

# Extending Medicaid Long-Term Care Impoverishment Protections To Same-Sex Couples in Pennsylvania



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## INTRODUCTION

When recipients of Medicaid receive long-term care (“LTC”) benefits, Medicaid can place a lien against their homes or seek recovery from their estates after death in order to recoup the expenses of the care. Medicaid can also penalize recipients of LTC for giving their home away for less than full value by not covering costs of their care for a certain period of time. State and federal law provides exceptions to these requirements when the LTC recipient has a different-sex spouse. These protections prevent surviving spouses from becoming impoverished by losing their homes. Until recently, these exceptions could not include same-sex spouses or partners.

In the summer of 2011, the Center for Medicare & Medicaid Services (“CMS”) informed states that federal law allows same-sex partners of recipients to be included in these impoverishment protections (“the CMS Letter”).<sup>1</sup> These protections can significantly reduce the likelihood that a same-sex partner must become impoverished in order for a sick or disabled partner to receive LTC through Medicaid. However, the CMS letter did not provide these impoverishment protections to same-sex couples directly. States must adopt affirmative policy measures to provide them.<sup>2</sup> This report explains how Pennsylvania can do so.

First, this report explains the CMS Letter’s approach to extending impoverishment protections to same-sex couples, and provides specific information about how Pennsylvania could amend its laws and policies to provide the protections. Next, it discusses criteria for determining which same-sex couples will be eligible for impoverishment protections. Finally, it explains that Pennsylvania’s limitation on recognizing marriage for same-sex couples would not preclude the state from offering impoverishment protections to same-sex couples.

This report concludes that Pennsylvania can extend impoverishment protections to same-sex couples in a manner consistent with its current state laws. Specifically, Pennsylvania could extend protection from lien imposition and transfer penalties to same-sex couples through administrative regulation. Existing Pennsylvania law likely protects some same-sex couples from estate recovery, but these protections could be broadened through either regulatory changes or guidance. Pennsylvania may have to amend its State Medicaid Plan to effectuate these changes.

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<sup>1</sup> Letter from Cindy Mann, Director of Center for Medicaid, CHIP and Survey Certification, to State Medicaid Directors (June 10, 2011), *available at* <http://www.cms.gov/smdl/downloads/SMD11-006.pdf>.

<sup>2</sup> The CMS Letter does *not* discuss the “income and asset” test used to determine eligibility for LTC, and in particular does not identify how same-sex partners may be protected in ways analogous to the protections built into this eligibility test for different-sex married couples.

## PENNSYLVANIA'S MEDICAID PROGRAM

Medicaid is a federally mandated program, implemented by states, which ensures access to health care for those low-income individuals and families that qualify under the program.<sup>3</sup> The program is funded with a combination of federal funds and state funds.<sup>4</sup> Medicaid's long-term care ("LTC") program covers the cost of long-term care in a professional care facility for those eligible for the program and expected to remain in the facility for at least 30 days.<sup>5</sup>

Each state must implement its own Medicaid program, in accordance with federal laws and regulations. Pennsylvania's Medicaid program, referred to as Medical Assistance, is administered by the Pennsylvania Department of Public Welfare ("the Department").<sup>6</sup> For the most part, the substantive provisions implementing the Medical Assistance program are located in regulations and guidance materials in Pennsylvania, rather than in statutes. The regulations issued by the Department that implement the program are codified in Title 55 of the Pennsylvania Code of Regulations. Guidance materials are available on the Department's website at: <http://www.dpw.state.pa.us/foradults/index.htm>.

At the federal level, CMS, within the U.S. Department of Health & Human Services, administers the Medicaid program.<sup>7</sup> Federal Medicaid laws are codified at 42 U.S.C. § 1396. Regulations issued by CMS appear in Chapter IV of Title 42 of the Code of Federal Regulations. Additionally, CMS has produced numerous guidance documents to assist the states in administering their Medicaid programs in accordance with federal laws and regulations.<sup>8</sup> The CMS guidance document primarily relied on in this report is the State Medicaid Manual ("SMM"), a publication that provides state Medicaid agencies "informational and procedural material needed by the States to administer the Medicaid program."<sup>9</sup>

## SUBSTANTIVE CHANGES TO LAWS, REGULATIONS & ADMINISTRATIVE GUIDANCE

According to the CMS Letter, states can extend three impoverishment protections to same-sex couples: 1) Protection from lien imposition; 2) Protection from estate and lien recovery;

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<sup>3</sup> Centers for Medicare & Medicaid Svcs., U.S. Dep't of Health and Human Svcs, Medicaid & CHIP Program Information, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/Medicaid-and-CHIP-Program-Information.html> (last visited June 19, 2012).

<sup>4</sup> Centers for Medicare & Medicaid Svcs., U.S. Dep't of Health and Human Svcs, Medicaid Reimbursement & Finance, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Financing-and-Reimbursement.html> (last visited June 19, 2012).

<sup>5</sup> U.S. Dep't of Health and Human Svcs., Medicaid Treatment of the Home: Determining Eligibility and Repayment for Long-Term Care (Apr. 2005), <http://aspe.hhs.gov/daltcp/reports/hometreat.htm>.

<sup>6</sup> Pennsylvania Department of Public Welfare, <http://www.dpw.state.pa.us/>.

