

Potential Changes to Medicaid Long-Term Care Spousal Impoverishment Rules: States' Plans and Implications for Community Integration

MaryBeth Musumeci, Kaiser Family Foundation, and Molly O'Malley Watts, Watts Health Policy Consulting

Executive Summary

To financially qualify for Medicaid long-term services and supports (LTSS), an individual must have a low income and limited assets. In response to concerns that these rules could leave a spouse without adequate means of support when a married individual needs LTSS, Congress created the spousal impoverishment rules in 1988. Originally, these rules required states to protect a portion of a married couple's income and assets to provide for the "community spouse's" living expenses when determining nursing home financial eligibility, but gave states the option to apply the rules to home and community-based services (HCBS) waivers.

Section 2404 of the Affordable Care Act (ACA), changed the spousal impoverishment rules to treat Medicaid HCBS and institutional care equally from January 2014 through December 2018. Congress subsequently extended Section 2404 through March 2019. This issue brief answers key questions about the spousal impoverishment rules, presents 50-state data from a 2018 Kaiser Family Foundation survey about state policies and future plans in this area, and considers the implications if Congress does not further extend Section 2404. Findings include:

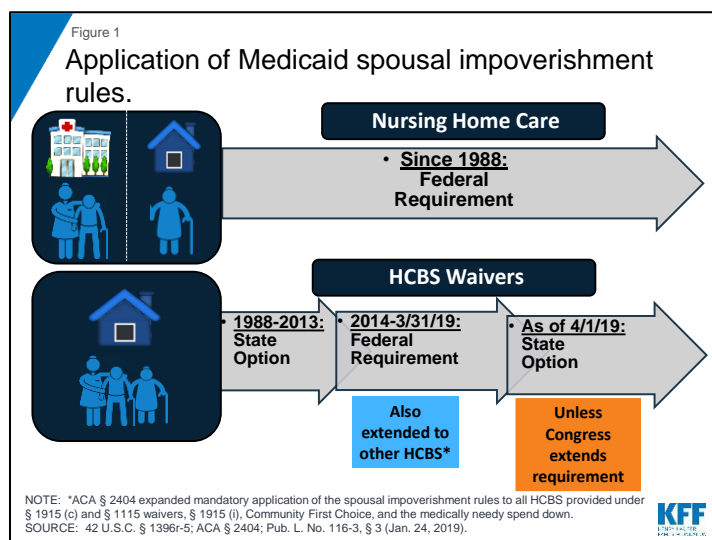
- **As of 2018, 50 states were applying the spousal impoverishment rules to HCBS waivers.**
- **Five states plan to stop applying the spousal impoverishment rules to some or all of their HCBS waivers if Section 2404 expires.** Specifically, Arkansas and Illinois plan to scale back by applying the rules to some but not all HCBS waivers. Minnesota would not apply the rules to some HCBS waivers but has a separate Section 1115 waiver addressing spousal deeming. Maine and New Hampshire do not plan to apply the rules to any HCBS waivers. Forty-five states plan to continue to apply the rules to all HCBS waivers, and Montana was undecided at the time of the survey.

If Congress does not further extend Section 2404, the spousal impoverishment rules will revert to a state option for HCBS waivers and will no longer apply to HCBS provided under other authorities, unless states obtain a Section 1115 waiver, as of April 1, 2019. Continuing to extend Section 2404 temporarily may create confusion for beneficiaries and increase administrative burden as states must redetermine eligibility using the pre-2014 rules and notify individuals of any changes in advance of each expiration date. If reauthorized, the rules would provide stability for enrollees receiving HCBS and states. Failing to reauthorize the rules could slow or begin to reverse states' progress in expanding access to HCBS.

Introduction

Seniors and people with disabilities or chronic illnesses may need long-term services and supports (LTSS) for help with self-care tasks (such as eating, bathing, or dressing) and household activities (such as preparing meals, managing medication, or housekeeping). Medicaid is the primary payer for LTSS, covering over half of national spending on nursing home care and home and community-based services (HCBS) as of 2017.¹ To financially qualify for Medicaid LTSS, an individual must have low income and limited assets. When one spouse in a married couple needs LTSS, Medicaid spousal impoverishment rules protect certain income and assets to support the other spouse's living expenses, in an effort to prevent her "financial devastation from paying the high cost of [her spouse's] nursing home care."²

Since the spousal impoverishment rules were enacted in 1988, federal law has required states to apply them when a married individual seeks nursing home care.³ Prior to 2014, states had the option to apply the rules when a married individual sought home and-community based waiver services.⁴ However, beginning on January 1, 2014, Section 2404 of the Affordable Care Act (ACA) required states to apply the spousal impoverishment rules to HCBS waivers. Section 2404 also expanded the spousal impoverishment rules to the Section 1915 (i) HCBS state plan option, Community First Choice (CFC) attendant care services and supports, and individuals eligible through a medically needy spend down. Section 2404 was set to expire on December 31, 2018, but Congress recently reauthorized it through March 31, 2019.⁵ If Congress does not further extend Section 2404, the spousal impoverishment rules will revert to a state option for HCBS waivers and will not apply to other HCBS, as of April 1, 2019 (Figure 1).



