

Western Mass Estate Planning

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QUALIFYING ONE MEMBER OF A MARRIED COUPLE FOR MASSHEALTH

Either member of a married couple can almost always qualify for

- reduced-cost (on a sliding scale, based upon income) **in-home care** through the State's Home Care program (both spouse's income is considered, but assets are ignored)
- free or reduced-cost **in-home care** paid for by MassHealth (only the applicant spouse's income is considered, but all assets are considered)
- substantial assistance with the cost of **nursing home care** (only the applicant spouse's income is considered, but all assets are considered)

In-home Care:

There are 25 Aging Services Access Points (ASAPs) in the state - private, non-profit, state-designated agencies under contract with the Massachusetts Executive Office of Elder Affairs to provide people age 60 and over, and their caregivers, with access to a variety of programs and services intended to allow older individuals to remain safely in their homes. Among the ASAPs, they provide services to individuals throughout the entire Commonwealth. To find the ASAP serving the individual needing assistance, click here: <https://contactus.800ageinfo.com/FindAgency.aspx> Although all ASAPs do not offer the exact same portfolio of services, they generally provide:

- ◇ Shopping
- ◇ respite care
- ◇ information and referral
- ◇ home care services
- ◇ housing options
- ◇ assistance with applications for public benefits
- ◇ hospice care
- ◇ assisted living and long term care ombudsman programs
- ◇ health insurance counseling (SHINE) – helps with medical billing problems, reducing insurance costs, Medicare Part D, and completing public benefits applications
- ◇ bill payer and sometimes SSA representative payee services through Money Management Program
- ◇ senior companions

- ◇ adult day care
- ◇ PCA (Personal Care Attendant) services
- ◇ protective services
- ◇ case management (needs assessments, screening and eligibility determination for institutional or community-based long-term care, development of a service plan, coordination and purchase of needed services through a network of subcontracted provider agencies, and monitoring and reassessment of on-going needs)
- ◇ support for caregivers caring for an individual 60 years or older
- ◇ nutrition services
- ◇ on-line resources, printed booklets and fact sheets, lending libraries

Each ASAP typically offers six (6) state-funded programs, in addition to MassHealth, which is state- and federally-funded. The state Home Care programs each have either a \$318/month or a \$700/month expenditure limit, while MassHealth has no limit.

Home Care Program:

Services under the Home Care program may include a personal emergency response system (PERS), home-delivered meals (Meals on Wheels), and a few hours of personal care or homemaking assistance (typically not more than 10 hours/week). More specialized service plans may include nursing assessments, in-home physical or occupational therapies, intensive case management, caregiver support, and more. This program works best for individuals who need only a minimal level of support and care – but enough that it allows them to remain at home safely.

MassHealth:

MassHealth offers services under the Frail Elder Waiver program for individuals whose medical needs qualify them for placement in a skilled-nursing facility, but prefer to remain at home. The program is person-centered, need-based, and there is no maximum number of hours. It should be kept in mind, however, that “Waiver” refers to the fact that Massachusetts obtained an exception (waiver) from the federal government to loosen the usual MassHealth eligibility requirements, so that more individuals could qualify for care at home. The waiver was approved, however, with the condition that, in administering the program, the average cost for the state-wide participants must be less than if all of the individuals were in nursing homes. If all participants received 24/7 care, this would far exceed the cost of nursing home placements, since receiving this level of care at home is more expensive than in a nursing home. As a result, ASAP staff will usually state that there is a limit to the number of hours MassHealth will provide, but this is only because it is necessary that the majority of participants receive far less than 24/7 care to meet the federal mandate. Theoretically, it is up to the ASAP to pursue funding for individuals who need the greater level of care.

While there is no income limit (see below), to qualify for MassHealth for in-home care, a MassHealth applicant cannot have more than \$2,000 in countable assets. All of the couple’s assets must be moved into the “well” spouse’s name only and countable

assets reduced to \$148,620 (2023) - \$2,000 for the applicant spouse and \$146,620 for the non-applicant spouse. Real estate in addition to the principal residence can often be made non-countable if it has a positive rental income (income exceeds expenses) or there are joint owners unwilling to cooperate with a sale.

