

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



Maine Department of Health and Human Services
Commissioner's Office
11 State House Station
109 Capitol Street
Augusta, Maine 04333-0011
Tel: (207) 287-3707; Fax: (207) 287-3005
TTY: Dial 711 (Maine Relay)

MEMORANDUM

TO: Joint Standing Committee on Health and Human Services
FROM: Department of Health and Human Services (DHHS)
DATE: May 13, 2021
RE: Answering Questions re LD 1427

What would a potential waiver be adding in terms of paying a relative that we don't already cover (focusing only on when the member is an adult)?

Medicaid allows a family member to be paid for services if the applicant can show that the services were needed and recommended by a physician to prevent a transfer to a facility, and that payment for services were reasonable. This Section appears to be asking the Department to seek approval from CMS to allow these transfers without clear and convincing evidence that they were made for fair market value or for a purpose other than to qualify for Medicaid. This isn't the purpose of 1915(c) waivers.

What needs to be requested from the Federal Government to implement this proposal? A waiver? SPA?

The department would need to ask to apply less restrictive asset transfer rules than federally required. That would be requested via SPA. A State Plan Amendment would have to be developed and then reviewed and approved by CMS. We do not believe that less restrictive asset transfer rules would be approved by the federal government.

Why were the changes made to the rules for hardship exemption? Was this required by the federal government? (From the sponsor's testimony)

After reading the testimony, we want to make it clear that there are exemption amounts allowed based on the level of care, less than 24/7. See highlighted policy below. This policy change was several years ago. Due to staff turnover we are unable to provide an exact date at this time. In review of the bill, it is important to remember the other aspects of policy that enable applicants to claim exemptions based on the level of care provided.

B. UNDUE HARDSHIP WAIVER BASED ON CARE GIVEN EXEMPTION

MaineCare may exempt a portion of a Member's estate from estate recovery for health maintenance activities and personal care services performed for the Member by one individual who has a beneficial interest in the Estate. If the current income level of the waiver applicant is below two hundred percent (200%) of the current Federal Poverty Income Level, adjusted for the person's household size, MaineCare may designate a portion of a Member's estate as exempt from its estate recovery efforts if a person can demonstrate that health care maintenance activities or personal care services have been provided to a Member, as outlined below:

5.08 **WAIVERS** (cont.)

1. The applicant requesting the care given exemption provided health maintenance activities or personal care services as defined herein to the decedent during part or all of the two (2) years immediately prior to the Member's death or institutionalization, enabling the decedent to remain at home and avoid institutionalization for an equivalent period of time. The person requesting the exemption must provide corroborating statements from the decedent's primary care physician or other approved medical care provider acceptable to MaineCare.
2. Any care given exemption granted will not exceed the value of MaineCare benefits paid on the behalf of the Member, which would otherwise be subject to Estate Recovery. Following the approval of the undue hardship waiver based on a care given exemption, the Department will use one of the following formulas to determine the exempt amount:
 - a. If the decedent received 24 hour a day care including health maintenance and personal care activities defined in Sections 5.02-6, and 5.02-12, that enabled the decedent to remain at home and avoid placement in institutionalized care as described in Section 5.02-8, and MaineCare was not paying for in home services at the time, the Department may grant an exemption not to exceed thirty-two thousand dollars (\$32,000) per year, prorated for each month of approved care given*; or
 - b. If the decedent received care including personal care services and/or health maintenance activities less than those services he or she would have received in institutionalized care as described in Section 5.02-8, the Department may grant an exemption not to exceed twelve thousand dollars (\$12,000) per year, pro-rated for each month of approved care given; or
 - c. If the decedent received approved care for three (3) or more health maintenance or personal care activities defined in Section 5.02 everyday, the maximum exemption of twelve thousand dollars (\$12,000) per year may be granted; or
 - d. If the decedent received approved care for three (3) or more health maintenance or personal care activities defined in Section 5.02 at least three (3) times per week, a maximum exemption of six thousand dollars (\$6,000) per year may be granted.