This issue brief answers key questions about the spousal impoverishment rules,⁶ presents new data from a 2018 Kaiser Family Foundation (KFF) 50-state survey about state policies and future plans in this area, and considers the implications if Congress does not extend Section 2404. Complete findings from KFF's 2018 survey of state Medicaid financial eligibility rules for seniors and people with disabilities will be released at a later date.⁷

Key Questions About Medicaid LTSS Spousal Impoverishment Rules

1. What Are the General Medicaid LTSS Financial Eligibility Rules?

Federal law limits Medicaid LTSS eligibility to people with low incomes and limited assets. At minimum, states generally must cover nursing home care for people who have qualifying functional needs and receive federal Supplemental Security Income (SSI) benefits⁸ (\$771 per month for an individual, and \$1,157 for a couple in 2019).⁹ States can choose to adopt the “special income rule,” to increase the Medicaid nursing home income limit to 300% of SSI (\$2,313 per month for an individual in 2019),¹⁰ and 43 states do so in 2018.¹¹ States also can choose to apply the “special income rule” when determining Medicaid financial eligibility for people receiving HCBS under a waiver, and all but one of the states using the “special income rule” elect this option to expand HCBS financial eligibility; this eligibility pathway sometimes is referred to as the “217-group.”¹² Additionally, people who qualify for Medicaid institutional LTSS or HCBS under the “special income rule” typically are subject to an asset limit, and most states apply the SSI asset limits of \$2,000 for an individual, and \$3,000 for a couple.

Once eligible for Medicaid LTSS, individuals generally must contribute a portion of their monthly income to the cost of their care. These “post-eligibility treatment of income” (PETI) rules apply to both nursing home services and HCBS waivers. For those in nursing homes, a small “personal needs allowance” is permitted to pay for items not covered by Medicaid, such as clothing;¹³ the federal minimum personal needs allowance is \$30 per month¹⁴ and the state median was \$50 per month in 2018. Individuals in the “217-group” are subject to PETI under HCBS waivers and may have a higher “maintenance needs allowance,” recognizing that individuals living in the community must pay for room and board. There is no federal minimum for HCBS maintenance needs; instead states may use any amount as long as it is based on a “reasonable assessment of need” and subject to a maximum that applies to all enrollees under the waiver.¹⁵

2. What Policy Considerations Led Congress to Enact the Spousal Impoverishment Rules?

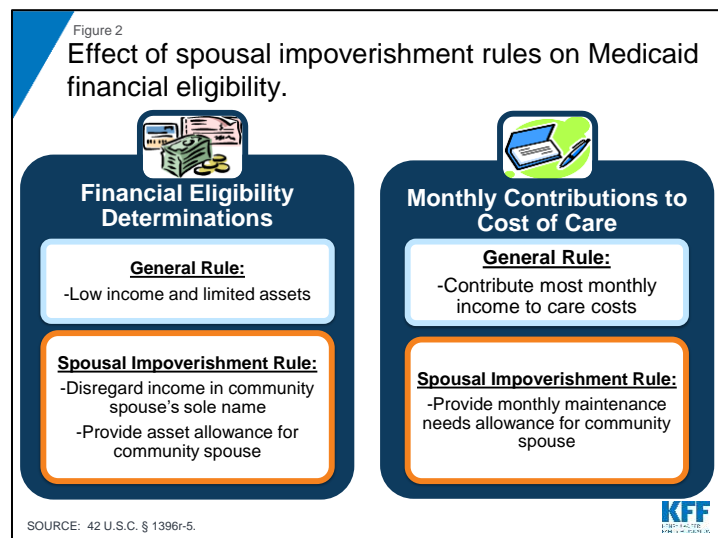
Congress created the spousal impoverishment rules in 1988, to protect a portion of a married couple’s income and assets to support the “community spouse’s” living expenses when the other spouse sought Medicaid LTSS. The spousal impoverishment rules supersede rules that would otherwise require eligibility determinations to account for a spouse’s financial responsibility for a Medicaid applicant or beneficiary.¹⁶ They were enacted “in response to evidence that at-home spouses – typically elderly women with little or no income of their own – faced poverty and a radical reduction in their standard of living before their spouses living in a nursing home could qualify for Medicaid.”¹⁷ Prior to the spousal impoverishment rules, “married individuals requiring Medicaid-covered LTSS were commonly

faced with either forgoing services or leaving the spouse still living at home with little income or resources.”¹⁸

Concerns about potentially financially devastating LTSS costs that motivated Congress to add the spousal impoverishment rules to Medicaid 30 years ago remain relevant today. LTSS costs are difficult for most people to afford out-of-pocket, and private insurance coverage of LTSS is limited. In 2018, a year of nursing home care averaged over \$89,000; average annual home health aide services cost over \$50,000; and average annual adult day health care services totaled nearly \$19,000.¹⁹ As in 1988, the high cost of LTSS “can rapidly deplete the lifetime savings of elderly couples”²⁰ today. The spousal impoverishment rules “help ensure. . . that community spouses are able to live out their lives with independence and dignity.”²¹ While the amounts protected under the rules (discussed below) might be considered “quite modest or even inadequate to sustain the at-home spouse’s accustomed standard of living, they far exceed the income and asset levels that may be retained in the case of unmarried recipients of Medicaid long-term care services”²² (described above, e.g., \$2,000 in countable assets and a minimum of \$30 monthly personal needs allowance for nursing home enrollees).

3. How Do the Spousal Impoverishment Rules Affect Medicaid LTSS Financial Eligibility?

Since 1988, Congress has required states to apply the spousal impoverishment rules to long-term nursing home services to provide financial support for the “community spouse.”²³ Specifically, states must disregard a portion of income and assets at two points when a married individual is seeking nursing home services: (1) when determining and renewing the individual’s Medicaid financial eligibility; and (2) when determining the individual’s monthly required contribution to his care costs under the PETI rules (Figure 2). The rules apply to long-term nursing home stays, which are those expected to last at least 30 consecutive days.²⁴ The spousal impoverishment rules apply when a married individual seeks or receives Medicaid LTSS, and his spouse is not in a nursing home or other medical institution.²⁵ The rules do not apply when both spouses seek long-term Medicaid nursing home care.²⁶ The amounts protected under the spousal impoverishment rules are updated annually and are in addition to the general Medicaid LTSS income and asset limits described above. Box 1 provides additional detail about how protected amounts are determined under the rules.



