

DATE: July 12, 2023

TO: ALL COUNTY WELFARE DIRECTORS Letter No.:23-13
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: POSSIBLE INSTITUTIONAL DEEMING OF TWO HOME AND
COMMUNITY-BASED SERVICES SPOUSES AND ELIGIBILITY
DETERMINATIONS FOR REGISTERED DOMESTIC PARTNERS WHEN
BOTH REQUEST HOME AND COMMUNITY-BASED SERVICES

RE: All County Welfare Directors Letters, [90-01](#), [90-03](#), [91-28](#), [12-36](#), [17-25](#) and [18-19](#);
Title 22, California Code of Regulations sections [50403](#), [50404](#), [50512](#)

Purpose:

The purpose of this All-County Welfare Directors Letter (ACWDL) is to provide counties with information and policy guidance related to institutional deeming when both spouses request Home and Community-Based Services (HCBS) Waivers or Programs, including In-Home Supportive Services Community First Choice Option (IHSS-CFCO). This ACWDL will also provide counties with guidance for establishing eligibility when two registered domestic partners (RDPs) request HCBS Waiver or Program participation.

Institutional deeming is the process of treating individuals as though they were institutionalized and in a Medi-Cal Family Budget Unit (MFBU) of one, if necessary, to establish eligibility. Institutional deeming applies to the HCBS Waivers and Programs listed previously in ACWDLs [17-25](#) and [18-19](#), and on the [DHCS webpage](#). HCBS Waivers and Institutional deeming may apply to the following:

- Married individual with no community spouse.
- A child whose family income and resources make them ineligible for no cost Medi-Cal.¹
- Married individuals who are both receiving HCBS Waiver or Program services

Institutional deeming applies only to the eligibility determination for federally-funded, full-scope coverage groups that are not subject to the Modified Adjusted Gross Income

¹ See ACWDL [91-84](#), for the most recent version of Section 50377.

(MAGI) rules and does not apply to the eligibility determinations for Medicare Savings Programs or other Mega Mandatory coverage groups.

Background:

HCBS Waivers and Programs are special agreements with the federal government that waive the federal regulatory requirements of “statewideness” and/or “comparability”. This enables states to provide a different array of services intended to prevent institutionalization in nursing facilities and medical institutions to a target population of individuals at home or in the community. The phrase, “HCBS Waivers and Programs”, is a generic phrase used to identify those agreements. Some include the term “Waiver” in their title and some do not.

Institutional Deeming of Two Spouses Who Both Request HCBS Waiver or Program Participation:

Who is eligible to be institutionally deemed?

Under federal regulations at [42 C.F.R., Section 435.217](#), an individual must be receiving HCBS Waiver and Program services to be institutionally deemed.

When can institutional deeming be applied?

For cases where institutional deeming applies, it must be effective in the same month of an applicant’s or beneficiary’s actual participation in an HCBS Waiver or Program. The county eligibility worker (CEW) must follow the institutional deeming processes that were demonstrated in ACWDLs [17-25](#) and [18-19](#) for making referrals and coordinating with the waiver administrator (WA) or care coordinator (CC). These processes should already be established to conduct the institutional deeming steps in the same month in which a waiver slot or waiver participation becomes available to that individual. As long as all of the eligibility criteria are met at any time in a month, they are considered to be met throughout the month, and the individual is eligible ([Title 22 CCR sections 50193 \(c\)](#) and [50195 \(c\)](#)). This means that individuals requiring institutional deeming, who are on an HCBS Waiver or Program wait list, cannot be institutionally deemed while waiting, but can have eligibility granted for that month as soon as the waiver enrollment is confirmed.

Who is eligible to have the Spousal Impoverishment (SI) provisions applied to their case?

The SI provisions apply to married individuals where only one spouse is requesting HCBS Waiver and Program participation. If both spouses are assessed for In Home

Supportive Services Community First Choice Option (IHSS CFCO), one spouse may decide to voluntarily disenroll and transition to IHSS personal care services so their spouse would receive HCBS Waiver and Program service, and the SI provisions would apply.

When are the spousal impoverishment provisions applied?

In contrast, the SI provisions are applied as an initial eligibility step. The SI provisions can be applied in the month when there is a request for in-home care, IHSS or HCBS Waiver and Program services, throughout the period while on a wait list and on-going if:

- The needs assessment is completed and the person is found to meet the waiver clinical criteria, or
- The [MC 604 MDV](#) is returned to the county indicating that the person's physician has determined that the individual requires nursing facility level of care for at least 30 consecutive days covering the month(s) in which the individual is requesting HCBS Waiver or Program participation.

What are the SI provisions?

