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



the
Williams
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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”).¹ These protections can significantly reduce the likelihood that a same-sex partner must become impoverished in order for a sick or disabled partner to receive LTC through Medicaid. However, the CMS letter did not provide these impoverishment protections to same-sex couples directly. States must adopt affirmative policy measures to provide them.² This report explains how Georgia 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 Georgia 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 Georgia: (1) criteria for determining which same-sex couples will be eligible for impoverishment protections; and (2) the potential impact of Georgia’s statutory and constitutional limitation on recognizing same-sex relationships.

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

GEORGIA’S MEDICAID PROGRAM

Medicaid is a federally mandated program, implemented by states, which ensures access to health care for those low-income individuals and families that qualify under the program.³

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.

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).

The program is funded with a combination of federal funds and state funds.⁴ Medicaid's long-term care ("LTC") program covers the cost of long-term care in a professional care facility for those eligible for the program and expected to remain in the facility for at least 30 days.⁵

Each state must implement its own Medicaid program, in accordance with federal laws and regulations. Georgia's Medicaid program is administered by the Medicaid Division of the Georgia Department of Community Health ("DCH").⁶ The statutes related to Georgia's Medicaid program appear in Chapter 4 of Title 49 of the Georgia Code. The regulations issued by the Georgia Department of Community Health that implement the program are codified in Chapter 111 of the Official Compilation of the Rules and Regulations of the State of Georgia. Georgia's State Medicaid Manual, which provides administrative guidance on the state's Medicaid program is available at http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MAN3480.doc. Georgia's State Medicaid Plan is available at: http://www.mcguiffey.net/gamedicaid/stateplan/GA_State_Plan%20feb%202008.pdf.

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

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

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 Medicaid Div., Georgia Dep't of Community Health, Georgia Medicaid Program, http://dch.georgia.gov/00/channel_title/0,2094,31446711_31944826,00.html.

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

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

⁹ The State Medicaid Manual is available at: U.S. Dep't of Health and Human Svcs., Centers for Medicare & Medicaid Svcs., Publication No. 45, <http://www.cms.gov/manuals/pbm/itemdetail.asp?itemid=CMS021927>.

directly to same-sex partners because of the federal Defense of Marriage Act (“DOMA”),¹⁰ and explains other ways that each of these protections may be extended to same-sex couples in accordance with federal law.

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

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

1. The “Income and Assets” Test

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

i. Different-Sex Spouses

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

The spousal impoverishment provisions exempt certain income and assets from being counted in initial and continuing eligibility determinations. Medicaid cannot require that these resources be spent down in order for the spouse needing LTC to qualify for, or to

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

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

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

continue to qualify for, Medicaid-covered LTC. These resources are set aside for the community spouse so that he or she is not left destitute as a result of his or her partner receiving LTC. Most significantly, a home occupied by a spouse is never countable in the eligibility determination.¹³ Additionally, a spouse is permitted to retain a certain amount of other resources as a living allowance.¹⁴ This is called the Community Spouse Resource Allowance (“CSRA”).¹⁵ Medicaid must permit a community spouse to keep this amount when his or her spouse enters an LTC facility and may not pursue these assets to offset the cost of care.¹⁶

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

ii. Same-Sex Couples

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

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

¹³ 20 C.F.R. § 416.1212(c) (2011).

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

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

¹⁶ 42 U.S.C. § 1396r–5(c)(2)(B).

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

¹⁸ This is because DOMA prevents recognition of spouses of the same sex and federal law generally does not recognize civil union partners, registered domestic partners, and other non-marital statuses through which some states recognize same-sex couples. *See* 1 U.S.C. § 7, 1 U.S.C. § 7 (defining “spouse” for federal law purposes as a person of the other sex and allowing federal recognition only of the marriages of different-sex couples); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

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

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

entitled to any income received by the institutionalized partner.²¹ Additionally, a home shared by same-sex partners could render a partner needing LTC ineligible. However, this is less likely than the other consequences because an LTC recipient's home is only considered for determining eligibility if he or she does not intend to return home²² or if home equity exceeds a certain amount.²³

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

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

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

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

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

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

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

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

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

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

iii. Protecting Same-Sex Couples under Georgia Law

Statute: Not addressed by statute.

Regulations: Ga. Comp. R. & Regs. R.111-3-8-.07(2) (2011).

