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

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

the Williams INSTITUTE

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EXECUTIVE SUMMARY

When recipients of Medicaid receive long-term care 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 exceptions prevent surviving spouses from becoming impoverished by losing their homes. Until recently, these impoverishment protections could not include same-sex spouses or partners.

In the summer of 2011, the Center for Medicare & Medicaid Services informed states that federal law allows same-sex partners of recipients to be included in these impoverishment protections ("the CMS Letter").[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 memo explains how states can do so.

First, this memo presents demographic data on same-sex couples likely to benefit if states extend these protections. Next, it explains the CMS Letter's approach to extending impoverishment protections to same-sex couples, and provides general information about the procedures through which the protections may be provided. Finally, it discusses two important considerations relevant to many states seeking to amend their impoverishment rules to protect same-sex couples: (1) criteria for determining which same-sex couples will be eligible for impoverishment protections; and (2) the potential impact of state statutory or constitutional limitations on recognizing same-sex relationships.

This report concludes that:

- Many same-sex couples could be protected from impoverishment if states amend their Medicaid programs as suggested by CMS. Almost 7% of individuals in same-sex couples are 65 years of age or older, and over 28% are disabled. Four percent of male couples and 7% of female couples live in poverty. Nearly 6% of individuals in same-sex couples receive Medicaid or other government assistance for those with low income or a disability.

- States can extend impoverishment protections to same-sex couples by amending statutes, regulations, or administrative guidance. Whether changes must be made to a statute, regulation, or guidance materials depends on where the existing spousal impoverishment provisions are located in state law, and the language of each state's provisions.

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[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.

[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.

- There are many ways that states can define which same-sex couples will be eligible for spousal impoverishment protections. Two possible options are presented in this memo. The "mutually dependent partners" model will extend protections to same-sex couples who are in a committed relationship. The "care or support provider" model will extend protections to any two adults who care for one another's basic needs and may include relatives, close friends, and same-sex or different-sex unmarried couples.

- States can implement these protections whether or not they have opened marriage or offer some other form of legal recognition to same-sex couples. Further, statutory and/or constitutional language prohibiting recognition of same-sex couples' relationships should not be a bar to offering these limited impoverishment protections in any state.

In short, the CMS Letter clarifies that federal law allows states to protect same-sex couples against impoverishment in important ways when one partner is receiving LTC through Medicaid. This memo demonstrates that all states can offer these protections in a manner consistent with their current state laws.

I. INTRODUCTION

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]

Like for other Medicaid programs, a person's income and assets are evaluated to determine eligibility for LTC, and the person may be required to "spend down" their resources to qualify. If an LTC recipient moves into a facility without the intent to return home, the home and any income received by the LTC recipient become countable resources with respect to continued eligibility and may have to be contributed to the cost of the care being received.[6] If a Medicaid recipient gives away a home or other assets in order to avoid this result, Medicaid can deny eligibility for a period of time.[7] Then, after the LTC recipient has

[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] Id.; U.S. Dep't of Health and Human Scvs., Spouses of Medicaid Long-Term Care Recipients (Apr. 2005), http://aspe.hhs.gov/daltcp/reports/spouses.htm.

[7] Medicaid Treatment of the Home, *supra* note 5.

died, Medicaid is charged to recoup the cost of the care received from the recipient's estate.[8] The practical effect of these rules is that to qualify or retain eligibility for LTC, a person or his or her estate may become impoverished.

Prior to 1988, a different-sex spouse (the "community spouse") whose income and assets were linked to those of an LTC recipient was also required to spend down assets and income for the LTC recipient to receive care. To prevent this outcome, in 1988, Congress enacted provisions that:

1) exempt certain income and assets from Medicaid eligibility determinations under the LTC care program;
2) limit imposition of liens on a residence occupied by a spouse;
3) limit lien and estate recovery during the lifetime or in-home residence of a spouse; and
4) exempt LTC claimants from penalties otherwise incurred for transferring property for less than fair market value if the transfer is to a spouse.[9]

Due to these provisions, known as "spousal impoverishment" provisions, a community spouse will not be forced to give up the couple's home or to subsist without income.[10] Each state is required to implement spousal impoverishment protections through its Medicaid program, by enacting laws, regulations, and administrative guidance that are consistent with the federal provisions.

However, same-sex spouses do not receive the same benefits and protections under federal law as different-sex spouses because of the "Defense of Marriage Act" ("DOMA").[11] Moreover, federal law generally does not recognize civil union partners, registered domestic partners and other legal statuses through which some states recognize same-sex couples' relationships.[12] As a result, until 2011, the federal spousal impoverishment provisions have been interpreted not to apply to same-sex couples.[13]

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[8] Id.

[9] 42 U.S.C. § 1365r-5. *See also* Centers for Medicare & Medicaid Svcs., U.S. Dep't of Health and Human Svcs., Spousal Impoverishment, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Spousal-Impoverishment-Page.html (last visited June 20, 2012).

[10] SERVICES & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS & MOVEMENT ADVANCEMENT PROJECT, IMPROVING THE LIVES OF LGBT OLDER ADULTS 15 (2010), *available at* http://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf.

