



LEGISLATIVE UPDATE

Access to Justice

BY BRUCE P. BOWER



Senate Bill 221 (effective Sept. 1, 2011) amended the definition of “exploitation” under the Texas Human Resources Code. The amendment makes an *attempt* to use the resources of an elderly or disabled person without the informed consent of the elderly or disabled person as an act of exploitation. The bill thus adds the *attempt* as a wrong on the same footing as the completed act. The bill states, in Section 5, (3):

‘Exploitation’ means the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an [the] elderly or disabled person that involves using, or attempting to use, the resources of the [an] elderly or disabled person, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.

This portion of Section 5 of S.B. 221 becomes Texas Human Resources Code Section 48.002(a)(3). (New wording underlined.)

Section 5 of S.B. 221 also amends Texas Human Resources Code Section 48.002(a)(5) to read:

‘Protective services’ means the services furnished by the department or by a protective services agency to an elderly or disabled person who has been determined to be in a state of abuse, neglect, or exploitation or to a relative or caretaker of an elderly or disabled person if the department determines the services are necessary to prevent the elderly or disabled person from returning to a state of abuse, neglect, or exploitation. These services may include social casework, case management, and arranging for psychiatric and health evaluation, home care, day care, social services, health care, respite services, and other services consistent with this chapter.



Thus, S.B. 221 increases the scope of protection of the elderly and disabled, so as to protect against attempts to use without informed consent the resources of an elderly or disabled person, as well as protect against the actual use. S.B. 221 also expands the range of services that can be offered by the Texas Department of Family and Protective Services or a protective services agency, once the definition of exploitation is found to be met. A relative or caretaker of the exploited person, under certain circumstances, may receive services. Respite services have been added to the services, which the department or agency was already authorized to furnish.

It remains to be seen how the increased definition of exploitation, and the expanded range of services brought about by S.B. 221 will intersect with Texas Disciplinary Rule of Professional Conduct 1.02(g). That Rule states, “A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client, whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.”

S.B. 221 left intact the penalty for failure to immediately report exploitation (or abuse or neglect) to the Texas Department of Family and Protective Services (or other state agency as applicable). It is a Class A misdemeanor if a person who has cause to believe that an elderly or disabled person has been abused, neglected, or exploited knowingly fails to report the matter to the Texas Department of Family and Protective Services (or other state agency as applicable). The failure to report is a state jail felony if the victim was a disabled person residing in a state-supported living center, or a facility licensed under Chapter 252 of the Health and Safety Code, and the actor knew that the disabled person had suffered serious bodily injury as a result of the abuse, neglect, or exploitation. *See* Texas Human Resources Code Sections 48.051 and 48.052. If the exploitation (or abuse or neglect) occurs in a facility that an agency of the state operates, licenses, certifies, or registers, the report is to be made to that state agency.

Under Texas Human Resources Code Section 48.002(a)(1), an elderly person is a person 65 years of age or older. Under Texas Human Resources Code Section 48.002(a) (8) a disabled person is a person with a mental, physical, or developmental disability that substantially impairs the person’s ability to provide adequately for the person’s care or protection and who is 18 years of age or older, or who is under the age of 18 and who has had the disabilities of minority removed.

S.B. 221 also did not alter the ability of adults who have been the victims of exploitation to sue the actor for unjust enrichment, conversion, or trespass. The U.S. Administration on Aging now supports in Texas an Elder Exploitation Hotline — (888) 612-6626. The Elder Exploitation Hotline, without charge, will advise a victim of elder exploitation regarding potential avenues of recovery. Referring an individual to the

Elder Exploitation Hotline is *not* a substitute for the mandated report to the Texas Department of Family or Protective Services (or other state agency, as applicable).

Another enactment (House Bill 1481, effective Sept. 1, 2011) will have to catch up with Senate Bill 221. Even after H.B. 1481, Texas Human Resources Code Section 48.002, for a time at least, will still use the term “disabled person.” Texas Human Resources Code Section 48.052, for a time at least, will still use the phrase “a person with mental retardation,” in regard to certain individuals protected by Chapter 48 of the Texas Human Resources Code. Some day, that wording will change, due to H.B. 1481, the Person First Respectful Language Initiative. H.B. 1481 will require replacement of the terms “disabled,” “developmentally disabled,” “mentally disabled,” “mentally ill,” “mentally retarded,” “handicapped,” “cripple,” and “crippled,” with “persons with disabilities,” “persons with developmental disabilities,” “persons with mental illness,” and “persons with intellectual disabilities.” In enacting or revising statutes, the Legislature and the Texas Legislative Council are to replace the superseded terms with the more respectful ones. A statute is not invalid because it fails to use the respectful term. H.B. 1481 enacts the adoption of respectful language by adding Chapter 392 to Subtitle Z, Title 3, of the Texas Government Code.