- Any assets titled in the name of the “sick” spouse, titled in the name of a trust or titled jointly with the healthier spouse or another individual must be moved to the healthier spouse’s name

- This may involve liquidating qualified (tax-deferred) accounts and paying income taxes, but remember that these taxes would be paid eventually (taxes are deferred, never avoided). Also, any Certificates of Deposits may have to be accessed and subject to an early-withdrawal penalty. Of course, accounts in the name of the healthier spouse will not have to be liquidated (only those in the name of the spouse needing care).

- Some couples elect to privately pay for care, so long as only a few hours/week are needed, just to avoid liquidating tax-deferred assets or incurring early-withdrawal penalties. However, once care needs increase, it may be more cost-effective to incur the taxes and fees, in order to obtain free care.

- One interim option is to apply for funds from the local homecare agency’s sliding scale funds (aka consumer-directed care). Under this program, the couple’s assets are ignored, but income for both spouses is considered. The sick spouse may be approved for only a few hours each week of coverage and a contribution toward the cost may be required, but it is typically better than paying privately for the full cost.

- Once a spouse’s care needs increase significantly, it may make sense to contact the local homecare agency to request a medical screening in order to qualify the spouse for MassHealth under the Frail Elder Waiver (be sure to say in the initial telephone call that you intend to apply for MassHealth under the Frail Elder Waiver; if you do not mention it, you will be directed to the sliding-scale program mentioned above, which provides significantly less coverage). The homecare agency will send a nurse to evaluate the spouse and determine the number of hours MassHealth will cover. The nurse will sign a Frail Elder Waiver form.

- When scheduling the time for the nurse to evaluate the spouse needing care, be sure to make it be at the time of day when the spouse’s needs are the most obvious (ex: later in the day, when the spouse is not as sharp). Also, we recommend creating a list in advance of areas where the spouse needs help and providing a copy to the nurse, since many of the spouse’s challenges may not be evident during the relatively brief evaluation. The spouse needing care may minimize or deny the need for certain assistance (“Oh, of course I can make my own lunch; I do it every day”), so it is important to “correct” that with the nurse (outside of the spouse’s hearing).

- Once the assets are transferred to the healthier spouse, the family should complete and submit a MassHealth application, along with the required supporting documents and the Frail Elder Waiver form (the home care agency is required to provide a copy to the family, so that the family can submit the application; it is not necessary for the agency to do so)

- MassHealth regulations previously provided that the healthy spouse’s assets would be ignored (no matter the amount), but MassHealth recently issued new regulations (allegedly to comply with federal regulations). MassHealth now imposes the same asset limits for spouses of community (at-home) applicants, as are imposed for spouses of nursing home applicants. Spouses with more than \$148,620, excluding their principal residence and one car, may not have to spend down any excess, however. They may still be able to transfer the excess to a child or other trusted individual, without

penalty (which there is if this is done to obtain nursing home coverage), but this option may be eliminated soon, as well; or, for sure, purchase an immediate annuity (see discussion below under nursing home coverage). Once eligibility for the sick spouse is established, MassHealth will no longer review the spouse's assets, so that will allow the healthier spouse to re-accumulate assets over the \$148,620 (at least until a nursing home placement is required; it is not clear whether spousal assets will be re-visited at that time).

□ If the sick spouse's income is less than \$2,742/month (for 2023), the services will be free, if the Frail Elder Waiver is submitted with the application.

□ If the sick spouse's income is \$2,742/month *or greater*, the spouse will have a recurring 6-month deductible which will need to be met before MassHealth will cover the cost of the care.¹ The amount of the deductible depends upon the program used, but can be anywhere between a few hundred dollars and many thousands of dollars. The sick spouse needs to show medical bills (including in-home care expenses) which equal the calculated sum and then MassHealth will cover the cost of care for the balance of the 6-month period. Although the math and process can be daunting, having income over \$2,742/month does not preclude eligibility for MassHealth. Unfortunately, many homecare agencies and elder care advocates erroneously advise families that there is an income limit to qualify for MassHealth. Here is information on how deductibles work (you may skip over this, if the applicant spouse's gross income is less than \$2,742/month):

