



HOUSE OF REPRESENTATIVES

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April 18, 2023

Testimony of Rep. Tavis Hasenfus introducing
**LD 1406, An Act to Amend the Laws Regarding Estate Recovery and
Planning for Long-term Care**
Before the Health and Human Services Committee

Senator Baldacci, Representative Meyer and distinguished members of the Health and Human Services Committee. My name is Tavis Hasenfus, and I represent House District 57 and the communities of Readfield and Winthrop. I am here before you today to present **LD 1406, An Act to Amend the Laws Regarding Estate Recovery and Planning for Long-term Care.**

The initial iteration of this bill came before this committee in the 130th as LD 1427. However, due to time constraints and the complexities of the bill we decided to dispose of the bill through a letter requesting some of the stakeholders review the issues addressed in LD 1427 and report back to this committee. The contents of the letter is included with my testimony.

Over the summer, I worked with a number of individuals, including Brenda Gallant, the long-term care ombudsman, Leo Delicata, from Legal Services for the Elderly, as well as representatives from the Department of Health and Human Services, Disability Rights Maine and others to address these issues. I decided the best way to proceed in the 131st was to sponsor the bill currently before you.

Outside of my work representing House District 57 in the Legislature, I practice as attorney in a Winthrop law firm that specializes in elder law and estate planning.

I put forward this bill because I am constantly witnessing the pain that elderly Mainers are going through as they slowly lose the ability to care for themselves. Many of them are desperate to stay in their homes for the last years of their life, and still more wonder if they will have any of their hard-earned life savings to leave their family. This all too common situation breaks my heart.

I also am very aware that the individuals who are fighting Alzheimer's, dementia and similar diseases requiring nursing home care are often the victims of an unfair system that treats their diseases different from other diseases that are typically treated at a hospital.

For example, an elderly widow diagnosed with dementia and treated at a nursing home is expected to pay the full cost of care, whereas her counterpart of the same age and financial means who is diagnosed with cancer is afforded comprehensive coverage from the government, regardless of its cost.

I realize that this problem extends far beyond our state borders, as the federal Medicaid program controls the baseline of what can and cannot be done. Nevertheless, there are still things we can do here in Maine to at least make life a little better for the Mainers dealing with these heartbreaking illnesses in their later years while still fully complying with federal law.

One step we can take here in Maine is to reassess the burden that we are placing on applicants for long-term care service who, in an attempt to stay in their home, paid a family member for their care. LD 1406 helps keeps honest families from being denied MaineCare long-term care coverage for payments made by the applicant to a caretaker relative for services rendered.

Under current eligibility rules, an applicant is presumed to have made a disqualifying transfer if, within the last five years, the applicant paid a family member for services that would otherwise qualify as fair market transfers. The burden is then placed on the applicant to show by clear and convincing evidence (a much higher burden than the typical preponderance of the evidence standard used in most civil cases) that the transfer was not made to qualify for MaineCare services but rather as necessary payments made for care services. Unless the applicant can prove (at an elevated standard of clear and convincing) that the payments were made for care services rendered or another exempt purpose, the applicant will be denied long-term care until the penalty period runs. I have also included with my testimony a factsheet from NCSL on these penalties.

In practice, this means that only applicants that executed a personal care contract are able to meet this standard. With a lower standard for clear and convincing evidence, more families may be able to avoid the penalty period for inadvertently paying a family member for caregiving.

Section 2 of this bill directs the Department to lower its high threshold of proof by requiring the Department to reduce the evidentiary burden from clear and convincing evidence to a preponderance of evidence standard when evaluating whether a transfer was made for the purpose of qualifying for Maine-care long term care. This can easily be done through rule making, and major substantive rules would make sure the Legislature is consulted on any future changes.

It is important to note that an applicant will still need to prove that the transfer was compensation for services rendered, but at least they will not have a nearly insurmountable burden of proof in their pursuit. Moreover, reducing this standard of proof will not jeopardize federal funding as the federal rules do not require a clear and convincing evidence standard. North Carolina has a standard of greater weight of the evidence and Wisconsin's standard is a satisfactory showing. You can see these and other examples on page 3 of the NCSL factsheet.

We should not give individuals who were advised by their attorney to preemptively complete a personal care contract preference over those who had no legal help with their estate planning and made the same types of payments for the same types of services but did not preemptively memorialize their agreement in writing. At minimum, I am requesting a comprehensive educational program where the state can provide essential information in a preemptive manner to help all Meiners plan for their long-term care.