These allowances are in place to assist the Member in maintaining independent living at home and reduce overutilization of institutional services. In circumstances where an applicant may qualify for more than one level of care, the highest amount for one application will be granted.*

5.08 **WAIVERS** (cont.)

3. Health care maintenance activities or personal care services previously used during the application process to reduce a transfer of assets cannot be counted again toward a care given exemption or a claim reduction.

4. All care given exemptions will be based on and limited to the two (2) year time period immediately prior to the Member's death or institutionalization.
5. An applicant may not be granted a waiver pursuant to this section for any services rendered to a Member and for which the applicant received compensation, either monetary or non-monetary.

Fair market value for personal care is compared to institutional care not home care, correct?

It appears the FMV of the services would be compared to the facility services, not the cost of those provided in the home. Would the MaineCare member have to have been NF-eligible when the family member began to take care of them or only when they went into an institution? As written no medical proof is necessary when the individual begins providing services. A request from a doctor may be made after the individual applies for Medicaid to confirm the services provided were necessary to prevent the applicant's transfer to a facility. Home care is always going to be less expensive than NF. Additionally, determining the value of services rendered after the fact without a contract, time period, or detailed knowledge of the services provided and geographic location of where they were rendered would be difficult.

How does the Department interpret the "may not presume" language for the rules?

We interpret this to reduce the evidence requirement. This is also potentially against federal regulations that require the Medicaid agency to review all assets transferred and prevents the Department for gathering satisfactory evidence or proof of intent.

If a relative provides personal care services at home and is paid by the MaineCare member but that relative is not an heir, is it still considered a transfer?

Currently any relative can provide personal services as long as there a legally enforceable agreement. In order to request a hardship exemption for estate recovery, for personal services, the applicant must have a beneficial interest in the Member's estate as defined below. For many, this would be viewed as an "heir" but we want to be precise and show you how our Estate Recovery policy defines who can apply for personal care services exemption.

Chapter VII, Section 5 Estate Recovery – MaineCare Benefits Manual

5.07 GENERAL REQUIREMENTS FOR ALL WAIVERS

A claim under 5.03(B) may be waived if enforcement of the claim would cause an undue hardship for the person, providing that the person holds a beneficial interest in the Member's estate, as defined in this Section, and properly requests a hardship waiver.

The applicant must prove that they have a beneficial interest in the estate:

- a. through a legal right to the property of the estate through a will;
- b. through the law of intestate succession; or

- c. must establish to the Department's satisfaction by providing written documentation that the applicant:
 - i. cohabitated with the Member for the five consecutive years prior to the Member's most recent eligibility for MaineCare benefits;
 - ii. provided significant support for the household and to maintain property in the estate during that time; and
 - iii. along with the Member held themselves out to the public as married or in a civil union; and
6. Should the applicant's beneficial interest in the estate be less than 100%, the Department must reduce the undue hardship waiver, if granted, to meet the applicant's beneficial interest; and
7. If the applicant is securing agreement from other heirs to increase their legal interest in the estate, the applicant must do so through irrevocable assignment by the other heirs; and
8. For all applicants claiming a beneficial interest in the estate, if the asset of concern to the applicant is the decedent's home, the applicant must prove that the home was the applicant's primary residence for two or more years immediately prior to the death of the MaineCare recipient, that the applicant's contribution to the upkeep of the house was significant, and that it was the understanding and belief of both the MaineCare recipient and the applicant that this was the home of both the applicant and the MaineCare recipient; and
9. Only one waiver application per estate may be submitted to the Department. The applicant may only request one type of waiver per application; and
10. The Department shall determine whether an undue hardship exists within ninety (90) days from the date of the receipt of all information requested. Appropriate notice of the decision will be sent to the person making the request. All decisions regarding the undue hardship waiver will be provided in writing and provide an explanation if the application is denied. The written decision must also provide information about how to appeal the denial to the Department's Administrative Hearings Unit.