<sup>7</sup> Centers for Medicare & Medicaid Svcs., U.S. Dep't of Health and Human Svcs., <https://www.cms.gov/>.

<sup>8</sup> CMS provides access to guidance materials it has issued on its website: [www.cms.gov/home/regsguidance.asp](http://www.cms.gov/home/regsguidance.asp).

<sup>9</sup> The State Medicaid Manual is available at: U.S. Dep't of Health and Human Svcs, Centers for Medicare & Medicaid Svcs, <https://www.cms.gov/manuals/pbm/itemdetail.asp?itemid=CMS021927>.

and 3) Protection from penalties imposed as a result of a transfer of a home for less than fair market value. The CMS Letter notes that the existing spousal exemptions cannot be applied directly to same-sex partners because of the federal “Defense of Marriage Act” (“DOMA”),<sup>10</sup> and explains other ways that each of these protections may be extended to same-sex couples in accordance with federal law.

This section provides an overview of the federal laws, regulations, and guidance that establish the three types of impoverishment protections addressed by the CMS Letter. This section also discusses the ways identified in the CMS Letter through which Pennsylvania can extend these protections to same-sex couples.

The CMS Letter does *not* authorize states to treat same-sex couples like different-sex spouses for purposes of determining eligibility for Medicaid, including Medicaid LTC. However, past CMS guidance indicates that states may treat same-sex couples like different-sex spouses when determining eligibility for Medicaid, but must use their own funds to cover any additional program expenditures related to doing so.<sup>11</sup>

### 1. The “Income and Assets” Test

The “income and assets” test is used to determine eligibility for Medicaid, including Medicaid LTC. If a Medicaid applicant’s or recipient’s income and assets are above a certain threshold, he or she will not be eligible for Medicaid, or will be required to spend down the income and assets in order to receive or continue to receive Medicaid. States determine their own income and asset thresholds, but must do so within parameters set by the federal law. Federal law treats married spouses differently than it treats single individuals under the income and assets test. People in same-sex couples are treated as single individuals for purposes of the test.

#### i. Different-Sex Spouses

Federal law requires that different-sex spouses’ countable income and assets are pooled for purposes of eligibility determinations.<sup>12</sup> In the context of LTC, this means that all countable income and assets of the “community spouse” (the spouse who does not need LTC) are added to the countable income and assets of the spouse needing LTC to determine his or her eligibility. If the pooled income and assets exceed the threshold, the spouse needing LTC will be required to spend down the pooled resources to the threshold amount before Medicaid covers the cost of LTC.

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<sup>10</sup> 1 U.S.C. § 7 (defining “spouse” for federal law purposes as a person of the other sex and allowing federal recognition only of the marriages of different-sex couples).

<sup>11</sup> Letter from Centers for Medicare & Medicaid Svcs., Dep’t of Health & Human Svcs., to Kristen Reasoner Apgar, General Counsel, Mass. Exec. Office of Health and Human Svcs. (May 28, 2004). *See also* Letter from Centers for Medicare & Medicaid Svcs, Dep’t of Health & Human Svcs., to Theo Kennedy, Director, Division of Policy Planning and Evaluation, Vt. Agency of Human Svcs. (Aug. 23, 2003).

<sup>12</sup> 42 U.S.C. §§ 1382a, 1382b, 1382c(f).

The spousal impoverishment provisions exempt certain income and assets from being counted in initial and continuing eligibility determinations. Medicaid cannot require that these resources be spent down in order for the spouse needing LTC to qualify for, or to continue to qualify for, Medicaid-covered LTC. These resources are set aside for the community spouse so that he or she is not left destitute as a result of his or her partner receiving LTC. Most significantly, a home occupied by a spouse is never countable in the eligibility determination.<sup>13</sup> Additionally, a spouse is permitted to retain a certain amount of other resources as a living allowance.<sup>14</sup> This is called the Community Spouse Resource Allowance (“CSRA”).<sup>15</sup> Medicaid must permit a community spouse to keep this amount when his or her spouse enters an LTC facility and may not pursue these assets to offset the cost of care.<sup>16</sup>

Finally, a community spouse may also be entitled to retain a certain amount of income received by his or her spouse in LTC, depending on the amount of his or her own income.<sup>17</sup>

## ii. Same-Sex Couples

People in same-sex couples are treated like individuals under Medicaid eligibility rules.<sup>18</sup> As a result, their income and assets are not pooled to determine eligibility—Medicaid will consider only the countable income and assets of the partner needing LTC to determine whether he or she is eligible.<sup>19</sup>

Because the spousal impoverishment provisions do not protect resources of individuals, almost all income and assets of the partner needing LTC are counted in initial and continuing eligibility determinations. Medicaid can require that these resources be spent down in order for the partner needing LTC to qualify for, or to continue to qualify for, Medicaid-covered LTC. None of these resources are set aside for the protection of the community partner. Under these rules, there is no Community Spouse Resource Allowance for the community partner that is disregarded in the eligibility determination,<sup>20</sup> and the community partner is not

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<sup>13</sup> 20 C.F.R. § 416.1212(c) (2011).

<sup>14</sup> 42 U.S.C. §§ 1396r–5(c)(4), 42 U.S.C. § 1396r–5(c)(2)(B).

