



MASSBAR

A S S O C I A T I O N

Keeping Older Adults Informed for 30+ Years
2023 ELDER LAW EDUCATION GUIDE
14th Edition



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

www.MassNAELA.com



COMMUNITY AND PUBLIC SERVICES

May 2023

Dear Massachusetts Older Adults:

This year's 14th annual edition of the Elder Law Guide (ELG) finds us finally seeing the light at the end of this long, difficult COVID-19 experience for many older adults, with many of us now fully vaccinated with the "booster shot."

This year's ELG reflects major revisions to Chapter 1, titled "Important Questions and Answers for Older Adults," and also useful as a summary of the chapters. We have also added a new and important section, and major revisions, to Chapter 16, which deals with retirement planning. We reorganized other chapters so that homesteads and life estate deeds are more easily found and explained, and most importantly, added two new chapters. The first is on "Pensions," thanks to the excellent work of the Pension Action Center affiliated with the UMass Boston School of Gerontology. The second new chapter is on end-of-life decision-making, hospice care, the use of MOLST forms, health care proxies and living wills.

We hope this year's updated and revised ELG helps you more easily find information that is important to you as we age and focus on how to be active, healthy and independent. We need your candid feedback to make the ELG better each year and relevant to our changing needs.

We try to no longer use the terms "elder," "elderly" and "senior," since leaders in the aging community tell us that those of us who are "older adults" really do not like any age-related labels. Like it or not, the consensus now is "older adults." As we all continue to age together, we also change and adapt.

Our volunteers keep expanding and are truly amazing, since a public service project of this magnitude requires many skilled hands and eyes. The participation of experienced elder law attorneys who are members of both the Massachusetts Bar Association (MBA) and the Massachusetts Chapter of the National Academy of Elder Law Attorneys (MassNAELA) is the gold standard and the hallmark of what makes this annual publication unique. The time, effort and commitment of these attorneys and other professionals is remarkable. The MBA, together with MassNAELA, continues a long partnership that is committed to helping all older adults face the opportunities and challenges of aging.

The Advisory Committee is especially grateful for the ongoing support of Elizabeth A. O'Neil, the director of community and public services at the MBA, who provides the support to keep us organized, to meet all the deadlines, and to implement numerous revisions, updates and edits to make the ELG happen.

Cordially,

Alex L. Moschella, Esq., chair
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The mission of the National Academy of Elder Law Attorneys is to develop awareness of issues surrounding legal services for older adults and those with special needs. The approximately 500 attorney members of NAELA's Massachusetts Chapter work for the older adult 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 society.

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CHAPTER 1

IMPORTANT QUESTIONS AND ANSWERS FOR OLDER ADULTS

This guide pertains only to the laws of Massachusetts at the time of publication. It is intended for educational purposes only and is not a substitute for legal advice specifically tailored to your personal situation.

We are proud to present this 14th annual edition of the Elder Law Guide (ELG) and hope that you find it helpful. This ELG is produced by the Massachusetts Bar Association (MBA) in partnership with the Massachusetts Chapter of the National Academy of Elder Law Attorneys (MassNAELA). It is designed as a resource for both attorneys and non-attorneys alike. It is also used by volunteer attorneys during Elder Law Month (May) to conduct presentations at councils on aging centers across the state. The following questions and answers touch upon important areas of elder law, many of which are covered in more detail later in the guide

1. What Is Elder Law?

Elder law is a multi-disciplinary approach to the legal needs of older individuals, and includes a wide range of practice areas and subject matters:

- (i) Health care decision-making and the use of advanced medical directives;
- (ii) Planning for disability and incapacity;
- (iii) Estate planning and the use of durable powers of attorney, living trusts and wills;
- (iv) Basic Social Security retirement planning;
- (v) Planning strategies for Medicare, Medicaid (MassHealth), veterans' benefits and other public benefits;
- (vi) Housing options and alternatives to nursing homes;
- (vii) Probate avoidance strategies;
- (viii) The interplay of long-term care and financial planning;
- (ix) The use of long-term care insurance; and
- (x) Asset protection strategies for the family home and other assets, including estate tax

minimization and potential long-term care financing.

See the Resource Directory on page 130 to find an experienced elder law attorney.

2. What Are the Essential Estate Plan Documents I Should Have and What Happens If I Don't Have Them?

The following documents are essential building blocks to your estate plan, together with some examples of potential consequences if you don't have them:

(i) Health care proxies and advanced medical directives

These documents are essential in ensuring that you have appointed individuals of your choosing to make medical decisions for you in the event of your incapacity and to set forth any limitations upon their authority to act. A discussion of these documents, including their uses and sample templates, is included in Chapter 18.

Absent direction, a health care provider has the right to confer with "responsible parties" related to you by blood or marriage to obtain informed consent for medical care. However, this approach may not be sufficient, particularly if the circumstances require emergency action, use of anti-psychotic medication or the discharge to a nursing facility. It also may not be clear who is going to act as the responsible party, which may lead to fighting among family about who has authority to act on your behalf and what your wishes are. In that event, the medical provider or family may need to resort to the court to appoint a guardian (a court-appointed fiduciary to care for a person), for authority to make medical decisions for you if you are incapacitated. The guardianship process involves a court proceeding, which is not ideal in an emergency situation. Family members have standing to petition the court for guardianship, and the person the court deems the

most appropriate may be the last person you would want to fill that role.

(ii) **Durable powers of attorney**

A power of attorney is a written legal document created by you (the “principal”) that authorizes an agent (the “attorney-in-fact”) to legally act on your behalf in handling your property and affairs. It is only effective during your lifetime and will be void upon your death. The attorney-in fact can be a spouse, or a trusted family member, friend or professional person. You, as the principal, specify in the document the powers you are granting to the attorney-in-fact. You can authorize the attorney-in-fact, for example, to sign checks, invest assets, enter into contracts, make gifts, create trusts (if the document provides) and transfer property. This document is a very powerful planning tool, and you should only appoint someone you fully trust.

If you do not have a power of attorney, no person automatically has control over or access to your individually owned assets. Even if assets are held jointly, the consent or involvement of both joint owners may be required (e.g., selling a jointly owned home). Without an authorized person to deal with your assets, a conservator (a court-appointed fiduciary to manage a person’s property) must be appointed. Again, this involves time-consuming court proceedings, often at times when immediate action is needed.

(iii) **Wills and guardian/conservator designations for minors or disabled adult children (if applicable)**

A will leaves directions regarding several key functions upon your death. It nominates fiduciaries to deal with your property and to care for any minor or disabled adult children. It empowers the fiduciaries to act, and it gives direction regarding the disposition of your assets. Every person needs a will, regardless of whether a trust (see below) is also part of your estate plan. In that case, your will would direct that your assets pass to the appropriate trust.

If you do not have a will, you are considered

to have died intestate. If you do not otherwise dispose of your assets (e.g., joint ownership, trusts or beneficiary designations), the commonwealth determines where they will go by statute. This may not be in keeping with your wishes (e.g., an estranged sibling could inherit if you have no spouse, descendants or living parents).

Depending upon your estate planning goals and your current financial situation, you may also wish to consider the following:

- (i) Real estate deeds with life estates and realty trusts (*see Chapter 8, section B*)
- (ii) Revocable and irrevocable trusts (*see section 6 in this chapter; also Chapter 3, section I*)
- (iii) Gifting plans (*see Chapter 3, sections L and M; see also question #20 in this chapter*)
- (iv) Tax plans (*see questions 19 and 20 in this chapter*)
- (v) Asset protection plans (*see Chapter 3, sections C, D, G, J and N*)

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

- (i) Your circumstances change over time, so it is important to periodically review your plan to ensure that your documents still reflect your wishes and will accomplish your goals. The laws change periodically (such as major changes to the probate laws in 2012 and tax law changes in 2017, 2020 and 2022), and such changes can have significant and unintended consequences for plans executed prior to the changes.
- (ii) Your goals may change as you progress to different stages of life (for example, planning for minor children, planning for marriage or remarriage, planning to minimize estate taxes, planning to avoid probate or to avoid the cost of long-term care). Changes may occur in your family makeup, and the persons you named as beneficiaries in your will or trust may no longer be appropriate due to death, disability or bankruptcy. Therefore, the plan that made sense at an earlier time may need to be updated.

- (iii) It is important to reevaluate the people you chose as fiduciaries in your health care proxy, durable power of attorney, will and trust, to determine whether those individuals are still appropriate choices. Often, individuals list parents or other family members who may no longer be living or competent, or friends with whom the individual has not kept in contact.

4. What Should Unmarried Couples Consider?

Unmarried couples have the same needs and rights as anyone else, but it is particularly important for these couples to protect one another through an appropriate estate plan. A properly drafted estate plan can establish rights for your partner that the law does not otherwise provide to an unmarried couple.

As noted above in section 2, should you become incapacitated without a health care proxy and/or a durable power of attorney, your partner may have little or no right to participate in your medical care or to assist and protect your financial or other interests. In addition, absent proper estate planning, your partner may not receive any intended post-death gifts or inheritance from you. For example, if you die owning a house in your sole name that you shared with your partner and did not complete the appropriate planning, your partner would have no rights to the home. Often, the only options available to a partner in this situation are to vacate or to engage in costly litigation to try to establish an equitable interest in the home.

5. What Should I Consider with Respect to Joint Ownership of Assets?

There are a number of circumstances and risks to consider with jointly owed assets, some of which are the following:

- (i) Using a joint account as a will substitute: Many people name one child as a joint owner on an account with the intent that the child will distribute the asset to others (including other children) after death, but there is no legal obligation to do so. Even if the joint owner has the best intentions to effectuate your wishes, if the joint owner is going through a divorce or being sued, the joint owner may not be able to transfer the joint asset as intended;

- (ii) Risking loss of your funds: Any joint owner has the legal right to access 100% of joint assets at any time. Likewise, you risk exposure of your assets to the joint owner's creditors (lawsuit, divorce, bankruptcy) or;
- (iii) Negative impact on your joint owner: There could be unintended negative consequences to the joint owner (or their children); e.g., in the context of an application for financial aid, the joint asset must be disclosed and is countable as the joint owner's asset on a financial aid application.

6. What Is a Trust, and What Forms of Trusts Are Commonly Used?

- (i) **Types of Trusts.** Trusts are used to hold assets for the benefit of an individual or individuals (beneficiary(ies)). The money or property held in the trust is managed by a trustee according to the grantor's (your) instructions. There are many different types of trusts, but the most common are (a) revocable trusts, (b) irrevocable trusts and (c) supplemental needs trusts (SNT).
- (ii) **Revocable Trusts.** A revocable trust is a trust over which you, the grantor or donor, retain the ability to amend or revoke (terminate) the trust later. A revocable trust is often used as a will substitute designed to avoid probate by transferring the title of assets into the name of the trust. You generally serve as trustee during your life and name those persons you wish to be trustees after your passing to carry out your wishes. If you have a revocable trust, you should still also have a will to direct that all assets that remain in your name at the time of your death, or that later come into the name of your estate (e.g., an inheritance or abandoned property), will be distributed to the trust. This type of will is sometimes referred to as a "pour over" will.
- (iii) **Irrevocable Trusts.** An irrevocable trust is a trust that, once established, except for rights retained at the outset, cannot be changed or revoked by the grantor. For older adults, irrevocable trusts are commonly used for asset protection planning for long-term care and require careful thought and consideration

and, most importantly, the expertise of an experienced elder law attorney. The trust must comply with MassHealth rules and regulations, and the assets that are transferred to the trust may trigger the “five-year look-back period” for eligibility. This trust is also established by you as the grantor but typically must have an “independent trustee,” who may be a family member. Your access to and control of the trust will likely be limited to “interest only,” so the principal is beyond your control, and you may not have the right to change the beneficiaries or other terms of the trust.

- (iv) **Special Needs Trusts or Supplemental Needs Trusts.** A supplemental or special needs trust (SNT) is a specialized trust that protects assets for a disabled individual and supplements the needs of that individual by funding things that are not otherwise covered by government benefits and/or other sources of support. For government benefit purposes, funds in a properly drafted SNT are not counted as the beneficiary’s assets in determining eligibility.

7. What Options Do I Have if I Have to, or Want to, Sell My Home?

- (i) 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.
- (ii) 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.
- (iii) Besides elder 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% 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 a long-term care facility. *See Chapter 7.*

- (iv) Older adults are exploring many innovative housing models to ensure a better quality of life, as an alternative to homeownership, including a one-floor living space with no stairs and a resulting lessened need for maintenance concerns. These housing options include age-restricted communities, condominiums, in-law apartments, shared living, conversion housing models adjacent to or owned by colleges and universities, and market rentals of new housing units.

8. What Should I Know if Considering a Reverse Mortgage? (See Chapter 10)

- (i) A reverse mortgage loan is secured by your home. It is a non-recourse loan, which means that your heirs are not responsible for paying off what is due on your death.
- (ii) You must be 62, living in the home as your principal residence and be able to pay taxes and the maintenance of the property. The loan is due on your death or the sale of your home, or if you have not lived in the home for one year due to medical or other reasons.
- (iii) A reverse mortgage could help if you do not qualify for a home equity line of credit. Unlike a line of credit, a reverse mortgage does not have an asset or income test — only the equity in your home is considered.
- (iv) Before undertaking a reverse mortgage, you should explore other ways that may be available for making your income cover your expenses, such as a property tax deferral or other abatements offered by your city or town. If you are eligible, you should compare the monthly savings so that you can determine if a reverse mortgage is worth pursuing. Elder law attorneys can assist you in the process.

- (v) The loan works like a home equity loan in that you can draw as many funds as you need. However, it is vitally important that you understand how compounding of interest impacts the balance due at the time of the payoff of the loan. Chapter 10 has a number of helpful examples and charts that explain in detail how reverse mortgages work.

9. What if I Incur Unmanageable Debt? Is Bankruptcy an Appropriate Option? (See Chapter 15)

- (i) As older adults reach retirement age, an anticipated and often welcome event, they may find that it is also a financial event that may trigger unanticipated circumstances due to a new economic framework that, in many cases, shifts the older adult into a fixed income situation.
- (ii) This new financial status can be fraught with unanticipated monetary consequences. There are many circumstances, such as a catastrophic medical event, an uninsured accident, an unexpected increase in household expenses, poor credit card management, and the like, that can leave older adults with debt beyond their means.
- (iii) In addition to the unpleasantness of being unable to pay your bills on time and to make necessary purchases, you may become a “debtor,” who then becomes subject to unpleasant contact by creditors. Options are available to the debtor for managing the ramifications of being in debt and for solving the debt problem altogether.
- (iv) There are many considerations to navigate, one of which is for the indebted older adult to explore the option of initiating a bankruptcy. It would benefit the indebted older adult to consult with a professional for advice in strategizing and deciding upon the right option for solving the problem, and if initiating a bankruptcy is to be explored, it is imperative that the older adult consult with an experienced bankruptcy attorney to explore the pros and cons of this option, as the bankruptcy process is complex and technical. *See Chapter 15.*

10. What Should I Know About Elder Abuse, Neglect and Financial Exploitation? (See Chapter 11)

- (i) Elder abuse, which can be committed by anyone, including a caretaker, conservator or guardian, can cause: (a) physical or emotional injury, including sexual abuse; (b) financial exploitation; or (c) denial of life necessities essential for the physical and emotional well-being of the older adult (neglect). Elder abuse also includes self-neglect.
- (ii) Financial exploitation comes in many forms, from the misuse of powers of attorney, by guardians or conservators who take advantage of older adults, unscrupulous financial advisers, planners, attorneys, accountants, home care workers, and other scam artists and professionals. Often, the older adult does not know that the money has been mishandled, that the trust has been betrayed and that such predatory practices have taken place over long periods of time.
- (iii) The warning signs are unusual bank and ATM withdrawals; late payments on bills; abrupt changes in wills, trusts, powers of attorney, deeds and mortgages; and changes in beneficiaries on insurance policies, bank accounts and investments. Another warning sign is that a new or significantly younger “friend” of the older adult has been receiving substantial “gifts.”
- (iv) Elder abuse in a nursing home is especially disturbing, resulting in willful infliction of injury; unreasonable confinement; intimidation, including verbal or mental abuse or punishment with resulting physical harm, pain or mental anguish; or assault and battery.

11. What Is the Difference Between Medicaid and Medicare? (See Chapters 3, 4 and 5)

- (i) 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.*

- (ii) Medicare is a federal health insurance program associated with Social Security Insurance benefits for older and disabled individuals. 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 their work history. *See Chapter 5.*

12. How Do I Know if Veterans Administration Benefits Will Help Me? (See Chapter 2)

- (i) The VA pension program is a needs-based benefit for disabled veterans who suffered a disabling injury during active military service.
- (ii) Older adults may be eligible, as either a single veteran, a veteran with a spouse or a surviving veteran with a spouse, for an important VA benefit for home care or assisted living called “VA pension with Aid and Attendance.” Local Veteran Service Offices (VSO) are able to assist with the eligibility and application process.
- (iii) A key eligibility requirement for the Aid and Attendance benefit is that the veteran’s “unreimbursed recurring medical expenses” are used to offset gross income. Thus, monthly medical expenses must exceed monthly income and must be “out of pocket,” meaning non-reimbursable by insurance.
- (iv) The veteran or surviving spouse must also have limited net worth. The current net worth is linked to the \$148,620 spousal allowance permitted by MassHealth (*see section 14 on this page*).
- (v) The MassHealth asset and transfer rules are also currently followed.
- (vi) There are other service-connected compensation plans for which a surviving spouse meeting certain conditions may qualify under the “Dependency and Indemnity Compensation” (DIC) program. A local VSO or an elder law

attorney can assist you in understanding how these complex benefits apply as well as the application process.

13. What Is Long-Term Care Insurance (LTCI)? (See Chapter 6)

Long-term care insurance (LTCI) is an insurance product that provides benefits to help cover the costs associated with in-home care or assisted living care, or the costs of care in a skilled nursing facility. LTCI products have many options and are complex contracts that require careful consideration and planning. A proposed policy should be reviewed with your financial adviser and elder law attorney to weigh the pros and cons of using LTCI in your particular circumstances.

14. If I Need Nursing Home Care, But My Spouse Does Not, Will I Still Be Eligible for Medicaid? (See Chapter 3)

You can still be eligible for Medicaid assistance, and your spouse may keep their income and your assets up to certain limits. The Medicaid (MassHealth) regulations are designed to protect the healthy spouse (referred to as the “community spouse”) from poverty when the other spouse enters a skilled nursing facility. The community spouse is currently allowed to keep \$148,620 in countable assets. This amount is known as the Community Spouse Resource Allowance (CSRA).

There are strategies available to preserve additional 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.*

15. What Are My Rights as an Older LGBTQ Person or Person Living with HIV?

You have the absolute right to age with dignity. If you experience discrimination based on your sexual orientation, your gender identity or your HIV status, you should contact an attorney right away. You are entitled to competent care in all aspects of your life, including health and medical services, continuing care and long-term residential care. You are entitled to live free from discrimination and ha-

arrassment. For example, if you are transgender and a long-term care provider tells you that you may not be placed in a semi-private room consistent with your gender identity, you should seek legal help immediately. Most people who provide elder services at home or in assisted living facilities are required by law to have special training to care for LGBTQ older adults. However, this training has not yet been expanded to include those providing care in a skilled nursing environment. Therefore, asking questions of prospective skilled nursing facilities such as, “Do you have any LGBTQ residents?” can shed valuable light on the facility’s attitudes and sensitivity toward LGBTQ residents.

16. What Is Probate?

Probate is a court process that may be necessary when someone dies with property in their individual name to transfer the assets to that person’s heirs or to the beneficiaries named in their will. The probate process is necessary when the asset itself does not establish the subsequent owner after the decedent’s death (i.e., assets held in a person’s name individually with no joint owner, designated beneficiary, or other payable on death clause or provisions). Through the probate process, the court will determine if the decedent’s will is valid (or that the decedent did not have a will, as the case may be) and who the heirs of the estate are, and will appoint a “personal representative” (usually nominated in the will and commonly known as an executor or executrix) to handle the business of the estate.

There are several different types of probate. An estate may qualify for a simplified probate procedure called voluntary administration provided that the estate assets are under \$25,000 (excluding an automobile), as long as there is no real estate involved. Any interested person (see M.G.L. ch. 190B, section 1-201(24)) can use this procedure by filing a voluntary statement with the probate court.

For estates greater than \$25,000, there are two basic types of probate:

- (i) Formal probate, which is a judicial proceeding often used when there is Massachusetts real estate involved. This process legally determines who the heirs are and allows a will, if any.

- (ii) Informal probate, which is an administrative proceeding that is quicker, but does not legally determine heirs or allow wills. You should consult a lawyer to determine whether you should use this procedure if there is real estate involved.

17. What Does It Mean to Avoid Probate?

Avoiding probate simply means that the probate court is not needed to determine who owns assets at death because the assets expressly indicate who will inherit them. For example, assets with a beneficiary designation, joint property (e.g., jointly held bank accounts, real estate, stock accounts, etc.) and property passing by contract (e.g., 401(k)s, IRAs, life insurance, annuities, etc.) are usually non-probate property.

Avoiding probate can be accomplished in the following ways:

- (i) By placing all assets in a trust.
- (ii) By making accounts payable on death to another, or ensuring that retirement and brokerage accounts, annuity contracts and life insurance policies have named beneficiaries.
- (iii) By placing all assets (e.g., 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.

In addition, there are simplified methods for dealing with specific probate assets without utilizing the court:

- (i) A spouse (or heirs, if the spouse is deceased) may collect bank and/or credit union accounts that do not exceed \$10,000 (*See Mass. G.L. ch. 167D, § 12 and Mass. G.L. ch. 171, § 42*); and
- (ii) A spouse may sell or reregister title to the decedent’s automobile(s) (*see Mass. G.L. ch. 90D, § 15A*).

18. What if Property Is Located Out of State — What Is Ancillary Probate?

Your family could be required to file a second probate, known as “ancillary” probate, if you die

owning real property (land or a house) in another state. People who own property in another state should consult with an attorney to discuss how to avoid an ancillary probate.

19. What Are Federal and State Estate and Gift Taxes, and How Do They Operate?

- (i) Both state and federal governments can impose an estate tax on high-net-worth estates. In 2023, the federal combined estate and gift tax exemption is \$12,920,000, and the Massachusetts estate tax exemption is \$1,000,000. With proper estate planning, a married couple may maximize the use of their estate tax exemption amounts and possibly reduce or avoid state and federal estate taxes. Currently, the federal estate tax rate is 40%, and in Massachusetts, the rate is as high as 16%, depending on the size of the decedent's gross estate.
- (ii) There is no estate tax on property that passes to a spouse, as long as the spouse is a U.S. citizen and the property otherwise qualifies for the unlimited marital deduction (IRC 2056). Decedents may also reduce their gross estate by leaving certain assets to qualified charities using the unlimited charitable deduction (IRC 2055).
- (iii) If one or both members of a married couple are not U.S. citizens, couples should consult with a qualified estate planning attorney to plan for the limited estate tax exemption allowed to a surviving non-U.S.-citizen spouse.

20. What Issues Should You Consider Before Making Significant Lifetime Gifts?

- (i) You should always consult with a qualified attorney and tax professional before making significant gifts. Large gifts may have unanticipated consequences, including tax consequences, effects on eligibility for government benefits and consequences to your own future financial needs.
- (ii) Massachusetts does not impose a gift tax. There is a federal gift tax, however. Individuals may give up to \$17,000 (married couples up to \$34,000) per person per year (the 2023 gift tax annual exclusion amount) without the need to file a federal gift tax return or pay a gift tax. Gifts in excess of the annual exclusion amount must be reported on a gift tax return but will not cause a gift tax to be due unless a person's total lifetime gifts exceed the exemption amount (\$12,920,000 in 2023). Gifts for a person's medical care or education made directly to institutions may be non-reportable exempt transfers even if in excess of the annual exclusion (IRC 2503(e)).
- (iii) Gifts of assets that have appreciated in value (e.g., stock or real estate) may reduce potential estate tax liabilities, but could adversely impact a later capital gains tax on the sale of the gifted asset.
- (iv) Gifts may also adversely impact eligibility for Medicaid benefits. For example, if a person makes a significant gift and needs to enter a long-term care facility within five years of making the gift, they could be denied eligibility for Medicaid benefits for a period of time based on the total amount gifted.

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.

VA PENSION WITH AID AND ATTENDANCE

Non-service-connected pension is a benefit that provides monthly payments to low-income wartime veterans, or their dependents, who are disabled or over the age of 65. Pension claimants who are housebound or require the aid and attendance of another person are eligible for 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 funds that can help veterans and their surviving spouses offset the costs of their 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.

Claimant’s Payment Categories	2023 Maximum Monthly Payment for Pension with Aid and Attendance
Single veteran	\$2,229
Veteran with a spouse	\$2,642
Surviving spouse of a veteran	\$1,432

All VA pension payments are tax-free, as it is a reimbursement for care costs.

FINANCIAL LIMITATIONS

The VA pension benefit is needs-based, and therefore, the claimant must meet income and asset limitations. If a claimant is married, then the VA includes income and medical expenses of both spouses to determine total net income. 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 recurring unreimbursed medical expenses (UMEs) are used to offset gross income. These expenses can include nursing home costs, assisted living costs, home health care and health insurance premiums. These expenses, however, must be “out of pocket” and not reimbursable by insurance or a third party. The difference between the claimant’s gross income and unreimbursed medical expenses is the “Income for Veterans Affairs Purposes” (IVAP). If the IVAP is less than zero (if medical expenses exceed gross income), then the claimant can be eligible for the maximum pension payment with Aid and Attendance. If the IVAP is greater than zero, but less than the monthly Aid and Attendance benefit, then the claimant can receive benefits equal to their monthly benefit minus the IVAP.

