

January 5, 2021

Daniel Tsai, Medicaid Director and Assistant Secretary for MassHealth
Executive Office of Health and Human Services
ATTN: Debby Briggs
Submitted by email to: masshealthpublicnotice@state.ma.us.

Re: MassHealth Estate Recovery, Proposed Rules at 130 CMR 501.000: Health Care Reform:
MassHealth: General Policies and 130 CMR 515.000: MassHealth: General Policies

Dear Director Tsai,

Thank you for the opportunity to comment on MassHealth's proposed amendments to its estate recovery regulations. These comments represent the views of the 14 undersigned organizations all of which share a stake in supporting a fair and equitable program of medical assistance for low income, elderly and disabled Massachusetts residents.

The last time MassHealth reformed its regulations for determining when estate recovery may be waived for undue hardship was in 2003 when it reduced the income threshold for hardship from 200% of the federal poverty level to 133% of the federal poverty level and added a requirement that the family members seeking a waiver to avoid sale of their home to repay MassHealth must remain at that low income level for the following two years before a waiver would be granted. Since that change, the number of individuals able to obtain a final waiver has been minimal.¹ Today, Massachusetts has the dubious distinction of recouping more money from the families of Medicaid beneficiaries than any other state.² Eighty percent of the money recovered comes from sale of the family home.³

We appreciate the efforts of the MassHealth agency to revisit its estate recovery policies and propose amendments that would expand the circumstances in which estate recovery may be waived. However, we urge the agency to go further to minimize the burden of estate recovery on the family members of MassHealth beneficiaries, to enable more MassHealth members to pass on to their loved ones a lifetime of investment in their family homes, and to provide a fairer and more transparent process for what has been called Medicaid's "dark secret."⁴

¹ In response to an MLRI record request, the agency reported that in the last three years it filed over 9000 claims, "conditionally" granted 36 waivers, no waivers became final, and a number of conditional waivers were revoked.

² Data compiled by CMS for the Senate Committee on Aging Ranking member office, available from MLRI.

³ This data is from FY 2003, but MassHealth staff has informed MLRI that most recoveries are still from sale of the family home; the agency supplied no specific figures in response to a public record request. Naomi Karp et al., ABA Commission on Law and Aging, *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices*, at 54 (Table 7) (June 2005), available at https://assets.aarp.org/rgcenter/il/2005_06_recovery.pdf

⁴ Rachel Corbett, *Medicaid's Dark Secret*, *The Atlantic* (Oct. 2019), available at <https://www.theatlantic.com/magazine/archive/2019/10/when-medicaid-takes-everything-you-own/596671/>

Background

Medicaid is the only public benefit program that requires correctly paid benefits to be recouped from deceased beneficiaries' family members. Too often it places an unfair burden on poor families preventing them from passing on assets like the family home that can stabilize the lives of their families, neighborhoods and entire communities. The burden of estate recovery falls disproportionately on those MassHealth members without the knowledge or resources to obtain legal advice on estate planning. As simple a change as updating a decades old will can mean the difference between a loved one qualifying for a hardship waiver or losing his or her home.⁵ Federal law imposes some minimum requirements and limitations on this extraordinary process but allows states great flexibility in how aggressively to pursue estate recovery. The MassHealth agency should exercise its discretion to minimize the burden of estate recovery to the greatest extent possible given existing state and federal law.

Comments on the proposed regulations

1. Changes for “clarity or consistency,” 130 CMR 501. 011 and 515.011 throughout.

The amendments make some changes for the stated reason of clarity or consistency. One of the changes to the existing waiver alters the word “will” waive estate recovery if certain conditions are met to “may” waive recovery if certain conditions are met. The proposed rules also use “may” when describing the new proposed hardship waivers. Only the proposed new cost-effectiveness exemption uses the word “will.”

The change from “will” to “may” is not a minor change for clarity. It risks converting the right to a waiver if defined criteria are satisfied to a discretionary decision by the agency. When the legislature authorized the Health Connector to create a waiver on hardship grounds in the former Commonwealth Care program using “may” language, the courts ruled that “may” left the Health Connector free to decide not to create a waiver at all.⁶ The federal statute stipulates that the state “shall” waive recovery in cases of undue hardship. The conditions for a waiver with specific criteria like those in the proposed rule should provide that if the specific conditions are met, the waiver “shall” be granted.

