

THE ELDER LAW PRACTICE OF DAVID L. MCGUFFEY, LLC

"Serving the Families of Georgia and Tennessee"

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David McGuffey, CELA*
Jan Hair, Elder Care Coordinator

David Hasteley, Elder Care Coordinator
Melinda Griffin, Administrative Assistant

*Certified Elder Law Attorney by the National Elder Law Foundation

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New Georgia Medicaid Policy Regarding Funeral Contracts and Insurance Policies

Notice: This memorandum is not a substitute for independent legal advice and you may not rely on it as such. The Medicaid program rules change frequently. If you have questions concerning Medicaid, you should seek counsel from an attorney qualified to render that advice.

Medicaid is a "means-tested" program. When individuals ask the Medicaid program to pay for long-term care, certain assets are exempt and others are counted in determining whether an individual is "poor enough" to qualify for Medicaid. An individual seeking Medicaid cannot have more than \$2,000 in countable assets. For this reason, it is critically important to know which assets are counted toward the \$2,000 limit.

Historically, Georgia has exempted (not counted) most pre-need burial contracts, designated burial accounts and small life insurance policies. On January 1, 2007, Georgia's Department of Community Health (DCH) narrowed the eligibility rules by changing how these assets are treated when individuals apply for Medicaid. Under the old policy, prepaid burial contracts of any value were not counted toward eligibility so long as they were irrevocable and itemized; designated burial accounts of \$5,000 or less were exempt; and insurance policies with a face value of no more than \$5,000 were exempt. The new policy, *retroactively effective as of July 1, 2005*, and implemented for applications and reviews beginning on January 1, 2007, changes the exemption rules by (1) limiting all burial arrangements to \$10,000 per person;¹ (2) including term and whole-life insurance policies in the calculation of the burial reserve; and (3) counting the accessible cash surrender value of all insurance policies after setting aside the burial exclusion amount.

¹ In Georgia, individuals who receive Supplemental Security Income (SSI) are automatically eligible for Medicaid, but the resource limits are different. The burial exclusion for SSI recipients is limited to \$1,500. Most applicants for nursing home Medicaid are not eligible for SSI because they have income exceeding the SSI limit.

Burial Contracts

The old rule excluded the full value of any pre-need burial contract, regardless of amount, if it was irrevocable and itemized. In practice, virtually all itemized pre-need contracts were exempt when determining Medicaid eligibility.

Under the new rule burial contracts, whether revocable or irrevocable, are treated the same. At first blush, this change appears to be innocuous, but it renders the value of all burial contracts potentially “countable” when considering Medicaid eligibility. This policy change is justified by referring to a Georgia law that allows purchasers of pre-need contracts to secure a refund prior to the earlier of: “(A) The delivery of the merchandise or services; or (B) The death of the person for whose interment or inurnment the merchandise or services are intended to be used.” See O.C.G.A. § 10-14-17(a)(3).

DCH will analyze *itemized* pre-need burial contracts as burial contracts, but non-itemized pre-need contracts will be treated under its more restrictive policy relating to insurance contracts. The new policy indicates that Medicaid applicants will be given a reasonable period of time to have a contract itemized. The distinction between itemized and non-itemized contracts is significant because, as described below, fully paid burial space items in an itemized contract do not count toward the burial exclusion.

The new policy distinguishes between “burial space items” and “non-burial space items.” Burial space items include burial plots, grave site, crypt, mausoleum, casket, urn, niche, or other repository for the deceased’s remains. They also includes necessary and reasonable improvements such as vaults, headstones, markers, plaques, burial containers for caskets, arrangements for opening and closing the gravesite, and contracts for the care and maintenance of the gravesite. Only one burial space item that would serve the same purpose may be excluded (e.g., a casket or an urn, but not both).

If the contract is *paid in full* and itemized, then Medicaid eligibility workers are instructed to (1) count the value of all non-burial space items toward the \$10,000 burial exclusion. They are instructed to totally exclude the value of all burial space items. The policy instructs eligibility workers to “allow the burial space items exclusion *in addition to*, and not as part of, the burial funds exclusion.” However, burial space items are given deferential treatment only if they are paid for in full. If they are not paid for in full, then the value of the partial payment is counted toward the burial exclusion.

