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Testimony of Leo J. Delicata, Esq., Legal Services for the Elderly, in support of L.D.1406 An Act to Amend the Laws Regarding Estate Recovery and Planning for Long-term before the Joint Standing Committee on Health and Human Services

Senator Baldacci, Representative Meyer and members of the Joint Standing Committees on Health and Human Services

On behalf of Legal Services for the Elderly I would like to offer comments in support of L.D. 1406. Legal Services for the Elderly is a non-profit legal services organization that was established in Maine following the passage of the Older American's Act in 1974. Since then, we have provided free legal assistance to our disadvantaged older adults when their basic human needs are at stake. Our clients are all aged sixty or older and most have very low incomes.

Each section of this bill addresses some but not all the elements of the MaineCare long term care programs that presently cause older adults much concern. The first section invites a policy discussion on the necessity for a feature of the program that is called "estate recovery". The second section focuses on a legal barrier in the MaineCare eligibility process which prevents applicants from qualifying for assistance if they have made prohibited transfers of their assets. The last two sections suggest ways of educating the public on the topic of estate recovery and the care of eligible individuals by family members. We offer will comment on each section.

Section One: estate recovery.

Estate recovery is a concept that was added to Medicaid by Federal law in 1993 (42 USC 1396p). It requires States that participate in the Medicaid program (and all States do), to recoup the total cost of any benefits paid for

people aged 55 and older while they receive nursing facility level services in their homes or in a nursing facility. The repayment happens when the individual dies and the claim that the State makes on their estate is paid in full or in part. Since the only significant property that may be in the estate is the older adult's home most claims are not fully satisfied. This "claw back" of benefit payments does not apply to any younger person receiving MaineCare benefits regardless of how much the program has paid for their care. Because both the State and Federal government share in the payment of an older MaineCare member's long term care expenses, the recovered amounts are shared by each in the proportion that the payments were made. Approximately two-thirds of the money recouped by Maine is sent back to the Federal government and the remainder is kept by Maine.

There are many reasons to question the existence of the estate recovery program. Here are some (we apologize in advance if the following reads like a rant): estate recovery is patently unfair, discriminates on the basis of age, disproportionately affects lower income adults who cannot afford to hire attorneys to help them legally avoid its effects, fosters financial exploitation, discourages older adults from seeking medically necessary health related services, disproportionately deprives families of a physical home likely financed through mortgage payments made over a long period of time and prevents families from escaping generational poverty or even maintaining a middle-class way of life. It is also incompatible with the current efforts of this Legislature to expand affordable housing opportunities that help lower income older adults shoulder the burdens of their housing costs.

Unfortunately, estate recovery is a mandatory part of the Federal Medicaid program and because Maine participates in Medicaid through the MaineCare program we are forced to accept it. Maine's flexibility to change the estate recovery program is extremely limited. Section One offers a suggestion that may prove to be a way to both respect the Federal law and help Maine people blunt the effect of our estate recovery recoupments. In short, it proposes to return the State share of the amount collected from an estate back to the estate. While we are not certain that this is the most efficient way to give effect to this policy, we believe that it deserves serious consideration,

We respectfully submit that given the number of bills and the time constraints currently occupying this Committee, you may not have the opportunity to engage in what could be a very long policy conversation.

We would like to see this discussion happen between sessions. We suggest that Section One should be amended as a Resolve creating a workgroup containing legislators from both parties to study the stated proposal and report its findings to this Committee for consideration in the Second regular session of this Legislature. We hope that you agree. We now turn our attention to Section two.

Section Two: change of an evidentiary standard in the asset transfer rules.

When determining eligibility for MaineCare long term care services, Maine is required by federal law to review any assets that an individual age 55 and older transferred during the five years before they applied. This five-year review of an applicant's finances is called the "look back period". Any transfer allowed under the rules is considered "exempt". Those non-exempt are examined further. If it is discovered that non-exempt property was sold for less than fair market value or given as a gift, that person will be found ineligible for the program. The period of ineligibility varies depending on the value of the asset transferred.

The purpose of this "asset transfer" rule is to discourage individuals from transferring assets in order to qualify for MaineCare or sheltering assets that could be used to pay for their long term care costs. The fact that every financial transaction involving a check or a deed or some other instrument will be scrutinized is just another example of how intrusive applying for these benefits can be.

The rule also contains a legal "rebuttable presumption" which is a rule of evidence that makes a particular fact true unless it is proven otherwise. In reviewing the five year collection of financial records the State must presume that the applicant has transferred property to reduce their assets so that they would qualify for MaineCare benefits. The applicant may dispute that presumption and the MaineCare rules provide a process for doing so. Here is the Section of the rule that sets out the process (highlighted and underlined for emphasis):

"Section 1.6: Disproving the Presumed Transfer

Any transfer taking place will be presumed to have been made for the purpose of becoming or remaining eligible for Medicaid unless the individual furnishes clear and convincing evidence that the transaction was

for some other purpose and that there was no intent at the time to apply for Medicaid within the foreseeable future. It is the Department's responsibility to demonstrate that a transfer took place and to establish the date of the transfer. It is the individual's responsibility to prove that the transfer took place for reasons other than to gain eligibility for Medicaid.

If the individual wants to disprove the presumption that the transfer was made to establish Medicaid eligibility, the burden of proof rests with the individual. The individual must demonstrate that the transfer was specifically and solely for some other purpose than to receive Medicaid. Statements and evidence to disprove the transfer must be contained in the individual's record..."

(10-144 Chapter 332: MaineCare Eligibility Manual, Part 15 - Transfer of Assets , page 4)

The process places the burden on the applicant to prove by “clear and convincing” evidence that “...the transaction was for some other purpose and that there was no intent at the time to apply for Medicaid within the foreseeable future”.

A “clear and convincing” evidence standard is not normally applied in civil matters. It requires a showing almost as high as the “beyond a reasonable doubt standard” used to prove a person’s guilt in a criminal trial. We suggest that it’s one thing to shift the burden of proving that you acted properly but to require that you prove it by using a measure of evidence almost as high as the criminal standard seems, at the very least, excessive.

Most civil matters require proof by a preponderance of the evidence which means that it is “more likely than not” that a fact is true. Given the strict parameters of what must be proven, we believe that this normal civil standard used in court cases involving all kinds of civil matters, including complicated business disputes, should replace the “current clear and convincing” standard. This is one change that the Federal law does not prohibit. So long as the State uses a standard that convinces it of the truth of the evidence presented, the Federal law does not mandate the choice.

We will now offer some brief comments about the remaining two sections of this bill.

Section Three requires the Department of Health and Human Services to work with interested parties to develop specific informational products explaining how the estate recovery program works. It also directs DHHS to make this information available to MaineCare members and the public both in print, on its website and through organizations serving older adults. We generally support the idea of making everyone more aware of the unique eligibility rules and practices of MaineCare long term care programs. Knowledge would help eliminate surprise and confusion as well as promote advance planning. Having the information come from an official source would also be welcome and ensure that it was accurate and helpful. But we are also mindful of the increased workload that the Department is experiencing and will continue to experience because of the demands created by the ending of the Federal Pandemic Health Emergency. In recognition of that reality, we suggest that if the Committee is interested in directing the Department to take on this additional work it should make the effective date of this directive as far into the next biennium as possible.

The last section of this bill concerns a similar directive to the Department to produce and distribute information regarding home and community-based services provided by a family member or a guardian. We support the idea for similar reasons but repeat our comment that implementation may require an adjustment to the date that the deliverables will be available. The effective date should be advanced for that purpose.

This concludes our comments. Thank you for giving us the opportunity to share our thoughts with you,