S.B. 220 (effective Sept. 1, 2011) will affect the intersection of long-term care Medicaid and guardianship. Once a person qualifies for long-term care Medicaid, the federal Medicaid statute provides for a series of deductions from countable income, to arrive at the copay of the long-term care Medicaid recipient. The federal statute is at 42 U.S.C. §1396r-5(d). The first deduction is a personal needs allowance (PNA) for the nursing facility resident; the 82nd Texas Legislature left the PNA at \$60 per month. Under S.B. 220, there can be deducted from the long-term care Medicaid recipient’s remaining income after deduction of the PNA, court-ordered guardianship fees. S.B. 220 amended Texas Human Resources Code Section 32.02451 to allow for the deduction of the following court-ordered amounts, from the income of the recipient of long-term care Medicaid: Guardian compensation up to \$175 monthly; costs to establish the guardianship up to \$1,000; and other administrative costs related to the guardianship of not more than \$1,000 during any three-year period. (To the extent that the deduction of such amounts reduces the copay of the recipient, the Medicaid payment, shared by the federal and state Medicaid programs, increases, leaving the facility with the same amount of reimbursement.)

As in past sessions, the budget adopted by the 82nd Texas Legislature will affect persons of modest means. House Bill 1 is the basis for the budget for the two fiscal years starting Sept. 1, 2011. Article II of the budget is where key provisions concerning health and human services are usually found.

Budget “riders” often tell significant parts of the budget story, and so it was in the 82nd Texas Legislature — riders to



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Article II illuminate what the Legislature enacted in regard to health and human services. The nursing facility Medicaid monthly income limit is kept at 300 percent of the Supplemental Security Income (SSI) maximum benefit. Rider 4 accomplishes this. Thus, the income limit is \$2,022 monthly (three times \$674). The SSI benefit is entirely a federal benefit in Texas (some other states provide a state supplement). Remember: If monthly income exceeds this \$2,022 limit, a Qualified Income Trust (QIT) can be used to achieve income eligibility. This is permitted by 42 U.S.C. §1396p(d)(4)(B). Because the SSI benefit sometimes increases on Jan. 1, the monthly income limit for long-term care Medicaid sometimes increase on Jan. 1, also.

Another rider that may affect long-term care under Medicaid is Rider 40. Rider 40 authorizes the Texas Department of Aging and Disability Services (DADS) to submit a plan to use Medicaid Estate Recovery funds above the biennial revenue estimate for community-based care to individuals who are on the waiting list or interest list. (If the criteria for facility-based long-term care under Medicaid are met, there is an entitlement to facility-based care — there is not a waiting list. For the same services under a community-based waiver, there is a waiting list.) The biennial revenue estimate for the Medicaid estate recovery account (Dedicated Account No. 5109) is \$2 million per year for fiscal years 2012 and 2013. In recent months, the Medicaid estate recovery account has had a balance of \$4 million.

By virtue of Rider 25 to Article II of H.B. 1, the Temporary Assistance for Needy Families (TANF) maximum grant is maintained at 17 percent of the federal poverty income limit. The current maximum monthly grant for a mother and two children is \$260. In years when the TANF grant is adjusted, that adjustment usually occurs in October.

Finger-imaging funding is eliminated in the food stamp and TANF program. Rider 57 and H.B. 710 (effective June 17, 2011) accomplish this. The Inspector General of the Texas Health and Human Services Commission signaled during the regular session of the 82nd Texas Legislature that there were other

means of combating duplicate application services, and thus finger-imaging is not needed. H.B. 710 requires that the Texas Health and Human Services Commission “use appropriate technology” to verify identity of applicants for TANF and prevent duplicate participation, and likewise in regard to food stamps.

H.B. 2651 (effective Sept. 1, 2011) added Section 461.009 to the Texas Transportation Code. It will place a two-business-day time limit for providers of public transportation services for persons with disabilities to determine if a person visiting the provider’s service area is eligible for the services.

S.B. 304 (effective June 17, 2011) allows public hospitals and hospital districts to administer “employment services program[s]” “consistent with” the procedures of the TANF program and allows public hospitals and hospital districts to require applicants and clients to register for work with the Texas Workforce Commission. Persons with pending applications and those already eligible must be given 30 days’ notice before the program is established.

S.B. 420 (effective May 28, 2011) allows a county indigent health care program to take into account the income and resources of a person who executed an affidavit of support for a sponsored alien and the income and resources of the spouse of the person who executed the affidavit of support.

Senate Bill 458 (effective Sept. 1, 2011) concerns unemployment compensation. It provides that, “[the] person for whom the claimant last worked” must be an employer for whom the claimant worked at least 30 hours during a week, or the employer as defined by Subchapter C of Chapter 201 or the Labor Code. This may have the effect of limiting the use of temporary employment or brief positions to avoid disqualification for voluntary quit or misconduct.

H.B. 848 and S.B. 482 (both bills effective Sept. 1, 2011) preserve and amend Chapter 34 of the Texas Family Code. The Chapter 34 authorization agreement remains capable of being signed by one parent. H.B. 848 allows an adult approved by Child Protective Services in parental child safety placement cases to be empowered by the authorization agreement. S.B. 482 requires certified mail notice to the non-signing parent, unless there is documentation that the non-signing parent has committed an act of family violence or assault against the parent who signed the authorization agreement, the child who is the subject of the authorization agreement, or another child of the parent who signed the authorization agreement. S.B. 482 provides that there can only be one authorization agreement pertaining to any one child. Under both bills, the authorization agreement’s scope remains as before, including applying for public benefits.

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