



# MASSBAR

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## 2018 ELDER LAW EDUCATION PROGRAM Taking Control of Your Future: A Legal Checkup

NINTH EDITION



Presented with the generous assistance and continued collaboration of the  
Massachusetts Chapter of the National Academy of Elder Law Attorneys

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# MASSBAR

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## COMMUNITY AND PUBLIC SERVICES

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May 2018

Dear Massachusetts Elders:

This year marks the ninth edition of the Massachusetts Bar Association's elder law resource guide. This guide was developed to serve as a tool to assist those who have important planning issues and health care questions.

The contributing commentators to this edition were greatly expanded to include some of the most experienced elder law attorneys in the state. In addition, we are very excited to continue our collaboration this year with the Massachusetts Chapter of the National Academy of Elder Law Attorneys (MassNAELA). We have expanded our advisory committee, comprised of members of both the MBA and MassNAELA. The exceptional work by everyone involved on this project ensures that the updated information featured within this guide is of the highest quality and accuracy for the public. We also added an important new chapter on "Consumer Bankruptcy."

These materials are part of the MBA's annual Elder Law Education Program, presented across Massachusetts by volunteer attorneys. The MBA is committed to helping you navigate these senior years with knowledge so you may age actively and positively, and be empowered to serve as your own health care advocate.

We hope that you find this guide informative and helpful.

Cordially,

Alex L. Moschella, Esq., chair  
MBA Elder Law Advisory Committee

# ACKNOWLEDGMENTS

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### MASSACHUSETTS CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS (MassNAELA)

The mission of the National Academy of Elder Law Attorneys is to develop awareness of issues surrounding legal services for the elderly and those with special needs. The approximately 500 attorney members of NAELA's Massachusetts Chapter work for our elderly population in areas as diverse as: planning for catastrophic care costs; disability planning; age discrimination in employment and housing; benefits planning, including Medicaid and Medicare; and guardianships, probate and estate planning.

The objective of both the national and Massachusetts chapters is to promote the highest standards of technical expertise while maintaining ethical awareness among attorneys who represent the most frail and vulnerable members of the society.

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A copy of this guide can be found and downloaded at [www.MassLawHelp.com/Estate-planing.aspx](http://www.MassLawHelp.com/Estate-planing.aspx).

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# CHAPTER 1

## IMPORTANT QUESTIONS AS WE AGE

The following questions and answers address the basics of elder law. Some of these issues are explained at greater length in later chapters. If such a chapter is contained in this guide it is referenced so that you may find it.

### A. What is Elder Law and What Does an Elder Law Attorney Do?

Elder law is legal life care planning that ensures the needs of an individual are addressed from a multi-disciplinary perspective. Elder law includes the following range of services:

- Asset protection planning;
- Basic Social Security retirement planning;
- Medicare, Medicaid (MassHealth) and other public benefits planning;
- Interplay of long-term care and financial planning;
- Use of long-term care insurance;
- Health care decision-making and the use of advanced directives;
- Estate planning and the use of durable powers of attorney, living trusts, wills and real estate strategies to protect the family home; and
- Housing options and alternatives to nursing homes.

An elder law attorney should be able to address all of the issues/matters listed above. See the Resource Directory on page 71 to find an experienced elder law attorney.

### B. What are the Essential Estate Planning Documents and Considerations I Should Know About?

- Wills;
- Health care proxies (*see Chapter 1, Section L1*);
- Power of attorney (*see Chapter 1, Section N*);
- Deeds with life estates and realty trusts (*see Chapter 8, section B*);

- Revocable and irrevocable trusts;
- Gifting plans; and
- Asset protection plans.

### C. If I Already Have Some of These Documents, Why Should I Review and Update Them?

One's estate plan evolves over time, and it is critical to continuously review that plan for the following reasons. First, it is important that your documents remain current with changes in the laws. Massachusetts implemented significant changes to its probate code in 2012, now called the Massachusetts Uniform Probate Code (MUPC) (laws that affect death and incapacity). These overhauls in the law can have drastic and unintended consequences for plans executed prior to these changes.

Second, your goals may change as you progress to different stages of life (i.e., planning for marriage or remarriage, planning for a young family, planning to minimize estate taxes, planning to avoid the cost of long-term care) and, therefore, the plan that made sense at an earlier time may not make sense today.

Finally, it is important to re-evaluate the people you chose as fiduciaries in your will, trust, power of attorney and health care proxy, and determine whether those individuals are still appropriate choices. Often individuals list parents who may no longer be living or competent, or friends with whom the individual has not kept in contact.

### D. What is the Probate Process?

Probate occurs when someone dies with property in his or her individual name. Joint property (i.e., jointly held bank accounts, real estate, stock accounts, etc.) and property passing by contract (i.e., 401(k)/IRAs, life insurance, annuities, etc.) are not probate property. Joint property with the right of survivorship and property held as tenants by the entirety pass to the surviving owner(s) immediately upon the death of the decedent. In contrast, proper-

ty held by tenancy in common gives each co-owner an equal share with equal rights; upon the death of any co-owner, his or her share passes to his or her estate.

A person dies either “testate” (with a will) or “intestate” (without a will). If the individual dies testate, the will should be filed within 30 days of the date of death, but is often filed much later without penalty. An individual named as personal representative (formerly called an “executor”) under the will must be appointed by the Probate Court in the county where the decedent resided. If a person dies intestate with property, the property passes by the state law of intestacy upon a petition to the Probate Court to appoint a personal representative to administer the estate.

This revision to the MUPC permits different types of probate:

- Formal Probate — requiring traditional supervision over every step in the probate process, or,
- Informal Probate — dispensing with many of the cumbersome reporting formalities.

Massachusetts also allows for Voluntary Administration of probate estates with a total value of less than \$25,000.

### E. What Does it Mean to Avoid Probate?

Although there is much said about avoiding probate, it is often misunderstood.

Avoiding probate simply means that there is no need to access the Probate Court to administer and settle your affairs after death. In order to avoid probate, your assets must be titled prior to the time of death in such a way that no asset is in your name alone prior to the time of death, except, in some instances your spouse or next of kin may be able to access, your automobile and a bank account of not greater than \$10,000. (Mass. G.L. ch. 167D, §12 (bank accounts), Mass. G.L. ch. 171, §42 (credit union accounts) and Mass. G.L. ch. 90D, §15A (automobiles)).

Avoiding probate can be done by the following:

1. By placing all assets in a trust. These trusts, however, have pros and cons, and present many complex issues to review with an experienced attorney knowledgeable in elder law and estate planning.

2. By placing all assets (i.e., bank accounts, real property, brokerage accounts, mutual funds, stocks, etc.) into joint ownership with another person or persons, who would inherit the joint assets after the individual’s death. There are many drawbacks to consider with joint ownership, however, including the following:
  - a. Disruption of one’s dispositive wishes and the possibility that one beneficiary can receive a windfall;
  - b. Loss of control over the joint asset if the joint owner exercises ownership rights;
  - c. Exposure of an asset to the joint owner’s creditors;
  - d. Consequences to the joint owner if the joint owner is involved in a divorce proceeding;
  - e. Consequences to the joint owner (or his or her children) in the context of an application for financial aid, because the joint asset must be disclosed and be counted on the financial aid application;
3. By making accounts payable on death to another, or ensuring that retirement and brokerage accounts, as well as any insurance policies, have named beneficiaries, since by doing so, these types of assets keep from becoming probate assets.

The perception is erroneous that avoiding probate is devoid of problems and delays and eliminates many hassles and expense of settling an estate. In Massachusetts, the probate system has been dramatically simplified, and in many instances the expense of probate after death may be far less than the expense before death (e.g., legal fees, cost of preparing a living trust) of arranging assets so as to avoid a probate. Massachusetts also has a very simple procedure for settling a small estate.

The probate process in Massachusetts has been simplified over the past five years; fees are not onerous, and involvement of the Probate Court may, in some circumstances, even offer protection to one’s beneficiaries. In some states, attorney and court fees can take up to five percent of an estate’s value; that is not the case in Massachusetts, where there is no statutory attorney fee, and court fees are modest. Most of what happens during probate is essentially clerical. For the most part, the attorney makes a

few routine court appearances; many matters can be handled by mail. In the majority of cases, if there is no conflict and no contesting parties, avoiding probate is not a compelling goal and is not worth the expense and effort involved in making sure one's assets are arranged and maintained through one's life so as to avoid probate.

Avoiding probate and the probate process does not solve all of the problems involved in settling one's estate. For instance, it does not avoid having to pay estate taxes, since non-probate assets are countable when determining whether or not there is a taxable estate and taxes that need to be paid. Additionally, if one asset (e.g., a bank account, certificate of deposit, savings bond, etc.) remains in the decedent's name only at the time of death, the probate process may need to be accessed. A refund or a check received after death may necessitate the opening of an estate even if everything else was done correctly and all other assets were titled properly. Also, avoiding probate does not prevent a disgruntled heir or beneficiary from accessing the Probate Court to challenge the appointment of a fiduciary or the distribution of an asset.

## **F. What are Federal and State Estate Taxes, and How Do They Differ From Gift Taxes?**

The federal government and Massachusetts may levy estate taxes on assets of the last to die of a husband and wife, or on the estate of an unmarried individual. There is a 100 percent tax exemption for bequests between spouses (when both are U.S. citizens), but when the surviving spouse eventually dies, a higher tax at graduated rates may be owed on the entire estate. Proper planning is required to avoid this outcome. If one spouse is not a U.S. citizen, couples should consult with an attorney, knowledgeable in elder law and estate planning matters, to draft an estate plan to defer potential estate taxes upon the death of the first spouse.

Also, if seniors are in a same-sex marriage or domestic partnership, they should consult an attorney with expertise in same-sex estate and tax planning issues.

The federal estate, gift and generation-skipping transfer (GST) taxes now form a unified transfer tax system. The exemption levels and tax rates for each of these taxes are the same. Estate taxes are assessed

on property passing at one's death, and gift taxes are assessed at the time a gift is made during one's lifetime. The GST tax is imposed on certain property that skips a generation. The federal estate, gift and GST tax exemptions for 2017 were \$5,490,000. The 2017 tax legislation has increased the 2018 exemption to \$11,180,000.

Property going to charity or to one's spouse is separately exempt from federal transfer taxes if the requirements for exemption are met.

For federal gift tax purposes, every person can currently (in 2018) make a tax-free gift of \$15,000 to any individual, every year. A married couple can currently make joint gifts of up to \$30,000 to each individual every year. Also, gifts for a donee's medical care or education can be made in unlimited amounts each year. A qualified accountant or a certified public accountant can advise you on whether a federal gift tax return should be filed, and can provide you with filing instructions.

Currently, estates are not required to file a Massachusetts estate tax return if they are under \$1,000,000. There is no Massachusetts gift tax, and hence no limitation on the amounts that an individual or couple can gift, tax free, each year for Massachusetts purposes.

Be mindful, however, that gifts may impact eligibility for government benefits.

## **G. What is the Difference Between Medicaid and Medicare?**

Medicaid, known as MassHealth in Massachusetts, is a joint federal-state medical assistance program based on financial need. It comprehensively pays for the medical and health maintenance needs of those receiving benefits. Medicaid also pays for long-term nursing home care or for home health aides in the community. *See Chapter 4.*

Medicare is a federal health insurance program associated with Social Security Insurance benefits for the elderly and disabled. Medicare assists in paying for medical expenses, including prescription drugs, durable medical equipment and up to 100 days of skilled nursing care each year. Medicare does not pay for extended nursing home or custodial care. Most citizens are eligible for Medicare at age 65 based on FICA tax contributions. *See Chapter 5.*

## H. If I Need Nursing Home Care, But My Spouse Does Not, Will I Still be Eligible for Medicaid?

Yes. You will still be eligible for Medicaid assistance and your spouse may keep his or her income and your assets up to certain limits. The Medicaid regulations are designed to protect the healthy spouse from poverty when the other spouse enters a skilled nursing facility. The healthy spouse (called the “community spouse” in Medicaid regulations) is currently allowed to keep \$120,900 in countable assets. This amount is known as the Community Spouse Resource Allowance (CSRA). There are allowable methods to save liquid assets that exceed the CSRA. Medicaid will not place a lien on the couple’s home as long as the home is the principal residence of the community spouse. In certain situations, the community spouse may also keep a portion of the institutionalized spouse’s income. *See Chapter 3.*

## I. Who Can See My Medical Information and How Do I Get It?<sup>1,2</sup>

Every physician who treats you keeps a record of your visit; when this record is entered on a computer, it is called an Electronic Medical Record (EMR). The record belongs to the medical professional who wrote it, but you can inspect the record and get a copy of it. You should make the request in writing. Under the Health Insurance Portability and Accountability Act (HIPAA), the doctor has 30 days to provide you with a copy of the medical record; if the records are older and no longer in the office, the process can take up to 60 days. You are charged a reasonable fee to copy the records, but you do not pay for the time it takes to find them.

You may be asked for permission for your medical record to be shared with your other providers. Some hospitals and physicians use the Mass Highway<sup>3</sup> (the Massachusetts Health Information Highway) where your personal Electronic Health Record (EHR) is shared with other providers who treat you. This is especially useful if you have specialists who treat you at different hospitals, since all of your doctors will be able to share their reports. Your medical records are not shared automatically; you have to agree or “opt-in” to have your records shared among your providers. Your spouse, family members or

other persons cannot get your medical records without your permission.

### • Are there any exceptions for medical records?

Yes. You generally do not have the right to see your records made by a psychologist or psychiatrist if the provider feels that the inspection would “lead you to serious harm.”<sup>4</sup>

### • Can my medical records be disclosed without my permission?

Yes. There are situations where your medical provider must report certain conditions. These are:

1. Injury due to guns, burns on more than five percent of a person’s body, rape, sexual assault or opioid overdose.<sup>5</sup>
2. Results of HIV/AIDS tests cannot be disclosed without first obtaining your written permission.<sup>6</sup>

## J. What is a Supplemental Needs Trust?

Trusts are used to hold assets for the benefit of an individual or individuals. The money or property held in the trust is managed by a trustee according to the grantor’s instructions. There are many different types of trusts. A supplemental needs trust (SNT) is a specialized trust that protects the assets for a disabled individual and supplements the needs of that individual that are not otherwise covered by government benefits and/or other sources of support. A SNT is often established by parents of a child with a disability, and managed by the parents or a third party. For government benefit purposes, funds in a properly drafted SNT are not counted as the child’s assets because the child has no access to or control over the funds. Parents or any other person can continue to add funds to a SNT after its creation without fear of disqualifying the disabled child from benefit programs. Certain trusts that are funded by the individual receiving public benefits must have a provision requiring that the trust pay back Medicaid for all benefits Medicaid paid on behalf of the disabled individual upon his or her death. *See Chapter 11.*

## K. What Options Do I Have if I Have To, or Want To, Sell My Home?

Making the decision to sell your primary residence requires a good working knowledge of what alternatives exist beyond the sale of your home and buying a replacement. If financial considerations are the major concern, you may want to look at residential programs that are affordable or even subsidized by the state or federal government. Most communities have elder housing developments and your local council on aging can connect you to an advocate who can help identify potential accommodations and discuss the pros and cons of public housing. Besides elderly housing developments, there are also subsidy voucher programs, like the so-called Section 8 program (the housing choice voucher program) where a tenant can enter a lease with a willing landlord in the private rental market. In these subsidized programs, the tenant typically pays between 30 and 40 percent of monthly income for rent, and the amount is adjustable if the income increases or decreases. If health or medical considerations are the major concern, and your new accommodations should include supportive or health/medical services you will want to consider an assisted living facility (ALF), a continuing care retirement community (CCRC) or long-term care facility. *See Chapter 7.*

## L. What Type of Medical Decisions Will I Have to Make in the Future?

Sometimes, medical decisions must be made in a hurry. Health care providers cannot always wait for an elder to regain capacity or the ability to communicate consent. A health care proxy is a fundamental estate planning document that provides your health care agent the ability to act on your behalf when a medical decision needs to be made on the spot.

### 1. What is a Health Care Proxy?

You (the principal) can appoint a trusted individual (the health care agent) in a health care proxy to make health care decisions for you should you become incapacitated or unable to communicate your wishes. Massachusetts recognizes the health care proxy by statute and provides a form, which must be appropriately witnessed and signed.

- The agent you select must be 18 years of age or older.

- The agent will be permitted to make a wide range of medical decisions on your behalf.
- You may want to express your wishes as to end-of-life care in writing within the health care proxy itself, or by way of an advance medical directive, sometimes referred to in other states as a living will.
- Your health care agent can rely on your most recently expressed wishes, whether in writing or oral, as a guide when making such extraordinary decisions on your behalf.

NOTE: Medicare now gives you the option on its website to identify a contact in the event of a medical emergency. This does not replace a health care proxy. (*See [www.Medicare.gov/MedicareOnlineForms/PublicForms/CMS10106.pdf](http://www.Medicare.gov/MedicareOnlineForms/PublicForms/CMS10106.pdf)*)

### 2. What are the Differences Between a Health Care Proxy and an Advance Directive?

- The health care proxy provides your agent with legal authority to make medical decisions on your behalf when you have been deemed incapacitated. If an individual does not execute a health care proxy prior to incapacity, a court-appointed guardian is required to make your medical decisions.
- An advance directive is a document in which an individual provides a statement of advanced preferences regarding medical-related decisions, such as life-sustaining measures, to a health care agent or medical provider in case that individual cannot communicate his or her wishes. If you wish to refuse the use of feeding tubes, respirators and/or cardiac resuscitation, these decisions can be expressed in an advance directive. The advance directive makes an incapacitated individual's treatment preferences known to the health care agent in a set of limited and specific circumstances. An advance directive provides valuable written evidence of the principal's wishes, values and beliefs.

### 3. What is MOLST?

MOLST is the acronym used for Medical Orders for Life Sustaining Treatment. It is a standardized form and process for discussing, documenting and communicating end-of-life

treatment options and preferences between doctor and patient.

- In order for the MOLST to be effective, it must be signed by both the patient and the clinician only after an in-depth conversation between the patient and the clinician.
- In addition to having a health care proxy, anyone with a serious medical condition should speak to his or her physician about MOLST.<sup>7</sup>

#### 4. Who Will Make Medical Decisions if No Health Care Proxy or Applicable MOLST Exists?

If you become unable to make or communicate treatment decisions to health care providers, and you have not executed a valid health care proxy or applicable MOLST, then decisions must be made by a court-appointed guardian.

- The guardian may be a family member, friend or professional guardian, but in any event, must be approved by the court.
- The guardianship process is time-consuming and expensive, especially if the individual requires anti-psychotic medications or other extraordinary treatment.
- More importantly, treatment decisions made by a guardian and health care professionals may not reflect your values and beliefs.
- Execution of a health care proxy is the most efficient way to appoint a trusted individual to carry out your treatment preferences without involving the courts.

#### M. What is a Guardianship?

A guardian is a court-appointed fiduciary who has the authority to make certain non-financial decisions for the incapacitated person.<sup>8</sup> An incapacitated person is one “who for reasons other than advanced age or minority, has a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.”<sup>9</sup>

### 1. What Powers Does a Guardian Have?

- The court-appointed guardian of an incapacitated person has the authority to make decisions regarding the incapacitated person’s support, care, education, health and welfare.<sup>10</sup>
- While a guardian does not typically have the power to make any financial decisions for the incapacitated individual, there may be instances where the guardian can exercise some financial control.
- A guardian can make decisions only to the extent needed by the incapacitated person, and the guardian shall consider the values and desires of the individual when making decisions.<sup>11</sup>
- In addition, a guardian is expected to encourage the incapacitated person to participate in decision-making, to act on his or her own behalf and to develop or regain capacity.<sup>12</sup>

### 2. Who Can Petition to be a Guardian?

- An incapacitated person, or any person interested in the welfare of the person alleged to be incapacitated, can petition for a determination of incapacity and the appointment of a guardian.<sup>13</sup>
- Any qualified person can be appointed to be a guardian, but persons are entitled to consideration for appointment in the following order:
  - a. The person last nominated by a respondent’s durable power of attorney;
  - b. The respondent’s spouse or spousal nominee;
  - c. The respondent’s parent or parental nominee;
  - d. Any person the court finds appropriate.<sup>14</sup>
- In addition to the petition for guardianship, a medical certificate detailing the extent of the incapacitated person’s incapacity must also be filed with the court.<sup>15</sup>
- The medical certificate must be completed and signed by a physician, licensed psychologist, nurse practitioner or certified psychiatric nurse.

### 3. Does the Court Have any Oversight or Other Responsibilities to the Incapacitated Person?

- The court must appoint counsel for any individual who is subject to a petition for guardianship (or conservatorship) if the individual, or someone on the individual's behalf, has requested counsel, or if the court decides that the individual may not be adequately represented without counsel.<sup>16</sup>
- Within 60 days of appointment, a guardian is required to report, in writing, the condition of the incapacitated person and account for all funds and assets subject to the guardian's possession or control.<sup>17</sup>
- Similar care plan reports must also be made annually, and when otherwise ordered by the court.<sup>18</sup> These care plans and annual reports provide the court with oversight for all incapacitated persons.

### 4. What Specific Medical Decisions Can a Guardian Make and How Does it Affect an Already Appointed Health Care Agent?

- Absent specific authority from the court, a guardian does not have the power to admit the incapacitated person to a skilled nursing facility.<sup>19</sup>
- A guardian does not have the authority to commit or admit an individual to a mental health facility unless the incapacitated person has a health care proxy granting such power.<sup>20</sup>
- A guardian may not revoke the health care proxy of an incapacitated person without an order of the court, and the health-care decision of the health care agent takes precedence over that of the guardian.<sup>21</sup>

### 5. What are Temporary Guardianships?

- The court can appoint a temporary guardian if a delay in a guardianship appointment will likely result in immediate and substantial harm to the health, safety or welfare of the individual.
- The temporary appointment is not a final determination on capacity, and the guardian has only the authority that is granted in the temporary order.<sup>22</sup>

- Temporary guardians are appointed for up to 90 days, but a longer period may be allowed if warranted by the circumstances.<sup>23</sup>

## N. What are the Legal and Financial Decisions I Will Need to Make?

### 1. What is a Power of Attorney and What Can It Do?

- A power of attorney is a written legal document created by an individual (the principal) that authorizes an agent (the attorney-in-fact) to legally act on the principal's behalf in handling the principal's property.
- The principal specifies in the document which powers he or she is granting to the attorney-in-fact. The principal can authorize the attorney-in-fact to, for example, sign checks, invest assets, enter into contracts, make gifts, create trusts and transfer property.
- The principal can grant to the attorney-in-fact the power to do most things the principal could have done for himself or herself.
- This document is a very powerful estate planning tool and should be granted with discretion and care.

### 2. What is the Difference Between a "Non-durable" and "Durable" Power of Attorney?

- An attorney-in-fact is not authorized under a non-durable power of attorney to act for the principal when the principal becomes incapacitated. These powers of attorney are typically used for specific situations and are limited in scope.
- A non-durable power of attorney may be utilized to conduct a single business transaction for an unavailable principal.
- By contrast, the durable power of attorney is not terminated upon the principal's incapacity. The durable power of attorney is relevant for long-term planning because it allows the attorney-in-fact to manage the principal's affairs after the principal becomes incapacitated with a chronic illness or disease. It does, however, terminate upon the death of the principal.

### 3. What is a “Springing” Durable Power of Attorney?

- The durable power of attorney can either be effective immediately upon execution of the document, or it can become effective upon the incapacity of the principal.
- If the power of attorney only becomes effective upon the principal’s incapacity, then it is a springing durable power of attorney.
- A springing power of attorney is triggered upon a certain event, typically a signed statement from one or more physicians confirming the principal’s incapacity or incompetence, the obtaining of which can be problematic.
- Remember that the non-durable power of attorney is terminated upon the incapacity of the principal, whereas the springing durable power of attorney only becomes effective upon the incapacity of the principal.

### 0. What is a Conservatorship?

A conservator may be appointed for an individual to be protected if “the person is unable to manage property and business affairs effectively because of a clinically diagnosed impairment in the ability to receive and evaluate information or make or communicate decisions, even with the use of appropriate technological assistance ...”<sup>24</sup>

- A conservator can be appointed by the court after a petition has been filed, notice has been given, and a hearing has been conducted.<sup>25</sup>
- The individual for whom a conservator is sought must be disabled, and the appointment must be necessary as a means of providing continuing care and supervision of the property and business affairs of that individual.<sup>26</sup>
- The appointment of a conservator vests title as fiduciary in the conservator, either to all property, or such specific property as is stated in the order of the court.<sup>27</sup>

### 1. Who Can be a Conservator?

Those who can petition for a conservatorship include the person to be protected, or any person who is interested in the estate, affairs or welfare of the person, including a parent, guardian, custodi-

an or any person who would be adversely affected by lack of effective management of the person’s property and business affairs.<sup>28</sup>

Any qualified person can be appointed to be a conservator, but persons are entitled to consideration for appointment in the following order:

1. The person last nominated by a respondent’s durable power of attorney;
2. A conservator or other like fiduciary appointed or recognized by a court of another jurisdiction in which the protected person resides;
3. An individual or corporation named by the person;
4. An agent appointed by the protected person under a durable power of attorney;
5. The respondent’s parent or parental nominee; and
6. Any person the court finds appropriate.<sup>29</sup>

In addition to the petition for conservatorship, a medical certificate detailing the extent of the incapacitated person’s incapacity must be filed with the court.<sup>30</sup>

### 2. What Does a Conservator Have the Authority To Do?

A conservator generally has the power to manage assets, but additional authority is required from the court, to:

- a. Make gifts;
- b. Convey, release or disclaim contingent and expectant interests in property;
- c. Exercise or release a power of appointment;
- d. Create a revocable or irrevocable trust to hold in trust property of the estate;
- e. Exercise rights under insurance policies and annuities; and
- f. Make, amend or revoke the protected person’s will.<sup>31</sup>

After appointing the conservator, the court can broaden or limit the conservator’s powers.<sup>32</sup>

### 3. What are the Duties of a Conservator?

- A conservator must act as a fiduciary for the protected person.<sup>33</sup>
- The conservator must exercise authority only

as needed by the limitations of the protected person and, to the extent possible, encourage the individual to participate in decisions, act on his or her own behalf, and develop or regain the ability to manage his or her estate and business affairs.<sup>34</sup>

- A court may require the conservator to file a plan for managing, expending and distributing the assets of the estate.<sup>35</sup>
- In addition, the conservator shall include in the plan steps to restore the protected person's ability to manage the property, an estimate of the duration of the conservatorship and protections for expenses and resources.<sup>36</sup>

#### **4. What are the Conservator's Responsibilities to the Court?**

- In addition to filing a financial plan if requested by the court, a conservator shall file a detailed inventory of the estate subject to the conservatorship within 90 days of his or her appointment.<sup>37</sup>

- A conservator must account to the court no less than once per year, unless the court directs otherwise.<sup>38</sup>
- Upon termination of the conservatorship, the conservator must provide a final accounting.<sup>39</sup>

#### **5. What are Temporary Conservators and Emergency Orders?**

- While a conservatorship petition is pending, the court may make orders to preserve and apply the property of the person to be protected as may be required for the support of the person to be protected and/or his or her dependents.<sup>40</sup>
- If the protected person is likely to cause substantial harm to the property, income, or entitlements while the petition is pending, a temporary conservator can be appointed.<sup>41</sup>
- Such an order will last for 90 days or longer if ordered by the court.<sup>42</sup>

## CHAPTER 2

# VETERANS AFFAIRS FINANCIAL BENEFITS

## Pension and Compensation for Eligible Veterans and their Surviving Spouses

### INTRODUCTION

The U.S. Department of Veterans Affairs (VA) provides two distinct financial benefit programs to qualified veterans or to their surviving spouses: 1) non-service-connected pension and 2) service-connected compensation. The VA pension is a needs-based benefit for disabled and elderly claimants who meet a specific set of financial and non-financial criteria. VA compensation, on the other hand, is a benefit for veterans who suffered a disabling injury during active military service.

Non-service-connected pension is a benefit that provides monthly payments to low-income war-time veterans, or their dependents, who are disabled or over the age of 65. The VA's pension is calculated to bring the claimant's total countable income to an amount established by Congress. The payment amount is the established pension rate less the claimant's other countable income [similar to how Social Security calculates its Supplemental Security Income (SSI) payment].

### AID AND ATTENDANCE

Claimants entitled to a VA pension who are housebound or require the aid and attendance of another person with activities of daily living are entitled to a higher payment amount. This enhanced pension is commonly referred to as "Aid and Attendance." Aid and Attendance can serve as a critical source of income that can help veterans and their surviving spouses pay for home care, assisted living or nursing home care.

The maximum amount a claimant is eligible to receive for pension with Aid and Attendance is based on that claimant's payment category. A veteran, a veteran with a spouse, and a surviving spouse of a veteran fall into different payment categories. For 2018, the maximum monthly payment for pension with Aid and Attendance is \$1,830 for a single veteran, \$2,169 for a veteran with a spouse, and \$1,176

for a surviving spouse of a veteran. All VA pension payments are tax free.

### FINANCIAL LIMITATIONS

The VA pension benefit is needs based and therefore the claimant must meet income and asset limitations. Income eligibility is driven by a formula that subtracts out-of-pocket medical expenses from gross income. If a claimant is married then the VA includes income and medical expenses of both spouses. All earned and unearned income is added together, such as Social Security, pension income, interest, dividends and business income. The claimant must also report lump-sum income, including inheritances, lottery winnings, gifts and awards.

All unreimbursed recurring medical expenses are used to offset gross income. These expenses can include nursing home costs, assisted living costs, home health services and health insurance premiums. These expenses, however, must be "out of pocket" and not reimbursable by insurance or a third party. The difference between gross income and unreimbursed medical expenses is the claimant's "Income for Veterans Affairs Purposes" (IVAP). If IVAP is less than zero (if medical expenses exceed gross income) then the claimant is eligible for the maximum pension payment.

The claimant must also have limited net worth, however, there is no defined asset limit. The VA's general standard is whether the claimant has sufficient assets to pay for medical expenses for the rest of his or her life. Practitioners generally use \$80,000 as a rough asset threshold, but this may vary depending on the age and income of the claimant. An older claimant with a shorter life expectancy may have a smaller asset limit than a younger claimant.

