



# Elder Law Overview and Medicaid Administration

November 15, 2011  
San Antonio Estate Planners Council

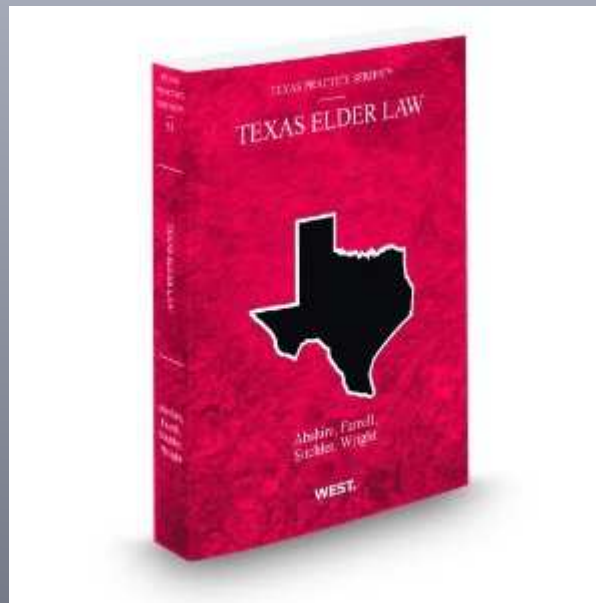
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# Today's Presentation

- History and Development of Elder Law
- General Practice Areas
- Medicaid Administration
- Medicaid Estate Recovery Program
- The Things People Say

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# History and Development of Elder Law

**President Roosevelt Signing  
Social Security Act of 1935  
August 14, 1935**



**The genesis of Elder Law?**





# Your Social Security

**MEDICARE** helps older Americans pay hospital and medical expenses

**NEARING 65?**

*Sign up for **MEDICARE** 2 or 3 months before your birthday*



U.S. DEPARTMENT OF  
HEALTH, EDUCATION, AND WELFARE  
SOCIAL SECURITY ADMINISTRATION

SSA-1158

001-114

# Medicare and Medicaid

## July 30, 1965



# MEDICARE

HEALTH INSURANCE PROGRAM  
NOT MEANS TESTED  
HOSPITALIZATION  
DOCTORS APPOINTMENTS  
SOME MEDICATIONS  
SHORT TERM REHAB

# MEDICAID

PROVIDES LONG-TERM CARE  
INSTITUTIONAL & NON-INSTITUTIONAL  
AGED, BLIND, OR DISABLED  
MEANS TESTED

FEDERAL ACTS

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graph TD; A[FEDERAL ACTS] --> B[HEALTH CARE PROGRAMS]; B --> C[BUREAUCRATIC AGENCIES];
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HEALTH CARE PROGRAMS

BUREAUCRATIC AGENCIES



# Navigating These New Laws Created the “Elder Law Attorney”

- Initially Worked Primarily for Government Funded Legal Services Programs
- Ensured that States Were Fair in the Administration of Medicare and Medicaid
- Continually Increasing Need for Age Related Services

# INCREASED DEMAND FOR Elder Law Attorneys



ELDERLY POPULATION IN GENERAL HAS  
INCREASED

COMPLICATIONS OF ACCESSING MEDICAID

HIGH COST OF NURSING HOME CARE

LACK OF ACCESS TO LONG-TERM HEALTH CARE

# ELDERLY POPULATION IN GENERAL HAS INCREASED

## 100-year-olds find it's not so lonely at the top of life

■ They might become fastest growing group

By HOPE YEN  
ASSOCIATED PRESS

**WASHINGTON** — It's starting to get crowded in the 100-year-olds' club.

Once virtually nonexistent, the world's population of centenarians is projected to reach nearly 6 million by midcentury. That's pushing the median age toward 50 in many developed nations and challenging views of what it means to be old and middle-age.

The number of centenarians already has jumped from an estimated few thousand in 1950 to more than 340,000 worldwide today, with the highest concentrations in the U.S. and Japan, according to the latest Census Bureau figures and a report being released today by the National Institute on Aging.

Their numbers are projected to grow at more than 20 times the rates of the total population by 2050, making them the fastest growing age segment.