A Georgia regulation allows, but does not require, the placement of a lien on the home of a Medicaid LTC recipient (referred to in the regulations as a "Member"):

The state may place a Lien on the Member's home when there is not a reasonable expectation that the Member will return home and when none of the following persons are living in the home:

- (a) The Member's spouse;
- (b) A child under twenty-one (21) years of age;
- (c) A disabled child of any age; or
- (d) A sibling with an equity interest in the home who has lived in the home for at least one (1) year before the Member entered the nursing home, and is lawfully residing in such home.

²⁵ 42 U.S.C. § 1396p(a)(1)(B).

²⁶ 42 U.S.C. § 1396p(b)(1)(A).

²⁷ 42 U.S.C. § 1396p(a)(3).

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

²⁹ 42 U.S.C. § 1396p(a)(1)(B).

Ga. Comp. R. & Regs. R.111-3-8-.07(2).

Medicaid State Plan: Georgia State Plan Attachment 4.17-A (2008).

With respect to lien imposition, Georgia's Medicaid State Plan states that:

The State may not place a lien on an individual's home if anyone of the following individuals are living in the home:

- (a) The member's spouse;
- (b) The member's child under twenty-one (21) years of age;
- (c) The member's blind or disabled child of any age as defined in §1614 of the Act;
- (d) The member's brother or sister who has an equity interest in the home and who has been in the member's home for at least one year immediately before the member's admission to a nursing home.

Georgia State Plan Attachment 4.17-A.

Administrative Guidance & Materials:

DCH requires that Medicaid applicants be given an Official Notice of the Georgia Estate Recovery Program, Form DMA 315, available at: http://www.odis.dhr.state.ga.us/3000_fam/3480_medicaid/MANUALS/FORMS/DMA%20315.doc. The Official Notice explains:

If Medicaid has paid for your at-home or institutionalized services, the state can place a lien on your home. No lien will be placed on a member's home if the following persons are living in the home: the member's spouse, the member's child or children under twenty-one years of age, a member's disabled child of any age; or a member's sibling with an equity interest in the home who has lived in the home for at least one year before the member received at-home or institutionalized services.

Protecting Same-Sex Couples

Because the language of the federal and state laws governing TEFRA liens is permissive, allowing but not requiring lien placement during an LTC recipient's lifetime, it is possible for Georgia to provide protection from lien imposition through guidance. Georgia could adopt a policy not to place a lien on an LTC recipient's residence (referred to in Georgia's Medicaid Manual as the "homeplace") so long as it continues to be occupied by the recipient's same-sex partner. DCH has the authority to implement this change through guidance in Georgia.

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.³⁰ 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.³¹

In addition, estate and lien recovery is not permitted if it would create "an undue hardship" for the recipient's heirs.³² 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]."³³ 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.³⁴

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

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

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

³⁰ 42 U.S.C. § 1396p(b)(1)(A).

³¹ 42 U.S.C. § 1396p(b)(2).

³² 42 U.S.C. § 1396p(b)(3).

³³ 42 U.S.C. § 1396p(b)(3).

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

iii. Protecting Same-Sex Couples under Georgia Law

Statute: O.C.G.A. § 49-4-147.1 (2011).

The Georgia Code provision governing estate recovery states:

In accordance with applicable federal law and regulations, including those under Title XIX of the federal Social Security Act, the department may make claim against the estate of a Medicaid recipient for the amount of any medical assistance payments made on such person's behalf by the department....The commissioner shall waive such claim if he or she determines enforcement of the claim would result in substantial and unreasonable hardship to dependents of the individual against whose estate the claim exists.

O.C.G.A. § 49-4-147.1.

Regulations: Ga. Comp. R. & Regs. r. 111-3-8-.08 (2011).

Georgia's regulation governing hardship waivers provides in relevant part:

(4) Recovery will be waived in whole or in part pursuant to Rule 111-3-8-.08(1) of any estate or lien recovery when the requesting party is able to show, through clear and convincing evidence, that the state's pursuit of recovery subjects them to undue hardship. In determining whether an undue hardship exists, the following criteria will be used:

(a) The asset to be recovered is a[n] income producing farm of one or more of the Heirs and the annual gross income is limited to \$25,000 or less; or

(b) The recovery of assets would result in the applicant becoming eligible for governmental public assistance based on need and/or medical assistance programs.