The claimant's primary residence, a vehicle and personal property are generally not counted when calculating net worth for VA pension. Life insurance that does not have a cash surrender value is not

a countable asset. All liquid assets, whether owned by the veteran or the veteran’s spouse, such as CDs, annuities, stocks, bonds, savings accounts, checking accounts and IRAs are included in the claimant’s net worth. Unlike SSI, or long-term Medicaid, there are currently no transfer penalties for the VA pension.

### MILITARY REQUIREMENTS

The veteran must also meet specific military requirements to qualify for the VA pension. The veteran must have served at least 90 days active duty, one day of which was served during a period of war. Periods of war fall within the following time frames:

<p><b>World War II:</b> Dec. 7, 1941 – Dec. 31, 1946</p>
<p><b>Korean War:</b> June 27, 1950 – Jan. 31, 1955</p>
<p><b>Vietnam War:</b> Aug. 5, 1964 (Feb. 28, 1961 for those who served “in country” before Aug. 5, 1964) – May 7, 1975</p>
<p><b>Gulf War:</b> Aug. 2, 2000 – a date yet to be set by law</p>

Active duty does not include “reserve” duty. Finally, the veteran must have been discharged for conditions other than dishonorable.

### VA PENSION

The VA pension is “non-service connected” because the claimant, whether the veteran or the surviving spouse, does not need to prove that the veteran incurred a disability during military service. The disability is therefore “not connected” to the veteran’s service. To medically qualify for base pension, claimants must be either age 65 or older, totally and permanently disabled, a resident in a nursing home, or a recipient of SSI or Social Security Disability Insurance (SSDI). To receive the enhanced pension with Aid and Attendance, the claimant must require the aid of another person in order to perform personal functions required in everyday living.

The pension benefit paid to a surviving spouse is referred to as Survivor’s Pension or Death Pension. In order for a surviving spouse of a veteran to qualify, the spouse must also satisfy certain marital requirements. The surviving spouse must have

been married to the veteran for at least one year, or, in the alternative, had a child with the veteran. The surviving spouse must also have remained married to the veteran and cohabitated with the veteran continuously until the veteran’s death. A divorce or separation from the veteran terminates the former spouse’s entitlement to Survivor’s Pension. Likewise, a surviving spouse, who remarries after the veteran’s death, terminates survivor’s eligibility off of the veteran’s service record.

### SERVICE-CONNECTED COMPENSATION

The VA’s service-connected compensation is distinct from the VA’s non-service-connected pension in several ways. Unlike the VA pension, VA compensation is not based on financial need and there is no income or asset test to qualify. The compensation is a monetary benefit paid to a disabled veteran whose disability was incurred or aggravated while serving in active military service. Incurred in the line of duty does not mean combat related, and unlike the VA pension, wartime service is not required. For example, a veteran who suffers from post-traumatic stress disorder (PTSD) during the Vietnam conflict could qualify for compensation, as well as a veteran who severely injured his back on a military base during peacetime.

The VA pays compensation on a scale from 10 percent to 100 percent in increments of 10 percent. In 2018, the VA pays a veteran with no dependents rated at 10 percent disability \$136.24 per month, while the VA pays the same veteran rated at 100 percent disability \$2,973.86 per month. The veteran will receive a higher amount if he or she has a spouse and/or children.

The key component with compensation is establishing the nexus between the veteran’s disability with the veteran’s military service. Eligibility must be established with sufficient medical evidence. There are some disabilities, however, that are presumed to be caused by a veteran’s military service. This presumption relieves the claimant from the burden of proving the connection between the disability and the veteran’s military service. For example, the VA presumes that a veteran with respiratory cancer who was exposed to Agent Orange during the Vietnam War has a service-connected illness and may qualify for compensation.

A surviving spouse of a veteran may also qualify for compensation under certain conditions. This survivor's benefit is called "Dependency and Indemnity Compensation" (DIC). To qualify for DIC, the spouse must have been married to a veteran who died while in the service, or married to a veteran who was rated as 100 percent disabled for at least 10 years prior to the veteran death (other conditions may apply as well). If the surviving spouse remarries, then potential eligibility to DIC is terminated.

Receipt of payment from the VA may take anywhere from two months to more than a year. Payments are made retroactively from the first day of the month following the application filing date. A claimant may submit a certain document that states an intention to file a claim for pension or compensation before submitting the fully developed application to lock in an eligibility date.

If the applicant has a mental incapacity and cannot manage his or her financial affairs, it is likely that the VA will appoint a fiduciary to manage the claimant's VA payments. This, unfortunately, will extend the time before which the VA will release the retroactive lump-sum payment owed to the veteran.

## APPEALS

Claimants are also entitled to an extensive appeal process if they receive a denial on a VA application for benefits. An initial denial for benefits can be appealed by submitting new and material evidence to the VA or by filing a "Notice of Disagreement," or both, within one year from the date of the denial. If the VA issues another denial, then the claimant has 60 days to file an appeal with the Board of Veterans Appeals. If you have exhausted all of your appeals with the VA, you may file an action with the United States Court of Appeals for Veterans Claims in Washington, D.C. This court has the authority to overturn the VA's internal decisions. You can locate an attorney at the court's website.

You will need an attorney admitted to practice before this court to argue your case. If you financially qualify, the Veterans Pro Bono Consortium, also located in Washington, D.C., will assign an experienced attorney to handle your case without charge.

If you need assistance with the VA benefit application process, or with any other veterans benefits issues, you may consult your local VA office or a certified veteran's agent for assistance.

# CHAPTER 3

## MEDICAID (MASSHEALTH)

### What You Need to Know About Medicaid Eligibility and Transfer Rules for Long-Term Care in a Nursing Home

#### INTRODUCTION

For most seniors, the prospect of long-term care in a nursing home is, to say the least, unpleasant. Seniors worry that the cost of long-term care will deplete their estates. The cost of nursing home care in Massachusetts, which typically ranges from \$100,000 to \$190,000 per year (the daily rate is often over \$375), only serves to compound these fears.

The premiums to purchase long-term care insurance to pay for the cost of long-term care are frequently beyond the means of middle-income seniors, or long-term care insurance is not available to seniors due to pre-existing medical conditions. Additionally, there are emerging financial concerns in the long-term care insurance industry. (*See Chapter 6.*)

Many seniors receive assistance from the federal Medicare program to help pay for medical expenses and the cost of prescription drugs. Generally, Medicare may pay a portion of long-term skilled nursing services but not non-skilled (custodial) care (*See Chapter 5 for further information*). Medicaid (known as MassHealth in Massachusetts), on the other hand, is a joint federal-state program that pays for nursing home care for individuals who meet certain financial eligibility and clinical rules.<sup>1</sup> The term “MassHealth” will be used throughout this chapter.

Understanding the complex MassHealth rules is the key to informed long-term care planning and asset protection. NOTE: In November 2016, MassHealth proposed substantial changes to many regulations described in this chapter. As of the writing of this chapter, the proposed regulations are not final, but it is imperative that you consult an experienced elder law attorney to confirm the current state of the law.

A growing percentage of seniors are seeking alternatives to nursing homes, including remaining at home with caregivers or moving to independent living communities or assisted living facilities. Options to help finance long-term care outside of nursing

homes are addressed in Chapter 4.

In determining an applicant’s financial eligibility, MassHealth looks at the individual’s assets and income.

<b>2018 MASSHEALTH AMOUNTS</b>	
<b>MassHealth Spousal Impoverishment Figures</b>	
Maximum Community Spouse Resource Allowance (CSRA)	\$123,600
Maximum Monthly Maintenance Needs Allowance	\$3,090
Minimum Monthly Maintenance Needs Allowance (MMMNA)	\$2,030

<b>ASSETS</b>	<b>INCOME</b>
Anything an applicant owns, such as:	All money an applicant receives, such as:
Cash	Social Security
Mutual Funds	Dividends
Automobile	Pensions
Real Estate	Rental Income

#### A. Asset Limitation

MassHealth imposes a \$2,000 asset limit for an individual applicant age 65 or older, or a single applicant of any age in a skilled nursing facility. MassHealth divides an applicant’s assets into three categories:

1. Non-countable assets;
2. Inaccessible assets; and
3. Countable assets.

Only countable assets are considered with respect to the \$2,000 asset limitation. The assets of a married couple aged 65 and older, when one member resides in a nursing home, may be treated differently. (*See, for example, Sections C and I.*)

## B. Non-countable Assets

Non-countable assets are not included in the calculation of an applicant's assets. Non-countable assets include:

- A principal residence in Massachusetts (*See special rules for the principal residence in Section C*);
- Household belongings and furnishings;
- Personal belongings (i.e., clothing, jewelry, furniture, etc.);
- Burial plots for the applicant and members of his or her family;
- Pre-paid irrevocable burial contracts;
- A \$1,500 burial bank account for miscellaneous funeral and burial expenses;
- Term, group, or other life insurance policies that have no cash surrender value;
- Life insurance policies with face values totaling up to \$1,500, regardless of cash surrender value; and
- One automobile for use by the applicant or his or her family. *See Example 1.*

<b>EXAMPLE 1</b> <b>Countable and Non-countable Assets</b>
Richard owns his home worth \$250,000, a car worth \$4,000, and mutual funds worth \$50,000. MassHealth does not consider the value of Richard's home or car when calculating Richard's countable assets. MassHealth does consider the \$50,000 Richard owns in mutual funds as countable assets.

## C. Special Rules for the Principal Residence

MassHealth will treat an applicant's home, valued up to \$858,000 (as of 2018), as a non-countable asset if it is located in Massachusetts, and if the applicant, living in a nursing home, expresses in the MassHealth application an intent to return to that home. MassHealth may place a lien on the property for services rendered, which lien would be paid back upon either the sale of the home or probate of the individual's estate. Even if an applicant does not intend to return home, an applicant's home may be classified as non-countable if any one of the following conditions is met:

1. The applicant owns a long-term care insurance policy, meeting certain requirements, at the time he or she entered the nursing home; or
2. Any one of the following persons lives in the home:
  - The applicant;
  - The applicant's spouse;
  - A child under age 21;
  - A disabled or blind child of any age;
  - A relative who is dependent on the applicant;
  - A child who lived in the home for at least two years immediately before the applicant moved into a nursing home, and provided care which permitted the applicant to remain at home; or
  - A sibling who has an equity interest in the home and has lived there for at least one year before the applicant moved into a nursing home.

**NOTE:** If the applicant checks the box indicating that he or she does not intend to return home, the home becomes a countable asset and must be put on the market for sale.

Seniors often want to "protect their home." There is, unfortunately, no uniformly agreed upon strategy to accomplish this goal. The various legal strategies that may be employed in an attempt to protect a home, including but not limited to irrevocable trusts, life estate deeds and outright gifts, each present complex pros and cons for a senior to consider. Among the relevant issues are:

- The options available if MassHealth coverage is required during the five-year look-back period (*see Section L of this chapter*);
- The degree to which a strategy does in fact successfully protect homes during current MassHealth applications, administrative fair hearings and/or court appeals;
- The level of control retained by the senior over his or her home;
- The tax impacts on the senior and his or her family; and
- The risks to a senior's ongoing right to reside at home.

In addition to the extraordinary complexity of these issues, we continue to see changes in the relevant statutes, case law, regulations and MassHealth practices. For these reasons, it is more vital than ever before to work with an experienced elder law attorney who is intimately familiar with these matters before attempting to implement any strategy to protect your home

**D. Inaccessible Assets**

Like non-countable assets, inaccessible assets are also not included in the calculation of an applicant’s assets for MassHealth purposes. Inaccessible assets are those to which the applicant has no legal access, such as expected inheritances before probate is completed, or divorce assets prior to a final decree. *See Example 2.*

<p><b>EXAMPLE 2</b>  <b>An Inaccessible Asset Can Become Countable</b></p>
<p>Karen’s sister Betty died six months before Karen applied for MassHealth. Under Betty’s will, Karen is entitled to one-half of Betty’s estate, which is worth \$200,000. Karen has not yet received any money from Betty’s estate. The \$100,000 Karen expects to receive from Betty’s estate is an inaccessible asset. Once Karen receives the \$100,000, it becomes a countable asset.</p>

**E. Countable Assets**

All assets not considered non-countable or inaccessible are considered countable assets; that is, they are counted towards an applicant’s \$2,000 asset limit, or the community spouse’s \$123,600 limit. In some cases, both jointly-held assets and assets in a trust will be viewed as countable assets.

**F. Jointly-held Assets**

MassHealth presumes that all funds held in joint bank accounts belong to the applicant. This presumption can be overcome if the non-applicant joint owner can demonstrate that he or she contributed part or all of the funds to the account. *See Example 3.*

Other assets held jointly, such as real estate, stocks, bonds and most mutual funds, are presumed to be owned proportionately by the persons on the account. This presumption can also be overcome (*see*

*Example 4*) and, in some cases, the entire asset may be deemed inaccessible.

<p><b>EXAMPLE 3</b>  <b>Who Contributed to a Joint Account?</b></p>
<p>Andy owns a joint bank account with his daughter, which totals \$10,000. His daughter contributed \$8,000 of that amount when she was going through a divorce. When Andy applies for MassHealth, it is presumed that Andy owns all of the \$10,000 in the joint account. If, however, Andy can prove that \$8,000 of this account is attributable to his daughter, only \$2,000 will be counted as Andy’s assets.</p>

<p><b>EXAMPLE 4</b>  <b>A Joint Account Presumption</b></p>
<p>Edna and Charley are joint owners of a stock and bond mutual fund with a value of \$20,000. If Edna applies for MassHealth, it may be presumed that she owns 50 percent of the mutual fund, or \$10,000. (<i>See Section L regarding transfer penalties for additions to joint accounts made during the five-year look-back period.</i>)</p>

**G. Trusts<sup>2</sup>**

If a MassHealth applicant is the beneficiary and grantor of a trust, and if under any circumstances principal can be paid to the grantor, then any amount of principal that the trustee has the discretion to pay to the applicant is considered a countable asset. Even principal that can be paid by a trust not created by the applicant may be countable under certain circumstances. The assets are considered countable even if a trustee never pays principal to the applicant. *See Example 5.*

If the applicant, or his or her spouse, is the grantor of a revocable trust, all assets in the trust are considered countable assets. The result is the same even if the applicant, or his or her spouse, is not a beneficiary of the revocable trust.

Treatment of trusts is a very complex area of law due to requirements of federal law, state regulations and court decisions. Questions regarding the creation of and transfers of assets to and from trusts should be carefully reviewed with an experienced elder law attorney. *See Example 6.*

**EXAMPLE 5**  
**A Beneficiary of Trust Assets**

Sam is the beneficiary of a trust, which he set up himself. The trust holds \$100,000 in assets, and the trustee has the authority to make any amount of distributions of interest and principal to Sam on a regular basis. Sam applies for MassHealth. MassHealth will consider the entire \$100,000 as a countable asset for Sam.

**EXAMPLE 6**  
**Revocable Trust Assets**

Sam funds a revocable trust where his brother is trustee and his nephew is beneficiary. The trust holds \$100,000. Sam applies for MassHealth. MassHealth will consider the entire \$100,000 as a countable asset for Sam because Sam can revoke the trust at any time.

**H. Income Limitations**

There are no income thresholds for nursing home residents so long as the applicant’s income does not exceed the private pay rate at the nursing home. Instead, the resident contributes all of his or her income towards the monthly cost, minus certain allowed deductions for health insurance premiums and a Personal Needs Allowance (PNA), which is currently \$72.80), and MassHealth covers the difference. The income of a married nursing home resident may be treated differently, in accordance with the Minimum Monthly Maintenance Needs Allowance rules outlined in Section K of this chapter.

**EXAMPLE 7**  
**MassHealth**

Charlotte is 70 years old and unmarried. She is admitted to a nursing home for long-term care and applies for MassHealth. She receives Social Security income of \$1,000 per month. She pays a Medicare supplement health insurance premium of \$220 per month. She must pay \$707.20 (\$1,000 – \$220 – \$72.80) of her Social Security to the nursing home each month as Patient Paid Amount (PPA), assuming she is otherwise eligible. MassHealth will pay for the balance of her nursing home and medical care.

**I. Community Spouse Resource Allowance (CSRA)**

When a nursing home spouse has a spouse at home (called a community spouse), the resource

rules are more complex. A married couple’s assets are pooled for the purpose of determining the nursing home spouse’s eligibility. MassHealth will calculate the couple’s total countable assets (sometimes called the “snapshot date”) as of the first day of a nursing home stay lasting 30 days or more. The couple’s assets are pooled without regard to which spouse actually owns the asset. The community spouse is allowed to keep a portion of the assets, called the Community Spouse Resource Allowance (CSRA), based on the equivalent of 120 percent of the federal poverty level for two persons. In 2018, the maximum CSRA is \$123,600. If the countable marital assets exceed that amount, the excess assets disqualify the nursing home spouse, and must be spent down or applied to the costs of his or her nursing home care. Under certain circumstances, the community spouse may request an increased CSRA to meet living expenses (*see Section K*) but that is a rare occasion because MassHealth will not grant an increased CSRA unless the community spouse needs more than the combined monthly income from both spouses to meet his or her living expenses.

In situations where one spouse refuses to cooperate with MassHealth, such as by refusing to supply the necessary documents, or the spouse has been physically separated from the applicant for reasons other than the MassHealth application, MassHealth may disregard the uncooperative or separated spouse’s assets, though an appeal may be necessary. In such a situation, the spouse will not be entitled to any spousal resource allowance from the community spouse’s income. *See Section K.*

Where MassHealth approves the nursing home spouse for eligibility, any assets higher in value than the \$2,000 asset limit still held in his or her name must be placed in the community spouse’s name within 90 days. If the nursing home spouse has assets exceeding the \$2,000 after 90 days, it will trigger a disqualification. *See Example 8.*

**EXAMPLE 8**  
**Asset Transfer Between Spouses**

Mr. Smith is entering long-term care in a nursing home and is entitled to a retain CSRA of \$123,600. Mrs. Smith has \$79,000 in her name alone. There remains, however, \$20,000 in assets in Mr. Smith’s name. The Smiths are allowed 90 days to transfer the \$20,000 from Mr. Smith’s name into Mrs. Smith’s account.

## J. Permissible Spenddown of Excess Assets

A married couple need not necessarily spend down any assets which exceed the CSRA on nursing home expenses. For example, the excess assets can be used to pay off existing debt, e.g., a mortgage balance, or to make repairs or necessary purchases, such as pre-need funeral contract, but timing is very important. Another important option is for the community spouse to purchase a MassHealth compliant annuity, which converts excess countable assets into an income stream to the community spouse. The annuity income can be retained by the community spouse because the community spouse is not subject to an income limit. The MassHealth compliant annuity must satisfy very specific requirements, including that it must be immediate, cannot have a balloon payment, must be irrevocable, cannot exceed the purchaser's life expectancy, cannot be assignable, and the Commonwealth of Massachusetts must be listed as beneficiary. Typically, the community spouse prefers an annuity with the shortest term possible, so as to recover funds more quickly. Non-MassHealth compliant annuities can result in MassHealth disqualifying transfer penalties and it is therefore advisable to consult with an experienced elder law attorney and financial planner before purchasing this product.

## K. Minimum Monthly Maintenance Needs Allowance (MMMNA) and the Patient Paid Amount

MassHealth rules provide that a community spouse needs income the equivalent of 150 percent of the federal poverty level for two persons, which in 2018 is \$2,030,<sup>3</sup> and is referred to as the Minimum Monthly Maintenance Needs Allowance (MMMNA). MassHealth will determine the community spouse's actual income as well as his or her actual expenses. In addition to the basic MMMNA, MassHealth makes an adjustment if the community spouse's shelter expenses exceed 30 percent of the minimum (which is currently \$609).

### EXAMPLE 9

Mrs. Smith, a community spouse, has monthly income of \$1,800. Her shelter costs (mortgage payments or rent, condo fees, real estate taxes, homeowner's insurance, utilities) total \$1,009, which is \$400 more than the federal minimum of \$609. As a result, Mrs. Smith's MMMNA is \$2,200, which is the total of her \$1,800 income plus the \$400 excess shelter costs. Because Mrs. Smith requires additional funds above her \$1,800 income to satisfy her \$2,200 MMMNA, she is granted a \$400 Spousal Monthly Maintenance Income Allowance from Mr. Smith's monthly income.

MassHealth calculates the MMMNA at the time it determines the nursing home spouse's Patient Paid Amount (PPA), which is the amount of income the nursing home spouse must pay to the nursing home toward the costs of care each month. A MassHealth eligible nursing home resident must pay all of his or her monthly income to the nursing home as PPA, minus certain allowed "deductions," which include a personal needs allowance (\$72.80) theoretically to be used to meet the resident's personal needs, e.g. haircuts, newspapers, etc. Other deductions include the costs of any medical or health insurance premiums, and in this case, a Spousal Monthly Income Maintenance Allowance of \$400.

If the community spouse and nursing home resident's combined income is insufficient to satisfy the MMMNA, a community spouse may file an administrative appeal to request an increased CSRA sufficient to generate additional income to satisfy the MMMNA. An experienced elder law attorney should be consulted to determine whether such a hearing is appropriate. For detailed questions on the MMMNA, consult an experienced elder law attorney.

## L. Transfer Rules

Medicaid, as implemented by MassHealth, was designed to provide medical-related coverage to those individuals and families who do not have enough assets to meet these needs themselves. Through a number of regulations, the program discourages individuals from intentionally impoverishing themselves by gifting to qualify for MassHealth.

MassHealth will review financial records and penalize the applicant and/or his or her spouse for gifts or transfers made for less than fair market value during the 60-month period prior to applying for MassHealth (known as the five-year look-back period). MassHealth will deem a transfer to be disqualifying if the applicant and/or community spouse transfers any assets, whether countable or non-countable, for less than fair market value during the look-back period, unless an exemption applies. (See *Example 10*.) MassHealth determines the period of ineligibility by dividing the total amount of disqualifying transfers by the applicable MassHealth divisor rate, which is currently \$354, and is regularly adjusted by MassHealth.

MassHealth does have several exemptions to its transfer penalties. For example, no penalties are applied when an applicant or his or her spouse transfers any assets to a spouse or to a blind or qualifying disabled child. Further, there are no penalties when an applicant or his or her spouse transfers the principal residence to a child who is under age 21, a sibling who has lived in the home during the year preceding the applicant's institutionalization and who already holds an equity interest in the home, or to a qualifying caretaker child. A caretaker child is a child of the applicant who lived in the house for at least two years immediately prior to the applicant's institutionalization and who, during that period, provided care that allowed the applicant to remain in the home.

<p><b>EXAMPLE 10</b>  <b>How the Look-back Period Works</b></p>
<p>Florence owns a condo with a fair market value of \$160,000. On April 1, 2018, Florence transfers the condo to her non-caretaker, non-disabled daughter as a gift. On June 1, 2018, Florence enters a nursing home and applies for MassHealth. Because the gift occurred during the 60-month period prior to the MassHealth application, MassHealth imposes a disqualifying transfer penalty of 452 days (<math>\\$160,000 \div \\$354</math> per day). As a result, MassHealth will not approve benefits for the applicant during the 452-day period commencing on June 1, 2018.</p>

MassHealth applies the disqualifying transfer penalty period beginning on the date when an applicant is "otherwise eligible" for MassHealth benefits. If an applicant delays the MassHealth application for more than 60 months after making a disqualifying

transfer, it is not necessary to report the transfer to MassHealth. In this manner, an applicant can essentially cap his or her ineligibility at a maximum of 60 months. Applying for MassHealth too soon after a large transfer for less than the fair market value of the asset transferred can cause a much longer than necessary disqualification period. In the unfortunate event that an applicant is deemed ineligible, or disqualified for receiving benefits, it is imperative that the applicant consult with an elder law attorney to discuss what options, if any, are available.

In light of these rules, planning early with the guidance of an elder law attorney is important.

<p><b>EXAMPLE 11</b>  <b>Timing is Important When Looking at When to Apply for MassHealth</b></p>
<p>Mike owned a house with a fair market value of \$600,000. On April 1, 2014, Mike transferred the house as a gift to his non-caretaker, non-disabled son. On June 1, 2018, Mike applied for MassHealth. MassHealth looked back 60 months from the date of Mike's application and flagged the disqualifying transfer. MassHealth calculated a 1,695-day ineligibility period (<math>600,000 \div \\$354</math> per day). This ineligibility period will last more than 4.5 years, or until 2023. If Mike had waited until April 1, 2019 to apply, the transfer would not have been included in the look-back period and he would have been eligible almost five years earlier.</p>

**M. Deeming Transfers to be Gifts**

A long-standing regulation, found at 130 CMR 520.019(F), states that MassHealth will not penalize an individual for transfers made for less than fair market value if the applicant proves, to MassHealth's satisfaction, that the assets were transferred exclusively for a purpose other than to qualify for MassHealth. Despite this regulation and the reason for the transfer, MassHealth routinely considers transfers made for less than fair market value to be disqualifying gifts, resulting in a penalty period. Thus, gifts made for the purpose of paying for a grandchild's tuition, wedding plans, a down payment on a child's home, etc., may be viewed by MassHealth as disqualifying transfers, regardless of the donor's actual intent. If a penalty period is imposed, it is important to consult with an experienced elder law attorney regarding options, including a return of the gift, appeal and/or request for a hardship waiver.

## N. The Spend-down Process

When a single applicant has countable assets that exceed the amount allowed by MassHealth, he or she will want to reduce these assets below the \$2,000 limit. This process is called a “spend-down.” There are many ways to achieve a spend-down, including purchasing non-countable assets, paying debts, purchasing an annuity and even gifting assets, knowing that there will be a controlled period of disqualification.

Regardless of the options used to achieve the spend-down, the applicant will usually want to qualify for MassHealth as quickly as possible.<sup>4</sup> A married couple has a greater range of options to achieve eligibility (and to save more assets) than a single individual.

<b>EXAMPLE 12</b>	
<b>How the Spend-down Process Works</b>	
Jack is single, requires nursing home care, and has countable assets totaling \$34,000. In order to become eligible for MassHealth, Jack will need to spend down \$32,000. Jack is allowed to keep \$2,000 in assets. Jack spends his money in the following manner:	
Balance to be spent down	\$34,000
Purchase of a pre-paid burial contract	\$10,000
Purchase of a burial plot	\$2,000
Pay off credit card debt	\$10,000
Attorney and professional fees (for illustrative purposes only)	\$8,500
<u>Burial account</u>	<u>\$1,500</u>
Total remaining (allowable)	\$2,000

## O. Estate Recovery

MassHealth has the right to recover the value of “community” benefits that it provided on behalf of a recipient after age 55. MassHealth can also recover for long-term care or nursing home benefits provided on behalf of a recipient of any age. Recovery, however, is limited under current law to collecting from the recipient’s probate estate, and, in the case of the recipient’s home, can only be pursued if there is no surviving spouse, child under age 18, or disabled child of any age living in the home.

If the recipient owns real property, MassHealth may place a lien on such real property for the amount of funds expended on the recipient’s behalf after the recipient reaches age 55. This lien may be placed on

the recipient’s real property (including, but not limited to, his or her primary residence) even before the recipient’s death, provided that all the following conditions are met:

1. The recipient permanently resides in a nursing home and is not expected to return home;
2. The recipient receives notice of the lien; and
3. There is no spouse, child under age 18, or disabled child of any age residing in the house.

These pre-death liens are simply notice liens. MassHealth has no claim against the real estate until the recipient dies. If the house is sold during the recipient’s life, however, MassHealth can seek recovery from the proceeds of the sale. Before selling a property subject to a MassHealth lien, consult a qualified elder law attorney.

## P. MassHealth Application

The MassHealth application is often difficult and time consuming to complete. Applications are submitted to a central office of the Division of Medical Assistance, which scans the application and assigns it to one of the long-term care units for processing. Final determinations on an applicant’s eligibility may take several months or more.

The supporting documentation required for a successful application is substantial and includes, among other things, copies of health insurance cards and premium information, 60 months of bank and investment account statements, copies of checks, verifications of all withdrawals and transfers, two years of income tax returns, life insurance policies, gross and net income, trust documents (if applicable), and, if the applicant is married, a copy of certificate of marriage and household expense information.

Withdrawals, transfers, and sales of assets occurring in the 60-month period preceding the application must be explained, or disqualification periods may result. Many practitioners compare the process to the complexity of a multi-year tax audit. Under these circumstances, the use of a qualified elder law attorney experienced in the preparation and submission of MassHealth applications is strongly recommended.

## CONCLUSION

Careful long-term care planning with an experienced elder law attorney prior to a hospitalization or medical crisis ensures that families understand their rights. Such planning allows families to evaluate their options, and, ideally, enables families to protect the family home and other substantial assets.

Generally, the more a person or family plans before a medical crisis occurs, the more assets the family can save. Good planning involves protecting the independence, integrity, and wishes of the elder individual or couple, as well as protecting assets. MassHealth may implement current and/or future proposed regulations to modify the law, or change the way it interprets the law. At no time has the need been greater to secure the early intervention of an experienced elder law attorney to review long-term care planning issues well in advance of hospitalization or nursing home placement.

An experienced elder law attorney will be able to conduct a complete review of your personal and financial situation, make appropriate recommendations to address your health care needs, and provide you with a framework of recommendations to protect your assets according to your own personal wishes.

## CONTACT INFORMATION

If you or a loved one are a current MassHealth beneficiary or have questions about eligibility or an application, you may call the state's toll-free number at (888) 665-9993. This service is available 24 hours a day, seven days a week, and can provide information on case status, key eligibility dates, plan information, items needed to process your case, examples of acceptable verifications, address information and more.

You may also find an elder law attorney in the Resource Directory located in the back of this guide.

## CHAPTER 4

# COMMUNITY MEDICAID (MASSHEALTH) BENEFITS

## Programs for Elders at Risk for Institutionalization

### INTRODUCTION

In addition to providing long-term care coverage, Medicaid (known as MassHealth in Massachusetts) also offers community benefits that enable an elder to stay at home while still receiving necessary care. Community MassHealth offers various programs and services to elders who meet both financial and medical qualifications. Those under age 65 can also qualify if they are permanently disabled, although different rules apply. Individuals who are eligible for MassHealth insurance can also be covered by their own private insurance. For those elders who wish to live at home, MassHealth offers various programs that allow a senior to receive care within his or her home. Adult and supportive day care, transportation and caretaker services are among a multitude of benefits that MassHealth provides to empower seniors to live at home. An elder law attorney can help an individual determine which program might be most appropriate for an elder's particular circumstances.

