



MASSBAR

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

NINTH EDITION



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Massachusetts Chapter of the National Academy of Elder Law Attorneys

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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.¹ 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.

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

ASSETS	INCOME
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.*

EXAMPLE 1 Countable and Non-countable Assets
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>EXAMPLE 2 An Inaccessible Asset Can Become Countable</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>EXAMPLE 3 Who Contributed to a Joint Account?</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>EXAMPLE 4 A Joint Account Presumption</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. Trusts²

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 \$2,030,³ 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>EXAMPLE 10 How the Look-back Period Works</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 ($\\$160,000 \div \\354 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>EXAMPLE 11 Timing is Important When Looking at When to Apply for MassHealth</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 ($600,000 \div \\$354$ 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.⁴ A married couple has a greater range of options to achieve eligibility (and to save more assets) than a single individual.

EXAMPLE 12	
How the Spend-down Process Works	
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.