...

(6) Undue hardship does not exist when:

(a) The adjustment or recovery of the Member's cost of assistance would merely cause the Member's family members inconvenience or restrict the family's lifestyle;

(b) The Member and/or the Heirs divest assets to qualify under the hardship provision.

(7) To the extent that there is any conflict between the preceding criteria and the standards that may be specified by the secretary of the Department of Health and Human Services, the federal standards shall prevail.

Ga. Comp. R. & Regs. r. 111-3-8-.08 (2011).

The regulations define “heirs” as “heirs-at-law who are entitled under the statutes of intestate succession to property of a decedent and beneficiaries who are entitled to inherit the estate if there is a lawful will.” Ga. Comp. R. & Regs. r. 111-3-8-.02(8).

Medicaid State Plan: Georgia State Plan, Attachment 4.17-A (2008).

The State Plan includes the following definition of “undue hardship”:

“**Undue hardship**” means (1) The asset to be recovered is the sole income-producing asset of the Medicaid beneficiary's heirs; or (2) The recovery of the assets would result in the heirs becoming eligible for governmental public assistance based on need and/or medical assistance programs.

Georgia State Plan, Attachment 4.17-A at 2.

Administrative Guidance & Materials:

Georgia’s Medicaid Manual contains the following provision regarding the “undue hardship” exception to estate recovery:

When the [LTC recipient] dies, the authorized representative, executor or heirs will be notified by DCH or their agent before any recovery is attempted on the [LTC recipient’s] estate. Upon notification, the heirs of the estate will be given an opportunity to show that if they meet one of the exceptions in the law that will delay recovery, then they will be told by DCH how to request an undue hardship waiver.

Georgia Medicaid Manual § 2398 (2008).

The Georgia Medicaid Manual does not provide any details on what may constitute an “undue hardship” for purposes of foregoing estate recovery.

The Manual further states that recovery will be delayed if a spouse (or certain other dependent family members) survives the LTC recipient. Recovery of the entire estate will be delayed until the surviving spouse is deceased or divorced, regardless of “undue hardship.” Georgia Medicaid Manual § 2398 (2008).

An example of the notification letter used by Georgia’s Medicaid Estate Recovery Unit is available at: http://www.mcguffey.net/Estate_Recovery_Notices.pdf.

The notification letter provides that an “undue hardship” exists in the following circumstances:

- “The asset to be recovered is an income producing farm of one or more of the heirs, and the annual gross income of the farm is limited to \$25,000 or less; [or]
- Recovery of assets would result in the applicant becoming eligible for governmental assistance based on need and/or medical assistance programs.”

Protecting Same-Sex Couples

Due to the inconsistent terminology used in Georgia's estate recovery law, it is unclear exactly who is protected by undue hardship waivers. Although the federal estate recovery provisions refer to hardship for the "heirs" of the deceased LTC recipient, the Georgia Code refers to "dependents" – a term that is not defined in that code chapter – and the statute mandates that DCH shall waive an estate recovery claim if the DCH "determines enforcement of the claim would result in substantial and unreasonable hardship to dependents of the individual against whose estate the claim exists." O.C.G.A. § 49-4-147.1(a). Subsection (c) of the same provision then refers to "dependents or heirs," implying some distinction between the two groups. And while the estate recovery regulations define "Heirs" in Rule 111-3-8-.02(8) to include anyone entitled to inherit from the deceased Medicaid recipient, whether by will or by intestate succession rules, Rule 111-3-8-.08, refers to those who may qualify for a hardship waiver variably as "heirs," "the requesting party," "the applicant," and the recipient's "family members."

Even if these terms are broadly construed to include same-sex partners, or if DCH issues guidance to clarify that same-sex partners are indeed "heirs" or "dependents," it would still not protect the surviving partner from estate recovery unless he or she could meet one of the two strictly limited criteria for undue hardship: (1) the asset subject to recovery is an income-producing farm with annual gross income of \$25,000 or less; or (2) recovery of assets would result in the surviving partner becoming eligible for need-based government assistance or medical assistance.