[11] *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). *See also* MOVEMENT ADVANCEMENT PROJECT, SERVICES & ADVOCACY FOR GAY, LESBIAN, BISEXUAL & TRANSGENDER ELDERS & CENTER FOR AMERICAN PROGRESS, LGBT OLDER ADULTS AND LONG-TERM CARE UNDER MEDICAID (2010), *available at* http://sageusa.org/uploads/lgbt_Medicaid.pdf .

[12] *See, e.g., Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

[13] *See* 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); 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).

On June 10, 2011, the Centers for Medicare & Medicaid Services ("CMS"), issued a State Medicaid Directors Letter ("the CMS Letter"),[14] explaining that states can protect same-sex partners from lien imposition, lien and estate recovery, and transfer penalties in ways consistent with federal law. The CMS Letter is a form of permissive guidance, meaning that states are not required to make changes to their Medicaid programs to protect same-sex couples, but they may choose to do so.

This memo presents data on same-sex couples likely to benefit if states extend impoverishment protections to them. It then explains the CMS Letter's approach to extending impoverishment protections to same-sex couples, and provides general information about the state-level procedures that would be required to implement these protections for same-sex couples. Finally, this memo provides information on two important considerations relevant to any state seeking to amend its impoverishment laws to protect same-sex couples: (1) criteria for determining which same-sex couples will be eligible for impoverishment protections; and (2) the potential impact of statutory or constitutional limitations on recognizing same-sex relationships.

II. SAME-SEX COUPLES LIKELY TO BENEFIT IF STATES EXTEND IMPOVERISHMENT PROTECTIONS

Many same-sex couples could be protected from impoverishment if states amend their Medicaid programs as authorized by CMS. Over 1.2 million individuals in the U.S. live with a same-sex partner.[15] Of those individuals, 7% are 65 years of age or older, and 28% are disabled.[16] Of the over 600,000 same-sex couples in the U.S., 7% of female couples live in poverty, along with 4% of male couples.[17] Nearly 6% of individuals in same-sex couples receive Medicaid or other government assistance for those with low income or a disability.[18] Same-sex couples are more likely than different-sex couples to rely on such assistance.[19]

A significant number of people are currently receiving some form of long-term care or will need long-term care at some point during their lives. Currently, approximately 10.3 million individuals need long-term care: 17% of the U.S. population that is 65 or older and 1.7% of

[14] Letter from Cindy Mann, *supra* note 1.

[15] GARY J. GATES AND ABIGAIL M. COOKE, WILLIAMS INSTITUTE, UNITED STATES CENSUS SNAPSHOT: 2010 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf. *See also* ADAM P. ROMERO, AMANDA K. BAUMLE, M.V. LEE BADGETT & GARY J. GATES, WILLIAMS INSTITUTE, CENSUS SNAPSHOT: UNITED STATES 1 (2007).

[16] ROMERO, ET AL., *supra* note 15, at 1.

[17] RANDY ALBELDA, M.V. LEE BADGETT, ALYSSA SCHNEEBAUM & GARY J. GATES, POVERTY IN THE POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY iii (2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

[18] Calculation based on data from the 2008 American Community Survey. Data are available at: http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?ref=top&refresh=t.

[19] 4.3% of people in married different-sex couples receive these types of assistance. Id.

the population younger than 65.[20] Medicaid provides assistance for over 3 million of these individuals.[21] Fourteen percent of people with long-term care needs live in a nursing care facility; 87% of these people are 65 or older, 13% are disabled adults under the age of 65 or children.[22] Researchers have estimated that by 2020, 46% of people who reach the age of 65 would enter a nursing home at some point in their lives.[23]

III. THE CMS LETTER'S APPROACH TO PROTECTING SAME-SEX COUPLES

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 property 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 DOMA, 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 states 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.[24]

A. 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.

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[20] Kaiser Comm. on Medicaid Facts, Medicaid and the Uninsured: Medicaid and Long-Term Care Services and Supports 1 (Mar. 2011), http://www.kff.org/medicaid/upload/2186-08.pdf. The calculations are based on U.S. population data reported in the 2005 American Community Survey. Data from the 2005 American Community Survey was used because the estimates of people were based on data collected in 2004 & 2005. Data are available at: http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?ref=top&refresh=t.

[21] Kaiser Comm. on Medicaid Facts, *supra* note 20, at 2.

[22] Id. at 1.

[23] Brenda C. Spillman & James Lubitz, *New Estimates of Lifetime Nursing Home Use: Have Patterns of Use Changed?* 40 MED. CARE 965, 965 (2002).

[24] Letter from Centers for Medicare & Medicaid Svcs., Dep't of Health & Human Svcs., to Kristen Reasoner Apgar, *supra* note 13. *See also* Letter from Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., to Theo Kennedy, *supra* note 13.

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.[25] 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 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 initially 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.[26] Additionally, a spouse is permitted to retain a certain amount of other resources as a living allowance.[27] This is called the Community Spouse Resource Allowance ("CSRA").[28] 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.[29]

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.[30]

ii. Same-Sex Couples

People in same-sex couples are treated like individuals under Medicaid eligibility rules.[31] As a result, their income and assets are not pooled to determine eligibility—Medicaid will

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[25] 42 U.S.C. §§ 1382a, 1382b, 1382c(f).

