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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](mailto: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 are submitted by Health Law Advocates, a public interest law firm dedicated to ensuring access to health care for the state's most vulnerable residents. Stable housing is an important social determinant of health which complements a fair and equitable program of medical assistance coverage, and Health Law Advocates joins with its fellow organizations and individuals who share a stake in these issues. Broadscale reform of estate recovery policies is necessary to achieve MassHealth's stated goal of dismantling systemic health inequities. We are excited to participate in this important component of support for low-income elderly and disabled residents and their survivors.

As you are no doubt aware, the most recent reform of MassHealth regulations relating to undue hardship waivers was in 2003, when the income threshold for hardship was reduced from 200% to 133% of the federal poverty level. At this time, a new component was also added, requiring surviving family members seeking a waiver to 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,<sup>1</sup> and Massachusetts recoups more money from the families of Medicaid beneficiaries than any other state.<sup>2</sup> Eighty percent of the money recovered comes from sale of the family home.<sup>3</sup> When this

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<sup>1</sup> In response to an MLRI record request, the agency reported that in the last 3 years it filed over 9000 claims, "conditionally" granted 36 waivers, no waivers became final, and a number of conditional waivers were revoked.

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

<sup>3</sup> This data is from FY 2003, but MassHealth staff have informed MLRI that most recoveries are still from sale of the family home; the agency supplied no specific figures

recovery removes stable housing for indigent family members, it functions counter to MassHealth's important goal of improving social determinants of health for indigent populations under Delivery System Reform Incentive Payment Programs such as ACOs, CPs, and SIs.<sup>4</sup> Housing stability has been firmly recognized as an important social determinant of health, especially in Massachusetts in recent years,<sup>5</sup> and accountable care organizations and community partners are currently instructed to screen for insecure housing as a risk factor for health outcomes.<sup>6</sup>

While we appreciate MassHealth's proposed reforms of its estate recovery rules, we strongly urge the agency to adopt more extensive changes that would significantly reduce the burden of estate recovery on vulnerable families. Allowing families to maintain the homes of their deceased loved ones is an investment in the health of surviving family members that will likely avoid preventable costs for the agency. It also permits an important transgenerational transfer of wealth, particularly within communities of color. We applaud the agency's attempts to ensure a fairer and more transparent process for what Atlantic magazine has called Medicaid's "dark secret."<sup>7</sup> We recommend changes to the proposed hardship waivers and creation of additional waivers to achieve this goal.

## A. Background

Medicaid is the only public benefit program that requires correctly paid benefits to be recouped from deceased beneficiaries' family members. Too often, this practice places a destabilizing burden on indigent families, who

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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](https://assets.aarp.org/rgcenter/il/2005_06_recovery.pdf)

<sup>4</sup> For a complete list of DSRIP initiatives currently in effect, *see, e.g.*, Massachusetts Delivery System reform Incentive Payment Program page, *available at* <https://www.mass.gov/info-details/massachusetts-delivery-system-reform-incentive-payment-program#dsrip-initiatives>, or *see* CMS Special Terms and Conditions, MassHealth Medicaid Section 1115 Demonstration, #11-W-00030/1 (July 1, 2017-June 30, 2022), *available at* <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ma/ma-masshealth-ca.pdf>.

<sup>5</sup> *See, e.g.*, Samantha Artiga and Elizabeth Hinton, Beyond Health Care: The Role of Social Determinants in Promoting Health and Health Equity, Kaiser Family Foundation (May 2018), *available at* <https://www.kff.org/racial-equity-and-health-policy/issue-brief/beyond-health-care-the-role-of-social-determinants-in-promoting-health-and-health-equity/>; Arlene Ash, Using SDOH Data In Rate Setting: MassHealth Risk Adjustment Model, December 2016; Collins, Susan E.; et al., Suicidality Among Chronically Homeless People with Alcohol Problems Attenuates Following Exposure to Housing First, *Suicide and Life-Threatening Behavior*, 2016, *available at* <https://onlinelibrary.wiley.com/doi/abs/10.1111/sltb.12250>.