The SI provisions are rules that allow a community spouse to keep more income and property when the HCBS spouse applies for Medi-Cal. Under the SI provisions, the community spouse retains the Community Spouse Resource Allowance (CSRA). The CSRA is an amount of property up to the greater of: a standard amount, an amount established by court order for support, or an amount established by fair hearing ([ACWDL 90-01, Section 50490.5 of that letter](#)). The community spouse also retains whatever income is received in the community spouse's own name. If that amount is less than the Minimum Monthly Maintenance Need Allowance (MMMNA), the HCBS spouse may also provide a spousal income allocation to bring the community spouse's income up to the MMMNA. The spousal income allocation can also be a higher amount if established through a fair hearing due to circumstances resulting in financial duress, or an amount established through a court order for support of the community spouse.

Cases Where Neither Institutional Deeming Nor the SI Provisions Apply

- Married spouses living together in the home, neither requesting or receiving HCBS or IHSS CFCO.
- Married spouses, living in the home, both receiving HCBS, eligible for no cost Medi-Cal

When two spouses both apply for Medi-Cal, reside together in the home, and are determined not eligible under any of the Mega Mandatory or MAGI coverage groups (see ACWDL [17-03](#)), they are considered to be in a Medi-Cal Family Budget Unit (MFBU) of two (or more if there are children for whom the spouses are financially responsible and who are living in the home). Similarly, when two spouses both apply for Medi-Cal and both request HCBS Waivers or Program services, they are in the same MFBU of two. Just as in the case of children for whom HCBS Waiver and Program participation is requested, Medi-Cal eligibility must first be determined with the family members in the MFBU following the Medi-Cal hierarchy pursuant to ACWDL [17-03](#). When the hierarchy is completed, if the couple has excess property or a share of cost (SOC), institutional deeming is triggered and each spouse is placed in their own MFBU of one. The county then determines eligibility for each spouse separately following the Medi-Cal hierarchy.

The following examples illustrate when to apply institutional deeming.

Example 1: Eligibility – no need for Institutional Deeming

For example, two spouses, who are both disabled pursuant to Title 22, CCR, Section [50223](#), and not working, applied for Medi-Cal and wondered whether they might be eligible for some type of in-home care. If the applicants are not already working with a WA or CC or IHSS staff, then the county eligibility worker (CEW) would make referrals to In-Home Supportive Services (IHSS) and to the applicable HCBS Waivers and Programs.

- Medi-Cal eligibility would first be determined for the two spouses together in the same MFBU.
- If the couple is not eligible under any of the Mega Mandatory or MAGI coverage groups (see ACWDL [17-03](#)), then --
- Proceed down the Medi-Cal hierarchy. Then see if the couple is eligible for the Aged, Blind or Disabled Federal Poverty Level Program (ABD FPL), 250% Working Disabled Program or MN program without a share of cost.
- In this example, both spouses are eligible. The CEW would establish eligibility for the couple in the respective program aid codes and provide that information to the WA or CC.
- In this example, both spouses pass (or passed) the needs assessment, the WA or CC would place them on a waiting list or enroll them into the waiver or program.
- The WA or CC would provide that information back to the CEW.

Example 2: Eligibility – need for Institutional Deeming

In this example, the WA or CC referred the couple for a Medi-Cal eligibility determination because two HCBS Waiver or Program slots were available and the clients both passed the needs assessment. The Medi-Cal eligibility determination for the ABD FPL, 250% WD program and Medically Needy (MN) program all resulted in the excess property (over \$130,000 + \$65,000). SI rules would not apply because there is no community spouse; therefore, no SI spousal income allocation or CSRA would apply. Institutional deeming with the community property spousal income allocation would apply and each spouse would be placed in a separate MFBU.

Eligibility would be redetermined following the Medi-Cal Non-MAGI hierarchy. This time, after applying institutional deeming, each spouse is under the income and property limits for a single person for the ABD FPL program. The county would establish each spouse's separate eligibility in the ABD FPL program aid codes through which they may participate in HCBS Waiver or Programs. The CEW would then provide the eligibility information to the WA or CC. Since both spouses passed the needs assessment, the WA or CC would enroll both into the HCBS Waiver or Program. The WA or CC provides that information back to the CEW.