[26] 20 C.F.R. § 416.1212(c) (2011).

[27] 42 U.S.C. §§ 1396r–5(c)(4), 42 U.S.C. § 1396r–5(c)(2)(B).

[28] 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).

[29] 42 U.S.C. § 1396r–5(c)(2)(B).

[30] 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).

[31] 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

consider only the countable income and assets of the partner needing LTC to determine whether he or she is eligible.[32]

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 initially qualify for, or to continue to qualify for, Medicaid-covered LTC. None of these resources are set aside for the protection of the community partner. Under these rules, there is no Community Spouse Resource Allowance for the community partner that is disregarded in the eligibility determination,[33] and the community partner is not entitled to any income received by the institutionalized partner.[34] 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[35] or if home equity exceeds a certain amount.[36]

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-covered 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 intially 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.

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which some states recognize same-sex couples. *See* 1 U.S.C. § 7, *supra* note 11; *Smelt*, 447 F.3d at 673, *supra* note 12.

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

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

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

[35] 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, *supra* note 5.

[36] 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.

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.[37]

B. Protection From Lien Imposition Upon Recipient's Permanent Institutionalization

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.[38] 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.[39] The lien must be removed if the LTC recipient is discharged from the institution and returns to the residence.[40] 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.[41]

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.[42] 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.

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[37] Letter from Centers for Medicare & Medicaid Svcs., Dep't of Health & Human Svcs., to Kristen Reasoner Apgar, *supra* note 13; Letter from Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., to Theo Kennedy, *supra* note 13.

[38] 42 U.S.C. § 1396p(a)(1)(B).

[39] 42 U.S.C. § 1396p(b)(1)(A).

[40] 42 U.S.C. § 1396p(a)(3).

[41] 42 U.S.C. § 1396p(a)(2). *See also* 42 C.F.R. § 433.36(g)(3) (same).

[42] 42 U.S.C. § 1396p(a)(1)(B).

C. 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.[43] 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.[44]

In addition, estate and lien recovery is not permitted if it would create "an undue hardship" for the recipient's heirs.[45] 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]."[46] 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.[47]

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 protected as an "heir." The CMS Letter concludes that the broad grant of discretion from the federal government permits states to establish "reasonable

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[43] 42 U.S.C. § 1396p(b)(1)(A).

[44] 42 U.S.C. § 1396p(b)(2).

[45] 42 U.S.C. § 1396p(b)(3).

[46] 42 U.S.C. § 1396p(b)(3).

[47] Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., State Medicaid Manual § 3810.C.1 [hereinafter "State Medicaid Manual"].

protections applicable to the same-sex spouse or domestic partner of a deceased Medicaid recipient."

D. 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.[48] 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.[49] 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."[50]

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."[51] 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.*"[52] 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 or her at risk of serious deprivation."[53] 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."[54]

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

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[48] 42 U.S.C. § 1396p(c)(1)(A). *See also* 42 U.S.C. § 1382b.

[49] 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.

[50] 42 U.S.C. § 1396p(c)(2)(D).

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

[52] State Medicaid Manual § 3258.10(C)(5), 3-3-109.21 (emphasis added).

[53] Id.

[54] Id.

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.[55]

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.[56] 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.[57] 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.[58]

IV. State-Level Procedures Required to Implement The Specified Protections For Same-Sex Couples

Spousal impoverishment protections are implemented at the state level through statutes, regulations, and/or guidance consistent with federal law. Each state implements the protections differently, meaning that one state may implement the protections primarily through statutes, while another state may implement them through only regulations or guidance, and other states may use a combination of all three. To provide the three forms of protection from impoverishment for same-sex partners discussed in the CMS Letter, the focus will be on these sources of law in any given state.

A spousal impoverishment provision, whether in a statute, regulation, or guidance, will have to be amended if the language is so restrictive that it would effectively preclude an interpretation that would protect same-sex couples. Examples of such language are provided below. It is important to focus on the "highest level" of law that must be changed in order to extend protection to same-sex partners (statutes being the "highest level," followed by regulations, and then guidance). This will ensure that the changes are not inconsistent with laws that could override them.

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[55] 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).

[56] 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).

[57] 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.

[58] 42 U.S.C. § 1382b(a).

If changes must be made to statutes, the state legislature will have to make them. The state administrative agency that administers the Medicaid program is generally responsible for making changes to regulations or guidance; however, in some cases, this role belongs to another state official. For example, in Missouri, the Attorney General is responsible for administering Medicaid's estate recovery process, and therefore, has the authority to issue guidance related to the impoverishment protection from estate recovery.[59]

The following are examples of language in state statutes, regulations, and guidance that would have to be amended because it would effectively preclude an interpretation that would protect same-sex couples. Along with each example is a short explanation of why the language is too restrictive. These examples are taken from state laws, regulations, and guidance materials in three different states.

