

JULY 2011

CMS Issues Guidance on Medicaid Rules for Same Sex Partners

The Centers for Medicare & Medicaid Services (CMS) has issued a letter to state Medicaid directors entitled “Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery.”¹ The letter identifies strategies states may employ to broaden the federal law’s narrow application of protections that extend to certain spouses of Medicaid beneficiaries.

Specifically, CMS proposes that states:

- Add same-sex spouses and domestic partners of Medicaid beneficiaries to the list of people whose residence in the home of a Medicaid beneficiary prevents a state from imposing a lien
- Include in the definition of their transfer-of-asset undue hardship exceptions transfers of the home between same-sex spouses or domestic partners
- Include in the definition of their estate recovery undue hardship exceptions certain protections for the surviving same-sex spouses or domestic partners of Medicaid beneficiaries

So that clients in same-sex marriages or domestic partnerships can benefit from the authority outlined in the CMS letter, advocates should urge their state Medicaid agencies to adopt the discretion without delay.

Background

Federal Medicaid law contains a number of important protections for spouses of Medicaid beneficiaries who receive coverage for long-term services and supports (LTSS). The paramount

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>, hereafter “Letter on Same-Sex Partners.”

example is the spousal impoverishment statute, which guarantees spouses of Medicaid LTSS beneficiaries a minimum portion of the couple's combined income and resources.² The guarantees were enacted into law in 1988 to remedy the pervasive problem of married couples having to sacrifice their homes and force themselves into poverty when one of the spouses needed Medicaid coverage to cover expensive nursing facility care. By virtue of the statutory guidelines, the "community" spouses of Medicaid LTSS beneficiaries are entitled, in 2011, to a minimum \$1,838 share of the couple's combined monthly income and at least half of the couple's combined assets, up to a maximum of \$109,560.³ The home is not counted in the asset calculation and remains exempt so long as the community spouse is living in it.

While the protections were mainly aimed at spouses of institutionalized Medicaid enrollees (hence the "community" spouse designation for the "well" spouse), states have had the discretion to extend the protections to spouses of Medicaid beneficiaries receiving home and community-based services (HCBS) through waivers,⁴ and most states have adopted the authority.⁵ In the Affordable Care Act, Congress amended the statute to make the spousal impoverishment protections mandatory for all HCBS waiver enrollees beginning in 2014.⁶ In addition, spouses of Medicaid recipients of state plan benefits, such as the Community First Choice benefit and the HCBS state plan benefit (otherwise known as the 1915(i) benefit), will also be guaranteed, beginning in 2014, the protections of the spousal impoverishment statute.⁷

Other important benefits for the spouses of Medicaid LTSS recipients come in the form of exceptions to special rules that apply to the Medicaid LTSS program. A primary example is Medicaid's transfer-of-asset provision, which requires that states deny coverage to Medicaid LTSS applicants who have made gifts or other transfers for less than fair market value in the five years preceding application.⁸ Under this provision, gifts or other transfers made between spouses are exempt from these transfer penalties.⁹

Additionally, federal Medicaid law expressly permits states to place liens on the real property of Medicaid beneficiaries who are receiving LTSS coverage,¹⁰ and also requires states to seek recovery of their costs from the estates of Medicaid beneficiaries to whom they provided LTSS coverage.¹¹ However, states are prohibited from imposing a lien if the spouse of a Medicaid LTSS

2 42 U.S.C. §1396r-5.

3 42 U.S.C. §1396r-5(d)(3), (e)(2).

4 §1396r-5(h)(1)(A).

5 Lina Walker, Jean Accius, AARP Public Policy Institute, *Access to Long-Term Services and Supports: A 50-State Survey of Medicaid Financial Eligibility Standards* 12 (2011), available at http://assets.aarp.org/rgcenter/ppi/ltc/i44-access-ltss_revised.pdf.

6 *Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, §2405, amending §1396r-5(h)(1)(A).

7 *Id.*

8 *See* 42 U.S.C. §1396p(c).

9 §1396p(c)(2)(A)(i).

10 §1396p(a)(1)(B).

11 §1396p(b)(1)(A).

recipient is residing in it,¹² and states may not seek recovery from the estate of a Medicaid LTSS recipient so long as the recipient's surviving spouse is still alive.¹³

Federal Definition of a "Spouse"

Independently and together, these provisions provide critical security for the spouses of individuals who have chronic conditions and must turn to Medicaid because they are unable to afford the private cost of the services they need.¹⁴ However, despite the unnecessary impoverishment that these provisions help many people avoid, states are prohibited from extending these protections to spouses in same-sex couples. This is due to the 1996 "Defense of Marriage Act,"¹⁵ or "DOMA," which mandates that references to a "spouse" in the federal law are to be strictly limited "to a person of the opposite sex who is a husband or wife." As a result, the same-sex spouse or domestic partner of a Medicaid LTSS recipient may be forced into impoverishment and/or homelessness in the absence of the protections.

