

Proposals for Legislation: Georgia Elder Law Section

H.B. 646:

During the 2007 session of the General Assembly, HB646 was proposed by Reps. Len Walker, Mary Margaret Oliver, and Stephanie Stuckey-Benfield. It was not dropped until late in the session and, thus, did not cross over. However, Rep. Walker remains interested in the Bill. Last session, Senator Don Thomas indicated he would support the Bill if it crosses over.

HB646 would reverse a policy change made by the Georgia Department of Community Health. In May, 2006, DCH chose to penalize (deny Medicaid) to individuals who over the age of 65 who funded a pooled trust sub-account pursuant to the Georgia Community Trust Act (OCGA 30-10-1 et seq). Pooled trusts are used to preserve funds for improving the quality of life for disabled individuals; funds placed in the sub-account do not count toward Medicaid eligibility. Mechanically, DCH deprived persons over 65 of the opportunity to use this device by determining that an individual over 65 is not disabled.

Until May 2006, people of all ages were permitted to deposit funds into a pooled trust without penalty. This is consistent with the Community Trust Act which does not include any age restrictions.

In changing its policy, DCH took the position that the change was mandated by federal law and the Center for Medicare and Medicaid Services. The reality is that no federal law changed between 1996 (enactment of the Georgia Community trust Act) and 2006 when DCH began penalizing seniors. Moreover, no new CMS guidance came out on this point. Further, all southern States bordering Georgia permit funding of a pooled trust sub-account for individuals over age 65 and the Center for Medicare and Medicaid Services has approved structures in other States authorizing seniors to fund them.

H.B. 646 was drafted with language suggesting that it corrects an age discrimination issue. In point of fact, this is true because 42 U.S.C. § 1396p(d)(4)(A) specifically authorizes funding for a supplemental needs trust for individuals under age 65. There is an ambiguity in the law at 42 U.S.C. § 1396p(c) relating to Medicaid transfer penalties and this ambiguity is used by some States to discriminate against the elderly. Our understanding following communication with the ARC of Texas, one of the original legislative advocates, is that the federal legislation was pushed through quickly and that the ambiguity was the result of a drafting oversight.

The Department of Community Health opposes H.B. 646. The Elder Law Section believes the Bill should be passed, with technical corrections to correct one known error which appeared when the Bill was re-typed for introduction.

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