



# LGBT OLDER ADULTS AND LONG-TERM CARE UNDER MEDICAID

September 2010



## ISSUE SUMMARY

Older Americans requiring long-term institutional or home-based care generally have such care paid for by Medicaid. Only individuals with low assets and income can qualify for Medicaid, but Medicaid qualification rules also include a series of “spousal impoverishment protections” that aim to prevent requiring a healthy spouse<sup>1</sup> to live in poverty in order to qualify a sick spouse for Medicaid. Unfortunately, these spousal impoverishment protections do not apply to same-sex couples, which can leave the same-sex partner of a Medicaid recipient homeless, penniless, and without a living wage income.

## LACK OF CRITICAL SAFETY NET LEADS TO IMPOVERISHMENT OF LGBT ELDERS

Medicaid is the single largest payer of long-term care in the U.S.<sup>2</sup> (Medicare generally does not cover the costs of institutional care or long-term home and community-based services (HCBS).) This makes Medicaid relevant to the 4% of older adults who live in institutional settings such as nursing homes,<sup>3</sup> as well as to the estimated 65%-70% of elders who will need some other form of long-term care services in their later years.<sup>4</sup>

Regardless of where services are provided, long-term care is costly. A year’s stay in a nursing home averages \$68,000 nationwide,<sup>5</sup> and in-home services cost an average of \$18,000 per year, although these costs are often much higher for individuals needing more intensive in-home services.<sup>6</sup> If an older person who needs these services cannot pay for them privately, or lacks long-term care insurance (only about 10% of all older adults have such insurance),<sup>7</sup> he/she must turn to Medicaid to pay for needed long-term care.<sup>8</sup>

Medicaid qualification rules vary by state, marital status, and the type of care received. Generally, Medicaid rules require elders to “spend down” their income and assets on long-term care services until these financial resources are largely depleted. For married heterosexual applicants, Medicaid offers exemptions to ensure that a healthy partner does not have to live in poverty to qualify a spouse for long-term care. Under these rules, if one spouse needs long-term care through Medicaid (the “long-term care beneficiary”), the other spouse (generally referred to as the “healthy spouse” or the “community spouse”) could keep the home, substantial assets and a living-wage income.

Unfortunately, these spousal impoverishment protections do not apply to other types of family structures, including same-sex couples, families of choice (such as two friends who own a home together), or elder heterosexual couples who live together but are not married. (See *Figure 1* on following page).

## FEWER ASSETS EXEMPTED IN MEDICAID ELIGIBILITY FORMULAS

For a heterosexual spouse to qualify for either institutional care or HCBS, Medicaid typically pools the couple’s assets and allows the healthy spouse to keep the greater of 100% of the assets up to \$21,912, or 50% of the assets up to a maximum of \$109,560.<sup>9</sup> In contrast, an LGBT elder must always apply as a single person<sup>10</sup> and is therefore only entitled to keep a mere \$2,000 in countable assets. The same-sex healthy partner (a legal stranger under the law) can keep any and all assets in his or her own name, but is not entitled to any assets or property held by the partner receiving long-term care.<sup>11</sup> Generally, the current rules hurt low-income same-sex couples (who make up the majority of couples)

<sup>1</sup> For ease of understanding, we use “healthy spouse” or “healthy partner” throughout this brief, though we note that in reality, this person may not always be healthy.

<sup>2</sup> Over half (52%) of residents in nursing homes are Medicaid recipients. From *Across the States: Profiles of Long-Term Care and Independent Living*, AARP, 2009.

<sup>3</sup> In 2007, 4.4% of the 65+ population lived in institutional settings. From *A Profile of Older Americans: 2008*, Administration on Aging, U.S. Department of Health and Human Services, 2008.

<sup>4</sup> 65% estimate is from P. Kemper et. al., “Long-term Care Over an Uncertain Future: What Can Current Retirees Expect?” *Inquiry* 2005; 42(4): pp. 335-350; 70% estimate is from the National Clearinghouse for Long-Term Care Information. [http://www.longtermcare.gov/LTC/Main\\_Site/Paying\\_LTC/Costs\\_Of\\_Care/Costs\\_Of\\_Care.aspx](http://www.longtermcare.gov/LTC/Main_Site/Paying_LTC/Costs_Of_Care/Costs_Of_Care.aspx).

<sup>5</sup> National Clearinghouse for Long-Term Care, 2008. Costs averaged \$74,000 in the MetLife Mature Market Institute study (2006).

<sup>6</sup> National Clearinghouse for Long-Term Care, 2008.

<sup>7</sup> “Protecting the Value Of Long-Term Care Insurance,” *Medical News Today*, June 8, 2009.