Box 1: General Application of Medicaid Spousal Impoverishment Rules²⁷

Income. When determining financial eligibility for a married individual seeking Medicaid LTSS,²⁸ and when determining his required contribution from monthly income to the cost of care,²⁹ any income in the “community spouse’s” sole name is not deemed available to the Medicaid spouse. Additionally, when determining the required contribution from monthly income to the cost of care, the starting point is that half of any income in the couple’s joint name is deemed available to the Medicaid spouse.³⁰ However, the rules also provide for a “monthly maintenance needs allowance” (MMNA) for the community spouse, subject to both minimum and maximum limits.³¹ If the “community spouse’s” sole income, plus half of the couple’s joint income, is less than the minimum MMNA, the “community spouse” can retain additional income, enough to reach the minimum. The MMNA is 150% FPL (\$2,057.50 per month for a household of two).³² The “community spouse’s” MMNA cannot exceed a maximum limit (\$3,160.50 in 2019).³³

Assets. When determining Medicaid LTSS financial eligibility, the starting point is that half of the couple’s assets (including any countable assets in which either or both spouses have an ownership interest at the time of the Medicaid spouse’s most recent period of continuous institutionalization³⁴) potentially can be retained by the “community spouse.”³⁵ However, rules also provide for a “community spouse resource allowance” (CSRA), subject to minimum and maximum limits.³⁶ If the “community spouse’s” half of the assets is less than the minimum CSRA (\$25,284 in 2019, and higher at state option), the Medicaid spouse can transfer to her enough assets to reach the minimum CSRA. If the “community spouse’s” half of the assets exceeds the maximum CSRA (\$126,420 in 2019), she can retain only the amount up to the maximum, with remaining assets considered available to the Medicaid spouse.³⁷ After Medicaid eligibility is established, none of the “community spouse’s” resources are deemed available to the Medicaid spouse.³⁸

From the rules’ creation in 1988, until ACA Section 2404 took effect in January 2014, states had the option to apply the spousal impoverishment rules to HCBS waivers.³⁹ Specifically, states could choose whether to apply the rules to HCBS waivers in two instances: first, states could decide whether to apply the rules when determining and renewing financial eligibility under HCBS waivers for the “217-group.” These are individuals for whom states have opted to expand the minimum Medicaid LTSS financial eligibility limits under the “special income rule” (described above), who would be eligible under the Medicaid state plan if institutionalized, meet an institutional level of care, and would be institutionalized if not receiving waiver services. The option to apply the spousal impoverishment rules to HCBS waivers is specifically limited to the 217-group, even though states also can include people eligible through other Medicaid eligibility pathways in their HCBS waivers.⁴⁰ Second, if states apply the spousal impoverishment rules when determining and renewing Medicaid financial eligibility for the 217-group

under HCBS waivers, they also can opt to apply the rules to this group when determining any required monthly contribution from income to their cost of care under the PETI rules (described above). The 217-group is the only Medicaid HCBS population subject to PETI.

Prior to Section 2404 taking effect in 2014, most, but not all states, opted to apply the spousal impoverishment rules to HCBS waivers. In 2009 (the most recent year for which data are available prior to 2014), five states (Alabama, Massachusetts, New Hampshire, New York, and West Virginia) chose not to apply the spousal impoverishment rules to HCBS waivers, and these data were not reported for one state (Illinois).⁴¹

4. How Did the ACA Section 2404 Change the Medicaid Spousal Impoverishment Rules?

Section 2404 required states to apply the spousal impoverishment rules to Medicaid HCBS waivers from January 1, 2014 through December 31, 2018, and Congress recently extended this provision through March 31, 2019. Section 2404 removes the state option for applying the rules to HCBS waivers and instead makes the rules mandatory for determining both financial eligibility and PETI when a married individual seeks Medicaid home and community-based waiver services.⁴² As of 2015, most states were applying the spousal impoverishment rules to HCBS waivers. Two states (New Hampshire and Massachusetts) were not doing so, and two states (Illinois and Minnesota⁴³) were applying the rules to some but not all HCBS waivers.⁴⁴

Table 1: Federal Requirements and State Options to Apply Medicaid Spousal Impoverishment Rules			
LTSS Authority	1988-2013	2014 through March 31, 2019, under Section 2404	As of April 1, 2019, unless Section 2404 reauthorized
<i>Institutional care</i>			
Nursing homes	Required	Required	Required
Medical institutions	Required	Required	Required
<i>HCBS</i>			
217-group in Section 1915 (c) waivers	State option*	Required	State option*
Other groups in Section 1915 (c) waivers	Not allowed**	Required	Not allowed**
HCBS under Section 1115 waivers	Not allowed**	Required	Not allowed**
Section 1915 (i) state plan HCBS	Not allowed**	Required	Not allowed**
Community First Choice	Not allowed**	Required	Not allowed**
Medically needy/spend down	Not allowed**	Required	Not allowed**
NOTES: *States opt whether to apply the rules to financial eligibility for the 217-group, and if so, separately opt whether to also apply the rules to that group's PETI. **States may obtain § 1115 waivers to apply the rules to individuals other than the 217-group. SOURCE: 42 U.S.C. § 1396r-5; ACA § 2404; Pub. L. No. 116-3, § 3 (Jan. 24, 2019).			