In order to offer protection to same-sex couples that more closely resembles the protection for different-sex spouses (that is, no estate recovery permitted during the surviving partner's lifetime), Georgia would have to state explicitly that an "undue hardship" exists where the deceased recipient has a surviving same-sex partner. Or, the state could require some additional showing of "undue hardship" in the case of a surviving partner but could require something less demanding than evidence that estate recovery will result in the surviving partner becoming eligible for need-based assistance.

These changes would require at minimum an amendment to Georgia's State Plan because they would require a significant expansion of the very limited "undue hardship" exemptions found in Attachment 4.17-A. The changes would likely also require promulgating new state regulations as well, since the current estate recovery rules also contain the strictly limited criteria for hardship waivers found in the State Plan. Rule 111-3-8-.08(7) does provide that in the event of any conflict between the hardship waiver criteria set forth in state regulations and "the standards that may be specified by the secretary of the Department of Health and Human Services, the federal standards shall prevail," so if this reference to "federal standards" is construed to include approval of the State Plan amendments by CMS, no further amendments to the regulations would be necessary.

DCH has the authority to implement this change (through guidance, regulations, or the State Plan) in Georgia.

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.³⁵ 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.³⁶ 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."³⁷

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."³⁸ 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."³⁹ 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."⁴⁰ 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."⁴¹

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

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

³⁶ 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.

³⁷ 42 U.S.C. § 1396p(c)(2)(D).

³⁸ The Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 6011(d), 120 Stat. 4 (2006).

³⁹ Centers for Medicare & Medicaid Svcs, Dep't of Health & Human Svcs., State Medicaid Manual § 3258.10(C)(5), 3-3-109.21 (emphasis added).

⁴⁰ *Id.*

⁴¹ *Id.*

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.⁴²

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.⁴³ 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.⁴⁴ 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.⁴⁵

iii. Protecting Same-Sex Couples under Georgia Law

Statute: Not addressed by statute.

Regulations: Not addressed by statute.

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

Georgia’s Medicaid State 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:

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

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

⁴² 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).

⁴³ 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).

⁴⁴ 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.

⁴⁵ 42 U.S.C. § 1382b(a).

Administrative Guidance & Materials:

The Georgia Medicaid Manual states that “[a]n individual having transferred assets for less than the fair market value...will not be found ineligible for [Medicaid LTC]...where it is determined that such denial would create undue hardship to the [LTC recipient].” Georgia Medicaid Manual § 2345 at 2. *See also id.* § 2342 at 2 (“A transfer of assets **penalty does not apply** if [d]enial of eligibility would cause an undue hardship. Undue hardship must be considered in every case.”). The Manual further provides:

Undue hardship is defined as a situation wherein an individual would be deprived of medical care such that his/her health or life would be endangered; or would be deprived of food, clothing, shelter, or other necessities of life. For purposes of this policy, the following definitions apply:

- “Health or life would be endangered” means: A medical doctor with knowledge of the [LTC recipient’s] medical condition at the time of the application of the penalty period, certifies in writing that in his or her professional opinion, the [LTC recipient] will be in substantial danger of death or the [LTC recipient’s] health will suffer substantial and irreparable harm.
- “Other necessities of life” means: Basic, life sustaining utilities, including water, heat, electricity, phone, and other items or activities that without which the individual’s health or life would be endangered.

Id. § 2345 at 1. The Manual adds an additional hardship requirement for assets transferred after February 8, 2006: “the applicant or representative must have taken legal action and equitable remedies to recover the asset before undue hardship can be considered. Documentation of such action must be attached to the undue hardship request.” *Id.* at 2.

The Manual further states that “[u]ndue hardship does NOT exist when:

- the application of a transfer of assets merely inconveniences or restricts the lifestyle of the [LTC recipient].
- the institutionalized spouse has transferred his/her assets to the community spouse and the community spouse refuses to cooperate in making the assets available to the institutionalized spouse
- the [LTC recipient’s] total available income and assets (or if a couple, the total combined available income and assets of the [LTC recipient] and the [LTC recipient’s] spouse, or if under age 18, the combined available assets and income of the [LTC recipient] and the [LTC recipient’s] parents), including all countable and excluded income and assets, are sufficient to provide the [LTC recipient] medical care and food.
- Clothing, shelter, and other necessities of life such that the [LTC recipient’s] health or life would NOT be endangered.”

Id. § 2345 at 1-2.

