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Georgia Long Term Care Medicaid Law — 2017
Including DRA 2005, Estate Recovery, and Annuities

The costs of long term health care can be staggering. For many people, being prepared to meet them can be an even greater challenge. Although some persons have amassed the necessary resources or insurance to meet the challenge, many others have few choices but to rely upon Medicare and Medicaid, the two government programs that have been established to provide assistance. Since neither of these programs provides exhaustive or universal coverage, it is important to fully understand which services are and are *not*, covered by these programs.

The Affordable Care Act

The main focus of the Affordable Care Act, or the "ACA" (commonly referred to as "Obamacare") is on individuals who are under 65 years of age. It does, however, provide for the Medicare Part D prescription drug coverage gap to close gradually, and provides for Medicare to cover yearly wellness visits and preventative care. However, there are no long term care benefits provided under the ACA, leaving individuals to look to other traditional forms of payment for long term care.

Medicare

Medi*care* is an *employment related* federal health insurance benefit which pays for limited long term *recuperative* care associated with an illness or injury (such as a broken hip). Under Medicare terminology, this is known as "convalescent" care and is limited to certain qualifying physician-prescribed home health care, and services received in nursing homes. Medicare payment for a nursing home stay is limited to a maximum of 100 days, although the typical payment is for far less. Under no circumstances does Medicare pay for long term institutional care.

Medicaid

Unlike Medicare, Medi*caid* is not employment related. Rather it is a jointly funded and administered state and federal welfare program that pays the qualifying medical expenses for those individuals whose financial resources fall below the program's established minimums. Medicaid law changes frequently. In 1993, Congress passed the "OBRA 93" legislation, making a number of sweeping changes to the Federal Medicaid law. Additional significant changes were implemented by Congress, most recently on February 8, 2006, and by Georgia in 2006, 2007, and

2008. Medicaid, however, is the only government program that pays for *ongoing* long term care. Even then, however, there are a number of ancillary items that Medicaid will not cover. While Medicaid also pays for some home health care services, as a practical matter those home health care providers who accept Medicaid often have long waiting lists, thus limiting the availability of the home health care option for many applicants.

2017 Qualification Criteria

To qualify for nursing home Medicaid in Georgia, an individual must be at least 65, or blind, or disabled, *and* must meet certain financial requirements. The financial criteria for 2017 are as follows:

- a single person can have no more than $2,000 in *resources* (assets) in his name (excluding his homeplace and certain other limited exempt resources);
- the community spouse can have no more than $120,900 in *resources* in his or her name (plus the homeplace and certain other limited exempt resources); and
- the applicant's total *income* (e.g. Social Security, pension, investment income, etc.) is limited to a maximum of $2,205 per month. If the applicant's gross monthly income exceeds this limit, it will be necessary for the applicant, his agent under a Durable Financial Power of Attorney, or his Conservator to establish a Qualified Income Trust (also known as a Miller Trust).

Qualified Income Trust

Individuals whose gross monthly income exceeds $2,205 must establish an irrevocable Qualified Income Trust (QIT) before becoming eligible for Medicaid benefits. The individual's income funds the QIT, and distributions are made monthly from the QIT for medical care and other allowed expenses. It is crucial that the QIT be properly drafted, executed, and administered. As such, the advice of a Certified Elder Law Attorney is invaluable in establishing a QIT in Georgia.

Spending

If an individual or married couple's includible resources exceed the limits outlined above and Medicaid qualification is the objective, those resources may be *spent* on anything desired, without penalty, in order to reach the limits. *However*, any spending which merely converts one form of includible resources to another (e.g. cash to stock) serves no purpose since the newly acquired asset is as includible as the original. Therefore, the only way to successfully "spend down" resources for eligibility purposes is to spend includible resources on those that are exempt for Medicaid purposes, such as paying off the mortgage on the homeplace, purchasing a vehicle (if it will be used for "medical transportation"), and purchasing burial spaces and funeral contracts within the new limits imposed by the Medicaid rules.