The claimant must also have limited assets to qualify for the non-service-connected pension programs, including Housebound and Aid and Attendance. The VA uses a net worth test. It calculates the applicant’s IVAP (if a married veteran, the IVAP of both spouses is considered) and adds that to the countable assets. Please note that the IVAP is often zero, as the IVAP calculation is based on the initial application for pension with Aid and Attendance, and recurring care costs generally exceed the income. For 2023, the net worth must be no more than \$150,538. The VA’s net worth limit increases every Dec. 1 to match the Consumer Price Index

inflation percentage increase for Social Security.

In calculating the claimant's net worth, the claimant's primary residence and up to two acres of attached land, vehicles for personal use and personal belongings are excluded. The recent rule changes specify that the exclusion of the primary residence is limited to the dwelling and a lot area of two acres. Excess acreage is counted but only to the extent that the excess land is marketable. If it is not marketable, then it will have no value. If the claimant's primary residence is sold, the sale proceeds will be considered as part of the claimant's net worth, unless the claimant purchases a new primary residence in the same calendar year. For example, if the claimant sold the primary residence on Dec. 10, they would only have 21 days to purchase the replacement residence, or the sale proceeds would be part of the claimant's net worth.

All assets that can be liquidated (with the exception of the primary home as described above, personal effects suitable for a "reasonable mode of life" and a vehicle), 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. Term or group life insurance and other financial investments that do not have a cash surrender value are not countable assets. Lastly, the VA includes the annual income of the claimant and the claimant's dependents in the net worth calculations. For example, if a claimant has \$100,000 in countable assets and an annual income of \$12,000, then the VA will determine the net worth of the claimant to be \$112,000. However, as stated above, the income is often zero, as the IVAP is generally a negative number.

On Oct. 18, 2018, the VA implemented a three-year look-back period and a penalty period for certain asset transfers for claimants seeking non-service-connected pension and Aid and Attendance.

The VA will penalize a claimant who has, within the look-back period, transferred a "covered" asset on or after Oct. 18, 2018 (all transfers prior to Oct. 18, 2018, are exempt). A covered asset is the amount by which a claimant's net worth would have exceeded the \$150,538 limit if the uncompensated value of the covered asset had been included in net worth. For example, if a single claimant has \$0 in IVAP and \$140,000 in assets but gave away \$20,000 in

2022, the claimant has a "covered asset" that was transferred in the amount of \$9,462. In contrast, if a single claimant has \$0 in IVAP and \$120,000 in assets and gave away \$20,000 in 2022, no transfer of a "covered asset" has occurred because when the transferred asset is added back in, the claimant is still under the \$150,538 net worth limit. In other words, if a claimant's transfer of assets qualifies a claimant for a VA pension, then the VA will implement a penalty. If, on the other hand, a claimant's transfer had no effect on eligibility because the claimant was already asset eligible before the transfer, then the VA will not apply a penalty and there is no "covered asset."

The length of the penalty is calculated by determining the value of the covered assets transferred and dividing that amount by the monthly penalty rate. The monthly penalty rate is determined by the Maximum Annual Pension Rate (MAPR) in effect on the date of the pension claim at the Aid and Attendance level for a veteran with one dependent, divided by 12. The penalty period will begin the month following the date of the last transfer. The monthly penalty rate for a veteran with one dependent in 2023 is \$2,642. For example, a claimant seeking eligibility in January 2023 who transferred \$2,642 in covered assets on Nov. 1, 2022, will be penalized for one month. The VA will not issue a penalty that exceeds five years, and the VA allows a claimant to "cure" a disqualifying transfer within a certain amount of time.

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 of active duty, one day of which was served during a period of war. For veterans of the Gulf War to present, the service requirement is 24 months or completion of the requirement for active-duty service, whichever comes first. Periods of war fall within the following time frames:

<p>World War II: Dec. 7, 1941–Dec. 31, 1946 Merchant Marines (Dec. 7, 1941–Aug. 15, 1945)</p>
<p>Korean War: June 27, 1950–Jan. 31, 1955 (inclusive)</p>
<p>Vietnam War: Nov. 1, 1955–May 7, 1975, These dates apply for veterans who served “in-country” in the Republic of Vietnam during this time period otherwise. Aug. 5, 1964–May 7, 1975, inclusive for all others.</p>
<p>Gulf War: Aug. 2, 1990– currently undetermined. A date to be set by law or presidential proclamation (for VA benefits purposes, this time of war is still in effect).</p>

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

DISABILITY REQUIREMENT

The VA pension is “non-service-connected” because the veteran’s or veteran’s surviving spouse’s disability does not need to be connected to or resulting from the veteran’s military service. To medically qualify for base pension, veterans must be either age 65 or older, or totally and permanently disabled or a resident in a nursing home. To receive the enhanced pension with Aid and Attendance, the claimant must require the aid of another person or require supervision from harm in order to perform personal functions required in everyday living.

MARRIAGE REQUIREMENT

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. Benefits are

available to the same-sex spouse of a veteran on the same terms as an opposite-sex spouse. The VA has provided guidance on marriage benefits for same-sex couples, available here: www.va.gov/opa/marriage/.

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 asset limits and transfer penalties described above do not apply to service-connected eligibility. 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. Unlike the VA pension, wartime service is not required. For example, a veteran who suffered from post-traumatic stress disorder (PTSD) during the Vietnam conflict could qualify for compensation, as could a veteran who injured their back on a military base during peacetime.

The VA pays compensation on a scale from 10% to 100% in increments of 10%. Effective Dec. 1, 2023, the VA pays a veteran with no dependents rated at 10% disability \$165.92 per month, while the VA pays the same veteran rated at 100% disability \$3,621.95 per month. The veteran with a rating ranging from 30% to 100% will receive a higher amount if the veteran has a spouse and/or dependent children.

The key component with compensation is establishing the nexus between the veteran’s disability and the veteran’s military service. This connection 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 conflict has a service-connected illness and may qualify for compensation.

Nursing home coverage is available for veterans who need nursing home care for a service-connected disability. A veteran with a minimum service-

connected disability rating of 60% for one condition who has been deemed permanently and totally disabled or has a 70% combined disability rating is similarly eligible. In the case of a private nursing home contracted with the VA, there may be a copayment.

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

APPEALS

The Appeals Modernization Act took effect in February 2019 and significantly changed the appeals process. Any claimant who receives an initial VA claim decision after February 2019 will follow the new Appeals Modernization process if they disagree with the decision. There are three ways to appeal: (1) higher-level review; (2) supplemental claim; or (3) appeal to the Board of Veterans' Appeals. The VA brochure that explains the process is located at: <https://benefits.va.gov/BENEFITS/factsheets/appeals/Appeals-Brochure.pdf>.

CHAPTER 3

MASSHEALTH (MEDICAID)

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

INTRODUCTION

For most older adults, the prospect of long-term care in a nursing home is, to say the least, unpleasant. Older adults worry that the cost of long-term care will deplete their estates. The cost of nursing home care in Massachusetts, which typically ranges from \$140,000 to \$190,000 per year (the daily rate is often over \$400), 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 older adults, or long-term care insurance may not even be available to some older adults due to preexisting medical conditions. See Chapter 6.

Many older adults receive assistance from the federal Medicare program to help pay for medical expenses and the cost of prescription drugs. Generally, Medicare may pay for a portion of short-term rehabilitation in a skilled nursing facility but not for 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 complex financial eligibility and clinical rules.¹ The term “MassHealth” will be used throughout this chapter. A growing percentage of older adults are seeking alternatives to nursing homes, including remaining at home with caregivers or moving to independent living communities, continuing care retirement 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 income and assets.

INCOME All money an applicant receives, such as:	ASSETS Anything an applicant owns, such as:
Social Security	Cash
Dividends	Mutual Funds
Pensions	Automobile
Rental Income	Real Estate
	Retirement Accounts
	Whole Life Insurance
<p>MassHealth is a complex area. Rules and regulations change frequently, and there are many exceptions to the rules. Unlike private health insurance, MassHealth has the right to recover its costs from your estate. (<i>See Section O.</i>) It is important to consult with an experienced elder law attorney.</p>	

A. 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 their income toward 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.

If there is a non-applicant spouse, called a “community spouse,” they will be able to keep all of their own income. If that income is low and falls below a certain minimum, the community spouse will then be allowed to keep a portion of the nursing home spouse’s income, as outlined in Section B of this chapter.

**EXAMPLE 1
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 has less than \$2,000 of countable assets and is otherwise eligible. MassHealth will pay for the balance of her nursing home and medical care.

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

MassHealth rules provide that a community spouse needs income equivalent to 150% of the federal poverty level for two persons, which through June 2023 is \$2,288.75,² and is referred to as the Minimum Monthly Maintenance Needs Allowance (MMMNA). MassHealth will determine the community spouse’s actual income as well as their actual expenses. In addition to the basic MMMNA, MassHealth makes an adjustment if the community spouse’s shelter expenses exceed 30% of the minimum (which is currently \$686.63).

EXAMPLE 2

Mrs. Smith, a community spouse, has monthly income of \$1,800. Her shelter costs (mortgage payments or rent, condo fees, real estate taxes, homeowners insurance, utilities) total \$1,086.63, which is \$400 more than the federal minimum of \$686.63. 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 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 their monthly income to the nursing home as PPA, minus certain allowed

“deductions,” which include a PNA (\$72.80) 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 Example 2 on this page, a Spousal Monthly Maintenance Income 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 and present evidence at an administrative appeal to request an increased asset limit sufficient to generate additional income to satisfy the MMMNA. An experienced elder law attorney should be consulted to evaluate the merits of and prepare for such a hearing.

C. 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. Additionally, in 2023, the community spouse (if any) is generally allowed to keep up to \$148,620 of countable assets, as discussed more fully in Section J of this chapter. MassHealth divides assets into three categories:

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

Only countable assets are considered with respect to asset limitations. The assets of a married couple age 65 and older, when one member resides in a nursing home, are treated differently and discussed more fully in Sections E, H and J of this chapter.

D. Non-Countable Assets

- A principal residence in Massachusetts (*See special rules for the principal residence in Section E*);
- Household belongings and furnishings;
- Personal belongings (e.g., clothing, jewelry, furniture, etc.);
- Burial plots for the applicant and members of their family;
- Pre-paid irrevocable burial contracts;
- A \$1,500 burial bank account for miscella-

- neous 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 their family. *See Example 3.*

- 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 they do not intend to return home, the home becomes a countable asset and must be put on the market for sale.

Older adults 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 an older adult 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 older adult over their home;
- The older adult’s access to equity in their home in the future (e.g., through a reverse mortgage);
- The tax impacts on the older adult and their family; and
- The risks to an older adult’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.

F. 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 4.*

<p>EXAMPLE 3 Countable and Non-Countable Assets</p>
<p>Richard owns his home worth \$250,000, a car worth \$4,00 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 a countable asset.</p>

E. Special Rules for the Principal Residence

MassHealth will treat equity in an applicant’s home, up to \$1,033,000 (as of 2023), 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 strict MassHealth requirements (*see Chapter 6*).
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 that permitted the applicant to remain at home; or

EXAMPLE 4

An Inaccessible Asset Can Become Countable

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.

G. Countable Assets

All assets not considered non-countable or inaccessible are considered countable assets; that is, they are counted toward an applicant's \$2,000 asset limit, or the community spouse's \$148,620 limit. In some cases, both jointly held assets and assets in a trust will be viewed as countable assets.

H. 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 they contributed part or all of the funds to the account. *See Example 5.*

EXAMPLE 5

Who Contributed to a Joint Account?

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.

Other assets held jointly, such as real estate, stocks, bonds and most mutual funds, are presumed to be owned proportionately by each owner. This presumption can also be overcome (*see Example 6*), and in some cases, the entire asset may be deemed inaccessible.

EXAMPLE 6

A Joint Account Presumption

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% of the mutual fund, or \$10,000. (*See Section L regarding transfer penalties for additions to joint accounts made during the five-year look-back period.*)

I. Trusts³

If a MassHealth applicant is the beneficiary and grantor of a trust, and if, under any circumstance, trust principal (as opposed to trust income) 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 7.*

EXAMPLE 7

A Beneficiary of Trust Assets

Paul 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 Paul on a regular basis. Paul applies for MassHealth. MassHealth will consider the entire \$100,000 as a countable asset for Paul.

If the applicant or their 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 their spouse is not a beneficiary of the revocable trust. *See Example 8.*

EXAMPLE 8

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.

Not all trust assets are countable assets, though. For example, certain types of trusts, including carefully drafted irrevocable trusts funded before the

look-back period, pooled trusts qualifying under 42 U.S.C. s. 1396(d)(4)(C) and qualifying testamentary supplemental needs trusts, may prevent assets in such trusts from being deemed countable assets by MassHealth.

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.

J. 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% of the federal poverty level for two persons. In 2023, the maximum CSRA is \$148,620. 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 their 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 their living expenses.

Where MassHealth approves the nursing home spouse for eligibility, any assets higher in value than the \$2,000 asset limit still held in their 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 9.*

EXAMPLE 9 Asset Transfer Between Spouses

Mr. Smith is entering long-term care in a nursing home and is entitled to retain a CSRA of \$148,620. 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 all but the permissible \$2,000 from Mr. Smith's name into Mrs. Smith's account.

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 physically separated spouse's assets, though an appeal may be necessary. In such a situation, the uncooperative or physically separated spouse will not be entitled to any of the applicant spouse's income.

K. Permissible Spend-Down of Excess Assets

A married couple need not necessarily spend down any assets that 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 a pre-need funeral contract, but timing is very important. Another option to consider 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 must satisfy MassHealth requirements concerning naming the Commonwealth of Massachusetts as beneficiary (litigation is pending on the beneficiary requirement). 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. An elder law attorney may present yet further spend-down options for consideration.

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 their 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 \$427 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 their spouse transfers any assets to a spouse or to a blind or qualifying disabled child or to a qualifying trust for such disabled child. Further, there are no penalties when an applicant or their 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.

CAUTION: It is important to note that the annual federal gift tax exclusion (\$17,000 per person in 2023) will be deemed a disqualifying gift transfer under the MassHealth regulations unless it fits under an allowable exemption.

EXAMPLE 10 How the Look-Back Period Works

Florence owns a condo with a fair market value of \$182,329. On April 1, 2023, Florence transfers the condo to her non-caretaker, non-disabled daughter as a gift. On June 1, 2023, 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 427 days ($\$182,329 \div \427 per day). As a result, MassHealth will not approve benefits for the applicant during the 427-day period commencing on June 1, 2023, assuming she is otherwise eligible for MassHealth on that date.

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 their 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 from receiving benefits, it is imperative that the applicant consult with an elder law attorney to discuss what options, if any, are available.

EXAMPLE 11 Timing is Important When Looking at When to Apply for MassHealth

Mike owned a house with a fair market value of \$640,500. On April 1, 2018, Mike transferred the house as a gift to his non-caretaker, non-disabled son. On June 1, 2022, Mike applied for MassHealth. MassHealth looked back 60 months from the date of Mike's application and flagged the disqualifying transfer. MassHealth calculated a 1,500-day ineligibility period ($\$640,500 \div \427 per day). This ineligibility period will commence on June 1, 2022, and last 1,500 days (4.1 years). If Mike had waited to apply until after April 1, 2023, the transfer would not have been included in the look-back period and he could have been eligible for benefits on April 2, 2023.

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.

N. The Spend-Down Process

When a single applicant has countable assets that exceed the amount allowed by MassHealth, they 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
Burial account	\$1,500
Total remaining (allowable)	\$2,000

O. Estate Recovery

MassHealth can 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. MassHealth’s current policy is that they will not pursue any estate recovery if the value of the member’s estate is \$25,000 or less.

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, their 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. MassHealth regulations also include circumstances in which estate recovery can be delayed or waived, so it is important to consult the latest regulations upon the death of a MassHealth member to determine whether and the extent to which MassHealth can recover against the estate. Estate recovery will not be required until after the death of a surviving spouse, if any, or while there is a surviving child who is younger than 21 years old or a child of any age who is blind or permanently disabled. This request is time-sensitive.

Note to SCO and PACE members: If you enroll in MassHealth and leave a probate estate, MassHealth will have an automatic lien against your estate. MassHealth will seek reimbursement not for the costs of medical care and treatment, but for the monthly premiums, which MassHealth pays to Senior Care Options (SCO) or the Program of All-Inclusive Care for the Elderly (PACE) on your behalf. MassHealth starts making the premium payments in the month after you enroll, and the payments could be as much as \$3,000 per month. If you are enrolled in SCO or PACE, you should discuss ways to avoid probate with an elder law attorney in order to avoid any estate recovery lien.

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 the 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 attorney, particularly an 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 older adult 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.

An experienced 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 is a current MassHealth beneficiary or you 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 in Chapter 19 of this guide.

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1. MassHealth is also available to blind and disabled individuals who meet the eligibility guidelines.
 2. The minimum and maximum monthly maintenance needs allowance figures usually increase each year due to a cost-of-living allowance.
 3. Specific rules pertaining to trusts vary according to the date the trust was established and the specific terms of the trust.
 4. In some circumstances, a disqualifying transfer may be an effective MassHealth planning tool.

CHAPTER 4

COMMUNITY MEDICAID (MASSHEALTH) BENEFITS

Programs for Older Adults at Risk for Institutionalization

INTRODUCTION

In addition to providing long-term care (LTC) coverage, Medicaid (known as MassHealth in Massachusetts) offers community benefits that enable older adults to stay at home while still receiving necessary care. Community MassHealth offers various programs and services to individuals age 65 and older 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 older adults who wish to live at home, MassHealth offers various programs that allow an older adult to receive care within their home. Adult and supportive day care, transportation and caretaker services are among a multitude of benefits that MassHealth provides to empower older adults to live at home. An experienced elder law attorney can help an individual determine which program might be most appropriate for each older adult's particular circumstances.

Note that qualifying for MassHealth in a community setting does not translate into coverage in a nursing home setting. Planning for community MassHealth may have adverse consequences for achieving nursing home eligibility if not done properly, as the income and asset rules vary for all benefits. For example, the transfer rules differ in a community setting from the long-term care nursing home rules. In addition, be advised that there could be estate recovery claims. *See Chapter 3, Section O for more information.* Therefore, one should consult with an attorney who is well-versed in these matters. Regulations and agency practices also change regularly.

A. Home- and Community-Based Services Waivers

For older adults 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 (FEW), authorize MassHealth to pay for those services, regardless of the number of hours needed. The waiver program serves three important purposes: (1) saves the state money; (2) allows the older adult to remain at home with care; and (3) provides older adults with greater choices in their care. Under the FEW program, the responsibility of care for the older adult is shifted to family members, home care agencies or other designated caregivers. The goals of the program are to help older adults age outside of a nursing home, and to promote independent living. If an older adult qualifies for the FEW, they can participate in the Community Choices or Personal Care Attendant (PCA) programs, the Program of All-inclusive Care for the Elderly (PACE), or senior care options (SCOs), if eligible.

The FEW allows those older adults who are eligible for nursing home care to receive services at home.¹ To qualify for the waiver, an older adult must either be at least 65 years old or, if under 65, be permanently and totally disabled.² Additionally, the individual must meet a clinical requirement and show that, if they did not receive waiver services, they would require institutionalization (nursing home care).³ In addition to the typical asset limitation of \$2,000 for MassHealth services, the waiver imposes a 2023 income threshold of \$2,742 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 \$148,620 (2023) (other than for the PACE program), but it is often beneficial to apply for only one spouse or to apply separately. Note that a recent MassHealth hearing decision found that LTC insurance benefits are not considered income when determining eligibility for the FEW program. Although the administrative decision is not binding on MassHealth, it should be mentioned at the time of application, if appropriate.

If an individual's gross monthly income is greater than \$2,742, there will be a recurring six-month

deductible that must be met before MassHealth coverage will begin. For example, if a single applicant's gross monthly income is \$2,792 (\$50 over the income limit), the Medicaid \$522 standard (less a \$20 income disregard) is applied and subtracted from \$2,792. That figure, \$2,250, is then multiplied by six, and as a result, a \$13,500 deductible must be met every six months before MassHealth benefits will begin/resume. This amount has to be paid out of pocket for medical or remedial expenses by the individual (remember, this individual can only have \$2,000 of assets) every six months, and then proof of payment has to be sent to MassHealth before becoming eligible for benefits. This approval is not retroactive, and then the individual has to meet this deductible every six months. *Note, if the income of an individual who was deemed eligible for the FEW (300% of the Federal Benefit Rate (FBR) or less) increases to a sum that exceeds this amount, the individual may still continue receiving benefits by paying the difference between their actual income and 300% of the FBR as a co-pay.

Applicants seeking coverage under the PCA program may have lower recurring deductibles, since an additional \$1,094 PCA disregard is subtracted from their gross income, resulting (using the prior example) in a monthly deductible of \$1,176, which, when multiplied by six, imposes a \$7,056 deductible (as opposed to a \$13,500 deductible) that must be met every six months to maintain eligibility. An individual needing only 12-15 hours of care each week might benefit from applying for MassHealth benefits to cover care after the deductible is met.

Applicants must meet any deductible by paying qualifying medical expenses, including Medicare and supplemental health (Medigap), prescription and dental 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 their 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 family or spousal assets, for example, as assets are limited to \$2,000 for a single individual and \$3,000 for a married couple). Advocacy and legislative efforts are underway to reduce the deductible amounts, with the goal of ensuring that more individuals may remain at home, but it

is unclear whether or when they will be successful.

Because MassHealth does not impose penalties for transferred assets in community cases, it is imperative that all applicants, but particularly those who anticipate having the recurring deductible, do not spend down their assets to \$2,000. Instead, they should move excess assets out of their name to a trusted individual (who may have to return them, if long-term nursing home care is needed later), so that funds will be available for medical and non-medical expenses. This should be done **ONLY** with the advice of an experienced elder law attorney.

Services and benefits of the FEW 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 older adults 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 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 FEW 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 older adult must be already enrolled in or eligible for the FEW. The program provides extensive home- and community-based services to older adults 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 older adults 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.⁴

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.⁵

2. PACE

The PACE program provides comprehensive medical and social services to frail older adults so as to allow them to live in their communities and to receive all of their health services under the same umbrella.⁶ 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.⁷ All of the medical services are provided by MassHealth at no cost to the older adult. 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 \$3,000⁸ if both

are seeking coverage. Under current practice, if only one member of a couple needs services, the non-applicant spouse's income and assets will be disregarded. In addition, the income threshold for an individual is \$2,742 (with a deductible imposed if the applicant's income exceeds this figure).

Through PACE, MassHealth will coordinate care for the older adult and provide the individual with medical professionals, including doctors, nurses, aides, therapists and social workers. Under this program, the older adult receives their 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 (PCA) Program

The PCA program provides personal care services to older 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 surrogates are responsible for directing the care to assist with ADLs and instrumental activities of daily living (IADLs). A PCA participant or their surrogate acts as an employer, and can hire friends, neighbors or certain family members (spouses and legal guardians are not eligible) to be their personal care attendant.⁹ Effective April 1, 2023, the PCA wage rate is \$18 per hour. Based on the federal poverty levels, effective Jan. 13, 2023, the MassHealth PCA disregard amount is \$1,094 for an individual and \$1,536 for a couple.

To be eligible for the program, an individual must have a permanent or chronic disability that requires them 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 older adult, and the services must be medically necessary.¹⁰ Additionally, the older adult 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 (e.g., bathing, grooming, eating, etc.), IADLs (e.g., homemaker services, laundry, meal preparation, etc.) and transportation. A personal care attendant may not be paid: (a) to help an older adult 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.¹¹

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, 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 professionals develops 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 an 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, as well as 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.

NOTE TO SCO AND PACE MEMBERS: If you enroll in MassHealth, and leave a probate estate, MassHealth will have an automatic lien against your estate. MassHealth will seek reimbursement not for the costs of medical care and treatment, but for the monthly premiums, which MassHealth pays to the SCO on your behalf. MassHealth starts making the premium payments in the month after you enroll, and the payments could be as much as \$3,000 per month.

If you are enrolled in SCO or PACE, you should discuss ways to avoid probate with an elder law attorney in order to avoid any estate recovery lien.

B. Other Programs for Older Adults

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

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 older adults who wish to transition to assisted living facilities (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 helps pay for the rent portion at an assisted living facility to the individual directly. An individual can get GAFC benefits without SSI-G. GAFC pays \$43.53 per day (\$1,324 per 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 the SSI-G program. The resident does not have to apply for or be eligible to receive SSI-G in order to qualify for GAFC. New regulations have been implemented for GAFC and can be found at 130 CMR 408.502 through 408.527.

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 (e.g., dressing, bathing, eating or toileting); (4) have the ability to live independently, with support services; (5) meet eligibility requirements for public housing, GAFC, ElderChoice subsidized rents and/or SSI-G; (6) do not need full-time skilled nursing care; and (7) are medically approved for assisted living by their 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. Because MassHealth does not impose penalties for transferred assets in community cases, it is imperative that all applicants, but particularly those who anticipate having the recurring deductible, do not spend down their assets to \$2,000. Instead, they should move excess assets out of their name to a trusted individual (who may have to return them, if long-term nursing home care is needed later), so that funds will be available for medical and non-medical expenses. This should be done ONLY with the advice of an experienced elder law attorney.