Now we enter into the educational piece of this bill. This directs the Department to assist family members wishing to care for their loved ones at home by creating an easy-to-access information database and publications on alternatives to institutionalization where a family member can receive information and assistance in navigating some of the programs that allow family members to be compensated by Medicaid for the care provided to a family member. This will be an important tool to help families who want to keep their loved ones at home navigate the complicated process of becoming eligible as a paid family caregiver under some of the recent waiver programs.

This database would also inform families of the rules regarding long-term care so they can be better informed on how to protect assets and develop a care plan that works for their family and allow an elder to leave a legacy. Ideally, this educational program will also include the state's current personal care contract required to be published.

Finally, the big ask of this bill is to end estate recovery in Maine. I have heard from so many older Mainers who are terrified that "the state might take everything" and they may not be able to leave their family any of their hard-earned life savings. Estate recovery has devastating impacts on economic and racial inequality. Oftentimes the only difference between a lifetime of poverty and living the American dream is receiving the family homestead. Estate recovery came from a midnight deal in Congress and has recently been the subject of considerable discussion and study at the federal level.

Though estate recovery as a whole needs to be reassessed at the federal level, this bill asks for the state's portion of estate recovery to be returned to the family through a refund to the deceased applicant's estate. In the alternative, the committee may like to consider using the State's portion

of estate recovery funds to reinvest in its family caregiver programs to allow willing family members the ability to care for their loved ones at home.

The constantly evolving rules make it harder and harder for family members who provide care to receive an exemption from estate recovery. Additionally, those that may have been well positioned to receive exemptions often find out too late. This bill moves the needle further toward exempting estate recovery by allowing an exemption from the state's share for services previously rendered by a caretaker.

In summary, this bill-

1. Ends the states portion of estate recovery by giving it back to the descendant's family
2. Reduces the burden of proof for families arguing a transfer was made for appropriate care services rendered.
3. Tasks the Department with publishing materials to promote current family care programs and the rules relating to long term care applications.

I understand that this is a complex bill designed to tweak an already complex process. I am willing to work with the committee to find the best way to help older Mainers age in place longer and pass something on to their heirs.

I thank the committee for their time and consideration.

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STATE OF MAINE
ONE HUNDRED AND THIRTIETH LEGISLATURE
COMMITTEE ON HEALTH AND HUMAN SERVICES

June 14, 2021

Brenda Gallant, Long-Term Care Ombudsman
Long Term Care Ombudsman Program
61 Winthrop Street
Augusta, ME 04330

Dear Ms. Gallant,

The Health and Human Services Committee recently considered LD 1427, An Act To Encourage Family Care of Aging Adults. This bill would have made it easier for family members to be paid under MaineCare for taking care of another family member, allow an exemption in estate recovery for such services, and allow for a lower standard of proof that the MaineCare applicant didn't make a transfer in order to qualify for MaineCare. The Committee voted Ought Not To Pass. It was unclear to us what might be allowable under federal law particularly in the area of estate recovery.

We are writing to you specifically regarding the issue of encouraging family members to take care of another family member at home and be paid for that work by MaineCare or an equivalent state-funded program. As you know, this topic was also raised during the Commission to Study Long-term Care Workforce Issues meetings. There are currently some circumstances where it is possible under MaineCare Sections 12 and 19 and state-funded Section 63 and Chapter 11. We are hopeful that you may be able to find a way to include this topic within your stakeholder group established pursuant to LD 1624, Resolve, to Create a Stakeholder Group to Identify the Needs of Long-term Care Family Caregivers. We understand that the stakeholder group is focused on identifying and implementing a family caregiver assessment tool to meet the requirements of the reauthorization of the Older Americans Act. If this issue cannot be discussed within the purview of the LD 1624 stakeholder group, we would welcome any recommendations that you may have from any of your other work on paid family caregiving.

We look forward to a presentation from you or your staff in January 2022 regarding the LD 1624 stakeholder group report. We will also welcome any recommendations or feedback that you may have on how we can encourage and extend paid family caregiving at that time as well. Thank you for all the very valuable work that your office does.

Sincerely,

Sen. Ned Claxton
Senate Chair

Rep. Michele Meyer
House Chair

cc: Members, Joint Standing Committee on Health and Human Services
Molly Bogart, Government Relations Director, Department of Health and Human Services
Representative Tavis Rock Hasenfus, LD 1427 sponsor



February 15, 2023

To: Jessica Lundgren, Reference Librarian, Maine State Law & Legislative Reference Library
From: Kathryn Costanza, Program Principal
Subject: Medicaid Asset Transfers

Robin Vos
Speaker
State Assembly
Wisconsin
President, NCSL

Anne Sappenfield
Director
Legislative Council
Wisconsin
Staff Chair, NCSL

Tim Storey
Chief Executive Officer
NCSL

Dear Ms. Lundgren;

Thank you for reaching out to NCSL to request information about Medicaid asset transfers and the burden of proof standards. Below is the following information:

- Background on Asset Transfers
- Resources for Information on Asset Transfers
- State Examples

Please do not hesitate to contact us with any further questions on this or any topic. As your professional membership organization, we are honored to support the work of state legislatures.