Additionally, Section 2404 expands the types of HCBS to which states must apply the spousal impoverishment rules from 2014 through March 31, 2019. First, Section 2404 applies the spousal impoverishment rules to all individuals under Section 1915 (c) HCBS waivers, not just the 217-group. Section 2404 also applies the spousal impoverishment rules to HCBS provided under Section 1115 waivers. Finally, Section 2404 requires states to apply the rules when determining Medicaid financial eligibility for HCBS provided through additional authorities, including the Section 1915 (i) state plan

option, CFC attendant care services and supports, and medically needy/spend down pathways. Table 1 summarizes federal requirements and state options to apply the spousal impoverishment rules.

5. How Will the Medicaid Spousal Impoverishment Rules Change if ACA Section 2404 Expires on March 31, 2019?

If Congress does not further extend Section 2404, application of the spousal impoverishment rules to HCBS waivers will return to a state option⁴⁵ and will no longer apply to the other HCBS authorities as of April 1, 2019 (Table 1). Without Section 2404, states would have to obtain a Section 1115 waiver to apply the spousal impoverishment rules to HCBS waiver enrollees other than the 217-group, those receiving Section 1915 (i) state plan HCBS or CFC, or individuals eligible through a spend down.⁴⁶ On February 9, 2019, CMS issued guidance directing states to take the following actions, effective April 1, 2019, if Section 2404 expires: (1) redetermine financial eligibility, without applying the spousal impoverishment rules, for all individuals receiving HCBS under Section 1915 (i) and CFC, and for those eligible under HCBS waivers (other than the 217-group if the state elects that option); (2) recalculate PETI for individuals receiving services under HCBS waivers, (other than the 217-group if the state elects that option); and (3) stop applying the rules to new Medicaid HCBS applicants (other than the 217-group if the state elects that option).⁴⁷

Continuing to extend Section 2404 on a temporary basis may create confusion for Medicaid beneficiaries and increase states' administrative burdens. CMS initially issued the above instructions to states about Medicaid eligibility redeterminations and PETI recalculations in November 9, 2018 guidance, when Section 2404 was set to expire on December 31, 2018. Because Congress subsequently extended Section 2404 through March 31, 2019, states that already had completed redeterminations and informed any Medicaid beneficiary that they were no longer eligible for Medicaid or would have PETI revised as of January 1, 2019, now must revise those decisions and "immediately inform these individuals that they will remain eligible for Medicaid or that their PETI calculation will not change."⁴⁸ However, states will again need to complete Medicaid eligibility redeterminations and PETI recalculations effective April 1, 2019, if Section 2404 is not further extended.

As of 2018, 50 states were applying the spousal impoverishment rules to HCBS waivers as required by Section 2404 (Table 2). One state (Illinois) applied the rules to some but not all HCBS waivers. According to Illinois' approved waiver documents, the rules currently apply to seven of nine HCBS waivers; this information is not provided in the approvals for Illinois' other two waivers.⁴⁹

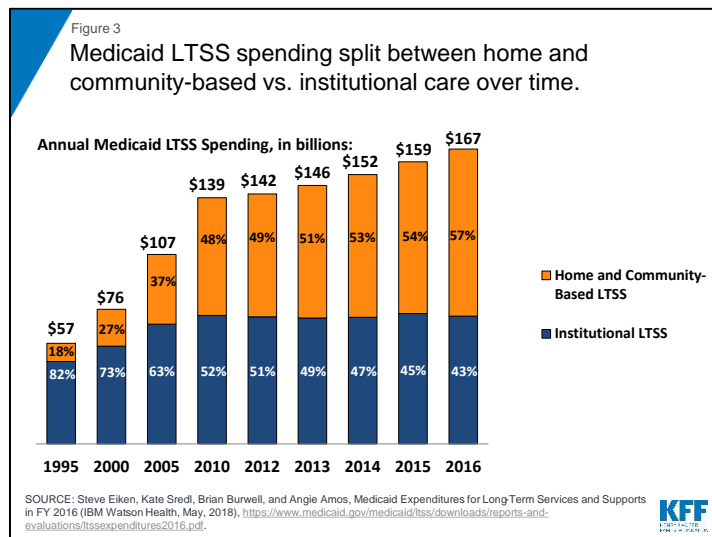
If Section 2404 expires, 45 states reported plans to continue to apply the spousal impoverishment rules to all of their HCBS waivers as of the end of 2018 (Table 2). (At the time of our survey, Section 2404 was set to expire at the end of 2018, but Congress subsequently extended it through March 2019.) Two states (Arkansas and Illinois) plan to scale back by applying the rules to some but not all HCBS waivers if Section 2404 is not reauthorized. Arkansas reports that it will apply the rules to two of its four waivers: seniors/adults with physical disabilities and assisted living, but not autism and

intellectual/developmental disabilities.⁵⁰ Approved waiver documents indicate that Illinois plans to scale back application of the rules if Section 2404 is not extended by applying the rules in full to one of nine HCBS waivers and in part (for financial eligibility but not PETI) to two waivers.⁵¹ One state (Minnesota) plans to apply the rules to one of five waivers (elderly only) but has a separate Section 1115 waiver addressing spousal deeming.⁵² Two states (Maine⁵³ and New Hampshire) do not plan to apply the rules to any HCBS waivers, and one state's plans (Montana) were still undecided at the time of our survey. Waiver approval documents indicate that none of Montana's waivers cover the 217-group, so Montana would have to pursue a Section 1115 waiver to continue to apply the rules to its HCBS waiver applicants and enrollees.⁵⁴

6. What Are the Implications of Not Applying Spousal Impoverishment Rules to Medicaid HCBS?

Applying the same financial eligibility rules to Medicaid nursing facility care and HCBS helps alleviate bias in favor of institutional care.⁵⁵ If financial eligibility limits are less stringent for nursing home care than for HCBS, an individual in need of LTSS may qualify only for institutional care. Even if an individual financially qualifies for both nursing home care and HCBS, he may be incentivized to choose nursing home care if that option will protect additional income and assets to support his spouse at home, due to differential application of the spousal impoverishment rules.