Aid Code Exceptions

If the institutionally deemed spouse(s) were participating in one of the following four specific waivers, the respective institutional deeming aid codes would be used instead of the program aid codes. Institutional deeming aid codes are only used when institutional deeming is applied, not for spousal impoverishment. The waivers that have specific institutional deeming aid codes are:

- Home and Community-Based Alternatives (HCBA) Waiver, formerly the In-Home Operations Waiver (IHO Waiver)
 - 6X (no SOC)
 - 6Y (SOC)
- Multipurpose Senior Services Program (MSSP) Waiver for 65 years of age or older
 - 1X (no SOC)
 - 1Y (SOC)
- HCBS Waiver for Californians with Developmental Disabilities (HCBS-DD Waiver) and the Self-Determination Program (DDS/SDP) Waiver
 - 6V (no SOC)

- 6W (SOC)

Example 3: One or both spouses have a SOC after Institutional Deeming

Using the same couple as in the example above, but when considered separately through institutional deeming, one or both of the spouses were still income ineligible for the ABD FPL program. Then, under the MN determination, one or both spouses still had a SOC. Even though a SOC will trigger institutional deeming, a SOC may still exist when the institutional deeming determination and/or community property spousal allocation is completed. One or both spouses will have their own SOC to meet each month and they may still participate in the HCBS Waivers and Programs to the extent of the terms of HCBS Waiver and Program rules. The WA or CC will inform the CEW if there are limits regarding SOC for the specific HCBS Waiver or Program being considered for the client.

Counties should inform the spouses how they can reduce or eliminate their share of cost (ex. purchasing supplemental health insurance; if appropriate, discuss the possibility of establishing eligibility under the 250% WD program; or meeting the SOC through the use of old, unpaid medical bills).

Example 4: Only one spouse passes need assessment

- One spouse does not pass the needs assessment, and the WA or CC makes a Medi-Cal referral for only one, and there is a spot for that spouse to participate in the HCBS Waiver or Program. The CEW needs to discuss the reasons for denying participation for the other spouse into that specific waiver or program with the WA or CC to determine whether a different HCBS referral would be appropriate. If so, the CEW makes the referral and then that spouse will be considered a community spouse of an HCBS spouse, for the time being, and may still be eligible for Medi-Cal. Eligibility is established for the HCBS spouse under the SI provisions.
- If the community spouse failed the initial needs assessment because their impairments do not reach the level required to participate in the HCBS Waiver or Program and a different HCBS Waiver or Program referral is not necessary, then that individual would continue on as a community spouse, and the SI provisions would continue to apply to the couple. The spousal income allocation may apply. The CEW will need to discuss the spousal income allocation with the couple to determine the best fit and how much they want that allocation to be, if any.

- In this example, the community spouse passes the needs assessment the second time and there is a spot available in the HCBS Waiver or Program. In that case, the couple remains in separate MFBUs, and both are institutionally deemed with the community property spousal income allocation, rather than being covered by the SI provisions since there is no longer a community spouse.

Example 5: Neither spouse passes the needs assessment

If the county receives a referral from a WA or CC, but learns that neither spouse passes the initial needs assessment and no other referral would be appropriate, then the couple's eligibility is determined as two spouses living together in the home and in one MFBU.

Registered Domestic Partners:

The institutional deeming rules for RDPs are not the same as for married individuals. The spousal impoverishment (SI) provisions can be applied to RDPs where one RDP requests HCBS Waiver and Program participation and the other RDP is a community spouse. In cases where both RDPs participate in HCBS Waiver and Programs, they are treated as unmarried individuals. Each RDP is in a separate MFBU and each RDP would benefit from the \$130,000 property limit for one person.

When Both RDPs Request HCBS Waiver or Program Participation:

SI provisions can be applied if one RDP requests HCBS Waiver and Program participation, or if only one RDP passes the needs assessment. RDPs are protected from transfer of property penalties and this allows for the transfer of the Community Spouse Resource Allowance and the spousal income allocation to the non-participant, non-institutionalized RDP (see ACWDL [12-36](#)).

RDPs who both request HCBS Waivers and Program participation are not treated as spouses for purposes of eligibility. Each RDP establishes eligibility in a separate MFBU from the beginning, without institutional deeming. When determining the eligibility of both RDPs who request HCBS Waiver and Program participation, and for whom the WA and CC states a HCBS Waiver or Program spot is available, counties must apply the rules currently in place for unmarried individuals to RDPs. As such, if there is excess property or a SOC, no redetermination for institutional deeming is necessary. When eligibility is first determined, the county would establish eligibility using the regular aid codes under which each RDP was found to be eligible and provide that information to the WA or CC. If both RDPs have passed the needs assessment, the WA or CC enrolls them into the waiver or program without a change in aid code. The WA or CC would

provide that information back to the CEW, but there would be no change in eligibility for either RDP.

Property

Each spouse would be assigned one-half of the couple's community property, plus each would be assigned their respective separate property as if they were in long-term care in accordance with Title 22, CCR, Section [50403](#) and Section [50404](#)². Each spouse would receive a full property limit for one (\$130,000 for each).