Demographers attribute booming long-livers to decades of medical advances and improved diets, which have reduced heart disease and stroke. Genetics and life-



(RENO) GAZETTE JOURNAL  
**SPRY:** Emma Hendrickson, 100, of Morris Plains, N.J., bowls at the National Bowling Stadium in Reno, Nev.

style also play a factor. So, too, do doctors who are more willing to aggressively treat the health problems of people once considered too old for such care.

"My parents are 86 and 87 and they're going strong, with my dad driving all over the place, so I've already told my financial planners that I'm going to live to at least 96," said Susan Ryckman, 61, as she walked around New York City, an iPod and iPhone in hand.

"As long as I'm not mentally and physically infirm, I'd like to live as long as I can," she said.

In the United States, centenarians are expected to increase from 75,000 to more than 600,000 by midcentury. Those primarily are baby boomers hitting the 100-year mark. Their population growth could add to rising government costs for the strained Medicare and Social Security programs.

"The implications are more than considerable, and it depends on whether you're healthy or sick," said Dr. Robert N. Butler, president and chief executive of the International Longevity Center, a New York-based nonprofit group specializing in aging. "Healthy centenarians are not a problem, and many are, but if you have a demented, frail centenarian, they can be very expensive."

Butler predicted a surge in demand in the U.S. for nursing homes, assisted living centers and other special housing, given the wave of aging boomers who will be at increased risk for Alzheimer's disease.

He said federal and state governments may have to re-evaluate retirement benefits, age limits on driving and Medicare coverage as they struggle to redefine what it means to be old.

# COMPLICATIONS OF ACCESSING MEDICAID

## Legislation and reform

1965

Social Security Amendments Establishing Medicare and Medicaid Benefits

1972

Medicare eligibility was extended to individuals under age 65 with long-term disabilities

1977

The Health Care Financing Admin. established

1987

Nursing Home Reform Act (OBRA87) strengthened protections for residents of nursing homes

1996

Temporary Assistance for Needy Families (TANF) Health Insurance Portability and Accountability Act (HIPAA)

2003

Medicare Prescription Drug, Improvement, and Modernization Act

2005

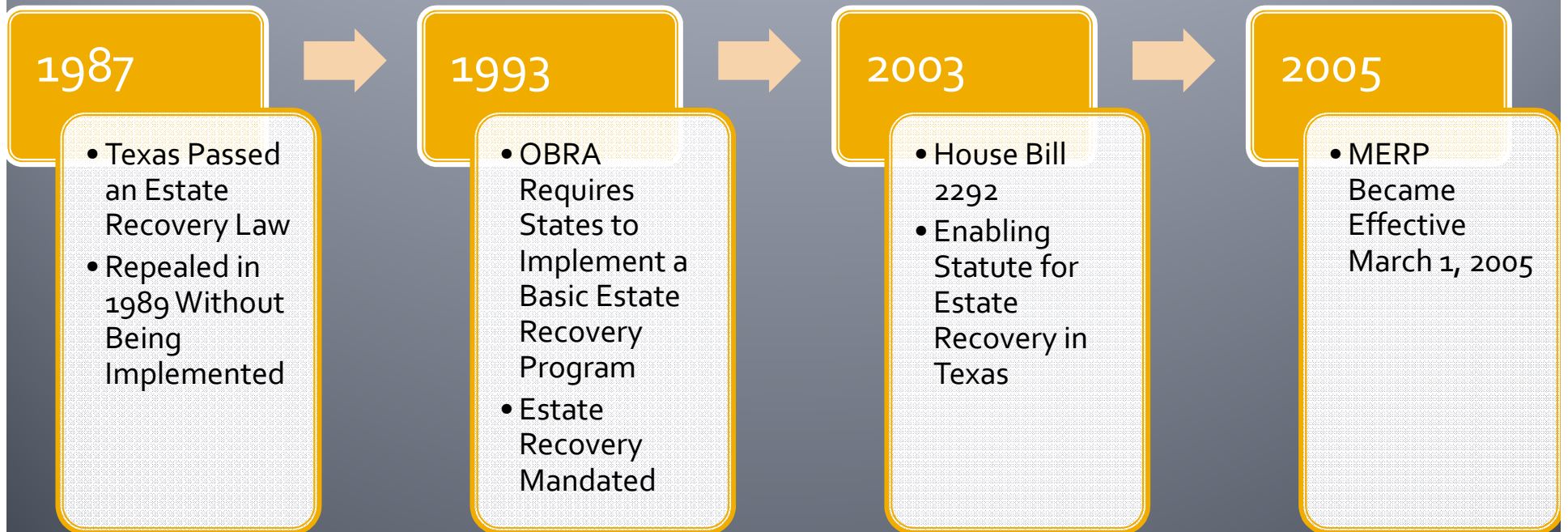
Texas adopts Medicaid Estate Recovery Program (MERP)