<sup>6</sup> *See, e.g.*, Using SDOH Data in Rate Setting: MassHealth Risk Adjustment Model, Arlene Ash, December 2016.

<sup>7</sup> 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/>

may be forced into homelessness when the family home is lost.<sup>8</sup> The burden of estate recovery also disproportionately affects MassHealth members who have difficulty accessing legal advice on estate planning due to lack of financial resources or knowledge of the system, as the remedies are accessed only by those educated on how to use them.<sup>9</sup> Federal law mandates minimum estate recovery requirements,<sup>10</sup> and we understand that the general obligation is not subject to MassHealth discretion. However, recognizing the disproportionate consequences that recovery may cause in some instances, federal law also imposes some mandatory limitations<sup>11</sup> on this extraordinary process, tasking states with creating process for waiver in instances of undue hardship. We urge the MassHealth agency to exercise its discretion to minimize the burden of estate recovery to the greatest extent possible under existing state and law, and we particularly recommend broad supports for keeping survivors stably housed if they reside in the familial home. To support these points, we bring the agency's attention to two recent cases we have worked on, which each strongly highlight ways families may fail to receive relief under the proposed system.

The Jones family, whom we will reference throughout our comment on the proposed regulations, qualifies or nearly qualifies for every proposed hardship exception and yet nonetheless would lose the familial home under the new rules. Their story highlights a myriad of ways families contemplated by the proposed exceptions to estate recovery may fall through the cracks. The Hughes family, whom we will discuss in our final section proposing a new exception, is seeking deferral due to two adult heirs living with permanent and total disability and yet will likely lose their familial home as well. Their story highlights the ways in which deferral cannot be considered a substitution for hardship exceptions.

## **B. Comments on the Proposed Regulations**

### **1. Changing “shall” to “may”, 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 changes current language, stating that MassHealth “will” waive estate recovery if certain conditions are met, to new language stating that MassHealth “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 federal statute

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<sup>8</sup> See Artiga et al, *supra* note 5.

<sup>9</sup> See, e.g., 42 USC 1396p(c)(2)(A) (2018) (providing eligibility when homes are transferred to spouse or children); 42 USC 1396p(c)(2)(B) (providing eligibility when homes are placed in a trust).

<sup>10</sup> See 42 USC 1396p(b)(1).

<sup>11</sup> See 42 USC 1396p(b)(3).

stipulates that the state “shall” waive recovery in cases of undue hardship, illustrating that the waived recovery is not intended to be discretionary when conditions are satisfied.<sup>12</sup> To comply with federal law, 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. Again, federal law prohibits recovery against such property,<sup>13</sup> and the Commonwealth 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.<sup>14</sup>

### **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)**

In its proposed regulations, MassHealth has indicated that it is not cost effective to pursue estate recovery where a member’s estate is valued at \$25,000 or less. We appreciate the creation of this new exception, which is authorized pursuant to federal law, and will be valuable for probate estates that do not contain real estate.

However, in most instances, this rule would not help preserve family homes with equity values of \$25,000 or less if the total value of estate assets is interpreted to mean gross assets such as the market value of a house *before* accounting for a mortgage or tax lien. Particularly after the housing crisis ten years ago, it is not uncommon for estates to have an equity value of \$25,000 or less after accounting for mortgage or tax lien when the estimated value would be much, much higher without these liens in place. Including mortgages and liens with priority over MassHealth

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<sup>12</sup> 42 USC 1396p(b)(3), *supra* note 11.

<sup>13</sup> See 42 USC 1396p(b)(3)(B), incorporating by reference State Medicaid Manual, Section 3810 A. 7 (full cite in fn 2).

<sup>14</sup> 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](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/P45_03.ZIP)

claims in calculations for total value is in accordance with both common sense and with the reality experienced by many homeowners in the Commonwealth.