<sup>15</sup> The CSRA is the greater of the minimum resource standard set by the state of residence (but no lower than \$22,728 in 2011) and 50% of the couple’s assets up to a maximum set by the federal government (\$113,640 in 2011). 42 U.S.C. § 1396r–5(f)(2).

<sup>16</sup> 42 U.S.C. § 1396r–5(c)(2)(B).

<sup>17</sup> Note that all income is pooled for purposes of the initial eligibility determination. This protection applies after one spouse has entered LTC. The community spouse may retain all of his or her own income from that point. 42 U.S.C. § 1365r-5(b)(1). The institutionalized spouse may supplement the community spouse’s income until it reaches the “minimum maintenance needs allowance” (MMNA) for the community spouse. 42 U.S.C. § 1396r–5 (d)(2).

<sup>18</sup> This is because DOMA prevents recognition of spouses of the same sex and federal law generally does not recognize civil union partners, registered domestic partners, and other non-marital statuses through which some states recognize same-sex couples. See 1 U.S.C. § 7, *supra* note 10; *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

<sup>19</sup> For income and asset rules that apply to individuals, see 42 U.S.C. §§ 1382a, 1382b.

<sup>20</sup> For the amount of resources that are set aside when an individual applies for LTC, see 42 U.S.C. § 1382b and implementing regulations.

entitled to any income received by the institutionalized partner.<sup>21</sup> Additionally, a home shared by same-sex partners could render a partner needing LTC ineligible. However, this is less likely than the other consequences because an LTC recipient's home is only considered for determining eligibility if he or she does not intend to return home<sup>22</sup> or if home equity exceeds a certain amount.<sup>23</sup>

For some same-sex couples, treatment of income and assets under this structure may be an advantage. A wealthier partner's resources would not disqualify his or her partner from Medicaid-funded LTC because those resources would not count towards the income and asset thresholds for eligibility. Medicaid could not require that any of these resources be spent down in order for the partner needing LTC to qualify for, or to continue to qualify for, LTC. For other couples, this treatment can be a disadvantage. If a wealthier partner needs LTC, he or she will be required to spend down all but a minimal amount in order to qualify for LTC through Medicaid. None of that partner's resources could be set aside to support a financially dependent community partner.

The CMS Letter does not authorize states to treat same-sex couples like different-sex spouses for purposes of determining eligibility. If a state chooses to treat same-sex couples like different-sex spouses for purposes of determining eligibility, it is responsible for covering any additional expenses with state funds.<sup>24</sup>

## 2. Protection from Lien Imposition

### i. Federal Law

Under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), states may place a lien on a Medicaid LTC recipient's home after the recipient becomes permanently

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<sup>21</sup> For the amount of income that may be retained by an institutionalized individual, see 42 U.S.C. § 1382a and implementing regulations.

<sup>22</sup> In most states, the intent of the person to return home is judged subjectively; that is, intent to return home is deemed established as long as the institutionalized person expresses such intent, however unrealistic it may appear to others. See SSA Program Operations Manual § SI 01130.100. However, in eleven so-called "209(b)" states, in contrast, the "intent to return" test may be objective, and will consider the assessment of a medical professional and an extended period of residence in an institution from which there is no reasonable expectation of return, despite the subjective intent of the recipient. U.S. Dep't of Health and Human Svcs., Medicaid Treatment of the Home: Determining Eligibility and Repayment for Long-Term Care (Apr. 2005), <http://aspe.hhs.gov/daltcp/reports/hometreat.htm>.

<sup>23</sup> 20 C.F.R. § 416.1212(c). The federal government has set the equity cap at a minimum \$500,000 and a maximum of \$750,000. Enclosure, Letter #06-018 from Dennis G. Smith, Director, Centers for Medicare & Medicaid Svcs, U.S. Dep't of Health & Hum. Svcs, to State Medicaid Director (July 27, 2006), available at <https://www.cms.gov/smdl/downloads/TOAEnclosure.pdf>. Most states cap equity at \$500,000. Income Requirements for Individuals Qualifying for Medicaid Coverage of Nursing Home Services Including Income and Home Equity Limits, 2009, <http://www.statehealthfacts.org/comparemaptable.jsp?ind=817&cat=4>.

<sup>24</sup> Letter from Centers for Medicare & Medicaid Svcs., Dep't of Health & Human Svcs., to Kristen Reasoner Apgar, General Counsel, Mass. Exec. Office of Health and Human Svcs.; Letter from Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., to Theo Kennedy, Director, Division of Policy Planning and Evaluation, Vt. Agency of Human Svcs. (Aug. 23, 2003).

institutionalized, that is, if the LTC recipient no longer resides in the home and it has been determined, after notice and an opportunity for a hearing, that he or she cannot reasonably be expected to return home.<sup>25</sup> Pursuant to such a lien, the state may recover certain costs upon transfer of the property to an individual other than the recipient's spouse.<sup>26</sup> The lien must be removed if the LTC recipient is discharged from the institution and returns to the residence.<sup>27</sup> The spousal impoverishment provisions prohibit states from imposing liens while the recipient's spouse or certain children or siblings continue to reside in the home.<sup>28</sup>

## ii. The CMS Letter's Approach to Protecting Same-Sex Couples

The CMS Letter authorizes states to protect same-sex couples from lien imposition. The CMS Letter notes that the imposition of TEFRA liens is allowed, *but not required*, under federal law.<sup>29</sup> Accordingly, the letter states that TEFRA merely provides a floor, and not a ceiling, on the possible exemptions from liens for LTC recipients and their families. In other words, at minimum, the state must not impose a lien when a spouse or certain dependent children or siblings reside in the LTC recipient's home. The state then has discretion to decide if it also will not impose liens in other situations, such as when the home is occupied by a family member other than a different-sex spouse or dependent child or sibling. The CMS Letter concludes that states may protect same-sex couples from lien imposition by deciding not to pursue liens when a same-sex partner occupies the home.