### A. Home- and Community-based Services Waivers

For elders who require nursing home level care, but would like to live at home or in a residential community, Home- and Community-based Services Waivers (also referred to as the Frail Elder Waiver) authorize MassHealth to pay for those services if those benefits can be obtained at the same or a lower cost. The waiver program serves three important purposes: (1) saves the state money; (2) allows the senior to remain at home with care; and (3) provides seniors greater choices in their care. Under the waiver program, the responsibility of care for the senior is shifted to family members or other designated caregivers. The goals of the program are to help seniors age outside of a nursing home, and to promote independent living. If an elder qualifies for the waiver, he or she can participate in the Community Choices, Personal Care Attendant or PACE programs or senior care organizations

(SCOs), if eligible.

The waiver allows those seniors who are eligible for nursing home care to receive services at home.<sup>1</sup> To qualify for the waiver, a senior must either be at least 65 years old or, if under 65, be permanently and totally disabled.<sup>2</sup> Additionally, the individual must meet a clinical requirement and show that, if he or she did not receive waiver services, he or she would require institutionalization.<sup>3</sup> In addition to the typical asset limitation of \$2,000 for MassHealth services, the waiver imposes a 2018 income threshold of \$2,250 per month. For couples, the income of the healthy spouse is not counted in determining eligibility. The non-applicant spouse's assets, however, are limited to \$123,600 (2018). If both spouses are applying for Frail Elder Waiver services, there is a \$3,375-per-month income threshold (2018) and a \$3,000 combined asset limit.

If an individual's income is greater than \$2,250, or a couple's income is greater than \$3,375 (if both spouses are applying), there will be a recurring six-month deductible which must be met before MassHealth coverage will begin. For example, if a single applicant's gross monthly income is \$2,300 (\$50 over the program threshold), the Medicaid \$522 standard (plus a \$20 income disregard) is applied and subtracted from \$2,300. That figure, \$1,483, is then multiplied by six and, as a result, an \$8,898 deductible must be met every six months before MassHealth benefits will begin/resume.

Applicants seeking coverage under the Personal Care Attendant (PCA) program have lower recurring deductibles, since \$1,337 is subtracted from their gross income, resulting (using the prior example) in \$963 which, when multiplied by six, imposes a \$5,778 deductible that must be met every six months to maintain eligibility. Applicants must meet the deductible by paying qualifying medical expenses, including Medicare and supplemental health insurance premiums. Once the deductible is satisfied, MassHealth covers services for the balance of the six-month period and the individual may retain all of his or her income. In many cases, however,

individuals find that they can meet the recurring six-month deductible only if they have access to other resources (non-countable VA Aid and Attendance benefits or spousal assets, for example).

Services and benefits of the waiver include MassHealth coverage of adult day health and supportive day programs. Supportive day is a social model day program and adult day health is a medical model day program for seniors who need supervision and health services during the day, but will return home at the end of the day (the individual can leave home for services and be covered by the waiver). In addition, MassHealth covers home health services under the waiver. Additional benefits may also include home delivered meals, home modifications to improve accessibility, and transportation assistance for medical or other appointments.

### 1. Community Choices (FEW)

Community Choices is a more care-intensive program for Frail Elder Waiver participants who either face imminent nursing home placement or currently reside in a nursing home but wish to return home or to the community. To be eligible, the senior must be already enrolled in or eligible for the Frail Elder Waiver. The program provides extensive home and community-based services to elders who require nursing home level care and exhibit at least one of four indications of frailty:

- Actively sought nursing home facility care within the last six months;
- Recently experienced a serious medical event, regression in physical or cognitive functional ability, or a cumulative deterioration in functional ability;
- Was discharged from a nursing facility within the last 30 days; or
- Is at risk of nursing facility admission due to the instability or lack of capacity of informal or formal supports.

Services are also provided to elders who exhibit at least one of five clinical characteristics demonstrating risk:

- Needs 24-hour supervision because of complex health conditions;
- Experiences a significant cognitive impairment;
- Is unable to manage/administer prescribed

medications;

- Experiences frequent episodes of incontinence; or
- Requires daily supervision and assistance with two activities of daily living (ADLs).
- ADLs are activities performed by a PCA to physically assist a member to transfer, take medications, bathe or groom, dress and undress, engage in passive range of motion exercises, eat, and toilet.<sup>4</sup>

Services are provided by an agency hired through MassHealth and administered through the local Aging Service Access Point (ASAP). Community Choices offers more hours of service than any other similar program and the care can often be put in place more quickly than other community care programs. Services offered include personal care, homemakers, nursing, companions, chore assistance, delivered meals, grocery delivery, laundry, transportation, home-based wander response systems, transitional assistance, and supportive day and adult day health.<sup>5</sup>

### 2. PACE

The PACE program provides comprehensive medical and social services to frail elders so as to allow them to live in their communities and to receive all of their health services under the same umbrella.<sup>6</sup> To be eligible, an individual must: (1) be 55 years of age or older; (2) live in a service area of a PACE organization; (3) be able to live safely in the community; (4) be certified by the state as eligible for nursing home care; and (5) agree to receive health services exclusively through the PACE organization.<sup>7</sup> All of the medical services are provided by MassHealth at no cost to the elder. Financial eligibility is in accordance with all other MassHealth Programs and, therefore, an individual's assets cannot exceed \$2,000 and a couple's assets cannot exceed \$3,000<sup>8</sup> if both are seeking coverage. If only one member of a couple needs services, the other spouse's income will be disregarded and the non-applicant spouse's assets are limited to \$123,600. In addition, the income threshold for an individual is \$2,250 (with a deductible imposed, if the applicant's income exceeds this figure).

Through PACE, MassHealth will coordinate care for the elder and provide the individual with

medical professionals including doctors, nurses, aides, therapists and social workers. Under this program, the elder receives his or her primary care, emergency care, prescription drugs, in-home services, transportation and more. The services are available 24 hours a day, seven days a week.

### 3. Personal Care Attendant Program

The PCA program provides personal care services to elderly and disabled Massachusetts residents who wish to remain living at home. The PCA program is administered by MassHealth and seeks to enable independent living and prevent unnecessary or premature nursing home institutionalization. While MassHealth pays the caregivers, participants in this program or their surrogate are responsible for directing the care to assist with the ADLs and instrumental activities of daily living. A PCA participant acts as an employer, and can hire friends, neighbors or certain family members (spouses and legal guardians are not eligible) to be his or her personal care attendant.<sup>9</sup> Effective July 1, 2017, the PCA wage rate is \$14.56-per-hour, increasing to \$15-per-hour as of July 1, 2018.

To be eligible for the program, an individual must have a permanent or chronic disability that requires him or her to receive assistance to perform at least two ADLs. ADLs are activities performed by a PCA to physically assist a member to transfer, take medications, bathe or groom, dress and undress, engage in passive range of motion exercises, eat, and toilet. A doctor or nurse practitioner must prescribe the services for the elder, and the services must be medically necessary.<sup>10</sup> Additionally, the senior must meet the \$2,000 asset limitation to qualify for MassHealth and a \$3,000 asset limitation for a couple. Each PCA applicant is assessed by a nurse and occupational therapist during enrollment in the program to determine the number of hours per week assistance is required; MassHealth will then provide a budget for care services. Benefits include assistance with ADLs (i.e., bathing, grooming, eating, etc.), instrumental ADLs (i.e., homemaker services, laundry, meal preparation, etc.) and assistance with transportation. A personal care attendant may not be paid: (a) to help a senior who is in a hospital, nursing facility or in a community program funded by MassHealth; (b) to provide social services such as

babysitting, recreation or educational activities; or (c) to provide medical services that are available from other MassHealth providers.<sup>11</sup>

## 4. Senior Care Options

Senior Care Options (SCO) is a no cost health insurance and care program for individuals eligible for MassHealth and Medicare, who are 65 or older, and it offers health services with social support services. SCO members receive all covered health services through the SCO plan and they have a primary care physician (PCP) who is affiliated with the SCO and 24-hour access to care and active involvement in decisions about their care. All services are provided by the SCO and the PCP and a team of nurses, specialists, and geriatric support services develop an individualized plan of care. Enrollment is voluntary and open to MassHealth standard members who: (1) are 65 or older; (2) reside in an area serviced by a SCO; (3) live at home or in a long-term care facility; (4) do not have to meet a recurring six-month deductible; and (5) do not have end-stage renal disease. The benefits for SCO members include all health services covered by MassHealth Standard; coordination of care, including a centralized record of medical information, individualized assessment, primary and specialty medical care, preventive care, emergency care, X-rays and lab tests, medical supplies and equipment, prescription drugs, mental health and substance abuse treatment, rehabilitative therapy, nursing facility care, if needed, transportation for services, geriatric support services, adult day care, dental care and eye care, home care services and family caregiver support.

## B. Other Programs for Elders

MassHealth also offers community programs to those elders who are not at risk for institutionalization, but nonetheless require help within the home. These programs help prevent a senior from entering a long-term care facility and aim to promote independent living among elders.

### 1. SSI-G/Group Adult Foster Care

The SSI-G (the Supplemental Security Income assisted living benefit) and Group Adult Foster Care (GAFC) programs are designed for seniors who wish to transition to assisted living facili-

ties (by statute referred to as assisted living residences), but cannot afford the monthly rates. The GAFC program pays a daily rate to the assisted living facility directly for personal care and services, while the SSI-G component pays for the rent portion at an assisted living facility to the individual directly. An individual can get GAFC benefits without SSI-G. GAFC pays \$47.74-per-day (\$1,432.20-per-30-day month) directly to the assisted living facility for services, such as daily personal care, homemaking, meals and transportation. The assisted living facility may combine the GAFC services with the room and board which is paid by the resident, and another program called SSI-G. The resident does not have to apply for or be eligible to receive SSI-G in order to qualify for GAFC.

Certain assisted living facilities offer a limited number of beds for applicants who meet certain eligibility criteria: (1) over the age of 60 or chronically disabled; (2) have a medical, physical, cognitive, or mental condition that limits their ability to care for themselves; (3) need daily help with one or more ADLs (i.e., dressing, bathing, eating or toileting); (4) have the ability to live independently, with support services; (5) meet eligibility requirements for public housing, GAFC, Elder-Choice subsidized rents and/or SSI-G; (6) do not need full-time skilled nursing care; and (7) are medically approved for assisted living by his or her physician and Aging Services Access Point (ASAP).

To qualify for GAFC, an individual may not have more than \$2,000 in countable assets and a couple may not have more than \$3,000 in countable assets. In addition, if an individual's income is greater than \$1,012 (2018), or a couple's income is greater than \$1,372 (if both spouses are applying), there will be a recurring six-month deductible. For example, if a single individual's gross monthly income is \$2,012 (\$1,000 over the program threshold), the Medicaid \$522 standard (plus a \$20 income disregard) is applied and subtracted from \$2,012. That figure, \$1,470, is then multiplied by six (six months) and, as a result, an \$8,820 deductible must be met every six months before GAFC benefits will begin.

Applicants must satisfy the deductible by paying

qualifying medical expenses, including Medicare and supplemental health insurance premiums. Once GAFC benefits are in effect, the resident is required to contribute his or her income toward the monthly rent portion; GAFC pays the medical portion. In cases where an applicant needs to meet a recurring six-month deductible, GAFC eligibility can be maintained only if the individual has access to other resources (non-countable VA Aid and Attendance benefits or spousal assets, for example).

## 2. Massachusetts Adult Family Care

The Adult Family Care program is a relatively new MassHealth program that provides care to the elderly or disabled by having the senior move into a caregiver's home or having a caregiver move into the elder's home. Similar to all MassHealth programs, the applicant must have less than \$2,000 in assets to qualify. Eligible caregivers include family members, friends or a professional service. Spouses and legal guardians are not eligible caregivers. Caregivers are paid for the 24-hour personal care they provide, and typically offer assistance with ADLs and instrumental ADLs. Although MassHealth will not pay for the room and board of the individual, depending on the level of care, caregivers receive an annual tax-free payment of between \$8,000 and \$18,000 from MassHealth.

To be eligible for Adult Family Care, the applicant must be elderly or disabled and require 24-hour assistance with ADLs. Care requirements, however, cannot be so severe as to necessitate residency in a nursing home.

## CONCLUSION

A long-term nursing facility is not the only choice for an elder. There are a multitude of options for seniors who require medical care or assistance with everyday life, but do not wish to enter a nursing home. One of MassHealth's community programs might be the solution for a qualified elder to remain at home and independent. Applying for the above programs can be very complicated. Practices and policies often differ among MassHealth workers and offices. Individuals seeking eligibility should consult with an experienced elder law attorney knowledgeable about these programs.

## CHAPTER 5

### MEDICARE

#### What You Need to Know

##### INTRODUCTION

Medicare is a health insurance plan administered by the federal government through the Centers for Medicare and Medicaid Services (CMS). It serves more than 55 million people (as of 2015) and was established in 1966 under Title XVIII of the Social Security Act. This vast program serves U.S. citizens and legal residents 65 years or older and people under 65 years with certain disabilities. The “Medicare and You” 2018 guide, available from CMS, is an excellent reference.<sup>1</sup>

Starting in April 2018 through April 2019, Medicare will automatically send new cards for Medicare Parts A and B to beneficiaries. The card will arrive in the mail automatically. The new card will not use your Social Security number, but instead a new special Medicare number that only you have. This change will not affect your Medicare account, but does help protect you from fraud. You will **NOT** receive a telephone call from Medicare concerning this new card.

##### A. What are the Different Parts of Medicare?

Medicare has four different parts: Medicare Part A, Medicare Part B, Medicare Part C and Medicare Part D. These Parts are separate from each other, cover different health care and have different rules.

1. **Part A:** Helps cover inpatient hospital services, including a semi-private room, meals, general nursing services, some home health care, some skilled nursing facility care and hospice (both with some limitations) and most inpatient drugs.
2. **Part B:** Helps cover services from doctors and other health providers, some preventative care, emergency department visits, medically necessary outpatient services, lab work, durable medical equipment and ambulance services.
3. **Medicare Part C (Medicare Advantage):** Includes all the benefits and services under Parts

A and B; it may include Medicare prescription drug coverage; is run by private health insurance companies; may include extra benefits and services and for an extra cost, such as vision, hearing and dental coverage, which are not covered by original Medicare. Generally you are in a network and must use the providers in that network for your health care.

4. **Medicare Part D:** Helps cover the costs of prescription drugs. If you have Part A, Part B and some types of Part C, you must enroll in Part D to have prescription drug coverage.

Part A and Part B are called “Original Medicare.” Under Original Medicare, you can choose any available provider who accepts Medicare. Your physicians can participate in an “Accountable Care Organization,” also called an “ACO.” In an ACO, your doctors coordinate your care and share your medical records, which means you don’t have as many repeated tests. An ACO cannot tell you which providers you must see or change your Medicare benefits.<sup>2</sup> You can purchase a Medicare Supplement, also called Medigap, if you have Original Medicare, including an ACO.<sup>3</sup> You may automatically qualify for Part A (read below), but you must sign up and pay a monthly premium for Part B. You must also sign up for Part D if you want prescription drug coverage.

Medicare Advantage Plans cover Part A, hospital and Part B, medical benefits, and are available from private insurers. They can have a range of premiums, costs and rules, and typically offer prescription drug coverage. You usually pay your Part B premium in addition to the Medicare Advantage Premium.<sup>4</sup> For example, a Medicare Advantage plan can be purchased from a Health Maintenance Organization (HMO), which restricts you to the doctors, other health care providers and hospitals in its network. There are special rules for emergencies. Under an HMO, you must have a primary care physician, who must authorize referrals before you can see specialists.<sup>5</sup>

Medicare Advantage plans are also sold by Preferred Provider Organizations (PPOs). PPOs establish a network of physicians for whom you pay less than if you go outside the network. A PPO plan isn't the same as Original Medicare with a Medigap Supplement; usually you pay extra for the additional benefits.<sup>6</sup>

Private Fee for Service Plans (PFFS) are another form of Medicare Advantage option. Under a PFFS plan, you can go to any Medicare-approved doctor; there is no network or restrictions. However, a doctor does not have to agree to treat you under a PFFS plan, even if the doctor has treated you before. The PFFS plan works differently than Original Medicare. The PFFS plan determines how much it will pay doctors, other health care providers and hospitals, and how much you must pay when you get care.<sup>7</sup>

Finally, Part C, Medicare Advantage, includes Special Needs Plans (SNP), which are limited to people with specific conditions.<sup>8</sup> Before you decide on a Medicare Advantage Plan, you should compare the costs. There is an online cost calculator and plan comparison tool run by CMS, at [www.medicare.gov/find-a-plan/questions/home.aspx](http://www.medicare.gov/find-a-plan/questions/home.aspx).

When you have a Medicare Advantage Plan, you cannot get Medigap insurance to cover your deductibles, copays and co-insurance.<sup>9</sup> You can use a Medicare Medical Savings Account (MSA) if you have a high-deductible Medicare Advantage Plan. You contribute nothing to the MSA. Medicare deposits money in your MSA to apply against the high deductible costs of your Medicare Advantage Plan. The Advantage Plan that you choose describes how much Medicare pays into the MSA. Any money left in the account at year end can be used towards next year's deductible, in addition to whatever Medicare contributes to the account for the new year. To avoid income taxes on withdrawals from your MSA, you must file Form 8853 with your Form 1040 income tax return, listing your qualified medical expenses (generally, expenses eligible for coverage under Parts A and B of Medicare). If you use all of the money in your MSA account and you have additional health care costs in a year, you'll have to pay for your Medicare-covered services out-of-pocket until you reach your Advantage Plan's deductible. You may use your MSA to pay for prescription drugs, but that does not count toward your deductible. So you may want to add drug coverage through a Medicare Prescription

Drug Plan if you choose a Medicare Advantage Plan.

## B. Am I Eligible for Medicare and How Do I Sign Up/Enroll?

- To be eligible for Medicare, you must be a U.S. citizen or a legal resident.
- If you are already getting benefits from Social Security or the Railroad Retirement Board, you will automatically get Part A and Part B starting the first day of the month you turn 65. If you are not already receiving those benefits, you will need to contact Social Security three months before your 65<sup>th</sup> birthday during the initial enrollment period. The initial enrollment period is the seven-month period that begins three months before you turn 65, and ends three months after you turn 65.
- Most people need to enroll in Medicare. You must contact Social Security three months before your 65<sup>th</sup> birthday during the initial enrollment period.<sup>10</sup> As stated above, the initial enrollment period is the seven-month period that begins three months before you turn 65, and ends three months after you turn 65.
  - If you have End Stage Renal Disease (ESRD) or Amyotrophic Lateral Sclerosis (ALS) you also need to enroll, but you do not need to be 65.<sup>11</sup> Individuals under age 65 with disabilities other than ESRD or ALS must have received Social Security Disability benefits for 24 months before becoming eligible for Medicare. A five-month waiting period is required after a beneficiary is determined to be disabled before a beneficiary begins to collect Social Security Disability benefits. Individuals with ESRD and ALS, however, do not have to collect Social Security Disability benefits for 24 months in order to be eligible for Medicare. Individuals with ESRD are eligible for Medicare generally three months after a course of regular dialysis begins or after a kidney transplant. Individuals suffering from ALS are eligible for Medicare coverage immediately upon approval for Social Security Disability benefits (but after the five-month waiting period).

**CAUTION:** If you do not sign up for Part A and/or Part B during the initial enrollment period,

or when you are first eligible, your monthly Part B premium may increase 10 percent for each year you delayed as a late enrollment penalty. This increased premium is permanent. In addition, there is a coverage gap. You can sign up between Jan. 1 and March 31 of the following year, however, coverage only begins on July 1. If you do not enroll in Part A and B when you are first eligible, or when you lose your employer health insurance, you may have to pay a late enrollment penalty for as long as you have Medicare.

### **C. What if I am Turning 65, Still Working and Have Health Insurance From My Employer?**

Full retirement age for Social Security benefits is now based on the year you were born, and the age when full benefits starts increasing. For those born between 1943 and 1954, the full retirement age is 66, and more benefits are available at age 70 (*see Chapter 12*). Consequently, many people work beyond 65. If you are turning 65, still working and have health insurance coverage through your employer, there are additional considerations.

“By law, people who continue to work beyond age 65 still must be offered the same health insurance benefits (for themselves and their dependents) as younger people working for the same employer.”<sup>12,13</sup> Your employer cannot require you to enroll in Medicare when you turn 65 or offer you a different kind of insurance, unless your employer has less than 20 employees. Generally, working people who have paid enough in Medicare taxes enroll in Part A, because they will not pay premiums. If your employer has fewer than 20 employees, Medicare is primarily responsible for your health care costs. The group health plan pays secondarily, after Medicare, up to covered costs. So in this case, if you fail to enroll in Medicare when you are first eligible, you may have little or no health coverage.

You may have had a Health Savings Account (HSA) with your employer group health insurance. This is an account used with a high deductible employer insurance to pay for uninsured medical costs on a pre-tax basis. If you are covered under either Part A, Part B or Part C of Medicare, you may no longer contribute to an HSA, but you can withdraw funds from an established HSA. HSA withdrawals that are used for qualified medical expenses are not taxable. But HSA withdrawals for other purposes

are subject to tax (and, if the HSA owner is under age 65, a 20 percent penalty). Note that if you do not enroll in Medicare when you first qualify, you must stop all contributions to your HSA up to six months before collecting Social Security.<sup>14</sup> If you contribute to an HSA during the period you are retroactively covered under Medicare, you can now avoid a penalty by distributing from the HSA the monthly amounts attributable to your period of retroactive Medicare coverage.

If you do enroll in Part A while working, and you still keep your group insurance plan, you can delay enrolling in Part B. Be sure to notify your providers of your eligibility for Part A when seeking care. When you leave work, you will have a special enrollment period to enroll in Part B. You can enroll any time when you are still covered by the group health plan and during the eight-month period that begins after the employment ends or the coverage ends, whichever happens first.<sup>15</sup>

Be sure to sign up for Medicare Parts A and B (and also Medigap, as discussed on page 28) when first eligible or upon losing employer group coverage. Those who go for extended periods of time without credible coverage may be assessed a late enrollment penalty upon electing Part B at a later date. Your monthly premium for Part B will go up 10 percent for each full 12-month period that you could have had Part B, but did not sign up for it. It is generally not advisable to go without coverage “until needed” to save the monthly premium costs.

You cannot have two different insurances pay the same amount on a bill. One insurance will pay some money first, and then the second insurance will pay some money. For more information when you have two insurances, see “Your Guide to Who Pays First,” from [www.Medicare.gov](http://www.Medicare.gov).

### **D. Medicare Cost Shares/Coverage Limitations**

Medicare does not pay all medical bills; for many services, the consumer (often referred to as the Medicare beneficiary) is liable for a portion of the cost of services received.

You have contributed to the Medicare program throughout your working life through payroll taxes and through income taxes. Those taxes cover the bulk of the Medicare program costs, but as a beneficiary, you do have some premiums, deductibles, co-insurance and co-pays.

2018 Costs at-a-Glance	
Part A premium	Most people don't pay a monthly premium for Part A. If you buy Part A, you'll pay up to \$422 each month.
Part A hospital inpatient deductible and co-insurance	You pay: <ul style="list-style-type: none"> <li>• \$1,340 for each benefit period</li> <li>• Days 1–60: \$0 co-insurance for each benefit period</li> <li>• Days 61–90: \$335 co-insurance per day of each benefit period</li> <li>• Days 91 and beyond: \$658 co-insurance per each “lifetime reserve day” after 90 for each benefit period (up to 60 days over your lifetime)</li> <li>• Beyond lifetime reserve days: all costs</li> </ul>
Skilled nursing facility stay when Medicare Part A eligible	<ul style="list-style-type: none"> <li>• First 20 days: \$0 for each benefit period</li> <li>• Days 21–100: \$167.50 co-insurance per day of each benefit period</li> <li>• Days 101 and beyond: all costs</li> </ul>
Part B premium	The standard Part B premium is \$134 (or higher depending on your income); those in the highest bracket pay \$428.60 per month.
Part B deductible and co-insurance	\$183 per year. After your deductible is met, you typically pay 20 percent of the Medicare-approved amount for most doctor services (including most doctor services while you're a hospital inpatient), outpatient therapy and durable medical equipment.
Part C premium	The Part C monthly premium varies by plan. Compare costs for specific Part C plans.
Part D premium	There are now two types of Part D monthly premiums. One must be paid to the insurance plan, to obtain the insurance. This amount varies by plan. There is also an income-adjusted premium where higher-income consumers pay more. This premium, called the Medicare Part D IRMAA, is paid directly to Medicare and NOT to the insurance company. Social Security determines if you owe this extra premium, which can range from \$13.30 per month to \$76.20 per month. Compare costs for specific Part D plans.
Home Health Care	Whether under Part A or Part B: \$0 for home health care services; 20 percent of the Medicare-approved amount for durable medical equipment.
Hospice Care	\$0 for hospice care.

(Source: www.medicare.gov)

There is a small co-payment of \$5-\$10 for each prescription drug and similar products for pain relief and symptom control. You can also use your Part D plan to cover this. Medicare does not cover room and board when you get hospital care in your home or another facility where you live (like a nursing home).

Part A has a deductible of \$1,340 (for 2018) for inpatient services. Additionally, there is a fixed limit on inpatient hospital and skilled nursing facility days in each period. The Part A benefit period does not automatically renew each year. Medicare does not pay for custodial care, which is non-skilled personal care, like bathing, dressing, feeding, getting out of bed, or using the bathroom. Because these services are not Medicare-approved, Medigap will not pay either.<sup>16</sup> However, Medicare is required to provide skilled nursing services if the beneficiary needs the services, even if the beneficiary's condition does not improve with the services.<sup>17</sup>

Part B has a \$183 deductible before providing coverage for covered services. Once the deductible is satisfied, Part B only pays 80 percent of the cost of the majority of covered services; limited office visits have co-pays. Furthermore, Original Medicare generally does not cover the prescription medicines you would normally pick up at a pharmacy.

Many Medicare beneficiaries express concern that the deductibles, the 20 percent Part B co-insurance (without a cap or out-of-pocket maximum), the costs of Part A hospital and skilled nursing facility days and the lack of prescription coverage may cause major financial difficulties in the case of a medical issue. To address these concerns, Medicare beneficiaries have opportunities to obtain some additional coverage.

## E. Options to Enhance Original Medicare Coverage

### 1. Buy a Medigap Plan for Supplemental Insurance

Medigap plans cover the deductibles, co-pays and co-insurance you owe under Original Medicare A and B. Medigap does not give you more coverage than Original Medi-

care. For example, under Part A, you would have up to 100 days in a skilled nursing facility (rehabilitation center). You would pay nothing for the first 20 days, and co-insurance of \$164.50 per day for days 21 through 100. A Medigap plan will pay the co-insurance of \$164.50 per day for all of the days when you qualify for Medicare coverage, but will not pay for any Medicare coverage beyond the 100 days. Medigap will not pay if you do not qualify for the skilled nursing facility, even if you have not used all your days. You have to pay a premium for Medigap plans. If you do not enroll in a Medigap plan when you first enroll in Medicare, you may not be able to buy a Medigap plan after. You may have to take a physical, and it may cost considerably more.<sup>18</sup>

Massachusetts offers two options of Medigap plans: the Core plan and Supplement 1.<sup>19</sup>

- 1) **Core:** The Core plan is the less expensive of the two options and covers the Part B co-insurance amount, paying for the 20 percent of approved amounts that Part B would normally require the Medicare beneficiary to pay out of pocket. With this option, policyholders would still pay the Part A and Part B deductibles out of pocket.
- 2) **Supplement 1:** Like the Core plan, this option covers the Part B co-insurance amount. Additionally, the Supplement 1 covers the Part A and Part B deductibles, providing more robust coverage than the Core plan. Due to the enhanced coverage, the Supplement 1 premiums are higher than the Core plan offerings.

### The Advantages and Disadvantages of Medicare Supplements

- With Medicare supplements in Massachusetts, policyholders generally have low out-of-pocket costs when receiving covered services and flexibility in choosing providers.
- To obtain these benefits, though, policyholders must pay a premium to the insurance company (which may exceed \$200 per month).
- Also, the supplements do not cover most prescription medicines. In many cases, retirees incur the additional cost of a Part D plan.

## 2. Part D: Buy a Medicare Part D Plan for Prescription Drug Coverage

Medicare Parts A and B, even with a Medigap Supplement, do not offer prescription drug coverage. Some, but not all, Medicare Advantage plans (Medicare Part C, see section 3) do not offer drug coverage. If you elect Medicare Parts A and B, or a C plan without prescription drug coverage, you should always consider whether Part D is right for you.

Medicare Part D is an option which provides prescription drug coverage to Medicare beneficiaries through a private insurance company. This program provides coverage for many common medicines which can be obtained at participating local pharmacies or mail order programs.

Coverage levels and monthly premiums vary by insurance company, but the basic structure and minimum coverage levels are specified by Medicare. Part D plans have four basic components:

- 1) **Deductible:** Some plans (especially lower premium options) have a deductible. A deductible is a dollar amount a policyholder must pay out of pocket before the insurance company pays benefits. The deductible may apply to all medicines the plan covers or only certain drugs (e.g., brand name medicines). Insurance companies may choose not to include a deductible; in such cases, coverage begins immediately.
- 2) **Initial Coverage Stage:** This stage provides benefits with a co-pay (fixed dollar amount) or co-insurance (percentage of cost) for covered drugs. Insurance providers classify medicines in tiers. Tiers are often divided in categories like preferred generics, non-preferred generics, preferred name brand, non-preferred name brand and specialty drugs. Generally, the higher the tier, the higher the policyholder's cost share. These co-pays change if the policyholder reaches the coverage gap.
- 3) **Coverage Gap:** The coverage gap goes into effect when the total cost of drugs used under the plan reaches \$3,750 (2018 numbers) in one calendar year. This cost is based upon the total cost of the medicine (insurance payment plus co-pay). In the gap, policyholders generally pay more for their medicines, with the policy-

holder's cost of about 51 percent of the generic medicine cost and 40 percent of the name brand medicine price. Remember that brand name drugs are typically more expensive than generic. The examples on the Medicare website show a patient would pay \$21.70 for a brand-name drug and \$9.68 for a generic drug during the coverage gap.

