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



the  
**Williams**  
INSTITUTE

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June 2012

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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 Utah 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 Utah 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 Utah: (1) criteria for determining which same-sex couples will be eligible for impoverishment protections; and (2) the potential impact of Utah’s statutory and constitutional limitations on recognizing same-sex relationships.

This report concludes that Utah can extend impoverishment protections to same-sex couples in a manner consistent with its current state laws. Specifically, Utah could extend protection from estate recovery to same-sex couples through administrative guidance; and could extend protection from transfer penalties to same-sex couples through administrative regulation. It is likely that Utah would also have to amend its State Medicaid Plan to effectuate these changes. Because Utah 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.

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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.

## UTAH'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. Utah's Medicaid program is administered by the Division of Medicaid and Health Financing in the Utah Department of Health ("the Division").<sup>6</sup> The statutes related to Utah's Medicaid program appear in various chapters of Title 26 of the Utah Code. The regulations that implement the program are codified as Rule R414 of the Utah Administrative Code. Utah's State Medicaid Manual, which provides administrative guidance on the Medicaid program, is available at: <https://utahcares.utah.gov/infosourcemedicaid/>. Utah's State Medicaid Plan, as filed with CMS, is available at: <http://health.utah.gov/medicaid/stplan/>. Other administrative guidance materials are available on the Division's Medicaid Program website: <http://health.utah.gov/medicaid/>.

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>

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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> Div. of Medicaid and Health Financing, Utah Dep't of Health, Utah Medicaid Program, [http://health.utah.gov/medicaid/provhtml/medicaid\\_a-z.html](http://health.utah.gov/medicaid/provhtml/medicaid_a-z.html) (last visited Jan. 3, 2012).

<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> .

## 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”),<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 Utah 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 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

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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).

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.<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.

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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 (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).

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

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 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>

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<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.

<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).

## 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.<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 Utah Law

Utah law does not allow the placement of liens on homes until after the death of a Medicaid recipient; at that point, a post-death lien is executed as part of the estate recovery process through which monies paid through Medicaid may be recouped.<sup>30</sup> Utah law contrasts with the law 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 Utah 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

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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).

<sup>30</sup> Utah Code § 26-19-13.5 (2010); Office of Recovery Svcs., Div. of Health Care Financing, Utah Dep’t of Health, Estate Recovery Information Bulletin, BES PM 994 (1997), *available at* <http://health.utah.gov/medicaid/pdfs/LongTrm/attachmts/D--publications.pdf>.



estate recovery process kicks in after the LTC recipient's death. Utah's Medicaid estate recovery process is discussed below.

### ***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>31</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>32</sup>

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

#### ***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

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<sup>31</sup> 42 U.S.C. § 1396p(b)(1)(A).

<sup>32</sup> 42 U.S.C. § 1396p(b)(2).

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

<sup>34</sup> 42 U.S.C. § 1396p(b)(3).

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

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 Utah Law

Statute: Utah Code § 26-19-13.5 (2010).

A Utah statute allows the Department to recoup money expended to provide long-term care through the Medicaid program upon the death of the recipient only if “the recipient has no:

- (a) surviving spouse; or
- (b) child:
  - (i) younger than 21 years of age; or
  - (ii) who is blind or has a permanent and total disability.” Utah Code § 26-19-13.5 (2010).

There is no mention of “undue hardship” in the statute pertaining to estate recovery.

Regulations: None found on this issue.

State Medicaid Plan: Utah State Medicaid Plan, Attachment 4.17-A at 2 (1996).

Utah’s State Medicaid Plan sets forth the state’s “undue hardship” exemption. The Plan states that “undue hardship” is established if any of the following conditions are met:

- a. The survivor is the spouse of the deceased recipient.
- b. The survivor is minor child of the deceased recipient.
- c. The survivor is a blind or disabled child of the deceased recipient.
- d. Income is limited, and the property is the sole income-producing asset and source of support for the survivors (such as a family farm or other family business, which produces a limited amount of income).
- e. An individual who has an equity interest in the decedent’s home resides in the home as his or her primary residence.

Utah State Medicaid Plan, Attachment 4.17-A at 2.

