DATE: September 26, 2017

TO: Interested Parties

FROM: Stefanie Nadeau, Director, MaineCare Services

SUBJECT: Proposed rule – 10-144, Chapter 101, MaineCare Benefits Manual, Chapter VII, Section 5, Estate Recovery

PUBLIC HEARING: October 23, 2017, 9:00 AM, Room 400, 111 Sewall Street, Burton M. Cross Building, Augusta, ME, 04330

COMMENT DEADLINE: November 2, 2017

This letter gives notice of a proposed rule: 10-144, MaineCare Benefits Manual (MBM), Chapter VII, Section 5, Estate Recovery.

This proposed rulemaking seeks to make the following changes:

- Add language to Section 5.02-4, DISABILITY, requiring that any disabled child must have already been determined disabled at the time of the MaineCare member’s death. This addition will put a stricter timeline in place for the Third Party Liability unit to enforce.
- Rewrite Section 5.07, HARDSHIP WAIVER, to assure that there are no gaps in the policy allowing personal representatives to avoid liability or responsibility.
- Add another allowance under Section 5.08, HARDSHIP WAIVER BASED ON CARE GIVEN EXEMPTION, to read “The Department shall determine whether a waiver exists within sixty (60) 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 care given 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 Hearing Unit.” Additional language added to read “Only one (1) waiver, hardship, or hardship based on care given will be granted per estate.”
- Change the timing requirement under Section 5.10, CLAIM REDUCTION, from “during the member’s lifetime” to “last two years that the member was institutionalized if an intent to return home was signed with the eligibility office during the member's lifetime.” This change will limit personal representatives from including reductions from the distant past.

Rules and related rulemaking documents may be reviewed at, or printed from, the MaineCare website at http://www.maine.gov/dhhs/oms/rules/index.shtml or for a fee, interested parties may request a paper copy of rules by calling (207) 624-4050 or Maine Relay number 711.

A concise summary of the proposed rule is provided in the Notice of Agency Rulemaking Proposal, which can be found at http://www.maine.gov/sos/cec/rules/notices.html. This notice also provides information regarding the rulemaking process. Please address all comments to the agency contact person identified in the Notice of Agency Rulemaking Proposal.
Notice of Agency Rule-making Proposal

AGENCY: Department of Health and Human Services, MaineCare Services

CHAPTER NUMBER AND TITLE: 10-144, Chapter 101, MaineCare Benefits Manual, Chapter VII, Section 5, Estate Recovery

PROPOSED RULE NUMBER:

CONCISE SUMMARY: This rulemaking will add new timeline language to different sections in the Estate Recovery policy to help the Third Party Liability unit enforce the policy. This rulemaking will also rewrite the Hardship Waiver and Care Given Exemption sections to assure that there are no gaps in the policy allowing personal representatives to avoid liability or responsibility and also increase the effectiveness of the policy.


STATUTORY AUTHORITY: 22 M.R.S. §§ 42, 3173

PUBLIC HEARING:

Date: October 23, 2017
Time: 9:00 AM
Location: Room 400, 111 Sewall Street, Burton M. Cross Building, Augusta ME, 04330

The Department requests that any interested party requiring special arrangements to attend the hearing contact the agency person listed below before October 16, 2017.

DEADLINE FOR COMMENTS: Comments must be received by 11:59 PM on November 2, 2017

AGENCY CONTACT PERSON: Cari Philbrick, Comprehensive Health Planner II
Cari.Philbrick@maine.gov

AGENCY NAME: MaineCare Services
ADDRESS: 242 State St.
11 State House Station
Augusta, Maine 04333-0011

TELEPHONE: 207-624-4031 FAX: (207) 287-1864
TTY: 711 (Deaf or Hard of Hearing)

IMPACT ON MUNICIPALITIES OR COUNTIES (if any): The Department anticipates that this rulemaking will not have any impact on municipalities or counties.