Applying more stringent income and asset rules to HCBS, compared to nursing home care, could impact the progress that states have made in expanding access to HCBS. The share of Medicaid LTSS spending devoted to HCBS instead of institutional care has been steadily increasing in recent decades. A majority of Medicaid LTSS spending went to HCBS for the first time in 2013, and reached 57% in 2016 (Figure 3). Although not required by federal Medicaid law, states have an independent community integration obligation under the Americans with Disabilities Act (ADA) when administering services, programs, and activities.⁵⁶ The Supreme Court's *Olmstead* decision found that the unjustified institutionalization of people with disabilities is illegal discrimination under the ADA, and Medicaid plays a key role in helping states meet their community integration obligations.⁵⁷



Looking Ahead

Congress authorized a temporary 3-month extension of Section 2404, which is now set to expire at the end of March 2019. Section 2404's initial expansion of the spousal impoverishment rules and the subsequent 3-month extension likely were time limited due to an effort to control costs. In January 2019, the Congressional Budget Office estimated the cost of the temporary extension of Section 2404 at \$22 million (\$9 million in FY 2019, \$7 million in FY 2020, and \$7 million in FY 2021).⁵⁸ This legislation also included a temporary extension of the [Money Follows the Person](#) program, and the costs of both of these extensions were offset by reductions in federal Medicaid matching funds after 2020 for states without asset verification programs and a reduction in the Medicaid Improvement Fund.⁵⁹

If further extended, the rules would provide stability and continuity for enrollees receiving HCBS and for states administering Medicaid eligibility determinations and renewals. State data show that many states were electing the option to apply the rules to the HCBS waiver 217-group before 2014, and most are planning to continue to do so at this time. However, if Section 2404 expires, several states already have indicated that they will not continue to apply the spousal impoverishment rules to some or all of their HCBS waivers, and more could follow. Without Section 2404 or a similar requirement, states can modify their election of the option by submitting an HCBS waiver amendment.⁶⁰ Additionally, without Section 2404, states lack legal authority to apply the rules when determining financial eligibility for HCBS under other Medicaid authorities, including waiver enrollees other than the 217-group, Section 1915 (i), CFC, and spend down pathways, and would have to devote time and resources to obtaining and administering a Section 1115 waiver to be able to treat financial eligibility for all HCBS equally.⁶¹ Applying different Medicaid financial eligibility rules to institutional LTSS and HCBS could affect states' progress in expanding access to HCBS, rebalancing LTSS spending, and promoting community integration.

**Table 2:
States' Application of Spousal Impoverishment Rules to Medicaid HCBS Waivers**

State	Applies to HCBS Waivers in 2018	Plans to Continue After Dec. 2018*	Notes on Planned Changes After Dec. 2018*
Alabama	Yes	Yes	
Alaska	Yes	Yes	
Arizona	Yes	Yes	
Arkansas	Yes	Some	Seniors/adults with physical disabilities and assisted living waivers only.
California	Yes	Yes	
Colorado	Yes	Yes	
Connecticut	Yes	Yes	
Delaware	Yes	Yes	
DC	Yes	Yes	
Florida	Yes	Yes	
Georgia	Yes	Yes	
Hawaii	Yes	Yes	
Idaho	Yes	Yes	
Illinois	Some	Some	Apply fully to supportive living waiver and partially to persons with disabilities and elderly waivers.
Indiana	Yes	Yes	
Iowa	Yes	Yes	
Kansas	Yes	Yes	
Kentucky	Yes	Yes	
Louisiana	Yes	Yes	
Maine	Yes	No	
Maryland	Yes	Yes	
Massachusetts	Yes	Yes	
Michigan	Yes	Yes	
Minnesota	Yes	Some	Elderly waiver only, but also has § 1115 waiver applying spousal deeming to other populations.
Mississippi	Yes	Yes	
Missouri	Yes	Yes	
Montana	Yes	Undecided	
Nebraska	Yes	Yes	
Nevada	Yes	Yes	
New Hampshire	Yes	No	
New Jersey	Yes	Yes	
New Mexico	Yes	Yes	
New York	Yes	Yes	
North Carolina	Yes	Yes	
North Dakota	Yes	Yes	
Ohio	Yes	Yes	
Oklahoma	Yes	Yes	
Oregon	Yes	Yes	
Pennsylvania	Yes	Yes	
Rhode Island	Yes	Yes	
South Carolina	Yes	Yes	
South Dakota	Yes	Yes	
Tennessee	Yes	Yes	
Texas	Yes	Yes	
Utah	Yes	Yes	
Vermont	Yes	Yes	
Virginia	Yes	Yes	
Washington	Yes	Yes	
West Virginia	Yes	Yes	
Wisconsin	Yes	Yes	
Wyoming	Yes	Yes	
TOTALS:	50 yes, 1 some	45 yes, 3 some, 1 undecided, 2 no	

NOTE: *At the time of our survey, the requirement to apply spousal impoverishment rules to HCBS waivers was set to expire on 12/31/18, but Congress subsequently extended it through 3/31/18. SOURCE: KFF Medicaid Financial Eligibility Survey for Seniors and People with Disabilities (preliminary data as of Nov. 2018), supplemented by Section 1915 (c) waiver approval documents for AR, IL, MN, and NJ, as posted on Medicaid.gov.

