians are able to work within the Medicaid guidelines and boundaries to qualify a Ward for Medicaid. However, in the instances where there are some, but not a great deal of resources real estate or dependents, it is important that the practitioner plan for the Ward's qualification for Medicaid so as not to jeopardize the Ward or his family.