CONTACT PERSON FOR SMALL BUSINESS INFORMATION (if different): N/A
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5.01 STATUTORY AUTHORITY

The following statutory authorities govern the definitions and rules defined under this Section of the MaineCare Benefits Manual:

22 M.R.S.A. §§ 14 (2-I), 42, 3173
22 M.R.S.A. § 3174-GG
42 U.S.C. §§1396a(a) (18)
42 U.S.C. § 1396p(b)
CMS, Medicaid State Plan Amendment (Maine), TN-06-006 (approved Feb. 15, 2007)

5.02 DEFINITIONS

5.02-1 Assets means property, real or personal, tangible or intangible, or any interest therein, and anything that may be the subject of ownership. It includes assets conveyed to a survivor, heir or assignee of the deceased member through a tenancy in common, survivorship, life estate, living trust, joint tenancy in personal property or other similar arrangement.

5.02-2 Department is the Department of Health and Human Services.

5.02-3 Dependent is:

   A. A surviving spouse; or

   B. A surviving child who is under age twenty-one (21); or

   C. A surviving adult child who is blind or permanently and totally disabled.

5.02-4 Disability exists when an individual has been determined disabled using the Supplemental Security Income standards by the Social Security Administration or a disability determination has been made by the Medical Review Team (MRT) at the Office for Family Independence Office of Integrated Access and Support. The disabled child must have already been determined disabled at the time of the MaineCare member’s death.

5.02-5 Estate includes:

   A. All real and personal property and other assets included in the member’s estate, as defined in 18-A, M.R.S.A. § 1-201; and

   B. Any other real and personal property and other assets in which the member has any legal interest at the time of death, to the extent of that interest, including assets conveyed to a survivor, heir or assign of the deceased through tenancy in common, survivorship, life estate, living trust, joint tenancy in personal property or other arrangement, but not including joint tenancy in real property.
5.02 **DEFINITIONS** (cont)

- **5.02-6 Health Maintenance Activities** include nursing, personal care services and additional activities for a member who otherwise would perform the activities if the member were physically and/or cognitively able to do so, and which help the member to live in the home and community. These additional activities include, but are not limited to, catheterization, ostomy care, preparation of food and tube feedings, bowel treatments, administration of medications, care of skin with damaged integrity, occupational and physical therapy activities such as assistance with prescribed exercise regimes, and transportation.

- **5.02-7 Institutional Care**, as used in this Chapter, is care given in any MaineCare reimbursable facility providing twenty-four (24) hour care, food, shelter, and treatment services. This includes but is not limited to private non-medical institutions, nursing facilities, adult family care homes, intermediate care facilities for persons with mental retardation, psychiatric hospitals, residential care facilities, and assisted living facilities.

- **5.02-8 Legal interest at Death**, for purposes of this section, means a legal interest immediately prior to death.

- **5.02-9 Long-term Care Insurance Partnership Program** allows for a specified amount of assets to be protected from estate recovery if a member has purchased a qualified long-term care insurance policy. The policy must meet the definition of a “qualified long-term care insurance policy” that is found in section 7702B(b) of the Internal Revenue Code of 1986 and Part 14, Section 4.1 of the MaineCare Eligibility Manual.

  The term “long-term care insurance policy” includes a certificate issued under a group insurance contract.

- **5.02-10 Member** is an individual who receives MaineCare benefits.

- **5.02-11 Personal Care Services** are activities of daily living (ADL) and instrumental activities of daily living (IADL) provided to or personally supervised for a member who does not reside in an institutional setting. ADLs include bed mobility, transfer, locomotion, eating, toilet use, bathing, and dressing. IADLs include meal preparation, routine housework, grocery shopping and storage of purchased groceries, and laundry done either within the residence or at an outside laundry facility.

5.03 **ELIGIBILITY**

Following the death of a MaineCare member, the Department may assert a claim against the estate of that member or his or her beneficiary for MaineCare benefits that the member received when:
5.03 **ELIGIBILITY (cont.)**

A. The member owned undisclosed property or other assets during the period when MaineCare benefits were paid for the member and disclosure of the property or assets at the time benefits were being paid would have rendered the member ineligible to receive the benefits; or

B. The member was fifty-five (55) years of age or older when the member received MaineCare benefits; or

C. The member received or was entitled to receive benefits for nursing facility services, long-term care services, or other institutional care services under a long-term-care insurance policy and MaineCare paid for those services on behalf of the member. This paragraph shall not apply in the case of an individual who was entitled to receive benefits under an insurance policy meeting the requirement of the Long-term Care Insurance Partnership Program described in Section 5.02-10. to the extent that payments are made under that policy.

