

Spousal Impoverishment Protections for Married Couples where One Spouse is in a Managed Long Term Care Plan - Pooled Trusts Allowed as an Option

In this Article

- **KNOW YOUR RIGHTS: Download Consumer Fact Sheet on Tips for Keeping More Income, including Spousal Impoverishment Protections.:**

1. What are Spousal Impoverishment Rules?
2. Which Married couples can Use Spousal Impoverishment Protections?
3. Spousal Impoverishment Protections for INCOME
4. Spousal Impoverishment Protections for ASSETS / Resources
5. Do Spousal Impoverishment rules apply at the time you apply for Medicaid in order to enroll in MLTC or for Immediate need Services?
6. AFTER Enrolled in MLTC - how to Request Rebudgeting with Spousal Impoverishment Protections
7. MLTC-Applicant Spouse May Use a Pooled Trust and "Single Person" Budgeting if Community Spouse's Income is Too High to Qualify for a Community Spouse Income Allowance
8. Past History of Spousal Impoverishment in NYS
9. Legal Citations & Forms

A. What are Spousal Impoverishment Rules?

Since 1998, a spouse of a nursing home resident on Medicaid is allowed to keep a reasonable level of income and resources to live on, while still permitting Medicaid payment for the nursing home resident's care. Congress enacted the "spousal impoverishment protections" in 1988 in response to stories of elderly "community" spouses -- mostly women -- whose husbands were in nursing homes. Medicaid required all of the husband's income to be paid to contribute to the cost of care. Some were practically starving. Others sought divorces in order to escape the crushing financial burden. An important sidelight of the 1988 "spousal impoverishment" legislation was that it permitted states to budget couples on home-and-community-based services (HCBS) "waiver" programs under these same income and asset rules, giving these couples a much-needed financial cushion.

B. Which Married Couples Can Use Spousal Impoverishment Protections?

- Since the 1980's, spouses of New Yorkers receiving services through the **Lombardi** long term home health care program and other waivers were entitled to spousal impoverishment protections.
- When the Lombardi program was phased out between 2012 - 2014, and all of its members were required to join **Managed Long Term Care** plans, the State agreed to give spousal impoverishment protections not just to married persons transitioning to MLTC from Lombardi, but to ALL married couples where one spouse receives MLTC services.
- The **Affordable Care Act Requires Spousal Impoverishment protections where one spouse is enrolled in a Managed Long Term Care plan or other Home-and-Community-Based Services (HCBS) waiver --Traumatic Brain Injury (TBI), Nursing Home Transition and Diversion (NHTD), and OPWDD waivers.** This was part of the Affordable Care Act called the PPACA, effective January 1, 2014. Click here for the exact language of the ACA -PPACA law on spousal impoverishment. This 2014 law originally had a sunset clause. This provision has been extended several times, most recently in 2022 through Sept. 30, 2027. See CMS Bulletin 8/15/23.
- **Immediate need - Spousal Impoverishment protections available since July 2016:** Spousal impoverishment protections are also available to consumers receiving immediate need personal care services pursuant to 16 ADM 02. Procedures for accessing immediate need personal care services are outlined in this article.

C. Spousal Impoverishment Protections for INCOME

The spouse receiving the MLTC or other waiver services may deduct from his/her income these allowances and deductions:

1. **SPOUSE** -an amount to bring his or her spouse's income up to the "Minimum Monthly Maintenance Needs Allowance" (MMMNA). In 2024, this is **\$3,853.50**. The allowance provided to non-applying spouse is called a "community spouse monthly income allowance" (CSMIA). The CSMIA is calculated by subtracting the non-applying spouse's own income and the monthly cost of his/her health insurance premiums from the MMMNA.
2. **Family member allowance (FMA)**, if applicable, is an allowance of \$852 per dependent family member up to a maximum of \$2,555 (2024). This is for minor children, dependent children of any age, or dependent parents (defined as having over 50% of their needs met by either spouse)
3. **Personal needs allowance (PNA)** for the waiver participant - This is \$619 in 2024 (the difference between the regular Medicaid level for ONE PERSON and TWO PERSON households).
4. **Health insurance premium** - may deduct the cost of his/her own Medigap and other insurance premiums.

The remainder after taking all of these deductions is the MLTC/waiver recipient's spend-down.

EXAMPLE: MLTC Spouse Sam Gross Income = \$2,956.80
Community Spouse Chris Gross Income =\$2,100.00
Chris has a Medigap policy that costs \$200/month.