2006

Deficit Reduction Act



# Estate Recovery in Texas





# HIGH COST OF NURSING HOME CARE

Texas	Avg. Daily Nursing Home Rate (Semi-Private)	Avg. Monthly Rate
Austin	\$150	\$4,500
Dallas	\$133	\$3,990
Houston	\$145	\$4,350
San Antonio	\$134	\$4,020

Source: Texas State-Specific Data from the Genworth 2011 Cost of Care Survey

# ORGANIZATIONS DEVELOPED ADDRESSING THE EMERGING FIELD

NAELA  
1988

- NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
- Has grown to over 4,000 attorneys dedicated to assisting elderly people with an array of legal needs

Texas NAELA  
1990

- TEXAS Chapter of the NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
- State organizations aligned and began to develop

DELAA  
1991

- DISABILITY AND ELDER LAW ATTORNEYS ASSOCIATION
- Developed by attorneys seeking greater knowledge and accountability in the assistance of the elderly and disabled

# **General Practice Areas**

## **Scope of Elder Law**

# Generally includes

- Medicaid Planning
- Estate Planning
- Guardianship and Litigation
- Long-Term Care Insurance
- Senior Housing
- Medicare
- Medicaid Estate Recovery
- Private Pensions
- Social Security Retirement

# Continued

- Disability
- Exploitation, Neglect & Abuse
- Ethical Considerations
- Poverty Issues
- Government Role
- Legislative Changes
- Conflicting or Intersecting Laws
- Attorney Liability



# Estate Planning

- Needs of Client
- Capacity
- Goals
- Generally not High-End Clients
- General Planning Mixed with Elder Law Issues

# Public Benefits Planning

- When Medicaid Planning is Needed
- Pre-Planners vs. Crisis Planners
- Re-Educating Client's Street Knowledge
- Complications of Medicaid
- General Lack of Awareness
- Case Example (Outside of Midland)
- Repairing "Home Brews"

# Public Benefits Planning

## Health Care Options

- Medicare
- Medicaid
- Long-Term Care Insurance
- VA Improved Pension (Aid and Attendance)
- Private Pay

# Medicaid in General

- State- Federal Partnership
- CMS/HHSC
- Means Tested
- Program Originally Based on Welfare Model
- Multiple Programs
- SSI Largest Group of Medicaid Users
- Texas -SSI Linked State

# Attorney Certifications Specializations

- National Elder Law Foundation (NELF)
- Certified Elder Law Attorney (CELA)
- State Bar of Texas Adopted



# Finding The Right Attorney

- No elder law attorneys specialize in all the areas covered under the umbrella of elder law.

# Medicaid Administration

# Medicaid Planning by Non-Attorneys

- Texas Human Resources Code Section 12.001
- Unauthorized practice of law
- Civil damages

# Monthly Income Limits

- Unmarried Individual - \$2,022
- Married Individual w/Ineligible Spouse - \$2,022
- Married Couple, Both Applying - \$4,044
- Name-on-the-Check Rule

# “Miller Trust” or “QIT”

- Solves only income problems
- Must be irrevocable
- Holds only grantor’s income
- Distributions must be for certain purposes
- State has right of reimbursement
- All of a single source of income goes into trust
- Affects eligibility but not applied income



# Asset Limits

- Unmarried Individual - \$2,000
- Married Individual w/Ineligible Spouse  
(See “spousal impoverishment” below)
- Married Couple, Both Applying - \$3,000
- Assets determined as of 12:01 a.m. on first day of each month

# Excluded Assets for Eligibility Purposes

- Homestead - But DRA 2005 limits home equity to \$500K, if single
- One Auto
- Burial Spaces (includes casket, vault, marker, etc.)
- Irrevocable Pre-Need Funeral Contracts
- Business Property

# Spousal Impoverishment Rules

- The purpose is to prevent impoverishment of the community spouse when the other spouse enters a nursing home.