In addition, if an individual's income is greater than \$1,215 (2023), or a couple's income is greater than \$1,643 if both spouses are applying (100% of federal poverty level), there will be a recurring six-month deductible.

Applicants must satisfy the deductible by paying qualifying medical expenses, including Medicare and supplemental health insurance premiums. Because only a portion of the monthly assisted living fee qualifies as a medical expense (the majority is considered room and board), individuals who are required to meet deductibles may have to pay as much as four times the amount of the deductible figure. Therefore, 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 or family assets, for example). Once GAFC benefits are in effect, the resident is required to contribute their income toward the

monthly rent portion; GAFC pays the medical portion.

2. Massachusetts Adult Family Care

The Adult Family Care program is a relatively new MassHealth program that provides care to older or disabled individuals by having the older adult move into a caregiver's home or having a caregiver move into the older adult'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. Care givers 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 \$9,000 and \$18,000 from MassHealth, with the payment based on the level of care needed. Caregivers also can receive as many as 14 respite care days per year.

To be eligible for Adult Family Care, the applicant must be 16+ or disabled and require either help with one ADL (level 1) or 24-hour assistance with ADLs (level 2). Care requirements, however, cannot be so severe as to necessitate residency in a nursing home.

OTHER IMPORTANT OLDER ADULT PROGRAMS

A. Statewide Nutrition Programs

The Elderly Nutrition Program, administered by the Executive Office of Elder Affairs, allows local agencies to provide nutritious meals to older adults. 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 older adults (age 60 or older) and handi-capped or disabled people under age 60 who live in housing facilities occupied primarily by older adults 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 older adults. In addition to providing meals, the Elderly Nutrition Program 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.

B. 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 older adult is eligible for the program if they are 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.

C. Pharmacy Outreach Program

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

D. Serving the Health Information Needs of Everyone Program

The Serving the Health Information Needs of Everyone (SHINE) program provides health insurance counseling services to older 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 older adults and Medicare beneficiaries understand their rights and benefits under Medicare and other health insurance coverage. Counselors can identify and compare current options, and protect older adults from paying too much for their medical care. SHINE counselors also help older adults 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 homebound clients. To locate a SHINE counselor in your community, contact your regional SHINE program at <https://www.sec.state.ma.us/cis/ciscig/o/o3.htm>.

CONCLUSION

A long-term nursing facility is not the only choice for an older adult. There are a multitude of options for older adults 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 older adult 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.

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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/doc/waiver-brief-0/download.
 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

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). Established in 1966 under Title XVIII of the Social Security Act, Medicare serves more than 63 million people (as of 2022). This vast program insures U.S. citizens and legal residents who are age 65 or older and people under age 65 year with certain disabilities. The “Medicare & You”¹ 2023 guide, available from CMS, is the national handbook as well as an excellent reference, published annually for Medicare beneficiaries.

Medicare cards are mailed to all Medicare recipients (“beneficiaries”) upon enrollment. The cards do not use your Social Security number, but a special Medicare number that only you have. Medicare will NEVER call you to check on your Medicare account; Medicare only writes to you. Do not give your Medicare number over the telephone. If you need to discuss your account, you can sign in to Medicare at www.medicare.gov/account/login or call 1-800-MEDICARE (1-800-633-4227). Since the Social Security Administration (SSA) handles Medicare enrollment, you may contact a district SSA office for enrollment issues. You may also enroll in Medicare online at www.ssa.gov.

A. What Are the Different Parts of Medicare?

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

1. Part A: Helps cover inpatient hospital services, including a semi-private room, meals and general nursing services; Part A also covers some home health care, limited skilled nursing facility care, certain hospice services and most inpatient drugs. In order to receive Part A hospital benefits, a person must be admitted as an “inpatient” when the person’s doctor AND the hospital both agree to the admission. If the hos-

pital does not agree, the person’s stay will not be covered by Part A. Going to the emergency department is NOT a Part A admission. Part A does not cover all inpatient costs; certain costs will be covered by Part B. A common misconception is that Part A covers custodial nursing home care; Part A ONLY covers skilled nursing facility (SNF) stays under certain conditions, as discussed below.

When a person is first admitted as an inpatient to a hospital, the Part A benefit begins and beneficiaries are responsible for the Part A deductible, unless the person has a Medicare Supplement, discussed below. The Part A benefit period ends when the person has not been an inpatient or receiving skilled nursing care for a period of 60 CONSECUTIVE days. Under Part A, benefits can expire before the benefit period ends. There can be more than one benefit period in a year, as long as the 60-consecutive-day interval requirement has been met. The Part A deductible is due for each new benefit period. Going to the emergency room under Part B without a hospital admission will not affect the 60-day count and force a restart of the 60 consecutive days. In 2023, the Part A deductible is \$1,600.

Your Medicare card shows Part A coverage as “HOSPITAL.”

2. Part B: Helps cover services from doctors and other health providers, some preventative care, emergency department visits, urgent care visits, medically necessary outpatient services, lab work, durable medical equipment and ambulance services. Part B also covers certain drugs that must be administered by a physician and vaccines administered by a pharmacist or other health care provider. Part B covers outpatient surgery (sometimes called “day surgery”) and time spent in the hospital for “observation.” A person who is in the hospital for observation

or in the emergency room does not qualify for Part A benefits. Part B has an annual deductible, paid only once per year as you use services. The Part B plan deductible is due when you start using services at the plan beginning. Plan B generally starts in January, except the first year you are enrolled, when the plan starts with your date of enrollment and the deductible is due when you first start using services. The deductible for 2023 is \$226. Part B also requires a monthly premium and pays for 80% of the approved costs of covered services. The monthly premium increases above the standard premium as your income increases; the amount is based on tax returns from two years earlier (e.g., for 2023 Part B premium, the income tax filing for 2021). Specific amounts can be calculated using the table on page 46. Note that Part B premiums for certain transplant patients are different, as shown on the table on page 46.

3. Medicare Part C (Medicare Advantage): Includes all the benefits and services under Parts A and B and may or may not offer outpatient prescription drug coverage. Medicare C/Advantage plans are run by private health insurance companies, approved by Medicare and may include extra benefits and services for an extra cost, such as vision, hearing and dental coverage, and rides to medical appointments that are not covered by original Medicare. Generally, you are in a network and must use the providers in that network for your health care; *see the TIP on this page for additional details on these plans.* Medicare Advantage plans have a yearly limit on out-of-pocket costs for Medicare Part A- and B-covered services. Once the yearly limit is reached, no additional payments from the beneficiary are necessary for the remainder of the year.

Part C will generally have its own premium, in addition to the Part B (and Part A, if any).²

TIP: Part C plans may or may not include prescription drug costs. You can check each plan’s benefits on the Medicare website, www.medicare.gov/plan-compare/#/?lang=en. If you have a Medicare Advantage HMO or PPO plan that includes prescription drug coverage, you may not enroll in a separate Part D plan for prescription drug coverage or in a Medigap (supplemental) plan.

4. Medicare Part D: Helps cover the costs of outpatient prescription drugs. To get prescription drug coverage, you must enroll in either a free-standing Part D plan or in a Medicare Advantage plan that includes drug coverage. Medicare mandates that all drug plans cover certain drug classes but not all prescription drugs. You should check the plans when enrolling and annually during open enrollment to see if your prescriptions are covered by the plans. In addition to the premium charged by the drug plan, Medicare beneficiaries with higher incomes are charged a Part D Income-Related Monthly Adjustment Amount (IRMAA). IRMAA means that you pay premiums to two different places each month, one to your insurer and the other to Social Security. The Part D Premium chart is located at the end of this chapter. Thus, if your 2021 income (the earliest Medicare can verify from tax returns) is above \$97,000 if you file individually, or \$194,000 if you are married and file jointly, you will pay an extra amount for the prescription drug coverage. Changes to Part D insulin coverage are discussed on page 47.

TIP: The Medicare Planfinder tool can help you estimate your annual medical costs; be sure to use the one at www.medicare.gov for full information. Ask your doctor or pharmacist for your current drug list to use in your search. Private insurers have similar information but usually only list the plans they offer, not the full range of choices you have. Private plans generally end with “.com.” The planners do not include information on premium adjustments. Note: these plans did not include the \$35/month insulin pricing in 2023.

Specific information regarding Part D insulin coverage and diabetic supplies is located in “Part D — Insulin Coverage” on page 47.

Part A and Part B are called “Original Medicare.” Under Original Medicare, you can choose any available provider anywhere in the country who accepts Medicare. Payment is fee-for-service. You should purchase a Medicare Supplement, also called Medigap, if you have Original Medicare to help cover certain out-of-pocket costs. You may automatically qualify for Part A (read below), but you must enroll in and pay a monthly premium for Part B. You must also choose a Part D plan if you want prescription drug coverage, and you pay a premium and may pay an additional amount (called IRMAA) for Part D. The premium charts are listed at the end of this chapter.

If you enroll in Original Medicare, you should strongly consider purchasing a Medicare Supplement. The supplement has an additional premium but covers the deductibles and co-insurance you would otherwise have to pay. If you have preexisting conditions that require regular physician visits, you may find that a supplement will save you money. There are decision charts on page 32 to help you decide.

An “Accountable Care Organization,” or ACO, is a type of original Medicare plan. When your physicians participate 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 does not limit your choice of providers or change your Medicare benefits, which is different from any Advantage Plan.³

Medicare Advantage Plans cover Part A, hospital, and Part B, medical benefits, and are sold and managed by private insurers. These plans manage your Medicare A and B benefits. They have a range of premiums, costs and rules, and may or may not offer prescription drug coverage. Some also offer limited dental, vision, fitness, transportation and hearing device insurance. You pay your Part B premium and usually another separate premium to the Medicare Advantage Plan.⁴

There are generally two types of Medicare Advantage plans — a Health Maintenance Organization (HMO) and a Preferred Provider Organization (PPO). If you purchase an HMO, you are restricted to the doctors, other health care providers and hospitals in the HMO network. This means that if you go to a provider not listed in your network, you will likely not have insurance coverage for the visit, even

if the provider accepts Medicare. There are special rules for emergencies. Under an HMO, you must have a primary care physician, who then authorizes medical care and referrals before you can see specialists.⁵

Medicare Advantage plans are also sold as 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.⁶

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 restriction. 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.⁷

Finally, Part C, Medicare Advantage, includes Special Needs Plans (SNP), which are limited to people with specific conditions or living in institutions, or dual beneficiaries (qualified for Medicare and Medicaid/MassHealth).⁸

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.

When you have a Medicare Advantage Plan, you cannot buy Medigap insurance to cover your deductibles, co-pays and co-insurance. 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; this money is usually less than the plan deductible. 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 toward 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. Consider adding drug coverage through a Medicare Prescription Drug Plan (a Part D plan) if you choose a Medicare Advantage Plan that does not include drug coverage; without prescription drug coverage at the beginning, you will likely have to pay a penalty to purchase Part D in the future.

If you have an existing health savings account (HSA), you should stop contributing to your HSA at least six months before you apply for Medicare. If you make HSA payments after you start Medicare, you may have to pay a tax penalty. You can use your HSA money after you enroll in Medicare to pay for deductibles, premiums, co-payments and co-insurance, but you cannot make additional HSA contributions when you enroll in Medicare.

B. Medicare and Medicare Advantage Limitations

Payroll and federal income taxes all Medicare beneficiaries pay over their working life cover about 75% of the Medicare program costs. The remaining 25% is paid by individual beneficiaries, or through the help programs discussed below. Medicare, including Medicare Advantage plans, does not pay all medical bills, even for covered services. The beneficiary pays premiums, deductibles, co-payments and co-insurance for many services. (*See Medicare 2023 Costs at-a-Glance chart on pag 32.*)

Part A benefits cover inpatient hospitalization, skilled nursing facility (SNF) care, hospice and home care. Part A benefits do not automatically start when you go to the hospital. In order to get Part A benefits, you must be admitted as an inpatient by both your doctor and the hospital. If your doctor tells you to go to the emergency department, you are NOT covered by Part A, only Part B. When you are admitted as an inpatient, you will pay a deductible of \$1,600 for 2023. This is not prorated; you pay this if you stay one day or for 60 days. You pay this deductible each time you start a new Part A period, not just once a year. A Part A period ends only when you have been out of the hospital or not using any

skilled nursing care for 60 consecutive days. Part A does not cover any doctor's services while you are hospitalized; doctor's services are billed under Part B and you pay for them separately.

Part A covers care in an SNF as long as you meet certain conditions, for up to 100 days per benefit period. To qualify, you must first be admitted as an inpatient in a hospital or Acute Care Unit for a minimum of three Medicare days (counted from midnight to midnight). Additionally: 1) you must need skilled services that must be performed by professional personnel for a condition for which you were in the hospital; 2) you must need these services on a daily basis; 3) as a practical matter, the daily skilled services can only be provided on an inpatient basis; and 4) the services must be reasonable and necessary (consistent with the nature and severity of the illness or injury). If you do not meet all four of these criteria, you cannot receive SNF benefits under Part A, even if you have been an inpatient, or have available or unused SNF days. Part A does NOT cover custodial care, even in hospice.

Medicare does provide skilled care (nursing, physical therapy, occupational therapy) for services that are required to maintain the patient's current function or to prevent or slow further deterioration. This requirement for care is referred to as the "Jimmo" standard, named after the court case that changed Medicare practice. Jimmo care must meet certain requirements. These services must be of such complexity and sophistication that the skills of a qualified therapist are required to perform the procedure safely and effectively. If a service can be safely and effectively performed (or self-administered) by an unskilled person, without the direct supervision of a nurse, the service CANNOT be regarded as a skilled nursing service although a nurse actually provides the service. A service is not considered a skilled nursing service merely because it is performed by or under the supervision of a nurse. The unavailability of a competent person to provide a non-skilled service, regardless of the importance of the service to the patient, does NOT make it a skilled service when a nurse provides the service. In addition, these services to "maintain" the patient's current condition or to prevent or slow further deterioration that do require skilled nursing cannot be provided in a hospital or skilled nursing facility, or most Medicaid nursing facilities. These services are only provided in

the “home.”⁹

Part B has a yearly \$226 deductible before providing coverage for covered services. Once the deductible is satisfied, Part B pays 80% of the approved 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. There are some exceptions — COVID vaccines and boosters, flu shots, Hepatitis B shots, pneumococcal shots and some insulin devices are covered under Part B.

Many Medicare beneficiaries express concern that the deductibles, the 20% Part B co-insurance (without a cap or out-of-pocket maximum), the costs of Part A hospital and SNF 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 purchase supplemental Medicare, which fills the gaps in Medicare.

MEDICARE 2023 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 \$506 each month for the entire time you have Part A.
Part A hospital inpatient deductible and co-insurance	You pay: <ul style="list-style-type: none"> • \$1,600 for each benefit period • Days 1–60: \$0 co-insurance for each benefit period • Days 61–90: \$400 co-insurance per day of each benefit period • Days 91 and beyond: \$800 co-insurance per each “lifetime reserve day” after 90 for each benefit period (up to 60 days over your lifetime) • Beyond lifetime reserve days: all costs
Skilled nursing facility stay when Medicare Part A-eligible	First 20 days: \$0 for each benefit period <ul style="list-style-type: none"> • Days 21–100: \$200 co-insurance per day of each benefit period • Days 101 and beyond: all costs
Part B premium	For those enrolling in Part B for the first time, the standard Part B premium is \$164.90 (or higher depending on your income); those in the highest bracket pay \$560.50 per month. Medicare uses your income from two years ago (2021) to calculate your premium. <i>(For immunosuppressive drug premiums, see chart on page 46.)</i>
Part B deductible and co-insurance	\$226 per year. After your deductible is met, you typically pay 20% 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. You usually also have to pay the Part B premium.
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 \$12.20 per month to \$76.40 per month. If your yearly income in 2021 was \$194,000 or less filing jointly, or \$97,000 filing singly, you pay only your plan premium. Compare costs for specific Part D plans.
Home Health Care	Whether under Part A or Part B: \$0 for approved home health care services; 20% of the Medicare-approved amount for durable medical equipment.
Hospice Care	\$0 for hospice care and limited costs for outpatient care; does not include custodial care. There is a small co-payment of \$5 to \$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 cost. Medicare does not cover room and board when you get hospital or hospice care in your home or another facility.

C. 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 (green card holder).
- 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 65th 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 must actively enroll in Medicare. You must contact Social Security during the initial enrollment period. You can enroll in person at your local Social Security Administration office, enroll online at www.SSA.gov, or call the Social Security Administration at 1-800-772-1213, Monday through Friday from 7 a.m. to 7 p.m. As of the date of printing, SSA recommends you enroll online.

If you or your spouse has paid Medicare taxes for at least 10 years (40 quarters), then you do not have to pay a premium for Part A Medicare. If you have not paid Medicare taxes for 40 quarters for that period of time (not how much in taxes you paid), then you will pay a monthly premium. If you worked more than 30 quarters but less than 40, it costs \$278/month; if you worked less than 30 quarters, then \$506 each month for the entire time you have Part A. If you work additional quarters, you can add these to your Social Security Administration account and reduce your lifetime premiums. Request an update from Social Security so you get the credits earlier.

Medicare is also available to people younger than 65 who have certain disabilities:

- If you have end-stage renal disease (ESRD) or amyotrophic lateral sclerosis (ALS), you are eligible for Medicare at any age. 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.

NOTE: 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).

NOTE: Beginning in 2023, certain Medicare enrollees who are 36 months post-kidney transplant and no longer eligible for full Medicare coverage can elect to continue Part B coverage of immunosuppressive drugs by paying a premium based on earnings; see the chart on page 46.

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, or when you lose your employer health insurance, your monthly Part B premium may increase 10% for each year you delayed as a late enrollment penalty for as long as you have Medicare. This late enrollment penalty is paid as an increase in your monthly premium and is permanent if you are 65 or older. If you are younger than 65, the penalty ends at 65. In addition, there is a coverage gap. You can sign up between Jan. 1 and March 31 of the following year, but coverage does not begin until July 1. If you have incurred such a sanction, you should look into filing for “equitable relief.” A successful claim for equitable relief may waive the Part B late enrollment penalties and win a “special enrollment date” if the federal government has misled you about enrollment rules.

D. 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 start has been raised. This means that you may qualify for Medicare before you qualify for Social Security benefits. *See Chapter 13 for full information on Social Security.* Consequently,

many people work beyond age 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.”¹⁰ If your employer has more than 20 employees, the employer’s health insurance is primary. 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 fewer than 20 employees. 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. In this case, if you fail to enroll in Medicare when you are first eligible, you may have little or no health coverage.

If you do enroll in Part A while working, and you keep your group insurance plan, you can delay enrolling in Part B. When you leave work, you will have a special enrollment period to enroll in Part B. You can enroll anytime 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.¹¹ Note that neither COBRA nor retirement health insurance coverage can extend the enrollment period for Part B or protect you from penalties.

Be sure to sign up for Medicare Parts A and B (and also Medigap) when first eligible or upon losing employer group coverage. COBRA is not considered credible coverage. Those who go for extended periods of time without creditable 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% 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 on the monthly premium costs.

TIP: Your employer’s insurance may coordinate benefits with Medicare; in some instances, the employer’s insurance will act like a Medicare Supplement and pay deductibles and co-insurance. Check the details where you work.

E. How Does Medicare Impact Other Health Insurance and Personal Injury Monies?

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 or sources of payment for a health-related injury, see “Medicare Guide to Who Pays First,” from www.Medicare.gov.

If you have Medicare and other health insurance or coverage, be sure to tell your doctor and other providers. They will be able to send your bills to the correct payers to avoid delays. If you have questions about who pays first or if your insurance changes, call 1-800-MEDICARE and ask for the Medicare coordination of benefits contractor.

For information on End-Stage Renal Disease, refer to www.medicare.gov/basics/end-stage-renal-disease.

If you receive money from a personal injury settlement, workers’ compensation claim, car accident, medical settlement or other compensation for personal injury, this will likely affect your Medicare benefits. You may owe Medicare money for your care. You should notify Medicare and speak with the Medicare coordination of benefits contractor. Failure to follow these rules can result in loss of Medicare coverage for certain conditions and a fine, possibly as much as \$1,000 per day.

Medicare will first send a demand for reimbursement. The procedure is found at www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Reimbursing-Medicare/Reimbursing-Medicare-. The time to respond is 30 days, before interest begins to accrue. There, is however, a waiver of recovery process described there.

Medicare has legal authority to recover money from these third-party payments. See www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Beneficiary-Services/Medicare-Recovery-Process/Medicare-Recovery-Process for a description of the various steps. Note that interest accrues on unrecovered payments. Medicare has an automatic lien on any funds you are paid.

IF YOU	CONDITION	PAYS FIRST	PAYS SECOND
Are age 65 or older and covered by a group health plan because you are working or are covered by a group health plan of a working spouse of any age	Entitled to Medicare and the employer has 20 or more employees	Group Health Plan	Medicare
	The employer has less than 20 employees and has no Medicare exceptions	Medicare	Group Health Plan
Have an employer group health plan after you retire and are age 65 or older	Entitled to Medicare	Medicare	Retiree coverage
Are disabled and covered by a large group health plan from your work or a family member who is working	Entitled to Medicare and: 1. The employer has 100 or more employees, or 2. The employer has less than 100 employees and no Medicare exceptions	1. Large Group Health Plan 2. Medicare	1. Medicare 2. Group Health Plan
Have been in an accident where no-fault or liability insurance is involved	Entitled to Medicare	No-fault or liability insurance for services related to accident claim	Medicare
Are covered under workers' compensation because of job-related illness or injury	Entitled to Medicare	Workers' compensation for workers' compensation claim-related services	
Are a veteran and have veteran's benefits	Entitled to Medicare and veteran's benefits	1. Medicare pays for Medicare-covered services; 2. Veterans Affairs pays for VA-authorized services NOTE: Generally, Medicare and VA can't pay for the same service	Usually doesn't apply
Are covered under TRICARE	Entitled to Medicare and TRICARE	Medicare pays for Medicare-covered services TRICARE pays for services from a military hospital or any other federal provider	TRICARE may pay second
Are age 65 or older OR disabled and covered by Medicare and COBRA coverage	Entitled to Medicare	Medicare	COBRA

F. Options to Enhance Original Medicare Coverage

1. Buy a Medigap Plan for Supplemental Insurance

Medigap plans cover many of the expenses you owe under Original Medicare A and B. Medigap does not cover more services or give you more coverage than Original Medicare. Here are two examples. First, Medicare does not cover hearing aids, so Medigap does not cover hearing aids. Second, under Part A, you would have up to 100 days in a skilled nursing facility (rehabilitation center) provided you meet the requirements. You would pay nothing for the first 20 days, and co-insurance of \$400 per day for days 21 through 100. A Medigap plan will pay the co-insurance of \$400 per day for all of the days when you qualify for Medicare coverage but will not pay for any costs beyond the 100 days. This is because Medicare itself does not cover more than 100 SNF days in any one period. Medigap will not pay if you are not receiving skilled care, even if you have not used all your days.

You have to pay a premium for Medigap plans. Currently, in Massachusetts, you can purchase a Medigap plan at initial enrollment or during any annual renewal. This is not true in all states, and may not be true in the future. In some states, 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, or you may have to take a physical exam to get Medigap, and it may cost considerably more.¹²

Massachusetts Medigap options are different than those in other states, but Massachusetts offers three options of Medigap plans: the Core plan, Supplement 1 and Supplement 1A.

1) **Core:** The Core plan is the least expensive of the three options and covers the Part B co-insurance amount, paying for the 20% 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 B deductibles out of pocket and the Part A deductibles and co-insurance.

2) **Supplement 1:** Like the Core plan, this option covers the 20% Part B co-insurance amount. Additionally, 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 premium is higher than the Core plan offerings.

3) **Supplement 1A:** This plan covers the Part A deductible, but not the Part B deductible.

If you are purchasing a Medigap plan, check if the plan covers Massachusetts state-mandated benefits, including yearly Pap tests and mammograms.

IMPORTANT NOTICE: Medicare Supplement premium rates are required to be in effect for no less than 12 months. Effective dates shown for each carrier are based on the most recent filing on record with the Division of Insurance.

TIP: Use this Medicare Planfinder tool to compare Medicare Supplement plans and prices available: www.medicare.gov/medigap-supplemental-insurance-plans/#/m/?year=2023&lang=en.

The Advantages and Disadvantages of Medicare Supplements

- Medicare supplements in Massachusetts work with Original Medicare; policyholders generally have low out-of-pocket costs when receiving covered services and flexibility in choosing providers. There are no networks and no referrals are necessary.
- Premiums for Medicare supplements may exceed \$200 a month, paid to the insurance company.
- Also, the supplements do not cover most prescription medicines. In many cases, retirees incur the additional cost of a Part D plan.

Medigap in Massachusetts

The chart on page 37 compares Massachusetts Medigap plans.

MEDIGAP IN MASSACHUSETTS: Compare These Plans Side-by-Side

If a “yes” appears, the plan covers the described benefit. If “no” appears, the policy doesn’t cover that benefit.