Protecting Same-Sex Couples

The CMS Letter indicates that states may expand the definition of “undue hardship” from transfer penalties beyond the circumstances described by federal law. (“States have considerable flexibility in determining whether undue hardship exists, and the circumstances under which they will not impose transfer of asset penalties”). In the context of transfer penalties, the Georgia Medicaid Manual strictly limits undue hardship waivers to applicants who would be deprived of medical care or other life necessities without coverage and who are able to demonstrate that they have sought to regain possession of the transferred asset through “legal action and equitable remedies.” Georgia Medicaid Manual at § 2345-2. These current standards would be especially difficult to prove when the asset has been transferred to a same-sex partner. In order to offer protection to recipient’s partners under the hardship waiver, Georgia would have to issue guidance and amend its Medicaid Manual to include separate circumstances under which an “undue hardship” would exist if a recipient were rendered ineligible because he or she transferred a home or other assets (up to the CSRA limit).⁴⁶ Affording same-sex couples in Georgia protection from asset transfer penalties could thus be achieved through guidance by amending the Medicaid Manual. Because language in the Medicaid State Plan is similarly restrictive, the plan would have to be amended to reflect these policy changes. DCH has the authority to implement this change (through guidance and amendment to the State Plan) in Georgia.

PROCEDURE FOR CHANGING GEORGIA’S MEDICAID PLAN

Substantive changes that can be accomplished through changes in regulations or sub-regulatory guidance may still require review and at least tacit approval by the governor.

States’ Medicaid Plans (“State Plans”) also may have to be amended if statutes, regulations, and/or guidance are amended to protect same-sex couples. A State Plan “describes the nature and scope” of a state’s Medicaid program and provides “assurance [to CMS] that [the program] will be administered in conformity with [federal law].”⁴⁷ The CMS Letter advises that states are “encouraged” to incorporate criteria regarding liens in their Medicaid Plans, does not specify whether states must amend their Medicaid State Plans in order to extend the protections concerning asset transfers to same-sex couples, and notes that criteria for waiving estate recovery based on hardship should be specified in the State Plan.

State Plans, and State Plan amendments, are subject to approval by CMS.⁴⁸ The CMS approval procedure requires that the governor or the governor’s designee (usually the state

⁴⁶ If Georgia were to allow transfers of assets without penalty to a “care or support provider,” it would also have to address the Medicaid Manual provisions establishing a presumption that penalties do apply to assets transferred to a care provider (e.g. § 2342 at 4 (“If an [LTC recipient]’s asset is given to someone (other than spouse) who has provided care to the LTC recipient who at the time provided the care for free, presume that the services were intended to be provided without compensation. Thus, a transfer to a relative or others for care provided for free in the past is a transfer of assets for less than FMV. However, an individual can rebut this presumption with tangible evidence that is acceptable.”).

⁴⁷ 42 C.F.R. § 430.10.

⁴⁸ 42 C.F.R. § 430.12.

attorney general) review and comment on the State Plan before it is submitted to CMS.⁴⁹ Although this process may be required, it seems unlikely that CMS would reject changes that comport with its June 2011 Letter. This procedure is considerably more complex than can be explained in this report, and should be determined by those seeking to make these changes in Georgia.

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

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

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”

Georgia 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 policy⁵⁰ and

⁴⁹ *Id.*

⁵⁰ 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

California’s domestic partnership laws.⁵¹ These criteria have become a standard and are familiar to many government officials. Moreover, some provisions have been tested in litigation and already have been construed and validated by courts. Accordingly, an approach relying on these structures may facilitate greater standardization among states.

Mutually Dependent Partners:

A. Definitions:

- (i) “Mutually dependent partners” means two adults who have chosen to share one another's lives in a committed domestic relationship of mutual caring for whom all of the following are true:
 - (1) The partners have a common residence, are financially interdependent, and consider each other to be immediate family.
 - (2) Neither partner is married to or in a civil union or registered domestic partnership with, or has claimed a mutually dependent partnership with, any other person that has not been ended by separation, termination, dissolution or adjudication to be a nullity.
 - (3) The two partners are not related by blood in a way that would prevent them from being married to each other in their state of residence.
 - (4) Both persons are at least 18 years of age.
 - (5) Both persons are of the same sex.
 - (6) Both persons are capable of attesting that the above criteria are satisfied.⁵²
- (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.

