LEGAL SERVICES FOR MAINE ELDERS

LD 169 – An Act to Amend the Laws Regarding Estate Recovery and Planning for Long-term Care

Testimony of John Brautigam, Esq. for Legal Services for Maine Elders
Joint Standing Committee on Health and Human Services

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Senator Ingwersen, Representative Meyer, and members of the Joint Standing Committee on Health and Human Services.

My name is John Brautigam, and I am here today on behalf of Legal Services for Maine Elders. LSE provides free legal help for Mainers aged 60 and older when their basic human needs are at stake. We support L.D. 169.

The first section of LD 169 invites a policy discussion on the necessity of "estate recovery." The second section focuses on a legal barrier in the MaineCare eligibility process which often prevents applicants from qualifying for assistance if they have transferred assets. The last two sections suggest ways of educating the public so that they can follow the rules set up for preserving their estate and allowing family members to be compensated for caregiving.

**Section 1: Estate Recovery.**

Since 1993 federal law has required state Medicaid programs to recoup benefits upon the death of a beneficiary who had assets such as a home. (42 USC 1396p). The estate recovery rules apply to people aged 55 and older receiving nursing facility level services in their homes or in a nursing facility. People with significant cash assets don't qualify for Medicaid, so usually when a Medicaid beneficiary dies, the only significant property in their estate is their home – if they own one. Estate recovery often means that Medicaid "claws back" all or part of the value of that home to reimburse Medicaid for the deceased person's benefits.

In is important to note that *this claw back is unique to older Medicaid beneficiaries.* It 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, any amount recovered from the estate is divided between them

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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.

Despite its superficial logic, estate recovery has been criticized for years, mostly because of its discriminatory effect. We believe estate recovery is often unfair and, in many cases, hinders the long term goals of MaineCare because it:

- discriminates on the basis of age
- disproportionally affects lower income adults who cannot afford to hire attorneys
- fosters financial exploitation
- discourages older adults from seeking medically necessary health related services
- disproportionally deprives families of a physical home likely financed through mortgage payments made over a long period of time
- traps families in generational poverty and obstructs their effort to maintain a middle-class way of life.

Estate recovery also runs counter to Maine's efforts to address the crisis of affordable housing and likely increases the next generation's reliance on housing assistance programs.

Estate recovery is mandated by federal law, but there is some flexibility on how it is applied. In practice, estate recovery extracts three buckets of funds from the estate – (1) to refund a portion to the federal government, (2) to refund a portion to the state government, and (3) to recover costs incurred to execute the recovery.

LD 169 offers a simple change that would help mitigate the effects listed above. Section 1 proposes to allow the estate of the deceased beneficiary to keep the State share. This is allowed by federal law and is done in other states. We support this provision.

We note that a person with a very valuable home would not be eligible for Medicaid until they spend down the value of that home. Therefore, refunding the state share to the heirs would not unduly allow wealthy people to benefit from Medicaid home care.

**Section 2: Evidentiary Standard in Asset Transfer Cases.**

When determining eligibility for MaineCare long term care services, Maine is required by federal law to review the circumstances surrounding any assets that an individual age 55 or older transferred during the five years before applying for MaineCare. This five-year review of an applicant's finances is called the "look back period." Certain types of transfers during this period will make the person ineligible for long term care services. For example, property sold for less than fair market value or given away as a gift during the look back period may cause the person to be at least temporarily ineligible – unless federal law allows for an exception. The period of ineligibility varies depending on the value of the asset transferred.

The purpose of this "asset transfer" rule is to stretch Medicaid dollars by discouraging individuals from transferring assets to circumvent MaineCare asset limitations or from sheltering assets that could be used to pay for their long term care costs. As a result, the look back review is quite intensive, with every significant financial transaction of the applicant scrutinized in detail.

Sometimes it is not immediately clear whether an asset transferred years ago was transferred for a permissible purpose. Depending on the facts, a transfer might not be permissible and should be counted against the person's eligibility. To resolve these murky situations, MaineCare regulations *assume* that a transfer made during the look back period was *not* permissible. This assumption is a "rebuttable presumption" – a rule of evidence that makes a particular fact true unless it is proven otherwise.

These situations can be murky and subjective. Moreover, intent is often hard to establish in a legal proceeding. It is often very difficult for the applicant to provide rock-solid proof regarding the circumstances in which the asset transfer was made. But this is exactly what Maine law requires. The applicant must satisfy a very high legal standard known as the "clear and convincing evidence" standard. Since this evidentiary standard is so hard to meet, it sometimes means that in those all-too-common murky cases, the applicant will be ruled ineligible simply because they did not have enough documents or witness testimony. This can happen even if they were not actually trying to circumvent the requirements. Especially where the applicant has no legal assistance and is not accustomed to managing complicated financial situations.

Here is the Maine regulation that spells this out:

> "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)

We think it is fair for MaineCare to require an applicant to produce evidence showing the circumstance of their asset transfer. But in those murky cases we do not think it is appropriate to impose such a strict evidentiary standard. The "clear and convincing" standard is almost as high as that in criminal law cases. And it is not required by federal law.

We think a less strict standard would make eligibility determinations more efficient and would be helpful to applicants in these murky situations. Specifically, we think it would be reasonable to use the "preponderance of the evidence" standard. This means that it is more likely than not that a fact is true. This is the standard used in all kinds of complex and weighty civil matters, including complicated business disputes.

LD 169 would replace the "clear and convincing" standard with the "preponderance of the evidence" standard. We support the change because it will reduce the number of occurrences when a person is ruled ineligible just because they did not keep good documents or have a long list of witnesses in those murky cases.

**Sections 3 and 4: Information Regarding Estate Recovery and Family Caregivers.**

As long as people follow the rules, informed estate planning is a legitimate tool that can help people achieve the long term goal of pulling themselves up out of poverty. It is not a loophole or a way to cheat on Medicaid. Therefore, it is important for everyone to have good information about these policies.

Section 3 requires the Department of Health and Human Services to work with interested parties to develop specific information explaining how estate recovery 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 support the idea of making everyone more aware of the unique eligibility rules and practices of MaineCare long term care programs. Having the information come from an official source would also be welcome and ensure that it was accurate and helpful.

Section 4 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 and their impact on eligibility. The testimony of LTCOP further explains the importance of this subject. We support the idea for similar reasons

For both Section 3 and Section 4 we recommend that the information programs should be contingent on the department's ability to access whatever resources may be required for these purposes. We do not wish to create an undue burden on the department or impose significant new costs that could pose an obstacle to enacting these reforms.

Thank you.