A. Statutory Change Required

A Missouri statute directs the state to place a TEFRA lien on the "real property of an individual … [who] the director of the MO HealthNet division or the director's designee determines, after notice and opportunity for hearing, … cannot reasonably be expected to be discharged from the medical institution and to return home."[60] The statute forbids the state from imposing a lien in the situation described above when "one or more of the following persons is lawfully residing in such home:

> (a) The spouse of such individual;
>
> (b) Such individual's child who is under twenty-one years of age, or is blind or permanently and totally disabled; or
>
> (c) A sibling of such individual who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution."[61]

This statute does not allow for an interpretation that would protect same-sex couples, so it must be amended in order to extend protection from lien imposition. The statute requires that the state place a lien on an LTC recipient's home unless certain people live in the home. Those people are limited to spouses, certain children, and certain siblings. These categories are not broad enough to cover a same-sex partner.

B. Regulatory Change Required

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:

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[59] Financial Svcs Div., Mo. Atty Gen., Frequently Asked Questions of the Financial Services Division, http://ago.mo.gov/divisions/financial-services-division-faqs.htm (last visited June 20, 2012).

[60] MO. REV. STAT. § 208.215(13) (2010).

[61] Id. § 208.215(13)(4) (2010).

(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."[62]

This regulation does not allow for an interpretation that would protect same-sex couples, so it must be amended in order to extend protection from transfer penalties. The 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 property (up to the CSRA) to a same-sex partner.

There is no statute in Utah that addresses the "undue hardship" exemption to transfer penalties, so regulations are the "highest level" of law that would need to be changed in the state.

C. Change To Guidance Required

Virginia could extend protection from estate recovery to same-sex couples by issuing guidance. Current guidance in Virginia does not address the "undue hardship" exemption from estate recovery, but the definition in the regulations is broad enough that it can be interpreted to protect same-sex couples. This interpretation can be issued through additional administrative guidance.[63]

[62] UTAH ADMIN. CODE r. 414-305-8(12) (2011).

[63] Virginia's statutes also do not preclude an interpretation that would extend protection to same-sex partners, because they say only that estate recovery must be carried out in accordance with federal law. VA. CODE ANN. § 32.1-326.1 (2010). Federal law requires an "undue hardship" exception to estate recovery, which the CMS Letter points out can offer protection to same-sex couples. 42 U.S.C. § 1396p(b)(3).

The only definition of "undue hardship" for purposes of estate recovery in Virginia law is in a regulation. The 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."[64] 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.[65] 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."

Through guidance, Virginia could determine that that "compelling circumstances" for an "undue hardship" waiver exist where the estate supports a surviving same-sex partner.

D. Changes to State Medicaid Plans May Also Be Required

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]."[66] The CMS Letter advises that states are "encouraged" to incorporate criteria regarding liens into their State Plans, does not specify whether states must amend their State Plans in order to extend the protections concerning property transfer penalties 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.[67] The CMS approval procedure requires that the governor or the governor's designee (usually the state attorney general) review and comment on the State Plan before it is submitted to CMS.[68] Although this process may be required, it seems unlikely that CMS would reject changes that comport with the CMS 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 at the state-level.

Additional information on state-level implementation (including more examples of language used in statutes, guidance, and regulations to implement impoverishment protections) can be found in the state Medicaid memos prepared by the Williams Institute for Colorado, Georgia, Illinois, Missouri, Pennsylvania, Utah, and Virginia.

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[64] 12 VA. ADMIN. CODE § 30-20-141(A).

[65] 12 VA. ADMIN. CODE § 30-20-141(D).

[66] 42 C.F.R. § 430.10.

[67] 42 C.F.R. § 430.12.

[68] Id.

These memos are available here: http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/medicaid-reports-june-2012/.

V. DEFINING SAME-SEX COUPLES FOR PURPOSES OF EXTENDING IMPOVERISHMENT PROTECTIONS

States that decide to offer impoverishment protections to same-sex couples will have to establish criteria for determining which couples are eligible. Some states already offer same-sex couples a legal status through which to acquire rights and responsibilities that are the same as, similar to, or less than those of different-sex spouses.[69] In these states, impoverishment protections can be extended to same-sex couples—whether they are married, in a civil union, registered as domestic partners, or in another legal status recognized by the state—through the mechanisms outlined in the CMS Letter. This would not violate DOMA because these mechanisms do not depend on Medicaid provisions that specifically apply to "spouses." Any changes made in state statutes, regulations, or guidance to extend impoverishment protections to same-sex partners should include confirmation that couples in the specified status are entitled to protection.

Most states do 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 protections. In these states, eligibility criteria will be required to determine which couples qualify.

This Part offers two approaches and provides draft provisions as a starting place for policy development. The first approach, set out in Section A 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 B 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.

Some same-sex couples may not wish to formalize their relationships under state law for many reasons. These include unfamiliarity with new relationship forms, fear of discrimination, and a lack of recognition by the federal government. Accordingly, even in states that offer a formal legal status to same-sex couples, it will be helpful to provide protection to same-sex partners who have not formalized their status. This could be accomplished by defining eligible same-sex partners in these states to include both couples who have formalized their relationship under state law and couples who qualify under either of the models presented in this section.

[69] For states that provide marriage, civil unions, or broad domestic partnerships for same-sex couples, see Movement Advancement Project, Marriage & Relationship Recognition Laws: Positive Laws, http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last visited Apr. 4, 2012) [hereinafter "MAP, Positive Laws"].