- The deductible period is a six-month period that starts on the first day of the month of application or may begin up to three months before the first day of the month of application.
- Although the applicant is eligible for this period of retroactivity, it is almost impossible to make this work.
- For an applicant participating in the Personal Care Attendant (PCA) program (who will be hiring and firing the caregivers, not using an agency), the deductible is calculated by taking gross income from Social Security and any pension (ignoring all deductions), subtracting Medicare and supplemental health insurance premiums, and \$1,506 (2023). Multiply the result by 6 and that is amount which must be paid up-front for medical expenses (usually home care, but can also be eye glasses, dentures, etc.) before MassHealth will pay for balance of 6-month period
- For an applicant participating in the Community Choices program (using an agency, not hiring and firing the caregivers), use the same formula above, but replace the \$1,506 with \$542, which results in a significantly larger deductible.
- This is repeated every 6 months – MassHealth ends benefits until proof is provided that the deductible has been met, then benefits are reinstated
- May need to run numbers to see if it is worth applying for MassHealth
 - Example: individual's deductible is \$6,000, he or she needs 10 hours/week of care, and is currently privately paying @ \$25/hour
 - Using those figures, it would take the individual 24 weeks before the deductible is met (\$25/hour x 10 hours = 24 weeks)
 - Since this leaves only 2 weeks left in a 6-month period, it would not make sense to apply for MassHealth
 - However, if the individual's deductible is \$6,000 and the client needs 30 hours/week of care, the client would meet the deductible in 8 weeks (2

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months). MassHealth would then pay for the remaining 4 months. It would definitely make sense to apply for MassHealth, as this would stretch out the individual's assets (spending only \$12,000/year on care, versus \$39,000/year).

- If an spouse's income exceeds \$2,742/month, the recurring deductible may be avoided by applying for the MassHealth CommonHealth program. No deductible is imposed (in other words, it does not matter how high the spouse's income is) provided the applicant can prove employment of 40 hours/month (10 hours/week), at \$1/hour or greater. This can be met by documenting that the applicant is watching grandchildren after school, being a companion to a neighbor, or watching a neighbor's pet. Many individuals are not able to perform any of these tasks, however, so will be subject to a deductible.

- If the applicant or the applicant's spouse is/was a veteran, it is possible that the applicant will qualify for VA Aid and Attendance benefits. These are for housebound veterans who can show proof of their monthly caregiving expenses, and the income is not countable for MassHealth purposes. It can be crucial for providing the extra funds necessary to allow an individual to remain home. You may wish to contact your local Veteran's Agent to discuss applying for these benefits, since they can take 5- 6 months before approval. Note that the VA applies the same asset limit as MassHealth.

The MassHealth application process for in-home care:

- When completing the application, you may request retroactive benefits, but note that eligibility cannot begin any sooner than the couple meets the asset limits AND a care plan is in place (created by the local ASAP).
- In other words, even though the application asks if you are requesting benefits back three months, it is unlikely that any retroactive benefits will be awarded. In addition, although retroactive benefits can cover past medical bills, including in-home care expenses, the bills must be outstanding (unpaid). This is rare, since most caregivers cannot wait for payment. If you have caregivers who can wait for payment, you should request retroactive benefits. Once MassHealth has been approved *and a care plan is in place*, the caregivers can submit time sheets for payment.
- Also, when completing the application, you should be clear that you are seeking eligibility under the Frail Elder Waiver (this allows the sick spouse to have a higher level of income). We either write on the top of the first page "FRAIL ELDER WAIVER" and highlight it in a bright color, or attach a large post-it note to the front page with the same phrase. Remember that this does not insure that the application will be processed correctly, but increases the chances that it will be.
- Since Frail Elder Cases are supposed to be given priority by MassHealth workers, we add to our note, "TO BE EXPEDITED."
- Be sure to make copies of the entire application and all supporting documents before mailing it. Everything should be mailed certified, return receipt requested.
- Once the MassHealth application has been filed, it may be several weeks before the assigned worker issues a letter (an Information Request), listing additional documents needed to approve benefits. Be prepared that documents are requested that you already submitted. Since you will not have information on how to reach the worker assigned to the case, it is easier to mail the documentation a second time. You may also receive incorrect notices (denying benefits or misstating income/assets, in which

case you will need to take prompt action to correct the situation, including filing a request for hearing.