#### Administrative Guidance & Materials:

A bulletin released by the Office of Recovery Services, an agency within the Department of Human Services that is responsible for recouping state money spent on Medicaid LTC,<sup>36</sup> states that the Office “may waive [estate] recovery when the property is the sole income-

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<sup>36</sup> Div. of Health Care Financing, Utah Dep’t of Health, Recovering Medicaid Costs from Estates and Trusts: Estate Recovery, [http://health.utah.gov/medicaid/provhtml/estate\\_recovery.html](http://health.utah.gov/medicaid/provhtml/estate_recovery.html) (last visited Jan. 3, 2012).

producing asset and source of support for the survivors (such as a family farm or other family business, which produces a limited amount of income).”<sup>37</sup>

The term “survivors” is not defined in the materials.

### Protecting Same-Sex Couples

Utah could likely offer some protection to same-sex partners from estate recovery through guidance. Because the term “survivors” is not defined in state statutory law or administrative materials, Utah could issue guidance defining “survivors” as including same-sex partners. However, doing so would only give a limited amount of protection to a recipient’s surviving partner because the partner would still need to show that the “property is the sole income-producing asset and source of support.”

In order to offer protection to same-sex couples that more closely resembles the protection for different-sex spouses (that is, no estate recovery under any circumstances), Utah would have to state explicitly that an “undue hardship” exists where there is a surviving same-sex partner. Or, the state could require some additional showing of “undue hardship” in the case of a surviving same-sex partner, but could require something less demanding than evidence that the “property is the sole income-producing asset and source of support.” While no regulations or statutes would have to be amended to make these changes, either of these changes would require an amendment to the State Medicaid Plan because the “undue hardship” exemptions in the State Medicaid Plan are not open presently to these interpretations.

The Division has the authority to implement this change through guidance and amendment to the State Medicaid Plan in Utah.

## **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>38</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>39</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>40</sup>

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<sup>37</sup> Office of Recovery Svcs., Division of Health Care Financing, Utah Dep’t of Health, Estate Recovery Information Bulletin, BES PM 994 (1997), *available at* <http://health.utah.gov/medicaid/pdfs/LongTrm/attachmts/D--publications.pdf>.

<sup>38</sup> 42 U.S.C. § 1396p(c)(1)(A); *see also* 42 U.S.C. § 1382b.

<sup>39</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>40</sup> 42 U.S.C. § 1396p(c)(2)(D).

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>41</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>42</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>43</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>44</sup>

## 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>45</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>46</sup> This limitation would ensure that same-sex couples and different-sex couples are treated similarly under the Medicaid

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<sup>41</sup> The Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 6011(d), 120 Stat. 4 (2006).

<sup>42</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>43</sup> Id.

<sup>44</sup> Id.

<sup>45</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>46</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).

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>47</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>48</sup>

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

Statute: Not addressed by statute.

Regulations: Utah Admin. Code r. 414-305-8(12) (2011).

The Utah regulations provide for a waiver from the transfer penalty if the LTC recipient can show “undue hardship.” The regulations require that the individual “meet both of the following conditions:

- (a) The individual or the person who transferred the resources may not access the asset immediately; however, the eligibility agency shall require the individual to exhaust all reasonable means including legal remedies to regain possession of the transferred resource;
  - (i) The agency may determine that it is unreasonable to require the individual to take action if a knowledgeable source confirms that the individual’s efforts cannot succeed;
  - (ii) The agency may determine that it is unreasonable to require the individual to take action based on evidence that the individual’s action is more costly than the value of the resource;
- (b) Application of the penalty period for a transfer of resources deprives the individual of medical care, endangers the individual’s life or health, or deprives the individual of food, clothing, shelter, or other necessities of life.”

Utah Admin. Code r. 414-305-8(12).

State Medicaid Plan: Utah State Medicaid Plan, Supplement 9(b) to Attachment 2.6-A at 4 (2008).

Utah’s State Medicaid Plan states that “the agency does not impose a penalty for transferring assets for less than fair market value when the agency determines that imposing a penalty would work an undue hardship. The agency uses the following criteria in making undue hardship determinations:

Application of a transfer of assets penalty would deprive the individual:

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<sup>47</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>48</sup> 42 U.S.C. § 1382b(a).

- (a) of medical care that endangers the individual’s health or life;
- (b) of food, clothing, shelter, or other necessities of life.”

Utah State Medicaid Plan, Supplement 9(b) to Attachment 2.6-A at 4.

Two other Supplements to the State Medicaid Plan address “undue hardship,” and both include the requirement set forth in the regulations that the applicant be unable to recover the asset, but these Supplements appear to apply only to transfers of trusts, and to applicants for regular medical care (not LTC) under the categorically needy or medically needy pathways. Utah Medicaid State Plan, Supplements 10, 10(a) (2008).

Administrative Guidance & Materials: Utah Medicaid Manual § 371-9(2)-(4) (2011).