A. Protection For "Mutually Dependent Partners"

States that recognize same-sex partners as spouses, civil union partners or registered domestic partners ("RDPs") should be able to designate spouses and RDPs as entitled to the protections described above. For example, Washington State waives estate recovery for Medicaid LTC, having found there to be an "undue hardship for a surviving domestic partner whenever recovery would not have been permitted if he or she had been a surviving spouse. The department is not authorized to pursue recovery under such circumstances."[70]

In states that offer a limited form of relationship recognition to same-sex couples[71] or no relationship recognition[72] to same-sex couples, the state 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[73] and California's domestic partnership laws.[74] These criteria have become a standard and are familiar to many government officials. Moreover, some provisions have been tested in litigation and already have been construed and validated by courts. Accordingly, an approach relying on these structures may facilitate greater standardization among states.

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[70] WASH. REV. CODE § 43.20B.080(5)(a) (2011).

[71] In states that offer limited relationship recognition, such as Colorado's designated beneficiaries, there may be a question whether lawmakers will accept that status as entailing sufficient mutual responsibility to warrant the impoverishment protections. In such a case, the state could provide an alternative framework that recognizes people in committed, mutually dependent relationships only for purposes of extending impoverishment protections.

[72] *See* MAP, Positive Laws, *supra* note 65.

[73] *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).

[74] CAL. FAM. CODE §§ 297-299.6 (2010).

Mutually Dependent Partners:

A. Definitions:

(i) "Mutually dependent partners" means two adults who have chosen to share one another's lives in a committed domestic relationship of mutual caring for whom all of the following are true:

(1) The partners have a common residence, are financially interdependent, and consider each other to be immediate family.

(2) Neither partner is married to or in a civil union or registered domestic partnership with, or has claimed a mutually dependent partnership with, any other person that has not been ended by separation, termination, dissolution or adjudication to be a nullity.

(3) The two partners are not related by blood in a way that would prevent them from being married to each other in their state of residence.

(4) Both persons are at least 18 years of age.

(5) Both persons are of the same sex.

(6) Both persons are capable of attesting that the above criteria are satisfied.[75]

(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.

[75] 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 raise constitutional questions.

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

(1) The partners have executed a document attesting to the elements listed in (a)(i)(1)-(6) above.

(2) The partners have entered into a legal status such as a civil union, domestic partnership, or similar status under the laws of any state or the District of Columbia, whether or not such status is recognized for other purposes under state law.

(3) One partner does not have capacity to attest to the elements listed in (a) (i) (1)-(5) above, and the other partner attesting to the elements in (a)(i)(1)-(5) has caretaking authority with respect to the other partner.

(4) Neither partner has capacity to attest to the elements listed in (a) (i) (1)-(5) above, but each one's legal representative attests to the elements on behalf of the represented partner.[76]

B. Protection For "Care or Support Provider"

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 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

[76] 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.

> the decedent's receipt of nursing home services during which time the decedent needed care or support to remain at home."[77]

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.

VI. THE POTENTIAL EFFECTS OF STATE LIMITATIONS ON SAME-SEX RELATIONSHIP RECOGNITION

Since the mid-1990s, thirty-eight states have amended their statutes, constitutions, or both to deny legal recognition to the marriages of same-sex couples.[78] Twenty-two of these states have laws that deny recognition to these relationships more broadly, prohibiting non-marital statuses such as civil unions and registered domestic partnerships with the same or substantially similar legal rights and obligations as marriage.[79] This section explains the impact of these bans on extending LTC impoverishment protections to same-sex couples.

In short, for the twenty-eight states and the District of Columbia that either have no such ban or a ban that only applies to marriage, the state can offer recognition to same-sex couples using either the "mutually dependent partners" (MDP) model or the "care and support provider" (CSP) model described above. In the twenty-two states with a broader ban on recognizing same-sex relationships, whether impoverishment protections can be provided using the MDP model will depend on the language of the ban, any prior court interpretations of that language, and whether the broad prohibition is imposed by the state's constitution or a statute. In most of these states, the stronger arguments will support use of the MDP model. Moreover, all of these states can extend the impoverishment protections through the CSP model.

A. States Without A Ban Extending Beyond Marriage

The twenty-eight states and the District of Columbia that do not have a ban on recognizing same-sex relationships that extends beyond marriage can adopt either the MDP model or the CSP model described above, in addition to extending LTC protections through any existing legal status for same-sex couples in the state. A state-level ban on recognizing same-sex couples' marriages poses no barrier to use of either model—or to other, non-marital forms of recognition for same-sex couples—in these states. These states are listed in Table 1.

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[77] 55 PA. CODE § 258.10(b) (2011).

[78] For current lists of state restrictions, see Movement Advancement Project, Marriage & Relationship Recognition Laws: Negative Laws, http://www.lgbtmap.org/equality-maps/marriage_relationship_laws (last visited May 24, 2012) [hereinafter "MAP, Negative Laws"]. Note that Wyoming enacted such a law much earlier, in 1977, bringing the total number of states with such explicit restrictions to 39.

[79] MAP, Negative Laws, *supra* note 74.