## iii. Protecting Same-Sex Couples under Pennsylvania Law

Statute: Not addressed by statute.

Regulations: 55 Pa. Code § 177.22(a) (2010).

A Pennsylvania regulation requires that when an individual applies for Medical Assistance, she or he signs "an agreement consenting to the placement of a lien against [his or her resident property]" to guarantee that the property will eventually be used to reimburse the state for the costs of Medical Assistance. 55 Pa. Code § 177.22(a). The regulation, however, does not allow the Department "to force the sale of, or execute on a lien against, resident property as long as the property is used as a home by the applicant or the recipient owner or his spouse or incompetent adult children." 55 Pa. Code § 177.22(a)(1).

Administrative Guidance & Materials: None found on this issue.

### Protecting Same-Sex Couples

Because states have considerable flexibility to develop their own rules regarding when they will impose liens, Pennsylvania may forbid the imposition of a lien in situations not already

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<sup>25</sup> 42 U.S.C. § 1396p(a)(1)(B).

<sup>26</sup> 42 U.S.C. § 1396p(b)(1)(A).

<sup>27</sup> 42 U.S.C. § 1396p(a)(3).

<sup>28</sup> 42 U.S.C. § 1396p(a)(2). *See also* 42 C.F.R. § 433.36(g)(3) (same).

<sup>29</sup> 42 U.S.C. § 1396p(a)(1)(B).

covered by state or federal law, including when an LTC recipient's partner resides in the home. A Pennsylvania regulation requires imposition of TEFRA liens unless a "spouse" and/or certain dependent children live in the home. In order to protect LTC recipient's partners from lien imposition, the regulation must be amended also to prohibit the state from imposing a lien when a same-sex partner lives in the home. The Department has the authority to implement this change by amending a regulation in Pennsylvania.

### ***3. Protection from Estate and Lien Recovery upon Recipient's Death***

#### ***i. Federal Law***

States generally are required to recover funds expended for LTC to the extent possible after the death of an LTC recipient either through the estate recovery process, or pursuant to a lien imposed on the LTC recipient's home.<sup>30</sup> However, the spousal impoverishment provisions prohibit states from recouping funds through estate and lien recovery in certain situations. Estate and lien recovery "may be made only after the death of the individual's surviving spouse, if any," and only when the individual has no surviving child who is under age 21 or who is blind or disabled.<sup>31</sup>

In addition, estate and lien recovery is not permitted if it would create "an undue hardship" for the recipient's heirs.<sup>32</sup> A federal statute directs states to "establish procedures...under which the agency shall waive [estate or lien recovery]...if such [recovery] would work an undue hardship as determined on the basis of criteria established by the Secretary [of the Department of Health and Human Services]."<sup>33</sup> CMS, acting under the Department of Health and Human Services, provides the following guidance on "undue hardship" criteria in the State Medicaid Manual ("SMM"):

The legislative history of §1917 of the Act states that the Secretary should provide for special consideration of cases in which the estate subject to recovery is: (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business; (2) a homestead of modest value; or (3) other compelling circumstances.<sup>34</sup>

The SMM notes that these examples are to be "considered" by states when developing hardship waiver rules, but that states may ultimately decide the appropriate criteria for determining the existence of an "undue hardship."

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<sup>30</sup> 42 U.S.C. § 1396p(b)(1)(A).

<sup>31</sup> 42 U.S.C. § 1396p(b)(2).

<sup>32</sup> 42 U.S.C. § 1396p(b)(3).

<sup>33</sup> 42 U.S.C. § 1396p(b)(3).

<sup>34</sup> Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., State Medicaid Manual § 3810.C.1.

## ii. The CMS Letter's Approach to Protecting Same-Sex Couples

The CMS Letter advises that states may extend protection to same-sex partners as “heirs” under the “undue hardship” exemption to estate and lien recovery. The federal laws and administrative materials cited above provide some parameters for the “undue hardship” exemption, but leave great discretion to the states to specify what constitutes an “undue hardship” and who may be protected as an “heir.” The CMS Letter concludes that the broad grant of discretion from the federal government permits states to establish “reasonable protections applicable to the same-sex spouse or domestic partner of a deceased Medicaid recipient.”

## iii. Protecting Same-Sex Couples under Pennsylvania Law

Statute: Not addressed by statute.

Regulations: 55 Pa. Code § 258.10 (2010).

There are several regulatory provisions addressing waiver of the Department's claim to the estate of a deceased LTC recipient.