Endnotes

¹ National LTSS expenditures totaled \$364.9 billion, including spending on residential care facilities, nursing homes, home health services, HCBS waivers, ambulance providers, and some post-acute care. Medicare post-acute care spending (\$81.5 billion) is excluded. LTSS payers include Medicaid (52%), other public and private insurance (20%), out-of-pocket spending (16%), and private insurance (11%). All HCBS waivers are attributed to Medicaid. KFF estimates based on 2017 National Health Expenditure Accounts data from CMS, Office of the Actuary.

² U.S. Dep't of Health & Human Servs. Office of the Asst. Sec'y for Planning & Evaluation, *Spouses of Medicaid Long-Term Care Recipients* (April 1, 2005), <https://aspe.hhs.gov/basic-report/spouses-medicaid-long-term-care-recipients>.

³ The rules also apply to long-term care in other medical institutions besides nursing homes. 42 U.S.C. § 1396r-5. The rules apply to stays of at least 30 consecutive days. 42 U.S.C. § 1396-r (h)(1)(B).

⁴ Specifically, states could opt to apply the rules to individuals who are eligible for Medicaid by reason of a Section 1915 (c) HCBS waiver, under 42 U.S.C. § 1396a (a)(10)(A)(ii)(VI) (describing individuals who would be eligible under the Medicaid state plan if institutionalized, meet an institutional level of care, and would be institutionalized if not receiving waiver services, sometimes referred to as the "217-group," because they also are described in 42 C.F.R. 435.217). 42 U.S.C. § 1396r-5 (h)(1)(A).

⁵ Medicaid Extenders Act of 2019, § 3, Pub. L. No. 116-3 (Jan. 24, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/259>.

⁶ This brief is not an exhaustive discussion of Medicaid LTSS financial eligibility rules. Additionally, other topics such as asset transfers and estate recovery are beyond the scope of this brief.

⁷ A prior version of this survey contains 2015 data. Kaiser Family Foundation, *Medicaid Financial Eligibility for Seniors and People with Disabilities in 2015* (March, 2016), <https://www.kff.org/medicaid/report/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-in-2015/>.

⁸ To be eligible for SSI, beneficiaries must have low incomes, limited assets, and an impaired ability to work at a substantial gainful level as a result of old age or significant disability.

⁹ Section 209 (b) allows states to apply Medicaid eligibility rules that are more restrictive than the SSI rules, as long as the state's rules are no more restrictive than they were in 1972, when SSI was created, and provided that the state allows SSI beneficiaries to establish Medicaid eligibility through a spend-down. 42 U.S.C. § 1396a (f).

¹⁰ 42 U.S.C. § 1396a (a)(10)(ii)(V).

¹¹ Kaiser Family Foundation, *Medicaid Financial Eligibility Survey for Seniors and People with Disabilities* (2018, report forthcoming).

¹² 42 U.S.C. § 1396a (a)(10)(ii)(VI); 42 C.F.R. § 435.217.

¹³ 42 U.S.C. § 1396a (q); 42 U.S.C. § 1396r-5 (d)(1). When determining PETI under the spousal impoverishment rules, additional deductions are permitted for minor or dependent children, dependent parents, or dependent siblings of either spouse who reside with the community spouse, 42 U.S.C. § 1396r-5 (d)(1)(C), and expenses incurred for medical or remedial care for the institutionalized spouse, 42 U.S.C. § 1396r-5 (d)(1)(D), in addition to the community spouse monthly income allowance discussed in Key Question 2.

¹⁴ 42 U.S.C. § 1396a (q)(2).

¹⁵ 42 C.F.R. § 435.726 (c).

¹⁶ 42 U.S.C. § 1396r-5 (a)(1). The rules permit (and sometimes require) that a married individual seeking Medicaid LTSS whose spouse is not institutionalized is treated differently for financial eligibility purposes from other individuals seeking Medicaid LTSS. 42 U.S.C. § 1396r-5 (a)(2).

¹⁷ U.S. Dep't of Health & Human Servs., Office of the Asst. Sec'y for Planning & Evaluation, *Spouses of Medicaid Long-Term Care Recipients* (April 1, 2005), <https://aspe.hhs.gov/basic-report/spouses-medicaid-long-term-care-recipients>.

¹⁸ CMS, Dear State Medicaid Director Letter #15-001, ACA#32, *Affordable Care Act's Amendments to the Spousal Impoverishment Statute* (May 7, 2015), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd050715.pdf>.

¹⁹ *Genworth 2018 Cost of Care Survey* (Oct. 9, 2018), <https://www.genworth.com/aging-and-you/finances/cost-of-care.html>.

²⁰ Medicaid.gov, *Spousal Impoverishment*, last accessed Feb. 20, 2019, <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html>

²¹ *Id.*

²² U.S. Dep't of Health & Human Servs., Office of the Asst. Sec'y for Planning & Evaluation, *Spouses of Medicaid Long-Term Care Recipients* (April 1, 2005), <https://aspe.hhs.gov/basic-report/spouses-medicaid-long-term-care-recipients>.

²³ The rules also apply to states providing Medicaid under a Section 1115 waiver, to the same extent that the rules would apply if the state instead used state plan authority, 42 U.S.C. § 1396r-5 (a)(4)(A), and to PACE programs, 42 U.S.C. § 1396r-5 (a)(5).

²⁴ 42 U.S.C. § 1396r-5 (h)(1).

²⁵ 42 U.S.C. § 1396r-5 (h)(1)(B).

²⁶ *Id.*

²⁷ These rules are subject to additional exceptions not discussed in this summary.

²⁸ 42 U.S.C. § 1396r-5 (b)(1).

