



TOBY DOUGLAS
Director

State of California—Health and Human Services Agency
Department of Health Care Services



EDMUND G. BROWN JR.
Governor

December 10, 2012

TO: ALL COUNTY WELFARE DIRECTORS Letter No.: 12-36
ALL COUNTY WELFARE ADMINISTRATIVE OFFICERS
ALL COUNTY MEDI-CAL PROGRAM SPECIALISTS/LIAISONS
ALL COUNTY HEALTH EXECUTIVES
ALL COUNTY MENTAL HEALTH DIRECTORS
ALL COUNTY MEDS LIAISONS

SUBJECT: Treatment of Same-Sex Spouses and Registered Domestic Partners Subject to Transfer of Property Penalties or a Share-of-Cost (SOC) for Nursing Facility Level of Care

The purpose of this letter is for the Department of Health Care Services (DHCS) to officially instruct county welfare departments to retroactively implement the provisions of Assembly Bill (AB) 641 (Feuer-Chapter 729, Statutes of 2011) which added Welfare and Institutions Code, Section 14015.12, effective January 1, 2012.

AB 641 extends the full array of spousal protections now available to married, opposite-sex couples, to same-sex spouses and registered domestic partners through the transfer of property undue hardship provisions.

As a result of AB 641, an undue hardship exists when certain transfers of property and income, described in the letter below, have been made between same-sex spouses or registered domestic partners that would otherwise have resulted in a period of ineligibility for nursing facility level of care or an SOC. This change permits same-sex spouses and registered domestic partners to retain largely the same amount of income and property that opposite-sex spouses are permitted to retain when one of the spouses is an institutionalized spouse and the other spouse is a community spouse pursuant to All County Welfare Directors Letters (ACWDLs) 90-01 and 90-03.

BACKGROUND

In accordance with ACWDL 90-01, if an institutionalized individual makes a disqualifying transfer of property for less than fair market value in order to establish eligibility for

Medi-Cal anytime during or after the 30 months immediately preceding the most recent of the date of application or date of admission to nursing facility level of care (the “look back period”), the institutionalized individual may be subject to a period of ineligibility for Medi-Cal payment for the nursing facility level of care per diem rate only. He or she remains eligible for all other Medi-Cal covered services for which he or she would otherwise be eligible. The period of ineligibility for nursing facility level of care is equivalent to the number of months that the institutionalized individual could have paid for his/her own nursing facility level of care at the average private pay rate, had he/she retained the property. Transfers of any property between opposite-sex spouses are an exception and are not considered disqualifying transfers subject to period(s) of ineligibility for nursing facility level of care. This means the institutionalized individual’s principal residence and/or other property (separate or community) may be transferred to the opposite-sex spouse at any time without penalty. However, in accordance with ACWDL 90-01, all of the property held in the name of either or both the institutionalized individual and community spouse is considered when determining the eligibility of the institutionalized spouse.

The opposite-sex community spouse is allowed to retain the Community Spouse Resource Allowance (CSRA) which, in California, is \$115,920 for 2013 and the institutionalized spouse is allowed to retain no more than \$2,000 in available nonexempt property. Once initial eligibility for Medi-Cal is established, the institutionalized spouse can allocate monthly income in amounts sufficient to bring the community spouse’s income up to the Minimum Monthly Maintenance Needs Allowance (MMMNA) each month, known as the Spousal Income Allocation (SIA). SIA is deducted from the institutionalized individual’s income used to determine his/her SOC, if any. The CSRA and SIA are intended to protect the community spouse against impoverishment.

Under current rules, a same-sex spouse or registered domestic partner is not afforded the same protections as an opposite-sex spouse. The same-sex spouse or registered domestic partner may have to sell the home he/she shares with the institutionalized individual who no longer intends to return home. The same-sex spouse or registered domestic partner may also become impoverished when the institutionalized individual must spend down his/her share of nonexempt available property, such as other real property, bank accounts or investments, to the allowable \$2,000 limit. The same-sex spouse or registered domestic partner also loses the institutionalized individual’s income because it must be applied to the institutionalized individual’s SOC each month.

In June 2011 the Center for Medicare and Medicaid Services issued specific guidance (State Medicaid Directors Letter No. 11-006), permitting states to expand the determination of undue hardship to allow the shared principal residence to be transferred in whole or in part from one to the other same-sex spouse or registered domestic partner without penalty. The guidance also permits states to extend the transfer of property undue hardship provision to

transfers of other property, income or rights to receive income. In response to this guidance, the California Legislature enacted AB 641 and provided for the expansion of the transfer of property undue hardship criteria for same-sex spouses and registered domestic partners in California so that these spouses and partners may benefit from protections that more closely align with the protections provided to opposite-sex spouses.