The Utah Medicaid Manual provides that, if the Bureau of Eligibility Policy (“BEP”), a division of the Utah Department of Health, determines that an “undue hardship” exists, it may waive the transfer penalty period. The Manual states that “undue hardship exists if the following conditions are met:

- a. The client cannot access the assets immediately, but is taking all reasonable steps including legal actions to access or regain possession of the transferred asset, AND
- b. A medical doctor certifies that the client is at risk of death or permanent disability without the institutional care, or the client would be deprived of food, shelter and other necessities of life without Medicaid coverage.

To determine if the client is at risk, the BEP will compare the income and resources of the client and the client’s spouse, or the parents of a minor client, to the cost of:

- medical care not covered by insurance or Medicaid
- diapers
- special foods
- normal living costs
- spenddown.”

Utah Medicaid Manual § 371-9(3).

The subsequent section of the Manual, like the regulations, allows the Division to waive the transfer penalty period if it determines that “the client has taken all reasonable steps, they have been unsuccessful, and based on the evidence, further steps are likely to be unsuccessful or too costly.” Utah Medicaid Manual § 371-9(4).

### Protecting Same-Sex Partners

The Utah regulation limits claims of “undue hardship” to situations where the recipient cannot regain possession of the asset, and the recipient would be at serious risk without

care—situations which would be especially difficult to prove when the asset has been transferred to a same-sex partner (in particular, the requirement that the recipient is unable to regain the asset). In order to extend protection to same-sex partners under this exemption, Utah would have to amend the regulations 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.

Because the State Medicaid Plan limits the Division’s discretion to grant hardship waivers to cases where an individual would be at serious risk without care, the State Medicaid Plan would have to be amended to protect same-sex partners in the same way the regulations would be amended.

The Division has the authority to implement this change by amending a regulation and the State Medicaid Plan in Utah.

## **PROCEDURE FOR CHANGING UTAH’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 Letter.<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 Utah.

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

Utah 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

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<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.

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 Utah.

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 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.

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

Utah 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.

#### Mutually Dependent Partners:

##### A. Definitions:

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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).



- (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.

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

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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.

- (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"***

A second 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."<sup>57</sup>

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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.

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

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.

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

Utah’s constitution states that no “domestic union” of same-sex partners “may be recognized as a marriage or given the same or substantially equivalent legal effect.”<sup>58</sup> Similarly, a Utah statute provides that “the state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.”<sup>59</sup> This broad relationship-recognition ban does not allow same-sex couples to marry or to enter into a state-recognized relationship that looks like a marriage legally but has a different name. However, this language should not preclude limited recognition of same-sex couples for purposes of the state’s Medicaid program. Merely extending the LTC impoverishment protections to same-sex couples is not creating “a legal status identical or substantially similar” to that of marriage.

Cases and practice in some states support this approach. Alaska and Montana, for example, offer health insurance to cover the same-sex partners of state employees.<sup>60</sup> The supreme courts of these states both required the specified, single-purpose benefit for public employees with a same-sex partner as a matter of state constitutional law,<sup>61</sup> and those benefits remain in place despite constitutional prohibitions on marriage and preexisting statutory bans on relationship recognition of broader scope.<sup>62</sup>

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. For example, Salt Lake City offers benefits to cover the domestic partners of city employees and allows any two residents

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<sup>58</sup> UTAH CONST. art. I § 29 (2010).

<sup>59</sup> UTAH CODE § 30-1-4.1 (2010).

<sup>60</sup> ALASKA ADMIN. CODE tit. 2, § 38.010-.100 (2010); *Snetsinger v. Montana University System*, 104 P.3d 445 (Mont. 2004) (finding that denial of insurance coverage to same-sex domestic partners of state employees violated the equal protection requirement of the state constitution in light of the existing benefit plan for different-sex domestic partners of state employees).

<sup>61</sup> *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).

