

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



the
Williams
INSTITUTE

Christy Mallory, Jennifer C. Pizer, and Brad Sears

June 2012

TABLE OF CONTENTS

INTRODUCTION	1
VIRGINIA’S MEDICAID PROGRAM	2
SUBSTANTIVE CHANGES TO LAWS, REGULATIONS & ADMINISTRATIVE GUIDANCE	3
1. The “Income and Assets” Test	3
i. Different-Sex Spouses.....	3
ii. Same-Sex Couples.....	4
2. Protection from Lien Imposition	6
i. Federal Law.....	6
ii. The CMS Letter’s Approach to Protecting Same-Sex Couples.....	6
iii. Protecting Same-Sex Couples under Virginia Law.....	6
3. Protection from Estate and Lien Recovery upon Recipient’s Death	7
i. Federal Law.....	7
ii. The CMS Letter’s Approach to Protecting Same-Sex Couples.....	7
iii. Protecting Same-Sex Couples under Virginia Law.....	8
4. Protection from Transfer Penalties	9
i. Federal Law.....	9
ii. The CMS Letter’s Approach to Protecting Same-Sex Couples.....	10
iii. Protecting Same-Sex Couples under Virginia Law.....	10
PROCEDURE FOR CHANGING VIRGINIA’S MEDICAID PLAN	12
DEFINING ELIGIBLE SAME-SEX COUPLES FOR PURPOSES OF EXTENDING IMPOVERISHMENT PROTECTIONS	12
1. Protection for “Care or Support Providers”	13
2. Protection for “Mutually Dependent Partners”	13
VIRGINIA’S CONSTITUTIONAL AND STATUTORY LIMITATIONS ON SAME-SEX RELATIONSHIP RECOGNITION	16
CONCLUSION	17

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.¹ 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.² This report explains how Virginia 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 Virginia could amend its laws and policies to provide the protections. Next, it discusses two important considerations relevant to extending impoverishment protections to same-sex couples in Virginia: (1) criteria for determining which same-sex couples will be eligible for impoverishment protections; and (2) the potential impact of Virginia’s statutory and constitutional limitations on recognizing same-sex relationships.

This report concludes that Virginia can extend impoverishment protections to same-sex couples in a manner consistent with its current state laws. Specifically, Virginia could extend protection from estate recovery and transfer penalties to same-sex couples through administrative guidance. Because Virginia does not place a lien on the home of a living Medicaid recipient, no changes are needed in order to protect same-sex couples from lien imposition to the same extent that different-sex married couples are protected. Virginia also may have to amend its State Medicaid Plan to effectuate these changes.

¹ 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>. These protections may also be referred to as “exceptions” or “hardship exemptions.” This report refers to them as “impoverishment protections” in accordance with the terminology used by CMS in its June, 2011 letter.

² 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.

VIRGINIA'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.³ The program is funded with a combination of federal funds and state funds.⁴ 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.⁵

Each state must implement its own Medicaid program, in accordance with federal laws and regulations. Virginia's Medicaid program is administered by the Virginia Department of Medical Assistance ("the DMAS").⁶ The statutes related to Virginia's Medicaid program appear in Chapter 10 of Section 32.1 of the Code of Virginia. The regulations issued by the DMAS that implement the program are codified in Agency 30 of Title 12 of the Virginia Administrative Code. Virginia's Medicaid Manual is available at: http://www.dss.virginia.gov/benefit/medical_assistance/manual.cgi. Other guidance materials are available on the DMAS's website at: <http://dmasva.dmas.virginia.gov/default.aspx>.

At the federal level, CMS, within the U.S. Department of Health & Human Services, administers the Medicaid program.⁷ 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.⁸ 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."⁹

³ 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).

⁴ 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).

⁵ 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>.

⁶ Virginia Department of Medical Assistance, <http://dmasva.dmas.virginia.gov/default.aspx>.

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

⁸ CMS provides access to guidance materials it has issued on its website: www.cms.gov/home/regsguidance.asp.

⁹ 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>.

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; 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”),¹⁰ 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 Virginia 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.¹¹

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.¹² 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

¹⁰ 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).

¹¹ 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).

¹² 42 U.S.C. §§ 1382a, 1382b, 1382c(f).

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.

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.¹³ Additionally, a spouse is permitted to retain a certain amount of other resources as a living allowance.¹⁴ This is called the Community Spouse Resource Allowance (“CSRA”).¹⁵ 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.¹⁶

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.¹⁷

ii. Same-Sex Couples

People in same-sex couples are treated like individuals under Medicaid eligibility rules.¹⁸ 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.¹⁹

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

¹³ 20 C.F.R. § 416.1212(c) (2011).

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

¹⁵ 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).