MEDIGAP BENEFITS	MEDIGAP PLANS		
	Core Plan	Supplement 1	Supplement 1A
BASIC BENEFITS	Yes	Yes	Yes
Part A: inpatient hospital deductible	No	Yes	Yes
Part A: skilled nursing facility co-insurance	No	Yes	Yes
Part B: deductible*	No	Yes*	No
Foreign travel emergency	No	Yes	Yes
Inpatient days in mental health hospitals	60 days per calendar year	120 days per benefit year	120 days per benefit year
State-mandated benefits (yearly Pap tests and mammograms. Check your plan for other state-mandated benefits.)	No	Yes	Yes

*Supplement 1 Plan (which includes coverage of the Part B deductible) will no longer be available to people who are new to Medicare on or after Jan. 1, 2020. These people can buy Supplement 1A Plan. However, if you were eligible for Medicare before Jan. 1, 2020, but not yet enrolled, you may be able to buy Supplement Plan 1.

TIP: If your Medicare costs are too expensive, there are four types of Medicare Savings programs that may help. To find out if you are eligible, and how much help you qualify for, go to <https://www.medicare.gov/basics/costs/help/medicare-savings-programs>.

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

Original Medicare Parts A and B, even with a Medigap Supplement, do not offer prescription drug coverage. Some 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 prescription drug costs and which Part D plan is right for you.

Medicare Part D is an option that provides prescription drug coverage to Medicare beneficiaries through a private insurance company. This program provides coverage for many common medicines that 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 amount the policyholder pays out of pocket. These co-pays change if the policyholder reaches the coverage gap.
- 3) **Coverage Gap:** Although Medicare has officially removed the coverage gap from Medicare Part D plans, most private insurers still use a coverage gap in their policies. The coverage gap (also called the “donut hole”) goes into effect when the total cost of drugs covered un-

der the plan reaches \$4,660 (2023 numbers) in one calendar year and extends until \$7,400. In the gap, policyholders generally pay 25% of the cost of both their generic and brand-name medicines, usually more than the co-pay.

- 4) **Catastrophic Coverage:** If a policyholder’s out-of-pocket cost reaches \$7,400 during 2023, 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).

TIP: Medicare has two websites that will help you with Part D coverage. One site helps you determine which type of plan is right for you (e.g., which type of plan works for people who take a lot of expensive prescription medications, or those who don’t take any); this site is at www.medicare.gov/drug-coverage-part-d/how-to-get-prescription-drug-coverage/6-tips-for-choosing-medicare-drug-coverage. One site also helps you select between plans in your coverage area, which is <https://www.medicare.gov/plan-compare/#/?lang=end&year=2023>.

Be sure to use the “medicare.gov” websites for full comparisons. Private insurers’ websites will not include information on competitors’ products.

Part D Formularies, Tiers and Quantity Limitations

Medicare requires each plan to cover 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, which lists each medicine covered and its tier. In addition, many drug companies impose “utilization management,” requiring prior authorization and step therapy (meaning that you are prescribed the most commonly used generic drug for your condition, to see if it works for you; you must fail on that drug before you can move up a “step” to a more expensive drug) before covering the drug, as well as quantity limits. 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. 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.

If a plan does not carry a drug you need, you and your physician may request an “exception.” Not all plans provide for formulary exceptions if a medically necessary medicine is generally not covered. If your plan allows exceptions, you contact the plan’s customer service department and request a “formulary exception” for the medicine. If your request is denied, you can appeal this decision. Follow all the steps listed at <https://medicare.gov/medicare-prescription-drug-coverage-appeals>.

If a prescription drug you need is listed on the formulary, but you are denied coverage under Medicare, you can also appeal this denial of coverage. This is useful to know if you have just enrolled in Medicare, and have been successfully taking a drug for your condition, and Medicare requires that you utilize step therapy.

If Medicare does not cover your drugs, or you have not been successful with an appeal, you can see if that drug is covered under a different program, such as SimpleCare or GoodRx, discussed in more detail on page 40 . If you use these plans, you cannot use Medicare for the same prescription, and the costs will not be included in your Medicare coverage limits.

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. Recent studies show that some plans can cost up to \$100,000 more 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.

New this year: Change to Part D insulin costs starting Jan. 1, 2023. Plans cannot charge you more than \$35 for a one-month supply of each Medicare Part D-covered insulin you take, and

cannot charge you a deductible for insulin. This means that the \$35/month fee does not reduce your deductible. <https://medicareadvocacy.org/ira-part-d-improvements-start-january-2023/>. This benefit is NOT reflected in the plan information posted on the Medicare Planner for Part D website. See the end of the chapter for specific information on how to determine drug costs, including insulin, for Part D.

If you have difficulty paying for insulin, see if you qualify for Extra Help, and your co-payment for insulin would be lower. You apply for Extra Help through Social Security; for the

Massachusetts-specific Medicare Savings Plan, call SHINE for Massachusetts — Serving the Health Insurance Needs of Everyone — at 1-800-243-4636.

Late Enrollment Penalty for Part D

If you do not enroll in a Part D plan when initially eligible, have creditable coverage from another source or have drug coverage through a Medicare Advantage plan, you will be subject to a Part D late enrollment penalty even if you do not currently require medication. If you go without coverage for more than 63 consecutive days, you

ORIGINAL MEDICARE & MEDICARE ADVANTAGE PLANS AT-A-GLANCE

	Original Medicare (Parts A & B)	Original Medicare & Medigap	HMO Part C (Medicare Advantage)	PPO Part C (Medicare Advantage)
What do I pay?	Part B premiums, deductibles and co-insurances	Medigap premiums, Part B premiums, generally no co-payment	Medicare premiums and plan premium; your plan sets its own deductibles and co-pays	Medicare premiums and plan premium; your plan sets its own deductibles and co-pays
Can I go to any doctor?	Yes, if they accept Medicare	You can go to any doctor, regardless of if they accept Medicare	No, you must go to in-network providers	Yes, though PPOs have provider networks, you may go out of network for a higher co-pay
Where can I get routine, non-emergency care?	Anywhere in the country	Anywhere in the country	For most plans, in your local geographic area	For most plans, in your local geographic area
Where can I get emergency care?	Anywhere in the country	Anywhere in the country	Anywhere in the country	Anywhere in the country
How do I get prescription drug coverage?	Part D	Part D	You must join a plan that includes drug coverage, also called MA-PD	You must join a plan that includes drug coverage, also called MA-PD
Will I need a referral to see a specialist?	No	No, unless you have a Medicare SELECT plan	Usually	No, but you may pay more out of pocket if you go to a provider who is out of network
Is there a limit to my out-of-pocket spending?	No	No	Yes, all Medicare Advantage plans must have limits on out-of-pocket spending	Yes, all Medicare Advantage plans must have limits on out-of-pocket spending
Will it pay for extras, like vision and hearing aids?	No, Medicare does not cover dental, hearing or vision	No	Maybe, some plans offer these additional benefits	Maybe, some plans offer these additional benefits

* Based on 2020 costs

will face a 1% monthly sanction if you ever need Part D coverage in the future. It is important to enroll in a Part D plan when first eligible or make sure you have creditable coverage (or a Part C plan that includes Part D benefits). There are some Part D plans that do not require premiums, which may benefit those who need little or no prescription medication.

These penalties can be significant. Medicare calculates the penalty by multiplying 1% of the “national base beneficiary premium” (\$32.74 in 2023) times the number of full, uncovered months you didn’t have Part D or creditable coverage. The monthly premium is rounded to the nearest \$.10 and added to your monthly Part D premium. In Medicare’s example, a person who delayed Part D coverage for 24 months pays an additional \$7.90 per month in premium. The national base beneficiary premium can change each year, so your penalty amount can also change each year.

If you already have incurred a late enrollment penalty, you may seek a waiver based on specified reasons. 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 beneficiaries who have difficulty paying for medicines. In addition to “Extra Help” or the “Low-Income Subsidy” provided to low-income beneficiaries, the following options may apply. 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 that 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% 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 that work in conjunction with your insurance plan. Please be sure to ask your pharmacist if your pharmacy offers such programs. You can compare the price on a national discount plan, like GoodRx, SimpleCare or Costplusdrugs, with your insurance price. You can buy the drug with a national discount plan, but you CANNOT combine the Medicare Part D benefit with the national discount plan.
- 3) **State pharmacy assistance:** Massachusetts offers a state pharmacy assistance program, Prescription Advantage, for those with lower incomes who do not qualify for MassHealth. 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” (also known as a low-income subsidy) to beneficiaries with lower income and assets. This program can reduce or eliminate your Part D premium and reduce deductibles and co-pays. Application for this program can be made through the Social Security Administration directly after you have enrolled in a Part D plan.
- 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 that may enhance the Part D benefit from your plan.
- 6) **Primary Outreach Programs:** *Refer to the Pharmacy Outreach Program information in Chapter 4.*

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 for Parts A and B, 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, lists all the Part C plans available in your area; the website identifies those Part C plans with drug coverage. These plans work similarly to employer-sponsored health insurance plans, often combining doctor, hospital and additional services in one comprehensive plan. The plan options vary by county of residence, and all plans are not available in all areas. Not all plans continue from one year to the next and some do not take new patients. Check if the plans you want provide these benefits:

- 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.

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 standalone 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.

G . Deciding Whether to Enroll in Original Medicare or Medicare Advantage

There are many considerations in deciding which type of Medicare plan is best for you. The chart taken from the National Council on Aging (NCOA) website, under My Medicare Matters (a nonprofit group),¹³ will help you evaluate your options and give you personalized advice.

TIP: Before enrolling, ask if your preferred physician is part of the plan you are thinking about choosing. The answer may determine what plan you ultimately take. While most physicians accept Medicare, not all physicians and hospitals are part of the various Advantage plans.

The following are specific questions the NCOA asks you to consider:

1. Which option is more stable from year to year?

Each year, Part C (Medicare Advantage) plans choose if they want to stay in Medicare or not. They can also change costs, providers and benefits each calendar year. Original Medicare will always be there, but its premiums, deductibles and co-insurance amounts increase slightly each year.

2. How can I measure quality for all of the various plans?

Medicare uses a 5-star rating system to assess the quality of Medicare Advantage and Part D plans, with 5 stars being “excellent,” 4 being “above average” and 3 being “average.” These ratings are based on a variety of factors, including how well the plans help members manage chronic diseases, member satisfaction and how often members get screening exams and vaccines, among others. The ratings are posted on the Medicare Planfinder website at Medicare.gov.

Some key information from the NCOA site:

Advantages of choosing Original Medicare combined with a Medigap policy (versus Medicare Advantage)

The most significant advantage is that it provides a better fit for individuals with ongoing medical issues. If you purchase a Medigap policy within six months of starting Part B at age 65 or older, the insurance agency cannot reject the applica-

tion for any reason. Having a history of cancer or a recent diagnosis of heart disease, chronic obstructive pulmonary disease (COPD), diabetes, or another chronic condition that will require frequent doctor visits, may indicate a Medigap policy is a better fit. The monthly payment will be the same every month, no matter how many doctor visits occur — so a Medigap policy may reduce total costs. This can be especially helpful when you are trying to diagnose a new health condition and need to seek second opinions. Original Medicare offers more flexibility with treatment options.

Tip for “snowbirds” or others who spend time out of state: If your physician is licensed in Massachusetts, they cannot treat you, even via telemedicine, if you are not physically in Massachusetts. The only exception is if you are in the emergency department — then the emergency department physicians can CONSULT with your physician. This limitation is set by the Massachusetts board of licensing, and not regulated by Medicare. An alternative is to have a “backup” physician in your second home, to continue routine care. Network plans will not commonly have practitioners out of state.

There are growing complaints that Advantage plans reduce benefits under Original Medicare. For example, Medicare will agree to provide oxygen support when the blood oxygen level is X; an Advantage plan may not provide oxygen support unless the blood oxygen level is X-Y. There are also complaints that Advantage plans restrict access to various cancer centers, which limits a patient’s treatment options.

Choosing a primary care physician (a requirement of some Medicare Advantage plans) is not a requirement for Original Medicare. The plan allows the patient to see any physician who accepts Medicare. Conversely, Medicare Advantage plans are more restricted in terms of the provider networks they work with. Individuals in rural and isolated areas may have difficulty finding plans in Massachusetts that work with their local health care services.

Massachusetts Medigap has three types of policies, which makes comparing costs relatively simple.

H. 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 & You” for further information. If you select an Advantage Plan in the first enrollment period, you can make ONE change to a different Medicare Advantage plan or switch to Original Medicare and Part D between Jan. 1 and March 31, 2023.

I. 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?

J. What Can You Do if Medicare Denies a Service/Coverage or Payment?

1. Medicare can deny coverage for a service before you receive it, or may deny a service or full payment after it is received. Medicare should notify you in writing that a future service will not be covered. Medicare does this by sending an “Advance Beneficiary Notice of Non-Coverage.” In this case, if you get the service before you appeal, you are agreeing that Medicare will not pay for it. You can still file an

appeal, but you will have to pay for the service first.

You can get this advance notice from a skilled nursing facility when the facility believes that Medicare will not cover your stay or certain items or services.

2. You can file an appeal if Medicare denies a service/coverage or payment. The process depends upon what type of Medicare coverage you have. You will be required to submit medical records and documentation, and may need a qualified physician to work with you on the appeal. Be careful not to miss a deadline. General information on appeals is found at www.medicare.gov/claims-appeals/how-do-i-file-an-appeal.

TIP: You can find additional information on Medicare Benefits at www.medicareinteractive.org/resources/toolkits/medicare-advocacy-toolkits. There is a non-profit organization that can help you with appeals. This is Medicare Interactive, found at www.medicareinteractive.org/get-answers/medicare-denials-and-appeals.

CONCLUSION

Navigating the Medicare system is confusing, but there are resources available to help. Please be sure to consult www.Medicare.gov, particularly “Medicare & 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. Beginning on page 44 is a chart of Medicare benefits and costs for Part A and Part B. Medicare is an exceedingly

complex program. For every rule cited in this chapter, many other rules and exceptions apply. “The devil,” practitioners in this field are quick to point out, “is in the details.”

1. <https://www.medicare.gov/Pubs/pdf/10050-Medicare-and-You.pdf>.
2. <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/medicare-advantage-plans/how-do-medicare-advantage-plans-work>.
3. <https://www.medicare.gov/manage-your-health/coordinating-your-care/accountable-care-organizations>.
4. <https://www.medicare.gov/sign-up-change-plans/joining-a-health-or-drug-plan>.
5. <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/medicare-advantage-plans>.
6. <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/preferred-provider-organization-ppo>.
7. <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/private-fee-for-service-pffs-plans>.
8. <https://www.medicare.gov/sign-up-change-plans/types-of-medicare-health-plans/special-needs-plans-snp>.
9. For resources on the *Jimmo* decision and settlement, see *Jimmo* decision FAQ: <https://www.cms.gov/Center/Special-Topic/Jimmo-Settlement/FAQs>; CMS manual updates can be found at <https://www.cms.gov/Outreach-and-Education/Outreach-and-Education?bucket-filter=MM8458.pdf>; for detailed information on the need for skilled nursing care when there is no likelihood of improvement, see <http://www.gpo.gov/fdsys/pkg/CFR-2011-title42-vol2/pdf/CFR-2011-title42-vol2-sec409-32.pdf>.
10. “Age Discrimination in Employment Act of 1967,” 29 USC § 621-34, at <https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967>.
11. “Medicare & You,” 2023.
12. “When Can I Buy Medigap?” <https://www.medicare.gov/supplements-other-insurance/when-can-i-buy-medigap>.
13. <https://www.ncoa.org/age-well-planner/medicare>.

MEDICARE PART A: 2023

SERVICES	BENEFIT	MEDICARE PAYS	YOU PAY*
<p>Hospitalization:</p> <ul style="list-style-type: none"> • Semi-private room and board • General nursing • Other hospital services and supplies (Medicare payments based on benefit periods) <p>Hospitalization does NOT include Medicare-approved doctors' services; you will pay an additional 20% of that amount while you are an inpatient.</p> <p>Hospitalization includes mental health inpatient stay, with the same benefits. Additionally, you will pay 20% of the Medicare-approved amount for mental health services you get from doctors and other providers while you're a hospital patient.</p>	First 60 days	All but \$1,600	\$1,600 (deductible)
	61 st to 90 th day	All but \$400 per day	\$400 (co-insurance) per day
	91 st to 150 th day (lifetime)**	All but \$800 per day	\$800 (co-insurance) per day
	Beyond 90 (or 150 if lifetime is used) days	Nothing	All costs
<p>Skilled Nursing Facility Care: (Have to be inpatient for 3 days beforehand)</p> <ul style="list-style-type: none"> • Semi-private room and board • Skilled nursing and rehabilitative services • Other services 	First 20 days	100% of approved amount	Nothing
	Additional 80 days	All but \$194.50 per day	\$194.50/day (co-insurance)
	Beyond 100 days	Nothing	All costs
<p>Home Health Care:</p> <ul style="list-style-type: none"> • Intermittent skilled nursing care • Physical therapy, speech language, pathology services • Home health aide services • Durable medical equipment (e.g., wheelchairs, hospital beds, oxygen and walkers) • Other services and supplies • No custodial care — Must be recovering 	Unlimited as long as you meet Medicare conditions	<ul style="list-style-type: none"> • 100% of approved amount • 80% of approved amount for durable medical equipment 	<ul style="list-style-type: none"> • Nothing for services • 20% of approved amount for durable medical equipment
<p>Hospice Care:</p> <ul style="list-style-type: none"> • Pain and symptom relief • Support services for the management of mental illness • DNR 	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% of approved amount)
<p>Blood:</p> <p>If the hospital or provider does not have to pay for the blood, there is no charge to the patient. The charges apply only if the hospital or provider has to pay.</p> <p>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.</p>	<ul style="list-style-type: none"> • Pints 1–3 • Pints 4 and over 	<ul style="list-style-type: none"> • Nothing • All 	<ul style="list-style-type: none"> • Patient must pay for 1–3 pints or have them replaced (self or usually family member) • Patient deductible is satisfied at 3 pints.

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

*2023 Part A Monthly premium: Most people don't pay a monthly premium for Part A (sometimes called “premium-free Part A”). If you buy Part A, you'll pay up to \$506 each month in 2023. If you paid Medicare taxes for less than 30 quarters, the standard Part A premium is \$506 in 2023. If you paid Medicare taxes for 30-39 quarters, the standard Part A premium is \$278 in 2023. This premium is paid for the entire time the person is on Medicare Part A.

**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 days to the skilled nursing benefit; when Medicare stops at 100, so does Medigap.

MEDICARE PART B: 2023

SERVICES	BENEFIT	MEDICARE PAYS	YOU PAY†
Medical Expenses: <ul style="list-style-type: none"> • Doctors’ services, inpatient and outpatient • Surgical services and supplies • Podiatrist services • Physical, occupational and speech therapy • Diagnostic tests (e.g., X-rays, hearing exams) • Durable medical equipment • Urgent and emergency services (including ambulances) 	Unlimited if medically necessary	<ul style="list-style-type: none"> • 80% of the approved amount after \$226 deductible • 20% for most outpatient services, including mental health 	<ul style="list-style-type: none"> • \$226 deductible (pay once per year) • 20% of approved amount after deductible • 20% for tests and durable medical equipment • 20% for all physical and occupational therapy
Outpatient Mental Health Services: <ul style="list-style-type: none"> • Yearly depression screening • Visits for mental health 		<ul style="list-style-type: none"> • Everything • 80% of the approved amount after \$226 deductible 	<ul style="list-style-type: none"> • Nothing if your provider accepts assignment • 20% of the approved amount after \$226 deductible
Clinical Laboratory Services: <ul style="list-style-type: none"> • Blood tests, urinalysis and more 	Unlimited if medically necessary	100% of approved amount	Nothing for services
Home Health Care: (if you don’t have Part A) <ul style="list-style-type: none"> • Intermittent skilled care • Home health aide services • Durable medical equipment • Other services and supplies • No custodial care — must be recovering 	Unlimited as long as you meet Medicare conditions	<ul style="list-style-type: none"> • 100% of approved amount • 80% of approved amount for durable medical equipment 	<ul style="list-style-type: none"> • Nothing for services • 20% of approved amount for durable medical equipment
Outpatient Hospital Treatment: Services for the diagnosis or treatment of an illness or injury	Unlimited if medically necessary	Medicare payment to hospital based on hospital cost	20% of Medicare payment amount (after \$226 deductible)

PREMIUMS (2022)‡ — Premiums are “means adjusted.”

All others: Premium	Income Level (Individual MAGI for 2020)	Income Level (Joint MAGI for 2020)
\$164.90	\$97,000 or less	\$194,000 or less
\$230.80	\$97,001–\$123,000	\$194,001–\$246,000
\$329.70	\$123,001–\$153,000	\$246,001–\$306,000
\$428.60	\$153,001–\$183,000	\$306,001–\$366,000
\$527.50	\$183,001–\$500,000	\$366,001–\$750,000
\$560.50	\$500,00 and above	\$750,000 and above

***PREMIUM MAY BE HIGHER IF YOU ENROLL LATE:** Premiums for high income, married, filing separately are different — See CMS Medicare site for additional information.

Married and lived with their spouses at any time during the year, but who file separate tax returns from their spouses, please refer to www.Medicare.gov.

MEDICARE PART C: MEDICARE “ADVANTAGE” — MANAGED CARE PLAN

MEDICARE PART D: PRESCRIPTION DRUG BENEFIT

† 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.

‡ Part B premiums must pay for 25% of Part B costs, including reserves. The government pays 75%; the premium increase cannot exceed the COLA (cost of living adjustment) in SSI for older adults.

Medicare Part B Premiums 2023

Full Part B Coverage			
Beneficiaries who file individual tax returns with modified adjusted gross income:	Beneficiaries who file joint tax returns with modified adjusted gross income:	Income-related Monthly Adjustment Amount	Total Monthly Premium Amount
Less than or equal to \$97,000	Less than or equal to \$194,000	0	\$164.90
\$97,001 and less than or equal to \$123,000	\$194,001 and less than or equal to \$246,000	\$65.90	\$230.80
\$123,001 and less than or equal to \$153,000	\$246,001 and less than or equal to \$306,000	\$164.80	\$329.70
\$153,001 and less than or equal to \$183,000	\$306,001 and less than or equal to \$366,000	\$263.70	\$428.60
\$183,001 and less than \$500,000	\$366,001 and less than \$750,000	\$362.60	\$527.50
Greater than or equal to \$500,000	Greater than or equal to \$750,000	\$395.60	\$560.50

Note that Part B premiums for certain transplant patients are different. Certain Medicare enrollees who are 36 months post-kidney transplant and therefore no longer eligible for full Medicare coverage can elect to continue Part B coverage of immunosuppressive drugs by paying a Part B premium.

Medicare Part B Immunosuppressive Premiums 2023

Immunosuppressive Part B Coverage ONLY			
Beneficiaries who file individual tax returns with modified adjusted gross income:	Beneficiaries who file joint tax returns with modified adjusted gross income:	Income-related Monthly Adjustment Amount	Total Monthly Premium Amount
Less than or equal to \$97,000	Less than or equal to \$194,000	0	\$97.10
\$97,001 and less than or equal to \$123,000	\$194,001 and less than or equal to \$246,000	\$64.70	\$161.80
\$123,001 and less than or equal to \$153,000	\$246,001 and less than or equal to \$306,000	\$161.80	\$258.90
\$153,001 and less than or equal to \$183,000	\$306,001 and less than or equal to \$366,000	\$258.90	\$356
\$183,001 and less than \$500,000	\$366,001 and less than \$750,000	\$356	\$453.10
Greater than or equal to \$500,000	Greater than or equal to \$750,000	\$388.40	\$485.50

Part D — Insulin Coverage

In 2022, a new rule went into effect that caps insulin at a \$35 co-payment for a one-month supply. The medicare.gov 2023 website doesn't seem to be updated (as of 12/1/22) for all insurers to reflect the correct insulin co-pay of \$35 per month. Insulin pen needles to be used with insulin pens and insulin needles and syringes to be used with insulin vials are covered under Part D and Medicare Advantage plans (if the Medicare Advantage plan covers prescription drugs) and can be put into the Medicare.gov website. Other insulin supplies, such as alcohol pads and glucose testing equipment, glucometers, test strips, lancets and control solution, are covered under Medicare Part B. Some community pharmacies accept assignment and can provide these additional diabetes supplies, but if your pharmacy doesn't, you may want to try a specialty or mail-order pharmacy or durable medical equipment provider. Most Medicare Advantage plans will cover diabetes testing supplies at the pharmacy because they cover both Part B and Part D items.

TIP: Planning for 2023 and beyond: Leave insulin off your list of drugs when you are on the medicare.gov website. The \$35 co-pay is a universal rule, so all insurers should charge you \$35/month in 2023. Since insulin will have a standard co-pay and the planning tool is not accurately reflecting the \$35 co-pay, it may be confusing. In your calculations, add \$35/month for each different type of insulin to your out-of-pocket costs so you can accurately plan, if you use insulin. The only step you should take is to make sure your insulin brand is on the drug formulary of your Medicare Part D plan or Medicare Advantage Plan (if your plan covers prescriptions drugs).

TIP: When starting or adjusting insulin, have your provider write the prescription for insulin with specific directions to increase the insulin dose up to a ceiling amount. This will allow the pharmacist to calculate an accurate amount of insulin you will need per month as you increase the dose. For example, if your provider starts you on 10 units daily and writes the prescription that way, you will get one 3mL pen for the month. If the provider tells you to increase the insulin dose by 2 units every 3-4 days and stop at 20 units daily, that one 3mL pen will only last you 25 days. This would mean you would have trouble refilling the prescription, and you would pay another \$35 co-pay for another prescription of one 3mL pen, which, at 20 units daily, will only last you 15 days. With the prescription reflecting the provider's spoken directions to you, increasing the dose to 20 units daily, you would get two 3mL pens per month.