The Department’s claim is limited to the amount paid by MaineCare on behalf of the member.

5.04 **RECOVERY PROCEDURE**

Assets subject to recovery pursuant to this section will be identified primarily through the MaineCare eligibility process. This method is not intended to be exclusive and assets may be identified through any legal means.

5.04-1 Processing Claims against Assets

When it is determined that a MaineCare member's estate is subject to recovery, the Department may file:

A. A claim in Probate Court against all assets included in the deceased member's estate. The process for filing such a claim is governed by existing provisions of the Probate Code regarding creditors' claims. See Title 18-A, Article 3, Part 8.

B. A claim in any court of competent jurisdiction against real and personal property and other assets in which the member had any legal interest at death to the extent of that interest.

C. A claim in any court of competent jurisdiction or any other legal means to recover the cost of medical services provided during a period of inaccurate eligibility. A notice of intent to recover shall be provided prior to filing suit.

D. If asserted against the estate, a claim may not be enforced until:

1. the member has no surviving spouse; and
5.04  **RECOVERY PROCEDURE (cont.)**

2. the member has no surviving child who is under age twenty-one (21) or who is blind or permanently and totally disabled as defined in 42 United States Code, Section 1382c.

E. The Department shall provide heirs, assignees or transferees of a deceased member an opportunity to pay a claim under this subsection through a voluntary payment arrangement that is acceptable to the Department. The payment arrangement may consist of a payment plan, promissory note, or other payment mechanism.

5.04-2 A claim made under this section must be waived if enforcement of the claim would create an undue hardship under criteria described herein or if the costs of collection are likely to exceed the amount recovered. A waiver may be granted in full or in part. A waiver may not be granted if the member or waiver applicant acted to lose, diminish, divest, encumber or otherwise transfer any value of or title to an asset for the purpose of preventing recovery under this subsection.

5.04-3 The Department may accept, hold, transfer title to and sell real property to collect a claim under this subsection. The Department may receive title to real property from a personal representative, special or public administrator, creditor, heir, devisee, assignee or transferee in full or partial satisfaction of a claim under this subsection.

Claims in subparagraphs above will be pursued against the person who holds the property or asset in which the member had a legal interest at death, other than a bona fide purchaser for value. If the asset or property is transferred or dissipated with intent to avoid the Department's claim, such action will be considered fraudulent and the person responsible will be held liable.

5.05  **NOTICE**

A. Reasonable efforts to give notice of Estate Recovery requirements to members will be made at the time of application for MaineCare.

B. Reasonable efforts to give notice will be provided pursuant to the relevant provisions of the Probate Code or to the legally authorized representative of the member’s estate when recovery is being sought. If there is no legally authorized representative, the State shall make reasonable efforts to notify known family members or heirs. If no one comes forward on the member’s behalf to settle the estate, the State may seek appointment as personal representative as a creditor pursuant to the Probate Code.

Notice shall include the action the State intends to take, the basis for the action, the amount sought to be recovered and a copy of these rules.

C. Lack of notice pursuant to this section does not bar application of Estate Recovery.
5.06 **TIME OF CLAIM**

A claim will not be enforced until the deceased member has no surviving dependent.

5.07 **HARDSHIP WAIVER**

A person (one person) may request a waiver of a claim under § 5.03(B) if enforcement of the claim would cause a hardship for the person. 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. To qualify for a waiver, a person who is not a son or daughter of the deceased member must also be an adult, aged eighteen (18) or over. If a determination is made that undue hardship exists, the Department may waive all or a portion of its claim.