DOMA has come under fierce criticism, and several efforts have been made to repeal it.¹⁶ Two courts have found the law unconstitutional.¹⁷ For the present, however, CMS has agreed to help states avoid at least some of the harsh results that stem from DOMA.

Given the express limitation DOMA imposes on the definition of a "spouse" under federal law, CMS' suggestions do not wade in to the territory of how a "spouse" is to be read under the Medicaid statute. Instead, CMS identifies for states existing discretion contained in various Medicaid LTSS provisions.

Flexibility with Medicaid Lien Provisions

The starting point in the letter centers on the language of the lien provision, which provides states

12 §1396p(a)(2)(A).

13 §1396p(b)(2).

14 The median annual national cost of private nursing facility care in 2011 is \$77,745, and the median annual national cost of private personal attendant services (at 40 hours a week) is \$39,520. Genworth Financial, Genworth 2011 Cost of Care Survey 6, available at http://www.genworth.com/content/products/long_term_care/long_term_care/cost_of_care.html.

15 Pub. L. No. 104-99, §3(a), codified at 1 U.S.C. §7.

16 Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009); Respect for Marriage Act, H.R. 1116, 112th Cong. (2011); Respect for Marriage Act of 2011, S.598, 112th Cong. (2011).

17 In two separate cases announced in July 2010, the U.S. District Court of Massachusetts found DOMA unconstitutional for violating the 10th and 5th Amendments. See *Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010). The U.S. Bankruptcy Court for the Central District of California found DOMA unconstitutional on June 13, 2011. See *In re Balas*, No. 2:11-bk-17831 TD, 2011 WL 2312169 (Bnkr. C.D. Cal.).

the authority to place liens on the property of institutionalized Medicaid recipients except where a spouse, child under the age of 21, adult child with a disability, or sibling with an equity interest is living in the property.¹⁸

CMS emphasizes that the provision does not require states to place a lien on the property of any Medicaid beneficiary property, whether a beneficiary is specifically protected from liens or not. “[Federal law] . . . allows, but does not require, States to impose liens on the property of a Medicaid beneficiary under certain circumstances.”¹⁹

For states that exercise the lien option, CMS explains that the list of individuals in the statute who are protected against liens is not exhaustive. Instead, the list is a “floor” for protection against liens, and that states “have considerable flexibility to determine the ‘ceiling’ for such protection and to develop their own rules regarding when they will impose/pursue liens, as long as the Federal beneficiary protections [listed in the statute] are fully implemented.”²⁰ With this flexibility, states may, according to CMS, add same-sex spouses or domestic partners to the list of individuals whose residence in the home of an institutionalized Medicaid LTSS recipient protects the property from a lien.

Transfer-of-Asset Penalties and Undue Hardship

More noteworthy is the suggestion CMS makes regarding asset transfers. Despite the strict rules that apply to Medicaid LTSS applicants who have made transfers during their five-year look-back period, federal law directs that applicants should not be penalized if the state determines that the imposition of a penalty will result in “undue hardship.”²¹ CMS suggests that states use this exception for the benefit of the same-sex spouses or domestic partners of Medicaid LTSS recipients.

Historically, the transfer statute’s undue hardship provision has granted CMS primary authority to develop hardship standards, which CMS in turn has delegated to state Medicaid agencies.²² However, the Deficit Reduction Act of 2005 amended the statute to require that states grant undue hardship at least where an applicant demonstrates that a transfer penalty will deprive the individual of either medical care such that his or her health or life is endangered, or other life necessities, such as food, clothing, or shelter.²³ After the DRA’s enactment, CMS informed states that they

18 42 U.S.C. §1396p(a)(2).

19 Letter on Same-Sex Partners, at 1.

20 *Id.*, at 2.

21 §1396p(c)(2)(D).

22 See CMS State Medicaid Manual, §3258.10(C)(5).

23 Pub. L. No. 109-171, §6011(D), codified as 42 U.S.C. §1396p, note. This standard was adopted from the preexisting provision in the CMS State Medicaid Manual (see note 21).

maintained “considerable flexibility” in developing their criteria for undue hardship,²⁴ meaning, essentially, that states can be very stingy in their grants of undue hardship, and can limit such grants to the acute situations the DRA added to the statute.