<sup>62</sup> Alaska’s Constitution was amended in 1998 to restrict marriage to different-sex couples. *AK CONST. art. I, § 25*. The 1997 Alaska statute reads, in part, “A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.” ALASKA STAT. § 25.05.013(b) (2010). Montana’s Constitution was amended in 2004 to exclude same-sex couples from marriage. *MT CONST. art. XIII, § 7*. The 1997 Montana statute prohibits “marriage between persons of the same sex” and also declares void as against public policy “a contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited [under the other provisions of the statute, including a marriage between persons of the same sex].” MONT. CODE ANN. § 40-1-401 (2011).

of the city to register as “mutually committed” partners,<sup>63</sup> despite the state’s constitutional ban on recognizing the “domestic union” of same-sex partners as a marriage or giving such a union “the same or substantially equivalent legal effect.”<sup>64</sup> Although there is no case law addressing the validity of Salt Lake City’s ordinance in light of the constitutional ban, it is well established through litigation in other states that the limited recognition of same-sex couples provided by local partnership registries and/or municipal employee health benefit plans does not conflict with state-level regulation of marriage and other family relationships.<sup>65</sup>

In some states, courts have upheld limited forms of relationship recognition for same-sex couples even though the state has a broad statutory or constitutional ban. For example, as described above, the Supreme Courts of Alaska and Montana have required specified, single-purpose benefits for same-sex couples despite constitutional prohibitions on marriage and preexisting statutory bans on relationship recognition of broader scope.<sup>66</sup> Similarly, Wisconsin and Ohio have case law that would support that LTC impoverishment protections can be provided without violating the broader bans.

Wisconsin allows same-sex couples to enter into a form of domestic partnership that entails a limited selection of rights and responsibilities.<sup>67</sup> In 2010, taxpayers challenged the domestic partnership law<sup>68</sup> arguing that it violated Wisconsin’s constitutional prohibition on marriage and on “a legal status identical or substantially similar to that of marriage” for same-sex partners.<sup>69</sup> The Wisconsin court upheld the domestic partnership law because it gives only limited, discrete rights to same-sex couples that do not amount to marriage or a relationship “substantially similar” to a marriage.<sup>70</sup> Similarly, a framework used to identify same-sex

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<sup>63</sup> SALT LAKE CITY, UTAH, CODE § 10.03.010 (2010).

<sup>64</sup> UTAH CONST. art. I, § 29 (2010).

<sup>65</sup> See, e.g., *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 563 (2001) (rejecting claim that local domestic partner registry and health insurance plan conflicts with state law regulation of familial relationships.); *Slattery v. City of New York*, 266 A.D.2d 24, 25 (1999) (concluding that city’s offering of benefits to domestic partners did not transform the relationship into a common law marriage and that substantial differences existed between marriage and city’s limited recognition of domestic partnerships), *appeal dismissed*, 94 N.Y.2d 897 (2000).

<sup>66</sup> Alaska’s Constitution was amended in 1998 to restrict marriage to different-sex couples. *AK CONST. art. I, § 25*. The 1997 Alaska statute reads, in part, “A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.” ALASKA STAT. § 25.05.013(b) (2010). Montana’s Constitution was amended in 2004 to exclude same-sex couples from marriage. *MT CONST. art. XIII, § 7*. The 1997 Montana statute prohibits “marriage between persons of the same sex” and also declares void as against public policy “a contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited [under the other provisions of the statute, including a marriage between persons of the same sex].” MONT. CODE ANN. § 40-1-401 (2011).

<sup>67</sup> WIS. STAT. § 770 (2010).

<sup>68</sup> *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011).

<sup>69</sup> WIS. CONST. art. XII, § 13.

<sup>70</sup> See *Appling*, No. 10-CV-4434, slip op. at 52-53, explaining:

Ultimately it is clear that [the domestic partnership law] does not violate the Marriage Amendment because it does not create a legal status for domestic partners that is identical or substantially similar to that of marriage. The state does not recognize domestic

partners only for the purpose of protecting the partners of Medicaid LTC recipients from impoverishment should not be seen as a marriage or a “union” in other states that ban recognition of marriage-like unions for same-sex partners. Courts in Ohio have considered similar questions in the context of a local domestic partnership registry and domestic violence prosecution, and reached similar conclusions in published appellate decisions.<sup>71</sup>

However, at least one state high court has taken a different view. In a suit brought to test whether Michigan’s marriage-restriction constitutional amendment barred public employers from offering health insurance coverage for their employees’ same-sex partners, the Michigan Supreme Court considered language stating 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.”<sup>72</sup> Michigan’s high court held that the plain language of that provision precluded such domestic partner coverage.<sup>73</sup> The court ruled that, when determining whether a union is “similar” to marriage, the question is not whether it entails all the same rights and responsibilities as marriage but whether it is being recognized as a marriage would be “for a purpose.” Considering the employee benefit at issue, the Michigan court determined that domestic partnerships were similar to marriage because these two relationship statuses were the only ones in Michigan law defined in terms of both gender and lack of a close blood connection. The court concluded that when public employers provide health insurance benefits on the basis of a domestic partnership they “recognize” the partnership, as they recognize marriages, “for a purpose.”<sup>74</sup>

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partnership in a way that even remotely resembles how the state recognizes marriage. Moreover, domestic partners have far fewer legal rights, duties, and liabilities in comparison to the legal rights, duties, and liabilities of spouses. [The domestic partnership law] is not even close to similar to a Vermont-style civil union, which extends virtually all the benefits spouses receive to domestic partners. *Instead, [the domestic partnership law] is simply a legal construct created to provide some benefits to same-sex couples* (emphasis added).