Table 1. States Without A Relationship Recognition Ban Extending Beyond Marriage[80]

	Marriage or Other Formal Recognition of Same-Sex Relationships	No Formalized, State-Level Recognition of Same-Sex Relationships
No Ban on Recognizing Same-Sex Couples' Relationships	**Connecticut** **District of Columbia** **Iowa** Maryland **Massachusetts** **New Hampshire** New Jersey **New York** Rhode Island **Vermont** Washington	New Mexico[81]
Ban Denies Recognition to Same-Sex Couples' Marriages But Does Not Go Further	California Colorado Delaware Hawaii Illinois Maine Nevada Oregon	Arizona Indiana Minnesota Mississippi Missouri Pennsylvania Tennessee West Virginia Wyoming

The eleven states and District of Columbia listed in the first row of Table 1 have no statutory or constitutional ban on recognizing the relationships same-sex couples. Therefore, state bans provide no barrier to the extension of LTC impoverishment protections in these states.

The seventeen states listed in row two of Table 1 have state-level bans that prohibit recognition of same-sex couples' marriages, but do not prohibit other forms of recognition such as civil unions or registered domestic partnerships.[82] Since the MDP and CSP models

[80] The information in this table is from the Movement Advancement Project, per the tables referenced, *supra*, in notes 65 and 74. The states in bold, and the District of Columbia, allow same-sex couples to marry. Maine, Maryland and Washington may allow same-sex couples to marry if legislatively approved changes to those states' marriage laws are approved by voters in November 2012.

[81] In January 2011, the Attorney General of New Mexico issued an opinion concluding that same-sex couples validly married outside the state should be recognized as married within New Mexico. The opinion has not been tested in court or addressed by a subsequent statute.

[82] MAP, Negative Laws, *supra* note 74; MAP, Positive Laws, *supra* note 65. Examples of these bans by constitutional amendments include Article I, § 7.5, of the California Constitution ("Only marriage between a man and a woman is valid or recognized in California."); Article II, § 31, of the Colorado Constitution ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state."); Article I, § 33, of the Missouri Constitution ("[T]o be valid and recognized in this state, a marriage shall exist only between a man and a woman"); Article XIII, § 7, of the Montana Constitution ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."); Article I, § 21, of the Nevada Constitution ("Only a marriage between a male and female person shall be recognized and given effect in this state."); and Article XV, § 5a, of the Oregon Constitution ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."). Some of these states have similar bans by statute but have not amended their constitutions. For example, a Pennsylvania statute provides: "It is hereby declared to the

are both designed to be consistent with the federal Defense of Marriage Act, which also only applies to marriage, both models of recognition also will be consistent with these state level bans.

In addition, all of the states listed in column one of Table 1 already extend at least some of the rights and benefits of marriage to same-sex couples through a formal legal status. This is relevant for two reasons. First, for all of these states, protections can be offered to partners who have entered into that legal status as well as those who qualify as MDPs or CSPs. Second, for the eight states in row 2 column 1 of Table 1, the fact that a state offers a status entailing some or all of the rights and obligations of marriage to same-sex couples provides a solid legal basis for concluding that extending LTC impoverishment protections will not conflict with these states' bans. California and Oregon, for example, restrict marriage by constitutional amendment but offer broad domestic partnerships, while Delaware and Illinois restrict marriage by statute but offer civil unions.[83] Colorado, on the other hand, restricts marriage by constitutional amendment, but offers a limited "designated beneficiary" status.[84] Maine restricts marriage by statute, but offers a limited form of domestic partnership. [85] This diversity of non-marital forms of relationship recognition for same-sex couples in these states that restrict marriage—ranging from comprehensive civil unions to limited designated beneficiary registrations—indicates that the marriage restrictions will not preclude the very limited forms of relationship recognition provided by the MDP and CSP models.

B. States With Broader Relationship Recognition Bans Extending Beyond Marriage

Twenty-two states have statutes or constitutional amendments that prohibit opening marriage to same-sex couples as well as non-marital forms of recognition.[86] These states are listed in Table 2. Twenty of these states have done so by constitutional amendment. Alaska and Montana have broader bans by statute, but not in their state constitutions. [87]

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strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." 23 PA. STAT. ANN. § 1704 (2010). Other states with a statutory restriction but no constitutional ban include Delaware, Hawaii, Illinois, Indiana, Maine, Minnesota, and Wyoming. See MAP, Negative Laws, *supra* note 74. Note that the Hawaii Constitution was amended, but the amendment authorizes legislature (but not the state courts) to allow same-sex couples to marry. HI CONST., art. I, § 23.

[83] MAP, Negative Laws, *supra* note 74; MAP, Positive Laws, *supra* note 65. Maine voters will consider an initiative to change the marriage law in November 2012. Maine Same-Sex Marriage Question (2012), http://www.ballotpedia.org/wiki/index.php/ Maine_Same-Sex_Marriage_Question_(last visited June 15, 2012).

[84] MAP, Negative Laws, *supra* note 74; MAP, Positive Laws, *supra* note 65. The Colorado legislature has considered also offering civil unions to same-sex couples. S. 12-002, 68th Gen. Assem. Reg. Sess. (Co. 2012).