The rule also creates a hardship waiver for recovery against certain property in the probate estate of MassHealth members who were American Indians or Alaska natives that “may” be granted. While native Americans are not a large population in Massachusetts, federal law prohibits recovery against certain of their property.⁷ The state has no authority to condition this federal prohibition on a request that “may” be granted. The rule should also recognize the federal exemption for estate property consisting of government reparation payments.⁸

⁵ See, Estate of Kathryn Johnson, Suffolk Superior Ct. No. 1984CV2806-B (Decision and Order June 5, 2020) in which the Court overturned the MassHealth agency's denial of a waiver because the decedent's disabled adult son obtained an interest in the house only after his grandmother disclaimed her interest under the decedent's 30 year old will.

⁶ *Provencal v. Commonwealth Health Connector Authority*, 456 Mass. 506 (2010).

⁷ 42 USC 1396p (b) (3) (B) incorporating by reference State Medicaid Manual, Section 3810 A. 7 (full cite in fn 2).

⁸ HHS, State Medicaid Manual, Ch. 3, Section 3810 A. 8 Available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/P45_03.ZIP

Recommendations:

- Change “may” to “shall” or “will” throughout when describing hardship waivers and exemptions.
- Prohibit recovery from protected property of American Indians/Alaska natives and reparation payments at any point that the existence of such property comes to the attention of the agency.

2. New cost-effectiveness exception, 130 CMR §§ 501.011(B) and 515.011(B)

A proposed amendment adds a new exception to estate recovery whereby MassHealth will waive its right to recover when the total assets in a MassHealth member’s estate are valued at \$25,000 or less. MassHealth has determined that it is not cost effective to pursue estate recovery in such cases. These small estates currently account for half of all claims but only 4% of recoveries.

This amendment will be helpful for probate estates that do not contain real estate. For example, it will protect estates that contain only a bank account with assets up to the \$2000 ceiling for countable assets. However, it would not help preserve a family home with an equity value of \$25,000 or less or help preserve any estate assets if the estate includes a house. This is because the valuation is based on the *total* value of estate assets. Total value is not defined in the regulation, but MassHealth has told us that it will interpret total assets to mean gross assets such as the market value of a house before accounting for a mortgage or tax lien. Also, the proof of value required for this exception in (B) (2) of the proposal applies to “probate estates of members where the probate petition certifies under the penalties of perjury that the total assets in a member’s estate are valued at \$25,000 or less,” Our understanding is that such a petition is only prepared in the case of voluntary administration of a small estate consisting solely of personal property.⁹ Some other form of documentation would be needed for an informal or formal probate proceeding.

Recommendations:

- Amend the cost-effectiveness definition to provide that it also applies to probate estates that include real estate if the net value of real estate less mortgages or liens with priority over MassHealth claims, together with other gross assets in the estate, are \$25,000 or less.
- Amend the regulation to identify acceptable verification of asset value available in informal and formal probate proceedings as well as in voluntary administration.

⁹ See, G.L. c. 190B, § 3-1201 and <https://www.mass.gov/guides/file-a-voluntary-administration-for-an-estate>

3. Amendment of the existing Residence and Financial hardship waiver. 130 CMR §§ 501.011(D)(1) and 515.011(D)(1)

Proposed amendments modify the existing waiver of estate recovery due to financial hardship to provide that the state may eliminate the requirement that the waiver is conditional for a two-year period for claims filed after the effective date.

The rule does not readjust the income threshold of the existing rule which prior to 2003 was 200% of poverty (\$2,127 per month for a household of one in 2020). The proposal retains the lower income level of 133% of poverty (\$1,415 per month for a household of one in 2020). It also will not apply to the small number of people who may be in the two year conditional period at the time the new rule takes effect. These may include people who had lower income while providing care for the MassHealth beneficiary and now are free to return to work but face loss of their homes if they do.