CALCULATE YOUR MEDICARE PART D PREMIUM FOR 2023

If your filing status and yearly income in 2021 was:

Filed individual tax return	Filed joint tax return	Filed married and separate tax return	You pay each month (in 2022)
\$97,000 or less	\$194,000 or less	\$97,000 or less	your plan premium
above \$97,000 up to \$123,000	above \$194,000 up to \$246,000	not applicable	\$12.20 + your plan premium
above \$123,000 up to \$153,000	above \$246,000 up to \$306,000	not applicable	\$31.50 + your plan premium
above \$153,000 up to \$183,000	above \$306,000 up to \$366,000	not applicable	\$50.70 + your plan premium
above \$183,000 but less than \$500,000	above \$366,000 but	above \$97,000 and less than \$403,000	\$70 + your plan premium
\$500,000 and above	less than \$750,000	\$403,000 and above	\$76.40 + your plan premium

Note: These figures do not include any Part D late enrollment penalty, discussed above. The 2022 Part D national base beneficiary premium is \$33.37.

Social Security calculates your Part D IRMAA; if your income goes down or you disagree with the calculations, file a dispute at: Medicare Income-Related Monthly Adjustment Amount — SSA <https://www.ssa.gov/forms/ssa-44.pdf>.

FROM MEDICARE:

The extra amount you have to pay isn't part of your plan premium. You don't pay the extra amount to your plan. Most people have the extra amount taken from their Social Security check. If the amount isn't taken from your check, you'll get a bill from Medicare or the Railroad Retirement Board. You must pay this amount to keep your Part D coverage. You'll also have to pay this extra amount if you're in a Medicare Advantage Plan that includes drug coverage.

For a list of specific premiums, see www.medicare.gov/drug-coverage-part-d/costs-for-medicare-drug-coverage/monthly-premium-for-drug-plans.

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 published average cost in Boston, Massachusetts, for a licensed home health aide is \$31 per hour, for an assisted living facility is \$81,816 per year, and for a semi-private room in a nursing facility is a staggering \$172,824 per year, according to AARP's cost of care calculator.

Unfortunately, Original Medicare, Medicare Supplements, Medicare Advantage Plans 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 privately pay or apply for MassHealth (Massachusetts Medicaid) coverage when the individual can no longer pay through their 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 pay for the cost of care in both private homes and private facilities to preserve the retirement nest egg, protect income streams and promote greater choices in care.

Unfortunately, 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, and companies still offering new policies have increased rates and tightened underwriting guidelines. The premium increases on existing policies, while bad news for older adults 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 the length of time the policy will pay. Several bills have been filed in the Massachusetts Legislature in the last few years seeking to impose limits on premium increases. As of December 2022, none have been passed into law. Unfortunately, the rate increases on Massachusetts LTCI policies have resulted in consumers seeking out-of-state group policies in an effort to obtain the protection, but at a lower cost. The problem there is that the Massachusetts Division of Insurance, which regulates Massachusetts LTCI policies, has no basis to regulate out-of-state policies. There is increasing pressure on policymakers to find a way to regulate policies for Massachusetts consumers buying LTCI products out of state, and to also find a way to limit premium increases on existing LTCI policies. In these difficult times, it is important to discuss options with trusted advisers (attorneys and financial planners) to review the situation. Also, please consider bringing family members into the conversation, as the children may be able to step up and pay the premiums to protect the parents' life savings and legacy. Be sure that a trusted person is named on the application as a person to be notified in the event of a failure to make a premium payment. Together, the older adults, children and advisers may well be able to find a creative and sustainable way to preserve the policy after an in-depth review of the family finances and available capital.

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

NOTE: In a MassHealth Fair Hearing decision from 2020, a hearing officer concluded that MassHealth's position that LTCI benefits constituted countable income in determining eligibility for community benefits under the Frail Elder Waiver was incorrect. The decision was not appealed by MassHealth and stands for the proposition that benefits paid from an LTCI policy that constitute repayment for incurred medical expenses are not countable income for Frail Elder Waiver eligibility purposes.

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 older adult. As custodial care can be quite expensive, the insurance policy 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 older adult's nest egg. Furthermore, if care expenses exceed interest earned on the retirement assets, the older adult 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 (in contrast to hybrid policies, described in Section E) is that Massachusetts law and MassHealth 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") provided that 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, under current regulations:

- Include coverage for nursing home care for at least 730 days;
- Pay at least \$125 per day for nursing home care; and
- 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 was institutionalized, an amendment to the exemption law passed with the state budget for 2020 allows the exemption to apply if, at any time after purchase, the policy has the minimum benefits in place (provided that the actions noted below are taken).

Note that having the exemption in place will not prevent a lien being placed on the home while the MassHealth applicant is alive and on benefits. This lien is intended to keep the home from being sold during the applicant's lifetime. If the home is sold during the applicant's lifetime, MassHealth will be entitled to recover any benefits paid for the applicant from the proceeds of the sale. However, upon the applicant's death, the exemption will prevent MassHealth from recovering those benefits when the home is then inherited by the applicant's heirs or other beneficiaries.

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.** Be mindful that exhausting the benefits of a policy too soon could jeopardize the protection of the primary residence. 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.
3. **The home must not be sold during the time the applicant is alive. The home can be rented or otherwise occupied or not occupied, but if it is sold while the applicant is alive, MassHealth can recover benefits paid for the applicant from the sale proceeds.**

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 LTCI.

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 2021 can claim a deduction for up to \$5,640 in long-term care premiums on their 2022 return, but the deduction, combined with other deductible medical expenses, may be deducted only to the extent it exceeds 7.5% of adjusted gross income.

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 bought 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 \$370 per diem in 2023. 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. If LTCI is provided through an individual's employer, and the premiums are includable in the employee's income when paid, benefits will not 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 typical policy purchased for a female, non-smoker, age 55, would be approximately \$5,466 per year. The same policy for the same person at age 75 would be approximately \$14,928. 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 receiving services. When retired and on a fixed income, managing premium payments may become difficult.

In addition, LTCI premiums can and do increase over time. Significantly, a prominent insurance company raised rates an average of 83% 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 and, in many cases, increased rates by more than 40%. Such increases can make keeping the policy in place for older adults on fixed incomes very difficult. As was common throughout the last decade, states continue to approve rate increases. 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 their 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 themselves, 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 they 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 older adults 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 favorable. Because many older adults 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 older adults 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 policies offer a residual death benefit 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 their own individual policy.

Hybrid policy premiums generally are not tax-deductible, though benefits are usually received tax-free. Generally, standalone 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 that is sufficient to cover needs after accounting for potential increased costs of care later.

Insurance companies are also offering fixed annuities with embedded LTCI-like protections and whole life policies, which are funded by a one-time lump sum and provide LTCI benefits. Please note that these annuity-based options often come with less stringent underwriting requirements. With the recent, rapid increase in interest rates, these annuity-based policies are currently offering competitive rates and terms. These new contracts allow for policies with inflation options that may prove beneficial, as well as reports from the insurer outlining for the client the portion of the premium that may be

tax-deductible. The policies are customarily funded with non-IRA assets. As these options evolve, and to determine which option to use, please be sure to discuss their applicability to your situation with your experienced and trusted adviser. Remember, as noted in Section A, that if a hybrid LTCI policy allows 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), it would not qualify for the “home” exemption to MassHealth estate recovery.

CONCLUSION

Currently, LTCI plays only a small part in the overall long-term care financing system, covering only about 10% 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 that 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 insurance product, consumers should gather information and begin discussing these options for payment of their long-term care costs with family members and experienced advisers well in advance of when they might need long-term care. One resource for general information that is very useful is “A Shopper’s Guide to Long-Term Care Insurance,” 2021 edition, put out by the National Association of Insurance Commissioners. This publication can be found at https://content.naic.org/publications?name=guide+to+long-term&field_publication_category_target_id=All.

CHAPTER 7

LONG-TERM CARE Residents' Legal Rights

CONTINUUM OF CARE

Long-term care services are provided along a spectrum of care. Service might be provided in a private home, a continuing care retirement community, an assisted living residence or a nursing facility. It is important for consumers to understand the differences between the settings and the different rules that apply within each context.

A. What Is Nursing Home Care?

Nursing homes provide around-the-clock nursing care and assistance with activities of daily living (ADLs). Nursing homes, technically “long-term care facilities,” are subject to state and federal law, as well as regulations issued by the Massachusetts Department of Public Health (DPH), 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.

COVID-19

Public Health Emergency. The earlier COVID-19-related state of emergency was rescinded effective June 15, 2021. However, the governor issued an executive order on May 28, 2021, finding that a public health emergency still existed, allowing DPH to continue to mandate certain measures to respond to the virus outbreak.

Waivers and Guidance to Nursing Homes and Assisted Living Residences. CMS and DPH have responded to the COVID-19 pandemic by issuing waivers of certain regulations as well as ongoing memoranda of guidance regarding many of the nursing home and assisted living residence provisions described in this chapter. The guidance from these organizations is updated frequently, as outbreak conditions change. Detailed information can be found on the CMS website, www.cms.gov, as well as the DPH website: www.mass.gov/info-details/covid-19-public-health-guidance-and-directives#health-care-organizations.

Other Provisions. Nursing facilities should not be allowed to make decisions about admission or return to the facility based on COVID-19 status, although facilities may be required to undertake certain measures. If a facility refuses to readmit a resident after a hospitalization, a Medicaid appeal may be filed whether or not the resident is Medicaid-eligible. Visitation should be allowed under the procedures outlined in both the CMS and DPH publications, subject to change depending upon the state of the pandemic.

Closures. Due to a variety of factors, including the public health emergency, staffing shortages and aging buildings, an increasing number of nursing homes and assisted living facilities have recently closed. It appears that this trend is likely to continue. DPH regulates and, in coordination with the Long-Term Care Ombuds Program, monitors nursing home closures. The Executive Office of Elder Affairs has recently amended its regulations to require a 120-day advance notice prior to the closure or sale of an assisted living facility.

DPH Website. The DPH website maintains an updated list of nursing facilities that have an admissions freeze based on infection control surveys or the number of new cases. The website also contains a list of pending nursing home closures.

Moving a Loved One Home During COVID-19 Pandemic. See the Appendix on page 63 for DPH guidance on moving residents from nursing homes, rest homes and assisted living facilities.

B. What Is Assisted Living?

Assisted living is a residential arrangement providing room and board for eligible older adults who need some minimal 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.¹ However, except as has been allowed under COVID exceptions, assisted living residents should not require the level of care provided in a nursing home.² Typically, assisted living residences offer a “menu” of services, for which a resident must pay extra. Assisted living is intended to encourage the maintenance of older adults’ autonomy and privacy.³

C. What Is a Continuing Care Retirement Community?

A continuing care retirement community (CCRC) is an option that offers single and married older adults a continuum of housing, services and nursing care that is intended to allow them to remain housed in the same community as their services are adjusted and altered depending upon their needs.⁴ 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.⁵

NURSING HOME CARE

A. 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. CMS has a website tool that allows you to compare nursing homes and select the most appropriate ones. (*See www.medicare.gov/care-compare/?providerType=NursingHome&redirect=true.*) 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, although most nursing homes in Massachusetts are Medicaid-certified, not all are, so a resident may only be able to stay in a private facility as long as they are 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.⁶ Although the attorney general’s regulations and Massachusetts law prohibit discrimination based on eligibility for MassHealth benefits, these provisions are often difficult to enforce. See 940 C.M.R. 4.03 and MASS G.L. 151B, § 4.

When choosing a nursing home, it is important to speak with others, such as the long-term care ombudsman, care managers, residents, and family members of residents. The Massachusetts Advocates for Nursing Home Reform and the National Consumer Voice websites contain information on how to select a nursing home and what questions to ask.

The following are quotes from the Massachusetts Advocates for Nursing Home Reform website:

- Surveys measure whether the nursing home meets certain “minimum” standards. If a nursing home has no deficiencies, it means that it met the minimum standards at the time of the survey. **It is important to realize that surveys and ratings do not identify nursing homes that give outstanding care.**
- While reading the Massachusetts and federal reports, keep in mind that the quality of a nursing home may get much better or much worse in a short period of time. These changes can occur when a nursing home’s administrator or ownership changes or when a nursing home’s finances suddenly change.
- Survey inspectors are only in the nursing home for a few days, which means surveys only provide a “snapshot” of what the facility is like — and the “snapshot” is usually taken when the facility administration and staff know they are being observed. In addition, inspectors do not look at the care of all residents; they only look at a sample of residents.
- And remember, government agency reports represent “one piece of the puzzle” in searching for a nursing home. Low ratings can tell more of a story than high ratings. Consider ratings with your personal perceptions and other research to help make an informed decision.

B. Dementia Care Standard for Nursing Homes

Massachusetts law provides further safeguards for dementia patients in nursing homes in the form

of regulations that require all direct care workers to have eight hours of initial training and an additional four hours of training annually.

In addition, Dementia Special Care Units (DSCUs) provide specialized care to nursing home residents with dementia through a combination of additional and ongoing dementia care training, expanded activities, and a safe and comfortable physical environment (e.g., special lighting and floor coverings to minimize confusion, safe/supervised access to the outdoors, etc.). Not every nursing home in Massachusetts has a DSCU, since compliance with DSCU law is not mandatory. DSCUs must be certified every year by DPH, and finding out if a nursing home has one is as simple as just asking. DSCUs 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.⁷

Additionally, the regulations mandate that a fence or barrier surround the facility to prevent injury and elopement of dementia care residents. Another significant change to the laws that aims to protect those living in dementia units is the prohibition against overhead paging systems, which often scare residents. Facilities can now use such systems only for emergencies.⁸ DPH has promulgated guidance with respect to the administration of antipsychotic medications that requires the written consent of the resident, the resident’s health care proxy agent or a duly authorized guardian.

C. Nursing Home Resident Rights

Under state and federal law, nursing home residents are entitled to certain rights with regard to quality of care, treatment, safety and quality of life.⁹ Nursing home residents have the right:

- To obtain, upon admittance to the facility, written notice of their rights as residents;¹⁰
- To freedom of choice of a physician, facility and health care mode;¹¹
- To obtain, upon request, an itemized bill for nursing home services;¹²
- To have all medical records and communications kept confidential to the extent provided by law;¹³

- To have all reasonable requests responded to promptly within the capacity of the facility;¹⁴
- To access all of their medical records upon request;¹⁵
- To refuse to be examined, observed or treated without jeopardizing access to other medical care;¹⁶
- To have privacy during medical exams or treatment;¹⁷ and
- To have informed consent to the extent provided by law.¹⁸

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

- To communicate with persons of one’s choice, privately and without restriction;¹⁹
- To make a complaint or express a grievance free from reprisal, restraint, coercion or discrimination;²⁰
- To be free from any requirement to perform any service for the facility not in the resident’s individual care plan, unless one volunteers or is paid for such service;²¹
- To participate in social, religious and community groups;²²
- To manage one’s own financial affairs;²³
- To keep and use personal possessions and clothing as space permits, and to have personal possessions reasonably safeguarded and secured;²⁴
- To be permitted to share a room with one’s spouse;²⁵ and
- To receive at least 48 hours’ notice of a roommate change, barring any emergency.²⁶

See “Arbitration” on the next page for information on mechanisms to enforce residents’ rights. Effective September 2019, federal regulation provides that residents cannot be required to agree to arbitration as a condition of admission to, or continued stay in, a nursing home.

ARBITRATION

Long-term care providers — nursing homes, assisted living residences and CCRCs — frequently include arbitration requirements in their admission agreements. By agreeing to arbitration, consumers are giving up important rights, including the constitutional right to a jury trial, in case they are harmed by the provider. Although the long-term care industry has argued that arbitration helps reduce legal costs, there is no good reason for residents to voluntarily agree in advance to waive their rights to a jury trial; alternative dispute resolution is always an option once a dispute has arisen if the parties agree. The practice of forced arbitration has had the effect of denying residents and their family members access to justice. Because arbitrations are confidential and there is no record of the outcomes, the use of forced arbitration has also operated to keep issues of abuse and neglect out of the public eye. Residents and their families should be aware of the prevalence and risks of arbitration, and should exercise their right to “just say no” to arbitration clauses in admission agreements. *See an important and helpful brochure regarding this issue in the Appendix at the end of this chapter.*

D. Nursing Home Transfers and Discharges in Medicaid- and Medicare-Certified Facilities

Nursing home residents should not be transferred or discharged from their rooms (their homes) without cause. Under federal law, residents in Medicaid- and Medicare-certified facilities must be given adequate notice prior to a transfer or discharge, and be informed of their right to a hearing to contest the proposed transfer or discharge.²⁷ Most nursing homes in Massachusetts are certified to participate in the Medicaid and Medicare programs. The federal transfer and discharge requirements apply to transfers or discharges to a hospital, other institutional setting or community setting (return home), as well as to transfers between differently certified parts of a nursing facility. Intra-facility transfers are not subject to these requirements; the different requirements applicable to them are discussed later in this section.

Before a nursing home can transfer or discharge a resident, there must be a permissible reason for the discharge properly documented in the resident's record. A resident can be moved only:

- If necessary for the resident's welfare and the resident's needs cannot be met in the facility.
- If the resident's health has improved sufficiently so that the resident no longer needs nursing home care.
- Due to the clinical or behavioral status of the resident.
- If the health of individuals in the facility would otherwise be endangered.
- For nonpayment or if the resident does not submit the necessary paperwork for third-party payment.
- If the nursing home closes.²⁸

However, a resident cannot be transferred or discharged for nonpayment pending an administrative appeal of a denial of eligibility.²⁹

Discharge Planning: As part of the discharge process, a facility must provide sufficient preparation and orientation to ensure a safe and orderly transfer or discharge from the facility, in a form and manner that the resident can understand, and the plan must be documented.³⁰ The resident may not be transferred if the resident files a timely appeal, whether the transfer is between different certified units, to another nursing home, to a hospital or to another setting.

Notice Requirements: Notice of a transfer to another facility or a discharge must be given to the resident, or the resident's designated representative and to the Office of the Ombudsman, at least 30 days in advance, except in an emergency. Notice may be given fewer than 30 days in advance but must be given as soon as possible when the health and safety of individuals in the facility would be endangered, a resident's health improves sufficiently to not require care in the facility, the resident has urgent medical needs (e.g., a need for hospitalization), or if the resident has resided in the facility for fewer than 30 days.³¹

The notice must specify the action to be taken, the specific reason(s) for the action, the effective date of the transfer or discharge, and the location to which the resident is to be discharged or transferred, and must inform the resident of appeal rights.³²

Any resident wishing to appeal a transfer or discharge has the right to request a fair hearing through the Office of Medicaid Board of Hearings. A resident has the right to refuse hospitalization, and an

appeal can be a useful mechanism to ensure that a resident's directives are followed. For a transfer to be approved, a hearing officer must find that the facility complied with all of the legal requirements. The assistance of an attorney or a care manager can be very useful in the appeal process.

If a timely appeal is filed (30 days from the date of the notice for non-emergency situations), the transfer or discharge may not occur until 30 days after a hearing decision is rendered. For emergency situations, the appeal period is 14 days. If the transfer or discharge has not taken place, the resident cannot be moved until five days after the decision. If the resident has been moved, the facility must readmit the resident to the next available bed in the event of a favorable decision.³³

Intra-facility Transfers: Massachusetts law governs transfers within the same certified facility. Transfers are permitted to different living quarters or to a different room based on a change in the resident's needs, e.g., the resident requires, or no longer requires, specialized accommodations, care, services, technologies or staffing not customarily provided in connection with the resident's living quarters.³⁴ The reason for an intra-facility transfer must be documented in the resident's clinical record by a physician. A resident should not be transferred based on a change in the payment status, such as termination of Medicare coverage or establishing eligibility for MassHealth. A nursing home may not discriminate against a resident based on source of payment. However, upon termination of Medicare coverage, a resident might wish to move to a different bed with a lower daily rate.

The resident must be notified of the proposed intra-facility transfer and the right to appeal to the facility's medical director.³⁵ The state law does not contain any provisions regarding the content of the notice or the appeal process. However, prior to a change of room, the resident must be given advance notice in writing with a reason for the change, and 48 hours' advance notice must be given for a change of roommate, except in an emergency.³⁶

Bed Hold: Under Massachusetts law, a nursing home resident has the right to return to their bed following a medical or non-medical leave of absence, and the nursing home must notify the resident of this right. The bed of a MassHealth recipient

must be held during this bed hold period.³⁷ Private pay residents may pay to hold their beds during such leaves. If a medical leave exceeds the bed hold period, the facility must admit the resident to the first available bed in a semi-private room.³⁸ The bed hold period is currently 20 days but subject to change on a yearly basis.

Readmission After Hospitalization: A nursing home resident has the right to be readmitted to the resident's nursing home following a hospitalization. The failure of a nursing home to readmit a resident following a hospitalization is a discharge, which requires notice and appeal rights.³⁹ The resident has a right to file an appeal, even if a nursing home has failed to give the required notice.

E. Department of Public Health Regulations

DPH monitors and licenses nursing home facilities throughout the commonwealth.⁴⁰ To determine whether an applicant for a nursing home license is responsible and suitable for licensing, 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.⁴¹

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 residents' personal possessions, and standards of facility sanitation.⁴² DPH surveyors have the right to visit and inspect any nursing home institution at any time to monitor compliance with regulations.⁴³ Such inspections are unannounced, and occur at least twice per year.⁴⁴ 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 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.⁴⁵ DPH also fields complaints by or on behalf of nursing home residents through its website and telephone hotline. DPH 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 a duly authorized guardian. The written informed consent must be documented on a form approved by DPH, kept in the resident's medical record, and must in-

clude, at a minimum, the purpose for administering the psychotropic drug, the prescribed dosage and any known side effect of the medication. Note that guardians of protected persons must obtain court approval to consent to the administration of anti-psychotic medication.

INFORMED CONSENT FOR PSYCHOTROPIC MEDICATION

Mass. G.L. ch. 111 § 72BB (effective 7/1/14) requires documentation of informed consent prior to the administration of psychotropic medications in long-term care facilities.

See DPH Circular Letter: DHCQ 17-2-699, dated 2/1/17:

- Summarizes the law.
- Lists psychotropic and antipsychotic medications.
- Requires an informed consent form:
 - Prior to administration of medication.
 - Anytime dosage range has changed beyond what resident or authorized person has consented.
 - At least yearly.
- Provides a good summary of when an agent under a health care proxy can consent to administration of antipsychotics without court approval.

F. Medicaid Regulations

To be certified for participation in MassHealth and Medicare programs, a nursing home facility must also follow regulations promulgated by the Office of Medicaid.⁴⁶ Among other things, these regulations include transfer and discharge provisions, bed hold rights and the right to request a fair hearing in certain circumstances. Otherwise, the nursing home will not be reimbursed for any services the nursing home provides to MassHealth- or Medicare-eligible residents.⁴⁷

G. Attorney General's Regulations

Nursing home facilities must also follow the Attorney General's Office regulations, 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.⁴⁸ 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.⁴⁹

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.⁵⁰

Nursing homes may not limit a resident's choice of physician or, for that matter, a resident's choice of pharmacy. See Chapter 5.⁵¹

Nursing home facilities cannot require residents to pay a non-refundable deposit.⁵²

Other Chapter 93A violations include a nursing home's refusal to permit a resident to have privacy during medical treatment or other activities of daily living, or refusal to allow a resident to live in the same unit with their spouse, if both consent.⁵³

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. The consumer protection statute enables an aggrieved consumer to seek a non-judicial remedy by writing a consumer demand letter and provides a mechanism for suing a facility and collecting damages and possibly attorney's fees should that be necessary.

H. Consumer Resources for Nursing Home Residents

If you are facing neglect, abuse, an illegal discharge or any other consumer issue in long-term care, it is important to protect your rights and build a record with the public agencies charged with long-term care oversight. *See list of consumer resources at end of chapter.*

I. Long-Term Care Ombudsman Program

The Long-Term Care Ombudsman Program has been moved from the Executive Office of Elder Affairs (EOEA) to the Executive Office of Health and Human Services. The State LTC Ombudsman oversees a network of staff and volunteer visiting ombudsmen whose job it is to help resolve problems related to the health, welfare and rights of individuals living in nursing facilities, rest homes and assisted living residences. Visiting facilities on a regular basis, ombudsmen offer a way for residents to voice

their complaints and work toward resolution with staff. Each facility is required to post, in a conspicuous location, the name and contact information of the visiting ombudsman assigned to that facility.

ASSISTED LIVING

A. Assisted Living Regulations

The EOECA certifies all assisted living residences (ALRs) in Massachusetts.⁵⁴ ALRs are not licensed facilities and are not subject to the same type of government oversight as nursing homes or other licensed health care facilities. An ALR must provide only single or double living units with lockable doors and a kitchenette within the unit or access to cooking facilities.⁵⁵ Any newly constructed ALR must provide a full bathroom for each unit, while existing ALRs must provide, at minimum, a private half-bathroom.⁵⁶ After evaluation of eligibility and assessment of appropriateness of assisted living services for an older adult, the older adult should receive an individualized service plan that 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.⁵⁷ In addition to a service plan, each resident and sponsor of the ALR 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.⁵⁸ Effective Jan. 1, 2019, all assisted living residency agreements must include a cover sheet summarizing the important provisions of the agreement, and the resident or legal representative must sign the form, which must be retained in the resident's record.⁵⁹ *See cover sheet attached in Appendix.*

Skilled Care in Assisted Living. During the COVID-19 emergency, ALRs were allowed to provide skilled care in certain circumstances. Proposed legislation could extend or permanently change some of the rules regarding certain skilled care services that ALRs can provide.