<sup>8</sup> There are other federal public programs, such as the Older Americans Act or state-funded programs, that pay for some long-term care services, but Medicaid is by far the biggest public payer of long-term care.

<sup>9</sup> These are 2009 asset limits; limits are adjusted annually. Note that rules vary somewhat by state (for example, some states allow the healthy spouse to keep 100% of the assets up to the \$109,560 cap).

<sup>10</sup> A same-sex partner must apply as single because, even if married, that marriage will not be recognized.

<sup>11</sup> Non-countable assets include personal possessions; a motor vehicle; the applicant’s home; prepaid funeral plans; and a small amount of life insurance.

**Figure 1: Medicaid Rules Create Shocking Disparities**

		What can the healthy partner keep?*		
		Assets	Home	Income
 <p><b>Heterosexual couple</b></p>	Half or more of spouse's assets up to \$109,560	Always, till death of healthy spouse	100% of spouse's income up to \$1,750/mo income cap for healthy spouse	
	 <p><b>Same-sex couple</b></p>	\$0 of partner's assets	Often loses home	\$0 of partner's income

\* This scenario is based on the one spouse requiring long-term institutional care

while protecting a wealthy minority of same-sex couples—the exact opposite of the law's purpose.

For example, consider Joe, who must enter an institution and has \$50,000 in individual assets. If Joe is heterosexual and his wife Sally has \$10,000 in individual assets, Sally is entitled to keep between \$30,000 and \$60,000 of their combined assets, depending on the state in which she lives.<sup>12</sup> If Joe is gay, and his partner George has \$10,000 in individual assets, George can only keep his own \$10,000. George is \$20,000-\$50,000 worse off than Sally, simply because he is gay. Conversely, if George were wealthy in this example, he could keep all of his assets, whereas Sally could not keep more than the asset limit of \$109,560.<sup>13</sup>

In regards to non-liquid assets, a heterosexual healthy spouse can keep the couple's home (without equity limit), household goods, an automobile and burial funds until his or her own death. In contrast, a same-sex healthy partner risks losing any or all of these assets unless the assets have been in the sole name of the healthy partner for at least five years. If the home is in the name of the long-term care beneficiary, the healthy partner risks losing the home immediately and will certainly lose it upon the death of the partner in long-term care. Even if the home is jointly owned, the healthy partner risks losing the home, and Medicaid will almost certainly place a lien on the home, creating problems if the long-term care beneficiary dies or the healthy partner wants to move. Furthermore, a same-sex couple cannot protect the healthy partner by transferring assets or property to the healthy partner. Medicaid will "look back" for five years for any asset transfers, and, if it finds any, will evoke a "penalty period," which in effect will cost the applicant a sum equivalent to that of the asset transfer.<sup>14</sup>

See *Figure 2* for an example of how current Medicaid spend-down rules can impoverish same-sex couples and leave them homeless.

## LESS INCOME EXEMPTED IN MEDICAID ELIGIBILITY FORMULAS

To assess an individual's eligibility for care, Medicaid only considers the income of the long-term care beneficiary (the healthy spouse can keep all of his or her individual income). For an unmarried institutionalized individual, on average, all but about \$60 per month must go toward nursing home expenses.<sup>15</sup> However, since HCBS recipients must cover their own living expenses, most states allow unmarried HCBS recipients to keep, at a minimum, the Supplemental Security Income (SSI) rate of \$674 per month, and many allow higher incomes.<sup>16</sup>

For married couples, the rules are more generous than for single elders. Medicaid law generally allows a married person to keep some personal income as described above, and to share some or all of his or her remaining income with the healthy spouse. This income sharing is capped at the maximum spousal allowance set by Medicaid, generally \$1,750 per month.<sup>17</sup>

Therefore, a single HCBS recipient might only be allowed an income of \$674 per month, while a couple in the same state might be able to keep \$2,424 per month in joint income (\$674 for the Medicaid recipient and \$1,750 for the healthy spouse). This profoundly disadvantages single elders because, while the cost of living for a couple averages only 35% higher than the cost of living for an individual,<sup>18</sup> Medicaid might allow a heterosexual couple to keep more than three-and-a-half times as much income.