¹⁶ 42 U.S.C. § 1396r–5(c)(2)(B).

¹⁷ 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).

¹⁸ 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 (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); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

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

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,²⁰ and the community partner is not entitled to any income received by the institutionalized partner.²¹ 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 home²² or if home equity exceeds a certain amount.²³

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.²⁴

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

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

²² 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>.

²³ 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>.

²⁴ 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).

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 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.²⁵ 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.²⁶ The lien must be removed if the LTC recipient is discharged from the institution and returns to the residence.²⁷ 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.²⁸

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.²⁹ 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 Virginia Law

Virginia law does not allow the placement of liens on homes of Medicaid recipients.³⁰ Virginia law contrasts with the laws of states that place a TEFRA lien on the home of an LTC recipient who is alive but not expected to return home, unless a spouse or certain dependents live in the home—a procedure that is allowed, but not required under federal law. Because Virginia law does not permit placement of a lien on the home of a living LTC recipient in any circumstances, there is no difference in treatment of same-sex partners and different-sex married spouses until the estate recovery process kicks in after the LTC recipient’s death. Virginia’s Medicaid estate recovery process is discussed below.

²⁵ 42 U.S.C. § 1396p(a)(1)(B).

²⁶ 42 U.S.C. § 1396p(b)(1)(A).

²⁷ 42 U.S.C. § 1396p(a)(3).

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

²⁹ 42 U.S.C. § 1396p(a)(1)(B).

³⁰ 12 VA. ADMIN. CODE § 30-10-560.

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.³¹ 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.³²

In addition, estate and lien recovery is not permitted if it would create "an undue hardship" for the recipient's heirs.³³ 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]."³⁴ 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.³⁵

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."

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."

³¹ 42 U.S.C. § 1396p(b)(1)(A).

³² 42 U.S.C. § 1396p(b)(2).

³³ 42 U.S.C. § 1396p(b)(3).

³⁴ 42 U.S.C. § 1396p(b)(3).

³⁵ Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., State Medicaid Manual § 3810.C.1.

iii. Protecting Same-Sex Couples under Virginia Law

Statute: Va. Code Ann. § 32.1-326.1 (2010).

A Virginia statute directs the DMAS to recover Medicaid LTC expenditures in accordance with federal law and regulations:

In accordance with applicable federal law and regulations, including those under Title XIX of the Social Security Act, the Department shall operate a program of estate recovery for all persons who receive payments or on whose behalf payments are made for Medicaid-financed nursing facility care by the Department.

Va. Code Ann. § 32.1-326.1.

Regulations: 12 Va. Admin. Code § 30-20-141 (2010).

A Virginia regulation defines “undue hardship” as enforcement of a claim to recover the value of Medicaid benefits that “would result in substantial hardship to the devisees, legatees, and heirs or dependents of the deceased individual against whose estate the Medicaid claim exists.” 12 Va. Admin. Code § 30-20-141(A). It further states that “anyone who may be affected by Medicaid estate recovery may apply for an undue hardship waiver” and that the state shall determine the merit of such applications. 12 Va. Admin. Code § 30-20-141(D). The regulation requires that “special consideration” be given in “cases in which the estate subject to recovery is:

- (i) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business;
- (ii) a homestead of modest value; or
- (iii) one in which other compelling circumstances exist as may be set out in agency guidance documents.” 12 Va. Admin. Code § 30-20-141(D)(1).

Administrative Guidance & Materials: Virginia Medicaid Manual § M1700.300(C) (2011).

With respect to recovery from a deceased recipient’s estate, the Virginia Medicaid Manual states that “[u]nder federal regulations and state law, [the DMAS] may make a claim against a deceased enrollee’s estate when the recipient was age 55 or over. The recovery *may* include any Medicaid payments made on his/her behalf. This claim *may* be waived if there are surviving dependents.” Virginia Medicaid Manual § M1700.300(C).

The Virginia Medicaid Handbook provides only that “Medicaid can recover money from the estate of a Medicaid enrollee over age 55. Recovery may take place only after the death of any surviving spouse and only if there are no minor disabled children.”

Neither the Manual nor the Handbook provides any information on the “undue hardship” exception to estate recovery.

Protecting Same-Sex Couples

Virginia would most likely be able to protect same-sex partners from estate recovery through guidance. The regulation provides that “special consideration” is given to waivers requested in certain circumstances. These circumstances can include those not specified by regulation, but which the DMAS determines to be “compelling.” Under this grant of authority, the DMAS could issue guidance providing that “compelling circumstances” for an “undue hardship” waiver exist where there is a surviving same-sex partner. The DMAS has the authority to implement this change through guidance in Virginia.