One provision provides that the Department will waive its claim with respect to the “primary residence” of a deceased LTC recipient in cases of “undue hardship.” As referenced above, the Department will waive its claim with respect to the primary residence of a deceased LTC recipient when all of the following conditions are met:

“(1) The person [claiming undue hardship] has continuously lived in the primary residence of the decedent of at least 2 years immediately preceding the decedent's receipt of nursing facility services, or, for at least 2 years during the period of time which Medicaid-funded home and community based services were received.

(2) The person has no other alternative permanent residence.

(3) The person has provided care or support to the decedent for at least 2 years during the period of time that Medicaid-funded home and community based services were received by the decedent, or for at least 2 years prior to the decedent's receipt of nursing home services during which time the decedent needed care or support to remain at home.” 55 Pa. Code § 258.10(b).

A separate provision provides that “[t]he Department will find undue hardship and will permanently waive its claim with respect to an income-producing asset if a spouse, child, parent, sibling, or grandchild of the decedent meets both of the following:

(c)(1) The asset is used to generate the primary source of income for the household.

(2) There would be a gross family income of less than 250% of the Federal poverty guideline without use of the asset.” 55 Pa. Code § 258.10(c).

An “income producing asset” is defined as: “property which is used in a trade or business such as a family farm, family business or rental property, excluding cash, stocks and bonds, mutual fund shares or other marketable financial instruments.” 55 Pa. Code § 258.10(d).

A third provision gives the Department “exclusive authority to waive its claim, compromise its claim, or postpone collection, in other circumstances when undue hardship exists, or when collection is not cost-effective, as determined by the Department on an individual case-by-case basis.” 55 Pa. Code § 258.10(h).

#### Administrative Guidance & Materials:

A guidance brochure produced by the Department repeats the regulatory provisions addressing “undue hardship” waivers.<sup>35</sup> The brochure also provides information on how to seek an estate recovery waiver in other circumstances:

After the decedent dies, write a letter explaining the situation and the compelling reasons why the Department of Public Welfare should not recover against the fair market value of the home or property. Give as many details as possible about how Medical Assistance Estate Recovery would cause a hardship.<sup>36</sup>

#### Protecting Same-Sex Couples

Pennsylvania’s primary residence “undue hardship” waiver provision (55 Pa. Code § 258.10(b)) likely provides some protection to same-sex couples in its current form. However, Pennsylvania could amend its medical assistance regulations to further protect same-sex couples from estate recovery. Pennsylvania could add a separate subsection to § 258.10 providing that an “undue hardship” exists where there is a surviving same-sex partner, regardless of whether the criteria of subsection (b) are met.

Alternatively, the Department may be able to protect same-sex partners from estate recovery through guidance. Subsection (h) of § 258.10 grants the Department broad discretion to determine in what circumstances it will grant an estate recovery waiver based on “undue hardship.” The Department’s estate recovery brochure allows anyone seeking an “undue hardship” waiver to “write a letter explaining the situation and the compelling reasons why [the Department] should not recover against the [property]...[giving] as many details as possible about how Medical Assistance Estate Recovery would cause an undue hardship.” The Department then decides whether or not to grant a waiver based on this information. The Department could likely specify through additional guidance that a surviving same-sex partner constitutes a “compelling circumstance” in which it will not recover. As a cautionary

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<sup>35</sup> PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, MEDICAL ASSISTANCE ESTATE RECOVERY PROGRAM AND RELATED TOPICS: QUESTIONS AND ANSWERS 8-9 (2008), *available at* [http://www.dpw.state.pa.us/ucmprd/groups/public/documents/communication/s\\_001584.pdf](http://www.dpw.state.pa.us/ucmprd/groups/public/documents/communication/s_001584.pdf).

<sup>36</sup> *Id.* at 9.

note, however, subsection (h) also provides that these determinations are to be made on a “case-by-case” basis, which might preclude the Department from issuing a blanket policy waiving recovery when there is a surviving partner. The Department has the authority to implement this change (through guidance or regulations) in Pennsylvania.

#### 4. *Protection from Transfer Penalties*

##### i. Federal Law

States are required to provide that transfer of an LTC applicant’s home or other assets for less than fair market value (“FMV”) renders the applicant ineligible for coverage for a certain period of time.<sup>37</sup> Under the spousal impoverishment provisions, however, transfer of a home or other assets to a spouse or certain children or siblings is permitted without penalty.<sup>38</sup> Additionally, transfer of a home or other assets will not be penalized if the state determines that denial of eligibility would create an “undue hardship.”<sup>39</sup>

The Deficit Reduction Act of 2005 (“DRA”) provides that “undue hardship exists when application of the transfer of assets provision would deprive the individual (A) of medical care such that the individual’s health or life would be endangered; or (B) of food, clothing, shelter, or other necessities of life.”<sup>40</sup> According to the SMM, states have “considerable flexibility in deciding the circumstances under which [the state] will not impose penalties” for transfers for less than FMV. However, the SMM seems to require that the basic DRA requirements are met: the state will have “the flexibility to establish whatever criteria [it] believe[s] are appropriate, as long as [it] *adhere[s] to the basic definition of undue hardship described above.*”<sup>41</sup> The manual further states that “[u]ndue hardship does not exist when application of the transfer of assets provisions merely causes the individual inconvenience or when such application might restrict his or her lifestyle but would not put him/her at risk of serious deprivation.”<sup>42</sup> Thus, the SMM may suggest only limited flexibility, with the states being able to “specify the criteria to be used in determining whether the individual’s life or health would be endangered and whether application of a penalty would deprive the individual of food, clothing, or shelter.”<sup>43</sup>

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<sup>37</sup> 42 U.S.C. § 1396p(c)(1)(A); *see also* 42 U.S.C. § 1382b.

