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May 3, 2021

Testimony of Leo J. Delicata, Esq., Legal Services for the Elderly, in support of L.D.1427 An Act To Encourage Family Care of Aging Adults before the Joint Standing Committee on Health and Human Services

Senator Claxton, Representative Meyers and members of the Joint Standing Committee on Health and Human Services.

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.

The stated goal of the 2020-2024 State Plan on Aging is "to assist older adults and their care partners to maintain their independence and to live where they choose safely". We think that this is also the goal of this proposed legislation. At the core it seeks to promote and encourage families to take care of their older adults at home and keep them out of nursing facilities and other commercial residential care settings for as long as possible. That is undeniable hope of most older adults.

This bill also recognizes several realities. Professional homecare is expensive and professional caregivers are scare; residential care and nursing facility care are more expensive still and beyond the financial means of many older adults; and family caregivers are key to preserving the health and safety of Maine's seniors. Finally, MaineCare is the default payer of long term care services and supports.

MaineCare program rules do not make it easy for caregivers to receive payment for their services from their family member. Nor do they make it easy for a family member to qualify for MaineCare if they pay their family caregiver. This makes little sense many MaineCare community long term

care services providers are unable to fully provide service due to chronic staff shortages and MaineCare per case service limits guarantee that without family caregiver assistance a person will doubtless require care in a more expensive nursing level of care.

The Federal Medicaid program controls may aspects of the State Medicaid programs of which MaineCare is one. But States have some measure of flexibility when it comes to the rules. The bill identifies the major barriers found in the rules and provides alternatives that allow people to qualify for MaineCare, pay their family caregivers, and ensure that the State will receive financial accountability for this transaction.

The barriers lie in sections of rules dealing with eligibility. The general eligibility rules provide that anyone who transfers property for less than fair market value within 60 months of applying for MaineCare long term care services and supports is ineligible for the program for a period of time depending on the value transferred.

The eligibility "Disproving the Presumed Transfer" rules presume that any transfer for less than fair market value is done for the purpose of qualifying for MaineCare and the applicant must prove by "clear and convincing evidence" that the transfer was made for another purpose and there was not intent to transfer the asset so that the individual would qualify for MaineCare. The "fair market value" section requires writings and medical confirmations. Both sections have provisions that specifically apply to family or relative caregivers.

The bill also adds a section to Title 22 Chapter 855 (Aid to Needy Persons) to provide a statutory basis for the rule changes and to provide that the MaineCare estate recovery rules credit family caregivers with the money that they earned but were not paid for their caregiving services.

I have taken those sections of the proposed rule changes and applied them as margin comments to the existing language. I'm not sure that I've succeeded in giving you a visual clue about how the changes may look but hopefully it will not confuse your understanding of what is intended. The comments are attached to this testimony. We will attend the work session on this bill and will be happy to provide further information at your request. Thank you for letting us present these thoughts to you today.

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.

Commented [S1]: The department may not presume that an applicant who has received paid services from a family member without a written agreement has done so for the purpose of qualifying for public benefits;

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.

Commented [S2]: The department may not presume that an applicant has made a disqualifying transfer of assets in the absence of a statement from a physician that the paid services provided by a relative were necessary. The department may require that the applicant, at the time of application, obtain a written statement from the applicant's physician confirming that the services provided in the past were necessary to prevent the applicant's transfer to residential or nursing facility care;

The statement should cover, but not necessarily be limited to the individual's:

I.purpose for transferring the asset;

II.attempts to dispose of the asset for fair market value;

III.reasons for accepting less than the fair market value for the asset;

IV.plans for and ability to provide financial support after the transfer;

V.relationship, if any, to the persons to whom the asset was transferred; and

VI.belief that the fair market value was received.

Section 1.5: Fair Market Value

A transfer for fair market value incurs no penalty. Fair market value may be received in cash by the individual.

Fair Market Value is an amount that can be expected to be received for selling a similar article on the open market in the geographic area involved.

The compensation received for the asset must be in a tangible form with intrinsic value that is equivalent to or greater than the value of the transferred asset. A transfer for love and consideration is not a transfer for fair market value.

Fair market value may be received by the individual in the form of payment of the individual's past medical expenses and debts if measurable and verified. Fair market value must be received by the individual and not delivered at a future date.

Fair market value may also be received in the form of past support for basic necessities if such support is measurable and verified. A reasonable value must be placed on the support provided and the specific time period must be substantiated for which it was given.

Past support for basic necessities does not include any items given as a gift or any services provided by relatives. Past support for basic necessities may include clothing, transportation or personal care provided by a relative only if this clothing, transportation or personal services were provided as part of a legally written enforceable agreement whereby the individual would transfer the asset in payment for clothes, transportation or personal services once those services have been received.

An Individual may only transfer assets for services provided by a relative if the transfer takes place at the time the service is rendered and:

Commented [S3]: 1. The department may not require, as a condition of eligibility, that an applicant have a prospective, legally enforceable written agreement governing the paid services provided by a relative;

2.The department may not presume that an applicant who has received paid services from a family member without a written agreement has done so for the purpose of qualifying for public benefits;

3.The department shall amend its rules to change the definition of "services" to mean assistance provided by a relative with activities of daily living or instrumental activities of daily living; and

Commented [S4]: The department may not require, as a condition of eligibility, that an applicant have a prospective, legally enforceable written agreement governing the paid services provided by a relative

I. the services must be performed after a written agreement has been executed between the applicant and provider. Other provisions stated above continue to apply.

II.at the time of the receipt of the services, the applicant may not be residing in a nursing facility or a CRBH, AFCH, or RCF.

III. at the time of the receipt of the services, the services must have been recommended in writing and signed by the applicant's physician, as necessary to prevent the transfer of the applicant to residential care or nursing facility care. Such services may not include the mere providing of companionship.

IV. at the time of application, the Department will verify the agreement by reviewing the written contract between the applicant and the provider / relative which must show the type, frequency and duration of the services being provided to the applicant and the amount of consideration (money or property) being received by the provider / relative. If the amount paid for the services is above the fair market value of the services at the time the services were delivered, then the applicant will be considered to have transferred the assets for less than fair market value. If in question, fair market value of the services may be determined by consultation with an area business which provides such services.

Commented [S5]: 1. The department may not require, as a condition of eligibility, that an applicant have a prospective, legally enforceable written agreement governing the paid services provided by a relative;

2 The department may not presume that an applicant who has received paid services from a family member without a written agreement has done so for the purpose of qualifying for public benefits;

Commented [S6]: 1. The department may not presume that an applicant who lives in a residential care or nursing facility has made a transfer of assets for less than fair market value, triggering a period of ineligibility, if the applicant pays reasonable compensation to a relative to provide services that are not provided by the facility or that supplement the services provided by the facility;

Commented [S7]: 1. The department may not presume that an applicant has made a disqualifying transfer of assets in the absence of a statement from a physician that the paid services provided by a relative were necessary. The department may require that the applicant, at the time of application, obtain a written statement from the applicant's physician confirming that the services provided in the past were necessary to prevent the applicant's transfer to residential or nursing facility care;

Commented [S8]: 1 The department may not require, as a condition of eligibility, that an applicant have a prospective, legally enforceable written agreement governing the paid services provided by a relative;

2 The department may not presume that an applicant who has received paid services from a family member without a written agreement has done so for the purpose of qualifying for public benefits;