Eligibility workers are instructed to include toward the reserve the total refund value of burial contracts that do not include burial space items. If a contract includes burial space items, then a percentage of the contract is counted by (1) determining the current refund value; (2) determining the dollar amount in the original contract for non-burial space items; and (3) dividing the value of non-burial space items by the current refund

value. The resulting percentage of the current refund value is counted toward the \$10,000/\$1,500 burial exclusion.²

Medicaid applicants may purchase burial contracts for themselves and their immediate family members. The policy defines an immediate family member as a spouse, child (natural, adopted and step-children), spouses of children,³ parents (natural or adopted) and their spouses, as well as siblings and their spouses. Each contract will be examined under the same burial exclusion amount described above.

The policy indicates that workers should consult with a Field Programming Specialist if selling or cashing in a burial contract will cause significant hardship. Hardship is undefined and no instructions appear in the policy indicating how a hardship would be resolved. It remains to be seen how Medicaid will respond if a hardship is alleged.

Burial Funds

Under the old rule, due to a policy ambiguity, Medicaid applicants were frequently allowed to have both a burial contract and a burial fund. The burial fund was presumably used to cover items frequently excluded from the burial contract, such as embalming, or opening and closing the grave.

Under the new rules, all funds set aside for non-burial space items are limited to the \$10,000/\$1,500 burial exclusion amount. Although in theory, Medicaid applicants may designate any amount toward burial, amounts exceeding \$10,000 are countable when determining Medicaid eligibility. Medicaid applicants who do not receive SSI, subject to limited exceptions, may designate any type of asset as a burial fund. SSI recipients may only designate liquid resources as burial funds. Burial funds must be separately maintained and cannot be commingled with non-burial funds.

In calculating the burial reserve, eligibility workers are instructed to reduce the burial exclusion by the face value of burial insurance policies, the face value of life insurance policies (whole life or term), the non-excluded portion of any pre-need burial contract,⁴ and funds set aside for burial. Any additional funds that remain after the burial exclusion amount is exhausted count toward Medicaid eligibility.

Once funds have been designated as burial funds, any appreciation of the burial exclusion remains exempt. Any appreciation of amounts exceeding the burial exclusion is counted toward eligibility.

² \$1,500 for SSI recipients and \$10,000 for all others.

³ The exclusion only applies while the marriage remains intact.

⁴ Essentially, this is the portion of any burial contract for non-burial space items.

If burial funds are used for any purpose other than burial arrangements, then a penalty applies. The penalty *appears to be* an increase in the patient liability amount during the month following notice to Medicaid that the funds were spent.⁵

Example: Jane has income of \$900 per month and her nursing home care costs \$4,000 per month. She also has a burial fund of \$5,000. Ordinarily, Jane would pay \$850 per month toward her nursing home bill and Medicaid would pay the balance of the bill. However, if Jane uses \$500 from her burial fund in January to purchase new clothes, then in February her patient liability amount would increase to \$1,450.

This analysis of the penalty described in the new policy is preliminary and may or may not be applied in this manner as the policy continues to develop.

Insurance Policies

Under the old rule, each life insurance policy was examined individually and if the face value was \$5,000 or less, then the cash surrender value was excluded when determining Medicaid eligibility. Term life insurance was not counted as an asset because it has no cash value.

Under the new policy, if the combined face value of all life insurance policies exceeds \$10,000,⁶ then the face value is counted toward the burial exclusion and the cash surrender value not used in the burial exclusion is counted toward eligibility. The face value of term life insurance is counted first and reduces the burial exclusion amount.

Example: John is otherwise eligible for Medicaid, but has life insurance policies with a combined face value of \$6,000. Those policies reduce his burial exclusion amount to \$4,000, so any pre-need contract would be limited to burial space items plus no more than \$4,000 in non-burial space items. Alternatively, he could maintain a burial fund of no more than \$4,000.