<sup>38</sup> 42 U.S.C. § 1396p(c)(2)(A)-(B). Note, however, that transfers resulting in the community spouse’s assets (other than the home) being above the Community Spouse Resource Allowance still must be spent down to meet the Medicaid LTC eligibility requirement because different-sex spouses’ countable income and assets are pooled for purposes of eligibility determinations.

<sup>39</sup> 42 U.S.C. § 1396p(c)(2)(D).

<sup>40</sup> The Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 6011(d), 120 Stat. 4 (2006).

<sup>41</sup> Centers for Medicare & Medicaid Svcs, Dep’t of Health & Human Svcs., State Medicaid Manual § 3258.10(C)(5), 3-3-109.21 (emphasis added).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

## ii. The CMS Letter’s Approach to Protecting Same-Sex Couples

The CMS Letter advises that states may extend protection to same-sex couples under the “undue hardship” exception to transfer penalties. Despite language in the SMM that seems to limit “undue hardship” to dire situations, the CMS Letter affirms that “[s]tates have considerable flexibility in determining whether undue hardship exists, and the circumstances under which they will not impose transfer of assets penalties.” The CMS Letter explicitly concludes that states may decide not to penalize the transfer of an LTC recipient’s home to a same-sex partner for less than FMV under the “undue hardship exception”: “states may adopt criteria, or even presumptions, that imposing transfer of assets penalties on the basis of a transfer of ownership interests in a shared home to [a same-sex partner] would constitute an undue hardship.” CMS has said that states may also decide not to penalize transfers of other assets to a same-sex partner under the “undue hardship” exception.<sup>44</sup>

If a state extends protection from penalties for transfers of assets other than the family home, it may want to consider not penalizing asset transfers so long as the community partner’s total resources are not more than the CSRA after the transfer.<sup>45</sup> This limitation would ensure that same-sex couples and different-sex couples are treated similarly under the Medicaid program, since the CSRA is the amount of assets that a different-sex community spouse is permitted to retain for his or her support.<sup>46</sup> If a state were to limit transfers to same-sex partners to the CSRA, the value of the home should not count towards this limit because different-sex couples’ homes do not count towards the CSRA.<sup>47</sup>

## iii. Protecting Same-Sex Couples under Pennsylvania Law

Statute: Not addressed by statute.

Regulations: 55 Pa. Code § 178.104b (2010).

A Pennsylvania regulation penalizes LTC recipients who transfer property for less than FMV, subject to certain exceptions. The “undue hardship” exception provides that no penalty will be assessed if “application of the transfer of assets provision would deprive the individual of one of the following:

- (1) Medical care so that the individual’s health or life would be endangered.

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<sup>44</sup> Letter from Gloria Nagele, Associate Regional Administrator, Div. of Medicaid & Children’s Health Operations, U.S. Dep’t of Health and Human Svcs., to Rene Mollow, Chief, Medi-Cal Eligibility Division, Cal. Dep’t of Health Care Svcs. (May 18, 2012).

<sup>45</sup> The CSRA is the greater of the minimum resource standard set by the state of residence (but no lower than \$22,728 in 2012) and 50% of the couple’s assets up to a maximum set by the federal government (\$113,640 in 2012). 42 U.S.C. § 1396r–5(f)(2).

<sup>46</sup> The income and assets of different-sex spouses are pooled to determine Medicaid eligibility. The couple is required to “spend down” any assets above the Community Spouse Resource Allowance. 42 U.S.C. § 1396r–5(c)(2)(B). The same-sex partner’s resources are not similarly included in eligibility determinations and “spend down” requirements.

<sup>47</sup> 42 U.S.C. § 1382b(a).

- (2) Food, clothing, shelter or other necessities of life.” 55 Pa. Code § 178.104b (2010).

#### Administrative Guidance & Materials:

Though transfer penalties are addressed in a guidance brochure issued by the Department, there is no discussion of the “undue hardship” exception.<sup>48</sup>

#### Protecting Same-Sex Couples

A Pennsylvania regulation applies the same “undue hardship” standard as federal law. In order to protect same-sex couples, Pennsylvania would have to amend the regulation to provide that an “undue hardship” exists if an LTC recipient would be rendered ineligible because he or she transferred a home or other assets (up to the CSRA limit) to a same-sex partner. The Department would have the authority to implement this change by amending a regulation in Pennsylvania.

### **PROCEDURE FOR CHANGING PENNSYLVANIA’S MEDICAID PLAN**

Substantive changes that can be accomplished through changes in regulations or sub-regulatory guidance may still require review and at least tacit approval by the governor. States’ Medicaid Plans (“State Plans”) also may have to be amended if statutes, regulations, and/or guidance are amended to protect same-sex couples. A State Plan “describes the nature and scope” of a state’s Medicaid program and provides “assurance [to CMS] that [the program] will be administered in conformity with [federal law].”<sup>49</sup> The CMS Letter advises that states are “encouraged” to incorporate criteria regarding liens in their Medicaid Plans, does not specify whether states must amend their Medicaid State Plans in order to extend the protections concerning asset transfers to same-sex couples, and notes that criteria for waiving estate recovery based on hardship should be specified in the State Plan.