[85] MAP, Negative Laws, *supra* note 74; MAP, Positive Laws, *supra* note 65. Maine Same-Sex Marriage Question (2012), http://www.ballotpedia.org/wiki/index.php/ Maine_Same-Sex_Marriage_Question_(last visited June 15, 2012).

[86] MAP, Negative Laws, *supra* note 74.

[87] MAP, Negative Laws, *supra* note 74.

Even in these states with broader bans on recognizing same-sex relationships, LTC impoverishment protections still may be extended to same-sex couples through the MDP model. The legal support for doing so will depend on the precise language of the ban, any prior court interpretations of that language, and whether the ban is imposed by the state's statute or constitution. We conclude that strong support for this model exists for the four states in the first column of Table 2 and the ten states in the first row of the second column. Moreover, all of the states in Table 2 still can extend these protections through the CSP model.

Table 2: States with Broader Bans Extending Beyond Marriage [88]

	Case Law Supporting Limited Forms of Recognition Despite Broader Ban (4)	No Case Law (17)	Case Law Interpreting Broad Ban as Preventing Even Limited Forms of Recognition (1)
State Constitutional Bans Forbidding Recognition of Any Status " Identical," "Replicating," or "Similar" to Marriage	Ohio Wisconsin	Alabama Arkansas Florida Georgia Kentucky Louisiana Nebraska North Dakota Texas Utah	Michigan
Broader State Constitutional Bans Without Language Limiting Ban to Status "Identical," "Replicating" or "Similar" to Marriage		Idaho Kansas North Carolina Oklahoma South Carolina South Dakota Virginia	
Broader Ban Only by State Statute	Alaska Montana		

i. Language of Broader Bans

In these states, the legal support for adopting the MDP model will be stronger to the extent that the language of the ban supports an argument that it only prohibits recognition of relationships that are similar or equivalent to marriage. In these states, it can be argued that extending protections related to one aspect of one benefits program is not substantially similar to recognizing a couple as married and therefore is not prohibited by the state's broader ban. As explained in sub-section 2, below, several state courts have adopted this reasoning when upholding limited protections for same-sex couples in states with such broader bans.

[88] The information in this table is from the Movement Advancement Project, per the tables referenced, *supra*, in notes 65 and 74.

Some of these broad bans specifically state that they only prohibit forms of recognition that are "identical," "replicating," "similar to," or "the equivalent of" marriage. For example, the Kentucky and the Louisiana constitutions state: "A legal status *identical or substantially similar* to that of marriage for unmarried individuals shall not be valid or recognized."[89] Merely extending the LTC impoverishment protections to same-sex couples is not creating "a legal status identical or substantially similar" to that of marriage.[90]

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.[91] 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,[92] and those benefits remain in place despite constitutional prohibitions on marriage and preexisting statutory bans on relationship recognition of broader scope.[93]

Similarly, a number of municipalities provide limited recognition of same-sex couples through a domestic partner registry or public employee benefits plan, which have not been

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[89] KY CONST., § 233A; LA CONST., Art. XII, § 15 (emphasis added).

[90] Other state bans that include such language, with emphasis added, include: Article I, § 36.03(g), of the Alabama Constitution ("A union *replicating* marriage of or between persons of the same sex … treated in all respects as having no legal force or effect in this state …."); Sections 1-3 of Arkansas Constitutional Amendment 83 ("Legal status for unmarried persons which is *identical or substantially similar* to marital status shall not be valid or recognized in Arkansas…."); Article I of the Florida Constitution ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is *treated as marriage* or the *substantial equivalent* thereof shall be valid or recognized."); Article XI, § 28, of the North Dakota Constitution ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or *given the same or substantially equivalent* legal effect."); Article I, § 4, of the Georgia Constitution ("No union between persons of the same sex shall be recognized by this state as entitled to the *benefits of marriage*. This state shall not give effect to any public act, record, or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is *treated as a marriage* under the laws of such other state or jurisdiction."); Article I, § 29 of the Nebraska Constitution ("The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."); Article I, § 32(b), of the Texas Constitution ("This state or a political subdivision of this state may not create or recognize any legal status *identical or similar* to marriage."); and Article I, § 29(2), of the Utah Constitution ("No other domestic union, however denominated, may be recognized as a marriage or given *the same or substantially equivalent* legal effect.").

[91] 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).

[92] *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005); *Snetsinger*, 104 P.3d 445.

[93] 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).

challenged as violating broader state constitutional bans. For example, Salt Lake City, Utah offers benefits to cover the domestic partners of city employees and allows any two residents of the city to register as "mutually committed" partners,[94] 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."[95] Although there is no case law addressing the validity of Salt Lake City's ordinance in light of the constitutional ban, courts in other states have held that there are "substantial differences" between recognizing a marriage and recognizing a limited set of rights for same-sex couples.[96]

In still other states, the text of the broader ban may not lend itself as readily to this interpretation because it could be construed to prohibit the extension any of the "incidents" of marriage to same-sex couples. For example, the Oklahoma Constitution, provides that "neither this Constitution nor any other provision of law shall be construed to require that marital status or *the legal incidents* thereof be conferred upon unmarried couples or groups."[97] Similarly, the Kansas Constitution states that "no relationship, other than a marriage, shall be recognized by the state as entitling the parties *to the rights or incidents of marriage*."[98] Considering such language, a court might conclude that the single-purpose impoverishment protections offered to different-sex spouses because they are married are "legal incidents" of those couples' marriages, and thus must not be offered to same-sex couples based on the coupled nature of their relationships.[99] Use of the MDP model might be challenged on those grounds, although the CSP model—based on caretaking conduct rather than a coupled relationship—should not to be.

ii. Case Law

The second factor to consider in these states is whether there is already case law approving more limited forms of recognition for same-sex couples despite the broadly worded bans.