This waiver also retains the requirement of residence in the home for one year before the deceased beneficiary *enrolled in MassHealth*, a period of time that may span decades or precede the date of birth of the decedent's child. It was this requirement that would have prevented the daughter profiled in the Atlantic Monthly article -- who had relocated to Boston to bring her mother home from a nursing home and cared for her at home for five years before her mother's death-- from qualifying for a hardship waiver despite low income.¹⁰

Recommendations

- Change “may” to shall.
- Add a higher income limit such as 400% of the poverty level.
- Add a more reasonable residence requirement such as two years before the death of the beneficiary.
- Make waivers final for those who are currently in the 2-year conditional period on the effective date of the rule change.

4. Creation of two new grounds for a hardship waiver

The proposed amendments would create two new waivers of estate recovery due to undue hardship: a Care Provided Hardship Waiver and an Income-Based Hardship Waiver.

a. Care Provided Hardship Waiver, 130 CMR 501.011(D)(2) and 130 CMR 515.011(D)(2)

¹⁰ Rachel Corbett, Medicaid's Dark Secret, *The Atlantic* (Oct. 2019), available at <https://www.theatlantic.com/magazine/archive/2019/10/when-medicaid-takes-everything-you-own/596671/> (adult daughter who pays \$100,000 to pay off mortgages and make repairs in mother's home, but then is assessed estate claim of almost \$200,000 after mother's death).

The first new waiver is a Care Provided Hardship Waiver. Like the existing waiver it would prevent sale of the family home in certain circumstances. It “may” apply when the following criteria are met:

- the deceased MassHealth beneficiary left a house in his or her probate estate,
- the heir resided in the home for two years prior to member’s admission to an institution and/or receiving an institutional level of care in the community or death,
- during that time, the member needed and the heir provided a level of care that avoided the member’s admission to a facility or receiving an institutional level of care in the community,
- the heir continues to live in the home at the time the notice of claim is filed,
- the heir was left an interest in the property,
- the sale of the property is required to satisfy the claim, and,
- the heir is not being forced to sell the property by other devisees or heirs.

This new waiver like the existing waiver will protect the family home. It differs from the existing waiver in substituting a caregiver requirement for financial hardship, and tying the residence requirement to the two year period before the MassHealth member’s admission to a nursing home, receipt of “institutional level of care in the community” or death. It is a useful expansion but does not help in other hardship situations in which the home should be protected. It does not help preserve the family home if the MassHealth member died from an accident or acute illness and did not need a nursing home level of care before his or her death, nor if the MassHealth member needed a nursing home level of care but died within two years of the caregiver moving in to provide care. Caregivers who have given up their jobs and their own housing and paid for improvements to enable the MassHealth member to live at home rather than a nursing home should be protected even if the family member dies within two years. Nor does this waiver help if the MassHealth member had been the caregiver for the surviving family members, and it is the loss of the member as caregiver that creates the hardship for the heirs.

It is not clear whether this hardship waiver would apply in a situation where an heir brought the MassHealth beneficiary home from a nursing home and then cared for her at home for two or more years before death. This waiver is also not clear as to what it means by “institutional level of care in the community”—this phrase is used to describe the two year period in which the heir resides in the home and provides care that will *avoid* “institutional level of care in the community” but is not defined. If an heir provided care that helped avoid a nursing home admission for a MassHealth member who also used a PCA or who also received meals on wheels through the Frail Elder Waiver, does that heir qualify for a hardship waiver or lose the house? The proposed rule is not clear.

Recommendations:

- Clarify that the new Care Provided waiver is available if the MassHealth member met a nursing home level of care and, but for the care provided by the heir, would have needed nursing home care even if the member also received LTSS in the community while receiving such care from the heir.

- Amend the waiver to apply when the care provider's residence was for less than two years before death.
- Expand hardship waivers to protect the home in additional circumstances as recommended below.

b. Income-Based Waiver, 130 CMR 501.011(D)(3) and 130 CMR 515.011(D)(3)

The second new waiver is an Income-Based Hardship Waiver due to financial hardship based on the income of heir(s) who inherited an interest in the member's estate. It is not tied to home ownership but waives a certain dollar value from recovery.