²⁹ 42 U.S.C. § 1396r-5 (b)(2)(A)(i). Separate rules apply to treatment of trust income. 42 U.S.C. § 1396r-5 (b)(2)(B).

³⁰ 42 U.S.C. § 1396r-5 (b)(2)(A)(ii).

³¹ The minimum MMNA can be increased if either spouse establishes that it does not provide adequate income to the "community spouse," "due to exceptional circumstances resulting in significant financial duress." 42 U.S.C. § 1396r-5 (e)(2)(B).

³² The minimum MMNA may be increased if a "community spouse" has "excess shelter costs." 42 U.S.C. § 1396r-5 (d)(2), (3); Medicaid.gov, *2019 SSI and Spousal Impoverishment Standards*, last visited Feb. 14, 2019, <https://www.medicaid.gov/medicaid/eligibility/downloads/spousal-impoverishment/ssi-and-spousal-impoverishment-standards.pdf>.

³³ 42 U.S.C. § 1396r-5 (d)(3)(C); Medicaid.gov, *2019 SSI and Spousal Impoverishment Standards*, last visited Feb. 14, 2019, <https://www.medicaid.gov/medicaid/eligibility/downloads/spousal-impoverishment/ssi-and-spousal-impoverishment-standards.pdf>.

³⁴ 42 U.S.C. § 1396r-5 (c)(1).

³⁵ The "community spouse" may retain additional assets if either spouse establishes that the assets retained in the CSRA do not generate enough income to meet the minimum MMNA. 42 U.S.C. § 1396r-5 (e)(2)(C).

³⁶ Medicaid.gov, *2019 SSI and Spousal Impoverishment Standards*, last visited Feb. 14, 2018, <https://www.medicaid.gov/medicaid/eligibility/downloads/spousal-impoverishment/ssi-and-spousal-impoverishment-standards.pdf>. See also CMS, CMCS Informational Bulletin, *2019 SSI and Spousal Impoverishment Standards* (Nov. 13, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib111318.pdf>.

³⁷ 42 U.S.C. §§ 1396r-5 (c)(2)(B), (f)(2)(A). For additional explanation of these provisions, see U.S. Dep't of Health & Human Servs., Office of the Asst. Sec'y for Planning & Evaluation, *Spouses of Medicaid Long-Term Care Recipients* (April 1, 2005), <https://aspe.hhs.gov/basic-report/spouses-medicaid-long-term-care-recipients>.

³⁸ 42 U.S.C. § 1396r-5 (c)(4).

³⁹ See *supra.*, n.4.

⁴⁰ For example, states may include in their HCBS waivers individuals eligible for Medicaid under the state plan option to cover seniors and people with disabilities up to 100% of the federal poverty level (FPL, \$12,490/year for an individual in 2019) to offer services that are not provided under the state plan benefit package.

⁴¹ Julie Stone, *Medicaid Eligibility for Persons Age 65+ and Individuals with Disabilities: 2009 State Profiles* (Congressional Research Service, June 28,2011), https://www.everycrsreport.com/files/20110628_R41899_a16a92dedbbe0c214803f55b35db14fd4f7ac861.pdf.

⁴² Section 2404 does not require actual receipt of HCBS waiver services and thus allows an individual to obtain state plan Medicaid eligibility, by applying the spousal impoverishment rules, if the individual qualifies for but will not actually receive HCBS waiver services upon enrollment due to a waiver waiting list. CMS Informational Bulletin, *Sunset of Section 2404 of the Affordable Care Act, Relating to the Spousal Impoverishment Rules for Certain Home and Community-Based Services Applicants and Recipients* (Nov. 9, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib110918-2.pdf>.

⁴³ The rules were to be implemented for new MN [brain injury waiver](#) and [community access for disability inclusion waiver](#) applicants by 6/1/16 and for current enrollees in both waivers by 3/1/17, according to the waiver approvals, both dated 6/1/16. MN also has a [Section 1115 waiver](#) to create a personal care assistance program, modeled after CFC, and targeting, *inter alia.*, a “Community First Choice-like” group to expand CFC eligibility beyond state plan limits to include seniors and non-elderly people with disabilities who otherwise require an institutional level of care and are not financially eligible under a state plan group but would be eligible under the HCBS waiver 217-group. Financial eligibility for seniors in this group would be up to 300% SSI without a spend-down, and the spousal impoverishment rules would apply. Financial eligibility for non-elderly adults with disabilities in this group would be the relevant state plan amount without a spend-down including an “exemption from spousal deeming.” This waiver also applies the spousal impoverishment rules to a limited HCBS benefit package for seniors who meet an institutional level of care and have income and/or assets above state plan limits (e.g. 100% FPL for aged/blind/disabled). Minn. Reform 2020,18 (b) and (c) and 23 (approved 10/18/13 through 6/3/18), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mn/mn-reform-2020-ca.pdf>, and temporarily extended through 12/31/18, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mn/Reform-2020/mn-reform-2020-temp-ext-ltr-09272018.pdf>. On July 17, 2017, MN submitted a waiver renewal application for these authorities, noting that implementation of the CFC-like group authorities had been delayed due to “systems modernization efforts.” MN Reform 2020 Section 1115 Waiver Renewal Request (June 30, 2017, cover letter dated July 17, 2017), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mn/mn-reform-2020-pa2.pdf>. On March 12, 2018, MN withdrew the pending waiver renewal request for the CFC-like group and stated that it would submit a new proposal when closer to implementation. Letter from Ann Berg, Deputy Medical Director, MN Dep’t of Human Servs. to Kimberly Howell, Director CMS, Div. of State Demonstrations and Waivers (March 12, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mn/Reform-2020/mn-reform-2020-ltr-wthdrwng-rqst-03122018.pdf>.