MLTC Spouse Sam's Gross income	\$2,956.80	
-- Personal Needs Allowance PNA (Sam's Allowance)(2024)		--\$619.00
-- Sam's Part B <u>Medigap policy</u> Premium		-174.70
-- Sam's Part D premium (to extent not paid by Extra Help)		-15.40
SAM'S NET INCOME AFTER DEDUCTIONS (MLTC Spouse)- This is the maximum Sam can "give" to community spouse	\$2,147.70	
Community Spouse Chris' Own Income	--\$2,100	
-Chris Medigap Premium		\$200.00
-Chris Part D premium		\$19.50
Chris' Net Income After Deductions (Community Spouse)	\$1,705.80	
Minimum Monthly Maintenance Needs Allowance MMMNA (2024)	\$3,853.50	
-Chris' Available Income	-1,705.80	
-- Community Spouse Monthly Income Allowance CSMIA (amount from Sam's income that brings Chris' income up to the MMNA)	\$2,147.70	
Sam's Net Income = Spend-down	\$0	\$0

2024 levels are in [GIS 23 MA/23](#) - 2024 Medicaid Levels and Other Updates and Attachment 1

USE [this Excel budgeting template](#) - plug in applicant's and spouse's income to calculate spend-down. Use the tab labeled Spousal Impoverishment .

D. Spousal Impoverishment Protections for ASSETS or RESOURCES?

The MLTC spouse may keep \$31,175 in his/her own name ([2024](#)).

PLUS the Community Spouse may have up to the greater of \$74,820 or one-half of the couple's total combined assets up to \$154,140 ([2024](#)). This total includes the Community Spouse's own resources in his/her own name, plus any of the MLTC Spouse's own resources that exceed \$31,175, which have been transferred to the community spouse, plus any of their joint resources. The MLTC applicant spouse must actually transfer his/her own individual and their joint resources that exceed the individual resource limit (\$31,175 in 2024) to the Community Spouse.

PLUS both spouses may have a burial fund, pre-paid funeral agreement, and an IRA or other retirement funds, provided that distributions are being taken, even if they are under age 70.5. See [Resource Disregards chart](#). See [funeral planning article](#).

The balance is deemed available to MLTC spouse for cost of care. Rules are in [NYS DOH MRG Resources Chapter](#) at pp. 331 -335.

E. Do Spousal Impoverishment protections apply at the time an individual applies for Medicaid seeking home care services?

If you apply for Medicaid in order to enroll in MLTC, Spousal Impoverishment protections DO NOT APPLY. See more below about how Medicaid is budgeted initially for married people seeking MLTC.

If you apply for Medicaid SEEKING IMMEDIATE NEED PERSONAL CARE SERVICES, spousal impoverishment protections DO APPLY initially. This is explained in [16 ADM 02](#), with procedures and tips [here](#).

For those who apply for Medicaid in order to get MLTC, the local Medicaid program must first determine eligibility using regular Community Medicaid rules for income and assets, **without** the spousal protections. The spousal impoverishment protections are only used "post-eligibility." This means that initially, an applicant may have a large spend-down, even though he will not have a spend-down once he enrolls in an MLTC plan and requests spousal impoverishment budgeting. On the initial Medicaid application, here are some tips for navigating the spend-down.

- **Community Spouse not applying for MLTC may consider submitting a "Spousal Refusal."** This means his or her income and assets will not be counted for the MLTC applicant's eligibility. Beware that the county has the right to sue a "refusing spouse" for support - to recover the Medicaid funds paid for services when the refusing spouse refused. However, if the MLTC applicant immediately enrolls in an MLTC plan and requests rebudgeting with spousal protections, there would be no Medicaid expenses for the county to recover in a support suit. Here is the [Spousal Refusal form](#) used in NYC (HRA's form revised in **2023**). Other counties may have their own forms, or this form can be adapted.
 - ◆ A spousal refusal can be used for the spouse's income and assets/resources. At the time of application, the MLTC applicant spouse's countable resources must be brought down to the individual Medicaid asset level (\$31,175 in 2024). Any excess resources must be transferred to the community spouse during the month prior to the application. Consult an elder law attorney if there are excess assets.
- **If the MLTC applicant has a spend-down or "excess income"** just counting his or her own income, even with the community spouse doing a "spousal refusal," be sure to **make clear that the Medicaid applicant is seeking to enroll in MLTC and ask for eligibility CODE 06**. This should ensure that the application for Medicaid is not DENIED because they have not "met" the spend-down. Medicaid applicants who would have a spend-down must request **CODE 06** so that an MLTC plan will see in the eligibility system that they are eligible. See [NYS DOH GIS 2014 MA/10 -- 06 to](#)