Medicaid treats same-sex couples the same way as single elders. While heterosexual couples can use the income of the long-term care beneficiary to supplement the income of the healthy spouse, same-sex couples have no such option. So if George, who is heterosexual, earns \$2,000 in monthly income and is married to Maria, who earns \$750 in monthly income, Maria can use George's income to supplement her own, leaving Maria at the maximum spousal allowance of \$1,750 (her \$750 in income plus \$1,000 from George). However, if Christine, who is a lesbian, earns \$2,000 in income and is partnered with June, who earns \$750 in income, June would only be left with her own \$750 in income, leaving her well below the poverty line (see *Figure 3*). Once again, this differential treatment only negatively impacts the poorest LGBT elders.<sup>19</sup>

<sup>12</sup> Some states would allow Sally to keep half of the joint assets while others would allow her to keep 100% of the assets up to the legal maximum, or \$109,560.

<sup>13</sup> For example, if George had \$250,000 in individual assets, as a legal stranger to Joe, he would not be required to spend down any of these assets in order to qualify Joe for Medicaid.

<sup>14</sup> For example, if a person lives in a state where the average monthly cost of care has been determined to be \$5,000, and that person gives away property worth \$100,000 during the look-back period, he or she will be ineligible for benefits for 20 months ( $\$100,000 \div \$5,000 = 20$ ).

<sup>15</sup> The income limit (known as the personal maintenance allowance) varies by state and type of care.

<sup>16</sup> The income limit and methodology for setting it varies by state and is generally based on some multiple of the federal Supplemental Security Income (SSI) rate or federal poverty level.

<sup>17</sup> Spousal allowance limits also vary by state. For institutional care, \$1,750 is the most typical limit for 2009, though the allowance may be as high as \$2,739 per month. For HCBS, the spousal limit generally falls between the SSI rate of \$674 per month and the more typical limit of \$1,750. <http://www.elderlawanswers.com/resources/article.asp?id=7228&Section=4&state>.

<sup>18</sup> MAP analysis based on the difference of the Federal Poverty Line in 2009 for an individual vs. a two-person household, as found at <http://aspe.hhs.gov/poverty/09poverty.shtml>.

<sup>19</sup> Wealthier couples or healthy spouses, whether LGBT or heterosexual, have sufficient income that they would not require (or be eligible for) the spousal income supplement.

**Figure 2: How Medicaid Asset Spend-Down Rules Can Impoverish Same-Sex Couples**

	Initial Assets	Medicaid Spend-down	Final Assets	
 George (l/t care recipient) Maria (healthy spouse)	<ul style="list-style-type: none"> <li>• \$25,000 in joint savings</li> <li>• Home worth \$90,000</li> </ul>	<ul style="list-style-type: none"> <li>• Maria can keep 100% of first \$21,912</li> <li>• Maria can keep home</li> </ul>	Maria keeps: <ul style="list-style-type: none"> <li>• \$21,912 in savings</li> <li>• \$90,000 home</li> </ul>	<b>\$22K</b> savings 
 Christine (l/t care recipient) June (healthy spouse)	<ul style="list-style-type: none"> <li>• \$25,000 in joint savings</li> <li>• Home worth \$90,000 in Christine's name</li> </ul>	<ul style="list-style-type: none"> <li>• Medicaid requires spend-down of half of the joint savings</li> <li>• When Christine dies two years later, Medicaid sues June, who has inherited the home, for back costs, forcing sale of the home</li> </ul>	<ul style="list-style-type: none"> <li>• June keeps \$12,500 in savings</li> <li>• June is homeless</li> </ul>	<b>\$12.5K</b> savings 

**Figure 3: How Medicaid Income Rules Can Impoverish Same-Sex Couples**

	Initial Monthly Income	How Medicaid Treats the Income Given a \$1,750 Spousal Income Allowance	Final Monthly Income of Community Spouse	Income as Percent of Federal Poverty Level
 George (l/t care recipient) Maria (healthy spouse)	\$2,000 \$750	<ul style="list-style-type: none"> <li>• \$60 personal allowance</li> <li>• \$1,000 to supplement community spouse</li> <li>• \$940 goes to nursing home to defray Medicaid's costs</li> <li>• Can keep \$750 in income</li> </ul>	<ul style="list-style-type: none"> <li>• Maria has \$1,750 in monthly income</li> <li>• Only \$940 of George's monthly income pays for Medicaid</li> </ul>	<b>194%</b> (well above poverty line) 
 Christine (l/t care recipient) June (healthy spouse)	\$2,000 \$750	<ul style="list-style-type: none"> <li>• \$60 personal allowance</li> <li>• \$1,940 to pay for nursing home care</li> <li>• Can keep \$750 in income</li> </ul>	<ul style="list-style-type: none"> <li>• June has \$750 in monthly income</li> <li>• A full \$1,940 of Christine's monthly income pays for Medicaid</li> </ul>	<b>83%</b> (below poverty line) 

## POLICY SOLUTIONS

### MARRIAGE

Most same-sex couples cannot marry, but even where legal at the state level, the federal government does not recognize such marriages under the Defense of Marriage Act (DOMA). This results in same-sex partners being treated as strangers for the purposes of Medicaid, even when legally married in their state.<sup>20</sup> To extend Medicaid spousal impoverishment protection and other critical safety net programs to older same-sex couple, Congress must repeal DOMA and states need to establish marriage for all couples. However, in absence of full marriage equality, and to protect other financially interdependent older adults, policymakers should consider the following federal and state solutions.