State Plans, and State Plan amendments, are subject to approval by CMS.<sup>50</sup> The CMS approval procedure requires that the governor or the governor’s designee review and comment on the state plan before it is submitted to CMS.<sup>51</sup> Although this process may be required, it is highly unlikely that CMS would reject changes that comport with its June 2011.<sup>52</sup> This procedure is considerably more complex than can be explained in this report, and should be determined by those seeking to make these changes in Pennsylvania.

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<sup>48</sup> PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, *supra* note 17, at 6-7.

<sup>49</sup> 42 C.F.R. § 430.10.

<sup>50</sup> 42 C.F.R. § 430.12.

<sup>51</sup> *Id.*

<sup>52</sup> Note that California’s AB 641 addressed issues beyond the CMS Letter re same-sex spousal/partner impoverishment, making CMS response to the law more uncertain.

## DEFINING ELIGIBLE SAME-SEX COUPLES FOR PURPOSES OF EXTENDING IMPOVERISHMENT PROTECTIONS

Pennsylvania does not offer same-sex couples a way to formalize their relationships at the state level. However, impoverishment protections still can be extended to same-sex couples because the CMS Letter does not require formal legal recognition in order for same-sex couples to qualify for impoverishment protection. Eligibility criteria will be required to determine which couples qualify in Pennsylvania.

This Part offers two approaches and provides draft provisions as a starting place for policy development. The first approach, set out in Section 1 below, draws from federal and state domestic partnership models. This approach, which we call “mutually dependent partners,” involves criteria that establish the interdependence of the partners. The second approach, set out in Section 2 below, is based on existing Pennsylvania regulations that allow protection for a “care or support provider” that has been sharing a home with the LTC recipient for a minimum amount of time and satisfies other requirements.

### 1. Protection for “Mutually Dependent Partners”

Pennsylvania could establish a framework that recognizes people in committed, financially interdependent relationships just for the purpose of extending impoverishment protections. The “mutually dependent partners” model is one option for doing so.

The “mutually dependent partners” model set out below draws upon the criteria in the U.S. Office of Personnel Management’s domestic partner employment benefits policy<sup>53</sup> and California’s domestic partnership laws.<sup>54</sup> These criteria have become a standard and are familiar to many government officials. Moreover, some provisions have been tested in litigation and already have been construed and validated by courts. Accordingly, an approach relying on these structures may facilitate greater standardization among states.

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<sup>53</sup> See OPM Rule: Federal Long Term Care Insurance Program: Eligibility Changes, Final Rule, 75 Fed. Reg. 30267, 30268 (2010). In relevant part, the regulation defines a domestic partnership as a “committed relationship between two adults of the same sex, in which they—(1) Are each other’s sole domestic partner and intend to remain so indefinitely; (2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle); (3) Are at least 18 years of age and mentally competent to consent to contract; (4) Share responsibility for a significant measure of each other’s financial obligations; (5) Are not married or joined in a civil union to anyone else; (6) Are not a domestic partner of anyone else; (7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which they reside.”

Other federal agencies also have adopted this definition. See, e.g., Federal Travel Regulation (FTR), Terms and Definitions for “Dependent”, “Domestic Partner”, “Domestic Partnership” and “Immediate Family” Interim Rule, 75 Fed. Reg. 67629, 67631 (2010). The Department of State uses a similar definition. See U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL, 3 FAM 1610 (2009), available at <http://www.state.gov/documents/organization/84830.pdf>. See also Domestic Partnership Benefits and Obligations Act, H.R. 2517, 111th Cong. (2009); Uniting American Families Act, H.R. 1024, 111th Cong. § 2(2) (2009).

<sup>54</sup> CAL. FAM. CODE §§ 297-299.6 (2010).

## Mutually Dependent Partners:

### A. Definitions:

- (i) “Mutually dependent partners” means two adults who have chosen to share one another's lives in a committed domestic relationship of mutual caring for whom all of the following are true:
  - (1) The partners have a common residence, are financially interdependent, and consider each other to be immediate family.
  - (2) Neither partner is married to or in a civil union or registered domestic partnership with, or has claimed a mutually dependent partnership with, any other person that has not been ended by separation, termination, dissolution or adjudication to be a nullity.
  - (3) The two partners are not related by blood in a way that would prevent them from being married to each other in their state of residence.
  - (4) Both persons are at least 18 years of age.
  - (5) Both persons are of the same sex.
  - (6) Both persons are capable of attesting that the above criteria are satisfied.<sup>55</sup>
- (ii) “Have a common residence” means that both partners share a common residence. It is not necessary that the legal right to possess the common residence be in both of their names. Two people have a common residence even if one or both have additional residences. “Mutually dependent partners” do not cease to have a common residence if one leaves the common residence but intends to return.
- (iii) “Financially interdependent” means that either or both of the partners depends on financial contributions from the other to pay for common necessities of life, such as food, clothing, shelter and medical care.
- (iv) “Caretaking authority” means authority conveyed through a formal vehicle such as a power of attorney signed when the person still had capacity, a court-ordered conservatorship, or provision for the other of daily personal care and decision-making about the common necessities of life by mutual consent given when each had the capacity.