30 Conversion for MLTC Enrollees. (May 5, 2014) Otherwise, their Medicaid coverage does not become effective until they submit medical bills that meet the spend-down, according to complicated rules [explained here](#) and on the [State's website](#). Many people applying for Medicaid to pay for long-term care services can't activate their Medicaid coverage until they actually begin receiving the services, because they don't have enough other medical bills that meet their spend-down. This creates a catch-22, because they cannot start receiving MLTC services until Medicaid is activated. Until their Medicaid is activated, the Medicaid computer is coded to show they are not eligible. As a result, an MLTC plan could refuse to enroll them -- because they do not have active Medicaid. Eligibility CODE 06 gives them "Provisional Medicaid" eligibility so that an MLTC plan sees they have Medicaid and will enroll them. See **Medicaid Alert dated July 12, 2012.** and see [NYLAG Troubleshooting Guide re MLTC Enrollment Barriers](#).

- In New York City and some other counties, MLTC plans are required to fax HRA a "[conversion form and package](#)" to activate Medicaid when the consumer has a spend-down. [Download Conversion cover sheet here.- FORM HCSP-3022](#) Despite extensive education by HRA, many plans still fail to do this.
 - ◆ [HRA FAQ - procedures for MLTC plans](#) to enroll members who have a spend-down.
 - ◆ A May 2014, State [GIS directive explains that as long as CODE 06](#) was used on the application, the code will automatically change to CODE 30 full eligibility when the MLTC plan enrolls the individual. So.. no "conversion" form should be necessary.
 - ◆ See [NYLAG Troubleshooting Guide](#).

F. AFTER the individual has enrolled in an MLTC plan -- Request DSS/HRA to rebudget with Spousal Protections.

Submit the DOH "[Request for Assessment - Spousal Impoverishment](#)" (DOH-5298 01/2023) form to your local DSS/ HRA to request spousal budgeting.

In NYC, submit the form or a letter requesting spousal impoverishment budgeting along with the **MAP-751W** form (check off "Budgeting Changes" and "Spousal Impoverishment") to:

HRA--HCSP Central Medicaid Unit

785 Atlantic Avenue, 7th Floor

Brooklyn, NY 11238

T: 929-221-0849 e-FAX 917-639-0837

(The MAP-751W is also posted in languages other than English in this [link](#). (Updated 3-15-2021.))

In March 2014, HRA published a [Medicaid Alert](#) regarding Spousal Impoverishment Budgeting for applicants/recipients in MLTC; which now must be modified in light of the August 2014 GIS.

G. MLTC Spouse May Use a Pooled Trust if the Spouse's Income is too high, so Spouse is not entitled to Spousal Impoverishment Income Allowance

1. Applicant may apply as a SINGLE PERSON without counting SPOUSE's INCOME, if Spouse's income is high so spouse doesn't qualify for a Community Spouse Income Allowance (spousal impoverishment allowance).

Married MLTC Recipient May Still Use a Pooled Trust to Eliminate His/Her Spend-down resulting from her own income being over the SINGLE's income limit.

The State Dept. of Health has changed its policy on this issue several times in the last few years. Since a directive issued November 3, 2014, a married person may CHOOSE to use EITHER Spousal Impoverishment budgeting OR regular Community Budgeting, which allows a pooled trust. See [GIS 14 MA/025 - Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act \(PDF\)](#), which states, "Spousal impoverishment budgeting with post-eligibility rules is **not mandated** for married individuals receiving home and community-based services (HCBS) pursuant to a waiver under Section 1915(c) of the Social Security Act or through enrollment in a managed long term care (MLTC) plan..."

The new directive rescinds an earlier [NYS DOH GIS 14 MA/015](#), issued August 5, 2014, and reinstates two even earlier directives. Pending further clarification from the federal CMS, "districts are to resume applying the policy provided in [GIS 12 MA/013](#), "Spousal Impoverishment Budgeting with Post-Eligibility Rules for Individuals Participating in a Home and Community-Based Waiver Program" and [NYS DOH GIS 13 MA/018](#), "Spousal Impoverishment and Transfer of Assets Rules for Certain Individuals Enrolled in Managed Long Term Care." These GIS messages provide for spousal impoverishment budgeting with post-eligibility rules only when it is *more advantageous* to the applicant.

This directive was the result of advocacy by the NYS Bar Association Elder Law Section.

- **When are Spousal impoverishment Protections Unfavorable, so Applicant would do Better using a Pooled Trust with regular Community Budgeting?**

Spousal protections can be *unfavorable* if the individual still has a high spend-down even after the spousal impoverishment allowances are allocated. Such an individual would normally want to use a supplemental needs trust in order to reduce his or her spend-down.