B. Assisted Living Resident Rights

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

- To live in a decent, safe and habitable environment;⁶⁰
- To be treated with consideration and respect;⁶¹
- To have one's personal dignity and privacy observed;⁶²
- To retain and use personal property in one's unit;⁶³
- To communicate privately and without restriction;⁶⁴
- To contract or engage with health care professionals in one's unit as needed;⁶⁵
- To engage in community services and activities as one chooses;⁶⁶
- To manage one's own financial affairs;⁶⁷
- To present grievances and recommendations without reprisal;⁶⁸
- To have all of one's records kept confidential;⁶⁹
- To have privacy during medical treatment or other services;⁷⁰
- To have reasonable requests responded to promptly and adequately; and⁷¹
- To be free from involuntary discharge or eviction without judicial process (summary process eviction proceedings).

It is important to note that assisted living is a residential model and residents do not have to move unless ordered to do so by a court following notice and a court hearing.

C. Assisted Living Ombudsman Program

The Assisted Living Ombudsman Program has been expanded and combined with the Long-Term Care Ombudsman Program, now housed under the Executive Office of Health and Human Services. 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. The ombudsman will enter the ALR to review and examine the situation.⁷² 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.⁷³ The assisted living ombudsman acts as a mediator and attempts to resolve problems or conflicts that arise between an ALR and one or more of its residents. To contact an assisted living ombudsman, you may call (617) 727-7750 or (800) AGE-INFO (1-800-243-4636).

D. Enforcement

In addition to contacting the Ombudsman Program or an attorney, residents can file a complaint with the EOEA or the Attorney General's Office. The attorney general's regulations provide a mechanism for consumers to pursue complaints based on unfair or deceptive practices, which include disputes

regarding the provision of services. See 940 CMR 3.01 -3.03, 3:05, 3.16 and 3.17.

CONTINUING CARE RETIREMENT COMMUNITIES

A. Continuing Care Retirement Community Oversight

EOEA compiles information about CCRCs in Massachusetts pursuant to Mass. G.L. ch. 93, § 76. The statute sets out disclosure requirements regarding the contractual rights of the parties. There are no regulations governing CCRCs. However, any part of the CCRC that is licensed by DPH as a skilled nursing facility is subject to the same laws, rules and regulations as any long-term care facility.

CONSUMER RESOURCES FOR ASSISTED LIVING RESIDENTS

Residents in assisted living may not be "discharged" or evicted without written notice and due process of law (i.e., summary process).

File a Complaint with the State Ombudsman Program

The Executive Office of Health and Human Services has a separate Ombudsman Program for assisted living facilities.
Phone: (617) 727-7750 or 1-800-243-4636

Send a Consumer Complaint

A demand letter is likely to get the facility's attention and may yield a resolution. Send copies of the demand letter to:

Mary Freeley, Esq., Consumer Protection Division
Office of the Attorney General, One Ashburton Place, Boston, MA 02108

Phone: (617) 727-8400

Email: ago@state.ma.us

Fax: (855) 237-5130

Assisted Living Ombudsman Program
One Ashburton Place, Boston, MA 02108

Phone: (617) 727-7750

Valuable advocacy resources can also be found at Massachusetts Advocates for Nursing Home Reform:
www.manhr.org.

The Executive Office of Elder Affairs 2019 Consumer Guide to Assisted Living can be found online at:
www.mass.gov/files/documents/2019/09/11/ALR%20Consumer%20Guide_09.2019.pdf.

CONSUMER RESOURCES

If you are facing neglect, abuse, an illegal discharge or any other consumer issue in long-term care or assisted living, it is important to protect your rights and build a record with the public agencies charged with long-term care oversight.

Consumer Organizations

Valuable advocacy resources can also be found at the following organizations:

Massachusetts Advocates for Nursing Home Reform (MANHR): www.manhr.org

National Consumer Voice for Quality Long-Term Care: theconsumervoice.org/home

Justice In Aging: <https://justiceinaging.org/our-work/healthcare/long-term-services-and-supports/nursing-facilities/>

Long Term Care Community Coalition (New York based): <https://nursinghome411.org/>

Contact a local legal services program, elder law attorney or care manager.

To find a local legal services program: <https://masslrf.org/en/home/>

To find a local elder law attorney: <https://massnaela.com/>

To find a care manager: www.aginglifecare.org/ALCA/Regional_Chapters/New_England_Chapter/New_England_Chapter_HOME.aspx/

File a Complaint with the Department of Public Health (DPH)

DPH website: www.mass.gov/nursing-home-consumer-information

DPH complaint form: www.mass.gov/how-to/file-a-complaint-regarding-a-nursing-home-or-other-health-care-facility. The complaint form is on the website, but it can't be filed online — it must be faxed or mailed in.

Consumers or their authorized representatives (as outlined below) should send the complaint form (with HIPAA release form if applicable) by:

Mail: Division of Health Care Facility Licensure and Certification Complaint Intake Unit
67 Forest St., Marlborough, MA 01752

Fax: (617) 753-8165

Phone: 1-800-462-5540 (24-hour complaint line for those unable to file a written complaint)

Contact the State Ombudsman Program: (617) 727-7750

The LTC Ombudsman Program assigns an ombudsman to every nursing home in the state, and every area has an assisted living ombudsman program. They can be helpful in resolving consumer complaints.

A list of local long-term care ombudsman programs is at: www.mass.gov/doc/nursing-rest-home-ombudsman-local-contact-information/download.

A list of assisted living ombuds programs is at: www.mass.gov/doc/assisted-living-ombudsman-local-contact-information/download.

Send a Consumer Complaint

The Attorney General's regulations provide that any violation of nursing home residents' rights is a per se violation of the state consumer protection statute, known as Chapter 93A. Send the demand letter to the facility, with copies to:

Mary Freeley, Esq., Consumer Protection Division
Office of the Attorney General
One Ashburton Place, Boston, MA 02108

Phone: (617) 727-8400

Email: ago@state.ma.us

Fax: (855) 237-5130

Carolyn Fenn, State Long-Term Care Ombudsman
One Ashburton Place, Fifth Floor, Boston, MA 02108

Division of Health Care Facility Licensure and Certification, Complaint Intake Unit
67 Forest St., Marlborough, MA 01752

APPENDIX — DPH GUIDELINES

Considerations for Moving a Loved One Home from a Nursing Facility, Rest Home or Assisted Living Residence

During the declared state of emergency in response to the COVID-19 pandemic, families may be considering whether their loved one should move from a nursing facility, rest home or assisted living residence. Outlined below are some steps to evaluate and a list of resources that are available to assist families in assessing this complex decision, as it is important to fully understand the care needs and other supports that your loved one may need.

Step 1: What type of facility does my loved one reside in?

The processes and implications are different depending on where your loved one resides. Read below to learn more.

If a loved one lives in an assisted living residence (ALR):	If a loved one lives in a nursing facility or rest home:
<p>There is no uniform process to move out, as the tenancy is governed by landlord-tenant law; however,</p> <ul style="list-style-type: none"> • If the move is permanent, it is important to check the resident agreement to understand any applicable terms or penalties for terminating residency. • If the move is temporary, it is important to inform the residence (preferably in writing) that the family member will be spending time away from the ALR and continue to make required payments to preserve your family member's tenancy so that they can return to their unit at a later date. • It is also important to coordinate the date, time and process for the move or subsequent return with the ALR and ensure access to any necessary medications, supplies and assistive equipment. 	<p>If you have decided on a discharge home, you can begin the process by:</p> <ul style="list-style-type: none"> • Contacting the social worker at the nursing home to begin to facilitate the discharge process outlined below. • The resident may initiate this contact on their own, or if a resident does not have decisional capacity, the authorized contact or guardian can make this request. • It is important to note that if a family chooses to discharge a loved one from a nursing facility or rest home, their loved one is not guaranteed readmittance to that facility.

Step 2: Primary considerations for moving a loved one

Here are some key questions to consider in moving a loved one from their facility to home:

- Does my loved one have a safe and accessible place to live?
- Is there consistent support and a backup plan should that support not be available?
- What specific services and supports are needed?

Step 3: What are your loved one’s needs? Who will provide assistance?

This chart below can assist with evaluating your loved one’s needs, help you gauge the level of assistance they may require, and allow you to determine who within the family/social support network can provide the in-home assistance. This chart can be shared with the social worker to help determine how much assistance is required and if an outside service is needed.

Needs	Independent/able to do for themselves	Family/friend/in-home support will provide needed assistance	Will need outside assistance
Bathing/personal hygiene			
Getting dressed/undressed			
Toileting			
Walking (ambulating)			
Getting into and out of chair or bed (transferring)			
Taking or reminding to take medication			
Meal preparation			
Shopping			
Laundry			
Transportation to medical appointments			
Supervision (due to cognition/memory loss)			
Other			

Step 4: If outside services are needed:

Now that you have a sense of what your loved one’s needs are and which of these needs requires outside assistance, there are resources in your community to assist you with these decisions.

Aging Services Access Points (ASAPs) are available in every region in the state and can help evaluate the following questions regarding the long-term care needs of a loved one:

- What services or care are available to support community living?
- What assistive devices or home modifications are available to support my loved one living in the community?
- Does insurance cover any services, care and/or home modifications? If not, what funding, loans or donations may be available?

Additionally, if your loved one was previously receiving in-home services from their local ASAP, the ASAP can assist with reinstating services upon their return home.

Step 5: Call your local Aging Services Access Point (ASAP):

Utilize your local ASAP to help navigate these decisions and ask which option is best for your loved one. Go to www.MassOptions.org to identify your local ASAP and their contact information.



EXECUTIVE OFFICE OF ELDER AFFAIRS

Assisted Living Certification Unit
www.mass.gov/elder

Assisted Living Residence (ALR): _____

Residency Agreement Cover Sheet: (651 CMR 12.08(4))

Initialing the box next to each section header confirms that the Resident or legal representative has read each statement listed on this form and has been given the opportunity to ask questions.

CARE:

- ___ An Assisted Living Residence (ALR) is not a nursing home.
- ___ Nurses are not required to be on duty and in the building 24 hours per day/7 days per week. Inquire with the ALR how often and when nurses are in the building.
- ___ Resident's cannot receive skilled nursing care from ALR employees.
- ___ You may be required to provide and pay for additional private care if the ALR determines that your care needs exceed the level of care available at the ALR.

RESIDENCY:

- ___ A signed residency agreement is a contract between you and the ALR; read it carefully before signing. **Note:** If additional services are subsequently required, your monthly costs may increase.
- ___ Eviction from an ALR must comply with the provisions of landlord/tenant law, M.G.L. c. 186 or c. 239, and include all notices required by law.
- ___ The ALR cannot prevent you from returning to the ALR after a hospital or rehab stay; however, if your care needs exceed the ALR's capacity for services you may be required to hire private care staff to meet your care needs.
- ___ Your resident agreement may allow the ALR to terminate your residency if it determines that you are no longer suitable to live there; if this is the case, the Residence must provide a ___ day notice prior to requiring you to leave.
- ___ Signing a residency agreement that includes an arbitration clause or signing a separate arbitration agreement may prohibit use of the court system to resolve disputes and instead require you to present your case to an mediator.

COST:

- ___ You should assess your finances to determine how long you can afford to stay at the ALR before making a commitment.
- ___ If you deplete your assets (run out of money) and are unable to afford the cost of the ALR in the future, the ALR may require you to move.
- ___ The ALR can change your monthly fees with ___ days' notice.
- ___ Your service plan can change based on the ALR's reassessment of your needs. Changes to your service plan may change your monthly costs.
- ___ If you fail to provide notice of termination of Residency in accordance with the terms of the Residency Agreement, you may incur additional charges.

RESIDENT RIGHT

___ Residents may file a complaint at any time with the Assisted Living Residence Ombudsman or the Assisted Living Residence Certification Unit at Executive Office of Elder Affairs by calling (617) 727-7750 or 1-800-AGE-INFO (1-800-243-4636).

Required Signatures

_____ Date: _____
Resident or Legal Representative

_____ Date: _____
ALR Witness: Name and Position

**A copy of this form should be provided to both parties after signing.
The ALR's copy should be maintained in the resident record.**

The Massachusetts Chapter of the National Academy of Elder Law Attorneys (MassNAELA) is a non-profit organization that was incorporated in 1992, to serve the legal profession and the public with the following mission:

- To provide information, education, networking, and assistance to Massachusetts attorneys, bar organizations, and other individuals or groups advising elderly clients, clients with special needs and their families;
- To promote high standards of technical expertise and ethical awareness among attorneys, bar organizations and other individuals or groups engaged in the practice of advising elderly clients, clients with special needs and their families;
- To develop public awareness and advocate for the benefit of the elderly, those with special needs and their families, by promoting public policies that support our mission; and
- To encourage involvement and enhance membership in, and to promote networking among members of the National Academy of Elder Law Attorneys.

MassNAELA is a voluntary association whose members consist of a dedicated group of elder law and special needs attorneys across the Commonwealth of Massachusetts.

CONTACT
INFORMATION FOR
MASSNAELA

P.O. Box 600046

Newtonville, MA 02460

Phone: (617) 566-5640

Fax: (781) 207-9027

www.MassNAELA.com

**ELDER ADVOCATES
SPREAD THE WORD:**

*Just Say
“NO” to
Arbitration!*



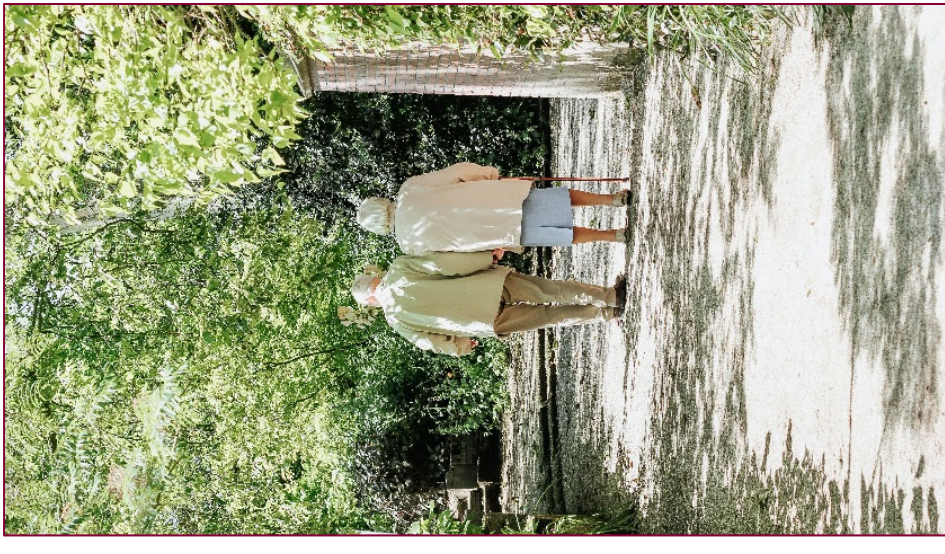


Frail nursing home residents and their frazzled family members are routinely asked to sign a stack of densely-printed documents at the time of admission, without adequate time to review them or to consult with counsel, and without realizing that the agreements may include forced arbitration provisions. Arbitration requires residents to waive their fundamental constitutional right to a jury trial, even if they later suffer serious injury, medical malpractice, or wrongful death. Because arbitration is secret and there is no public record of the outcome, it keeps cases of malpractice, abuse and neglect out of the public eye, effectively denying residents and their families access to justice.

A new federal rule from Centers for Medicare and Medicaid Services, effective September 16, 2019, provides that:

- **Residents may not be required to agree to arbitration as a condition of admission to a nursing home.**
- **Residents may not be required to agree to arbitration as a condition of continued stay in a nursing home.**
- **Residents and their representatives have a 30-day right to rescind the arbitration agreement.**
- **Nursing homes must explicitly inform residents or their representatives of the right not to sign an arbitration agreement as a condition of admission to, or right to remain in, the facility.**
- **The arbitration agreement itself must explicitly state that the agreement is not a condition of admission to, or right to remain in, the facility.**
- **Facilities must ensure that the agreement is explained to residents and their representatives in a “form and manner” that they understand, including in a language they understand.**

Although the new rule does not impose an outright ban on arbitration agreements in nursing homes, it does affirm the right of residents to “just say no” to arbitration clauses in admission agreements. Elder advocates should seize this opportunity to educate residents, their families and representatives, and the public about these critical rights.



1. MASS. G.L. ch. 19D, § 1 (2012).
2. *Id.*
3. *Id.*
4. MASS. G.L. ch. 93, § 76 (2012).
5. *Id.*
6. www.medicaid.gov/medicaid/ltss/institutional/nursing/index.html.
7. 105 CMR 150.000: STANDARDS FOR LONG-TERM CARE FACILITIES 150.022 - 150.029 Dementia Special Care Units.
8. *Id.*
9. MASS. G.L. ch. 111, § 70E (2010).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. MASS. G.L. ch. 111, § 70E (2010).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. 940 C.M.R. § 4.06.
20. *Id.*
21. *Id.*
22. *Id.*
23. 940 C.M.R. § 4.07.
24. *Id.*
25. 940 C.M.R. § 4.06.
26. *Id.*
27. Nursing Home Reform Law, 42 U.S.C. §§ 1395i-3(a)-(h) and 1396r(a)-(h).
28. 42 C.F.R. § 483.15(c)(1).
29. 940 C.M.R. § 4.09(2).
30. 42 C.F.R. § 483.15(c)(1).
31. 42 C.F.R. § 483.15(c)(3).
32. 42 C.F.R. § 483.15(c)(3).
33. 42 C.F.R. § 483.15(e)(1)(i).
34. *Id.*
35. *Id.*
36. 42 C.F.R. § 483.10(e)(6), 940 C.M.R. § 4.06(11).
37. 42 C.F.R. § 483.15(c)(1) and (2).
38. 42 C.F.R. § 483.15(e)(1)(i).
39. 42 C.F.R. § 483.15(e)(1), *See* 130 C.M.R. § 456.429, 130 C.M.R. § 610.028(D); and *Brunelle v. DMA* (Mass. Superior Ct.).
40. MASS. G.L. ch. 111, § 71 (2010).
41. *Id.*
42. *Id.* § 72.
43. MASS. G.L. ch. 111, § 72 (2010).
44. *Id.*
45. *Id.*
46. 130 C.M.R. § 456.406.
47. *Id.*
48. *Id.*
49. 940 C.M.R. § 4.03.
50. 940 C.M.R. § 4.04.
51. *Id.*
52. *Id.*
53. 940 C.M.R. § 4.06.
54. 651 C.M.R. § 12.03.
55. 651 C.M.R. § 12.04.
56. *Id.*
57. *Id.*
58. 651 C.M.R. § 12.08.
59. 651 C.M.R. § 12.08(4).
60. 651 C.M.R. § 12.08.
61. *Id.*
62. *Id.*
63. *Id.*
64. 651 C.M.R. § 12.08.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. 651 C.M.R. § 12.08.
70. *Id.*
71. *Id.*
72. 651 C.M.R. § 13.00.
73. *Id.* § 13.03.

CHAPTER 8

HOMESTEADS AND LIFE ESTATES

INTRODUCTION

For most Americans, their home is their largest single asset. As we age, we become increasingly concerned about how its value can be protected and passed on to future generations. It is important for homeowners to educate themselves about how to protect their homes from creditors (by placing a homestead declaration on the home), how to reduce property taxes (discussed in Chapter 9), how to borrow prudently on equity that has built up during their lifetimes (discussed in Chapter 10 and how to efficiently transfer property to family and loved ones. Consulting with a knowledgeable elder law attorney is critical to determine what planning steps may be appropriate. *See the sample forms at the end of this chapter that are available online at www.mass.gov for Homes Owned by Natural Persons and Homes Owned by Trustee(s).*

A. Homestead Declaration

1. What Is a Homestead Declaration?

A homestead declaration is a document recorded with the Registry of Deeds that protects equity in one's principal residence from certain creditors and their claims.

Massachusetts revised its homestead laws in 2011 and again in 2022 to provide homeowners with added protection against creditors. The 2022 amendment to the homestead laws provided clarification to the 2011 law, expanded the class of individuals who could benefit from a homestead declaration, and expanded the ways in which a homestead could be terminated. The law provides homeowners with an automatic \$125,000 homestead exemption. Homeowners may record a declared homestead exemption to extend the exemption amount to \$500,000. This protection extends to the homeowner's spouse and family. 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 refile. 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. Older adults (persons 62 years of age or older) have an increased homestead exemption of \$500,000 for single owners and \$1,000,000 for a married couple. Lastly, homeowners do not have to refile 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:
 - Federal, state and local taxes, assessments, claims and liens;
 - Liens on the home recorded prior to the filing of the declaration of homestead;
 - First and second mortgages;
 - A court order that the homeowner pay support to a former spouse or minor children; or
 - A Medicaid (MassHealth) lien if the owner requires nursing home care.
- b. If an individual recorded a homestead declaration before attaining age 62, the individual must file a new declaration to gain added protections for older homeowners.
- c. Individuals who gift the remainder interest in the property to one or more individuals and reserve a life estate may lose the homestead protection over the entire property. To be safe, the life estate holder should file a new homestead with respect to the life estate.
- d. A remainderman may file a declaration of homestead if they use the property as their primary residence.
- e. When transferring a home to or from a trust, a new homestead declaration must be filed.

B. What Is a Deed with a Life Estate?

- (i) An individual may give a future interest in a home to another person by deed, while at the same time reserving the exclusive right to live in the home for life. This transfer is accomplished by executing and recording a deed transferring this property interest. The individual retaining the right to live in the property is the “life tenant,” and the person receiving the future interest in the property is the “remainderman.” In many situations, individuals will give their children or other relatives the remainder interest in their homes.
- (ii) The life tenant has the sole right to live in and operate the property. If the life tenant rents the property, the life tenant has the right to any income generated from the property. The life tenant has the duty to maintain the property.
- (iii) Upon the death of the life tenant, the life estate terminates and the remainderman will then own the property in its entirety, avoiding probate.
- (iv) If a property is owned in this format, then the property cannot be sold or mortgaged without the consent of both the life tenant and the remainderman. The life tenant may still be eligible for a reverse mortgage provided that the remainderman consents.
- (v) If the property is sold during the life tenant’s life, the life tenant will not receive the full sales proceeds since they do not entirely own the property. The life tenant will receive a portion of the sales proceeds (the actuarial value of the life estate), and the remainderman will receive the balance. The remainderman may be subject to and have to pay capital gains taxes when the property is sold if they do not qualify for the IRC Sec. 121 capital gains tax exclusion by not using the property as their primary residence. If the property is sold after the life tenant’s death, the remainderman would benefit from a stepped up in basis for capital gains tax purposes.
- (vi) Under current MassHealth (the term used for Medicaid in Massachusetts) law, certain individuals who receive MassHealth benefits 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 in a property that has a lien and the property is sold during the life tenant’s life, then MassHealth can collect on the lien from the proceeds of the sale that are attributable to the life estate’s actuarial value, but not the remainderman’s actuarial value. If the property is sold after the life tenant’s death, MassHealth cannot enforce the lien because, under current law, that life estate is extinguished upon the death of the life tenant.
- (vii) A transfer of a remainder interest is a disqualifying transfer under MassHealth regulations and creates a “five-year look-back period” on that transfer. If the transferor applies for MassHealth benefits within five years after making the transfer, then the transferor would be subject to a disqualification period for MassHealth benefits. The disqualification period is a period of time determined under a formula that MassHealth utilizes. (*See the section on Transfer Rules in Chapter 3.*)
- (viii) A transfer of a remainder interest is a taxable gift that needs to be reported on a federal gift tax return.
- (ix) The remainderman’s interest in the property is subject to their creditors, including a divorce judgment, and the future sale of the property may be further complicated if the remainderman predeceases the life tenant.

EXAMPLE 1

Larry retains a life estate and gifts the remainder interest in his home to his son, Robert. Larry needs to file a gift tax return reporting the gift of the remainder interest. Later, Larry decides he wants to sell his home to a third party. Not only does Larry need Robert to agree to sell the home, since Larry does not have full ownership of the property (he only has a life estate), Larry will only receive the actuarial value of his life estate and Robert would receive the balance of the sales proceeds. Larry can use his Section 121 capital gains tax exemption on his portion of the sales proceeds, but Robert, presuming he did not use the property as his primary residence two out of the last five years, would have to pay capital gains taxes on his portion of the amount realized less his portion of the basis.

The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth

Declaration of Homestead for Homes Owned

by Natural Persons *(General Laws Chapter 188)*

In situations where the home is owned by multiple owners, each owner may be best served to complete a separate declaration of homestead.

1. I, _____,
(insert name of owner)

We, _____,
(insert name of owners)

hereby declare homestead pursuant to M.G.L. c.188 and state that I/we own the home described below and occupy or intend to occupy the home as my/our principal residence.