### **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.

### **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, which waives recovery due to financial hardship and residence in the family home. Under the proposed changes, the state may eliminate the requirement that the waiver is conditional for a two-year period for claims filed after the effective date. This is a valuable step towards a just estate recovery policy, and we appreciate that this additional requirement, added in 2003, is being rescinded.

However, the rule does not readjust the income threshold of the existing rule, which was placed at 200% of the federal poverty line prior to the 2003 changes. 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.

Perhaps most disturbingly, this waiver also retains the requirement of residence in the home continually from one year before the deceased beneficiary was eligible to enroll in MassHealth through the time of death, a period of time that may span decades—or, if it precedes the date of birth of the decedent’s child, may be literally impossible to satisfy. It was this requirement that prevented the daughter profiled in the Atlantic Monthly article from qualifying, as she 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.<sup>15</sup>

As we testified in today’s public hearing, in the Jones family’s case, the decedent became eligible in 1991, nearly twenty-five years before she passed away in 2015; although Ms. Jones had been living with the decedent since 1988, she briefly moved out and then moved back in during that time. MassHealth took the position that she did not meet the

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<sup>15</sup> 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).

residency requirement for this waiver, because she had not lived with the decedent for twenty-five continuous years. That is a much more onerous standard that is obvious at first blush.

It is unjust and confusing to tie the surviving heir's eligibility to continual residence since before the decedent was eligible for MassHealth, as this window creates an extremely variable range from case to case and may in some instances be literally impossible to satisfy. This will become a particularly common problem as members of our Commonwealth age, since Medicaid expansion was granted by the Affordable Care Act and MassHealth now covers many non-disabled adults. Perhaps more to the point, this requirement also runs counter to MassHealth's stated aim of improving housing stability to create better health outcomes and reduce avoidable health costs. It is not ultimately in MassHealth's fiscal interests to maintain this standard of residence in instances when the surviving child undisputedly lives in the family home.<sup>16</sup>

### **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 one year before the death of the beneficiary as outlined below.
- 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: one for Care Provided Hardship and one for Income-Based Hardship.

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

Much like the existing waiver for residence and financial hardship, this new waiver would prevent sale of the family home in certain circumstances. The proposed changes to the regulations provide that this waiver "may" apply when the following criteria are met:

- The deceased MassHealth beneficiary left a home in his or her probate estate;
- The heir resided in that home for two years prior to member's admission to an institution and/or receipt of 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

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<sup>16</sup> See, e.g., Ash, *supra* note 5.

facility or receipt of 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.

Like the existing residence and financial hardship waiver, this new care provided waiver will protect the family home. It differs from the existing waiver in requiring care provided rather than financial hardship, and in 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. We appreciate the insight being shown regarding the beneficial cost-saving that can occur when family members care for their elderly parents, and this proposed change also brings the waiver provisions considerably more in-line with housing stability goals.

However, the proposed new waiver has several holes in its coverage that create predictable and preventable housing instability; these gaps further may disincentivize family members from leaving existing housing to return home and care for an ill parent. Notably, the current proposed waiver does not help preserve the family home if the MassHealth member died from an acute illness that progressed to termination in a period shorter than two years; unfortunately, this is quite common for some very serious and expensive-to-treat conditions.

As we testified today, in the Jones family's case, Ms. Jones had cared for her mother through deteriorating health conditions and was initially able to prevent her mother from requiring nursing home care. However, as is so common for individuals with deteriorating conditions, her mother eventually required a standard of care that could not be provided in a home environment and passed away subsequent to inpatient admission. Though Ms. Jones had cared for her mother and successfully forestalled hospitalization for over a year, she would not qualify for the new caregiver waiver because it requires a period of two years of caregiving.

Caregivers who have given up their jobs and their own housing 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. These surviving caregivers are at serious and predictable risk of homelessness upon estate recovery, and homelessness creates further preventable healthcare costs. We recommend that MassHealth implement metrics that measure the care provided based on documentation of the care itself. If a time increment must be attached to this waiver, we do not recommend a period longer than one year.