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[94] SALT LAKE CITY, UTAH, CODE § 10.03.010 (2010).

[95] UTAH CONST. art. I, § 29 (2010).

[96] *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 conflict 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).

[97] OK. CONST. Art. II, § 35A.

[98] KS. CONST. Art. XV, § 16(b). Additional examples include Article XVII, § 15, of the South Carolina Constitution ("This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated."); Article I, § 15-A, of the Virginia Constitution ("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."); and Article II, § 35A of the Oklahoma Constitution ("Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.").

[99] For an example of a court that has construed a broad relationship recognition ban in this way, see *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008), discussed in Section VI.B.ii, *infra*.

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.[100] Similarly, case law in Wisconsin and Ohio 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.[101] In 2010, taxpayers challenged the domestic partnership law[102] 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.[103] The Wisconsin court upheld the domestic partnership law because it offers only limited, discrete rights to same-sex couples that do not amount to marriage or a relationship "substantially similar" to a marriage.[104] Similarly, a framework used to identify same-sex 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.[105]

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[100] 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).

[101] WIS. STAT. § 770 (2010).

[102] *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011).

[103] WIS. CONST. art. XII, § 13.

[104] *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 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).

[105] *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 an unmarried domestic partner could not be subject to penalty enhancement under domestic violence statute).

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."[106] Michigan's high court held that the plain language of that provision precluded such domestic partner coverage.[107] 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."[108]

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 that have a broader relationship recognition ban. In states where this has happened or seems likely, either the MDP model or the CSP model could be used to protect same-sex couples within the state's Medicaid program. As a general matter, however, courts in all of these states probably will find more easily that the CSP model—based on mutual caretaking rather than an intimate relationship—is clearly permitted regardless of the scope of the relationship recognition ban. After the *National Pride at Work* case, the CSP model is probably the only option in Michigan.

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[106] MICH. CONST. art 1, § 25.

[107] *National Pride at Work, Inc.*, 748 N.W.2d 524.

[108] 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, 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 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 Employee Domestic Partner Benefit Restriction Act, H.R. 4770, 96th Leg, Reg. Sess. (Mich. 2011) (enacted). 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. 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.

iii. Constitutional or Statutory Ban

The third factor to consider in these states is whether the broader ban is in the state's constitution or a statute. For two states, Alaska and Montana, the broader ban is only in statutes. While these states already have case law requiring a more limited form of recognition, it also would be easier to create a specific exception to these bans for extending the LTC impoverishment protections. Unlike the states with broad constitutional amendments, pursuant to standard rules of statutory construction, passage of a statute providing for the LTC protections would create a valid exemption to the existing statutory ban.

To summarize, in 28 states and the District of Columbia, there is no state law impediment to offering these protections because the states either have no law precluding recognition of same-sex relationships, or they have laws only prohibiting marriage for same-sex couples, but not barring other forms of relationship recognition. Of the states with broader bans, there also should be no barrier to providing these protections in at least the four of them (Alaska, Montana, Ohio and Wisconsin), in which the courts have found that recognizing same-sex relationships for a limited purpose is permissible despite the states' relationship recognition bans. In addition, ten more states have language in their broader bans that courts in Ohio and Wisconsin have interpreted to cover only forms of recognition that are substantially similar to marriage. Although the highest court of Michigan reached a different conclusion, the sounder textual approach is that of the Ohio and Wisconsin courts and a strong argument for extending the impoverishment protections through the MDP model can be made in these ten states. Finally, for all states, the bans on various forms of recognition of same-sex relationships are not a barrier for impoverishment protections offered through the CSP model.

VII. CONCLUSION

States can implement the impoverishment protections identified in the CMS Letter by adopting appropriate policies to protect same-sex spouses and partners of LTC recipients. These protections can include (1) being exempt from lien imposition against their homes; (2) protection from lien and estate recovery; and (3) being able to exchange ownership of certain property between partners without penalties. Each state's laws and policies regarding Medicaid and legal recognition of same-sex couples will determine what changes need to be made and whether a state will need to modify its statutes, regulations, or guidance.

States that offer same-sex couples a way to formalize their relationships will find it easier to implement these impoverishment protections. However, states that do not offer same-sex couples any formal legal status can provide the protections by identifying eligible couples through a framework such as the "mutually dependent partners" model or the "care or support provider" model. In fact, incorporating such a framework is important in all states because even in states that allow same-sex couples to enter a formal legal status, not all couples will do so. This is likely particularly to be true for the very couples that the CMS Letter seeks to help—couples who are elderly, disabled, and/or poor.