Sincerely,

Kathryn Costanza
Program Principal
(o) 303.856.1388
Kathryn.costanza@ncsl.org

NCSL is a nonpartisan organization and does not support or oppose any of the policies or sources identified in this memorandum.



Background on Asset Transfers

Medicaid is the federal health care program for low-income people that is jointly financed and administered by the federal and state governments and is the largest payor of long-term services and supports (like those provided in nursing facilities and home-and community-based settings) in the United States. To be eligible to receive Medicaid services, including long-term services and supports, individuals need to meet income and asset thresholds. Income and asset thresholds vary by the type of population and eligibility pathway in Medicaid (described in more detail in the resources below).

Additionally, the types of assets that count towards asset thresholds or are excluded from asset thresholds vary. Asset transfer restrictions are intended to prevent individuals from transferring countable assets for less than fair market value for the purpose of obtaining Medicaid eligibility to receive long-term services and supports.

Note that some individuals are dually eligible for Medicaid and Medicare coverage and may access long-term services and supports through Medicaid. Medicare only covers the first 100 days a beneficiary spends in a nursing facility and does not cover other long-term services and supports. Dually eligible beneficiaries must also meet Medicaid income and asset thresholds to maintain Medicaid coverage. Accordingly, dually eligible beneficiaries may also be subject to asset transfer restrictions and requirements.

The resources provided below offer background on asset transfers, types of asset transfers that disqualify a person from Medicaid eligibility, penalties for disqualifying asset transfers, and state exceptions from penalties (also referred to as waivers). States have flexibility to establish burdens of proof for disqualifying asset transfers and waiver standards.

Resources on Asset Transfers

- [Transfer of Assets in the Medicaid Program: Important Facts for State Policymakers](#) | CMS (2008) – Guidance issued shortly after the most recent changes to Medicaid asset transfer rules took effect.
- [Medicaid Financial Eligibility for Long-Term Services and Supports](#) | CRS (2017) – Contains a section on asset transfers starting on pg. 12.
- [Medicaid Estate Recovery: Improving Policy and Promoting Equity](#) | MACPAC (2021) - Discusses asset transfers rules at pg. 9. Additionally provides background on eligibility



pathways for long-term services and supports and income and asset thresholds, including countable and excluded assets.

- *Note that this is one Chapter of a larger report to Congress and this Chapter addresses MACPAC's recommendations for policy changes related to estate recovery. This resource is provided for informational purposes only and NCSL does not support or oppose any position taken by MACPAC in this report.*

State Examples

The following state statutes and Medicaid policies address asset transfer restrictions and hardship waivers, including the state's burden of proof (when specified):

- **Connecticut** (Conn. Gen. Stat. Ann. § 17b-261a)
 - Burden of Proof: "Clear and convincing" evidence.
 - Waiver: Waivers related to individuals with dementia.
- **Montana** (Asset Transfer Manual)
 - Burden of Proof: Individual provided with notification that asset transfer disqualified and opportunity to rebut the presumption by demonstrating "proof" of legitimate transfer by "convincing" evidence.
 - Waiver: Waivers available for undue hardship or fraud and misrepresentation (but only if the individual or their spouse sought legal recourse).
- **New Hampshire** (N.H. Rev. Stat. § 167:4; and N.H. Rev. Stat. § 151-E:19)
 - Burden of Proof: It is an "affirmative defense" as determined in a court proceeding to recover costs of long-term care that the asset transfer was not a disqualifying asset transfer.
 - Waiver: Delegated to state agency.
- **North Carolina** (N. C. Gen. Stat. Ann. §§ 108A-58.1 and 108A-58.2)
 - Burden of Proof: Individual can rebut the presumption of a disqualifying transfer by demonstrating that the transfer was legitimate by the "greater weight of the evidence."
 - Waiver: Limited to undue hardship.
- **Wisconsin** (Wisc. Stat. Ann. 49.453)
 - Burden of Proof: Individual must make a "satisfactory showing" to the state to demonstrate that any assets transferred for less than fair market value were returned to the individual.
 - Waiver: Limited to undue hardship.