If MassHealth determines that the family group of the heir(s) had a gross income below 400% of the federal poverty level for two years prior to the date of the MassHealth notice of claim being filed, MassHealth will waive recovery in an amount equal to the value of each qualifying heir's interest in the estate up to a maximum of \$50,000 per qualifying heir. If there is more than one qualifying heir in an estate, the total amount of the waived amount shall be limited to a total of \$100,000.

This waiver differs from the existing waiver and the caregiver waiver in also applying to estates that do not include a house or in which a house would have to be sold regardless of the MassHealth claim. It waives a dollar amount from either the estate value subject to recovery or the MassHealth claim. It is difficult to understand without an example. MassHealth supplied us with this explanation based on the following set of facts:

*In this example, an estate has four heirs with equal shares, two qualifying for the income-based waiver and two non-qualifying. The total value of the estate consists of a house valued at \$150,000. The MassHealth claim is \$220,000. There are \$30,000 in expenses with priority over MassHealth's claim. Each heir has an interest of \$37,500 in the total estate (\$150,000/4). The maximum exemption for the estate based on the shares of the two qualifying heirs is \$75,000 (\$37,500*2).*

The estate will be subject to recovery on the lesser of:

- *the remaining value of the estate after deducting priority expenses and the amount excluded for the qualifying heirs (150,000 – (30,000 + 75,000)) = 45,000); or*
- *the remaining value of the MH claim after deducting the amount excluded for qualifying heirs from the total value of the MH claim (220,000 - 75,000 = 145,000).*

MassHealth will recover \$45,000. The remaining \$75,000 will be divided among the four heirs each receiving \$18,750.

Recommendation:

Include an example in the regulation; it is difficult to understand without one.

Recommendations for additional new hardship criteria:

Add a hardship waiver for family members and caregivers to whom the MassHealth member could have transferred the house during his or her lifetime with no transfer of asset penalties.

Estate recovery is a byproduct of the failure of our health care system to provide affordable care to individuals needing a nursing home level of care. Medicaid's restrictive asset rules still require individual's to exhaust almost all their resources before it will pay for their care and has in place "transfer of asset" rules intended to deter people from giving away their assets during their lifetimes in order to qualify for Medicaid. However, even these strict rules recognize that transfers of the home to certain close family members are permissible and not a reason to deny coverage. But these same close family members, who existing state and federal transfer of asset rules favor, are at risk due to estate recovery. Simply because the Medicaid beneficiary did not understand estate recovery or have the resources for legal assistance for estate planning or thought they had plenty of time to make provision for their families but were fatally wrong, these favored family members may be left with nothing. The permissible transfers include transfers to a spouse, minor child, disabled adult child, sibling with an interest in the house and who lived in the home for at least one year before the nursing home admission, or a son or daughter who lived in the home for at least two years and provided care to avoid a nursing home admission for at least two years.¹¹ There is a waiver proposed for only the caregiver children.

While state and federal law prohibit recovery until the death of a surviving spouse or when there is a minor child or disabled adult child (G.L. c. 118E, § 31), this so-called "deferral" is not a waiver. If a survivor must sell or refinance the property, the state requires steps to secure the state's eventual repayment—posting a bond, segregating the proceeds from the sale, or agreeing to a "mortgage" against any new property into which the proceeds are invested. See, G.L. c. 118E, § 32 (j). Since this may not be feasible, the only realistic option is a settlement with the state for discounted payment. Thus, despite the protections in the law for a surviving spouse and children, the practical pressure to settle deferred claims are significant.¹² Another waiver is needed.

Add the hardship circumstances contemplated by Congress in the legislative history and recommended in federal guidance.

The federal Medicaid statute requires states to waive recovery in cases of undue hardship and directs the Secretary to define the term. Federal Medicaid agency guidelines give examples of undue hardship-- based on the legislative history-- in cases where the estate subject to recovery is-

- the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business, or

¹¹ 42 USC 1396p(c) (2) (A) or (B).

¹² 2005 ABA Survey pp 41-42. Full citation in footnote 3.