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.³⁶ 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.³⁷ 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.”³⁸

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.”³⁹ 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.”⁴⁰ 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.”⁴¹ 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

³⁶ 42 U.S.C. § 1396p(c)(1)(A); *see also* 42 U.S.C. § 1382b.

³⁷ 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.

³⁸ 42 U.S.C. § 1396p(c)(2)(D).

³⁹ The Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 6011(d), 120 Stat. 4 (2006).

⁴⁰ Centers for Medicare & Medicaid Svcs, Dep’t of Health & Human Svcs., State Medicaid Manual § 3258.10(C)(5), 3-3-109.21 (emphasis added).

⁴¹ *Id.*

health would be endangered and whether application of a penalty would deprive the individual of food, clothing, or shelter.”⁴²

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.⁴³

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.⁴⁴ 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.⁴⁵ 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.⁴⁶

iii. Protecting Same-Sex Couples under Virginia Law

Statute: Not addressed by statute.

Regulations: 12 Va. Admin. Code § 30-40-300(F)(2)(c)(3)(b) (2010).

A Virginia regulation penalizes LTC recipients who transfer property for less than FMV, subject to certain exceptions. The “undue hardship” exception provides that no penalty will

⁴² Id.

⁴³ 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).

⁴⁴ 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).

⁴⁵ 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.

⁴⁶ 42 U.S.C. § 1382b(a).

be assessed if “a satisfactory showing is made that...the Commonwealth determines that the denial of eligibility would work an undue hardship.”

The regulation does not define “undue hardship.”

12 Va. Admin. Code § 30-40-300(F)(2)(c)(3)(b).

Administrative Guidance & Materials: Virginia Medicaid Manual § M1450.700 (2011).

The Virginia Medicaid Manual provides that a Medicaid recipient must be given an opportunity to claim “undue hardship” if imposing a penalty would affect payment for LTC. Virginia Medicaid Manual § M1450.700(A). The Manual states that “undue hardship may exist when the imposition of a transfer of assets penalty would deprive the individual of medical care such that the individual’s health or life would be endangered or he would be deprived of food, clothing, shelter, or other necessities of life.” Virginia Medicaid Manual § M1450.700(A).

The Manual requires documentation “that shows:

- that the assets transferred cannot be recovered, and
- that the immediate adverse impact of the denial of Medicaid coverage for payment of LTC services due to the uncompensated transfer would result in the individual being removed from the institution or becoming unable to receive life-sustaining medical care, food, clothing, shelter or other necessities of life.” Virginia Medicaid Manual § M1450.700(A).

More specifically, the following documentation must be provided by an individual claiming “undue hardship”:

- “the reason(s) for the transfer;
- attempts made to recover the asset, including legal actions and the results of the attempts;
- notice of pending discharge from the facility or discharge from [community based care] services due to denial or cancellation of Medicaid payment for these services;
- physician’s statement that inability to receive nursing facility or [community based care] services would result in the applicant/recipient’s inability to obtain life-sustaining medical care;
- documentation that individual would not be able to obtain food, clothing or shelter;
- list of all assets owned and verification of their value at the time of the transfer if the individual claims he did not transfer resources to become Medicaid eligible; and
- documents such as deeds or wills if ownership of real property is an issue.”

Virginia Medicaid Manual § M1450.700(B)(1).

Protecting Same-Sex Couples

Virginia could protect same-sex couples from transfer penalties under the “undue hardship” exemption through guidance. Virginia regulations give the DMAS discretion to determine when an LTC recipient has made “satisfactory showing that the denial of eligibility would work an undue hardship.” Exercising this discretion, the DMAS has decided to apply the same “undue hardship” standard as federal law, as described in Virginia’s Medicaid Manual. In order to protect same-sex couples, Virginia could amend the Manual to state that “undue hardship” also would exist if an LTC recipient were rendered ineligible because he or she transferred a home or other assets (up to the CSRA limit) to a same-sex partner. The DMAS has the authority to implement this change through guidance in Virginia.

PROCEDURE FOR CHANGING VIRGINIA’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].”⁴⁷ 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.⁴⁸ 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.⁴⁹ Although this process may be required, it is highly unlikely that CMS would reject changes that comport with its June 2011 Letter. 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 Virginia.

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

Virginia 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 Virginia.

⁴⁷ 42 C.F.R. § 430.10.

⁴⁸ 42 C.F.R. § 430.12.

⁴⁹ *Id.*

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, is based on Pennsylvania’s 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. The second approach, set out in Section 2 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.

1. Protection for “Care or Support Providers”

One approach to identifying eligible couples, the “care or support provider” model, is based on existing Pennsylvania law. Pennsylvania 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 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.”⁵⁰

The “care or support provider” model may be more useful than the “mutually dependent partners” model in states that are reluctant to recognize same-sex relationships even for specific, limited purposes because of broad relationship recognition bans. As discussed further below, Virginia has a very broad relationship recognition ban.