**Recommendation:**

- 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.

This provision is helpful in many instances, but it does not consider whether the indigent individual will be unhoused despite the waived recovery. In fact, since there is a maximum of \$100,000 per family no matter how many heirs are involved, it is likely that whole families may be unhoused in many instances, especially if they are all living in a familial home that is a larger property with a corresponding higher value. In the case of the Jones family, though Ms. Jones would definitely qualify for the waiver of \$50,000 under this new guideline based on income requirements, the \$50,000 waiver would not preserve ownership of the house in her case or her tenancy within it, both because the amount of the MassHealth claim remaining is too high and because all four of the surviving siblings combined may only waive up to \$100,000 per this proposed rule

In these instances, it is in MassHealth's interest to allow surviving heirs to remain securely housed, as that has a number of health implications and many individuals living at or below 400% of the federal poverty level will themselves be MassHealth recipients.

It is also not clear from the proposed changes whether this rule can be combined with new cost-effectiveness exception. The proposed new rules state that a family with an income-based waiver will be subject to recovery based on the lesser value of either the remaining value of the estate after deducting priority expenses and the amount excluded for the qualifying heirs, or the remaining value of the MassHealth claim after deducting the amount excluded for qualifying heirs from the total value of the claim. If the total assets in the estate become \$25,000 or less once the initial \$50,000 or \$100,000 is waived, will MassHealth consider that estate to be a cost-effective exception to recovery?

**Recommendation:**

- Clarify that in instances when a financial hardship waiver creates total assets in the estate of \$25,000 or less, the family will be excepted from estate recovery.

- Permit at least \$50,000 per qualifying heir without a family cap in instances where qualifying heirs can show residence in the familial home.

### **C. Recommendations for additional new hardship criteria:**

In addition to the above suggestions, we agree with our colleagues at MLRI that our current moment is an opportunity to review additional bases for hardship waivers. We outline several suggestions for bringing the current hardship waiver guidelines further in line with the stated goals of our recent Medicaid innovations under the DSRIP program.

#### **1. 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.**

Medicaid's restrictive asset rules require individuals to exhaust almost all their resources before it will pay for their care, and has "transfer of asset" rules intended to deter people from transferring assets purely to qualify for Medicaid. However, these strict rules create exceptions in several instances, recognizing that some transfers should be permitted for humanitarian reasons: namely, the rules permit 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.<sup>17</sup> These same family members should not be placed at risk by estate recovery simply because the Medicaid beneficiary was not educated about the benefits of transferring in life. Such an approach perpetuates existing systemic inequities that lead to less access to education and advocacy for families who are most in need, and families whom the federal statute obviously intends to protect.

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,<sup>18</sup> 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.<sup>19</sup> Additionally, it has a strict 60-day window to be raised at all. Since this may not be feasible, the only realistic option is a

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<sup>17</sup> See 42 USC 1396p(c)(2)(A) or (B).

<sup>18</sup> See M.G.L. c. 118E, § 31.

<sup>19</sup> See M.G.L. c. 118E, § 32(j).

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.<sup>20</sup>

This problem is clearly illustrated by a family HLA is helping, who we'll call the Hughes family. At present, the family qualifies for a deferral on the basis of two surviving adults with disability, but the family will nonetheless be responsible for a great deal of repayment even if that deferral is put in place. The family is also likely to lose the familial home, where one of the surviving children is currently housed; this almost certainly will have implications for the agency regarding the cost of treating her disability. These issues would have been avoidable with more time to process their rights, and they would also have been avoidable if a waiver were permitted. A deferral is not equivalent to an exception, and this has very real consequences for a lot of families living with disability.

## **2. 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;
- A homestead of modest value (defined as a home worth less than 50% of the average home value in the county); or
- [Representative of] other compelling circumstances.<sup>21</sup>

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 myriad situations that may not fit neatly into the specific criteria of the existing and proposed waiver.