Owner Information

2. Check all that apply:

I/we, _____ am elderly (62 years of age or older).
(insert name (s))

I/we, _____
(insert name (s))

am/are disabled (have a physical or mental impairment that meets the disability requirements for Supplemental Security Income under 42 U.S.C. 1382c(a)(3)(A) and 42 U.S.C. 1382c(a)(3)(C). One of the following must be attached: 1) an original or certified copy of a disability award letter issued to the person by the United States Social Security Administration, or 2) a letter signed by a physician registered with the board of registration in medicine certifying that each person meets the disability requirements stated in 42 U.S.C. 1382c(a)(3)(A) and 42 U.S.C. 1382c(a)(3)(C).

I am married to _____,
who is not a co-owner of the home but who occupies or intends to occupy the home as his/her principal residence.

I/we, _____
(insert name (s))

am/are servicemember(s) who may be subject to protection under the servicemember(s) Civil Relief Act, 50 U.S.C. App 533, should I/we be called to active duty.

Home Information

3. Address: _____, Massachusetts.
(street number and name, city/town)

4. Select **ONE** of the following:

Deed is recorded in _____ Registry of Deeds in _____ and _____
(district/county) (book) (page)

Certificate of Title _____ registered in the Land Registration Office _____
(number) (document #)

Inheritance from _____, Docket number _____
(name of previous owner)
_____ in _____
(number) (county)

For manufactured homes, license number _____
(number)

5. I/we, whose names are signed on this document, acknowledge that I/we sign it voluntarily for its stated purpose.

To be signed by Applicant(s) in front of Notary Public.

Signed under pains and penalties of perjury this

_____ day of _____, 20_____.

For Use by Notary Public Only:

COMMONWEALTH OF MASSACHUSETTS

_____, ss.

_____, 20 _____, before me, the undersigned notary public, personally appeared

_____,
(name(s) of the document signer(s))

proved to me through satisfactory evidence of identification, which were _____,
(drivers license, passport, etc.)

to be the person(s) who signed the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (her) (their) knowledge and belief.

Notary Public: _____

My commission expires: _____

The Commonwealth of Massachusetts

William Francis Galvin, Secretary of the Commonwealth

Declaration of Homestead for Homes Owned by Trustee(s) *(General Laws Chapter 188)*

1. I, _____, Trustee
(insert name of owner)

We, _____,
(insert name of owners)

_____, Trustees
of certain trust _____
(trust name)

dated _____ and recorded _____ and _____
(date) (book) (page)

hereby declare homestead pursuant to M.G.L. c.188 and state that I/we own the home described below and which the beneficiaries listed herein occupy or intend to occupy as his/her/their principal residence:

Beneficiary Information

2. Enter beneficiary name(s): _____
(insert beneficiary name(s))

3. Check all that apply and enter beneficiary name(s):

_____ is/are elderly (62 years of age or older).
(insert beneficiary name(s))

(insert beneficiary name(s))

is/are disabled (have a physical or mental impairment that meets the disability requirements for Supplemental Security Income under 42 U.S.C. 1382c(a)(3)(A) and 42 U.S.C. 1382c(a)(3)(C). One of the following must be attached: 1) an original or certified copy of a disability award letter issued to the person by the United States Social Security Administration, or 2) a letter signed by a physician registered with the board of registration in medicine certifying that each person meets the disability requirements stated in 42 U.S.C. 1382c(a)(3)(A) and 42 U.S.C. 1382c(a)(3)(C).

I/we, _____
(insert name (s))

am/are servicemember(s) who may be subject to protection under the servicemember(s) Civil Relief Act, 50 U.S.C. App 533, should I/we be called to active duty.

4. For each applicable beneficiary, complete one statement. Attach additional page(s) as necessary.

_____ is married to _____
who is not a co-owner of the home but who occupies or intends to occupy the home as his/her principal residence.

_____ is married to _____
who is not a co-owner of the home but who occupies or intends to occupy the home as his/her principal residence.

Home Information

5. Address: _____, Massachusetts.
(street number and name, city/town)

6. Select ONE of the following:

- Deed is recorded in _____ Registry of Deeds in _____ and _____
(district/county) *(book)* *(page)*
- Certificate of Title _____ registered in the Land Registration Office _____
(number) *(document #)*
- Inheritance from _____, Docket number _____
(name of previous owner)
- _____ in _____
(number) *(country)*
- For manufactured homes, license number _____
(number)

7. I/we, the trustee(s) whose name(s) are signed on this document, acknowledge that I/we sign it voluntarily for its stated purpose.

To be signed by Applicant(s) in front of Notary Public.

Signed under pains and penalties of perjury this

_____ day of _____, 20_____.

For Use by Notary Public Only:

COMMONWEALTH OF MASSACHUSETTS

_____, ss.

_____, 20 _____, before me, the undersigned notary public, personally appeared

_____,
(name(s) of the document signer(s))

proved to me through satisfactory evidence of identification, which were _____,
(drivers license, passport, etc.)

to be the person(s) who signed the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (her) (their) knowledge and belief.

Notary Public: _____

My commission expires: _____

CHAPTER 9

TAX ABATEMENTS

A. 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 their home for a minimum number of years (usually five or 10 years). An applicant may either own their 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 their property taxes, they may receive additional relief through a hardship exemption, the Elderly and Disabled Taxation Fund, the Senior Work-Off Program or the Senior Circuit Breaker Tax Credit, discussed in Section D 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% of the property.

B. Exemptions

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, applicants should contact their local tax authorities for particular details on programs.

1. Elderly Persons

The standard Elderly Persons exemption provides \$500 (or \$1,000 in some communities) for homeowners who are at least 70 years of age or 65 years of age in some communities. The applicant must have occupied the property as their 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 older individuals own the property jointly, the exemption amount will only benefit one owner.

An 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 \$13,000 per year and have assets less than \$28,000. A married applicant cannot earn more than \$15,000 per year and cannot own assets that exceed \$30,000. 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 is also excluded when calculating the applicant's assets.

Cities and towns may adopt more liberal restrictions, and therefore, older adults should contact their local assessor to see if they qualify under the town's Elderly Persons 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 B, 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 a Massachusetts resident for at least six months prior to entering the service, or the veteran must have lived in Massachusetts for at least two 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 their medal awarded. A list of available veteran exemptions relating to real estate includes:

- \$400 to veterans who received at least a 10% 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 their 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 their 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 they are 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 their 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

Sally 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, however, have voluntarily adopted a higher exemption amount.

There are no income limitations for these exemptions. As a result, this exemption is a good alterna-

tive for older adults who do not qualify under the Elderly Persons exemption discussed in Section B, 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. On the other hand, an older adult applying for this exemption must have owned and occupied the property as their 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

Ethel is 70 years old and has lived in her home for the past seven years. Ethel has \$30,000 in the bank and a home valued at \$200,000 with an outstanding mortgage of \$170,000. Ethel 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. Ethel 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

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

C. Deferring Taxes

The Elderly Tax Deferral, available under Mass. G.L. ch. 59, § 5,(41)(A), allows an older homeowner to defer payment on their 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% of the then-assessed property value. A single older homeowner must be at least 65 years old to be eligible for the deferral. An older adult may own the property jointly or as a tenant in common. For older adults 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% interest annually, 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 older

homeowner or sale of the property. If the property is sold or the older homeowner is deceased and the taxes are not repaid, the tax deferral becomes a lien on the property.

The 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 older adult'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

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

D. Other Tax Exemptions and Credits for Older Adults

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."

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 deposited 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 their community's eligibility guidelines. Since the statute does not provide specific standards to define elderly or dis-

abled, 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 their 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 older adults to volunteer their services to the community in exchange for a reduction in their property tax bill.

An eligible older adult may save up to \$1,500 on their taxes, depending on the community's election. The older adult 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 older adult that will be applied against their property tax bill. By applying these vouchers, the older adults 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 abatement on the same property, unless local provisions express otherwise. Older adults may earn the work-off abatement on top of any other exemptions and credits that may be available under any other statutes. Older adults 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, older adults must demonstrate a financial hardship in order to receive jobs with the community, and the hours an older adult may work are limited since they can only earn up to \$1,500 per year. In most towns, there is no automatic reenrollment, 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 older adult; (b) increases the involvement of older adults in local government; and (c) gives communities a skilled pool of potential older 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 older adult's state income tax as opposed to their property tax. The circuit breaker credit allows property owners or renters 65 years of age or older to claim a credit of up to \$1,200 (for 2022) for rent or real estate taxes paid on their principal residence to the extent the taxes exceed 10% of their total income. The state pays the credit as opposed to the local cities and towns.

Older homeowners who paid more than 10% of their income for real estate taxes and water and sewer charges are eligible for the credit. Older renters can count 25% of their rent as real estate taxes. In order to receive the credit, an older adult must file a state income tax return, even if they are 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 2022, single older adults cannot earn more than \$64,000. For heads of household, and married couples filing a joint return, the annual 2022 income limitations are \$80,000 and \$96,000, respectively. In all cases, the value of the home after abatements cannot exceed \$912,000 for 2022. In order for a renter to receive the credit, they cannot be receiving a rent subsidy, and they cannot pay rent to a landlord who is not required to pay real estate taxes. A taxpayer may add 50% of their water and sewer bill to their 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

Nancy is 81 years old and lives alone. Nancy's home is valued at \$350,000, and she earned \$20,000 in 2022. 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. Nancy also received the Elderly Persons exemption of \$175 and earned \$500 through the Senior Work-Off Abatement. Nancy's adjusted property tax is \$4,575 (\$5,250 - \$175 - \$500). Ten percent of Nancy's income is \$2,000. Because Nancy's adjusted real estate tax exceeds 10% of her total income by at least \$1,200, Nancy is eligible for the full \$1,200 income tax credit for 2022.

ADDITIONAL RESOURCES AND CONCLUSION

Additional information and applications for exemptions can be obtained at the assessors' office in each city or town. Several assessors' offices have websites that 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 assessors' office for specific eligibility requirements and exemption amounts.

CHAPTER 10

REVERSE MORTGAGES

Basic Information About a Potentially Helpful Retirement Tool

INTRODUCTION

Reverse mortgages are one of the most misunderstood financial products on the market today. For many older homeowners, their homes are their most valuable, if not their 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 homeowners who 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 adviser before entering into one of these transactions.

WHAT IS A REVERSE MORTGAGE?

A reverse mortgage is a type of loan that enables an age-qualified homeowner to release or “cash out” some of the equity in their home without incurring a new monthly mortgage payment. The purpose of a reverse mortgage is to increase a homeowner’s access to spendable cash in their later years. The tradeoff is that the reverse mortgage is eating into the borrower’s home equity as the loan repayment balance increases steadily over time.

HOW DOES A REVERSE MORTGAGE COMPARE WITH THE OTHER MORTGAGES?

In a “standard” mortgage, you pay principal to build equity in your home. In a home equity line of credit (HELOC), you can take out “loans” secured by the value of your home, but you must make inter-

est payments on the outstanding loan balance. For all mortgages, there are eligibility rules and costs. The Loan Comparison Chart (see page 84) compares a reverse mortgage with a standard mortgage and a HELOC.

A. Types of Reverse Mortgages

In 2023, Massachusetts homeowners can choose among a few 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 2018 in an effort to improve consumer protections and stabilize the FHA Mutual Mortgage Insurance Fund.

From time to time, there may be additional proprietary reverse mortgage products available for high-value properties. While many of these loans are set up to run similarly to a HECM, they often have different closing costs and interest rates and other unique features. An individual contemplating one of these loans should consult with an elder law attorney or a real estate attorney to have the loan terms reviewed and explained. As with a HECM, homeowners obtaining these loans are required to have reverse mortgage counseling with a HUD-certified reverse mortgage counselor prior to obtaining the loan.

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 an HECM Reverse Mortgage Work?

Unlike a conventional “forward” mortgage, a HECM has no required monthly repayment obligation. It is a deferred payment loan. The repayment of the loan is deferred until the home is sold or the last borrower (or qualified non-borrowing spouse) has

passed away, left the home permanently or defaulted on the terms of the mortgage. As with any mortgage, the borrower must keep current with property taxes, homeowners insurance, maintenance, and municipal utility charges.

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.

Borrowers can access loan proceeds in one of the following ways or any combination of them.

- **Immediate Lump Sum.**
- **Tenure Payment.** A monthly amount sent to the homeowner that is guaranteed to continue as long as the homeowner occupies the home as their primary residence, even if for 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 \$724 per month, whereas a 75-year-old living in the same house might have a tenure payment of \$1,060 per month.¹
- **Term Payment.** A monthly payment that lasts for a finite number of months and then ends. These payments are usually for a larger amount than is available under the tenure payment option and may deplete the available loan balance quickly.
- **Line of Credit.** The homeowner can pull out loan funds at times and in amounts of their choosing. In that way, it is similar to a HELOC. However, that is where the similarities end. As long as the borrower meets their 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 a HECM line of credit grows larger at a guaranteed, compounding growth rate (the same interest rate at which the loan balance grows). So, a 62-year-old living in a home worth \$600,000 may start out today with a line of credit of \$174,973. But if the individual leaves the line of credit alone and allows it to grow, it will grow to \$357,454 in 10 years and \$730,241 in 20 years, even if the home de-

creases in value.²

The importance of understanding how compounding interest impacts any reverse mortgage is significant. The impact on the balance due at the time of payoff may cause some confusion among homeowners and their families. *See Example 1 on page 83).*

C. Repaying an HECM Reverse Mortgage

Any of the following six circumstances will trigger repayment of a HECM:

1. Most common — the last borrower (or eligible non-borrowing spouse) passes away.
2. The borrower sells the property or otherwise conveys title without retaining a life estate interest or beneficial interest in a trust.
3. The borrower ceases to occupy the real estate as their principal residence.
4. Failure to maintain the property such that the home falls into disrepair.
5. Failure to maintain the homeowners insurance on the property.
6. Failure to pay the property taxes and, in some cases, municipal utility charges, which, if unpaid, become liens, such as water and sewer bills.

The outstanding repayment 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 who withdraws \$20,000 initially for a home repair and to eliminate credit card debt may owe \$48,305 in five years and \$69,042 in 10 years.³ Compare that to a homeowner who withdraws \$100,000 initially and deposits most of it in the bank. The homeowner could owe \$169,124 in five years and \$241,728 in 10 years because of the compounding effect of the loan charges.⁴

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 outstand-

ing balance will leave the loan open and accessible in the future.

Usually, a HECM is repaid by selling the home, refinancing into a regular mortgage, or utilizing the cash or life insurance death benefit of a deceased borrower. Typically, the home is sold for a price that exceeds the HECM outstanding balance. In that case, the excess sale proceeds revert to the borrower or their estate.

A HECM is a “non-recourse” loan, meaning that, if the outstanding loan balance exceeds the home’s fair market value at the time of repayment, the borrower or their estate is only responsible for repaying 95% 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 the borrower’s 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. This one-year period includes an initial six-month repayment period plus additional, allowable extensions. 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 an 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 carefully consider how they want to use 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

EXAMPLE 1

First, understand compound interest. Compound interest is the addition of interest to the principal sum of a loan or deposit, or in other words, interest on interest. For example, borrowing \$50,000, at a 2% interest rate, compounded monthly. In January, the interest is \$83.33 (\$50,000 times .02, then divided by 12). In February, the interest is calculated on \$50,083.33, so the February interest is \$83.47.

Let’s assume a 70-year-old couple in a \$500,000 home sets up an HECM line of credit with \$283,000 in it. First, their \$19,543 in closing costs are automatically subtracted, and then the couple withdraws \$125,000 immediately. Their beginning loan balance is \$144,543. Lender interest and FHA mortgage insurance begin accruing on that amount and compound over time. If the couple sells their home or dies 15 years later when they are 85, their outstanding loan balance could be \$255,627. Over that 15-year period, \$111,084 in lender interest and FHA mortgage insurance has built up and is added into their outstanding loan balance.

The difference between the home’s value and the \$255,627 loan balance is their remaining home equity that they will receive as cash from the sale. The same \$500,000 home could either appreciate or depreciate over time, and that will impact how much equity, if any, the homeowners or their estate will receive upon sale. For instance, if the home appreciates at 4% per year over that 15-year period, it will be worth \$900,472. If it appreciates at 2% per year, then the home will be worth \$672,934. The difference between those figures and the \$255,627 loan payoff is the equity returning to the homeowners or their estate. Finally, if the home depreciates over the 15 years down to \$240,000, then the non-recourse protections built into the HECM program will protect the homeowners and their estate.

At the same time this couple’s loan balance is growing due to the compounding interest and FHA mortgage insurance, their available line of credit is also growing larger. After our couple withdrew their initial \$125,000, their remaining available line of credit was \$138,457. Over the next 15 years, the available line of credit grows, and that growth, like their interest, compounds over time. By year 15, their available unused line of credit grows from \$138,457 to \$244,866. That’s \$106,409 in additional line of credit growth that the couple had the opportunity to access if they wanted to.

Social Security retirement benefits in order to receive a larger monthly benefit;

7. Replacing lost income sources like a deceased spouse's Social Security or pension, or a depleted 401K, IRA or annuity;
8. As a funding source for older adults 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.

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

E. Determining Eligibility for an HECM Reverse Mortgage

There are a few requirements to be eligible for a HECM.

Age. The minimum qualifying age for the FHA-insured HECM program is 62. New rules 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, a HUD-certified reverse mortgage counselor and their lender.

Property Value. There is no minimum property value requirement, though a homeowner must have enough equity in their home to pay off any existing

LOAN COMPARISON

Loan Type	Due Date	Interest Rate	Non-Recourse	Expenses	Income/Credit/Asset in Underwriting	Mortgage Payment and Balance
(Reverse mortgage) HECM (federally insured Home Equity Conversion Mortgage)	Death of borrower(s); Sale of home; Borrower(s)'s absence from property for six or more months in a year; Borrower(s) in hospital and/or nursing home care for 12 consecutive months; Foreclosure for nonpayment of property charges. <i>See no. 1 reference below.</i>	Adjustable or Fixed Rate (smaller sum available under fixed rate "lump sum" option).	Yes	Mortgage insurance premium = 2% of home value; negotiable loan origination fee of \$2,500 to \$6,000 based on home value; Standard loan closing costs (<i>see no. 2 reference below</i>); annual MIP (<i>see no. 3 reference below</i>).	Only for purposes of confirming borrower's ability to pay property charges (potential proceeds from HECM loan are included in the calculation).	No mortgage payments are required. Loan balance increases at compounding interest. In these loans, the interest is added to the loan amount and becomes interest on interest.
Standard Mortgage	End of term of loan; Sale of home; Refinance of loan; Foreclosure for non-payment.	Adjustable or Fixed Rate	No	Standard loan closing costs; Origination fee(s)/points (if applicable).	Yes	Principal and interest payments are required, reducing loan balance over life of loan.
HELOC (Home Equity Line of Credit)	End of term of loan; Sale of home; Refinance of loan; Foreclosure for non-payment.	Adjustable or Fixed Rate	No	Standard loan closing costs; Origination fee(s)/points (if applicable).	Yes	Interest payments are required; Principal payments will reduce loan balance over the life of loan.

1. Property charges are real estate taxes, homeowners insurance, condominium or homeowners association (HOA) fees, and certain municipal fees, which, if unpaid, become liens.
2. Standard loan closing costs are lender attorney's fee, lender's title insurance premium and recording fees at Registry of Deeds.
3. A mortgage insurance premium equal to 0.5% of the outstanding loan balance added on an annual basis.

mortgages or liens, and the home must meet FHA guidelines. In 2023, lenders may consider up to the first \$1,089,300 when determining an applicant's eligibility and loan amount.

Residency. The property securing the loan must be the borrower's primary residence.

Ownership. While home ownership is ordinarily a prerequisite, life tenants and beneficiaries of certain types of trusts may obtain a HECM, subject to some restrictions. Applicants should make sure that they or their attorney communicates with the lender early in the process to make sure their ownership interest meets HUD and lender guidelines.

Home Type and Condition. 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 (individual condominiums can now be approved rather than entire condominium complexes/buildings). 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 one year to complete the repairs post-closing or, in cases when repairs are deemed a serious safety or structural hazard, lenders will require a homeowner to complete those repairs prior to closing. Homeowners who installed leased solar panels on their homes should note that a portion of their solar panel lease agreement will have to be changed. The lender should discuss this matter directly with the solar energy company.

Income and Credit. "Financial Assessment" is a term describing credit and income underwriting rules that assess the suitability of a HECM for each applicant's financial situation and 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 their ongoing property expenses. Those who don't meet certain HUD thresholds will encounter "Life Expectancy Set Asides" that require setting aside what can be a substantial percentage of their available HECM funds for future property tax and insurance payments, or in some cases (where the borrower is 62 or

a few years older and the property charges are large), their HECM application may be denied.

F. Fees Associated with Obtaining a Reverse Mortgage

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.

The FHA Initial Mortgage Insurance Premium is equal to either 2% of the home's value or \$21,786, whichever is less. More often than not, this insurance premium makes up the largest percentage of the total financed closing costs.

An origination fee is another closing cost, and depending on the home's value, it can be as high as \$6,000 for a home valued at \$400,000 or more. In some cases, lenders will agree to reduce their origination fee or offer "lender credits" to offset some of the closing costs. However, this may cause the lenders to increase the interest rate margin, allowing them to recapture these fees over time.

Although borrowers need not pay most closing costs out of pocket, they should be aware that if they finance the loan costs by adding them to their loan balance, they (or their estate on their death) will still pay them back (plus interest) when the loan becomes due and payable.

In terms of ongoing costs, there is interest, an FHA mortgage insurance premium of .50% per year and possibly servicing fees of \$30 or \$35 per month. As Section C illustrates, interest and the FHA annual insurance premium compound over time, thereby causing the outstanding loan balance to grow faster over time.

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 in a much lower amount than is available with an adjustable rate. A line of credit, tenure payment and term payment are not available with a fixed interest rate.

REVERSE MORTGAGE COUNSELING

TIP: Calculate the amount you will need immediately, and then calculate what you will need going forward. Ask for the calculations over different periods of time — the first year, the fifth year, etc. If you expect to live in the home indefinitely, what are the calculations 15 or 20 years out? Is the interest rate variable or fixed? How do these calculations fit into your overall plan? Know that both the lender and the reverse mortgage counselor are required to show each borrower an amortization schedule forecasting the loan's outstanding balance each year until the youngest borrower's 100th birthday.

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-certified reverse mortgage counselor. All reverse mortgage counseling sessions within Massachusetts must take place face-to-face with a HUD-approved counselor.

NOTE: Telephonic or virtual "Zoom" counseling is allowed through March 31, 2023, per state legislation passed in July 2022. One can find an agency approved in Massachusetts at the Executive Office of Elder Affairs website: www.mass.gov/service-details/reverse-mortgage-counselors.

APPROVED HUD HOUSING COUNSELING AGENCIES

The following is the currently approved list of HUD Housing Counseling agencies providing HECM counseling within the commonwealth as of January 2023:

American Consumer Credit Counseling

130 Rumford Ave., Ste. 202
Auburndale, MA 02466
Tel: (617) 559-5700 • Toll-free (866) 826-7180

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

Housing Assistance Corp.

460 West Main St.
Hyannis, MA 02601
Tel: (508) 771-5400, ext. 287

Neighborworks Housing Solutions

68 Legion Parkway
Brockton, MA 02301
Tel: (617) 770-2227, ext. 344

1. Calculated 02/22/2023 assuming \$400,000 home value, 6.665% expected rate, 7.835% initial rate adjusting monthly, \$17,296 financed closing costs.
2. Calculated 02/22/2023 assuming \$600,000 home value, 6.665% expected rate, 7.835% initial rate adjusting monthly, \$21,826 financed closing costs.
3. Calculated 02/22/2023 assuming \$400,000 home value, 6.665% expected rate, 7.835% initial rate adjusting monthly, 0.50% MIP, \$17,296 financed closing costs.
4. Calculated 02/22/2023 assuming \$600,000 home value, 6.665% expected rate, 7.835% initial rate adjusting monthly, \$21,826 financed closing costs.

CHAPTER 11

ELDER ABUSE, NEGLECT AND FINANCIAL EXPLOITATION

**** In this chapter, the term “elder” will be used due to statutory references. Otherwise, “older adult” is now the commonly accepted term.**

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 underreported, 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. Some studies have shown that when abuse occurs, family members and caregivers may account for as much as 90% of the abuse. 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 older adults.

A. What Is Elder Abuse?

Elder abuse has a broad definition because of the many ways in which older adults are vulnerable. In Massachusetts, elder abuse includes actions by almost anyone, including a caretaker,¹ conservator² or guardian,³ causing: (1) physical or emotional injury, including sexual abuse; (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 older adults are unable to care for themselves. Some often-overlooked warning signs of neglect include bed sores, poor hygiene, malnutrition, mood changes and unaccounted-for changes to the older adult's finances.

B. What Should I Know About Financial Exploitation of Older Adults?

1. Definition

Financial exploitation is an act or omission that causes a substantial monetary or property loss to an older adult, or causes a substantial monetary or property gain to another person, which gain would otherwise benefit the older adult but for the act or omission of such other person.⁴ The consent of an older adult to the harmful act or omission is not valid if the older adult lacked capacity or if it

was the consequence of misrepresentation, undue influence, coercion or threat of force.⁵

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 older adults also may be considered to be financial exploitation. For the more traditional forms of financial abuse by persons that the older adult 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 older adult, such as a child or a sibling. Often, the older adult does not know it is happening because the older adult depends on and trusts the abuser. Financial abuse is sometimes accompanied by physical or emotional abuse, which silences the older adult.