### OTHER FEDERAL SOLUTIONS

A solution at the federal level is to make married same-sex couples, “permanent partners,” “domestic partners,” those in “civil unions,” or other financially interdependent individuals eligible for Medicaid spousal protections. This could be done by adding these partners to the already enumerated list of non-spousal persons who may receive assets or income from a person who is spending down in order to qualify for Medicaid payment of long-term care. For example, currently siblings who own a home together can transfer the home to the other sibling without incurring a penalty, and a parent can transfer property to a disabled child, a child under 21, or an adult child who has lived with and provided care to the parent for the past two years.

The federal government, such as the Centers for Medicare and Medicaid Services (CMS), should also clarify state flexibility in interpreting existing Medicaid guidelines (see below).

### OTHER STATE SOLUTIONS

While Medicaid policy is primarily set at the federal level, states have several options for protecting the healthy spouses of LGBT elders requiring Medicaid.

- States may electively extend spousal impoverishment protections to same-sex couples, domestic partners and other financially interdependent individuals at the state’s expense. For example, Massachusetts and Vermont extend spousal impoverishment protections to married same-sex couples, while Washington State passed legislation that prevents the recovery of assets transferred to a heterosexual or same-sex domestic partner where a similar asset transfer would have been allowed a married couple.<sup>21</sup>

- States may take maximum advantage of the flexibility in interpreting existing federal Medicaid spend-down and cost-recovery rules. For example, states may currently opt to:
  - Allow an individual to qualify for Medicaid without having to sell and spend down the assets of a jointly owned home and/or avoid placing a lien on a jointly-owned home.
  - Allow long-term care beneficiaries to keep their homes as long as they express an intent to return home (rather than requiring medical proof of their ability to return home). This would allow a domestic partner or friend to remain in the home.
  - Upon the death of the institutionalized partner, not pursue the sale of a home for cost-recovery purposes when this type of cost-recovery would cause an “undue hardship” to a person living there. (Medicaid rules allow an exception on cost-recovery that causes an “undue hardship,” but there is limited federal guidance about what this means. States should use the undue hardship clause to protect the homes of same-sex couples and other financial interdependent individuals. Washington State will be the first to explicitly adopt this broader reading of the law.)
- States may allow single recipients of Medicaid-funded home-based care to retain a greater living wage. The personal income allowable for a single or widowed home-based care recipient is often too low to maintain a reasonable standard of living (while married couples can keep disproportionately higher income levels).<sup>22</sup> This would also help same-sex couples where the home-based care recipient is treated as a “single” person for the purposes of Medicaid law.
- States should allow LGBT home-based care recipients to use their income to support their low-income partner in the same manner as legally married couples.

<sup>20</sup>Note that on July 8, 2010, the U.S. District Court of Massachusetts ruled DOMA unconstitutional, in part due to a challenge brought forward by the state of Massachusetts, which argued that DOMA requires the state to violate the constitutional rights of its citizens by treating married same-sex couples differently when determining Medicaid eligibility. At time of writing, this decision only affects the state of Massachusetts, and it is expected that the decision will be appealed.

<sup>21</sup>In Washington State, the legislature has enacted the following protections for domestic partners: “The department shall establish procedures consistent with standards established by the federal department of health and human services and . . . waive recovery when such recovery would work an undue hardship. The department shall recognize 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.” Wash. Rev. Code § 43.20B.080(5)(a); see also Wash. Admin. Code 388-527-2750(1)(c).

<sup>22</sup>Despite the fact that the estimated cost of living for a couple is only 35% higher than the cost of living for an individual, Medicaid might allow a couple to keep over three-and-a-half times as much income. MAP analysis based on the difference of the Federal Poverty Line, 2009, for an individual versus a two-person household, as found at <http://aspe.hhs.gov/poverty/09poverty.shtml>.

## ABOUT THIS BRIEF

This is one of a series of issue briefs based on content from *Improving the Lives of LGBT Older Adults*, a report which provides an in-depth examination of the issues facing LGBT elders, and potential solutions for improving their lives. For more information, visit [www.lgbtmap.org](http://www.lgbtmap.org) or [www.sageusa.org](http://www.sageusa.org).