In its current letter, CMS suggests that the flexibility states have regarding undue hardship can be actually be utilized to assist same sex couples. Essentially, CMS explains that the examples of undue hardship in the statute, like those identified in the lien provision, are a floor above which states have the discretion to go. As an example, CMS suggests that states could “adopt criteria, or even presumptions, that recognize that imposing transfer of asset penalties on the basis of the transfer of ownership interests in a shared home to a same-sex spouse or domestic partner would constitute undue hardship.”²⁵

As mentioned above, federal Medicaid law exempts the home of an institutionalized Medicaid enrollee from the Medicaid financial eligibility calculation for as long as his or her “spouse” (under DOMA’s definition) is living in the home. For an institutionalized Medicaid enrollee who does not have a DOMA-defined spouse living in a home in which the enrollee has an ownership interest, the enrollee might eventually be forced to sell the home in order to preserve Medicaid eligibility. Such a sale could easily result in the same-sex spouse or domestic partner losing his or her residence altogether, with the only potential solution being the transfer of the ownership of the home from the enrollee to the spouse or domestic partner. However, this would trigger a transfer penalty, so CMS suggests that states excuse the penalty in this situation on the basis of undue hardship.

Estate Recovery and Undue Hardship

An undue hardship provision also exists in the estate recovery statute, which, as mentioned above, requires that states seek recovery against the estates of Medicaid beneficiaries who received LTSS coverage.²⁶ The requirement is controversial and can have onerous results for surviving family members, who often are unaware of the requirements.²⁷ Still, it is a mandate, and states have recouped millions of dollars.²⁸

While mandating recovery, however, federal law prohibits it in certain circumstances, such as during the lifetime of a beneficiary’s surviving spouse, child under age 21, or adult child with a

24 Letter from Dennis Smith, Director, Centers for Medicaid and State Operation to State Medicaid Directors (July 27, 2006), Enclosure, at 7, available at <http://www.cms.gov/smdl/downloads/TOAEnclosure.pdf>.

25 Letter on Same-Sex Partners, at 2-3.

26 42 U.S.C. §1396p(b).

27 See Laura Parker, *Medicaid Patient Dies. Who Gets the House?*, USA Today, April 30, 2002, <http://www.usatoday.com/news/nation/2002/05/01/usatcov-medicaid.htm>.

28 For example, states collected a total of \$361.7 million in 2004. See U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Medicaid Estate Recovery Collections*, available at <http://aspe.hhs.gov/daltcp/reports/estreccol.htm>.

disability.²⁹ Additionally, the federal law permits waiver of estate recovery where the recovery will impose undue hardship, under standards specified by the federal government.³⁰ The examples of undue hardship in the CMS Medicaid Manual include circumstances in which the deceased's property is the sole income-producing asset of the surviving family members, where the estate is of a "modest" value, or under "other compelling circumstances," as identified by states.³¹

CMS suggests that states utilize this discretion to establish estate recovery undue hardship criteria to add "reasonable protections applicable to the same-sex spouse or domestic partner of a deceased Medicaid recipient."³² CMS does not provide specific examples as it does for the transfer rules; however, the agency presumably has in mind protections that will preserve the residence of a surviving same-sex spouse or domestic partner in the home the couple shared.

Application

Some states that recognize domestic partnerships permit both opposite-sex and same-sex couples to enter them,³³ but it is not entirely clear whether opposite-sex domestic partners would benefit from a state that exercises the authority in the letter. The consistent reference in the body of the letter is to "same-sex spouses or domestic partners" (emphasis added), from which it is not clear that "same-sex" modifies "domestic partners." However, the topic of the letter is identified as "Same Sex Partners and Medicaid Liens, Transfers of Assets, and Estate Recovery" (emphasis added), which seems to imply a more limited focus.

At the very least, the obvious concern on the part of the agency is for Medicaid LTSS beneficiaries who are in committed relationships in their states but whose partners, in whatever designation, are barred from the tremendous advantages federal Medicaid law provides to spouses of LTSS beneficiaries. Advocates should familiarize themselves with the CMS guidance so that the harsh results that stem from the current limitations in federal law can be avoided.

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29 §1396p(b)(2).

30 *Id.*

31 CMS State Medicaid Manual, §3810(C)(1)

32 Letter on Same-Sex Partners, at 3.

33 National Center for Lesbian Rights, Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States 2-7, 9 (2011), http://www.nclrights.org/site/DocServer/Relationship_Recognition_Update_-_09_03_08.pdf?docID=881.