- 4) **Catastrophic Coverage:** If a policyholder's out-of-pocket cost reaches \$5,000 during 2018, the coverage gap is closed and the policyholder moves into the catastrophic coverage stage. As of publication, there were no prices on the CMS website but they are expected to be low. Please note, on Jan. 1, the plan resets for the new year, returning to the initial coverage stage (or deductible stage).

**Part D Tiers, Formularies and Quantity Limitations**

Each plan is required by Medicare to include certain classes of drugs, but the plans vary widely in what specific medicines are covered. It is very important to obtain the plan's formulary. The formulary lists each medicine covered and its tier. For many common drugs, there are major differences in coverage levels between insurance companies, so it makes sense to check the tier and quantity limitations for each of your medications with prospective insurance providers before enrolling. Note that an insurer cannot remove a therapeutic category (e.g., high blood pressure medication) during a plan year, but can remove any single drug from its coverage with 60 days notice to the insured.<sup>20</sup>

Please note that plans sometimes provide for formulary exceptions if a medically necessary medicine is generally not covered. In such cases, please contact the plan's customer service department and request a "formulary exception" to request your medicine is covered.

**TIP: Your pharmacist can discuss insurance plans you research on the CMS website, but cannot market any specific plan to you.** Select your Medicare Part D plan using the Medicare Part D plan finder tool, from the CMS website, found at [www.medicare.gov/find-a-plan/questions/home.aspx](http://www.medicare.gov/find-a-plan/questions/home.aspx). Recent studies show that some plans can cost up to \$100,000 for the same drugs. If you take any single prescription that costs more than \$600 a

month, you should take great care to evaluate these plans. Mail order is not automatically cheaper than retail.

**Late Enrollment Penalty for Part D**

It is important to enroll in a Part D plan when first eligible or make sure you have credible coverage (or a Part C plan which includes Part D benefits). Those who fail to obtain coverage may be subject to substantial late enrollment penalties if coverage is desired later in life.

If you already have been assessed a late enrollment penalty, waivers may be available for those with lower incomes.

**3. What Options are Available if Your Medicines are Still Too Expensive?**

There are multiple options for retirees who have difficulty paying for medicines. Some notable options include:

- 1) **Explore alternative medicines with your pharmacist and doctor: Ask your regular pharmacist for a Drug Utilization Review (DUR), which is free. This report identifies duplicate drugs and suggests, drugs which may be more appropriate for you; then show this report to your doctor(s). Be sure that the DUR lists all the drugs you take, even those that you do not fill at that pharmacy.** Ask your doctor if a safe and effective generic medicine or an alternative therapeutic may work better for you. Often co-pays for generics can be more than 75 percent less than the brand-name medicines. Also, it may be possible to switch to a preferred brand-name from a non-preferred brand-name drug listed in the formulary to reduce co-pays. Of course, only consider changing in consultation with a medical professional.
- 2) **Local discount programs:** Some grocery stores and pharmacy chains offer discount programs which work in conjunction with your insurance plan. Please be sure to ask your pharmacist if your pharmacy offers such programs
- 3) **State pharmacy assistance:** Massachusetts offers a state pharmacy assistance program, Prescription Advantage, for those with lower incomes who do not otherwise qualify for MassHeath. This program provides out-of-

pocket maximums on co-pays and extra help in the coverage gap. Unlike Medicare Extra Help and MassHealth, there is no asset test; qualification is based upon income. You can reach Prescription Advantage at 1-800-AGE-INFO, option 2.

- 4) **Medicare Extra Help:** Medicare offers extra help to beneficiaries with lower income and assets. This program can reduce or eliminate your Part D premium and reduce co-pays. Application for this program can be made directly with Medicare.
- 5) **Veterans' Benefits:** The Veterans' Administration (VA) offers prescription benefit programs. For our readers who are veterans, please inquire with the VA to see if you qualify for benefits which may enhance the Part D benefit from your plan.
- 6) **Primary Outreach Programs:** Refer to the Pharmacy Outreach Program information on page 42.

#### 4. Change from Original Medicare to Medicare Part C (Medicare Advantage)

While the CMS website will clearly state premiums, deductibles, co-pays and co-insurance, each Part C plan must be separately researched. The information about coverage options is found above. One limitation to consider is that not all Part C plans cover prescription drugs.

The website, [www.Medicare.gov](http://www.Medicare.gov), lists all the Part C plans available in your area; the website identifies those Part C plans with drug coverage. The plan options vary by county of residence and all plans are not available in all areas. These plans may provide some major benefits such as:

- Out-of-pocket maximums;
- Reduced co-insurance amounts and co-pays for certain services;
- Coordination of care;
- Prescription drug benefits;
- Elimination of deductibles; and
- Low (or zero) monthly premiums.
- Star Rating — Pay particular attention to the star rating for both Part C and Part D plans; the star rating is a measure of quality.

These plans work similarly to employer-spon-

sored health insurance plans, often combining doctor, hospital, drug and additional services in one comprehensive plan.

Medicare Advantage plans are generally one-year programs. During each annual election period (usually starting in early October and ending in the first week of December), Medicare beneficiaries may change plans or disenroll from Part C and select other options (like stand-alone Part D plans), or return to original Medicare). Such changes take effect on Jan. 1.

During the year, there are options to change coverage if you have certain special circumstances. Some of the more common situations include:

- 1) Moving your primary residence outside the plan service area;
- 2) Obtaining/losing employer coverage;
- 3) Qualifying for MassHealth;
- 4) Obtaining a low-income subsidy;
- 5) Qualifying for state pharmacy assistance (Prescription Advantage); and
- 6) Enrolling in Part B.

In such circumstances, you may change plans with an effective date of the first of the following month.

#### F. Changing Medicare Plans

As long as you are enrolled in Medicare, you can change plans during the open enrollment period. This generally becomes available in early October, and decisions must be made by early December. The new plans go into effect Jan. 1. In certain circumstances, you can switch between Medicare Part D plans during the year; consult "Medicare and You" for further information.

#### G. Comparing Insurance Providers

When shopping for Medicare Part C, Part D and Medigap supplements, it is important to compare premiums among insurance companies. As coverage is standardized, please consider the following criteria when evaluating options:

- **Consider customer service quality and reputation:** Are claims processed accurately and are you able to obtain prompt and professional service when questions arise?

- **Premium consistency:** By how much do rates tend to change annually? How will those changes impact your budget?
- **Discount programs and value-added services:** Does the insurance company you are considering offer any discounts (based upon age, paying by automatic bank draft) or savings programs for dental or vision?

## CONCLUSION

Navigating the Medicare system is confusing, but there are resources available to help. Please be sure to consult [www.Medicare.gov](http://www.Medicare.gov), particularly “Medicare and You,” or call 1-800-MEDICARE for detailed information, consult your trusted advisers and request written information from insurance companies before enrolling in any plan. Below is a chart of Medicare benefits and costs for Part A and Part B.

MEDICARE PART A: 2018			
SERVICES	BENEFIT	MEDICARE PAYS	YOU PAY <sup>1</sup>
<b>Hospitalization:</b> <ul style="list-style-type: none"> <li>• Semiprivate room and board</li> <li>• General nursing</li> <li>• Other hospital services and supplies (Medicare payments based on benefit periods)</li> </ul>	First 60 days	All but \$1,340	\$1,340 (deductible)
	61 <sup>st</sup> to 90 <sup>th</sup> day	All but \$335/day	\$335 (co-insurance)/day
	91 <sup>st</sup> to 150 <sup>th</sup> day <sup>2</sup> (lifetime)	All but \$670/day	\$670 (co-insurance)/day
	Beyond 90 days (or 150 days if lifetime is used)	Nothing	All costs
<b>Skilled Nursing Facility Care:</b> (Have to be in hospital for 3 days beforehand) <ul style="list-style-type: none"> <li>• Semiprivate room and board</li> <li>• Skilled nursing and rehabilitative services</li> <li>• Other services</li> </ul>	First 20 days	100 percent of approved amount	Nothing
	Additional 80 days	All but \$167.50/day	\$167.50/day (co-insurance)
	Beyond 100 days	Nothing	All costs
<b>Home Health Care:</b> <ul style="list-style-type: none"> <li>• Intermittent skilled nursing care</li> <li>• Physical therapy, speech language, pathology services</li> <li>• Home health aide services</li> <li>• Durable medical equipment (e.g., wheelchairs, hospital beds, oxygen and walkers)</li> <li>• Other services and supplies</li> <li>• No custodial care (must be recovering)</li> </ul>	Unlimited as long as you meet Medicare conditions	<ul style="list-style-type: none"> <li>• 100 percent of approved amount</li> <li>• 80 percent of approved amount for durable medical equipment</li> </ul>	<ul style="list-style-type: none"> <li>• Nothing for services</li> <li>• 20 percent of approved amount for durable medical equipment</li> </ul>
<b>Hospice Care:</b> <ul style="list-style-type: none"> <li>• Pain and symptom relief</li> <li>• Support services for the management of mental illness</li> <li>• DNR</li> </ul>	For as long as doctor certifies need (6 months to live or less)	All but limited costs for outpatient drugs and inpatient respite care	Limited costs for outpatient drugs (\$5 co-pay) and inpatient respite care (5 percent of approved amount)
<b>Blood:</b> Blood paid for or replaced under Part A of Medicare during the calendar year does not have to be paid for or replaced under Part B and vice versa.	Pints 1 – 3	Nothing	Patient must pay for 1-3 or have them replaced (self or usually family member)
	Pints 4 and over	All	Patient deductible is satisfied at 3 pints.

2018 Part A Monthly premium: \$422 if the beneficiary has worked less than 40 quarters in Medicare-covered employment. Most beneficiaries do not pay a premium for Part A. This premium is paid for the entire time the person is on Medicare Part A. The Part C monthly premium varies by plan. Compare costs for specific Part C plans.

1. You must pay the amounts listed in the “You Pay” column; Medigap insurance will only pay the deductibles and co-insurance, but does not cover services Medicare itself doesn’t cover. For example, Medigap will NOT add additional days to the Skilled Nursing benefit; when Medicare stops at 100, so does Medigap. You must pay the amounts listed in the “You Pay” column; Medigap insurance will only pay the deductibles and co-insurance, but does not cover services Medicare itself doesn’t cover. For example, Medigap will NOT add additional days to the Skilled Nursing benefit; when Medicare stops at 100, so does Medigap.

2. You must pay the amounts listed in the “You Pay” column; Medigap insurance will only pay the deductibles and co-insurance, but does not cover services Medicare itself doesn’t cover.

Medicare “beneficiaries” receive “medically necessary and reasonable” (least expensive) treatment. Not all services/tests are provided under Medicare.

<b>MEDICARE PART B: 2018</b>			
<b>SERVICES</b>	<b>BENEFIT</b>	<b>MEDICARE PAYS</b>	<b>YOU PAY</b>
<b>Medical Expenses:</b> <ul style="list-style-type: none"> <li>• Doctor services, inpatient and outpatient</li> <li>• Surgical services and supplies</li> <li>• Podiatrist services</li> <li>• Physical, occupational and speech therapy</li> <li>• Diagnostic tests (e.g., X-rays, hearing exams)</li> <li>• Durable medical equipment</li> <li>• Urgent and emergency services (including ambulances)</li> </ul>	Unlimited if medically necessary	<ul style="list-style-type: none"> <li>• 80 percent of approved amount after \$183 deductible</li> <li>• 50 percent for most outpatient mental health</li> </ul>	<ul style="list-style-type: none"> <li>• \$183 deductible (pay once per year)</li> <li>• 20% of approved amount after deductible (except outpatient)</li> <li>• 20–40 percent for outpatient mental health</li> <li>• 20 percent for all physical and occupational therapy</li> </ul>
<b>Clinical Laboratory Services:</b> <ul style="list-style-type: none"> <li>• Blood tests, urinalysis, and more</li> </ul>	Unlimited if medically necessary	<ul style="list-style-type: none"> <li>• 100 percent of approved amount</li> </ul>	<ul style="list-style-type: none"> <li>• Nothing for services</li> </ul>
<b>Home Health Care (if you don't have Part A):</b> <ul style="list-style-type: none"> <li>• Intermittent skilled care</li> <li>• Home health aide services</li> <li>• Durable medical equipment</li> <li>• Other services and supplies</li> <li>• No custodial care – must be recovering</li> </ul>	Unlimited as long as you meet Medicare conditions	<ul style="list-style-type: none"> <li>• 100 percent of approved amount</li> <li>• 80 percent of approved amount for durable medical equipment</li> </ul>	<ul style="list-style-type: none"> <li>• Nothing for services</li> <li>• 20 percent of approved amount for durable medical equipment</li> </ul>
<b>Outpatient Hospital Treatment:</b> <ul style="list-style-type: none"> <li>• Services for the diagnosis or treatment of an illness or injury</li> </ul>	Unlimited if medically necessary	<ul style="list-style-type: none"> <li>• Medicare payment to hospital based on hospital cost</li> </ul>	<ul style="list-style-type: none"> <li>• 20 percent of Medicare payment amount (after \$183 deductible)</li> </ul>

**PREMIUMS (2018)<sup>3</sup> —** Premiums are “means adjusted.”  
 \$109 annual premium for individuals who have modified adjusted incomes of \$85,000 or less (or \$170,000 or less for joint filers) and have the SSA withhold their Part B premium.

All others:	Premium*	Income Level (Individual)	Income Level (Joint)
	\$134	\$85,000 or less	\$170,000 or less
	\$187.50	\$85,001–\$107,000	\$170,001–\$214,000
	\$267.90	\$107,001–\$133,500	\$214,001–\$267,000
	\$348.30	\$133,501–\$160,000	\$267,001–\$320,000
	\$428.60	Above \$160,000	Above \$320,000

**\*PREMIUM MAY BE HIGHER IF YOU ENROLL LATE**

MEDICARE PART C: MEDICARE “ADVANTAGE” – MANAGED CARE PLAN  
 MEDICARE PART D: PRESCRIPTION DRUG BENEFIT

3. Part B premiums must pay for 25% of Part B costs, including reserves. Gov't pays 75% ; Premium increase cannot exceed Cost of Living Adjustment in SSI for elderly.

## CHAPTER 6

# LONG-TERM CARE INSURANCE

### INTRODUCTION

Although most adults expect to remain healthy and independent throughout their lives, some develop chronic illnesses or conditions that require care over a prolonged period of time. Such care can range from assistance at home to more extensive care in assisted living facilities or nursing homes. Long-term care in any setting can be expensive. For example, the median costs in Massachusetts for a licensed home health aide is \$24 per hour, for an assisted-living facility is \$59,400 per year, and for a private room in a nursing facility is a staggering \$133,225 per year.

Unfortunately, Medicare, Medicare Supplements and ordinary health insurance generally do not cover long-term care expenses. As a result of this gap in coverage, the cost of long-term care is often borne by the individual who is forced to either private pay or apply for MassHealth (Massachusetts Medicaid) coverage when the individual can no longer pay through his or her own financial resources. Due to the costs associated with long-term care and the strict asset requirements of MassHealth eligibility, many adults are seeking private long-term care insurance (LTCI) to help pay for these costs. LTCI helps consumers pay for the cost of care in both private home and private facilities to preserve the retirement nest egg, protect income streams and to promote greater choice in the market for care.

Also, unfortunately, in the last few years many major insurers have stopped offering traditional LTCI to consumers due to many factors, including low return on investment in the current economy and miscalculated underwriting with more and longer claims than originally anticipated. In addition, some companies have increased premium rates substantially on existing policies. These premium increases, while bad news to seniors on fixed incomes, often come offered with what are known in the industry as “landing spots.” These are options allowing the policyholder to pay the same premium, but reduce policy benefits such as the daily amount paid

or length of time the policy will pay. That said, as the industry has changed and policies have become more expensive, it may be advisable to give greater consideration to hybrid life/long-term care insurance contracts and fixed annuities with long-term care insurance provisions (*see Section D of this chapter*). These can provide an alternative to traditional long-term care insurance. This chapter will discuss both options in detail.

### A. What are the Benefits of Long-term Care Insurance?

Modern long-term care policies can offer coverage for long-term care expenses not otherwise covered by medical insurance. Policies may provide a cash benefit or offer reimbursement for the cost of care up to the policy limits. Many policies today will cover care in the home and in facilities, providing flexibility for the insured elder. As custodial care can be quite expensive, the insurance can provide the funds necessary to pay for care without exhausting assets or liquidating retirement plans. Oftentimes, liquidating retirement plans can create income tax issues, further accelerating the degradation of the elder’s nest egg. Furthermore, if care expenses exceed interest earned on the retirement assets, the elder can rapidly reduce principal, leaving fewer assets available to generate future income or leave to loved ones.

A significant benefit to a traditional LTCI policy is that Massachusetts law and regulations allow for an exemption against a post-death claim by MassHealth for recovery of MassHealth benefits paid during the life of the policyholder. This exemption protects the primary residence (the “home”), providing the policy meets certain minimum requirements. The minimum policy benefits must be in place at the time the policy is purchased (the policy could certainly exceed these and still qualify), and must include:

- Coverage for nursing home care for at least 730 days;
- Pay at least \$125 per day for nursing home care; and

- Policy must begin paying benefits within one year, or have a substantial deductible.

If the policy did not have the minimum benefits in place when purchased, but due to inflation riders the policy did have the minimum benefits in place when the person is institutionalized, the exemption would not apply.

In addition to these basic provisions in the policy, the following actions must be taken to take advantage of the exemption:

1. An application for MassHealth Long-Term Care must provide that the applicant does not intend to return home.
2. The policy must still be in place at the time of institutionalization, and some minimum policy benefits must still be in place. The exemption only covers long-term care costs such as nursing home or hospice costs. MassHealth payments for medical bills such as hospitalization during life are not protected. The exemption only applies to the person(s) who is, or are, the named insured(s) under the LTCI policy. For instance, if only one spouse has an LTCI policy, unless the policy covers both spouses, the exemption will not protect the house against the MassHealth costs of the spouse who does not have the policy.

Because current hybrid LTCI policies allow for a return of premium paid by the policyholder during the term of the policy (you can get your cash paid for the policy back), they do not qualify for the exemption.

## B. Potential Tax Advantages

For individuals who do not itemize deductions, no income tax deduction is available for long-term care insurance.

Under IRC Section 7702B (a)(1), LTCI is treated as an accident and health insurance benefit. For those who itemize deductions, premiums may be deductible up to the eligible LTCI premium limit. For example, the individual who turns 71 before the beginning of 2017 can claim a deduction for up to \$5,110 in long-term care premiums on his or her 2017 return, but the deduction, combined with other deductible medical expenses, may be deducted only to the extent they exceed 7.5 percent of ad-

justed gross income (for 2018, the premium limit is \$5,200).

Please note, policyholders who own a business may well have the ability to deduct a greater portion of the premium depending upon how the business is structured. Consult your tax adviser for more information.

When benefits are received, the reimbursement for care under a policy brought by an individual is not included in income (IRC Section 104(a)(3), 7702B(a)(2) but if the contract provides for a per diem reimbursement, the exclusion is limited to \$360 in 2017 and 2018. Different provisions apply to LTCI provided through an individual's employer. If the premiums paid are not includable in the employee's income currently, benefits will be taxed when received. Thus, it is normally beneficial to be taxable currently on employer-paid premiums. However, if LTCI is provided through an individual's employer, and the premiums are not includable in the employee's income when paid, benefits will be taxed when received.

## C. When to Purchase Long-term Care Insurance

As with any other type of insurance, it is necessary for consumers to purchase LTCI before they need it. The main advantage of purchasing LTCI earlier in life is the reduced cost of premiums. For example, the premiums for a policy purchased for a female, non-smoker, aged 55, would be approximately \$3,000 per year. The same policy for the same person at age 75 would be approximately \$8,000. Purchasing LTCI earlier in life, however, carries its own risks. First, LTCI is generally an unwise investment for those who cannot afford to pay the policy premiums for the remainder of their lives because policyholders often pay premiums for many years before needing services. When retired and on a fixed income, premium payments may become difficult.

In addition, long-term care premiums can and do increase over time. Significantly, just this past year a prominent insurance company raised rates an average of 83 percent for federal employees on the plan. Most policies are guaranteed renewable, not non-cancelable, allowing the insurance company

flexibility to raise premiums on a class basis. In fact, over the last decade, many carriers have had rate increases, in many cases increasing rates by more than 40 percent. Such increases can make keeping the policy in place for elders on fixed incomes very difficult. In Massachusetts, rates have not been raised in the past several years, but are expected to be subject to increases in the coming year. Companies are looking at ways to provide so-called “landing-spots,” amending policies so that benefits are reduced but premiums remain affordable.

## D. What to Consider When Comparing Policies

- **Limits on Benefits**

LTCI policies generally feature both daily (expressed in dollars) and lifetime maximum benefits (expressed in days). Daily maximum benefits vary in terms of the amount of money the insurance company pays for each day or month a policyholder is covered by an LTCI policy. If the cost of care is more than the policyholder’s daily or monthly benefit, the policyholder will need to pay the balance out of his or her own pocket. Please note, some insurance companies offer monthly benefit options rather than daily.

- **Length of Benefit Period**

LTCI policies cover different periods that measure the length of time policyholders can receive benefits from their policy. In Massachusetts, LTCI benefit periods may last as little as two years or as long as a lifetime. While lifetime policies offer the greatest security, many consumers cannot afford the premiums. For most individuals, four years of coverage is more than sufficient, as the average nursing home stay is approximately 2.5 years.

- **Length of Elimination Period**

LTCI elimination periods are waiting periods before benefits begin. Just as health insurance beneficiaries usually pay for a portion of their treatment out of pocket before they are eligible for benefits, LTCI beneficiaries must pay their long-term care expenses out of pocket during the elimination period. Policies may have no elimination period at all, or may have an elimination policy lasting a full year; typically, the longer the elimination period, the lower the premium.

- **Eligibility to Begin Receiving Benefits**

Insurers determine whether a policyholder is eligible to begin receiving policy benefits in different ways. The more common methods center on the policyholder’s ability to perform various activities of daily living (ADLs). Insurers typically consider a policyholder’s ability to eat, walk, move from a bed to a chair, dress himself or herself, bathe and use the bathroom. Ordinarily, a physician or licensed health care practitioner chosen by the insurer evaluates these skills and a policyholder becomes eligible to begin receiving benefits when he or she cannot perform two or more ADLs. When comparing LTCI policies, the consumer should evaluate which ADLs a prospective insurer will consider. Consumers are prudent to consider only those policies that mention bathing specifically, since most elders with long-term care needs require assistance with this task.

## E. LTCI/Life Insurance Policy (Hybrids) Contrasted with Traditional LTCI

In recent years, many of the major insurers have exited the individual LTCI industry. With fewer providers and less competition, pricing has become less competitive. Because many elders have concerns about long-term care issues, planners in the industry are developing alternatives. One such alternative is hybrid life insurance/LTCI combination policies. With life insurance/LTCI hybrids, insureds can accelerate access to the death benefit if they need long-term care. The named life insurance beneficiaries receive either the full death benefit if the long-term care benefits are not used, or what remains of the death benefit if the policy has been tapped for long-term care (less any service fee assessed per the insurance contract). These types of policies often offer guaranteed level premiums for life (providing stable costs), while traditional LTCI premiums are subject to change. Also, certain elders with morbidity issues may be able to qualify for coverage in cases in which they are declined for LTCI as many of the hybrid products are underwritten on life insurance (mortality standards) not long-term care (morbidity) criteria.

Some contracts offer amounts greater than the death benefit to pay for long-term care, and even if the death benefit is exhausted by long-term care expenses, some products offer a residual death ben-

efit payable to beneficiaries. In most cases, however, with an accelerated death benefit, one cannot expect substantial insurance payouts for both an expensive long-term care episode and death. The consumer must continue to pay the life insurance premiums while receiving the accelerated benefit.

These policies do not offer joint benefits for spouses (as some so-called joint and survivor traditional LTCI contracts do), since each spouse would have his or her own individual policy.

Hybrid policy premiums generally are not tax deductible, though benefits are usually received tax-free. Generally, stand-alone LTCI policies provide a wider range of benefit options than a combination policy. Also, hybrid policies may not have inflation protection, which would significantly erode the purchasing power of the benefits in the future. Consumers are encouraged to purchase a benefit which is sufficient to cover needs after accounting for potential increased costs of care later.

Recently, insurance companies are beginning to offer fixed annuities with embedded long-term care insurance-like protections and whole life policies, which are funded by a one-time lump sum and provide long-term care insurance benefits. As these

options evolve and to determine which asset to use, please be sure to discuss their applicability to your situation with your experienced and trusted advisor.

## CONCLUSION

Currently, LTCI plays only a small part in the overall long-term care financing system, covering only about 10 percent of all long-term care costs. However, as individuals live longer, the applicability of insurance options as an estate-planning tool is likely to grow. Remember that it may not be affordable to purchase a policy large enough to cover the entire cost of care. In such cases, one may do well to employ a co-insurance principle in which the consumer purchases a policy which covers some of the risk, and commits to cover the difference (if care is needed) from assets or income. This way the premium is more manageable but the risk is still addressed.

As LTCI is a complex product, consumers should gather information and begin discussing these options for payment of their long-term care costs with family members and experienced advisors well in advance of when they might need long-term care.

## CHAPTER 7

### LONG-TERM CARE

#### Regulations and Resident Rights

##### NURSING HOME CARE

###### A. What is Nursing Home Care and for Whom is it Suited?

Nursing homes provide around-the-clock nursing care and assistance with daily living activities.

Nursing homes, technically long-term care facilities, are subject to state and federal regulations issued by the Massachusetts Department of Public Health, the state Medicaid program (MassHealth), the Office of the Attorney General and the federal Center for Medicare and Medicaid Services (CMS). Many of the regulations will be discussed below.

###### B. Department of Public Health Regulations

The Massachusetts Department of Public Health (DPH) monitors and licenses nursing home facilities throughout the commonwealth.<sup>1</sup> To determine whether an applicant for a nursing home license is responsible and suitable for licensing, the DPH will look to the applicant's criminal history, if any; financial capacity to operate a long-term care facility; and the applicant's history and experience in providing long-term care.<sup>2</sup>

The DPH sets out rules and regulations governing medical and nursing care, the maintenance of medical records, the handling of patient funds, the prevention of loss or damage to patients' personal possessions, and standards of facility sanitation.<sup>3</sup> The DPH surveyors have the right to visit and inspect any nursing home institution at any time to monitor compliance with regulations.<sup>4</sup> Such inspections are unannounced, and occur at least twice per year.<sup>5</sup> If violations are found, the nursing home facility may be subject to a monetary fine, and will be expected to submit a plan of correction to the DPH within a certain time period. At the expiration of such time period, the violation will be made public if no correction plan has been submitted.<sup>6</sup> The DPH also fields complaints by or on behalf of nursing home residents through its website and telephone hotline.

In consultation with the Alzheimer's Disease and Related Disorders Association, the DPH is required to establish regulations for so-called "dementia special care units" (DSCUs) to ensure safety and quality of services provided to residents with dementia. The regulations require dementia-specific training for all direct-care providers, dementia-specific activities, and guidelines for physical design, including anti-wandering methods and promoting a therapeutic environment in DSCUs.

The DPH also requires nursing homes to obtain written informed consent to treat with any psychotropic medications. The consent must be signed by the resident, the resident's health care agent or duly authorized guardian. The written informed consent must be documented on a form approved by the DPH, kept in the resident's medical record, and must include, at a minimum, the purpose for administering the psychotropic drug, the prescribed dosage and any known side effect of the medication.

###### C. Medicaid Regulations

To be certified for participation in MassHealth and Medicare programs, a nursing home facility must also follow regulations set out by the Office of Medicaid.<sup>7</sup> Otherwise, the nursing home will not be reimbursed for any services the nursing home provides to MassHealth or Medicare eligible residents.<sup>8</sup>

###### D. Attorney General's Regulations

Nursing home facilities must also follow regulations set out by the Attorney General's Office which state that it will be considered an "unfair and deceptive" act, in violation of Mass. G.L. ch. 93A, for a nursing home to fail to comply with any federal or state statute or regulation protective of resident rights, or for a nursing home to fail to disclose the policies of the facility to a resident or prospective resident.<sup>9</sup> Further, a nursing home will be in violation of Chapter 93A if it discriminates against a Medicaid-eligible resident on the basis of that resident's source of payment for nursing home services.<sup>10</sup>

The Attorney General's regulations also prohibit nursing homes from requiring residents to have a third-party guarantor, or requiring residents to waive the facility's liability for personal injury or loss of personal property.<sup>11</sup>

Nursing homes may not limit a resident's choice of physician or, for that matter, his or her choice of pharmacy. (*See Chapter 6, section 3, regarding prescription drug coverage for nursing home residents.*)<sup>12</sup>

Nursing home facilities cannot require residents to pay a non-refundable deposit.<sup>13</sup>

Other Chapter 93A violations include a nursing home's refusal to permit a resident to have privacy during medical treatment or other daily living activities, or refusal to allow a resident to live in the same unit with his or her spouse, if both consent.<sup>14</sup>

While this is hardly an exhaustive list of the regulations as set out by the Attorney General's Office, it provides an overview of standards by which nursing homes must operate in order to prevent liability.