## **D. Further Suggestions and Considerations**

Finally, HLA joins our colleagues in suggesting a few additional changes to the existing regulations, mostly pertaining to notice, in order to facilitate smooth waiver and estate recovery practice.

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<sup>20</sup> See 2005 ABA Survey pp 41-42, *supra* note 4.

<sup>21</sup> 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](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/P45_03.ZIP)

**1. 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.<sup>22</sup> The statute gives the personal representative 60 days to inform the agency that such conditions for deferral or a hardship waiver exist and to “provide supporting documentation satisfactory to the division,”<sup>23</sup> which is not a lot of time to procure this kind of documentation and is particularly difficult without direction. If the Division of Medical Assistance receives a request for waiver with which it disagrees, its recourse is to file suit against the personal representative.<sup>24</sup> 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 request for waiver, why it disagrees.

This process is confusing for surviving heirs, and it is expensive for the agency because it so often results in litigation. Much of this litigation could be avoided, however, if there were clearer standards about what documentation is required and more time were provided to procure that documentation. It is surely preferable for everyone if hardship waivers and deferrals are resolved by improved communications and exchange of information between the agency and the personal representative. This can be best achieved through adequate notice in terms of both time and direction, and we strongly recommend that the Agency change its practices to provide more specific and educating guidance.

**2. Add adequate notice of potential estate recovery for managed care premiums**

MassHealth takes the position that it can recover amounts paid to managed care plans, including SCOs, One Care Plans, MMCOs, and ACOs. We believe this position is unfair to MassHealth members and particularly those who pursue less care through their plans. However, given that this is the agency’s position, MassHealth must inform its members about the risk of estate recovery of these payments. The agency should 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. This notice should be provided as soon as it is relevant to MassHealth members, either upon turning 55 or before enrollment in relevant programs. This notice should inform MassHealth

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<sup>22</sup> See M.G.L. ch. 118E, §32(c).

<sup>23</sup> See M.G.L. ch. 118E, §32(d).

<sup>24</sup> See M.G.L. ch. 118E, §32(f).

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.<sup>25</sup>

### **3. 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.

### **4. Additional need for legislative reform in 2021**

While 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,<sup>26</sup> states have flexibility to pursue recovery for the costs of providing other state plan services to individuals age 55 or older.<sup>27</sup> Unfortunately, Massachusetts state law has elected the more expansive option pursuant to G.L. c. 118E, § 31. HLA and our partners in the health care advocacy community are pursuing legislative changes to reduce the burden of estate recovery on MassHealth members. Our goal is to limit the agency's power to recovery only Medicaid spending that is mandatory under federal law.

MassHealth and the legislature are moving in the right direction to reform Medicaid estate recovery in Massachusetts. The recently enacted FY 2021 budget took the first step in making estate recovery less punitive by reducing the 12% interest rate to 3.25%, but more is needed. Medicaid estate recovery exacerbates the inequities of unequal wealth distribution, and it has particularly strong implications for families of color, who have already long experienced structural inequities created by our history of redlining and who often rely on familial property for transference of intergenerational wealth. Massachusetts should not recoup more from grieving family members than the federally mandated amount. Only legislation can make that change, and we hope the Baker Administration will support further legislative reforms.

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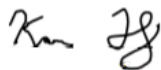
<sup>25</sup> State Medicaid Manual, Section 3810(d)

<sup>26</sup> 42 USC 1396p(b)(1)(B)(i)

<sup>27</sup> 42 USC 1396p(b)(1)(B)(ii)

Thank you again for the opportunity to make these comments. If you have any questions or require further information about these comments, please feel free to contact me at [khurvitz@hla-inc.org](mailto:khurvitz@hla-inc.org) or 617-275-2846.

Sincerely,

A handwritten signature in black ink, appearing to read "Kara JH".

Kara Hurvitz  
Staff Attorney  
Health Law Advocates