



Center for Medicaid, CHIP and Survey & Certification

SMDL # 11-006

June 10, 2011

**RE: Same Sex Partners and Medicaid Liens,
Transfers of Assets, and Estate Recovery**

Dear State Medicaid Director:

The purpose of this letter is to ensure that States are informed of the existing options and flexibilities regarding the application of Medicaid liens, transfer of assets, and estate recovery. Specifically, this letter is intended to advise States of existing choices and options regarding spousal and domestic partner protections related to liens, transfer of assets, and estate recovery.

Liens:

Section 1917(a) of the Social Security Act (the Act) allows, but does not require, States to impose liens on the property of a Medicaid beneficiary under certain circumstances.

More specifically, liens are permitted in two instances prior to a beneficiary's death:

- 1) when there has been a court judgment that benefits were incorrectly paid; or
- 2) when the lien is imposed against the real property of an individual
 - a. who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if the individual is required to spend for medical care all but a minimal amount of his or her income, and
 - b. with whom the State determines that the individual cannot reasonably be expected to be discharged from the institution and return home.

State plans must specify the medical assistance services that are subject to recovery.

Section 1917(a)(2) of the Act provides important beneficiary protections from liens. Liens may not be imposed in instances where certain people are lawfully residing in the home. These individuals include:

- 1) a spouse (as defined in the Defense of Marriage Act of 1996 [DOMA] Pub. L. No. 104-199),
- 2) a child under age 21,
- 3) children who are blind or totally/permanently disabled, and
- 4) siblings residing in the beneficiary's home who have an equity interest in such home and were residing in the home for at least 1 year immediately before the date the individual was admitted to the medical institution.

The Federal beneficiary protections listed above represent the minimum level of protection, in other words, the “floor” for protection from imposition of liens, that must be implemented by the State. States have considerable flexibility to determine the “ceiling” for such protection and to develop their own rules regarding when they will impose/pursue liens, as long as the Federal beneficiary protections noted above are fully implemented. A State can have a policy or rule not to pursue liens when the same-sex spouse or domestic partner of the Medicaid beneficiary continues to lawfully reside in the home.

States choosing not to pursue liens when the same-sex spouse or domestic partner beneficiary continues to lawfully reside in the home would exercise their existing discretion in determining the scope or circumstances, either prior to, or when pursuing liens. States are encouraged to incorporate their criteria for determining when to impose a lien in the Medicaid State plan.

Transfers of Assets:

States are required to have provisions regarding transfers of assets for less than fair market value under sections 1902(a)(18) and 1917(c) of the Act. A State Medicaid plan must provide that, if an institutionalized individual or the spouse of an individual transfers assets for less than fair market value after the “look-back” date defined in the statute, the State will calculate and impose a period of ineligibility. Medicaid payment is not available for the long-term care services the individual receives during the period of ineligibility, although the individual remains eligible for Medicaid coverage of non-long term care State plan services.

While periods of ineligibility are generally required, the Act establishes certain exceptions to the provisions regarding transfers of assets to prevent hardship, allowing individuals who have transferred assets to receive long-term care services without the imposition of any penalty period in certain circumstances. The statute specifically exempts transfers of any type of asset to a spouse or to another person for the sole benefit of the spouse under section 1917(c)(2)(B)(i) of the Act, and also exempts the transfer of a home to a spouse under section 1917(c)(2)(A)(i) of the Act. The exemptions for transferring assets to a spouse cannot be directly applied to same-sex spouses or partners as a result of DOMA.

However, under section 1917(c)(2)(D) of the Act, a transfer of assets penalty period will not be applied if the State determines, under procedures established by the State, that denial of eligibility would create an undue hardship. The Deficit Reduction Act of 2005 (DRA, Pub. L. No. 109-171) provided that, in applying this provision, States should determine that an undue hardship exists when application of the transfer of assets penalty and denial of eligibility for Medicaid payment for long-term care would deprive the individual of medical care such that the individual’s health or life would be endangered, or the individual would be deprived of food, clothing, shelter, or other necessities of life.

The Centers for Medicare & Medicaid Services has provided guidance on undue hardship determinations in the State Medicaid Manual and in a State Medicaid Director letter (SMD #06-018, dated July 27, 2006) emphasizing that States have considerable flexibility in determining whether undue hardship exists, and the circumstances under which they will not impose transfer of assets penalties. Because of the flexibility afforded to States in determining undue hardship, we believe that States may adopt criteria, or even presumptions, that recognize

that imposing 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.

Estate Recovery:

Sections 1902(a)(18) and 1917(b)(1) of the Act require States to pursue estate recovery when a Medicaid beneficiary received medical assistance under the State plan: 1) in cases where a lien has been imposed under the State's lien authority, and 2) for recipients age 55 and over, who received nursing facility services, home and community-based services, or related hospital and prescription drug services. States may optionally seek recovery to pay for costs of other approved State plan services provided to those 55 and over, except Medicare cost sharing paid on behalf of Medicare Savings Program beneficiaries on or after January 1, 2010, as provided in Section 115 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), Pub. L. 110-275).

Per section 1917(b)(2) of the Act, Medicaid estate recovery may be made only when there is no surviving spouse (subject to the provisions in DOMA) and when there is no surviving child under age 21, or blind or disabled child of any age. When estate recovery occurs pursuant to a lien, protections are afforded for siblings still lawfully residing in the home, as well as for sons or daughters who provided care to the parents and who continue to lawfully reside in the home.

In addition, States are required by section 1917(b)(3) of the Act to have procedures to waive estate recovery where it would create an undue hardship for the deceased Medicaid recipient's heirs. States have flexibility to design reasonable criteria for determining what constitutes an undue hardship and who may be afforded protection from estate recovery in such instances. At the State's discretion, this may include establishing reasonable protections applicable to the same-sex spouse or domestic partner of a deceased Medicaid recipient. The State plan need only specify the criteria for waiver of estate recovery claims due to undue hardship.

We hope this guidance regarding existing options for liens, transfer of assets, and estate recovery provides useful clarification regarding State plan flexibilities available to all Medicaid recipients, regardless of sexual orientation. If you have any questions regarding the guidance pertaining to liens and estate recovery, please contact Nancy Dieter, Technical Director, Division of Integrated Health Systems at 410-786-7219, or by email at nancy.dieter@cms.hhs.gov. Questions pertaining to transfers of assets may be referred to Roy Trudel, Technical Director, Division of Eligibility, Enrollment and Outreach at 410-786-3417, or by email at roy.trudel@cms.hhs.gov.

Sincerely,

/s/

Cindy Mann
Director

cc:

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