## E. Nursing Home Resident Rights

Nursing home residents are entitled to certain rights with regard to quality of care, treatment and safety.<sup>15</sup> Nursing home residents have the right:

- To obtain, upon admittance to the facility, written notice of their rights as residents;<sup>16</sup>
- To freedom of choice of a physician, facility and health care mode;<sup>17</sup>
- To obtain, upon request, an itemized bill for nursing home services;<sup>18</sup>
- To have all medical records and communications kept confidential to the extent provided by law;<sup>19</sup>
- To have all reasonable requests responded to promptly within the capacity of the facility;<sup>20</sup>
- To access all of their medical records upon request;<sup>21</sup>
- To refuse to be examined, observed, or treated without jeopardizing access to other medical care;<sup>22</sup>
- To have privacy during medical exams or treatment;<sup>23</sup> and
- To informed consent to the extent provided by law.<sup>24</sup>

A nursing home resident is also entitled to certain rights relating directly to his or her personal freedoms. A nursing home resident is entitled:

- To communicate with persons of one's choice, privately and without restriction;<sup>25</sup>
- To make a complaint or express a grievance free from reprisal, restraint, coercion or discrimination;<sup>26</sup>
- To be free from any requirement to perform any service for the facility not in his or her individual care plan, unless one volunteers or is paid for such service;<sup>27</sup>
- To participate in social, religious and community groups;<sup>28</sup>
- To manage one's own financial affairs;<sup>29</sup>
- To keep and use personal possessions and clothing as space permits, and to have personal possessions reasonably safeguarded and secured;<sup>30</sup>
- To be permitted to share a room with his or her spouse;<sup>31</sup> and
- To receive at least 48 hours' notice of a roommate change, barring any emergency.<sup>32</sup>

## F. Choosing a Nursing Home

Once a health care practitioner has determined the level of care you need, you are able to make choices on which nursing home to use. The Centers for Medicare and Medicaid (CMS) has a website and tool that allows you to compare nursing homes and select the most appropriate ones. (*See [www.medicare.gov/nursinghomecompare/search.html](http://www.medicare.gov/nursinghomecompare/search.html).*) This website provides a wealth of information, including data on health inspections, staffing, quality measures, and quality ratings. The nursing home reports this information to CMS, so it is important to visit the nursing home in person before you make a final decision.

Additionally, not all nursing homes accept Medicaid patients, so a patient may only be able to stay in that facility as long as he/she is able to pay for the required care. In order to use a Medicaid benefit to pay for nursing home care, the nursing home must be Medicaid certified.<sup>33</sup>

## G. Dementia Care Standard for Nursing Homes

Massachusetts law provides further safeguards for dementia patients in nursing homes in the form of regulations which require dementia unit workers to have eight hours of initial training and an additional four hours of training annually. In addition, dementia units must have at least one “therapeutic activities director” who is responsible for developing and implementing activities for residents. These regulations ensure that dementia units are staffed with appropriately trained workers.<sup>34</sup>

Additionally, the regulations mandate that a fence or barrier surround the facility to prevent injury and elopement of dementia care patients. Another significant change to the laws that aim to protect those on dementia units is the prohibition against overhead paging systems, which often scare patients. Facilities can now use such systems only for emergencies.<sup>35</sup> The DPH has promulgated guidance with respect to the administration of anti-psychotic medications which require the written consent of the resident, the resident’s health care proxy agent or a duly authorized guardian.

### ASSISTED LIVING

#### A. What is Assisted Living and for Whom is it Suited?

Assisted living is a residential arrangement providing room and board for eligible elders as an alternative to nursing home care.<sup>36</sup> It suits elders who require some aid, support, or supervision with activities of daily living such as meal preparation, medication regimen, housekeeping, clothes laundering, dressing or bathing, grocery shopping and transportation needs.<sup>37</sup> However, elders in assisted living do not require 24 hours of skilled nursing home care.<sup>38</sup> Assisted living provides the security of having assistance available 24 hours a day as needed, but encourages the maintenance of elders’ autonomy and privacy.<sup>39</sup>

#### B. Assisted Living Regulations

The Executive Office of Elder Affairs certifies all assisted living residences in Massachusetts.<sup>40</sup> An assisted living residence must provide only single or double living units with lockable doors and a kitchenette within the unit or access to cooking facilities.<sup>41</sup>

Any newly constructed assisted living residence must provide a full bathroom for each unit, while existing assisted living residences must provide, at minimum, a private half-bathroom.<sup>42</sup> After evaluation of eligibility and assessment of appropriateness of assisted living services for an elder, the elder should receive an individualized service plan which sets out the services provided, who will provide them, how often and for how long the services will be provided, the payment terms and reimbursement source for such services, the way the residence will provide for the presence of 24-hour on-site staff capability and information regarding self-administered medication management.<sup>43</sup> In addition to a service plan, each resident and sponsor of the assisted living residence must execute a written agreement setting out the responsibilities and rights of the resident and sponsor with regard to the charges for services, a grievance procedure, and termination conditions.<sup>44</sup>

#### C. Assisted Living Resident Rights

Massachusetts law specifies that a resident of an assisted living facility has the right:

- To live in a decent, safe, and habitable environment;<sup>45</sup>
- To be treated with consideration and respect;<sup>46</sup>
- To have one’s personal dignity and privacy observed;<sup>47</sup>
- To retain and use personal property in one’s unit;<sup>48</sup>
- To communicate privately and without restriction;<sup>49</sup>
- To contract or engage with health care professionals in one’s unit as needed;<sup>50</sup>
- To engage in community services and activities as one chooses;<sup>51</sup>
- To manage one’s own financial affairs;<sup>52</sup>
- To present grievances and recommendations without reprisal;<sup>53</sup>
- To have all one’s records kept confidential;<sup>54</sup>
- To have privacy during medical treatment or other services;<sup>55</sup>
- To have reasonable requests responded to promptly and adequately; and<sup>56</sup>
- \* To be free from involuntary discharge or eviction.

tion without judicial process (summary process eviction proceedings).

## D. Ombudsman Program

In the case of a complaint or violation, a resident, the family member of a resident, or the representative of a resident may contact a statewide ombudsman trained by the Executive Office of Elder Affairs. The ombudsman will enter the assisted living residence to review and examine the situation.<sup>57</sup> In order to maintain certification, each assisted living facility must comply with the Ombudsman Program and facilitate the ombudsman's right to enter and investigate the residence.<sup>58</sup> The assisted living ombudsman acts as a mediator and attempts to resolve problems or conflicts that arise between an assisted living residence and one or more of its residents. To contact an assisted living ombudsman, you may call Elder Affairs at (617) 727-7750 or (800) AGE-INFO (1-800-243-4636).

## CONTINUING CARE RETIREMENT COMMUNITIES

### A. What is a Continuing Care Retirement Community?

A continuing care retirement community is a housing option which offers single and married elders a continuum of housing, services and nursing care which allows them to age in place as their services are adjusted and altered depending upon their needs.<sup>59</sup> It is a comprehensive and individualized plan offering such services as nursing and health care, housekeeping, transportation, meals and special diets, recreational activities and emergency help.<sup>60</sup>

### B. Continuing Care Retirement Community Oversight

The Executive Office of Elder Affairs registers and regulates continuing care retirement communities (CCRCs) in Massachusetts pursuant to Mass. G.L. ch. 93, § 76, which sets out disclosure requirements regarding the contractual rights of the parties. There are no regulations governing CCRCs, except for any part of the CCRC which is licensed by the DPH as a skilled nursing facility. Any skilled nursing facility accommodations are subject to the same laws, rules and regulations as any long-term care facility.

## OTHER IMPORTANT ELDER PROGRAMS<sup>61</sup>

### A. Massachusetts Senior Care Options (SCO)

Senior Care Options (SCO) is a comprehensive health care plan that covers all of the services normally paid for through Medicare and MassHealth. SCO combines health services and social support services. SCO offers an important advantage for eligible members over traditional fee-for-service care. There are no copays for members enrolled in SCO. Members enrolled in SCO have 24-hour access to care and active involvement in decisions about their health care. This is a voluntary program, and patients can disenroll any month of the year, but you must be eligible to enroll. Patients can live at home or in a long-term care facility. See the Massachusetts SCO website for more program, and eligibility and enrollment information.<sup>62</sup>

### B. Statewide Nutrition Programs

The Elderly Nutrition Program, administered by the Executive Office of Elder Affairs, allows local elderly agencies to provide nutritious meals to senior citizens. Meals are provided at congregate meal sites, such as senior centers, churches, schools and other locations. The congregate setting provides opportunities for socialization and companionship. It also offers programs related to nutrition education, exercise activities, health promotion and disease prevention. Some programs also offer meals on weekends. Transportation is often available for those who have trouble getting around on their own. The Elderly Nutrition Program also provides home-delivered meals to senior citizens (aged 60 or older) and handicapped or disabled people under age 60 who live in housing facilities occupied primarily by the elderly where congregate meals are served.

Each meal contains at least one-third of the current daily Recommended Dietary Allowance of nutrients and considers the special dietary needs of the elderly. In addition to providing meals, the Elderly Nutrition Program also provides access to social and rehabilitative services.

To apply for one of the elderly nutrition programs, contact the Executive Office of Elder Affairs at (800) 882-2003 to find the elderly nutrition agency nearest to you.

### C. Prescription Advantage

Prescription Advantage is a prescription drug insurance plan available to all Massachusetts residents age 65 and older, as well as younger individuals with disabilities who meet income and employment guidelines. An elder is eligible for the program if he or she is not receiving prescription drug benefits under Medicaid. Individuals receiving Medicare benefits may be eligible for assistance with paying for prescription drug costs (also known as “Extra Help”) from Social Security. In order to receive this assistance, an application must be submitted to Social Security.

### D. Pharmacy Outreach Program

The purpose of the Pharmacy Outreach Program is to work closely with local and statewide health care resources, physicians and elders to help relieve the burden of medication expenses. The Pharmacy Outreach Program is a public service to the people of the commonwealth. Any Massachusetts resident may utilize the MCPHS University Pharmacy Outreach Program toll-free telephone number, (866) 633-1617 and website, [www.MCPHS.edu/PharmacyOutreach](http://www.MCPHS.edu/PharmacyOutreach), to inquire about prescription drug medication support programs that are available at low cost or free of charge. Consumers can ask any questions regarding their medications and general health.

### E. Serving the Health Information Needs of Everyone Program

The Serving the Health Information Needs of Everyone (SHINE) program provides health insurance counseling services to elderly and disabled adults. SHINE counselors are trained to handle complex questions about Medicare, Medicare supplements, Medicare Health Maintenance Organizations, public benefits with health care components, Medicaid, free hospital care, prescription drug assistance programs, drug discount cards and long-term health insurance.

SHINE counselors help elders and Medicare beneficiaries understand their rights and benefits under Medicare and other health insurance coverage. Counselors can identify and compare current options, and protect elders from paying too much for their medical care. SHINE counselors also help elders learn how to fill out insurance claims forms and public benefits applications.

SHINE counselors are available at most councils on aging, senior centers and Aging Services Access Points, hospitals and libraries. Counselors are also available for home-bound clients. To locate a SHINE counselor in your community, contact your regional SHINE program at [www.mass.gov/service-details/find-a-shine-counselor](http://www.mass.gov/service-details/find-a-shine-counselor).

## CHAPTER 8

### PROTECTING THE HOME

#### Homestead, Medicaid (MassHealth) Issues and Tax Exemptions

##### INTRODUCTION

For most Americans, their home is their largest single asset. As we age, we become increasingly concerned about how we can maintain our home as well as how its value can be passed on to future generations. Elder law attorneys strive to keep abreast of laws that not only allow elders to remain in their home, but also to protect their homes from creditors (by placing a homestead declaration on their home), reduce property taxes and borrow prudently on equity that has built up during their lifetimes.

##### A. Homestead Declaration

###### 1. What is a Homestead Declaration?

A homestead declaration is a document recorded with the Registry of Deeds that protects one's principal residence from creditors' claims involving the debtor, debtor's spouse or debtor's minor children from certain creditors and their claims.

Massachusetts revised its homestead laws in 2011 to provide homeowners with added protection against creditors. The new law provides homeowners with an automatic \$125,000 homestead without having to file. Homeowners may file for the \$500,000 homestead, and this protection now extends to the real estate owner's spouse. Further, multi-family homes and homes in trust are eligible for the homestead protection.

Homesteads filed prior to March 2011 are grandfathered into the law, and therefore, homeowners do not have to re-file. Caveat: A homestead filed prior to March 2011 may not be grandfathered if a mortgage (or equity line of credit) was subsequently filed before March 2011. If that is the case, it would be wise to file a new homestead now. The homestead for seniors (persons 62 years of age or older), has increased protection of \$500,000 for single owners and \$1,000,000 for a married couple. Lastly, owners

do not have to re-file homesteads when a home is refinanced (after March 2011), which had long been an issue with Massachusetts residents.

###### 2. What Should I Know About a Homestead Declaration?

- a. It is important to be aware that the homestead declaration cannot protect the homeowner from certain claims, such as:
  - A Medicaid (MassHealth) lien if the owner requires nursing home care;
  - Federal, state and local taxes, assessments, claims and liens;
  - First and second mortgages;
  - Liens on the home recorded prior to the filing of the declaration of homestead; or
  - Judgment that the spouse pay support for the other spouse or for minor children.
- b. If an individual recorded a homestead declaration before attaining age 62, he or she must file a new declaration to gain added protections the law gives elderly homeowners.
- c. Individuals who transfer the remainder interest in the property to one or more children and reserve a life estate after making a homestead declaration will lose the homestead over the entire property. At that point, it is unclear whether the protection offered by a homestead declaration would continue to protect the reserved life estate, but not the remainderman's interest. (The individual who will own the property after the life tenant dies or subsequently releases the life estate interest.) To be safe, file a new homestead with respect to the life estate only.
- d. When deeding a home to or out of a trust, a new homestead declaration must be filed.

## B. Deed With a Life Estate

A deed is a document showing proof of ownership of real property. A real estate owner can transfer a future interest in the property, a so-called “remainder interest,” while reserving the right to continue to live at the property for the rest of the individual’s life. In addition to the right to continue to live there, the holder of a life estate has the right to all income generated from the property and the duty to maintain the property for the remainderman, the owner of the future interest. Upon the death of the owner of the life estate, the life estate automatically ends, thereby avoiding probate, and the remainderman ends up owning 100 percent of the property. Real property with a life estate may only be sold (or sometimes mortgaged) with the assent of both the life tenant and the remainderman.

The remainderman will also benefit from a “step up in basis” for capital gains tax purposes upon the death of the life tenant. The remainderman, however, may not benefit from the Section 121 capital gains tax exclusion if the property is sold before the life tenant dies. Under current “MassHealth” (the term used for Medicaid in Massachusetts) estate recovery law, certain individuals who receive MassHealth will have a lien placed on any property in which they have an ownership interest, including a life estate. If a MassHealth recipient owns a life estate and the property is sold during the life estate holder’s life, then MassHealth can only collect on the lien from the proceeds of the sale attributable to the life estate’s actuarial worth, and not the remainderman’s actuarial value. MassHealth cannot enforce a lien if the life tenant dies owning the life estate as, under the current law, that life estate is extinguished upon the death of the life tenant. (Governor Baker in the past has proposed a change in the MassHealth estate recovery law that would place a lien on the life estate, presumably to the extent of the actuarial value of the life estate immediately prior to the death of the life tenant. The governor may seek to introduce such a change in the law in the future.)

A transfer of a remainder interest in property triggers the so-called “five year lookback period,” meaning that if the transferor applies for MassHealth benefits within five years after making the transfer he or she would not be eligible for such benefits for a period of time determined under a formula that MassHealth utilizes.

## C. How Exemptions and Deferrals Work

Each property tax exemption, deferral and credit has eligibility requirements that may include age, asset or income limitations. The applicant must be a resident of Massachusetts. Most exemptions require that the resident occupy his or her home for a minimum number of years (usually five or 10 years). An applicant may own either his or her home individually, or co-own the home with another person. Even a trust beneficiary can obtain the exemption if the beneficiary has a sufficient beneficial interest in the house held in trust, and the beneficiary is a trustee. Each exemption should be read carefully to determine its specific eligibility requirements.

Homeowners must file an application for an exemption or deferral at their local Board of Assessors Office on or before April 1 of the year to which the tax relates, or three months after the tax bill is mailed, whichever is later. Applicants must pay their property taxes while their application is pending. Approved applications will result in a reduced real estate tax bill to the taxpayer/applicant. Since an individual typically can qualify for only one exemption each year, it is important to review all exemptions annually in order to select the exemption that will result in the greatest tax reduction. If one is still having trouble paying his or her property taxes, he or she may receive additional relief through a hardship exemption, Elderly and Disabled Taxation Fund, the Senior Work-Off Program or Senior Circuit Breaker Tax Credit discussed in Sections E and F of this chapter.

### EXAMPLE 1

Mary lives in a two-family home. Mary occupies the first floor and her son occupies the second floor. If she otherwise qualifies for a tax exemption of \$1,000, her tax reduction would be \$500 because Mary occupies 50 percent of the property.

## D. Exemptions

Cities and towns may give property tax exemptions to some individuals as defined by state law. An exemption discharges a taxpayer from the legal obligation to pay all or part of the tax and examples can be found in the various clauses of Mass. G.L. ch. 59, § 5. Since an individual can only apply for one exemption and the exemptions vary from town to

town, those seeking such exemptions should contact their local tax authorities for particulars.

## 1. Elderly Persons

The standard Elderly Persons exemption provides \$500 (or \$1,000 in some communities) for home owners who are at least 70 years of age. The applicant must occupy the property as his or her primary residence for at least five years and the applicant must have lived in Massachusetts for 10 years preceding the application. The Elderly Persons exemption is only granted to one person for the same parcel of property. If two elderly individuals own the property jointly, the exemption amount will only benefit one owner.

An elderly applicant must also meet income and asset limitations to be eligible for this exemption. The standard exemption is available to single applicants who earn less than \$6,000 per year, and have assets less than \$17,000. A married applicant cannot earn more than \$7,000 per year, and cannot own assets that exceed \$20,000. The income limitations do not include Social Security benefits, and the asset limitations do not include the value of the home. As with other exemptions, the value of the applicant's cemetery plots, registered vehicles, clothing and household furniture are also excluded when calculating the applicant's assets.

Cities and towns may adopt more liberal restrictions and, therefore, elders should contact their local assessor to see if they qualify under the town's Elderly Person exemption.

Applicants who do not qualify for this exemption because they exceed the income restriction should apply for the Older Citizens exemption (discussed in Section D, no. 4 of this chapter), as there is no income restriction for that particular exemption.

## 2. Veterans

The Veterans exemption is available to certain veterans, as well as their spouses, surviving spouses, and/or surviving parents. Although the residency requirement may vary from town to town, applicants seeking this exemption must have been either a Massachusetts resident for at least six months prior to entering the service or the veteran must have lived in Massachusetts for at least five

years prior to filing for this exemption.

Disabled veterans, honored veterans and their spouses or parents are eligible for one of several real estate tax exemptions. Exemption amounts vary depending on the severity of the veteran's disability or his or her medal awarded. A list of available veteran exemptions relating to real estate includes:

- \$400 to veterans who received at least a 10 percent disability rating from wartime service, veterans who have been awarded the Purple Heart and mothers and fathers of veterans who have been awarded the Gold Star;
- \$750 to veterans who suffered the loss of one foot, one hand, or one eye; veterans who received the Congressional Medal of Honor, Navy Cross or Air Force Cross, and their spouses or surviving spouses;
- \$1,000 to veterans who suffered total disability in the line of duty and are incapable of working, and their spouses or surviving spouses;
- \$1,250 to veterans who suffered in the line of duty the loss of use of both feet, both hands, or both eyes, and their spouses or surviving spouses;
- \$1,500 to veterans who suffered total disability in the line of duty and to veterans who received assistance in acquiring "specially adapted housing," as well as their spouses or surviving spouses;
- A full exemption, with a cap of \$2,500 after five years is available to surviving spouses of soldiers, sailors and guardsmen who died from being in a combat zone; and
- A total exemption is available to paraplegic veterans and their surviving spouses.

There are no income or asset restrictions for the qualified Veterans exemption, but the applicant must occupy the property as his or her primary residence. Applicants who co-own the property must have an ownership interest in the property valued at \$2,000 to \$10,000, depending on the exemption. If the property is greater than a single-family home, the exemption amount is calculated and is prorated based on the value of the property that is occupied by the applicant.

A motor vehicle of a disabled veteran operated for personal use is exempt from automobile excise taxes. In addition, a motor vehicle of a veteran, or his or her surviving spouse, is exempt from automobile excise taxes if the veteran was a prisoner of war and the city or town allows this exemption provision.

### 3. Blind

The property tax exemption for the blind is either \$437.50 or \$500, depending on the city or town's discretion. An individual applying for this exemption will need to provide proof that he or she is legally blind. Most assessors will accept a certificate showing that the applicant is registered as legally blind with the Massachusetts Commission for the Blind or a letter from the applicant's physician stating that the applicant is legally blind.

While there are no income or asset restrictions, the blind applicant must own and occupy the property as his or her primary residence. Applicants who co-own the property must have an ownership interest worth at least \$5,000 in order to satisfy the requirement of this exemption. There is no apportionment of this exemption if the blind person co-owns the property (owns as a joint tenant or tenant in common, for example). A co-owning blind person will receive the entire exemption.

#### EXAMPLE 2

Mary and her sister are both legally blind, registered with the Massachusetts Commission for the Blind, and are joint owners of the property. Even though both women qualify for the exemption, the first person to apply for the exemption will receive the abatement because only one exemption is granted on the same parcel of land.

### 4. Older Citizens, Surviving Spouses and Minors

This exemption provides relief to three categories of persons: 1) widows and widowers; 2) minor children with one parent deceased; and 3) persons 70 years of age and older. The state statute compels cities and towns to provide a \$175 property tax exemption to applicants meeting the eligibility requirements. Some cities and towns, howev-

er, have voluntarily adopted a higher exemption amount.

There are no income limitations for these exemptions. As a result, this exemption is a good alternative for elders who do not qualify under the Elderly Persons exemption discussed in Section D, no. 1 of this chapter. A surviving spouse or a minor with a deceased parent does not have to own and occupy the property for any period of time to receive this exemption. An elderly person, on the other hand, applying for this exemption must have owned and occupied the property as his or her primary residence for at least five or 10 years, depending on the town's discretion.

The dollar amounts in the original eligibility requirements under this exemption established by the commonwealth have become somewhat outdated with increasing property values. The commonwealth, therefore, now gives cities and towns the option of electing from several alternatives that vary in asset limitations and residency requirements. For example, under the original standard exemption, an individual cannot exceed \$20,000 in total assets, excluding any unpaid mortgage on the property.

Conversely, under the most flexible alternative, an individual cannot own more than \$20,000 under clause 17, or \$40,000 under the other clauses, excluding the total value of the subject property.

#### EXAMPLE 3

Mary is 70 years old and has lived in her home for the past seven years. Mary has \$30,000 in the bank and a home valued at \$200,000 with an outstanding mortgage of \$170,000. Mary would not qualify for this exemption if she lives in a town that adopted the standard exemption because she exceeds the asset limitation (\$30,000 cash + \$30,000 in equity) and she does not meet the residency requirement of 10 years. Mary does, however, qualify for the exemption if she lives in a town that adopted the least restrictive alternative, because she does not exceed the asset limitation and she does meet the residency requirement of five years.

**Practice note:** Check with the local assessor to determine which clause the city or town has adopted. Also check if the exemption amount is \$175 or if the city or town adopted a higher exemption amount.

An applicant’s personal belongings, household furniture, car and prepaid funeral expenses are not counted in determining the applicant’s maximum total asset value amount.

**EXAMPLE 4**

Mary is 70 years old and has lived in her home for the past 10 years. In addition to \$13,000 in the bank, Mary owns a car worth \$15,000 and has household furniture valued at \$20,000. Mary also prepaid her funeral expenses. Mary would qualify for all clause 17 exemptions and would receive a reduction of taxes on her home of \$175.

**5. Hardship**

Individuals who do not qualify for any of the above exemptions may apply for a hardship exemption. A hardship exemption can be obtained by individuals who also received one of the above exemptions. This exemption grants relief to a homeowner in his or her tax bill due to medical hardship, financial hardship, or extenuating circumstances and expenses.

There are no expressed restrictions, and eligibility is determined on a case-by-case basis. This exemption is typically available to individuals who are unable to fulfill their tax obligation because of age, infirmity, poverty or financial hardship resulting from a change to active military status.

**E. Deferring Taxes**

The Elderly Tax Deferral, available under Mass. G.L. ch. 59, § 5, clause 41A, allows an elder homeowner to defer payment on his or her property taxes. In contrast to tax exemptions, deferred taxes must eventually be paid. Under the deferral, all or part of the property taxes due on the property are deferred until the deferred tax amount reaches 50 percent of the then-assessed property value. A single elder homeowner must be at least 65 years old to be eligible for the deferral. An elder may own the property jointly or as a tenant in common. For elders owning property jointly with a spouse, at least one spouse must be 65 years or older.

A qualified applicant must enter into a written tax deferral and recovery agreement with the city or town. This agreement is recorded at the Registry of Deeds. During the deferral period, the deferred tax amount incurs a maximum 8 percent interest annu-

ally, although the statute permits cities and towns to elect a lower interest rate. Some towns have elected an interest rate of zero. Deferred taxes must be repaid within six months after the death of the elder homeowner or sale of the property. If the property is sold or the elder homeowner is deceased and the taxes are not repaid, the tax deferral becomes a lien on the property.

The elder applicant must have owned and occupied any real property in Massachusetts (including the current property) for five years, and must have been a resident of Massachusetts for the previous 10 years. While there are no asset limitations, the elder’s income may not exceed \$20,000 per year. Cities and towns may adopt higher income limitations, but no city or town may adopt an annual income limitation higher than \$40,000. The deferral can be used in conjunction with one of the available real estate tax exemptions, as long as the applicants meet eligibility requirements for both.

**EXAMPLE 5**

Mary has a yearly real estate tax bill of \$1,200 on her home. She is 73 years old and receives a \$500 reduction in her real estate tax under the Elderly Persons exemption. Mary’s remaining tax amount due of \$700 can be deferred.

**F. Other Tax Exemptions and Credits for Seniors**

**1. Elderly and Disabled Tax Fund (Mass. G.L. ch. 60, §3D)**

Pursuant to Mass. G.L. ch. 60, § 3D, the commonwealth authorized cities and towns to create an Elderly and Disabled Taxation Fund “ ... for the purpose of defraying the real estate taxes of elderly and disabled persons of low income who, in the judgment of the fund administrators, are unable to contribute fully toward their public charges.”

Each city or town may adopt the program. If adopted, the community will establish a five-person Taxation Aid Committee, which identifies the recipients of the aid and determines how much of their tax bills will be defrayed. The community’s taxpayers may donate any amount to the fund through their tax bills. Donated funds are depos-

ited into a special account until administered by the committee.

An individual meeting the eligibility criteria must submit an application to the taxation aid committee. The applicant must be elderly or disabled in accordance with his or her community's eligibility guidelines. Since the statute does not provide specific standards to define elderly or disabled, the committee has some flexibility in administering the funds.

Whether elderly or disabled, the applicant must have some degree of financial hardship, and must disclose his or her financial information on the application. Certain communities consider other factors, such as marital status, employment status, work qualifications, public assistance received by the applicant, or the value of the applicant's home. Each community may establish its own unique standards to better meet its local needs.

Communities will frequently award aid to all qualified applicants because few residents apply for aid. This high acceptance rate is ordinarily due to a lack of knowledge of the program. Because an individual's entire property tax burden can be covered by the tax fund, it is essential for potential applicants who meet the minimum qualifications to be made aware of the program and submit an application.

## **2. Senior Work-off Abatement (Mass. G.L. ch. 59, § 5K)**

The Senior Work-Off Abatement program enables tax-paying seniors to volunteer their services to the community in exchange for a reduction in their property tax bill.

An eligible senior may save up to \$1,500 on his or her taxes, depending on the community's election. The senior will work at an hourly rate that may not exceed the state minimum wage; in exchange for such work, the city or town will issue a voucher to the senior that will be applied against his or her property tax bill. By applying these vouchers, the seniors are not earning income and, therefore, the voucher is tax free.

The state statute provides that the taxpayer must be more than 60 years of age and own property within the community. The applicant may be a trustee if the property is owned by a trust. More than one qualifying owner may earn the abate-

ment on the same property, unless local provisions express otherwise. Seniors may earn the work-off abatement on top of any other exemptions and credits that may be available under any other statutes. Seniors may work in schools, libraries, senior centers, or other public departments and offices in the community.

Not every applicant is guaranteed work through the program. Generally, seniors must demonstrate a financial hardship in order to receive jobs with the community and the hours a senior may work are limited since he or she can only earn up to \$1,500 per year. In most towns, there is no automatic re-enrollment and, as a result, interested workers need to apply each year.

The program has been well-received in the communities that have adopted the senior work-off, because it: (a) decreases property taxes for the working senior; (b) increases senior involvement in local government; and (c) gives communities a skilled pool of potential senior employees.

## **3. Senior Circuit Breaker Tax Credit (Mass. G.L. ch. 62, § 6(k))**

The Senior Circuit Breaker Tax Credit differs from the other exemptions and deferrals discussed earlier because this program credits the senior's state income tax as opposed to his or her property tax. The circuit breaker credit allows property owners or renters 65 years of age or older to claim a credit of up to \$1,080 (for 2017) for rent or real estate taxes paid on their principal residence to the extent the taxes exceed 10 percent of their total income. The state pays the credit as opposed to the local cities and towns.

Senior homeowners who paid more than 10 percent of their income for real estate taxes and water and sewer charges are eligible for the credit. Senior renters can count 25 percent of their rent as real estate taxes. In order to receive the credit, a senior must file a state income tax return, even if he or she is not otherwise required to do so. The taxpayer will receive a refund if the credit due exceeds the amount of the income tax paid that year.

To be eligible for the credit for 2017, single seniors cannot earn more than \$57,000. For heads of household, and married couples filing a joint return, the annual 2017 income limitations are

\$72,000 and \$86,000, respectively. In all cases, the value of the home after abatements cannot exceed \$747,000 for 2017. In order for a renter to receive the credit, he or she cannot be receiving a rent subsidy, and he or she cannot pay rent to a landlord who is not required to pay real estate taxes. A taxpayer may add 50 percent of his or her water and sewer bill to his or her property tax assessment when calculating the credit, so long as the water and sewer bill is not already included in the municipal property tax bill. For example, delinquent water and sewer bills are generally added to the property tax whereas the provisions of the circuit breaker credit only apply to current water and sewer bills.

Any property tax reductions or exemptions, such as the ones described in this guide, earned or received by the taxpayer must be taken into account before determining the total real estate tax paid.