- a homestead of modest value (defined as a home worth less than 50% of the average home value in the county) or
- other compelling circumstances.¹³

The proposed regulations should include these federally-defined criteria as additional grounds for a hardship waiver. The provision for other compelling circumstances is particularly important to capture the myriad situations which may not fit neatly into the specific criteria of the existing and proposed waiver.

Add a requirement of adequate notice of the specific reasons the agency disagrees with a notice that conditions for a waiver exist and provide an opportunity to cure a deficiency in the notice

After filing an estate recovery claim, MassHealth is required by state statute to give the personal representative notice of the circumstances that give rise to deferral or a hardship waiver. GL 118E, §32(c). The statute gives the personal representative 60 days to notify the agency that such conditions for deferral or a hardship waiver exist and to “provide supporting documentation satisfactory to the division.” GL 118E, §32(d). If the division receives a notice with which it disagrees, its recourse is to file suit against the personal representative. GL 118E, §32(f). Neither the statute nor the regulations address what kind of notice the agency should give to the personal representative about what supporting documentation is satisfactory to the division or, if the agency disagrees with the personal representative’s notice, why it disagrees.

When the agency disagrees with the personal representative’s notice, it sends a notice that the notice was insufficient, and gives the representative the option of paying the claim or having the claim referred to the agency’s legal division to file suit. It supplies no specific reason of why it disagrees and no opportunity to correct any deficiency. Worse, in some cases, the agency deems the notice so deficient that it does not constitute a notice at all and does nothing. It may be many months or years later before the personal representative even realizes the claim was not waived.

The regulations should require the agency to notify the personal representative when it disagrees with his or her notice for any reason, the reason it disagrees and an opportunity to correct any deficiency. It is surely preferable for the agency and the family for hardship waivers and deferrals to be resolved by improved communications and exchange of information between the agency and the personal representative rather than by expensive and time-consuming litigation.

¹³ HHS, State Medicaid Manual, Ch. 3, Eligibility, Section 3810(C), Estate Recovery Undue Hardship. Available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/P45_03.ZIP

Add adequate notice of potential estate recovery for managed care premiums

Add a requirement of adequate notice to beneficiaries describing how estate recovery will be calculated for people in SCO, One Care, or other managed care plans in which MassHealth pays a fixed monthly amount regardless of services actually used by the member. This notice should also inform MassHealth members how to find out the amount of the premium or portion of the premium potentially subject to estate recovery. Federal guidelines require a separate notice with this information about estate recovery for managed care premiums in addition to general information about estate recovery.¹⁴

In certain managed care arrangements, MassHealth pays a fixed amount to a health care plan each month regardless of services used by the member. Of course, MassHealth can never recover more than it spends so the amount of the fixed monthly payment is the maximum amount MassHealth can recover for the services provided by the plan. MassHealth takes the position that it can recover the full amount of the fixed payment for a month in which an individual was enrolled in a plan even if the individual received no plan services at all or services of much lower cost than the fixed payment. MassHealth does not notify members enrolling in managed care that this is the MassHealth estate recovery policy and that their estates may be potentially liable for substantial sums regardless of how few services they received.

In one recent legal aid case, the annual difference in the amount MassHealth spent on an SSI recipient living at home and enrolled in the frail elder waiver increased by \$24,000 in the first year her coverage changed from MassHealth fee for service, which paid for the services she actually used, to a SCO plan that was paid a fixed monthly amount regardless of services used.¹⁵ Not only does MassHealth not notify members of these potential consequences of enrolling in managed care or how to find out the amount of the premium being paid, it does not notify anyone else. The decedent in this case and her family were reassured by the elder services program providing her home care services that estate recovery would not apply unless she entered a nursing home. This is a widely shared but incorrect view of the scope of MassHealth estate recovery under current law.

MassHealth acknowledges it cannot lawfully recover when it pays for Medicare cost sharing, such as a hospital deductible, for members with both Medicare and MassHealth. But it takes the position that it can recover the full amount of the fixed payment it makes to OneCare and SCO plans that pay for Medicare cost sharing on its behalf. MassHealth provides no notice to One Care or SCO members about this or any other way that managed care enrollment may increase the amount of potential estate recovery.