Please note: Beginning January 1, 2024, all property will be exempt and property will no longer be considered when determining eligibility for Medi-Cal.

Income

The CEW would follow Title 22, California Code of Regulations (CCR) Section [50512](#), "Ownership of Income", as though each spouse was in long-term care, but with a full percentage of federal poverty level for one (\$1677 for 2023) or a full community maintenance need for one (\$600 for 2023). Section [50512\(b\)](#) is to be applied even though both spouses are deemed to be institutionalized. "It is presumed that each spouse has a one-half community property ownership interest in the total monthly gross earned and unearned income of both spouses." If both spouses receive equal amounts based upon the name on the check, then the county should determine eligibility for their separate MFBU of one. If one spouse receives less than half of the total income, then a spousal income allocation may serve to make one or both spouses eligible. This spousal income allocation calculation is similar to the calculation formerly used before the SI provisions when one spouse was in a long-term care facility and the other spouse was at-home that is contained in Section III on the [MC 176W](#).

Income Calculation Instructions:

- 1) Begin by looking at the name of the person who receives the income.
- 2) Total the gross nonexempt income and divide by 2. Each spouse gets a ½ share in their separate MFBU of one.
- 3) Allow any relevant deductions to each spouse's separate MFBU. Divide equally any deductions that are the obligation of both spouses. Deductions include, but not limited

² Any property transferred between spouses pursuant to an interspousal agreement will not result in a period of ineligibility for nursing facility level of care. The income generated by the transferred property would then become the income of the spouse receiving the property as a result of the agreement.

to, the Any Income deduction, \$65 + ½ earned income deduction, court orders for support, dependent relative deduction, other health insurance, and conservatorship fees.

4) If each spouse actually receives one half of the total nonexempt income in their own name, and after deductions, each spouse is at or below their individual Medi-Cal program income limit for no-cost Medi-Cal, then complete each spouse's eligibility determination. There is no need for a community property spousal income allocation.

5) If each spouse receives a different amount, but after deductions, each spouse is below the program income limits for no cost Medi-Cal based upon the calculation above, each spouse is eligible for no cost Medi-Cal and there is no need for a spousal income allocation.

Example 6: Couple Without Community Property Spousal Income Allocation

Both spouses are aged and apply for and are approved to receive PACE Program. Spouse 1 receives \$1,500 a month nonexempt income based on name on the check. Spouse 2 receives \$1,500 a month nonexempt income.

Total nonexempt presumed community property income after deductions: $\$3000/2 = \1500 . There is no need for a community property spousal income allocation because they both have equal interest.

- 6) a. If one spouse receives different amount in their own name, and after deductions one or both spouses would be ineligible for no-cost Medi-Cal, OR
- b. If both spouses receive the same amount in their own name, and after deductions one or both spouses would be ineligible for no-cost Medi-Cal,

Then determine the community property spousal income allocation (Go to 7 below.) To see a side-by-side of the steps below and Example 7, see pages 12 and 13.

- 7) a. Use the income amount of the spouse with the lower net nonexempt income, determine the income limits [the relevant Federal Poverty Level (FPL) or Maintenance Need Level (MNL)] for that spouse's Medi-Cal Program, and determine the difference between the two amounts.
- b. Determine ½ of the community property income by dividing the community property income by two. Determine the difference between the amount of income

received in the name of the spouse with the lower amount of net nonexempt income and $\frac{1}{2}$ community property income.

c. Compare the results of a and b above. The smaller amount is the potential community property spousal income allocation.

8) Determine the amount of net nonexempt income in excess of the relevant FPL or MNL for the spouse with the greater income. This is the amount available to allocate.

9) Compare the potential community property spousal income allocation in number 7c with the amount available to allocate in number 8 above. The smaller of those two amounts is the actual spousal income allocation.

Example 7: Using Spousal Income Allocation for Spouses with Different Income Amounts

Both spouses are aged and apply for and are approved to receive CFCO. Spouse 1 receives \$2,000 a month net nonexempt income based on name on the check. Spouse 2 receives \$1,000 a month net nonexempt income.

Total net nonexempt income presumed to be community property: $\$3000/2 = \1500 .

Spouse 2's community property interest is not protected $\$1000 < \$1,500$.

The ABD FPL program income limit for one person in 2023 is: $\$1,677$.

The spousal income allocation for Spouse 2 could be no more than $\$677$ ($\$1,677 - \$1,000$). (This is the amount described in 7a above.)

$\frac{1}{2}$ community property income is $\$500$ ($\$1500 - \$1,000$). (This is the amount described in 7b above.)