#### EXAMPLE 6

Mary is 81 years old and lives alone. Mary's home is valued at \$350,000 and she earned \$20,000 in 2017. She had an unadjusted real estate tax bill of \$5,000 and a \$500 water and sewer bill. She can therefore add \$250 (50% of \$500) to her tax bill in calculating the circuit breaker credit, bringing it up to \$5,250. Mary also received the elderly person's exemption of \$175 and earned \$500 through the Senior Work-Off Abatement. Mary's adjusted property tax is \$4,575 (\$5,250 – \$175 – \$500). Ten percent of Mary's income is \$2,000. Because Mary's adjusted real estate tax exceeds 10 percent of her total income by at least \$1,080, Mary is eligible for the full \$1,080 income tax credit for 2017.

## ADDITIONAL RESOURCES AND CONCLUSION

Additional information and applications for exemptions can be obtained at the Assessor's Office in each city or town. Several assessor's offices have websites which provide local exemption information, downloadable applications, and links to other websites. The following are additional resources that may be useful:

- **Commonwealth of Massachusetts Citizen Information Service**  
www.sec.state.ma.us/cis  
(617) 727-7030
- **Department of Revenue, Division of Local Services, Property Tax Bureau**  
51 Sleeper St., Boston, MA 02210  
(617) 626-2300

This chapter should provide you with information needed to determine whether you may be eligible for a real estate tax exemption or deferral. Because several cities and towns have adopted alternatives for many exemptions, you should contact your local Assessor's Office for specific eligibility requirements and exemption amounts.

## CHAPTER 9

### REVERSE MORTGAGES

#### Basic Information About a Potentially Helpful Financial Instrument

##### INTRODUCTION

Reverse mortgages are one of the most misunderstood financial products on the market today. They can be very good, or very bad depending upon the individual. For many older homeowners, their homes are their most valuable, if not only, asset. Some may need funds to help pay for health care bills, property-related expenses or even subsistence needs. On the other side of the financial spectrum, many affluent baby boomers and their financial advisers are searching for creative ways to incorporate home equity into their comprehensive retirement plans. One tool available to these homeowners that reach a certain age is a reverse mortgage. Reverse mortgages allow older homeowners to borrow against their home equity and convert it into spendable cash in order to accomplish their personal financial goals. There are many myths and misconceptions about reverse mortgages and they are not the answer for everyone. Homeowners should do their research, weigh their options, connect with U.S. Department of Housing and Urban Development (HUD) counselors, and speak to an elder law attorney or other trusted professional advisor before entering into one of these transactions.

##### WHAT IS A REVERSE MORTGAGE?

A reverse mortgage is the opposite of a conventional mortgage. In a conventional mortgage, you pay principal to build equity in your home. In a reverse mortgage, you borrow against the equity in your home. A reverse mortgage allows you to “cash out” some of the equity in your home. As with any mortgage, there are requirements, rules and costs.

The home must be your principal residence, you have to be at least 62 years old and your property has to qualify. There are credit requirements for a reverse mortgage, but these are more lenient than those of a conventional loan. The fees to get a reverse mortgage are generally higher than the fees for a conventional mortgage. As long as you have the reverse mortgage,

you must pay all property costs, including real estate taxes, utility fees, homeowner’s insurance, flood insurance, condominium and management fees, and maintenance of the home. However, there is no requirement to make “mortgage payments” on the reverse mortgage. If you do not make the required payments, the mortgage holder can evict you. A reverse mortgage does not affect your Social Security or Medicare benefits. It can affect your Medicaid (MassHealth) benefits because assets are considered for eligibility. (*See Chapter 4.*)

No matter what type of reverse mortgage a person considers, the loan proceeds received from a reverse mortgage cannot be considered “income” for the purpose of any government-funded program that uses income as a qualifier. Examples of such programs include the Supplemental Nutrition Assistance Program (SNAP) and fuel assistance, or Low Income Home Energy Assistance Program (LIHEAP).

There were a number of changes in reverse mortgages which took effect last year, and are too detailed to discuss here. The basic rule — don’t sign until you are sure you understand all the fine points, and as always, we suggest you seek legal advice.

The next paragraphs outline some important information for you to consider.

##### A. Types of Reverse Mortgages

In 2018, Massachusetts homeowners can choose between several types of reverse mortgages. By far, the most common is the Federal Housing Administration (FHA)-insured Home Equity Conversion Mortgage (HECM). HECMs are offered through mortgage lenders, mortgage brokers, banks and credit unions. FHA made several program changes between 2014 and 2017, improving consumer protections, reducing costs and stabilizing the HECM program.

A couple of proprietary reverse mortgage products exist today. The most common are the Term Reverse Mortgage and Senior Equity Line of Credit

offered by Homeowner Options for Massachusetts Elders (HOME), partnering with local banks. HOME loans have some requirements that are significantly different than the standard HECM. First, they are meant for those with low incomes. Second, they are more limited than the standard HECM. Third, they are set up so that the elders can transition out of their home; they are not meant for those who want to continue to reside in their home indefinitely. HOME's product is a delayed payment mortgage, meaning that the full payment will be due at a set point in the future. When that payment will be due will be part of the counseling session that goes with a HOME loan, but will usually be within five, 10 or 15 years. These are not long-term loans. Fourth, the age requirements for these loans are significantly less than the more standard HECM, with 60 being typical, but as low as 50 for a homeowners in danger of losing their home. For more information on these loans, see <http://www.elderhomeowners.org>.

From time to time, there may be an additional proprietary reverse mortgage for high-value properties. While many of these loans are set up to run similar to a HECM, they often have different closing costs, interest rates and other unique features. It is highly suggested that an individual contemplating one of these loans speak to an elder law attorney or a real estate attorney to have the loan terms reviewed and explained.

**As the HECM program is the most prolific reverse mortgage program in Massachusetts, the remaining chapter is devoted to explaining the HECM.**

## **B. How Does a HECM Reverse Mortgage Work?**

Unlike a traditional mortgage, a HECM has no required monthly repayment obligation. It is a deferred payment loan. The repayment of the loan is deferred until the last borrower (or qualified non-borrowing spouse) has passed away, left the home permanently or defaulted on the terms of the mortgage. Borrowers have several choices of how they can take the funds. They can be taken as a tenure payment (a monthly installment payment that continues for as long as the borrowers are in the home), a term payment (a larger payment than the tenure payment that will last only for a term of years), a line of credit, a lump sum, or a combination of the

above. As with any home-secured loan, the borrower must keep current with property taxes, insurance and maintenance.

A tenure payment is a monthly amount sent to the homeowner that is guaranteed to continue as long as the homeowner occupies the home as his or her primary residence, even if that is for his or her entire life. The older the homeowner at the start of the loan, the larger the tenure payment. For instance, a 62-year-old living in a \$400,000 house might have a tenure payment of \$768 per month, whereas a 75-year-old living in the same house might have a tenure payment of \$1,102 per month.<sup>1</sup> A term payment is a monthly payment that lasts for a finite number of months and then ends. Said payments are usually for more than available under the tenure payment and may deplete the available loan balance quickly.

A line of credit is a popular method whereby the homeowner can pull out loan funds at times and in amounts of his or her choosing. In that way, it is similar to a home equity line of credit (HELOC). However, that is where the similarities end. As long as the borrower meets his or her loan obligations, a HECM line of credit cannot be "called" or arbitrarily terminated by the lender the way a HELOC can. Also, the unused portion of HECM line of credit grows larger at a guaranteed, compounding growth rate. So, a 62-year-old living in a home worth \$600,000 may start out today with a line of credit of \$229,077. But if he or she leaves the line of credit alone and allows it to grow, it will grow to \$392,818 in 10 years and \$673,597 in 20 years, even if the home decreases in value.<sup>2</sup>

Payments for a HECM are not required until the homeowner sells the home, dies, is absent from the home for more than 12 consecutive months because of an illness, or defaults on his or her loan obligations. An absence from the home for more than six consecutive months for reasons other than illness will also trigger loan repayment. The outstanding balance will be made up of any loan funds disbursed to the homeowner over the life of the loan plus interest, FHA mortgage insurance and servicing fees that have accumulated over time. Unless the homeowner makes voluntary prepayments, the charges will compound over time so it is important to draw down only the loan funds that one needs to pay one's bills and live comfortably. For instance, a homeowner

that withdraws \$20,000 initially for a home repair and to eliminate credit card debt may owe \$45,567 in five years and \$59,670 in 10 years.<sup>3</sup> Compare that to a homeowner who withdraws \$100,000 initially and deposits most of it in the bank. He or she could owe \$156,939 in five years and \$205,512 in 10 years because of the compounding effect of the loan charges and would get next to nothing in interest payments from his or her bank.<sup>4</sup> The second homeowner should have withdrawn only what he or she needed at the time, thereby reducing the total loan charges and allowing the HECM line of credit to grow over time. Just like any other loan, seniors are encouraged only to borrow what they need.

### C. Repaying a HECM Reverse Mortgage

Six circumstances trigger repayment of a HECM. The first, and most common, occurs when the last borrower passes away. The second occurs when the borrower sells the property or otherwise conveys title without retaining a life estate interest or beneficial interest in a trust. The third occurs if the borrower ceases to occupy the real estate as a principal residence (for example, by establishing a new principal residence, or by continuous confinement to a nursing home). The fourth trigger is if the borrower fails to maintain the property. The fifth trigger is if they fail to maintain their homeowner's insurance on the property. The final trigger is failure to pay the property taxes. This is the one that causes the most defaults in HECMs as people run through the money and stop paying the property taxes. It is important to note that a HECM can be repaid, in part or in whole, without any prepayment penalty. Prepaying an adjustable rate HECM down to a zero balance will close out the loan, whereas leaving a small outstanding balance will leave the loan open and accessible in the future if needed.

Usually a HECM is repaid by selling the home, refinancing into a regular mortgage, or utilizing the life insurance death benefit of a deceased borrower. Typically, the home is sold at a fair market price that exceeds the HECM outstanding balance. In that case, the excess sale proceeds revert to the borrower or his estate. Because a HECM is a "non-recourse" loan, a borrower or estate that finds itself with an outstanding loan balance that exceeds the home's fair market value at the time of repayment is only responsible for repaying 95 percent of the home's

value. FHA's mortgage insurance fund covers the repayment of any shortfall between the outstanding loan balance and the home's value. Neither the borrower nor his or her estate is personally responsible for repaying the shortfall. Lenders will allow the estate up to one year from the last borrower's date of death to repay the reverse mortgage. However, it is important to note that interest and FHA mortgage insurance will continue to accrue during this time, which can reduce the amount of any remaining equity in the home.

### D. Reasons to Use a HECM Reverse Mortgage

The HECM can be used for any purpose and, when used responsibly, can provide additional, long-term financial security during a homeowner's retirement. That being said, it is recommended that borrowers do think about the uses of the money. Here are some common examples of how HECMs are used today:

1. Paying off existing mortgage debt to eliminate monthly principal and interest payments;
2. Eliminating credit card debt and other unsecured debts;
3. In-home care services;
4. Home renovations and repairs, including accessibility modifications;
5. Dental work, hearing aids and other medical expenses not covered by Medicare or health insurance;
6. Deferring the date that one begins drawing Social Security retirement benefits in order to receive a larger monthly benefit;
7. Replacing lost income sources like a deceased spouse's Social Security, pension, or a depleted 401K, IRA or annuity;
8. As a funding source for seniors caring for grandchildren or adult disabled children;
9. Supplementing income to help pay for everyday living expenses;
10. As a "safety net" for emergencies or large expenditures;
11. Extending the longevity of one's other retirement savings and investments.

A HECM should never be used as a means to purchase any other time of financial product, investment or annuity.

## **E. Determining Eligibility for a HECM Reverse Mortgage**

There are a few requirements to be eligible for a reverse mortgage. One prerequisite is age. The minimum qualifying age for the FHA-insured HECM program is 62. New rules exist that extend eligibility to a married applicant who has a spouse under age 62 as long as certain procedures are followed. These new rules create new protections, responsibilities and consequences for the “non-borrowing spouse,” which the couple should review with their attorney, the reverse mortgage counselor and their lender.

There is no minimum property value requirement, though a homeowner must have enough equity in his or her home to pay off any existing mortgages or liens, and the home must meet FHA guidelines. In 2018, lenders may consider up to the first \$679,650 of a HECM applicant’s home value when determining an applicant’s eligibility and loan amount.

The property securing the loan must be the borrower’s primary residence. While home ownership is ordinarily a prerequisite, life tenants and beneficiaries of certain types of trusts may also secure a HECM, subject to some restrictions. In these situations, applicants should make sure that they or their attorney communicate with the lender early in the process to make sure their ownership interest meets HUD guidelines. Single-family residences are eligible, but lenders will also extend credit on owner-occupied, multi-family homes (up to four units) and FHA-approved condominiums. For homes requiring structural repairs, lenders will either set aside a portion of the loan funds into a “repair set-aside account” and give the homeowner several months to complete the repairs post-closing or, in severe cases, lenders will require a homeowner to complete any major repairs prior to closing.

“Financial Assessment” is a term describing new credit and income underwriting rules that assess the suitability of a HECM for each applicant’s financial situation and to reduce the number of technical mortgage defaults caused by nonpayment of property taxes and homeowners insurance. Lenders must

now analyze each applicant’s credit history, property charge payment history and income to determine the homeowner’s ability (income) and willingness (credit) to meet his or her ongoing property expenses. Those who don’t meet certain HUD thresholds will encounter new “Life Expectancy Set Asides” that require setting aside what can be a substantial percentage of their HECM for future property tax and insurance payments or, in extreme cases, their HECM application may be denied.

The loan amount available under a reverse mortgage varies based upon a number of factors, but primarily upon the borrower’s age, the value of the home and the expected interest rate. Therefore, older borrowers with more valuable homes (up to the current limit) can access greater loan amounts.

## **F. Fees Associated with Obtaining a Reverse Mortgage**

Lenders generally charge borrowers up-front fees. Although borrowers need not pay most of these expenses out of pocket, they should be aware that if they finance the loan costs by adding them to their loan balance, they will still pay them back (plus interest) when the loan becomes due and payable.

Fees vary based upon the lender offering the program. Initial loan costs include those for FHA mortgage insurance, usual and customary third-party closing costs and loan origination fees. Homeowners should shop around to see what different lenders offer for closing costs and lender credits.

Part of every borrower’s closing costs is an FHA Initial Mortgage Insurance Premium equal to either 2 percent of the home’s value or \$13,593, whichever is less. More often than not, this insurance premium makes up the largest percentage of the total financed closing costs.

Depending on the home’s value, origination fees can reach as high as \$6,000, although this fee is often negotiable. In some cases, lenders reduce their origination fees or offer “lender credits” to offset some of the remaining closing costs. However, this may often cause the lender to increase the interest rate margin allowing them to recapture these fees, and more, over time.

In terms of ongoing costs, there is interest, an ongoing FHA mortgage insurance premium of 50 percent per year and possibly servicing fees of \$30 or \$35 per month. If there is a service fee, it will

be deducted and set aside as part of the terms of the reverse mortgage.<sup>5</sup> Most reverse mortgage lenders offer both fixed and adjustable interest rates. Keep in mind that borrowers who select a fixed interest rate must take all of their loan funds in one single disbursement lump sum at closing. A line of credit and monthly advance are not available with a fixed interest rate.

## **G. Mandatory Counseling Prior to Reverse Mortgage Application**

In an effort to protect older homeowners from undue influence and to ensure that they make the most educated decision possible, HECM applicants must complete a reverse mortgage counseling session with an independent, HUD-approved reverse mortgage counselor. All reverse mortgage counseling sessions within Massachusetts must take place face-to-face with a HUD-approved counselor. Telephone counseling is no longer accepted in Massachusetts.<sup>6</sup> Counseling fees range from \$175 to \$350 and counseling sessions typically range anywhere from 90 to 180 minutes.<sup>7</sup> In addition, it may often take 10 or more days to get into a counseling session. Only after the counseling session is completed may a lender proceed with an application. A lender may not “steer” a prospective borrower toward or away from any particular counseling agency. One can find an agency approved in Massachusetts at the Executive Office of Elder Affairs website: <http://www.mass.gov/elders/housing/reverse-mortgage-counselors.html>.

The following is the currently approved list of HUD Housing Counseling agencies providing HECM counseling within the commonwealth as of January 2018:

### **American Consumer Credit Counseling**

130 Rumford Ave., Ste. 202  
Auburndale, MA 02466  
Tel: (617) 559-5700 • Toll-free (866) 826-7180  
[www.ConsumerCredit.org](http://www.ConsumerCredit.org)

### **Cambridge Credit Counseling Corp.**

67 Hunt St.  
Agawam, MA 01001-1920  
Tel: (800) 757-1788

### **Community Service Network Inc.**

52 Broadway  
Stoneham, MA 02180  
Tel: (781) 438-1977  
[www.CSNINC.org](http://www.CSNINC.org)

### **Homeowner Options for Massachusetts Elders (HOME)**

87 Hale St., 2nd Floor  
Lowell, MA 01851  
[www.ElderHomeowners.org](http://www.ElderHomeowners.org)  
Tel: (978) 970-0012 • Toll-free (800) 583-5337

### **Housing Assistance Corp.**

460 West Main St.  
Hyannis, MA 02601  
Tel: (508) 771-5400, ext. 287  
[www.HACOnCapeCod.org](http://www.HACOnCapeCod.org)

### **Neighborworks Southern Mass**

68 Legion Parkway  
Brockton, MA 02301  
Tel: (617) 770-2227, ext. 44  
[www.NWSoma.org](http://www.NWSoma.org)

### **Nuestra Comunidad Development Corp.**

56 Warren St., Suite 200  
Roxbury, MA 02119-3236  
Tel: (617) 318-1237

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## CHAPTER 10

# ELDER ABUSE, NEGLECT AND FINANCIAL EXPLOITATION

### INTRODUCTION

Elder abuse encompasses classic physical and emotional abuse, as well as neglect, self-neglect and financial exploitation. Numerous studies have found that elder abuse is far under-reported, with roughly only one in five incidents being reported. This low figure is due partly to the common familial or close relationship between the victim and perpetrator.<sup>1</sup> Some studies have shown that when abuse occurs, family members and caregivers may account for as much as 90 percent of the abuse.<sup>2</sup> To stop the abuse and help victims, elder abuse, neglect, self-neglect and financial exploitation must be on the forefront of educational efforts for those caring for seniors.

#### A. What is Elder Abuse?

Elder abuse has a broad definition because of the many ways in which elders are vulnerable. In Massachusetts, elder abuse includes actions by almost anyone, including a caretaker,<sup>3</sup> conservator<sup>4</sup> or guardian,<sup>5</sup> causing: (1) physical or emotional injury; (2) financial exploitation; or (3) denial of life necessities essential for physical and emotional well-being (neglect). Elder abuse also includes self-neglect, which is when an elderly person is unable to care for himself or herself. Some often overlooked warnings signs of neglect include bed sores, poor hygiene, malnutrition and mood changes.<sup>6</sup>

#### B. What Should I Know About Financial Exploitation of Elders?

##### 1. Definition

Financial exploitation is an act or omission which causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to another person, which gain would otherwise benefit the elderly person but for the act or omission of such other person.<sup>7</sup> The consent of an elder to the harmful act or omission is not valid if it was the consequence of misrepresentation, undue influence, coercion, or threat of force.<sup>8</sup>

ercion, or threat of force.<sup>8</sup>

Some common examples of financial abuse include: misuse of durable powers of attorney and bank accounts; misuse or neglect of the authority by a guardian or conservator; failure to provide reasonable consideration for the transfer of real estate; excessive charges for goods or services; or the use of fraud or undue influence to gain control of or obtain money or property. Predatory lending, telemarketing fraud, sweepstakes fraud and other scams that are targeted toward the elderly also may be considered to be financial exploitation.<sup>9</sup> For the more traditional forms of financial abuse by persons that the elder trusts, it can be hard to identify the abuse because it happens over time; and, in many cases, the abuser is also a person who might ordinarily be expected to receive gifts from the elder, such as a child or a sibling. Often the elder does not know it is happening, the elder depends on the abuser and commonly this financial abuse is accompanied by physical or emotional abuse which silences the elder.<sup>10</sup>

##### 2. Warning Signs

There are some warning signs that can help you identify whether financial abuse may be occurring, such as unusual bank withdrawals; failure to meet financial obligations; withdrawals from investments in spite of penalties for early withdrawal; abrupt changes in wills, trusts, contracts, powers of attorney, property titles, deeds or mortgages; changes in beneficiaries on insurance policies; or financial activity that is inconsistent with the senior's abilities (such as ATM withdrawals when the senior has difficulty leaving the house) or previous spending patterns.<sup>11</sup>

##### 3. Role of Banks

Financial exploitation can be devastating to an elder and an evolving first line of defense is bank tellers. Often financial exploitation can be hard to detect because the person exploiting the elder has

been trusted with the elder's money, but a bank may be able to notice sudden changes in accounts and other suspicious activity. To address financial exploitation, Massachusetts has implemented a program, The Massachusetts Bank Reporting Project: An Edge Against Elder Financial Exploitation, that provides training to bank personnel in how to identify and report financial exploitation.<sup>12</sup> The project has been successfully replicated in numerous communities.<sup>13</sup> If you would like more information on the Bank Reporting Project, call (617) 727-7750.<sup>14</sup>

#### **4. Power of Attorney**

A power of attorney (*see Chapter 1*) gives another individual the power to make decisions about the elder's property. Such powerful instruments can easily be misused to exploit the elderly. Therefore, the grant of power to an attorney-in-fact should be carefully and thoughtfully considered and drafted, and the actions of the attorney-in-fact should be monitored.

#### **C. I am Worried About an Elder Who Cannot Care for Himself or Herself. Is Help Available?**

Elder abuse encompasses "self-abuse," meaning, when an elder can no longer provide for his or her own essential life needs, cannot make informed decisions understanding the consequences of his or her actions, and/or his or her mental and physical condition declines without it being addressed.<sup>15</sup> One of the reasons that the law includes this self-neglect is so that these individuals can receive services from Protective Services. Protective Services must always use the least restrictive measures, and try to keep a self-neglecting elder in the community safely.<sup>16</sup> Even in cases of self-neglect, an elder who has capacity has the right to refuse services, and only in emergency situations, and if the elder lacks capacity, can the court be petitioned for temporary guardianship.

#### **D. What Should I Know About Abuse in a Nursing Home?**

Abuse in a long-term care facility is separately defined as, "... the willful infliction of injury, unreasonable confinement, intimidation, including verbal or mental abuse or punishment with resulting physi-

cal harm, pain or mental anguish or assault and battery ..."<sup>17</sup> Regulations require that reports of abuse be made to the Department of Public Health rather than Protective Services.<sup>18</sup> *Note: Protective Services are discussed later in this chapter and the Rights of a Nursing Home Resident are fully discussed in Chapter 7.*

#### **E. Who Can Report Elder Abuse, Neglect or Financial Exploitation?**

Reporting elder abuse is an important and powerful act, and such a report should be made when the reporter has reasonable cause to believe that abuse has occurred or is about to occur. Every day of the year, the Massachusetts Elder Abuse Hotline can be reached at (800) 922-2275. Certain people, such as doctors, nurses, police and elder outreach workers, are considered to be mandated reporters, and are required by law to report suspected elder abuse; and, all other individuals, while not required to report elder abuse, may, and should do so, if the elder is at risk of harm. Mandated reporters who have reasonable cause to believe abuse has occurred but fail to report may be subject to a \$1,000 fine.<sup>19</sup> The identity of the person who makes a report of elder abuse may not be disclosed to anyone, except to the district attorney or in compliance with a court order.

#### **F. Is There a Statewide Agency That Helps Elderly Victims?**

Yes. The Executive Office of Elder Affairs, by law, maintains 22 Protective Services agencies throughout Massachusetts.<sup>20</sup> The role of Protective Services is to investigate cases and, where appropriate, offer services, make referrals and connect elders to community resources. To find the Protective Services agency nearest you, call the above hotline, or visit [www.mass.gov/ago/consumer-resources/consumer-information/resources-for-elders/elder-abuse-and-protection.html](http://www.mass.gov/ago/consumer-resources/consumer-information/resources-for-elders/elder-abuse-and-protection.html).

#### **G. What Happens When Abuse is Reported?**

If an allegation of abuse is made, then a case-worker from Protective Services will investigate the allegation. Due care is taken to balance the rights of privacy and self-determination of the elder and the need to protect the elder from harm. If, as a result of the ensuing investigation, one or more types of abuse are found, then the Protective Services social worker will intervene to protect the elder's safety. Often this

intervention means that a care plan will be drafted with the elder, if he or she has capacity. The care plan may include counseling, legal aid, home health care, transportation, housing aid or safety planning. If the abuse is very serious, Protective Services will report it to the prosecuting authority, which may elect to bring criminal charges against the alleged abuser. In addition to criminal charges, in some cases there may also be referrals to attorneys to take legal actions, including civil lawsuits due to abuse, neglect or exploitation.

It is very important to note that elder abuse victims who have capacity can choose whether or not to take advantage of any of the services offered by Protective Services.<sup>21</sup> If the elder lacks capacity, and Protective Services believes the elder is in need of protection, Protective Services can petition the court for the appointment of a guardian and/or conservator, or for a protective order pursuant to M.G.L. Chapter 19A, Section 20.<sup>22</sup> In such petitions, Protective Services must prove by a preponderance of the evidence that the elder is being abused, is in need of services, and lacks the capacity to consent.<sup>23</sup> Protective Services may only seek a protective order or the appointment of a guardian or conservator if that is the least restrictive and least intrusive means available for protecting the elder.<sup>24</sup>

## **H. Will an Elder Lose His or Her Rights Once Protective Services are Involved?**

An elder should not lose rights once Protective Services has been contacted because, as noted above, Protective Services cannot provide services unless the elder consents or a guardian or conservator consents on his or her behalf. Due to the Doctrine of Self-Determination, an elder who has capacity has the right to refuse services. In addition, Protective Services may not serve in a fiduciary capacity for an abused elder. This means that Protective Services may not act as a conservator, making financial or property decisions for an abused elder,<sup>25</sup> or as guardian, making personal or medical decisions for elders.<sup>26</sup> If Protective Services seeks a protective order or appointment of a guardian and/or a conservator, the elder has numerous rights with regard to those proceedings, including the right to counsel.

There are cases in which it might be helpful for the court to appoint a guardian ad litem (GAL) for the elder, either for the purpose of conducting a neutral investigation and informing the court of his or her recommendations, or, in the case of an elder who lacks capacity, for the purpose of representing the best interests of the elder. In the latter situation, the difference between the GAL and an attorney appointed to represent the elder is that the attorney would be required to advocate for whatever it is that the elder wants, while the GAL would be required to advocate for what he or she believes is in the best interest of the incapacitated elder.

## CHAPTER 11

# SPECIAL CONSIDERATIONS FOR DISABLED DEPENDENT ADULT CHILDREN

### INTRODUCTION

Families with disabled dependents face special considerations which are discussed in this chapter.

#### A. Government Benefits: SSI, SSDI and MassHealth Benefits

##### 1. Supplemental Security Income (SSI)

Supplemental Security Income (SSI) is a means-tested benefits program that pays monthly benefits to low-income elders (ages 65 or older), disabled adults, and to disabled or blind children. Disability is defined as being unable to work (“to engage in substantial gainful activity” in Social Security parlance) due to a medical condition or conditions that is expected to last at least one year or result in death. The program bases financial eligibility on income and assets. An individual cannot have more than \$2,000 in countable resources in order to be eligible for the benefit. SSI benefits are funded by the federal government and provide monthly cash assistance. Some states, including Massachusetts, supplement the amount of the SSI stipend. The living situation of the SSI recipient initially determines the amount the recipient will receive from SSI but this amount can be reduced based on other factors, principally what other income, earned or unearned, the recipient receives. As a general rule, the more income an individual has, the lower the SSI monthly payment. An individual eligible for SSI in most states, including Massachusetts, is also automatically eligible for Medicaid benefits (MassHealth in Massachusetts) other than nursing home Medicaid and certain MassHealth Home and Community Based Waiver Services. If an individual receiving SSI or Medicaid benefits inherits a large sum of money directly rather than in a properly drafted trust, that person may be disqualified from the program.

##### 2. Social Security Disability Insurance (SSDI)

Social Security Disability Insurance (SSDI) is an earned benefit available to individuals over the age of 18 who are unable to work because of a medical condition that is expected to last at least one year or result in death. This is the same disability standard as in the SSI program described above. The benefit is based on the person’s work record and how much he or she has contributed to Social Security rather than on assets or income. SSDI benefits are administered by the Social Security Administration and the program is funded through taxpayer dollars. Since SSDI benefits are based on an individual’s work record and not on his or her assets, an inheritance will not disqualify a recipient from benefits.

SSDI also provides cash benefits for eligible family members. For example, a disabled adult child may also be eligible for SSDI on a parent’s record if the disability began before the age of 22, has been continuous, and if the parent is drawing Social Security benefits himself or herself, or is deceased, and paid into the Social Security system. These benefits are sometimes referred to as DAC (Disabled Adult Child) benefits. A child may also start receiving a monthly pension or other income upon a parent’s death.

One of the consequences of SSDI or a pension, however, may be the loss of MassHealth benefits or a need to pay a premium for those benefits. (Note that what is income for public benefits programs differs from taxable income, and what is considered income varies from program to program. Also, income limits for MassHealth Standard is lower than the income limits for MassHealth Home and Community Based Waiver Services.) If a disabled adult child receives a higher SSDI payment than the monthly SSI payment, then the adult child may lose automatic MassHealth eligibility. This loss of SSI may require a separate MassHealth application and special planning for

continued MassHealth eligibility. Many times this can be fixed by seeking a court order assigning pension payments or other income to a d4A Trust; however, Social Security payments are non-assignable. An elder with a dependent adult child who receives SSI benefits must be mindful of the eligibility requirements and should structure his or her estate plan to protect those benefits while still providing for the child.

### 3. Differences Between SSI and SSDI

There are many significant differences between the SSI and SSDI programs. Among them are how work income is treated, how distributions from trusts are treated and the impact of supported housing. These differences go beyond the scope of this chapter. Suffice it to say that one needs to have a thorough knowledge of these programs and their differences.