The policy distinguishes burial insurance from life insurance by recognizing that burial insurance policies cannot be used for any other purpose and are not resources when determining Medicaid eligibility if there is no accessible cash surrender value. However, these policies do count toward the burial exclusion. The new policy also indicates that if a burial policy exceeds the burial exclusion, it may be considered as a transfer of resources.⁷

⁵ If the penalty is applied in this manner, it appears to be harsh and unwarranted in situations where the Medicaid recipient has exhausted her \$2,000 in countable assets and still requires necessities such as clothing. However, using burial funds for medical care not covered by Medicaid should not alter the eligibility analysis because there would be an offsetting income deduction for those expenses.

⁶ For a married couple, the amount doubles since each spouse may retain a burial reserve.

⁷ How this would work in practice is unknown since ordinarily a transfer penalty cannot be applied where the Medicaid recipient exchanges an asset for something of equivalent value.

Similarly, term life policies have no cash value so they are not counted toward Medicaid eligibility. They do, however, reduce the burial exclusion and are counted first in reducing the burial exclusion.⁸

Example: John has a term life insurance policy in the amount of \$10,000. This policy is counted first and makes up his entire burial exclusion amount.⁹

If the combined face value of all life insurance policies owned by a Medicaid applicant exceeds \$10,000 (including the value of other burial exclusion assets), then the cash surrender value is counted as a resource. The face value, not the cash surrender value is counted toward the burial exclusion. Conversely, if the face value of all life insurance policies (including the value of other burial exclusion assets) is less than \$10,000, then the cash surrender value is excluded from resources when considering Medicaid eligibility.

What these changes mean

Previously, burial contracts, burial funds and insurance policies were analyzed separately. Under the old policy, a Medicaid applicant could, for example, have both a burial contract and multiple insurance policies so long as the face value for each policy did not exceed \$5,000.

The new policy indicates that regardless of how a Medicaid applicant finances a burial, the combined amount available from all sources for burial is limited to \$10,000 per person, plus the value of fully paid burial space items in an itemized pre-need contract. It also indicates that DCH will not allow a Medicaid applicant to use insurance for one of its traditional purposes, which is to protect a decedent's survivors. Over time, this will reduce the value of life insurance contracts for the elderly and may have the effect of discouraging younger individuals from purchasing whole life insurance (or similar products with equity value) due to experience gained while assisting aged parents.

The new policy favors paid in full and itemized pre-need arrangements over insurance products or pay-as-you-go plans. Only those individuals with itemized burial contracts, specifying those burial space items that are fully paid will be able to exceed the \$10,000/\$1,500 per person burial exclusion amount. Itemized burial contracts will be particularly important to SSI recipients as their exclusion amount is limited to \$1,500.

⁸ The policy also indicates that Estate Recovery will apply to term life insurance in excess of \$10,000. This will likely be challenged since the policy appears to be inconsistent with property law and insurance law. Under a traditional life insurance contract, the insurance proceeds are the property of the beneficiary. Unless the beneficiary is obligated to pay the decedent's debts, the proceeds should not be subject to estate recovery.

⁹ This policy rule could have the unintentional effect of leaving John's estate with no burial reserve since, after gaining Medicaid eligibility, he may not have insufficient assets to pay the term premiums so the policy may lapse.

What is Elder Law?

Despite these changes, planning opportunities still exist for individuals who wish to put their estates in order. These changes mean that families who anticipate the need for long-term care must begin the planning process earlier and can no longer wait until the last minute. If you anticipate the need for long-term care, you should contact an Elder Law Attorney who is familiar with the Medicaid program rules.

Elder law attorneys focus on the legal needs of the elderly, and work with a variety of legal tools and techniques to meet the goals and objectives of the older client. Under this holistic approach, the elder law practitioner handles general estate planning issues and counsels clients about planning for incapacity with alternative decision making documents. The attorney would also assist the client in planning for possible long-term care needs, including nursing home care. Locating the appropriate type of care, coordinating private and public resources to finance the cost of care, and working to ensure the client's right to quality care are all part of the elder law practice.

More than 5,000 attorneys across the nation are members of the National Academy of Elder Law Attorneys. You can find an Elder Law Attorney near you by searching at www.NAELA.org.