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A Major Step on Medicaid

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WHITE HOUSE/PETE SOUZA

Will Attorney General Eric Holder (r., looking on as the president exits the House chamber after his 2010 State of the Union address) apply the "undue hardship" concept articulated in the new Medicaid policy to the case of binational same-sex couples?

■ POLITICS

A Major Step on Medicaid

Obama administration highlights ways to protect assets of same-sex couples

BY ARTHUR S. LEONARD

With the House of Representatives in GOP hands and the number of Republicans in the Senate sufficient to prevent a vote on anything they solidly oppose, the Obama administration is limited in what it can currently deliver for the LGBT community through legislative means.

But the administration's process of scrutinizing existing statutes and regulations to figure out what might be achieved through Executive Branch actions — an effort begun with a presidential instruction issued during LGBT Pride Month in 2009 — continues.

The most recent is a June 10 letter from the federal Centers for Medicare & Medicaid Services to state Medicaid directors, advising them of circumstances in which their programs may voluntarily take account of same-sex partner relationships in ways advantageous to gay and lesbian couples receiving Medicaid.

"Medicaid gives states remarkable flexibility to set these kinds of policies," said Cindy Mann, the Centers' deputy administrator, said in a written release. "We want 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."

The first situation the letter addresses concerns a provision of the Social Security Act that allows states to impose liens on a Medicaid beneficiary's property if a court determines benefits were improperly paid or if where that recipient is institutionalized and not expected to be able to return home. The statute specifies that states may not impose such

liens if that property is occupied by a spouse, a minor child, or a blind or disabled child of any age.

The administration's letter suggests states could voluntarily decide not to impose liens on property occupied by a Medicaid recipient's same-sex spouse or domestic partner. In fact, the Obama administration encourages states to amend their Medicaid plans to make this remedy explicit.

The second situation concerns the penalties imposed on Medicaid recipients who hasten their benefits eligibility by spending down their assets in transfers made at less than fair-market value. When the government discovers such transactions, it imposes penalties in the form of ineligibility time periods, but there are exceptions in cases of asset transfers to spouses and in certain "undue hardship" situations.

The federal government advises that transfers to same-sex spouses and domestic partners can be covered as such a hardship situation.

Finally, federal law lays out conditions under which state Medicaid programs can seek recovery against the estates of deceased Medicaid beneficiaries to recoup benefit expenses, but that action is authorized only if there is no surviving spouse or minor or disabled child. Again, there is also an undue hardship exception, which the administration says states have the discretion to apply to surviving same-sex partners.

Though highly technical, these remedies can be crucial for families affected, and the Medicaid letter is another in a long and growing list of instances in which the Obama administration has combed existing law and regulations to



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► **DOMA**, from p.26

judges not only endorsed Holder's view, they also cited binding precedent from the 9th Circuit, in which they serve, from Major Margaret Witt's successful challenge to the Air Force's discharge of her under Don't Ask, Don't Tell. In that case, the 9th Circuit Court of Appeals said that heightened scrutiny was appropriate and that the government could not meet that standard in defending the discharge. (That case has been settled, and the government will not appeal.)

Pointing to the 9th Circuit's "direction" in the Witt case, the judges found that dismissing the Balas-Morales bankruptcy petition would not advance any of the "governmental interests" identified in the legislative history of DOMA as it moved through Congress in 1996. Indeed, there is no evidence Congress considered the

practical implications — or even the possibility — of DOMA denying married same-sex couples the ability to file a joint bankruptcy petition.

After carefully examining how sexual orientation discrimination meets the criteria for heightened judicial scrutiny, the bankruptcy judges hedged their bets, concluding that even under a less demanding test — putting the burden on the challengers to show that the government has no rational basis for DOMA's application in the bankruptcy context — the law would fail.

In laying out its analysis, the court offered an extraordinarily passionate criticism of Congress' passage of DOMA.

"Although individual members of Congress have every right to express their views and the views of their constituents with respect to their religious beliefs and principles and their personal standards

of who may marry whom, this court cannot conclude that Congress is entitled to solemnize such views in the laws of this nation in disregard of the views, legal status, and living arrangements of a significant segment of our citizenry that includes the Debtors in this case," the court wrote. "To do so violates the Debtors' right to equal protection of those laws embodied in the due process clause of the Fifth Amendment."

Concluding its opinion, the court cited Supreme Court Justice William O. Douglas' majority opinion in *Griswold v. Connecticut*, the 1965 decision that struck down a ban on the sale of contraceptives to married adults.

"We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system," Douglas wrote. "Marriage is a coming together for better or for worse,

hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not in political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any."

Donovan wrote, "No one expressed the Debtors' view as pertinent to this simple bankruptcy case more eloquently and profoundly than Justice William O. Douglas."

It will now be interesting to see whether Boehner and his majority in the House Advisory Group decide to attempt an appeal to the 9th Circuit, a court that recently upheld the application of heightened scrutiny in the Witt Don't Ask, Don't Tell case. One suspects that the 9th Circuit is not the place where the House Republican leadership would want this issue decided.

► **MEDICAID**, from p.25

recognize and provide benefits to same-sex partners and their families.

Because of the Defense of Marriage Act, the administration's efforts remain limited, and some gay rights opponents may argue Obama is pushing the limits and has perhaps gone over the line. Election of a Republican president in 2012 could lead to a pullback in reforms the president has initiated, just as the Bush

administration retreated on the protections for gay federal employees earlier pioneered by the Clinton administration.

One area, however, where the administration has yet to move decisively is in dealing with the status of binational same-sex partners. Although it has voluntarily suspended deportation of surviving different-sex spouses of US nationals — pending legislative action to deal with a gaping hole in existing law — it has refused to commit to halt-

ing removal of same-sex partners, insisting that any definitive action must await comprehensive immigration reform.

As with Medicaid, however, DOMA could be construed as not being an absolute bar to exercising discretion under the rubric of "undue hardship." In South Africa, for example, the Constitutional Court ruled this is an issue involving the right of intimate association of a citizen who does not want to be forcibly parted from his or her same-sex partner. The

Department of Justice could adopt similar reasoning to suspend deportations in cases of documented committed same-sex partners.

Perhaps Attorney General Eric Holder's recent intervention in one such deportation case — involving a couple in a New Jersey civil union — suggests this other shoe is soon to drop, but so far the Justice Department has denied that action signals a more general change in policy.

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