



Client Alert



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CMS Issues Guidance to State Medicaid Programs on Options for Protecting the Assets of Same-Sex Couples

The admission of a loved one to a nursing home involves a host of difficult decisions, including financial decisions that can affect spouses and other family members. To qualify for Medicaid, the nation's largest payor for nursing home services, an individual must "spend down" or exhaust most of his or her personal resources. Generally speaking, the Medicaid program contains certain protections for the spouses of Medicaid recipients in nursing home; such protections, however, do not typically apply to same-sex couples.

On June 10, 2010, the Centers for Medicare & Medicaid Services (CMS), which is the federal agency that oversees state Medicaid programs, issued guidance to state Medicaid directors designed to clarify existing options and flexibilities regarding the application to same-sex couples of certain financial protections from Medicaid liens, transfer of asset penalties and estate recovery mechanisms. In the accompanying press release, Health and Human Services Secretary Kathleen Sebelius noted that "[l]ow-income same-sex couples are too often denied equal treatment and the protections offered to other families in their greatest times of need. This is now changing. Today's guidance represents another important step toward ensuring that the rights and dignity of every American are respected by their government."

Federal law permits state Medicaid programs to impose liens on the property of Medicaid recipients who reside in nursing homes, but also provides protections from such liens in certain situations, including where a recipient's spouse or children remain in the home. CMS's June 10 guidance does not require a change in state policy, but clarifies that states can implement policies or rules prohibiting the imposition of liens when a same-sex spouse or domestic partner continues to reside in the recipient's home.

States are also required to have provisions related to the transfer of assets by a Medicaid recipient in a nursing home for less than fair market value. These provisions require the calculation and imposition of a penalty in the form of a period of ineligibility for long-term care coverage when such a transfer has been made within the statutorily-defined "look back" period. Federal law exempts certain transfers, however, including transfers made by a recipient to a spouse or for the sole benefit of a spouse and where the imposition of the penalty would result in an "undue hardship." CMS's guidance clarifies that "States may adopt criteria, or even presumptions, that recognize that impos-

ing transfer of assets penalties on the basis of the transfer of ownership interests in a shared home to a same-sex spouse or domestic partner would constitute an undue hardship.”

CMS’s June 10 letter also offers guidance on estate recovery, which federal law requires state Medicaid programs to pursue for recipients who have received certain services, including Medicaid payments for nursing home care. Current law provides that estate recovery may not be made in certain situations, such as where there is a surviving spouse. CMS clarified that state programs also have the discretion to establish reasonable protections against estate recovery that are applicable to same-sex spouses or domestic partners of deceased Medicaid recipients.

As noted, CMS’s letter constitutes guidance to the states, but does not require that any such changes in policy be made. Ultimately, state Medicaid programs are administered by the states, and any changes will be implemented at the state level. According to Cindy Mann, the deputy administrator of CMS who directs the Medicaid division within the agency, CMS wants “to assure states that they are within the law when they make the choice to extend equal financial rights and protections to all of their citizens receiving Medicaid services, regardless of sexual orientation.” Whether such changes will be implemented remains to be seen.

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