A. Application process: A person applying to the Department for consideration of a hardship waiver must comply with the following:

1. The collection of the Department’s claim would result in placing the income of the person requesting the waiver below one hundred eighty percent (180%) of the current federal poverty level adjusted for the person’s household size, and the total value of the household’s assets is equal to or less than one hundred eighty percent (180%) of the current federal poverty annual level. An applicant requesting a hardship waiver must file an application on a form prescribed by the Department; and

2. The request for hardship waiver must be made within six (6) months from the member’s death or within sixty (60) days from the notice of the Department’s claim, whichever is later; and

3. The Department may require the applicant to submit any information and documentation regarding the applicant’s and all household member’s finances, tax returns, property, employment, liabilities, expenses, and any other matters relevant and necessary to determine whether an undue hardship would result from recovery. If the information requested by the Department is not provided within sixty (60) days of the written request of the Department, or if the request is materially incomplete the request for hardship waiver may be denied. Estate’s real property is the primary income-producing resource for the person requesting the waiver, and enforcement of the Department’s claim would result in placing that person’s household income below one hundred eighty percent (180%) of the current federal poverty level, and the total value of the household’s assets is equal to or less than one hundred eighty percent (180%) of the current federal poverty level.

B. **All Eligibility criteria for a hardship waiver:** The person applying for a hardship waiver must demonstrate they have a beneficial interest in the estate and that they are
5.07 HARDSHIP WAIVER (cont.)

dependent upon the assets of the estate, as defined below, requests for a hardship waiver will be considered on an individual basis. The procedure for making a request is as follows:

1. **Beneficial interest in the Estate:** A person must demonstrate they have a significant interest in the estate. The applicant must show that they have a beneficial interest in the estate through a legal right to the property of the estate through a will or through the law of intestate succession, or must establish to the Department’s satisfaction by providing written documentation within thirty (30) days of the Department’s claim that the person cohabitated with the member for the five consecutive years prior to the member’s most recent eligibility for MaineCare benefits, provided significant support for the household and to maintain property in the estate during that time, and along with the member held themselves out to the public as married or in a civil union. Should the person’s beneficial interest be less than 100%, the Department must reduce the hardship waiver, if granted, to meet the person’s beneficial interest.

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.

If the asset of concern to the applicant is the decedent’s home, the applicant must show that he or she lived in the home for two or more years 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. A request for hardship waiver must be made within six (6) months from the member’s death or within thirty (30) days from the notice of the Department’s claim, whichever is later.

2. **Dependence upon Estate Assets:** The person must demonstrate their financial circumstances require them to rely upon the assets of the estate by meeting one or more of the following criteria:

a. The estate assets or property received by survival or distribution are part of a business, including a working farm, upon which the applicant was dependent for applicant’s livelihood during the decedent’s lifetime, the recovery of which by the Department would deprive the applicant of their sole means of livelihood, and the applicant has no other means of satisfying the Department’s claim;
b. The applicant’s household income and asset level combined is less than 180% of the Federal Poverty Income level. The request shall contain a written statement of the circumstances constituting the hardship and all supporting documentation.

3. The Department may request additional information, which must be provided within sixty (60) days of the request. If the information requested is not provided within sixty (60) days, the request for hardship waiver may be denied. The information requested may include, but not be limited to, any of the following:

   a. Income statement and affidavit;
   b. Tax return(s);
   c. Will or bequest instructions;
   d. Statement of resources; or
   e. Receipts.

C. **Limitations on waiver requests:** A hardship does not exist if any of the following are present: Additional information requested when applying for a hardship Waiver based on a Care Given Exemption may include but is not limited to any of the following:

   1. The decedent or applicant created the hardship by using estate planning, gifting or other methods to divert or shelter assets to avoid estate recovery; or
   2. The circumstances indicate that the hardship was created for the purposes of avoiding or defeating recovery, including, but not limited to, undue influence on the decedent by the applicant or other family members, or
   3. The sole basis for the request is lack of income pursuant to sub-section (B)(2)(b) above and sale of the real property in the estate will net the applicant more than $10,000.00.

   a. Nursing home eligibility assessments;
   b. Home health agency plan of care;
   c. In home service providers’ report(s);
   d. Medical documentation including but not limited to reports, records and clinical notes;
   e. A written statement detailing the health maintenance activities and personal care services furnished to a member and all supporting documentation describing the care given, frequency and duration.

D. The Department shall determine whether undue hardship exists within sixty-nine (690) 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 hardship waiver will be provided in writing and provide an explanation if the
5.07 HARDSHIP WAIVER (cont.)

application is denied. The written decision must also provide information about how to appeal the denial to the Department’s Administrative Hearings Unit.