Obligations Act, H.R. 2517, 111th Cong. (2009); Uniting American Families Act, H.R. 1024, 111th Cong. § 2(2) (2009).

⁵¹ CAL. FAM. CODE §§ 297-299.6 (2010).

⁵² 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 would raise constitutional questions.

- (iii) “Financially interdependent” means that either or both of the partners depends on financial contributions from the other to pay for common necessities of life, such as food, clothing, shelter and medical care.
 - (iv) “Caretaking authority” means authority conveyed through a formal vehicle such as a power of attorney signed when the person still had capacity, a court-ordered conservatorship, or provision for the other of daily personal care and decision-making about the common necessities of life by mutual consent given when each had the capacity.
- B. Demonstrating that two persons are mutually dependent partners: The fact that two adults are mutually dependent partners may be demonstrated by the following:
- (1) The partners have executed a document attesting to the elements listed in (a)(i)(1)-(6) above.
 - (2) The partners have entered into a legal status such as a civil union, domestic partnership, or similar status under the laws of any state or the District of Columbia, whether or not such status is recognized for other purposes under state law.
 - (3) One partner does not have capacity to attest to the elements listed in (a) (i)(1)-(5) above, and the other partner attesting to the elements in (a)(i)(1)-(5) has caretaking authority with respect to the other partner.
 - (4) Neither partner has capacity to attest to the elements listed in (a) (i) (1)-(5) above, but each one’s legal representative attests to the elements on behalf of the represented partner.⁵³

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

⁵³ 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.

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.”⁵⁴

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 GEORGIA’S CONSTITUTIONAL AND STATUTORY LIMITATIONS ON SAME-SEX RELATIONSHIP RECOGNITION

Georgia’s constitution provides that the “state shall recognize as marriage only the union of man and woman” and prohibits “[m]arriages between persons of the same sex.”⁵⁵ The state constitution also provides that “[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.”⁵⁶ Similarly, a Georgia statute declares it “to be the public policy of this state to recognize the union only of man and woman”⁵⁷ and provides that “[n]o marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage.”⁵⁸ 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 union...entitled to the benefits 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.⁵⁹ The supreme

⁵⁴ 55 PA. CODE § 258.10(b) (2011).

⁵⁵ GA. CONST. ART. I, § IV, PARA. I(a) (2011).

⁵⁶ GA. CONST. ART. I, § IV, PARA. I(b) (2011).

⁵⁷ O.C.G.A. § 19-3-3.1(a) (2011).

⁵⁸ O.C.G.A. § 19-3-3.1(b) (2011).

⁵⁹ 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).

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,⁶⁰ and those benefits remain in place despite constitutional prohibitions on marriage and preexisting statutory bans on relationship recognition of broader scope.⁶¹

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, 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,⁶² 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.”⁶³ 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.⁶⁴

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.⁶⁵ Similarly,

⁶⁰ *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).

⁶¹ 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).

⁶² SALT LAKE CITY, UTAH, CODE § 10.03.010 (2010).

⁶³ UTAH CONST. art. I, § 29 (2010).

⁶⁴ *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).

⁶⁵ 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).

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.⁶⁶ In 2010, taxpayers challenged the domestic partnership law⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰

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.”⁷¹ Michigan’s high court held that the plain language of that provision precluded such domestic partner coverage.⁷² The court ruled that, when determining whether

⁶⁶ WIS. STAT. § 770 (2010).

⁶⁷ *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011).

⁶⁸ WIS. CONST. art. XII, § 13.

⁶⁹ *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).

⁷⁰ *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).

⁷¹ MICH. CONST. art 1, § 25.

⁷² *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

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.”⁷³

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 Georgia, 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 Georgia’s Medicaid program. As a general matter, however, a Georgia 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.⁷⁴

CONCLUSION

Georgia can implement the impoverishment protections identified in the CMS Letter by adopting appropriate policies to protect same-sex partners of LTC recipients. Specifically, Georgia can extend protection from lien imposition and estate recovery to same-sex partners through administrative regulation, and could extend protection from transfer penalties

⁷³ 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 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.

⁷⁴ 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/>.

through administrative guidance. Although there currently is no formal status for recognizing same-sex couples under Georgia law, Georgia 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. Georgia’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. DCH has the authority to make all of the changes to Georgia’s Medicaid program identified in this report.