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<sup>55</sup> A “look back” period has not been incorporated into the “mutually dependent partners” model and is not recommend. A “look back” period would require that same-sex couples show that they have been in a relationship with each other for a certain amount of time. For example, some employers have a “look back” period of 6 months for recognizing partners entitled to domestic partner benefits. In light of the fact that different-sex spouses are not subject to a “look back” period under spousal impoverishment provisions, however, any “look back” period required of same-sex partners would be intrusive and possibly to raise constitutional questions.

B. Demonstrating that two persons are mutually dependent partners: The fact that two adults are mutually dependent partners may be demonstrated by the following:

- (1) The partners have executed a document attesting to the elements listed in (a)(i)(1)-(6) above.
- (2) The partners have entered into a legal status such as a civil union, domestic partnership, or similar status under the laws of any state or the District of Columbia, whether or not such status is recognized for other purposes under state law.
- (3) One partner does not have capacity to attest to the elements listed in (a) (i) (1)-(5) above, and the other partner attesting to the elements in (a)(i)(1)-(5) has caretaking authority with respect to the other partner.
- (4) Neither partner has capacity to attest to the elements listed in (a) (i) (1)-(5) above, but each one's legal representative attests to the elements on behalf of the represented partner.<sup>56</sup>

## *2. Protection for "Care or Support Providers"*

Existing Pennsylvania law allows limited protection of any one person who has provided care and/or support to an LTC recipient for at least two years and who lives in the LTC recipient's primary residence. The regulation provides that hardship sufficient to justify waiver of estate recovery exists when the primary residence of the LTC recipient is occupied by a person who satisfies the following criteria:

- “(1) The person has continuously lived in the primary residence of the decedent for at least 2 years immediately preceding the decedent's receipt of nursing facility services, or, for at least 2 years during the period of time in which Medicaid-funded home and community based services were received.
- (2) The person has no other alternative permanent residence.
- (3) The person has provided care or support to the decedent for at least 2 years during the period of time that Medicaid-funded home and community

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<sup>56</sup> A proof requirement has not been included in the “mutually dependent partners model” and is not recommended. A proof requirement would mean that same-sex couples must provide certain types of documentary evidence or other confirmation of the existence of their relationship, such as joint financial accounts, designation for hospital visits, being named as a beneficiary in the other's will, etc. Requiring such proof is not recommended for several reasons. First, different-sex spouses do not have to provide such personal information to receive spousal impoverishment protections. Second, same-sex partners may find these burdens intrusive and thus not seek protections that would allow the community partner to remain in the home and self-sufficient. Third, and perhaps most important, the low-income LTC claimants who most need assistance through Medicaid generally will be among those least likely to have joint banking accounts, designated-beneficiary life insurance, survivor pensions, and resources for preparing legal and other documentation that would prove the existence of the relationship. Therefore, imposing such requirements could have the anomalous result of preventing many of the LTC claimants and partners who most need the protections from proving their eligibility.

based services were received by the decedent, or for at least 2 years prior to the decedent's receipt of nursing home services during which time the decedent needed care or support to remain at home."<sup>57</sup>

Pennsylvania could use this existing model to extend protection from lien imposition and transfer penalties.

## **PENNSYLVANIA'S STATUTORY LIMITATION ON RECOGNIZING MARRIAGE FOR SAME-SEX COUPLES**

Pennsylvania precludes marriage for same-sex partners by state statute.<sup>58</sup> This statutory ban poses no barrier to extending spousal impoverishment protections to same-sex couples that are recognized through a non-marital status, such as a registered domestic partnership or civil union or through either model presented above. Since the "mutually dependent partnership" and "care and support provider" models are both designed to be consistent with the federal Defense of Marriage Act, which also only applies to marriage, both models of recognition will be consistent with Pennsylvania's state level ban.<sup>59</sup>

## **CONCLUSION**

Pennsylvania can implement the impoverishment protections identified in the CMS Letter by adopting appropriate policies to protect same-sex partners of LTC recipients. Specifically, Pennsylvania can extend protection from lien imposition and transfer penalties to same-sex couples through administrative regulation. Existing Pennsylvania law likely protects some same-sex couples from estate recovery, but these protections could be broadened through either regulatory changes or guidance. Although there is currently no formal status for recognizing same-sex couples in Pennsylvania law, Pennsylvania can provide or expand these protections by identifying eligible couples through a framework such as the "mutually dependent partners" model or the "care or support provider" model, which is based on an existing Pennsylvania regulation. Pennsylvania's statute limiting marriage to different-sex couples would not be a bar to offering these protections to same-sex couples. The Department has the authority to implement all of the changes to Pennsylvania's Medicaid program identified in this report.

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<sup>57</sup> 55 PA. CODE § 258.10(b) (2011).

<sup>58</sup> 23 PA. STAT. ANN. § 1704 (2010).

<sup>59</sup> For further discussion of the effects of state laws and constitutional amendments limiting marriage to different-sex couples, see Williams Institute, Extending Spousal Impoverishment Protections to Same-Sex Couples: Overview Report, <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/medicaid-reports-june-2012/>.