# Spousal Protected Resource Amount (SPRA)

- Equals half of the couple's combined assets as of month of entry to medical care facility for a continuous stay (30 consecutive days), but
- Not less than \$21,912 (in 2011)
- Not more than \$109,560 (in 2011)
- Minimum SPRA in 2012: \$22,728
- Maximum SPRA in 2012: \$113,640

# Calculation of SPRA

- If combined assets total \$250,000, the SPRA is \$109,560
- If combined assets total \$100,000, the SPRA is \$50,000
- If combined assets total \$20,000, the SPRA is \$21,912



# Minimum Monthly Maintenance Needs Allowance (MMMNA) for Community Spouse

- This amount is \$2,739.00 per month in 2011.
- This amount will increase to \$2,841.00 in 2012.

# SPRA Expansion

- May be expanded (even beyond the \$109,560 maximum) in certain instances to bring the community spouse's monthly income up to the MMMNA (\$2,739.00).

# Transfer of Assets

- OBRA 1993 imposes a penalty (period of ineligibility) for disposing of assets for less than FMV.
- The length of the penalty period depends upon the amount transferred.

# Exempt Transfers of the Home

No penalty if transferred to -

- The spouse
- The individual's child under 21
- The individual's disabled child of any age
- A sibling with an equity interest who lived there 1 yr. before nursing home entry
- The individual's child who lived there 2 yrs. before nursing home entry and who provided care that delayed that event

# Other Exempt Transfers

No penalty for assets transferred to -

- The spouse
- To the individual's disabled child of any age, or to a trust for the sole benefit of such child
- To a trust for the sole benefit of any disabled individual under 65



# OBRA 1993 Transfer Rules (prior to 02/08/06)

- Look-Back Period - 36 months for non-trust transfers; 60 months for certain transfers to/from trusts
- Penalty Period Begins - The month the transfer occurred

# DRA 2005 Transfer Rules (Effective 02/08/06)

- Look-Back Period - 60 months for all transfers.
- Penalty Period Begins - When the individual enters a nursing home, applies for Medicaid, and would be eligible but for the transfer.

# Formula for Calculating Penalty Period

$$\begin{array}{c} \text{Amount Transferred} \\ \div \\ \text{Average Nursing Home Daily Rate} \\ \text{(\$142.90)} \\ = \\ \text{Penalty Period in Days} \end{array}$$

**Medicaid Estate  
Recovery Program  
(MERP)**

# Medicaid Estate Recovery Program ("MERP")

Applicable To:

- Person 55 & older, and
- Who initially apply for covered services on or after 3/01/05



# Covered Services

- Nursing home services;
- ICF-MR services;
- Home & community-based waiver services (CBA, CLASS, etc.);
- Certain Medicaid-funded attendant services; and
- Related hospital & prescription drug services.

# Basis For Claims

- Acceptance of Medicaid-funded covered services provides basis for a Class 7 Probate claim.

# The Things People Say

# Clients Street Knowledge

- But I can gift \$10,000 a year, right?  
(IRS/MDC/VA)
- We have too much in the way of assets to get Medicaid.
- I have \$100,000 in the bank and need a Miller Trust.
- I can't qualify my husband for income eligibility because our combined social security is \$2,023 a month.

# Advisors Should Beware of Saying:

- Three words you should never say, “just spend down.”
- Never, ever say these five words, “there’s nothing you can do.”
- You had to do something three years ago.
- You had to do something five years ago.
- Just transfer all your assets to the children, then apply.
- Just put the house in an RLT, then apply.
- Just disclaim the inheritance, then apply.

# The End