- ❑ During the time you are waiting for approval, you may want to take advantage of the home care agency's sliding-scale coverage mentioned above.
- ❑ As soon as benefits are approved and a care plan is in place, you can move forward with services under the Community Choices program (where the home care agency contracts with a local agency to provide care givers).
- ❑ If you have applied for services under the Personal Care Attendant (PCA) program, that is, unfortunately, a second step after MassHealth has been approved. You may use the Community Choices program in the interim. The PCA program allows you to hire and fire your own caregivers (for example, if you wish to employ friends or family members)
- ❑ Note that, for individuals whose income exceeds \$2,742/month, the recurring 6-month deductible which the applicant must meet to qualify for MassHealth is less when using the PCA program

Either member of a married couple may also qualify for MassHealth to cover the cost of **assisted living**.

- After thirty (30) days of living separately (one spouse in an assisted-living facility and one at home), the couple's assets are treated separately. This means that all assets may be moved to the name of the spouse living at home and will not be considered when determining the eligibility of the assisted-living spouse. The assisted-living spouse may not have more than \$2,000 in countable assets to qualify for MassHealth.
- The biggest challenges of making MassHealth work in an assisted living facility are:
 - ❑ The facility must accept GAFC. To find out if a facility accepts GAFC, you may go to <https://www.mass-ala.org/>, click on "Search for an Assisted Living," and then, under "Financing" use the drop-down box to search for residences that accept GAFC, Medicaid and PACE
 - ❑ The facility must have a GAFC room available (each facility has only a limited number of so-called "low-income" rooms and there may be a waiting list)
 - ❑ If the applicant's gross income exceeds \$1,295-per-month, there will be a recurring 6-month deductible which must be satisfied (the amount varies and depends upon the resident's income). *See our website for details on making MassHealth work for assisted living expenses, where the individual's income exceeds \$1,295/month* (it is a very complicated process that does not work for most people)
 - ❑ Do not believe any assisted living facility that claims the resident is not eligible for GAFC/MassHealth because his or her income exceeds \$1,295/month
 - ❑ Because the resident's income must be contributed as rent each month, GAFC is successful only if the resident has other funds available (those transferred to a trusted third party)
- A resident of an assisted living facility who is a veteran, may also qualify for VA Aid and Attendance benefits, which are not countable income for MassHealth purposes, making the funds available to an applicant needing to meet any deductible.

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- Either member of a married couple may also qualify for MassHealth to cover the cost of **nursing home care**. Again, all of the assets need to be moved in to the at-home spouse's name. However, two things are different for nursing home eligibility, than qualifying for in-home care or assisted-living coverage:

1) The care is rarely free. All of the nursing home spouse's income, minus \$72.80 for a personal needs allowance and any health insurance premium, must be paid to the nursing home each month, as the spouse's contribution toward the cost (MassHealth would pay the rest). In some cases, if the at-home spouse's income is relatively low, that spouse may be able to retain some of the nursing home spouse's income (MassHealth uses a formula to determine this on a case-by-case basis); and

2) The at-home spouse may keep only \$148,620 (2022), above the couple's principal residence and one car of any value. Any excess funds must either be spent down OR the at-home spouse may purchase an irrevocable annuity. For sure, the excess funds may not be gifted. A couple may reduce the excess assets by paying-off any existing mortgage or other debts, making needed home repairs, pre-paying funerals, and/or opening two \$1,500 burial savings accounts (*see our website for details on setting these up*).

Real estate in addition to the principal residence can often be made non-countable if it has a positive rental income (income exceeds expenses) or there are joint owners unwilling to cooperate with a sale.

If those spenddowns are not sufficient to bring a couple's assets under the combined \$148,620, the at-home spouse may purchase an immediate, non-assignable, irrevocable annuity with the balance of the excess funds. The annuity locks up the excess funds (making them non-countable for MassHealth purposes), but the at-home spouse will receive a check each month from the annuity company, until all of the funds are repaid. In other words, the funds are protected, but they come back into the at-home spouse's name slowly, typically over a 5-year period.