## B. Special Needs Trusts

A special needs trust (or supplemental needs trust) is a planning technique an attorney can utilize as part of an estate plan in order to offer an elderly parent flexibility and control, as well as protection of government benefits for a dependent child. The assets held in the special needs trust are for the benefit of the child, but are generally used to supplement his or her needs that government benefits are not paying for. A trustee uses his or her discretion to distribute funds and manage assets on behalf of the child.

### 1. Types of Special Needs Trusts

There are two basic types of special needs trusts: third-party settled trusts and self-settled trusts.

Third-party settled trusts are trusts funded by another person's assets. For example, as part of an elder's estate plan, he or she can leave an inheritance to a special needs trust established for the benefit of his or her child (the beneficiary). The assets did not originate from the beneficiary. These types of trusts can be established under the will of the elder or it can be a separate trust established during the lifetime of the elder. The provisions can include the ultimate disposition of the assets held in the special needs trust once the beneficiary child passes away (for example, the remaining assets can go to other family members).

Self-settled trusts hold the assets of the beneficiary. If properly established, the assets in a self-settled trust do not disqualify the beneficiary from SSI or Medicaid benefits. For example, if the beneficiary is injured and receives a settlement or award those proceeds can be deposited into the special needs trust and not be seen as a countable resource. In order to be properly established, the special needs trust must: 1) be established by the disabled individual, a parent, grandparent, legal guardian (conservator in Massachusetts) or the court; and 2) provide a payback provision that states the commonwealth will receive payment to the extent the beneficiary received Medicaid benefits during his or her entire lifetime (not just since the funding of the trust) upon the beneficiary's death. These types of trusts are usually referred to as "d4A trusts" in reference to its statutory title.

These trusts must be reported to both Social Security and MassHealth when created or upon application for certain benefits by the disabled individual. Both agencies will review how the trusts were established, the trusts' terms and how the trusts are administered to determine whether the trust assets are countable, or whether a penalty period will apply.

### 2. Special Needs Trusts and Long-term Care Planning

Special needs trusts can also be used during the legal spend-down process for a parent to qualify for long-term MassHealth benefits. The transfer of assets to a special needs trust established for the sole benefit of a totally and permanent disabled person does not create an ineligibility period for an elder in a nursing home. Under the terms of the trust, the trustee must use the funds in a manner that is actuarially sound based upon the beneficiary's life expectancy or the trust must contain the same payback provision as a self-settled trust (as discussed in section 1).

### 3. ABLE Accounts

ABLE Accounts can be a useful addition to special needs trusts. These accounts are owned by the disabled person and can be managed by the disabled person or someone else on his or her behalf. Contributions from all sources per year cannot exceed \$15,000, except that some working

disabled may be able to contribute more. There are also account balance limits, most importantly a \$100,000 limit. Like a d4A trust, there is a Medicaid payback at the death of the account owner. The uses, restrictions, and differences between ABLE Accounts and d4A trusts are complex and beyond the scope of this brief chapter.

In addition to d4A trusts, there are also pooled trusts (“d4C trusts”). They have all of the same requirements as d4A trusts but differ in that they are run by a nonprofit organization and not an individual trustee. This makes it possible for the pooled trust to take on much smaller trust deposits and still be economical with the fees. It also allows for individuals who cannot identify a known trustee to manage his or her funds. Currently pooled trusts are available to persons of any age. However, MassHealth has proposed regulations that would eliminate this option for individuals over 65. Therefore, consult with a professional before considering this option.

## CHAPTER 12

# WHAT YOU NEED TO KNOW ABOUT SOCIAL SECURITY

### INTRODUCTION

As the workforce is aging, older adults should carefully contemplate when they will receive their Social Security benefits. Workers can receive Social Security at early retirement age, full retirement age or late retirement age. It is important for retirees to know their options and to understand how each option will affect their overall retirement strategy.

#### A. Retirement Training

The earlier a worker takes Social Security retirement benefits before age 70, the lower the monthly payment will be, because it will be paid over a longer period. Full retirement age is a set age upon which the base benefit amount is calculated, and benefits also increase between full retirement age and age 70 by delaying retirement benefits. The chart below outlines the ages when workers reach full retirement age.

Year of Birth	Full Retirement Age
1943–1954	66
1955	66 + 2 months
1956	66 + 4 months
1957	66 + 6 months
1958	66 + 8 months
1959	66 + 10 months
1960 and later	67

\*If you were born on Jan. 1 of any year, you should refer to the previous year. If you were born on the first of the month, your full retirement age will be determined as of the immediate previous month.<sup>1</sup>

Retirees do not have to wait for full retirement age before they can take Social Security retirement benefits. Retirees can elect to take Social Security as early as age 62, but benefits will be permanently reduced unless the retiree later stops receiving the benefits and returns to work prior to full retirement age. Conversely, retirees can wait to take retirement benefits as late as age 70. By delaying until age 70, the monthly payments will be substantially increased above the full retirement benefit amount. Retirees can delay taking payments as long as they choose,

but there is no advantage to delaying payments past age 70 because there is no retirement increase after that age.

In summary, there are three different windows for beginning retirement benefits:

- **Early Retirement:** Before full retirement age, and as early as age 62, benefits are permanently reduced by up to 25 percent; in addition, early retirees do not receive a cost of living adjustment (COLA). Your earnings may reduce benefits until you reach full retirement age.
- **Full Retirement:** Currently at age 66, 100 percent of calculated benefits and no reduction due to work earnings.
- **Delayed Retirement:** Between full retirement age and age 70, benefits will be permanently increased by 8 percent per year.

**CAUTION:** It is imperative to start your benefits precisely on your desired date. If you choose to start at full retirement age but sign up three months earlier, you are not at full retirement age. Your benefits are reduced by a percentage for every month under full retirement age. Any early retiree does not receive an annual cost of living increase.

#### B. The Calculations

The actual equation is more complex, but the breakdown may be understood through an illustration. A retiree born in 1954 reaches full retirement age the month that he or she reaches age 66. If the retiree elects to take payments at age 66, Social Security will distribute 100 percent of the monthly benefits. If the retiree elects to take payments early at age 62, then the monthly payments will be reduced by 25 percent. If the retiree waits until age 70 or later to take benefits for the first time, then the monthly payments will be 132 percent of what he or she would have received at full retirement age. If everyone lived to his or her average life expectancy, then everyone would receive around the same amount of total money, regardless of when they elected to receive their monthly payments. Since no

one is guaranteed to live an average life expectancy, the election flexibility allows retirees greater control over the benefit to which they have contributed throughout their working lives.

### C. Various Factors to Consider

Some financial planners will recommend retirees taking payments immediately at age 62 because financial planners may forecast greater earnings through private investments. This strategy would require a large return on investment to match or exceed the increase in payments the government guarantees by delaying.

Another factor to consider is immediate financial need. For example, if retirees are forced into early retirement and do not have the savings on which to survive without Social Security, then receiving the payments at age 62 may be necessary regardless of the reduction. Conversely, if retirees have saved well for retirement, or if they are still earning sufficient income, then delaying Social Security might provide a larger payoff in the end.

If a retiree is in poor health or foresees poor health in the future and does not believe he or she will reach average life expectancy, then it may make more economic sense to begin payments early. If a retiree expects to live past his or her life expectancy, then the overall payout may be much larger if a retiree delays taking Social Security.

Retirees should also weigh how Social Security will affect their income tax liability. If an individual retiree is earning \$25,000 or more, then he or she may have to pay income taxes on Social Security benefits. The Social Security Administration offers a website that calculates the payouts the recipient will receive depending on income and when the recipient expects to take the benefits. See [www.ssa.gov/benefits/retirement/estimator.html](http://www.ssa.gov/benefits/retirement/estimator.html).

### D. How Work Affects Your Benefits

Work earnings can also affect Social Security benefits. Individuals can still work and receive Social Security benefits, but the benefits might be reduced. Social Security calculates countable earnings during certain ages in a formula called the “retirement test.” If an individual is working between the ages of 62 and the year before full retirement age, and he or she elects to take early Social Security benefits, \$1 will be deducted for every \$2 in gross earnings over the

annual limit until the year in which full retirement age is reached. The annual limit in 2018 is \$17,040.<sup>2</sup> In the year in which an individual attains full retirement age, Social Security will deduct \$1 for every \$3 that an individual earns above \$45,360 until he or she reaches full retirement age.<sup>3</sup>

Regardless of the age of retirement, an individual will also receive benefit increases based on increases in average lifetime earnings if his or her current annual wages are higher than the prior average upon which benefits were calculated. Once a worker reaches full retirement age, the retirement test ends and Social Security will no longer deduct anything from the monthly payments due to work earnings. Social Security does not count pensions, annuities, investment income, interest, or government or military retirement benefits as work earnings. If an individual is still working after full retirement age and earning a significant amount of income, that can result in an increase both in the average annual income upon which the base benefit rate is calculated, and a “delayed retirement” increase of 8 percent per year until age 70.

Families of retirees may also be entitled to Social Security benefits. If a retiree is married or has minor or adult disabled children, then that retiree’s spouse or children may be entitled to benefits on the retiree’s record. A retiree’s qualified dependents can each receive 50 percent of the retiree’s benefits and the retiree’s surviving spouse can receive 75 percent. Dependents and survivors may have their retirement benefits reduced if received prior to full retirement age. Total benefits payable under any worker’s record, however, are usually capped at 150 percent to 175 percent of what the worker would otherwise receive.

### E. Possible Benefit Enhancement Strategies

Recent changes in the Social Security laws have limited the benefit enhancement strategies available to workers and their spouses. Some benefit enhancements remain available based on eligibility and timely application. Strategies to discuss with an elder law attorney are:

- 1) **Filing a Restricted Application:** Only available to married clients who reached age 62 prior to Jan. 2, 2016.
- 2) **Timing of Multiple Benefits (also called “Deemed Filing”):** Applies to anyone who turned age 62 on or after Jan. 2, 2016.

A formerly popular “file and suspend” strategy ceased to be available after April 30, 2016.

## F. Coordinating Social Security Benefits with Employer’s Retirement Funds

When considering at what point to take Social Security benefits, it is important to consider all benefits earned over an individual working career and when they become due. Many employees earn qualified retirement benefits through their work — for example, under 401(k), or defined benefit pension plans. An individual may also have his or her own individual retirement accounts (IRAs), with balances sheltered from tax until distributed. The payment of retirement benefits from these sources should be considered in overall retirement planning.

Employers usually pay employees their retirement benefits when they leave employment or retire. By law, employers must generally begin paying an employee’s qualified retirement benefits in the calendar year in which the employee reaches age 70½, or when the employee retires, if later. Owners of IRAs must begin taking minimum distribution when they reach age 70½, whether or not they are still working.

Once tax-sheltered retirement distributions begin, an individual is required to take certain minimum amounts each year or be subject to tax penalties. Required minimum distributions are generally spread over the life expectancy of the individual (or the individual and a beneficiary) and are taxed to the individual recipient at ordinary rates.

Individuals who got married or divorced before receiving retirement payments from an employer should be particularly careful to verify that all beneficiary designations for retirement benefits are properly updated. Employees who have been divorced should also take into account any requirements of a qualified domestic relations order (QDRO) to pay some portion of retirement benefits to an ex-spouse.

## G. Social Security Benefits and Government Pensions

If you are entitled to receive a government pension from working in the public sector, your Social Security benefits may be reduced by the Windfall Elimination Provision (WEP), the Government Pension Offset (GPO), or both.

If you are receiving a pension from your work as

a municipal, state or federal employee and you also have contributed to the Social Security system, you are entitled to receive both benefits, but your Social Security benefits may be reduced by the WEP. Your benefit will never be eliminated, and generally not reduced more than 50 percent. For example, if you worked under Social Security for 21 years, and retire at age 62 in 2018, your monthly Social Security benefit will be reduced by about \$403 due to the WEP. If you have at least 30 years of creditable earnings on which you paid FICA taxes, you are entitled to receive both the government pension and the full Social Security benefit. See below for the GPO offset if you are also entitled to receive Social Security benefits from your spouse’s record.

If you are receiving a government pension from your employment in the public sector, your Social Security benefit received from a spouse will be reduced by two-thirds of your government pension. If you get a monthly civil service pension of \$1,200, two-thirds of that, or \$800, will be deducted from your Social Security benefit. For example, if you are eligible for a \$1,600 spouses, widows, or widowers benefit from Social Security, you’ll get \$800 a month from Social Security ( $\$1,600 - \$800 = \$800$ ). If two-thirds of your government pension is more than your Social Security benefit, your benefit could be reduced to zero. The WEP offset above applies to any Social Security benefit that you get on your own earnings record.

There are some exceptions to both the WEP and the GPO. Since many individuals are entitled to a government pension and Social Security benefits from their own earnings record and Social Security benefits from a spouse’s record, trying to determine the actual Social Security benefit can be very complicated. Please refer to the publications listed below. You can also go to the Social Security website, [www.socialsecurity.gov](http://www.socialsecurity.gov), or call the SSA, (800) 772-1213, for specific information about your own benefit calculation.

### Social Security Administration

Publication No. 05-10007 | ICN 451453

February 2017

Government Pension Offset

Publication No. 05-10045 | ICN 460275

January 2018

Windfall Elimination Provision

## CHAPTER 13

### ELDER DRIVING

#### INTRODUCTION

As the elderly population of the United States continues to grow, and the average life expectancy increases, more individuals are continuing to drive later in life than ever before. Elderly drivers, their family members, practitioners, and society as a whole have both an interest in assessing an elder's ability to continue to safely drive as well as in the transportation alternatives that may be utilized when a driver must eventually hang up the keys.

There is no set age at which one loses the ability to drive safely. Rather physical and mental impairments, which accompany the aging process, will gradually begin to diminish and affect an elder's ability to drive. Therefore, elders, families, physicians, police officers and lawmakers are growing increasingly aware of the indications that it may no longer be safe for an elder to drive, in an effort to minimize the risks to the elderly driver, other drivers, passengers and pedestrians.

#### THE AGING PROCESS

The aging process is generally accompanied by physical and mental impairments, both of which may require medication. Drowsiness, dizziness, fatigue and blurred vision may result from taking medications, and such symptoms may make safe driving increasingly difficult.<sup>1</sup> Drivers who take medications should be aware of the side effects of each medication and how exactly those side effects may impact driving abilities.<sup>2</sup> Among the various physical limitations that challenge safe driving are diminished vision, slower reflexes and arthritis. Cognitive and memory impairment, such as dementia, may also greatly challenge an elder's ability to safely drive. While those with mild symptoms of dementia may be able to safely drive with limitations, eventually, as dementia-related symptoms progress, the elder will no longer be able to adequately evaluate his or her own driving.<sup>3</sup>

Safe driving habits should be implemented by elders who are able to, and who choose to, continue driving as they age. They may take proactive measures to ensure their own safety as well as that of

others by maintaining good health, enrolling in driver safety classes tailored to the elderly, and adjusting driving patterns to avoid driving when traffic is heavy or when visibility is limited. However, some elderly drivers may have difficulty recognizing when they have reached the point that they are no longer able to drive safely. For others, they may realize the time has come to hang up the keys, but may resist as their ability to drive provides continued independence.

It is crucial that family members and physicians support elderly drivers in hanging up the keys when it becomes necessary, by engaging in candid conversations. Family members may struggle to determine when it becomes necessary to have this conversation. A pattern of clear and open dialogue must be established with the elderly driver in order to reinforce driving safety issues. While this conversation should be an ongoing assessment of the elder's ability to continue to drive safely, close calls while driving, getting lost and damage to the elder's car are strong indicators that the elder's driving abilities are diminishing.

This conversation must be structured so that the elder feels listened to and respected, and is aware of the transportation alternatives that are available. Careful attention should be given to determine who should initiate the conversation. It may be best to have one person conduct a private conversation so that the elder does not feel ganged-up on. Other interested parties should then form a united front about the decisions reached during the conversation and help the elder to make safe decisions.<sup>4</sup> It is important to determine who might be the best person to communicate with the individual about driving concerns.<sup>5</sup> The conversation may be best received from a spouse, a family member, friend or a trusted professional.<sup>6</sup> Reasoning and insight are impaired as dementia progresses, making such conversations challenging for some. In planning such conversations, family members should take into consideration the driver's personality, driving record, family relationships, available resources and the geographic proximity of those resources.<sup>7</sup>

Even if an elder does readily agree that it is no longer safe for him or her to drive, family members must still be sensitive to the notion that relinquishing one's driving privileges may be both overwhelming and depressing for the elder.<sup>8</sup> Nearly one in four elderly drivers reported experiencing depression as a result of this conversation.<sup>9</sup> This is to be expected, as surrendering driving privileges often results in fewer trips outside of the home, increased isolation, often permanent dependency on others for transportation and other basic needs, and fewer social opportunities.<sup>10</sup>

### **MASSACHUSETTS REGISTRY OF MOTOR VEHICLES**

Although the Massachusetts Registry of Motor Vehicles (RMV) does not require drivers to renew their licenses more frequently when they attain a certain age, the RMV does require that drivers age 75 and older renew their driver's licenses in person.<sup>11</sup> At the time of renewal, the licensee must either pass a vision screening or present a completed vision-screening certificate.<sup>12</sup> The Medical Affairs Branch of the RMV has developed policies and procedures that set minimum physical qualifications for all motor vehicle operators in Massachusetts, regardless of age.<sup>13</sup> As such, drivers must meet the minimum standards for vision, loss of consciousness and seizure conditions, as well as cardiovascular and respiratory conditions.

It is important to note that Massachusetts is a self-reporting state and thus, "... [a] person is legally responsible for their actions behind the wheel. There are no mandatory reporting laws for physicians to report persons who may be unsafe to the RMV ... . That means it is [the driver's] responsibility to report any medical condition that may affect

[his or her] ability to drive."<sup>14</sup> However, though not required to report a potentially unfit driver, physicians may choose to report. When a report is received, the RMV will conduct an individualized assessment, which may include a road test, to determine whether the driver is, in fact, qualified to safely operate a motor vehicle.<sup>15</sup>

### **RESOURCES**

Resources are available to aid elders and interested parties in dealing with the issues and challenges pertaining to elderly driving. The Massachusetts RMV has dedicated a part of its website to addressing the needs of, and providing resources concerning elderly driving. Community senior centers are also typically a great source of information. The U.S. Administration on Aging has developed "Eldercare Locator," a search tool that connects the elderly and their families with various services, including transportation. The American Automobile Association, the American Association of Retired Persons and the Alzheimer's Association on both the state and national levels, are also great resources, as they have published brochures and feature websites that offer tips, guides and worksheets for addressing elderly driving issues and challenges. All of these organizations have studied these issues and have excellent resources that may be of help in addressing these sensitive issues of when an elder should no longer be driving.

Agencies that may assist with driving-related concerns include: elder services, councils on aging, driving evaluation programs, local law enforcement and the Alzheimer's Association 24/7 helpline: (800) 272-3900. The Massachusetts/New Hampshire chapter can be contacted at (617) 727-7750.

## CHAPTER 14

# OVERVIEW OF COMMON BANKRUPTCY AND DEBT ISSUES FOR THE ELDERLY AND RETIRED

### INTRODUCTION

A catastrophic medical event, unemployment, or some other unforeseen event can leave a person with debt beyond their means. While the prospect of bankruptcy is unthinkable to most, it may be an appropriate solution in some circumstances. If you are experiencing the stress of overwhelming debt, it is important that you seek professional guidance to assess your individual situation and to compare the pros and cons of bankruptcy and non-bankruptcy options to determine what the best solution is for you.

#### A. What is Bankruptcy?

Bankruptcy is a legal status of a person or other entity (such as a business) that cannot repay their debts to creditors. Bankruptcy is imposed by a court order, and is often initiated by the debtor.

Depending on the type, or “chapter,” of bankruptcy, debts are treated differently. There are five types of bankruptcy filings, but only four of them are available to individuals:

- Chapter 7: Liquidation
- Chapter 11: Reorganization (or Rehabilitation bankruptcy)
- Chapter 12: Adjustment of Debts of a Family Farmer with Regular Annual Income
- Chapter 13: Adjustment of Debts of an Individual with Regular Income
- Chapter 9: For municipalities (including cities, towns, townships, and school districts) [not available to individuals]

Here we will focus only on Chapters 7 and 13, since these are the forms of bankruptcy that are typically appropriate for seniors.

Chapter 7 bankruptcy is often referred to as a “straight” or “liquidation” bankruptcy. Chapter 7 is typically considered when the debtor has no hope of repaying his or her debts, and when there are no co signers involved. Under a Chapter 7 bankruptcy fil-

ing, some or all of the debtor’s non-exempt assets are sold off (liquidated) to pay the lenders (creditors). It is a quick way for a debtor to get a fresh financial start.

Chapter 13 bankruptcy is a reorganization bankruptcy designed for debtors with regular income who can pay back at least a portion of their debts through a three- or five-year repayment plan. Chapter 13 allows debtors to keep the property they are paying on during the repayment plan and, once the payment plan is complete, creditors cannot force the debtor to pay them in full.

Most people would prefer to settle their debts instead of filing bankruptcy. There is a perceived stigma attached to bankruptcy, so many people avoid it for as long as they can. They incorrectly believe that everyone will find out, but the reality is that usually the only people who know you filed for bankruptcy are your creditors and the people you tell.

Also, if you file for bankruptcy, although that fact stays on your credit report for seven to 10 years, you can begin to improve your credit score immediately after your bankruptcy is over. There is a big difference between a bankruptcy notation on your credit report and your credit score. If you begin to pay your bills on time after your bankruptcy is over, you will begin to improve your credit score immediately. Your credit score is the number lenders, including banks, use when deciding to loan you money.

#### B. Some General Considerations

##### 1. Pros of Bankruptcy

Before we discuss the specifics of Chapter 7 and Chapter 13 bankruptcy, below are some general considerations to keep in mind as you weigh your options,

- **Stress Minimization:** When creditors call you nonstop, it can be very stressful and demeaning. Bankruptcy stops all contact from creditors, including phone calls, bills and threatening letters.

- **Elimination of Medical Bills:** A bankruptcy can eliminate medical bills. Keep in mind, if you are continuing to incur medical debt, the bankruptcy will only discharge the bills you have incurred as of the day your case is filed. (You will be responsible for all bills incurred after filing, so you may want to consider the best timing for filing.)
- **Social Security Income is Protected:** Social security income is not considered in the means test, which determines whether or not you are eligible to file in Chapter 7. It is also excluded from consideration in what you can afford to pay a judgment creditor, such as credit card debt.
- **The Credit Card Cycle is Stopped:** A bankruptcy discharge can free up funds from your monthly budget, so you can better provide for yourself and your dependents. If you find yourself spending most of your monthly income on credit card minimums, and then being forced to rely on those same credit cards to afford food and other necessities, bankruptcy may be appropriate. Bankruptcy can stop the credit card cycle and give you a fresh financial start.

## 2. Protected Assets

In bankruptcy proceedings, some assets can be protected.

If your life insurance policy has accrued cash value, there may be a limit to the amount that can be fully protected from your creditors. Term Life Insurance policies with no cash value present no bankruptcy issues.

In most cases the value in your pension, 401(k) or other retirement plan can be fully protected in a bankruptcy case.

## 3. Secured Creditors

### (i) House and Vehicles

If you have a loan on your house or car and your loan balance is greater than the value of your house or car, you can keep them without the need for bankruptcy protection. If that is the case, then your house and car are “upside-down” which means that if you sold them, there would be no money left for you or your creditors. If there is no equity, then there is nothing to be protected and

no exposure in bankruptcy.

Note that in a Chapter 7 bankruptcy, you may be able to “redeem” your vehicle. The bankruptcy court can reduce your car loan to the actual value of your car. So if you owed \$15,000 on a car worth \$10,000, you would only owe \$10,000 on your car after the redemption procedure is completed.

### (ii) Repossession

Secured creditors can take back the property they loaned to you so you could purchase the property if you fail to pay them. Secured creditors always have at least two avenues to collect the amount owed from you, including collecting based on the promissory note or contract you signed, or seizing and selling the asset that they loaned you the money to buy. Secured creditors that have properly filed their documents in the right place and in correct form have a lien on your asset, whether it be a house, car, dining room set or washer and dryer.

Bankruptcy only gets rid of your legal obligation to pay your secured creditor money under the contract you signed, but it does not get rid of the lien or right your secured creditor has to take back the property. So, in order to keep your house, car, or other secured property, you need to keep paying as promised. On the other hand, you can “surrender” it or give it back to the creditor, and you will not owe them any additional amount based on your bankruptcy discharge.

### (iii) Exemptions

In bankruptcy, certain assets are exempt and cannot be used to satisfy your debts in the bankruptcy proceeding, although a secured lien can survive bankruptcy. Some states allow you to choose between your state law exemptions and federal bankruptcy exemptions. In Massachusetts, the state’s Homestead law can protect your primary residence up to \$500,000. *See Chapter 8 for a discussion of this law.*

## C. How Chapter 7 “Liquidation” Bankruptcy Works

When you file a Chapter 7 case in court, a court order goes into effect immediately, making it illegal for your creditors to contact you in any way. This provides breathing room and alleviates pressure.

There are some types of creditors who can still collect from you. If you are under other court orders to pay for child support, alimony or other domestic support obligations, these obligations, along with most income taxes and student loans, are generally not discharged in a bankruptcy filing. However, there are times when income taxes and student loans may be eligible for discharge.

A Chapter 7 case stays open for about four months, at the conclusion of which the judge will issue an order discharging all of the dischargeable debts that you have listed in your petition. Any debts that you have failed to list will not be discharged and you will still be obligated to pay them. To confirm that you are aware of all of your creditors, you should obtain copies of your credit reports from the three major credit reporting agencies: Trans Union, Experian and Equifax. These reports can be obtained online and in some states, including Massachusetts, you are entitled to one free report per year.

### 1. What Documentation Is Needed?

Generally, you will be required to produce two years of tax returns, proof of your income, and bank statements, as well as a host of other documents that may apply to your case, such as deeds, evidence of the value of your house, vehicles, personal belongings, retirement plans, and life insurance.

### 2. Time Frame

About a month after your case is filed, you will have to attend a “meeting of creditors” where you will answer questions about your case to a trustee in a conference room setting. Most people filing bankruptcy never see the inside of a courtroom.

### 3 Which Exemptions Can You Use?

Most people in a Chapter 7 case get the best of both worlds because they are allowed to keep most of what they own, but they get rid of their debts for good. The bankruptcy laws have a long and generous list of exemptions that let people keep their real property and personal property, so long as they fit within the allowed exemptions.

If you have a mortgage on your house or a loan on your vehicle, you will generally be allowed to keep them, provided that you continue to pay the lender. If you miss payments on your house or car, the lender can foreclose on your house and repossess your vehicle, but they usually need to obtain

the prior permission of the bankruptcy judge. Bankruptcy almost never gets rid of the secured status of a lender, so it is important to understand that you can still lose your house or car (or other secured property) after your bankruptcy case is resolved if you fail to make payments as agreed.

## D. How Chapter 13 “Reorganization” Bankruptcy Works

For most people, Chapter 13 bankruptcy will only work for you if you have regular monthly income. Upon filing your case, you will be required to begin making your regular payments to your lender, plus an extra payment to catch up on the past due amounts. This extra monthly payment will be paid to the Chapter 13 trustee, who will keep track of your payments and pay off your creditors over the three- or five-year timetable.

Filing a Chapter 13 bankruptcy can be an effective way to save your home from foreclosure and get three or five years to catch up on the past due mortgage payments. Chapter 13 also works if you are behind on car payments, or any other secured item you are behind in paying and want to keep. Keep in mind that the Bankruptcy Court generally has no authority to lower your monthly mortgage payment or to change the terms of your loan or mortgage.

#### EXAMPLE:

Let’s assume that your regular mortgage payment is \$1,000 per month and that you are six months behind. Also, by this time, your bank has usually hired attorneys, which you will have to pay for because you agreed to that when you signed your mortgage and promissory note. Let’s estimate \$3,000 as a minimum legal fee, depending on how much work the bank’s lawyers have done. If an auction of your home has been scheduled, you will also likely have to pay auctioneer fees and advertising fees in addition. So now you owe the bank \$6,000 for past due mortgage payments plus \$3,000 in legal fees, for a total past due amount of \$9,000. In most cases, the repayment plan would require you to repay that \$9,000 by dividing the payments up over three or five years. So that means that each month you will pay your \$1,000 mortgage payment to the bank, plus you will have to make an additional payment of \$250 each month for the next three years in order to catch up on your mortgage. If you miss too many payments, usually two or three, the court will usually dismiss your case, which means you are no longer under Bankruptcy Court protection and the bank can reschedule the foreclosure auction of your home.

## 1. What Documentation Is Needed?

Substantial documentation is required to provide an accurate picture of your finances as of the date of filing your case. You will be required to have your tax returns filed and up to date, provide paystubs or other evidence of income, a binder for your homeowner's insurance if applicable, and evidence of the value of your home (which can be provided by a local realtor). You will also need to disclose any domestic support obligations you have, such as alimony or child support.

## 2. Reverse Mortgages

Seniors who have taken out a reverse mortgage are sometimes uncertain about the circumstances under which their lender can foreclose on them. It is important for the homeowner to understand that, while there is no monthly mortgage payment due on a reverse mortgage, they must pay their real estate taxes, homeowners insurance, and basic maintenance on the property. If the homeowner fails to pay the real estate taxes, the reverse mortgage company can foreclose on the property. In such a situation, Chapter 13 bankruptcy can provide the means for the homeowner with a reverse mortgage to keep his or her home, provided that the past due real estate taxes are paid through the Chapter 13 plan. The homeowner will need to have sufficient income to pay the past due real estate taxes over three or five years, plus pay the real estate taxes on time going forward. It is important to note that the homeowner cannot draw additional funds from the reverse mortgage while the bankruptcy or payment plan is pending. *See Chapter 9 on Reverse Mortgages as to other situations where a lender can take action on your home.*

## 3. Other Debts

If you have other debts, such as credit card bills or other unsecured loans, you will also have to pay a portion of those back. After you complete the three- or five-year repayment plan, any remaining balances on your credit card debts or other unsecured debts are discharged.