Annuities

The Georgia Department of Community Health changed the way annuities are treated as of November 2008. An annuity purchased before February 8, 2006 that is actuarially sound is treated as a retirement fund, and may be an exempt resource. However annuities that are purchased on or after that date must name the State of Georgia as remainder beneficiary, up to the total amount of medical assistance paid on the owner's behalf. Annuity distributions are treated as income to the applicant or his spouse, which may result in the need to establish a QIT.

Gifts and Penalties

While spending is one way to reduce resources, another planning option used in the past has been the making of gifts. However, the rules regarding gifts changed significantly when the Deficit Reduction Act of 2005 became law in Georgia in 2007, retroactive to February 8, 2006.

Under this law, the "look back" for asset transfers is extended to five years, and the penalty period for such transfers begins to run when the individual is residing in a nursing home and would otherwise be eligible for Medicaid benefits. States can no longer "round down" fractional periods of ineligibility when determining ineligibility periods, and will be permitted to treat multiple transfers of assets as a single transfer.

This law applies to all transfers made on or after February 8, 2006. As such, anyone who has considered transferring assets as part of a long term care plan should consult with a Certified Elder Law Attorney **before** making any future transfers, or before filing an application for Medicaid benefits if there is any question about the individual's eligibility for such benefits.

Beware also the provision in the new Estate Recovery regulations that allows for gifts to be voidable. These regulations may seriously impact the planning of anyone who is planning for future Medicaid qualification or who anticipates making any transfers for less than fair market value.

Timing

So, what if an individual has resources that exceed the resource limit, and needs care today? Is all hope lost? No! There are nearly always planning opportunities available, even in crisis situations. It is important to consult with a Certified Elder Law Attorney as soon as possible to determine the options available in a given case.

Estate Recovery

In Georgia, a Medicaid applicant is allowed to keep his homeplace for *eligibility* purposes, if he intends to return to it. However, under OBRA 93 Congress mandated a new program called "Estate Recovery." Under Estate Recovery the state

is empowered to file a lien against the Medicaid recipient's probate and non-probate estate, including both real and personal property, as a means of recouping the Medicaid dollars spent on his behalf during his lifetime.

For nearly thirteen years Georgia chose not to implement Estate Recovery; however, Georgia does now have such a program in place. Estate Recovery applies to care provided on or after May 3, 2006. Every potential Georgia Medicaid applicant should seriously consider the implications of Estate Recovery in the planning process, and should consult with a Certified Elder Law Attorney if concerned about the effect of Estate Recovery.

Special Needs Trusts

A planning technique widely used in the past to shelter assets for Medicaid purposes is the use of Trusts. Under OBRA 93 this option was substantially limited, though Special Needs Trusts are specifically approved under the law for use by some individuals who are or expect to become eligible for public benefits.

An individual who has not yet reached his 65th birthday may qualify to fund a Special Needs Trust established for his benefit, thus allowing for assets to be preserved and spent more slowly over the individual's lifetime for "quality of life" expenditures. However, assets remaining in this trust at the beneficiary's death must first be used to reimburse Medicaid for the costs that Medicaid has paid on his behalf over his lifetime.

A third-party Special Needs Trust is a planning option that can benefit spouses or children who have disabilities, allowing for the individual in need of care to benefit from the funds held in the trust while using Medicaid benefits to pay for care. A properly drafted and funded third-party Special Needs Trust does not pay back to Medicaid at the beneficiary's death.

If Medicaid is a consideration for an individual who is contemplating transferring his assets into a Trust, that person would be wise to consult with an Elder Law Attorney who is knowledgeable and experienced in this area. The risk exposure in not being fully apprised of the law in this area is that all Trust assets may need to be spent before the individual can qualify for benefits.

Consult an Expert

Finally, while the Medicaid law has become more restrictive and qualifying for Medicaid has become more difficult, a number of planning options remain for those who are practiced in applying the law. Therefore, as with all technical legal planning issues, it is best to consult a Certified Elder Law Attorney who practices regularly in the area of Medicaid law before independently initiating any activities (such as transferring assets) to accomplish Medicaid qualification.