As a result, when counties:

a) Consider transfers of property, and any of the transfers listed below have been made between same-sex spouses or registered domestic partners, a finding of undue hardship shall be found to exist if the institutionalized applicant/beneficiary:

1) Verifies that he/she has a same-sex spouse or registered domestic partner, or makes such attestation;

Please note: The status as a same-sex spouse or registered domestic partner is verified by an indication on the Statement of Facts or by a signed statement of the institutionalized applicant/beneficiary included with the other verification submitted to the county as described below. At the option of the applicant/beneficiary, same-sex spouse or registered domestic partner, either spouse may provide a copy of the marriage license or registered domestic partner certificate.

And,

2) Provides verification that any or all of the following transfers have been made to his/her same-sex spouse or registered domestic partner and provides verification of the net market value of those items other than the principal residence;

a. All or any portion of his/her ownership interest in the shared principal residence.

b. His/her interest in property (other than the shared principal residence), or property right (including a right to receive income) to the extent that the net market value of that property does not exceed the CSRA that would be available to that person if he/she were an opposite-sex spouse. Amounts of nonexempt available property transferred in excess of the CSRA continue to be subject to the transfer of property rules.

b) Calculate the SOC. When the requirements of 1) above have been satisfied, the county shall reduce the SOC as necessary to allow for the transfer of the SIA, if the amount of the transferred income does not cause the income of the same-sex spouse or registered domestic partner's income to exceed the MMMNA. Any amount of excess nonexempt

income transferred that causes the same-sex community spouse to exceed the MMMNA shall be deemed available to the institutionalized applicant/beneficiary and shall continue to be included in the SOC calculation. If the requirements of 1) above are not met, the county must ask the individual completing the Statement of Facts whether there is a same-sex spouse or registered domestic partner.

When considering the criteria above, the Medi-Cal eligibility determination rules contained in ACWDLs 90-01 and 90-03, applicable to opposite-sex spouses' income and property evaluations, will be used to determine the nonexempt income and property available to the institutionalized applicant/beneficiary and his/her same-sex spouse or registered domestic partner. Additionally, the CSRA and the SIA amounts may be increased using the same procedures as provided for opposite-sex spouses via fair hearing or court order.

When counties provide notice that the transfer of property undue hardship provisions are being considered and request the verification/documentation to make the undue hardship determination, counties must also present the new criteria and request the necessary verification, or attestation if needed.

Counties shall apply these new provisions retroactively to all same-sex spouses and registered domestic partners currently receiving nursing facility level of care and to those who received nursing facility level of care on or after January 1, 2012. Counties shall:

- 1) Implement these changes at application, redetermination, and whenever a case is brought to their attention.
- 2) Conduct a review of their county systems to locate and correct any periods of ineligibility for nursing facility level of care as appropriate.
- 3) Retroactively reinstate any denied or discontinued cases, retroactively correct SOC's, and void or adjust any periods of ineligibility for nursing facility level of care as appropriate.
- 4) Rescind and reissue notices of action as appropriate.
- 5) Issue MC 180s as appropriate and assist institutionalized applicants/beneficiaries and their same-sex spouses/registered domestic partners in obtaining reimbursement for Medi-Cal covered services.

DHCS will send a provider bulletin to long term care and skilled nursing facilities informing these providers of these new provisions (draft bulletin attached).

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Please note: The instructions for other Medi-Cal and state-only programs contained in ACWDLs 09-03 and 09-04 remain unchanged.

If you have any questions or if we can provide further information, please contact Sharyl Shanen-Raya at (916) 552-9449 or by email at Sharyl.Shanen-Raya@dhcs.ca.gov.

Original signed by Azadeh Fares

Azadeh Fares, Chief (Acting)
Medi-Cal Eligibility Division

Enclosure

Provider Bulletin
Implementation of Assembly Bill 641
Treatment of Transfers of Resources/Income for Same Sex Spouses and Registered
Domestic Partners

The purpose of this bulletin is to inform long term care, skilled nursing facility and intermediate medical facility for the mentally retarded providers of the provisions of Assembly Bill (AB) 641 (Feuer).

AB 641 extends the full array of spousal protections now available to married, opposite-sex couples, to same-sex spouses and registered domestic partners through the transfer of property undue hardship provisions.

As a result of AB 641, an undue hardship exists when certain transfers of property and income, described in the letter below, have been made between same-sex spouses or registered domestic partners that would otherwise have resulted in a period of ineligibility for nursing facility level of care or an SOC. This change permits same-sex spouses and registered domestic partners to retain largely the same amount of income and property that opposite-sex spouses are permitted to retain when one of the spouses is an institutionalized spouse and the other spouse is a community spouse .

These new provisions will be applied retroactively to all same-sex spouses and registered domestic partners currently receiving nursing facility level of care and to those receiving nursing facility levels of care back to January 1, 2012. Counties will evaluate applications from same-sex spouses and registered domestic partners who were assessed periods of ineligibility or had a share of cost for nursing facility levels of care back to January 1, 2012. Counties will also review cases at annual redetermination, state hearings, or whenever a case is brought to the counties' attention, and apply these new policies retroactive to January 1, 2012.

If nursing facility staff are aware of any cases that might be affected by these new provisions please have the beneficiary, their registered domestic partner or same sex spouse, or their representative contact the county so the county can re-evaluate the case.