¹⁴ State Medicaid Manual, Section 3810(d)

¹⁵ See, Estate of Idalina Gravito, Suffolk Superior Court No. 2084CV00178B, filed Jan 21, 2020, Complaint Affidavit Exhibit 8 showing MassHealth fee for service spending from 2005-2009 and SCO capitated monthly premiums paid from 2010-2019.

Add clarification that anyone appointed as a public administrator also has the ability to apply for a hardship waiver on behalf of eligible heirs.

If a MassHealth member dies leaving a probate estate but no personal representative takes action to file a probate proceeding, MassHealth may arrange for a public administrator to be appointed to initiate the probate proceeding. The regulations should clarify that the public administrator, not just the personal representative, can apply for a hardship waiver on behalf of eligible heirs.

Delete reference to property passing outside of probate in 130 CMR 501.011(F) and 515.011(F).

This section on providing estimates of equity and fair market value when there are insufficient assets to satisfy an estate recovery claim still refers to “[t]he executor or administrator of the probate estate or, in the case of real property that passes outside the probate estate, the person or entity to whom legal title or interest passed.” This language does not reflect current law, it should be updated to refer to a personal representative and the reference to real property passing outside the probate estate should be deleted.

Additional need for legislative reform in 2021

Federal Medicaid law requires states to recoup from the probate estate for the costs of individuals needing a nursing home level of care, home and community based services and certain related costs.¹⁶ It gives states the option of recovering for the costs of providing other state plan services to individuals age 55 or older.¹⁷ GL 118E, § 31 elects that option and requires the agency to recover for all medical services provided to members age 55 or older whether they ever resided in a nursing home or received home and community based services or not.

For adults 55-65 in the Medicaid expansion program, CarePlus –which does not cover nursing home or other long term services--90 percent of Medicaid spending is reimbursed by the federal government and would be repaid to the federal government from any estate recovery collected by the state. CMS has made clear that states can elect not to recover for any but mandatory spending for this or other discrete eligibility groups.¹⁸ Limiting estate recovery to only mandatory spending would also protect most of the spending for CommonHealth members age 55 or older whose coverage does not include long term nursing home care, and who are not enrolled in home and community based waivers. It would also go a long way toward solving the problem of the state collecting the full amount of capitated premiums to managed care plans even when it is more than the costs of services actually received by a member, and would remove the disincentive for low cost users to enroll in managed care.

We appreciate that the Administration and the legislature are reexamining Medicaid estate recovery in Massachusetts. The recently enacted FY 2021 budget took the first positive step in

¹⁶ 42 USC 1396p(b)(1)(B)(i)

¹⁷ 42 USC 1396p(b)(1)(B)(ii)

¹⁸ CMS Letter to State Medicaid Directors, 14-001, p. 3 (Feb. 21, 2014) available at <https://www.medicaid.gov/federal-policy-guidance/downloads/smd-14-001.pdf>

making estate recovery less punitive by reducing the 12% interest rate to 3.25%, but more is need than even our recommended regulatory reforms. Medicaid estate recovery exacerbates the inequities of unequal wealth distribution. Massachusetts should not recoup more from grieving family members than the federally mandated amount. Only legislation can make that change and we hope the Administration will support further regulatory and legislative reforms.

Thank you again for the opportunity to make these comments. If you have any questions or require further information about these comments, please call or write Vicky Pulos, MLRI, 40 Court Street, 8th Floor, Boston, MA 02108, vpulos@mlri.org 617-357-0700 Ext 318.

The 14 organizations listed below endorse the recommendations in these comments:

Boston Center for Independent Living

Community Legal Aid, on behalf of its clients

Disability Law Center

Disability Policy Consortium

Greater Boston Legal Services on behalf of its clients

Health Care for All

Massachusetts Advocates for Nursing Home Reform

Massachusetts Law Reform Institute

Massachusetts League of Community Health Centers

Massachusetts Senior Action Council

National Academy of Elder Law Attorneys, Massachusetts Chapter

Northeast Justice Center

Stavros Center for Independent Living, Inc.

Veterans' Legal Clinic, Legal Services Center, Harvard Law School