### EXAMPLE

If you are behind \$2,000 on your car payment, and also have \$20,000 of credit card bills, your Chapter 13 Plan will require you to pay the full \$2,000 to fully catch up on your car loan, and you will typically have to pay back a percentage of the \$20,000 to your credit cards. What that percentage is depends on how much of your monthly income is left over after all your necessary expenses are paid. The formula is based on your income and each case must be independently analyzed to determine the monthly Trustee payment. Incidentally, the Chapter 13 trustee earns a 10 percent commission on your total debt, and the trustee's fee is paid by you and added to your plan payment.

## 4. Chapter 13 Payment Plans

The monthly payment you make will be determined according to your Chapter 13 "Plan." The Plan is a document that has all your debts, both secured and unsecured, as well as the amount of your regular monthly income, and also indicates how much your monthly payment will be. As soon as your Plan is agreed to by the Chapter 13 Trustee and the Judge, your Plan will be confirmed. You will be ordered to make the monthly payment to the Chapter 13 Trustee, who will pay each of your creditors. As a reminder, the Plan payment is in addition to your regular payments to secured lenders.

## 5. Benefits of Chapter 13

One of the most helpful benefits is that in some cases, a Chapter 13 judgment can discharge a second mortgage on your home. This is called a "strip off." Whether you can take advantage of it or not depends on several factors, including the fair market value of your house and how much you owe the first mortgage holder. If you have student loans, or income taxes owed, a Chapter 13 can stop collection enforcement and the accumulation of interest on past due amounts for tax liabilities, as well as give you protection from your creditors because any payments made to them will be subject to court oversight.

Another benefit of a Chapter 13 is that it protects co-signers on your accounts because they will receive the same bankruptcy court protection that you do, even though they are not filing bankruptcy.

## E. Alternatives to Bankruptcy

### 1. Debt Settlement

For clients who wish to settle their debts, the key is in timely paying the creditor the settlement amount you have agreed to. There are two general types of settlements: payment plans over time and a lump sum settlement.

#### (i) Payment Plan

For example, if you have a \$10,000 balance on a credit card and you want to set up a payment plan to pay it off, the credit card company will usually let you make smaller monthly payments over time, so long as you agree to pay off the full \$10,000. Whether interest and late fees are still accumulating depends on how well you negotiate an agreement with your credit card company. This type of settlement can be long, drawn out and not really save you very much money in the long run. Also, the longer a settlement agreement is in place, generally the worse it is for you because the credit card companies often have a clause that says if you miss an agreed payment, the deal is off and they can come after you immediately and demand the full past due balance from you. These payment plans usually fall by the wayside for one reason or another, often after people have made many monthly payments that they would not have had to make had they filed for bankruptcy earlier.

#### (ii) Lump-Sum Settlements

The better type of settlement is a “lump-sum” settlement. With that same \$10,000 balance in the previous example, if you offer the credit card company an immediate payment of \$8,000 to settle this account in full and final settlement, the chances are good that they will take it. If you are current with your payments, the credit card company is unlikely to agree to this and that is because they are getting your payment every month and they have no incentive to offer you a deal. The longer you are unable to make your monthly payment and the further behind you fall month after month tells the credit card company that you are having financial difficulty. Typically, the more you fall behind, the better your chances are for a lump-sum settlement for a lower amount.

Before you agree to any type of settlement, it is best to get the terms of the agreement in writing. Also, you should insist that upon receipt of your payment, the credit card company will report to the credit bureaus that your account is “paid off” or “settled in full.”

There are other important consequences to consider before attempting to settle your credit card or other debts without the assistance of an experienced attorney. As you fall further behind on your monthly payments, your credit score will be negatively affected. You will also be called constantly by your creditors and they may call your place of employment unless you advise them in writing that they are not permitted to do so. You also run the risk that they will sue you in court if you do not pay your balance. However, if you have an attorney, they cannot contact you by law. Further, typically your creditors will not file suit against you while you are represented by an attorney and are trying in good faith to negotiate a settlement.

Note that settlements can cost you taxes. If the credit card company agrees to accept \$2,000 to settle your \$10,000 balance, that may sound wonderful — a savings of \$8,000! But Uncle Sam says that any amounts of debt forgiven by your creditors are treated as taxable income to you in the year that the debt was forgiven. The credit card company will issue a 1099 Form to you. You are advised to check with your tax preparer to see how much tax, if any, you will have to pay as a result of the forgiven debt.

Another issue to be aware of is withdrawing from your retirement accounts to pay off credit card or other debts. This is generally a poor decision because you are using funds that were set aside for your future, usually income taxable when withdrawn. Furthermore, depending on your age, you could suffer penalties as well as the tax consequences for using the retirement funds to pay for the debts. Consult an experienced financial advisor to assess your situation.

### 2. Mortgage/Loan Modification

A loan modification is typically a request by a borrower for their lender to change the terms of their loan. This may involve changing all or some of the following: interest rate, principal balance, past

due amounts, collection costs, late fees, legal fees and auctioneer fees. A loan modification can also change your loan from an adjustable rate to a fixed rate in some instances. The most important thing to keep in mind about a loan modification is that the decision to grant or not grant a loan modification is entirely up to the lender. In the case of real estate, the mortgage and promissory note that you signed when you bought your real estate or refinanced are the legally binding documents that control your relationship with your lender, so the lender may simply refuse your request.

### **(i) Modification Application**

Your lender may have a website where you can fill out their specific loan modification application. Your lender may use a formula to determine your ability to participate in a loan modification and if you are currently past due on, for example, your home mortgage, that can actually be a benefit when asking your lender to modify your loan. The reality is that most people who request a loan modification are behind on their mortgage and need the lender to make some changes to their loan in order to make the house more affordable. You will need to gather your financial documents such as tax returns, paystubs and other evidence of income to show your lender that you have money coming in on a regular basis. Also, you should write a hardship letter to explain to the lender what caused you to fall behind with your mortgage payments, and to explain how you have resolved those problems and anticipate being able to make your monthly payments if the lender gives you a loan modification.

### **(ii) Dealing With the Lender**

While the process of submitting a loan modification request is relatively straightforward, the difficulty usually lies in the constant follow up that will be required from you to make sure that the bank has your package and that it is complete. Lenders commonly lose paperwork and requests from them for you to resubmit your loan modification package are quite common, so be sure to make legible copies of everything that you send to your lender, in case you need to send it again. It may take anywhere from three months to well over a year to get an answer from your lender on whether your modification has been granted.

The important thing to remember is that even though your lender is reviewing your loan modification application, they can still pursue their legal right to foreclose on your real estate. That is why some people are confused when they get a letter from their lender's attorneys advising that they are filing a foreclosure proceeding against them. Remember that the lender is going to take the necessary steps to protect what is best for it, and you should take the necessary steps to protect what is best for you and consult with an experienced attorney to understand your rights and legal options.

## **CONCLUSION**

All options are complex to consider at such a vulnerable time in your life and the best decision for you depends on your personal situation. Each option has positive and negative consequences, and each has highly technical requirements. It is always recommended that you consult with an experienced bankruptcy attorney to help you assess your specific situation and determine your best strategy. The Resource section lists those agencies to contact for further information.

# CHAPTER 15

## RESOURCE DIRECTORY

### GENERAL INFORMATION

#### **Aging Services Access Points (ASAP's)**

[www.800AGEINFO.com/map](http://www.800AGEINFO.com/map)

#### **Alzheimer's Association**

(800) 272-3900

[www.ALZ.org](http://www.ALZ.org)

Massachusetts/New Hampshire Chapter

(617) 868-6718

#### **Executive Office of Elder Affairs in Mass.**

(617) 727-7750

[www.Mass.gov/Orgs/Executive-office-of-elder-affairs](http://www.Mass.gov/Orgs/Executive-office-of-elder-affairs)

#### **National Council on Aging**

(571) 527-3900

[www.NCOA.org](http://www.NCOA.org)

#### **National Multiple Sclerosis Society**

(781) 890-4990 • (800) 344-4867

[www.NationalMSSociety.org](http://www.NationalMSSociety.org)

### LEGAL INFORMATION

#### **Justice in Aging**

(202) 289-6976

[www.JusticeInAging.org](http://www.JusticeInAging.org)

#### **Legal Assistance: Massachusetts Bar Association Lawyer Referral Service**

(617) 654-0400

Toll-free (866) 627-7577

[www.MassLawHelp.com](http://www.MassLawHelp.com)

#### **Massachusetts Bar Association Dial-A-Lawyer (held on the first Wednesday of each month)**

5:30–7:30 p.m.

(617) 338-0610, toll-free (877) 686-0711

[www.MassLawHelp.com](http://www.MassLawHelp.com)

#### **Massachusetts Chapter of the National Academy of Elder Law Attorneys (MassNAELA)**

(617) 566-5640

[www.MassNAELA.com](http://www.MassNAELA.com)

#### **National Academy of Elder Law Attorneys**

[www.NAELA.org](http://www.NAELA.org)

### ELDER ABUSE PREVENTION AND REPORTING INFORMATION

#### **Elder Abuse and Protective Services**

(800) 882-2003

#### **Long-Term Care Ombudsman**

(617) 727-7750

[www.mass.gov/service-details/ombudsman](http://www.mass.gov/service-details/ombudsman)

#### **Massachusetts Elder Abuse Hotline**

(800) 922-2275

[www.Mass.gov/Report-elder-abuse-programs](http://www.Mass.gov/Report-elder-abuse-programs)

#### **Massachusetts Bank Reporting Project**

(617) 727-7750

[www.Mass.gov/Ago/Consumer-resources/Consumer-information/Resources-for-elders/Bank-reporting-project.html](http://www.Mass.gov/Ago/Consumer-resources/Consumer-information/Resources-for-elders/Bank-reporting-project.html)

### SOCIAL SECURITY INFORMATION

#### **Social Security Advisory Service**

[www.SSAS.com](http://www.SSAS.com)

#### **Social Security Prescription Help**

[www.SSA.Gov/Medicare/Prescriptionhelp/](http://www.SSA.Gov/Medicare/Prescriptionhelp/)

#### **U.S. Social Security Administration**

(800) 772-1213

[www.SSA.gov](http://www.SSA.gov)

### MEDICAL INSURANCE INFORMATION

#### **MassHealth: Customer Service Center**

(800) 841-2900

24-hour hotline: (888) 665-9993

#### **Massachusetts Health Care for All Health Care Resources**

[www.HCFAMA.org](http://www.HCFAMA.org)

(800) 272-4232

(617) 350-7279

## **MEDICARE AND MEDICAID SERVICES**

### **Centers for Medicare and Medicaid Services**

(877) 267-2323

[www.CMS.gov](http://www.CMS.gov)

### **Prescription Drug Coverage: General Information**

[www.CMS.gov/Medicare/Prescription-drug-coverage/PrescriptionDrugCovGenIn](http://www.CMS.gov/Medicare/Prescription-drug-coverage/PrescriptionDrugCovGenIn)

### **Medicare HelpLine: Official U.S. Government Site for People with Medicare**

(800) 633-4227, (800) MEDICARE

[www.Medicare.gov](http://www.Medicare.gov)

### **MCPHS Pharmacy Outreach Program**

(866) 633-1617

[www.MCPHS.edu/Patient-clinics/Pharmacy-out-reach-program](http://www.MCPHS.edu/Patient-clinics/Pharmacy-out-reach-program)

### **Medicare Rights Center: Prescription Drug Plan**

Hotline: (800) 333-4114

[www.MedicareRights.org](http://www.MedicareRights.org)

### **SHINE (Serving Health Insurance Needs of Everyone)**

(800) 243-4636

[www.Mass.gov/Health-insurance-counseling](http://www.Mass.gov/Health-insurance-counseling)

## **VETERANS INFORMATION**

### **City of Boston Veterans' Services**

(617) 635-3026

[www.Boston.gov/Departments/Veteran-services](http://www.Boston.gov/Departments/Veteran-services)

### **Massachusetts Department of Veterans' Services**

(617) 210-5480

[www.Mass.gov/Veterans](http://www.Mass.gov/Veterans)

*In each of the chapters, you may find additional resources that are not listed on these pages.*

## ENDNOTES

### CHAPTER 1

1. "Your Medical Records: Know Your rights," Commonwealth of Massachusetts, Board of Registration in Medicine, 3/2012. Accessed on March 18, 2016 at [https://www.google.com/?gws\\_rd=ssl#q=who+owns+your+medical+record+in+massachusetts](https://www.google.com/?gws_rd=ssl#q=who+owns+your+medical+record+in+massachusetts).
2. [www.mass.gov/info-details/massachusetts-law-about-medical-privacy](http://www.mass.gov/info-details/massachusetts-law-about-medical-privacy).
3. [Mehi.masstech.org/ehealth/health-information-exchange/mass-hiway](http://Mehi.masstech.org/ehealth/health-information-exchange/mass-hiway).
4. "Your Rights Regarding Access to Mental Health Records in Massachusetts," Prepared by the Mental Health Legal Advisors Committee, Feb. 2010. Accessed on March 18, 2016 at [www.mhlac.org/Docs/your\\_rights\\_regarding\\_access\\_to\\_mental\\_health\\_records.pdf](http://www.mhlac.org/Docs/your_rights_regarding_access_to_mental_health_records.pdf).
5. MASS. G.L. ch. 112, § 12A.
6. MASS. G.L. ch. 111 § 70F.
7. Information about MOLST is available at [www.molst-ma.org](http://www.molst-ma.org).
8. MASS. G.L. ch. 190B, § 5-309(a) (West 2013).
9. *Id.* § 5-101(9).
10. *Id.* § 5-309(a).
11. *Id.*
12. *Id.*
13. MASS. G.L. ch. 190B, § 5-303(a) (West 2013).
14. *Id.* § 5-305.
15. *Id.* § 5-303.
16. *Id.* § 5-106(a).
17. *Id.* § 5-309(b). The report must describe the person's status, needs and supports. *Id.*
18. MASS. G.L. ch. 190B, § 5-309(b) (West 2013).
19. *Id.* § 5-309(g).
20. MASS. PROBATE AND FAMILY COURT STANDING ORDER 2-09(2)(e) (July 1, 2009).
21. MASS. G.L. ch. 190B, § 5-309(e) (West 2013).
22. *Id.* § 5-308(a).
23. *Id.*
24. MASS. G.L. ch. 190B, § 5-401(c)(1) (West 2013).
25. *Id.* § 5-401(a).
26. *Id.* §§ 5-407(b)(6)-(7).
27. *Id.* § 5-419(a).
28. *Id.* § 5-404(a).
29. MASS. G.L. ch. 190B, § 5-409(a) (West 2013).
30. *Id.* § 5-404.
31. *Id.* § 5-407(d).
32. *Id.* § 5-425.
33. *Id.* § 5-416(a).
34. MASS. G.L. ch. 190B, § 5-416(b) (West 2013).
35. *Id.* § 5-416(c).
36. *Id.*
37. *Id.* § 5-417(a).
38. *Id.* § 5-418(a) (West 2012).
39. MASS. G.L. ch. 190B, § 5-418(a) (West 2013).
40. *Id.* § 5-412A(a) (West 2009).
41. *Id.* § 412(b).
42. *Id.*

### CHAPTER 2

**No endnotes.**

### CHAPTER 3

1. MassHealth is also available to blind and disabled individuals who meet the eligibility guidelines.
2. Specific rules pertaining to trusts vary according to the date the trust was established and the specific terms of the trust.
3. The minimum and maximum monthly maintenance needs allowance figures usually increase each year due to a cost-of-living allowance. *See* <https://www.mass.gov/files/documents/2017/12/29/figures-used-to-determine-minimum-monthly-maintenance-needs-allowance.pdf>.
4. In some circumstances, a disqualifying transfer may be an effective MassHealth planning tool.

### CHAPTER 4

1. 130 C.M.R. 519.007(B).
2. 130 C.M.R. 519.007(B)(1)(a); *see also* 56 MASS PRACTICE SERIES ELDER LAW § 7.46.
3. 130 C.M.R. 519.007(B)(1)(b).
4. 130 C.M.R. 456.409(B); 130 CMR 422.410(A).
5. "About Home and Community Based Services (HCBS) Waiver," [www.mass.gov/eohhs/docs/dmr/hcsis/hcbs-brief.pdf](http://www.mass.gov/eohhs/docs/dmr/hcsis/hcbs-brief.pdf).
6. 130 C.M.R. 519.007(C).
7. 130 C.M.R. 519.007(C)(2).
8. 130 C.M.R. 520.003(A)(2).
9. 130 C.M.R. 422.404(A)(4).
10. 130 C.M.R. 422.403(C).
11. 130 C.M.R. 422.412.

### CHAPTER 5

1. "Medicare and You," 2018, available at [www.medicare.gov/pubs/pdf/10050-Medicare-and-You.pdf](http://www.medicare.gov/pubs/pdf/10050-Medicare-and-You.pdf). Printed copies are available upon request.
2. [www.medicare.gov/manage-your-health/coordinate-your-care/accountable-care-organizations.html](http://www.medicare.gov/manage-your-health/coordinate-your-care/accountable-care-organizations.html).
3. [www.medicare.gov/supplement-other-insurance/medigap/medigap-and-medicare-advantage/medigap-and-medicare-advantage-plans.html](http://www.medicare.gov/supplement-other-insurance/medigap/medigap-and-medicare-advantage/medigap-and-medicare-advantage-plans.html).
4. [www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/your-medicare-coverage-choices.html](http://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/your-medicare-coverage-choices.html).
5. [www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/hmo-plans.html](http://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/hmo-plans.html).
6. [www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/preferred-provider-organization-plans.html](http://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/preferred-provider-organization-plans.html).
7. [www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/private-fee-for-service-plans.html](http://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/private-fee-for-service-plans.html).
8. [www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/special-needs-plans.html](http://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/special-needs-plans.html).
9. [www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/how-medicare-advantage-plans-work.html](http://www.medicare.gov/sign-up-change-plans/medicare-health-plans/medicare-advantage-plans/how-medicare-advantage-plans-work.html).
10. For information about your eligibility and to sign up, call the Social Security Administration at 1-800-772-1213.
11. "Medicare Coverage of Kidney Dialysis & Kidney Transplant Services," [www.medicare.gov/Pubs/pdf/10128-Medicare-Coverage-ESRD.pdf](http://www.medicare.gov/Pubs/pdf/10128-Medicare-Coverage-ESRD.pdf) or call 1-800-MEDICARE.
12. "Medicare Part B Enrollment When Working Beyond 65," AARP; [www.aarp.org/health/medicare-insurance/info-03-2011/ask-ms-medicare-question-94.html](http://www.aarp.org/health/medicare-insurance/info-03-2011/ask-ms-medicare-question-94.html); *see also* [www.medicare.gov/sign-up-change-plans/get-parts-a-and-b/special](http://www.medicare.gov/sign-up-change-plans/get-parts-a-and-b/special)

- conditions/special-conditions.html#collapse-3161.
13. "Age Discrimination in Employment Act of 1967," 29 USC § 621-634.
  14. "Medicare Part B Enrollment When Working Beyond 65," AARP; [www.aarp.org/health/medicare-insurance/info-03-2011/ask-ms-medicare-question-94.html](http://www.aarp.org/health/medicare-insurance/info-03-2011/ask-ms-medicare-question-94.html).
  15. "Medicare and You" 2018.
  16. "Medicare and You" 2018.
  17. "Skilled Nursing Facility Level of Care" (Rev. 179), [www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/bp102c08.pdf](http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/bp102c08.pdf); pp. 17 (JIMMO decision), 30.
  18. "When Can I Buy Medigap?," [www.medicare.gov/supplement-other-insurance/when-can-i-buy-medigap/when-can-i-buy-medigap.html](http://www.medicare.gov/supplement-other-insurance/when-can-i-buy-medigap/when-can-i-buy-medigap.html).
  19. [www.medicare.gov/supplement-other-insurance/compare-medigap/massachusetts/medigap-massachusetts.html](http://www.medicare.gov/supplement-other-insurance/compare-medigap/massachusetts/medigap-massachusetts.html).
  20. Medicare drug plans can make maintenance changes to their formularies, such as replacing brand-name drugs with new generic drugs or change their formularies as a result of new information on drug safety or effectiveness. Those changes must be made according to the prescribed approval procedures and plans must give 60 days notice to CMS, State Pharmacy Assistance Programs (SPAPs), prescribing physicians, network pharmacies, pharmacists and people covered under the plan. [www.cms.gov/Outreach-and-Education/Training/CMSNationalTrainingProgram/Downloads/2013-Prescription-Drug-Coverage-Workbook.pdf](http://www.cms.gov/Outreach-and-Education/Training/CMSNationalTrainingProgram/Downloads/2013-Prescription-Drug-Coverage-Workbook.pdf); p. 31.

## CHAPTER 6

**No endnotes.**

## CHAPTER 7

1. MASS. G.L. ch. 111, § 71 (2010).
2. *Id.*
3. *Id.* § 72.
4. *Id.*
5. *Id.*
6. MASS. G.L. ch. 111, § 72 (2010).
7. 130 C.M.R. § 456.406.
8. *Id.*
9. *Id.*
10. 940 C.M.R. § 4.03.
11. 940 C.M.R. § 4.04.
12. *Id.*
13. *Id.*
14. 940 C.M.R. § 4.06.
15. MASS. G.L. ch. 111, § 70E (2010).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. MASS. G.L. ch. 111, § 70E (2010).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. 940 C.M.R. § 4.06.
26. *Id.*
27. *Id.*
28. *Id.*
29. 940 C.M.R. § 4.07.
30. *Id.*
31. 940 C.M.R. § 4.06.

32. *Id.*
33. [www.medicare.gov/medicaid/ltss/institutional/nursing/index.html](http://www.medicare.gov/medicaid/ltss/institutional/nursing/index.html).
34. Kay Lazar, "Dementia Care Standards Finalized for Massachusetts Nursing Homes," BOSTON GLOBE, Feb. 12, 2014, at White Coat Notes.
35. *Id.*
36. MASS. G.L. ch. 19D, § 1 (2012).
37. *Id.*
38. 651 C.M.R., § 12.01.
39. *Id.*
40. 651 C.M.R. § 12.03.
41. 651 C.M.R. § 12.04.
42. *Id.*
43. *Id.*
44. 651 C.M.R. § 12.08.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. 651 C.M.R. § 12.08.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. 651 C.M.R. § 12.08.
55. *Id.*
56. *Id.*
57. 651 C.M.R. § 13.01.
58. 651 C.M.R. § 12.04.
59. MASS. G.L. ch. 93, § 76 (2012).
60. *Id.*
61. MASS. EXECUTIVE OFFICE OF ELDER AFFAIRS, [www.mass.gov/elders/](http://www.mass.gov/elders/) (last visited Feb. 20, 2013).
62. [www.mass.gov/eohhs/consumer/insurance/senior-care-options/sco-overview.html](http://www.mass.gov/eohhs/consumer/insurance/senior-care-options/sco-overview.html).

## CHAPTER 8

**No endnotes.**

## CHAPTER 9

1. Calculated 01/17/2018 assuming \$400,000 home value, 4.905% expected rate, 4.564% initial rate adjusting annually, \$17,572 financed closing costs.
2. Calculated 01/17/2018 assuming \$600,000 home value, 4.905% expected rate, 4.564% initial rate adjusting annually, \$21,122 financed closing costs.
3. Calculated 01/17/2018 assuming \$400,000 home value, 4.905% expected rate, 4.564% initial rate adjusting annually, 0.50% MIP, \$14,797 financed closing costs.
4. Calculated 01/17/2018 assuming \$500,000 home value, 4.905% expected rate, 4.564% initial rate adjusting annually, 0.50% MIP, \$19,847 financed closing costs.
5. As of January 2017, these service fees are being waived by the vast majority of lenders. However, as rates change, they may very well come back. Borrowers are encouraged to discuss, negotiate or argue with their lenders to reduce or eliminate these fees. For every dollar that a service fee goes down, the service fee set aside will be reduced. If the fees are eliminated, there will be no service fee set aside.
6. The law does allow phone counseling in cases of borrowers with significant income and/or assets, however, the penalties to the lenders if they allow a telephone counseling session and find out later that a face-to-face session would have been required are so draconian that lenders are not willing to chance it. By default, all

counseling in Massachusetts must be face-to-face. It is understood that this can result in significant issues for seniors, particularly those with travel issues, however, it is the law of the commonwealth. Some counseling agencies will travel, but most will not. If it becomes a significant issue in the case of a disabled senior, it is recommended that the senior contact HUD's Boston office, (617) 994-8200, TTY (617) 565-5453 and ask for a reasonable accommodation under the Americans with Disabilities Act to have a counselor come to their home. HUD will then help the senior to receive home counseling. Please note, seniors need to be bed bound to get this kind of accommodation. If they can travel at all, it will not be granted.

7. Agencies, such as Community Service Network, Inc., which charge an upfront fee for counseling, are required to provide counseling for anyone whose gross income is under 200 percent of the poverty line for no charge. In addition, at least one agency, Homeowner Options for Massachusetts Elders, will not charge at all, but the borrower must make less than \$30,000 gross income (\$40,000 per couple) and not have any other property. It is recommended that individuals talk to more than one agency to get counseling.

## CHAPTER 10

1. The National Elder Abuse Incidence Study 7, U.S. DEPT. OF HEALTH AND HUMAN SVCS. ADMINISTRATION ON AGING (1998), Available at [www.aoa.gov/AoARoot/AoA\\_Programs/Elder\\_Rights/Elder\\_Abuse/Index.aspx](http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/Index.aspx) (last visited Jan. 19, 2014).
2. *Id.*
3. MASS. G.L. ch. 19A, § 14 (2012). A caretaker is defined as "a person responsible for the care of an elderly person, which responsibility may arise as the result of a family relationship, or by a voluntary or contractual duty undertaken on behalf of an elderly person, or may arise by a fiduciary duty imposed by law." *Id.*
4. *Id.* A conservator is a person who is appointed to manage the estate of a person pursuant to MASS. G.L. ch. 190B, § 5-409 (2013).
5. *Id.* A guardian is a person who has qualified as a guardian of an elderly person pursuant to MASS. G.L. ch. 190B, § 5-305 (2013).
6. "Signs of Nursing Home Neglect," ELDER ABUSE FOUNDATION, [www.elder-abuse-foundation.com/html/signs.html](http://www.elder-abuse-foundation.com/html/signs.html) (last visited Feb. 23, 2013).
7. § 14.
8. *Id.*
9. Lori A. Stiegel, "Financial Abuse of the Elderly: Risk Factors, Screening Techniques and Remedies," 23 B. ASS'N FOCUS IN AGING & THE L. 1 (2002), available at [apps.americanbar.org/aging/publications/bifocal/summer02.pdf](http://apps.americanbar.org/aging/publications/bifocal/summer02.pdf).
10. *Id.* AT 6.
11. "Financial Abuse of Seniors," ALBERTA ELDER ABUSE AWARENESS NETWORK, available at [www.oakner.ca/abuse/what-is-elder-abuse/types-of-abuse/financial-material-abuse](http://www.oakner.ca/abuse/what-is-elder-abuse/types-of-abuse/financial-material-abuse).
12. "Best Practice Models," NATIONAL COMMITTEE FOR THE PREVENTION OF ELDER ABUSE, [www.preventelderabuse.org/communities/best.html](http://www.preventelderabuse.org/communities/best.html) (last visited Feb. 23, 2013).
13. *Id.*
14. *Id.*
15. MASS. G.L. ch. 19A, § 14 (2012).
16. 651 C.M.R. § 5.02.
17. MASS. G.L. ch. 111, § 72F (2012).
18. *Id.* § 72G.
19. MASS. G.L. ch. 19A, § 15(A) (2012).
20. EXECUTIVE OFFICE OF ELDER AFFAIRS, [www.mass.gov/report-elder-abuse](http://www.mass.gov/report-elder-abuse).
21. *Id.*
22. *Id.* See also "Elder Abuse and Protective Services for Massachusetts Seniors," MASSRESOURCES.ORG, [www.mass.gov/report-elder-abuse](http://www.mass.gov/report-elder-abuse).
23. 651 C.M.R. § 5.17.
24. *Id.*
25. 651 C.M.R. § 5.02.
26. *Id.*

## CHAPTER 11

**No endnotes.**

## CHAPTER 12

1. "Retirement Planner: Full Retirement Age," SOCIAL SECURITY ADMIN., [www.ssa.gov/planners/retire/retirechart.html](http://www.ssa.gov/planners/retire/retirechart.html) (last visited Feb. 2017).
2. "Social Security: How Work Affects Your Benefits," SSA PUBLICATION No. 05-10069, 2018, SOCIAL SECURITY ADMIN. (Jan. 2018), <https://www.ssa.gov/pubs/EN-05-10069.pdf>
3. *Id.*

## CHAPTER 13

1. "Medication and Driving," AARP, [www.aarp.org/auto/driver-safety/info-2013/medications-and-driving-html](http://www.aarp.org/auto/driver-safety/info-2013/medications-and-driving-html).
2. *Id.*
3. "We Need to Talk: Family Conversations with Older Drivers," AARP ONLINE SEMINAR, [www.aarp.org/home-garden/transportation/we\\_need\\_to\\_talk/](http://www.aarp.org/home-garden/transportation/we_need_to_talk/) (last visited Feb. 13, 2014).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. "We Need to Talk: Family Conversations with Older Drivers," AARP ONLINE SEMINAR, [www.aarp.org/home-garden/transportation/we\\_need\\_to\\_talk/](http://www.aarp.org/home-garden/transportation/we_need_to_talk/) (last visited Feb. 13, 2014).
9. *Id.*
10. *Id.*
11. "Mature Driver's FAQ," MASS. REGISTRY OF MOTOR VEHICLES, [www.mass.gov/service-detauks/older-drivers](http://www.mass.gov/service-detauks/older-drivers).
12. *Id.*
13. "Elder Driver Issues," MASS. REGISTRY OF MOTOR VEHICLES, [www.mass.gov/rmv/medical/edi.htm](http://www.mass.gov/rmv/medical/edi.htm) (last visited Feb. 13, 2014).
14. "Mature Driver's FAQ," MASS. REGISTRY OF MOTOR VEHICLES, [www.massrmv.com/rmv/seniors/faqs.htm](http://www.massrmv.com/rmv/seniors/faqs.htm) (last visited Feb. 13, 2014).
15. "Reporting Requirements," MASS. REGISTRY OF MOTOR VEHICLES, [www.mass.gov/medical-standard-related-to-driving](http://www.mass.gov/medical-standard-related-to-driving).

## CHAPTER 14

**No endnotes.**