The potential spousal income allocation for Spouse 2 is $\$500$ ($\$677 > \500). This is the amount described in 7c above.)

Spouse 1's net nonexempt income after deductions is:	\$2,000
Minus the ABD FPL	<u>-\$1,677</u>
Total <u>available</u> for allocation (8 above) is:	\$ 323

Per Step 9 above, $\$323 < \500 . Therefore, the actual spousal income allocation is $\$323$.

Spouse 1's net nonexempt income is: \$2,000
Minus the actual spousal income allocation: -\$ 323
Spouse 1's net nonexempt income is: \$1,677
Spouse 1 is eligible for the ABD FPL: \$1,677 ABD FPL program limit = \$1,677 net nonexempt income.

Spouse 2's net nonexempt income is: \$1,000
Plus the actual spousal income allocation: +\$ 323
Spouse 2's net nonexempt income is: \$1,323

Spouse 2 is eligible for the ABD FPL program: \$1,323 net nonexempt income < \$1,677 ABD FPL program limit.

Side-By-Side of the Determination the Community Property Spousal Income Allocation and Example 7	
<p>Example 7: Using Spousal Income Allocation for Spouses with Different Income Amounts</p> <p>Both spouses are aged. They apply for and are approved to receive CFCO. Spouse 1 receives \$2,000 a month net nonexempt income based on name on the check. Spouse 2 receives \$1,000 a month net nonexempt income.</p> <p>Total net nonexempt income presumed to be community property: $\\$3000/2 = \\1500.</p> <p>Spouse 2's community property interest is not protected $\\$1000 < \\$1,500$.</p> <p>The ABD FPL program income limit for one person in 2023 is: \$1,677.</p>	
<p>7) a. Use the income amount of the spouse with the lower net nonexempt income, determine the income limits (the relevant FPL or MNL) for that spouse's Medi-Cal Program, and determine the difference between the two amounts.</p>	<p>The spousal income allocation for Spouse 2 could be no more than: \$1,677 (ABD FPL) - \$1,000 (net nonexempt income) = \$677(difference).</p>

<p>b. Determine $\frac{1}{2}$ of the community property income by dividing the community property income by 2. Determine the difference between the amount of income received in the name of the spouse with the lower amount of net nonexempt income and $\frac{1}{2}$ community property income.</p>	<p>Total net nonexempt income presumed to be community property: $\\$3000/2 = \\1500.</p> <p>$\frac{1}{2}$ community property income is $\\$1500 - \\$1,000 = \\$500$.</p>
<p>c. Compare the results of a and b above. The smaller amount is the potential community property spousal income allocation.</p>	<p>The <u>potential</u> spousal income allocation for Spouse 2 is $\\$500$ ($\\$677 > \\500).</p>
<p>8) Determine the amount of net nonexempt income in excess of the relevant FPL or MNL for the spouse with the greater income. This is the amount available to allocate.</p>	<p>Spouse 1's net nonexempt income after deductions is: $\\$2,000 - \\$1,677$ ABD FPL = $\\$323$ Total <u>available</u> for allocation</p>
<p>9) Compare the potential community property spousal income allocation in number 7c with the amount available to allocate in number 8 above. The smaller of those two amounts is the actual spousal income allocation.</p>	<p>$\\$323 < \\500. Therefore, the actual spousal income allocation is $\\$323$.</p> <p>Spouse 1's net nonexempt income is: $\\$2,000$ Minus the actual spousal income allocation: <u>$-\\$ 323$</u> Spouse 1's net nonexempt income is: $\\$1,677$</p> <p>Spouse 1 is eligible for the ABD FPL: $\\$1,677$ ABD FPL program limit = $\\$1,677$ net nonexempt income.</p> <p>Spouse 2's net nonexempt income is: $\\$1,000$ Plus the actual spousal income allocation: <u>$+\\$ 323$</u></p>

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	<p>Spouse 2's net nonexempt income is: \$1,323</p> <p>Spouse 2 is eligible for the ABD FPL program: \$1,323 net nonexempt income < \$1,677 ABD FPL program limit.</p>
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Please note: If there is a court order for the support of the current spouse, or a fair hearing decision, then the amount of the court order or fair hearing amount will be the spousal income allocation if the amount ordered is higher than the actual spousal income allocation (See ACWDLs [87-77](#) and [84-40](#)).

Section 50512 (c) applies if either spouse wishes to rebut the presumption that the total income of both spouses is community property pursuant to subsection (b).

For questions on the information contained in this letter, please contact Meuy Saeteune at (916) 345-8064 or by email at Meuy.Saeteune@dhcs.ca.gov.

Sincerely,

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