Example of circumstances when spousal protections are NOT favorable and Better to use Pooled Trust. Change the EXAMPLE above so that community spouse Chris' income was not \$2100 but was \$4100. Chris would not be entitled to any Community Spouse Monthly Income Allowance (CSMIA) because Chris' own income would be equal to or more than the Minimum Monthly Maintenance Needs Allowance (MMNA).

MLTC Spouse Sam has the option of using community budgeting based **just on Sam's own income** as follows. Community Spouse Chris' Income Does Not Count. Use Medicaid income level for ONE. GIS 12 MA/013

MLTC APPLICANT-Spouse Income	\$2,956.80
- Part B premium	-\$174.70
- Part D premium (after Extra Help Subsidy)	-\$15.40
- Standard Disregard	-\$20.00
- Medicaid level for ONE	\$1,732
Excess Income = Spend-down - May Deposit in Pooled Trust	\$959.80

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BACKGROUND: What State Policy was Rescinded by GIS 14 MA/025? ?

The August 2014 directive **NYS DOH GIS 14 MA/015** that is now rescinded had required use of the spousal impoverishment protections even when they were unfavorable. But under the State's interpretation from August 2014, these married individuals were not allowed to use a supplemental needs trust. The State's view was that the spousal impoverishment protections are used in "post-eligibility budgeting" which is the same budgeting used in nursing homes. Just as one cannot reduce one's NAMI in a nursing home by depositing excess income into a pooled trust, the State's view was that married individuals in an MLTC plan cannot reduce their spend-down by using a pooled trust. ("NAMI" is Net Available Monthly Income - the name for "spenddown" for people in nursing homes on Medicaid).

Suffolk County was the only county, to our knowledge, that had already rebudgeted married MLTC recipients. Couples with combined gross income exceeding about \$3400/ month were impacted (then, roughly the sum of the PNA and the CSMIA). If the MLTC recipient was using a pooled trust, Suffolk DSS had told them they were no longer allowed to use the trust and budgeted them with a high spend-down that must be paid to the MLTC plan. All of these individuals should now be rebudgeted and allowed to use the pooled trusts.

The new directive reinstates two previous GIS directives -- NYS DOH GIS 13 MA/018 and GIS 12 MA/013 to the extent that they gave married individuals receiving MLTC or other HCBS waiver services an OPTION of choosing NOT to use the spousal impoverishment protections, if it was more favorable for the couple not to use them. It could be more favorable NOT to use the protections if a married MLTC recipient instead used a pooled trust to eliminate his or her Medicaid spend-down. Even if s/he would otherwise have a very high spend-down, by using a pooled trust, she qualifies for Medicaid and MLTC without any spend-down. Even though the spousal impoverishment protections may reduce the spend-down, they may not eliminate it altogether if the individual's or spouse's income is high enough.

H. Past History of Spousal Impoverishment Protections in New York State - 2006 Threat to End the Protections

Since they were first available in 1988, New York State has always exercised the option of applying the spousal impoverishment protections to the flagship Lombardi program (long term home health care program) and other waivers. The continued use of spousal impoverishment protections was thrown into doubt in 2006, when, under the Bush Administration, CMS held up renewal of New York's Lombardi waiver, reversing its policy of 20 years and insisting that New York drop the spousal protections. CMS re-interpreted federal regulations to prohibit the spousal protections in waiver programs, restricting them to nursing home care.

The dispute between NYS and CMS over spousal protections reached at least a temporary resolution in 2010 after the national health reform law, section 2404 of the Patient Protection and Affordable Care Act (PPACA) mandated that all waiver programs nationally must include spousal impoverishment beginning in June 2014 through 2019. This law amends 42 USC 1396r-5(h)(1)(A) to define "institutionalized spouse" -- whose spouse is eligible for the impoverishment protections -- to include individuals who are eligible for HCBS waiver services. Posted at p. 205 of this link and see excerpt copied below.

Although this mandate didn't take effect until January 2014, in 2010 NYS was able to reach agreement with CMS under its 1115 Partnership plan extension to permit spousal impoverishment protections to continue in the Lombardi program. See GIS 10 OLTC/003. The Lombardi program, however, is being phased out. Current Lombardi program participants in the mandatory MLTC counties have been required to enroll in an MLTC plan if they are dual eligibles. Thus continuation of the spousal impoverishment protections for MLTC was critical. As first implemented by NYS under GIS 12 MA/013, participants in the Lombardi, TBI or NHTD waiver programs, who have a community spouse must have eligibility determined under spousal impoverishment budgeting *only if it was advantageous* to the recipient.