⁴⁴ Kaiser Family Foundation, *Medicaid Financial Eligibility for Seniors and People with Disabilities in 2015* (March, 2016), <https://www.kff.org/medicaid/report/medicaid-financial-eligibility-for-seniors-and-people-with-disabilities-in-2015/>.

⁴⁵ CMS notes that states providing HCBS under Section 1115 waivers who wish to continue to apply the spousal impoverishment rules after their expiration may need to seek a waiver amendment to do so. CMS Informational Bulletin, *Sunset of Section 2404 of the Affordable Care Act, Relating to the Spousal Impoverishment Rules for Certain Home and Community-Based Services Applicants and Recipients* (Nov. 9, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib110918-2.pdf>.

⁴⁶ *Id.*

⁴⁷ CMS Informational Bulletin, *Temporary Extension of the Affordable Care Act’s Spousal Impoverishment Provision for Married Recipients of Home and Community-Based Services* (Feb. 8, 2019), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib020819.pdf>.

⁴⁸ *Id.*

⁴⁹ IL currently applies the rules to 7 of its 9 HCBS waivers: [persons with disabilities waiver](#) (approved 7/12/16); [elderly waiver](#) (approved 11/1/16); [children and adults with I/DD waiver](#) (approved 7/1/17); [residential waiver for children and young adults with I/DD](#) (approved 7/1/17); [medically fragile children’s waiver](#) (approved 9/1/17); [supportive living waiver](#) for seniors and people with disabilities (approved 10/31/17); [adult I/DD waiver](#) (approved 12/11/17). This

information is not provided for 2 waivers: [HIV/AIDS waiver](#) (approved 1/21/14) and [brain injury waiver](#) (approved 7/1/17).

⁵⁰ Waiver approval documents on Medicaid.gov indicate that AR's excluded waivers do cover the 217-group.

⁵¹ IL plans to apply the rules in full to 1 waiver: [supportive living waiver](#) for seniors and adults with physical disabilities (approved 10/23/17). IL plans to apply the rules for financial eligibility but not PETI to 2 waivers: [persons with disabilities waiver](#) (approved 7/12/16) and [elderly waiver](#) (approved 11/1/16). IL does not plan to apply the rules to 4 waivers: [children and adults with I/DD waiver](#) (approved 7/1/17); [residential waiver for children and young adults with I/DD](#) (approved 7/1/17); [medically fragile children's waiver](#) (approved 9/1/17); and [adult I/DD waiver](#) (approved 12/11/17). This information is not provided in for 2 waivers, neither of which cover the 217-group: [HIV/AIDS waiver](#) (approved 1/21/14) and [brain injury waiver](#) (approved 7/1/17).

⁵² MN plans to apply the rules to its [elderly waiver](#) (approved 7/1/18). MN does not plan to apply the rules to its [brain injury waiver](#) (approved 6/1/16); [community access for disability inclusion waiver](#) (approved 6/1/16); [DD waiver](#) (approved 10/27/17); and [community alternative care waiver](#) (approved 4/1/18). See n.44, *infra*, for information on MN's Section 1115 waiver regarding spousal deeming.

⁵³ Waiver approval documents on Medicaid.gov indicate that ME's seven waivers do cover the 217-group.

⁵⁴ This information was not provided in the survey response or waiver approval documents for MT's 6 waivers: [bridge waiver](#) (approved 10/1/12); [supports for community living and working waiver](#) (approved 10/1/15); [behavioral health waiver](#) (approved 7/1/15); [children's autism waiver](#) (approved 1/1/17, does not cover 217-group); [Big Sky waiver](#) (approved 1/1/18, does not cover 217-group); [DD waiver](#) (approved 7/1/18, does not cover 217-group).

⁵⁵ See, e.g., Kaiser Family Foundation, *Streamlining Medicaid Home and Community-Based Services: Key Policy Questions* (March, 2016), <https://www.kff.org/medicaid/issue-brief/streamlining-medicaid-home-and-community-based-services-key-policy-questions/>.

⁵⁶ Kaiser Family Foundation, *Olmstead's Role in Community Integration for People with Disabilities Under Medicaid: 15 Years After the Supreme Court's Olmstead Decision* (June 2014), <http://kff.org/medicaid/issue-brief/olmsteads-role-in-communityintegration-for-people-with-disabilities-under-medicaid-15-years-after-the-supreme-courts-olmstead-decision/>.

⁵⁷ *Id.*; see also Kaiser Family Foundation, *Medicaid Home and Community-Based Services: Results from a 50-State Survey of Enrollment, Spending, and Program Policies* (Jan. 2018), <https://www.kff.org/medicaid/report/medicaid-home-and-community-based-services-results-from-a-50-state-survey-of-enrollment-spending-and-program-policies/>.

⁵⁸ Congressional Budget Office, H.R. 259 Medicaid Extenders Act of 2019 cost estimate (Jan. 11, 2019), <https://www.cbo.gov/system/files/2019-01/hr259.pdf>.

⁵⁹ *Id.*

⁶⁰ Since § 2404 took effect, CMS has asked states to indicate in their § 1915 (c) waiver applications and renewals whether they intend to apply the rules to the 217-group if § 2404 expires. CMS Informational Bulletin, *Sunset of Section 2404 of the Affordable Care Act, Relating to the Spousal Impoverishment Rules for Certain Home and Community-Based Services Applicants and Recipients* (Nov. 9, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/cib110918-2.pdf>.

⁶¹ CMS indicates that it will work with states to expedite these waiver approvals. States could seek waivers to apply the rules to some but not all of these populations. These waivers would be approved using expenditure authority and would be subject to federal budget neutrality rules. *Id.*