DATE: March 2, 2018

TO: Interested Parties

FROM: Stefanie Nadeau, Director, MaineCare Services

SUBJECT: Adopted Rule: Chapter 101, MaineCare Benefits Manual, Chapter VII, Section 5, Estate Recovery

This letter gives notice of an adopted rule: Chapter 101, MaineCare Benefits Manual, Chapter VII, Section 5, Estate Recovery

The adopted rule makes the following changes:

- Adds language to the definition of “Disability” in Section 5.02-4, to clarify that persons are qualified as “disabled” under the Estate Recovery rule if they are considered disabled by the Maine Public Employee Retirement System. In addition, in the Recovery Procedures section (5.04), the Department added language to require that any disabled child must have already been determined disabled at the time of the MaineCare member’s death. This language provides a clear standard for the Third Party Liability unit to enforce.
- Rewrites Section 5.07, General Requirements for All Waivers, to strengthen the standards applied by the Third Party Liability unit in making determinations regarding waiver requests. For example, this rule adds language regarding the timing of when information must be received by the Department and when determinations on waiver requests must be made, as well as clarifying the process for appeals.
- As a result of review by the Office of Attorney General, the Department finds that the hardship waiver provisions of the final rule required reorganization in order to clarify the intent of the rule. As such, there is now one section, 5.07, which sets forth generally applicable requirements for both types of Hardship Waivers, and a separate section 5.08 that reflect the specific requirements applicable to the two different types of Hardship Waivers.
- In order to clarify policy and preserve state and federal Medicaid funding, the Department is adding a limitation that only one type of hardship waiver will be granted per estate. Additionally, this rulemaking implements numerous changes in the undue hardship waiver provisions (Sec. 5.08) to further strengthen the eligibility and other standards by which determinations are made regarding waiver requests.
- Under Section 5.08(B), Hardship Waiver Based on Care Given Exemption, added a limitation that the waiver request shall not be granted if the applicant created the undue hardship by various methods to divert assets for the purposes of defeating estate recovery.
- Changes 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 the Member executed a Department approved Intent to Return Home form and delivered that signed form to the eligibility office.” This change limits personal representatives from including reductions from the distant past.
The Department is seeking and expects to receive approval from the Centers for Medicare and Medicaid Services for changes to its Estate Recovery State Plan Amendment consistent with these rule changes.

Various changes were made to the final rule, consistent with 5 M.R.S. §8052(5)(B), as described more specifically in the “List of Changes to the Final Rule” in the Summary of Comments and Responses document.

Rules and related rulemaking documents may be reviewed at, or printed from, the Office of MaineCare Services 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 call Maine Relay at 711.

A concise summary of the adopted 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.
Notice of Agency Rule-making Adoption

AGENCY: Department of Health and Human Services, MaineCare Services

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

ADOPTED RULE NUMBER:

CONCISE SUMMARY: This rulemaking adds new timeline language to different sections in the Estate Recovery policy to help the Third Party Liability unit enforce the policy. This rulemaking also rewrites 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 increases the effectiveness of the policy.

HTTP://WWW.MAINE.GOV/DHHS/OMS/RULES/INDEX.SHTML for rules and related rulemaking documents.

EFFECTIVE DATE: March 7, 2018

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The Department is seeking and anticipates receiving CMS approval for this Section. Pending approval, the following rule will be applied.

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. §§ 14 (2-I), 42, 3173
22 M.R.S. § 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 to be disabled using the Supplemental Security Income standards by the Social Security Administration or has been determined to be disabled pursuant to the Maine State Retirement System.

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. § 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 as used in this Chapter 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 Income: as defined by 42 U.S.C. § 1382a.

5.02-8 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 Intellectual Disabilities (ICF-IID), psychiatric hospitals, residential care facilities, and assisted living facilities.

5.02-9 Legal interest at Death for purposes of this section means a legal interest immediately prior to death.

5.02-10 Long-term Care Insurance Partnership Program is a program authorized by 22 M.R.S. § 3174-GG and 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.

5.02-11 Member is an individual who receives MaineCare benefits.

5.02-12 Personal Care Services as used in this Chapter 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 Member, the Department may assert a claim against the estate of that Member or the Member’s 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 18-A M.R.S. 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. For the purposes of this section, a surviving child must be blind or determined to be disabled at the time of the Member’s death.

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 **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. An applicant may request an undue hardship waiver because the applicant is reliant upon the assets of the estate or an undue hardship waiver based upon care given to the Member. The specific requirements for each type of waiver are set forth below. 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 an undue hardship exists, the Department may waive all or a portion of its claim.

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

A. **Application process:** A person applying to the Department for consideration of an undue hardship waiver ("the applicant") must comply with the following:

1. An applicant must file an application on a form prescribed by the Department; and

2. The request for an undue 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 applicant must be either the son or daughter of the Member or an adult aged eighteen (18) or older and

4. 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 an undue hardship waiver may be denied; and

5. 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:
5.07  **GENERAL REQUIREMENTS FOR ALL WAIVERS** (cont.)

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.

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.

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 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

6. Only one waiver application per estate may be submitted to the Department. The applicant may only request one type of waiver per application, and;

7. 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.

B. **Limitations on waiver requests:** An undue hardship does not exist if any of the following are present:

1. The decedent or applicant created the undue 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 undue 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

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5.07 **GENERAL REQUIREMENTS FOR ALL WAIVERS** (cont.)

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. In determining whether the sale of real property will net the applicant more than $10,000.00, the Department may establish the value of the real property based upon:

   a. Municipal Tax valuation;
   b. An appraisal report issued within the past year;
   c. Real Estate professional’s estimate of fair market value;
   d. Sales history for the real estate; or
   e. Other information establishing a fair market value for the real property.

5.08 **WAIVERS**

**A. UNDUE HARDSHIP WAIVER**

An applicant may request a waiver of a claim under § 5.03(B) if enforcement of the claim would cause an undue hardship for the applicant.

**Eligibility criteria for an undue hardship waiver:** The applicant must demonstrate they have a beneficial interest in the estate and that the applicant is dependent upon the assets of the estate, as defined below.

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

   a. The estate assets or property received by survival or distribution are part of a business, including a working farm,
      i. upon which the applicant was dependent for applicant’s livelihood during the decedent’s lifetime, and
      ii. the recovery of which by the Department would deprive the applicant of their sole means of livelihood, or
   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.
5.08 **WAIVERS** (cont.)

**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:

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 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

   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
5.08 **WAIVERS** (cont.)

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. 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.

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 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
5.09 **ESTATE RECOVERY EXEMPTION WITH QUALIFIED LTC INSURANCE PARTNERSHIP POLICY** (cont.)

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 occurring during the Member last two years that the Member was institutionalized if the Member executed a Department approved Intent to Return Home form and delivered that signed form to the eligibility office.

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:

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:
5.11 **AGENCY REVIEW** (cont.)

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.