<sup>71</sup> *Cleveland Taxpayers for the Ohio Constitution v. City of Cleveland*, 2010 Ohio 4685 (Ohio Ct. App. 2010) (rejecting claim that city domestic partnership registry violated state constitutional provision limiting marriage to different-sex couples, and precluding creation or recognition by the state or municipalities of any “legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage”); *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (concluding that a legally established relationship bearing less than all the attributes of marriage is constitutional despite the state marriage amendment, and rejecting argument that unmarried domestic partner could not be subject to penalty enhancement under domestic violence statute).

<sup>72</sup> MICH. CONST. art 1, § 25.

<sup>73</sup> *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

<sup>74</sup> To maintain health coverage for their employees’ same-sex domestic partners, a number of Michigan public employers responded to the court’s holding in *National Pride at Work* by revising their employee health plans to provide family coverage to unmarried employees who live with an “Other Qualified Adult,” which could include an employee’s same-sex partner. See, e.g., University of Michigan, Benefits Eligibility: Other Qualified Adults, available at: <http://www.benefits.umich.edu/eligibility/oqa.html> (last visited May 9, 2012). Because benefits for the employee’s “Other Qualified Adult” are not predicated upon an agreement establishing or affirming any particular type of relationship or union similar to marriage, they would appear to cover same-sex partners within the strict confines of Michigan’s marriage amendment and to comply with the *National Pride at Work* decision. Similarly, even states with a very broad prohibition on same-sex relationship recognition may be able to provide a specific, limited benefit

As the case law from Wisconsin, Ohio, Alaska and Montana shows, courts may allow recognition of same-sex relationships for a limited purpose in states, like Utah, that have a broader relationship recognition ban. Either the “mutually dependent partners” model or the “care or support provider” model could be used to protect same-sex couples within Utah’s Medicaid program. As a general matter, however, a Utah court probably will find more easily that the “care or support provider” model—based on mutual caretaking rather than an intimate relationship—is clearly permitted regardless of the scope of the relationship recognition ban.<sup>75</sup>

## CONCLUSION

Utah can implement the impoverishment protections identified in the CMS Letter by adopting appropriate policies to protect same-sex partners of LTC recipients. Specifically, Utah can extend protection from estate recovery to same-sex partners through administrative guidance, and can protect same-sex partners from transfer penalties by amending an administrative regulation. Because Utah does not place liens on the homes of living LTC recipients, no changes are needed in order to protect same-sex couples to the same extent that different-sex spouses are protected. Although there currently is no formal status for recognizing same-sex couples in Utah law, Utah can provide these protections by identifying eligible couples through a framework such as the “mutually dependent partners” model or the “care or support provider” model. Utah’s constitutional limitation on recognizing same-sex couples would not likely preclude limited recognition of same-sex couples through these models for the purpose of extending impoverishment protections. The Division has the authority to implement all of the changes to Utah’s Medicaid program identified in this report.

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that covers same-sex partners through a relationship-neutral approach such as the “care or support provider” model.

In December 2011, however, Michigan enacted the “Public Employee Domestic Partner Benefit Restriction Act,” Public Act 297, *available at* <http://www.legislature.mi.gov/%28S%28himpn3endzxpdxiq40f0p245%29%29/documents/mcl/pdf/mcl-Act-297-of-2011.pdf>. This law prohibits most public employers from offering any health or other fringe benefits to individuals who share a residence with a public employee unless the individual is married to the employee, a dependent of the employee as defined in the Internal Revenue Code, or in some other family relationship to the employee that is recognized by Michigan’s intestate succession laws. This new ban has been challenged as a violation of the U.S. Constitution. *See* Complaint, *Bassett v. Snyder*, No. 2:2012cv10038 (E.D. Mich. Jan. 5, 2012), *available at* [http://www.aclu.org/files/assets/bassett\\_first\\_amended\\_complaint.pdf](http://www.aclu.org/files/assets/bassett_first_amended_complaint.pdf).

<sup>75</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/>.