5.08 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, as defined in this Section. If the current income level of the person requesting the waiver is below two hundred percent (200%) of the current federal poverty 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:

1. The person 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 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 care including health maintenance and personal care activities defined in Sections 5.02-6 and 5.02-11, that enabled the decedent to remain at home and avoid placement in institutionalized care as described in Section 5.02-7, 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 5.02-7, 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
5.08 HARDSHIP WAIVER BASED ON CARE GIVEN EXEMPTION (cont.)

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.

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. The Department shall determine whether a waiver exists within sixty (60) 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 care given 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 Hearing Unit.

6. Only one (1) waiver, hardship, or hardship based on care given will be granted per estate.

5.09 ESTATE RECOVERY EXEMPTION WITH QUALIFIED LTC INSURANCE PARTNERSHIP POLICY

If a member covered under a long-term care insurance policy received benefits for which assets or resources were disregarded through the MaineCare Eligibility process as outlined in the MaineCare Eligibility Manual, Part 14, Section 4.1, the Department will not seek adjustment or recovery from the member’s estate for the amount of assets or resources disregarded. The amount of disregard for estate recovery is equal to the total amount of the insurance benefits paid to or on behalf of the individual.

A. Before applying an exemption for a qualified long term care insurance policy described under this subsection, the Department must determine that the policy is a qualifying long term care insurance policy. The Department will verify the policy by reviewing
5.09 **ESTATE RECOVERY EXEMPTION WITH QUALIFIED LTC INSURANCE PARTNERSHIP POLICY** (cont.)

the list of qualified policies posted on the Maine Bureau of Insurance website at http://www.maine.gov/pfr/insurance/.

B. The Member needs to ensure that any long term care insurance policy, for which an exemption is sought, qualifies for an exemption under the criteria adopted by the Bureau of Insurance. This can be done by contacting an eligibility specialist in the Department’s Office of Integrated Access and Support (OIAS).

C. Within 60 days of notice of the Department’s claim, the amount of benefits paid to the member or on the member’s behalf must be confirmed [by the Department.] This time period may be extended if reasonable efforts have been made to obtain the confirmation information. If the amount is not confirmed, the Department will use the amount disregarded when eligibility was first determined as the value of the exemption unless a different amount is proven before recovery occurs. Evidence of the amounts paid may be submitted in the form of statements from the insurer or other reliable claims payment information. The Department may request additional information relevant to the exemption prior to final recovery.

5.10 **CLAIM REDUCTION**

A. When the collection of the Department’s claim would otherwise deplete the estate fully, the Department, at its discretion may reduce its claim in order to permit whole or partial reimbursement of an heir or devisee for use of personal resources to protect against damage or loss of value to the member’s real property during the member’s last two years that the member was institutionalized if an intent to return home was signed with the eligibility office lifetime.

The heir or devisee must request such reduction in writing, and the request must be supported by proof of payments made and the reasonableness of such payments.

B. All reasonable requests for a claim reduction will be considered on an individual basis. The procedure for making a request is as follows:

1. A request for claim reduction must be made within six (6) months from the member’s death or within thirty (30) days from the notice of the Department’s claim, whichever is later.

2. The request must contain a written statement of the circumstances constituting the claim reduction and all supporting documentation.

C. The Department may request additional information, which must be provided within sixty (60) days of the request. If the information is not provided within sixty (60) days, the request for claim reduction may be denied. The information requested may include but not be limited to the following:
5.10 **CLAIM REDUCTION** (cont.)

1. Will or bequest instructions; and/or

2. Receipts/documentation of personal resources used to maintain property or pay member debts.

D. All decisions regarding the claim reduction will be provided in writing.

5.11 **AGENCY REVIEW**

A decision pursuant to this section is final unless within thirty (30) days of the date of the decision, the person making the request sends a written request for agency review to:

Estate Recovery  
Office of MaineCare Services  
Department of Health and Human Services  
11 State House Station  
Augusta, Maine 04333-0011

The agency review shall be conducted through the Department's Office of Administrative Hearings.

If the person making the request is dissatisfied with the final decisions of the Office of Administrative Hearings, he/she may appeal this final agency decision to the Superior Court.