2. Protection for “Mutually Dependent Partners”

Virginia may also be able to 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. However, as described below, the “care and support provider” model may be a better option in Virginia because of the broad language in the state’s statutory and constitutional bans on recognizing same-sex relationships.

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 policy⁵¹ and

⁵⁰ 55 PA. CODE § 258.10(b) (2011).

⁵¹ 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

California's domestic partnership laws.⁵² 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.

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.⁵³

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).

⁵² CAL. FAM. CODE §§ 297-299.6 (2010).

⁵³ 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,

- (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.

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.⁵⁴

however, any “look back” period required of same-sex partners would be intrusive and possibly would raise constitutional questions.

⁵⁴ 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

THE POTENTIAL EFFECTS OF VIRGINIA’S STATUTORY AND CONSTITUTIONAL LIMITATIONS ON SAME-SEX RELATIONSHIP RECOGNITION

By statute, Virginia prohibits the recognition of “marriage between persons of the same sex,”⁵⁵ as well as the recognition of “a civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage.”⁵⁶ Similarly, Virginia’s constitution provides that “only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”⁵⁷

These provisions prohibit opening marriage to same-sex couples as well as non-marital forms of recognition. In states with such bans, it can be argued that extending protections related to one aspect of one benefits program is not similar to recognizing a marriage-like relationship, and therefore is not prohibited.⁵⁸ However, this argument may not be as persuasive in Virginia as it is in states with bans that are not as broadly worded as Virginia’s. For example, some states that prohibit marriage and non-marital forms of recognition for same-sex couples specifically state that they only prohibit recognition that is “identical to” or “similar to marriage.” Virginia’s statutory and constitutional language—which prohibits recognition of any status that “purports to bestow the privileges or obligations” and that “approximates...the qualities...or effects of marriage”—may not lend itself as readily to a similar interpretation. Instead, this language may be construed to prohibit the extension of any single incident or benefit of marriage to same-sex couples. Thus, while Virginia may be able to determine

requirements could have the anomalous result of preventing many of the LTC claimants and partners who most need the protections from proving their eligibility.

⁵⁵ VA. CODE ANN. § 20-45.2 (2010).

⁵⁶ VA. CODE ANN. § 20-45.3 (2010).

⁵⁷ VA. CONST. art. I, § 15-A.

⁵⁸ Case law and practice in some states supports this approach. The supreme courts of Alaska and Montana have required domestic partner health insurance for public employees with same-sex partners as a matter of state constitutional law. The benefits remain in place despite constitutional prohibitions on marriage and preexisting statutory bans on relationship recognition of broader scope. *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005); *Snetsinger v. Montana University System*, 104 P.3d 445 (Mont. 2004). Similarly, a number of municipalities provide limited recognition of same-sex couples through a domestic partner registry and/or public employee benefits plan, which have not been challenged as violating broader state constitutional bans. See, e.g., SALT LAKE CITY, UTAH, CODE § 10.03.010 (2010). Further, a court in Wisconsin upheld the state’s limited domestic partnership law despite a broad constitutional amendment prohibiting relationship recognition because it gave only limited, discrete rights to same-sex couples that do not amount to a marriage or a relationship “substantially similar” to a marriage. *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011). However, at least one high court has taken a different view. The Michigan Supreme Court found that public employers were barred from offering domestic partner health benefits by a constitutional amendment which stated that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

eligibility using the “mutually dependent partners” model, as a general matter, a court probably would find more easily that the “care or support provider” model—based on mutual caretaking rather than an intimate relationship—is permitted.⁵⁹

CONCLUSION

Virginia can implement the impoverishment protections identified in the CMS Letter by adopting appropriate policies to protect same-sex partners of LTC recipients. Specifically, Virginia can extend protection from estate recovery and transfer penalties to same-sex partners by amending an administrative regulation. In addition, because Virginia does not place liens on the homes of living LTC recipients, no changes are needed to protect same-sex couples from such liens as different-sex spouses are protected.

Although there is currently no formal status for recognizing same-sex couples in Virginia law, Virginia can provide the protections from estate recovery and transfer penalties by identifying eligible couples through a framework such as the “mutually dependent partners” model or the “care or support provider” model. However, because of the broad language in Virginia’s statutory and constitutional bans on relationship recognition for same-sex couples, a court probably would find more easily that a model based on mutual caretaking, rather than an intimate relationship, is permitted. DMAS has the authority to make all of the changes to Virginia’s Medicaid program identified in this report.

⁵⁹ 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/>.