Section 2404 of the Patient Protection and Affordable Care Act (PPACA)

SEC. 2404. PROTECTION FOR RECIPIENTS OF HOME AND COMMUNITY- BASED SERVICES AGAINST SPOUSAL IMPOVERISHMENT.

"During the 5-year period that begins on January 1, 2014, section 1924(h)(1)(A) of the Social Security Act (42 U.S.C. 1396r-5(h)(1)(A)) shall be applied as though "is eligible for medical assistance for home and community-based services provided under subsection (c), (d), or (i) of section 1915, under a waiver approved under section 1115, or who is eligible for such medical assistance by reason of being determined eligible under section 1902(a)(10)(C) or by reason of section 1902(f) or otherwise on the basis of a reduction of income based on costs incurred for medical or other remedial care, or who is eligible for medical assistance for home and community-based attendant services and supports under section 1915(k)" were substituted in such section for "(at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI)".

This federal provision has been extended several times, most recently through Sept. 30, 2023. See [CMS Bulletin May 4, 2021](#).

I. LEGAL CITATIONS and FORMS.

- **NYS LAW** NY Social Services Law [366-c](#),
- **NYS REGULATIONS** 18 NYCRR 360-4.9,
- **NYS Medicaid Reference Guide (MRG)** at 278-282. Note that pp. 283-84 of the [MRG](#), which explain spousal budgeting in the TBI and NHTDW home and community based waiver programs, were last updated in 2011, when the longstanding spousal protections were temporarily banned. (see history above). Thus this MRG section does not explain the spousal protections as they apply to MLTC. See March 2014 DOH Medicaid Update Vol. 30 No. 3 at pp. 5-8:
- **CURRENTLY EFFECTIVE NYS DOH DIRECTIVES:**
 - ◆ **NYS DOH GIS 14 MA/025 - Spousal Impoverishment Budgeting with Post-Eligibility Rules Under the Affordable Care Act (PDF)**,
 - ◆ **Was rescinded, but reinstated 11/3/2014 GIS 12 MA/013**, "Spousal Impoverishment Budgeting with Post-Eligibility Rules for Individuals Participating in a Home and Community-Based Waiver Program" and
 - ◆ **Was rescinded but reinstated 11/3/2014 NYS DOH GIS 13 MA/018**, "Spousal Impoverishment and Transfer of Assets Rules for Certain Individuals Enrolled in Managed Long Term Care."
- **RESCINDED DOH DIRECTIVE NYS DOH GIS 14 MA/015 -- Affordable Care Act - Requirement to Apply Spousal Impoverishment Budgeting with Post-Eligibility Rules to Couples with a Spouse Receiving Home and Community-Based Services Pursuant to a Waiver or Enrolled in a Managed Long Term Care Plan.**
- NYS DOH Medicaid UPDATE explaining Spousal Impoverishment rules
 - ◆ See "[Information Notice to Couples with an Institutionalized Spouse](#)," (p. 6-8 of link)

- ◆ Instructions to MLTC plans, nursing homes and other providers to provide this notice to all married consumers (page 5 of [link](#)) and
- ◆ **"Request for Assessment - Spousal Impoverishment" (DOH-5298 01/2023) form**
- LDSS-4346 form "Institutionalized Spouse Budget Worksheet" (1995 version) - this is the only version we could find. Please send any updated version to vbogart@nylag.org and we will post it.
- Federal law - Section 2404 of the Patient Protection and Affordable Care Act (PPACA), which, effective January 1, 2014, required all States to expand spousal impoverishment protections for all married couples with a spouse receiving Managed Long Term Care (MLTC) or other Home-and-Community-Based Services under a waiver --**Traumatic Brain Injury (TBI), Nursing Home Transition and Diversion (NHTD), and OPWDD** waivers. Click here for the exact language of the ACA -PPACA law on spousal impoverishment. This 2014 law originally had a sunset clause. This provision has been extended several times, most recently in 2022 through Sept. 30, 2027. See CMS Bulletin 8/15/23.

For more information

See webinar of NY Metropolitan Elder Law Institute, a project of UCS Trust Services, "Pooled Trusts and the Changing MLTC Landscape - Special Issues for Married Couples, by Valerie Bogart, recorded May 18, 2016 (Also discusses other budgeting strategies to reduce the spend-down, including the housing disregard for those discharged from NH or Adult Home, and pooled trusts generally.

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