Although the nursing home applicant's retirement accounts (such as IRAs and 401ks) must be liquidated, it is possible to roll over the at-home spouse's qualified (retirement) accounts into an annuity, so that they do not have to be liquidated and allow for continued income tax deferral.

Some spouses end up with two annuities: one for the retirement accounts and one for other non-retirement assets above the \$148,620. As the monthly annuity checks come in, the at-home spouse may reinvest them as desired and they are not considered again.

The benefit of an annuity, of course, is that it results in immediate eligibility for MassHealth benefits, saving thousands of dollars each month. The risk, however, is that the annuitant (the spouse who purchased the annuity and is receiving the monthly checks) dies before all of the funds are repaid. Current MassHealth practice requires that the annuitant name the Commonwealth of Massachusetts as primary beneficiary of any remaining payments, to the extent it paid out benefits for either the nursing home spouse or the annuitant spouse. Children, a trust, or other individuals may be named contingent beneficiaries. As

of January, 2023, a case is pending before the Massachusetts Supreme Court challenging the requirement to name the Commonwealth a primary beneficiary. If the spouse who purchases the annuity (the annuitant) lives long enough to get all of the funds paid back, they will all be preserved. However, if the annuitant dies with payments remaining, they may end up going to the Commonwealth as reimbursement (depending upon the outcome of the Supreme Court case). Note that MassHealth pays substantially less to nursing homes (typically closer to 65% of the private-pay rate, offset by the resident's income), so reimbursement would be at a lower monthly rate and only to the extent funds are remaining on the annuity contract. Our office can refer you to an insurance agent to assist with purchase of the annuity.

- ❑ The MassHealth application for nursing home benefits requires significantly more financial documentation (typically, five years of records, rather than just current records), and retroactive benefits are the norm (again, back to the date the couple's assets were reduced to the permitted amount).
 - ❑ Unlike applications for in-home benefits, the case will be assigned to a specific worker, whose name and direct telephone number will usually be reflected on the Information Request. You will be able to contact the worker directly if you have questions.
 - ❑ *Our website has additional write-ups on annuities, burial accounts, and the MassHealth application process.*
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- ❑ Although a MassHealth recipient is permitted to have an interest in a principal residence (it is non-countable under MassHealth regulations), title to the property should be conveyed to the non-applicant spouse, to avoid the risk of a MassHealth lien at the nursing home spouse's death. This may be done at any time, including after MassHealth has been approved. Transfer may be done by the nursing home spouse, if competent, by an agent, under a Durable Power of Attorney, or, if the applicant is not competent and does not have a Durable Power of Attorney, then through a single-transaction conservatorship proceeding, filed with the appropriate Probate Court.
- ❑ Once assets have been moved to the at-home spouse's name, that spouse should sign a new Will ensuring that the assets do not pass back to the nursing home spouse, if the at-home spouse were to die first (MassHealth coverage would be terminated until the funds were spent down). The at-home spouse could also sign a revocable trust that leaves assets directly to other people, such as children (assets the at-home spouse does not think the surviving spouse would need). *A separate description of this strategy is available at our website.*

Other resources:

800 AGE-INFO (resources): <https://contactus.800ageinfo.com/FindAgency.aspx>

MassOptions (resources): <https://www.massoptions.org/massoptions/>

MetroWest Center for Independent Living (resources for disabled individual of any age):
<https://mwcil.org/>

National Academy of Elder Law Attorneys (search for elder law attorney):
<https://www.naela.org/findlawyer>

This is intended to be a general description of the process for qualifying an individual for in-home and skilled-nursing MassHealth coverage and was current as of February 1, 2023. However, individual circumstances may permit other methods of obtaining eligibility or may limit eligibility. Because each situation is different and the laws relating to MassHealth eligibility are regularly changing, a competent elder law attorney should be consulted concerning any particular situation and legal advice relative to these issues. This article is for informational purposes only and is not intended to constitute comprehensive or specific legal advice.