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 older adult's abilities (such as ATM withdrawals when the older adult has difficulty leaving the house) or previous spending patterns (such as online shopping). Another potential warning sign of financial exploitation is a new, and many times significantly younger, “friend” of the older adult, who has been

receiving substantial “gifts” from the older adult. Sometimes, the “friendship” is couched in romantic terms, which perhaps fills a void in the older adult’s life. Oftentimes, older adults refuse to believe that they have been a victim of the scam and, if they do believe it, are too ashamed to admit that they were victimized.

3. Role of Banks

Financial exploitation can be devastating to an older adult, and bank tellers are an evolving first line of defense. Often, financial exploitation can be hard to detect because the person exploiting the older adult has been trusted with the older adult’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.⁶ The project has been successfully replicated in numerous communities. If you would like more information on the Bank Reporting Project, call (617) 523-7595 or visit www.massbankers.org/MBRD/MB_TechnologyFraud/Bank_Reporting_Project.⁷

4. Power of Attorney

A power of attorney (*see Chapter 1*) gives another individual the power to make decisions about the older adult’s property. In order for the power of attorney document to be valid, the older adult granting the power must be mentally competent at the time of execution and execute it knowingly and voluntarily, without fraud, coercion or undue influence. Such powerful instruments can easily be misused to exploit older adults. 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 Older Adults Who Cannot Care for Themselves. Is Help Available?

Elder abuse encompasses “self-neglect,” meaning when older adults can no longer provide for their own essential life needs, cannot make informed

decisions understanding the consequences of their actions, and/or their mental and physical condition declines without it being addressed.⁸ 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 to alleviate the neglect, and try to keep a self-neglecting older adult in the community safely.⁹ Even in cases of self-neglect, an older adult who has capacity has the right to refuse services. If the older adult lacks decisional capacity, or there is reasonable cause to believe the older adult lacks decisional capacity, the court may be petitioned for a protective order under M.G.L. ch. 19A and/or for guardianship and/or conservatorship.

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 physical harm, pain or mental anguish or assault and battery ...”¹⁰ Regulations require that reports of abuse be made to the Department of Public Health rather than Protective Services.¹¹ *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 Physical or Emotional Abuse, Neglect or Financial Exploitation?

Elder abuse should be reported 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 or online at www.mass.gov/how-to/report-elder-abuse. 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; all other individuals, while not required to report elder abuse, may and should do so if the older adult 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.¹² 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 Older Adult Victims?

Yes. The Executive Office of Elder Affairs, by law, maintains 22 Protective Services agencies throughout Massachusetts.¹³ The role of Protective Services is to investigate reports of abuse and, where appropriate, offer services, make referrals and connect older adults to community resources. All reports are received through a statewide centralized intake system. Reports can be made by calling the Massachusetts Elder Abuse Hotline at (800) 922-2275 or online at www.mass.gov/how-to/report-elder-abuse.

G. What Happens When Abuse Is Reported?

If an allegation of abuse is made, then a caseworker from Protective Services will investigate the allegation. Due care is taken to balance the rights of privacy and self-determination of the older adult and the need to protect the older adult 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 older adult's safety. Often, this intervention means that a care plan will be drafted with the older adult, if they have 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 be referrals to attorneys to take legal actions, including civil lawsuits to address the wrongdoing and restore the wrongfully removed property to the older adult.

It is 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.¹⁴ If the older adult lacks capacity, and Protective Services believes the older adult 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. ch. 19A, Section 20.¹⁵ In such petitions, Protective Services must prove by a preponderance of the evidence that the older adult is being abused, is in need of services and lacks the capacity to consent.¹⁶ 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 older adult.¹⁷

H. Will Older Adults Lose Their Rights Once Protective Services Are Involved?

An older adult should not lose rights once Protective Services has been contacted because, as noted previously, Protective Services can only provide services if the older adult consents, or through a protective order issued by the court, or if a guardian or conservator consents on their behalf. Due to the doctrine of self-determination, an older adult who has capacity has the right to refuse services. In addition, the Department of Protective Services for an elder services agency may not serve in a fiduciary capacity for an abused older adult. This means that Protective Services may not act as a conservator, making financial or property decisions for an abused older adult,¹⁸ or as a guardian, making personal or medical decisions for older adults.¹⁹ If Protective Services seeks a protective order or appointment of a guardian and/or a conservator, the older adult has numerous rights with regard to those proceedings, including possibly 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 older adult, either for the purpose of conducting a neutral investigation and informing the court of their recommendations, or, in the case of an older adult who lacks capacity, for the purpose of representing the best interests of the older adult. In the latter situation, the difference between the GAL and an attorney appointed to represent the older adult is that the attorney would be required to advocate for whatever it is that the older adult wants, while the GAL would be required to advocate for what they believe is in the best interest of the incapacitated older adult.

I. What Protections Are Available to LGBTQ Older Adults?

Everyone has the absolute right to age with dignity. In Massachusetts, discrimination based on sexual orientation and gender identity is illegal. Laws are in place to protect against discrimination in medical care, housing and other services. Many

people who provide elder services are required by law to have special training to care for LGBTQ older adults. Furthermore, long-term residential care providers must intervene to stop discrimination and harassment by staff or other residents. You should report discrimination and harassment immediately. Contact an attorney, call the GLAD Answers legal hotline at (800) 455-GLAD or visit www.glad.org/know-your-rights/resources-from-glad-answers.

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1. 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.*
 2. *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).
 3. *Id.* A guardian is a person who has qualified as a guardian of an older adult pursuant to MASS. G.L. ch. 190B, § 5-305 (2013).
 4. § 14.
 5. *Id.*
 6. Office of Attorney General, www.mass.gov/service-details/the-massachusetts-bank-reporting-project.
 7. *Id.*
 8. MASS. G.L. ch. 19A, § 14 (2012).
 9. 651 C.M.R. § 5.02.
 10. MASS. G.L. ch. 111, § 72F (2012).
 11. *Id.* § 72G.
 12. MASS. G.L. ch. 19A, § 15(A) (2012).
 13. Executive Office of Elder Affairs, www.mass.gov/report-elder-abuse.
 14. *Id.*
 15. *Id.*
 16. 651 C.M.R. § 5.17.
 17. *Id.*
 18. 651 C.M.R. § 5.02.
 19. *Id.*

CHAPTER 12

SPECIAL CONSIDERATIONS FOR DISABLED DEPENDENT ADULT CHILDREN

INTRODUCTION

Families with disabled dependents face special considerations. The disability community is the only minority group that anyone can unexpectedly join at any time. In recent years, The Arc of the United States identified the issue of aging family caregivers as an important concern for disabled dependents. Families need to plan carefully for the eventual transition to the next generation of caregivers. This topic is a complex web of long-term services and supports to navigate, further compounded in its difficulty by the impact of dealing with the caregiver's own health care and long-term care needs. Early planning is essential for success and it involves more factors than can be addressed in this brief chapter, such as: housing, public benefits, caregiver choices, guardianship and legal authority, advocacy, trustees and more.

A. Government Benefits: SSI, SSDI and MassHealth

1. Supplemental Security Income (SSI)

Supplemental Security Income (SSI) is a means-tested benefits program that pays monthly benefits to low-income older adults (ages 65 or older), disabled adults, and disabled or blind children. Disability for adults is defined as the inability to work ("to engage in substantial gainful activity" in Social Security terms) due to medical conditions that are expected to last at least one year or result in death. The program bases financial eligibility on income and assets. In order to be eligible for the benefit, an individual cannot have more than \$2,000 in countable resources.

SSI benefits are funded by the federal government and provide monthly cash assistance. Some states, including Massachusetts, supplement the amount of the SSI stipend with additional funds.

Although the living situation of the SSI recipient initially determines the amount the recipient will receive from SSI, other factors, principally

what other income, earned or unearned, the recipient receives, can reduce the monthly payment. Generally, the more income an individual has, the lower the SSI monthly payment. It is important to note that the SSI rules greatly favor income from work ("earned income"), and the reduction to the SSI benefit from earned income is lower than from other income.

An individual eligible for SSI in most states, including Massachusetts, will be automatically eligible for Medicaid benefits (MassHealth in Massachusetts) not including 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, then 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 definition is the same disability standard as in the SSI program described on this page. The benefit is based on the person's work record and how much they have contributed to Social Security rather than on assets or income. SSDI benefits are administered by the Social Security Administration, and the program is largely funded by a participant's payments into Social Security during their working years. Since SSDI benefits are based on an individual's work record and not on their assets, an inheritance will not disqualify a recipient from receiving 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 and has been continuous, and if the parent is

drawing their own Social Security benefits, or is deceased, and paid into the Social Security system. These benefits are sometimes referred to as Disabled Adult Child (DAC) benefits. A child may also start receiving a monthly private pension or other income upon a parent's death.

One of the consequences of SSDI or other non-working income, however, may be the loss of MassHealth benefits or the need to pay a premium for those benefits. (Note that income for public benefits programs differs from taxable income, and what is considered income varies from program to program. Additionally, income limits for MassHealth Standard are 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 will be ineligible for SSI payments and may lose their automatic eligibility for MassHealth.

This loss of SSI may require a separate MassHealth application and special planning for continued MassHealth eligibility. Many times, this problem can be fixed by seeking a court order to assign pension payments or other income to a d4A trust (discussed on this page); however, some pensions and Social Security payments are non-assignable. Fortunately, there is a MassHealth regulation in place that protects individuals whose DAC benefits cause them to be over the income limits for MassHealth Standard. An older adult with a dependent adult child who receives SSI benefits must be mindful of the eligibility requirements and should

3. Differences Between SSI and SSDI

There are many significant differences between the SSI and SSDI programs. Among them are: a) how work income is treated, b) how distributions from trusts are treated, and c) 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 to offer a family flex-

ibility and control over assets as well as protection for the dependent child's government benefits. The assets held in a properly drafted special needs trust are for the dependent child and are generally used to supplement the dependent child's needs that are not paid for with government benefits. A trustee uses their discretion to manage and distribute 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 first-party self-settled trusts.

Third-party settled trusts are created and funded by a third party. For example, a parent or other individual can establish a special needs trust and direct assets to the trust established for the benefit of a dependent child. The assets did not originate from the beneficiary. These types of trusts can be established at death by an individual's will (testamentary trusts) or during an individual's life by a separate trust. The provisions of the special needs trusts can include the ultimate disposition of the assets once the beneficiary child passes away (e.g., the remaining assets can go to other family members).

First-party or 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 considered a countable resource. In order to be properly established, this special needs trust must: 1) be established by the disabled individual, a parent, grandparent, legal guardian or the court; 2) be funded prior to the disabled beneficiary attaining age 65; and 3) provide a payback provision that states the Commonwealth of Massachusetts and other states will receive payment to the extent the beneficiary received Medicaid benefits during the beneficiary's 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 their statutory title.

In addition to d4A trusts, d4C trusts are another type of self-settled trust. d4C trusts are pooled trusts that have all the same requirements

as d4A trusts, but differ in that they are administered by a nonprofit organization and not an individual trustee. Having a nonprofit administer the d4C trust makes it possible for the pooled trust to take smaller trust deposits while being economical with fees. It also allows for individuals who cannot identify an appropriate trustee to manage their funds. Currently, pooled trusts are available to persons of any age. However, MassHealth proposed regulations in 2016 that would penalize funding these trusts for individuals over age 64. These regulations are still pending. Therefore, individuals should consult with knowledgeable elder law attorneys before considering this option.

These trusts must be reported to both Social Security and MassHealth when created or upon application for certain benefits by the disabled individual. (Note that Social Security recently stopped requiring reporting of unfunded third-party trusts.) 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 transfer 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 an individual 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 permanently disabled person under the age of 65 is not a disqualifying transfer for an older adult seeking MassHealth long-term care benefits. 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 pay-back provision as a self-settled trust (as discussed in Section 1).

3. Third-Party Special Needs Trusts as Beneficiaries of Retirement Plans

When individuals attain a certain age, they are required to withdraw mandatory required minimum distributions (RMDs) from their retirement accounts. Individuals may designate certain beneficiaries to inherit the balance of their accounts after their death. The SECURE Act, signed into

law on Dec. 20, 2019, created a number of changes for retirees (e.g., delaying the age to begin to take RMDs from 70.5 years to 72) and beneficiaries (e.g., limiting the amount of time over which a beneficiary may withdraw from the inherited account).

The SECURE Act, however, provides an exception for certain beneficiaries, including disabled or chronically ill beneficiaries. In these situations, a disabled or chronically ill beneficiary (or special needs trust for their benefit) may qualify as an eligible designated beneficiary and benefit from a prolonged distribution over the life expectancy of the beneficiary.

Special needs trust and account beneficiary designations should be carefully drafted by qualified estate and tax planning professionals to ensure that the special needs trust is an eligible designated beneficiary. Moreover, the special needs trust should only permit the beneficiary who is disabled or chronically ill during their lifetime to receive distributions so that the trust will qualify to use the life expectancy of that individual for RMDs.

The Secure 2.0 Act was enacted on Dec. 29, 2022, and provided greater clarity for special needs trusts to be eligible designated beneficiaries and to benefit from the prolonged lifetime distribution periods.

4. ABLE Accounts

ABLE Accounts can be a useful addition to special needs planning. These accounts are owned by the disabled person and can be managed by the disabled person or someone else on their behalf. Contributions to the account from all sources per year cannot exceed \$17,000 in 2023, except that some working disabled persons may be able to contribute more. Additionally, ABLE Account balances over \$100,000 count toward the \$2,000 asset limit for SSI. Similar to a d4A trust, there is a Medicaid payback at the death of the account owner. Final regulations were issued in October 2020. The uses, restrictions, and differences between ABLE Accounts and d4A trusts are complex and beyond the scope of this brief chapter.

For more information, you should consult with

CHAPTER 13

WHAT YOU NEED TO KNOW ABOUT SOCIAL SECURITY

INTRODUCTION

It is important for workers and their families to understand how Social Security benefits fit into the overall plan for financing retirement years. The Social Security Administration (SSA) generally provides workers and their spouses certain basic retirement benefits, payable monthly for life. A worker's retirement benefit at full retirement age is based on their average indexed wages over a work history of up to 35 years. Spousal benefits are calculated based on the worker's Social Security benefits. The following is an overview of the basic Social Security retirement program.

A. Timing Retirement

The chart below outlines when workers reach full retirement age under Social Security.

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.¹

Individuals do not have to wait until their full Social Security retirement age before they can begin taking benefits. Instead, an individual may elect to begin taking Social Security benefits as early as age 62, but the monthly amount will be reduced to reflect the longer period over an individual's lifetime during which payments will be made. Alternatively, an individual can delay receiving retirement benefits until after reaching the Social Security retirement age, up to age 70. By delaying the start of payments, each monthly amount will be increased above the monthly amount otherwise due at early or

full retirement age to account for the shorter period of an individual's lifetime during which monthly payments will be made. Delaying Social Security payments past age 70 will not further increase the monthly Social Security payment.

Social Security benefits are eligible for cost-of-living (COLA) adjustments.² The COLA adjustment for 2023 is an 8.7% increase from the previous year.

- **Early Retirement:** An individual may begin collecting Social Security benefits before full retirement age, and as early as age 62, but the monthly payments are reduced to account for the longer period of one's life that benefits will be paid. If an individual's health status is precarious, choosing early retirement benefits may be prudent if one is not expected to live to one's life expectancy.³ If an individual continues working past age 62, the amount of Social Security payments may be reduced further to account for that work (*see D, How Working Affects Benefits*).
- **Full Retirement:** Once an individual reaches full retirement age (*see chart on this page*), they may elect to begin receiving the primary insurance amount based on their highest average indexed earnings during a work history of up to 35 years. Working past full retirement age at lower wages will not result in a reduction of Social Security payments (*see D, How Working Affects Benefits*).
- **Delayed Retirement:** Between full retirement age and age 70, monthly payment amounts will be increased to reflect the shorter period over which they will be paid. Benefit payments delayed to age 70 will not be reduced if the individual continues working past age 70 at lower pay.

Helpful Tip: Individuals are advised to contact the SSA for a personal calculation and not to rely on the general calculators. Merely requesting the information does not trigger the benefit.

B. Factors Affecting the Calculations

Average earnings over a work history of up to 35 years based on Social Security records for Federal Insurance Contributions Act (FICA) and Self-Employment Contributions Act (SECA) taxes paid by the individual are used to calculate the amount of the retirement benefit.⁴ That amount is called the primary insurance amount (PIA), and it is used as the basis for any retirement, dependents' or survivors' benefits paid on that person's record. The calculation also pays a higher percentage benefit amount for replacement of pre-retirement earnings to individuals with lower lifetime earnings.⁵ Working past retirement age, whether or not an individual's Social Security payments have begun, can increase the 35-year average if those wages are significantly higher. Stopping working early may limit the 35-year average to a lower amount if one would have earned substantially higher wages after reaching the earliest retirement age at 62.

One hundred percent of benefits are paid if retiring at full retirement age in 2023, which is age 66 and six months. This is the age at which benefits will not be reduced due to "early retirement." After the worker's primary insurance amount at full retirement age is determined, it is adjusted to reflect when an individual's payments actually begin before or after full retirement age. For example, if an individual elects to begin retirement benefits in 2023 at age 62, the monthly amount will be reduced by 30% compared to what would have been paid if the individual had started receiving benefits at full retirement age.⁶ If the individual waits until age 70 before starting benefits, the benefits will be increased by 8% for each full year of delay. For example, if an individual reaches full retirement age at 66 and six months in 2023, but waits until age 70 or later to begin payments, then the monthly amount will be about 25% higher than what the individual would have received at full retirement age.⁷

An individual who begins receiving monthly Social Security payments at age 62 receives a higher lifetime benefit total than an individual who begins payments at age 70 only until a crossover point at about age 78. After the crossover point, the person who delays payments to age 70 will collect more lifetime benefits than the person who begins Social Security payments at age 62. However, the cross-

over point also depends on an individual's particular situation, including working status, taxes and rate of inflation. Many advisers suggest that the best guide is to wait until benefits are necessary to sustain the individual's, dependents' and survivors' lifetime needs rather than base the decision solely on expected total lifetime benefits by starting benefits at a particular age.

The calculation for early or late retirement benefits can be confusing, but the SSA has a nifty calculator on its website, www.ssa.gov/oact/quickcalc/early_late.html.

C. Taxes and Other Factors to Consider

A portion of Social Security benefits is taxable if a recipient's income is over certain thresholds. If an individual's combined income (adjusted gross income, nontaxable interest and half of their Social Security benefits) falls between \$25,000 and \$34,000 (or \$32,000 and \$44,000 if filing jointly), then half of the Social Security benefits are subject to income tax. If an individual's combined income is above \$34,000 (or \$44,000 if filing jointly), then 85% of their Social Security benefits are subject to income tax.⁸

Some financial planners recommend that individuals begin Social Security payments at age 62 if they believe that they can invest those payments and receive a higher rate of return than what would otherwise accrue by delaying payments. This strategy assumes that the individual does not need the Social Security payments, and that future investment returns, net of investment fees and income taxes, are greater than the increased monthly payments of delaying Social Security payments. For each year that Social Security is delayed after full retirement age to age 70, there is an 8% increase in the amount of benefits paid.

If an individual has limited savings and other retirement benefits, then beginning Social Security payments early may be financially necessary.

If an individual is in poor or precarious health, then beginning payments early will result in that individual's greater overall receipt of benefits if they do not live to an average life expectancy.

D. How Working Affects Benefits

Social Security monthly payments begun before full retirement age can be reduced if an individual

is continuing to work. For every \$2 earned above the annual limit, the individual's early Social Security payments will be reduced by \$1. For 2023, the annual limit is \$21,240 (\$1,770 per month).⁹ In the year in which an individual attains full retirement age, Social Security will deduct \$1 for every \$3 earned above a separate limit until the month before the month in which full retirement age is reached. For 2023, that annual limit is \$56,520 (\$4,710 per month).¹⁰

Working past full retirement age will not result in a reduction of the monthly amount otherwise payable. An individual working past full retirement age may be able to increase their Social Security benefit if the wages paid increase the individual's prior career average upon which benefits were otherwise calculated. *See B, Factors Affecting the Calculations.*

E. How Disability Affects Benefits

The Social Security Disability Insurance (SSDI) benefit, which arises due to a medical condition, is the same as the full retirement benefit. Once the disabled worker reaches full retirement age, the benefit switches to a retirement benefit instead of a disability benefit. SSDI recipients who are still able and willing to work can earn up to \$1,470 per month (2023) without being found to be not disabled and losing the benefit, but in practice, this amount is more of a guide rather than a set limit. Benefits are not reduced by earnings, but if the recipient works, the continuing disability analysis by the SSA is made on total work capacity and verifiable medical condition rather than actual earnings exceeding this limit. The SSA offers support and incentives for disabled workers to return to the workforce in the form of "trial periods," job training for new careers, and continuation of benefits for an extended period of time. Check out Ticket to Work programs on the SSA website, www.ssa.gov/work, to learn how the SSA is supporting the disabled worker.

Disabled workers (and certain family members eligible for SSDI on the record of a worker) who have been approved for SSDI benefits are eligible to apply for Medicare benefits after 24 months of payments, even if they have not reached age 65. There are exceptions for waivers of the waiting period for certain catastrophic illnesses. Please refer to Chapter 5 for an excellent review of the Medicare program.

F. Family Benefits

Spouse. Social Security benefits provide some protection to a worker's family. For example, a spouse with a limited or no work history is entitled to receive Social Security retirement benefits based on the working spouse's record. If the spouse begins receiving the spousal benefit at full retirement age, the maximum amount of that benefit is half the amount that the working spouse receives at full retirement age. If the spousal benefit begins when the spouse is between age 62 and full retirement age, however, it will be reduced to reflect the longer period of payment. If the spouse is working when receiving the benefit, the spouse's Social Security benefits may be reduced. (See D, How Working Affects Benefits.) The spousal benefit is not increased for delayed payment of Social Security benefits that the working spouse receives after full retirement age. If a spouse has worked, they would generally receive an amount equal to the higher of their own Social Security benefit or the spousal benefit. A spousal benefit does not reduce the working spouse's Social Security payment. If the working spouse's birthday is Jan. 2, 1954, or later, it is no longer possible to take only one spouse's benefit at full retirement age and delay the other. Rather, if the working spouse files for a benefit, it is automatically treated as filing for the spousal benefit at the same time.¹¹

Divorced Spouse. A divorced spouse of a marriage that lasted at least 10 years can collect a spousal benefit based on the other spouse's work history if that benefit is higher than what the divorced spouse could collect based on their own work history. To collect the spousal benefit, the divorced person must be at least age 62 and unmarried, and the working ex-spouse must be entitled to Social Security benefits. If the working spouse qualifies for, but has not applied for, Social Security benefits, the spouses must have been divorced at least two years before the other spouse qualifies for the divorced spouse benefit. The maximum spousal benefit for a divorced person is equal to half of the former spouse's Social Security retirement benefit at full retirement age, and can be subject to reduction if the divorced spouse is working. *See D, How Working Affects Benefits.*¹²

Children. The children or dependent grandchildren of a worker who qualifies for Social Security retirement benefits may also qualify for Social Security benefits based on the worker's record. To receive benefits, the child must be unmarried and:

- under age 18; or
- 18–19 years old and a full-time student (no higher than grade 12); or
- 18 or older and disabled since before age 22.

Normally, benefits stop when a child reaches age 18 unless the child is disabled. If a child is still a full-time student at a secondary (or elementary) school at age 18, however, benefits will continue until the child graduates or until two months after the child becomes age 19, whichever is first.¹³

Adult Disabled Child. The adult disabled child of an individual collecting Social Security retirement benefits is eligible for Social Security benefits based on the worker's (or retiree's) work history.

If the child is working when receiving the benefit, their Social Security benefits may be reduced. *See D, How Working Affects Benefits.*

Widow or Widower. The widow or widower of a worker may receive a survivor benefit based on the worker's earnings history. The survivor benefit can begin as early as age 60, at a reduced rate, or when the widow or widower reaches full retirement age or older, at a higher monthly amount. The reduction for taking benefits early is 19/40 of 1% for each month under full retirement age. For example, if a widow or widower begins receiving a survivor benefit at age 60, that benefit will equal 71.5% of the deceased spouse's primary insurance amount at full retirement age. If a widow or widower qualifies for higher retirement benefits on their own record, they can switch to that benefit as early as age 62. If a widow or widower is disabled before the death of the worker, or within seven years thereafter, they can begin receiving survivor benefits as early as age 50. Remarriage of the surviving spouse does not reduce or eliminate the survivor benefit.¹⁴

Dependent Parent. If a worker who was supporting a parent dies, the dependent parent, who is at least age 62, may be eligible to receive Social Security survivor benefits. To be eligible, the dependent parent must be unmarried, and must have been receiving at least half of their support from

the working child. The dependent parent must not have a work history of their own that would yield a higher benefit.¹⁵

Family Cap. Total family benefits payable under a worker's record are capped. The total cap varies but is equal to about 150% to 180% of what the worker would otherwise receive at full retirement age.¹⁶

G. Contacting Social Security and Representation by a Third Party

An appointment can be made to speak with a representative at a local Social Security office, but many persons now apply for benefits through the Social Security website, www.SSA.gov. Known as "my Social Security," this online tool allows the participant to check their earnings record, apply for benefits, and estimate future earnings and benefits to help make decisions about when to retire. The individual is also able to add or change direct deposit instructions, obtain benefit verification letters, and notify Social Security of any changes.

Other than the eligible individual or the parent of a minor child making the contact, the SSA will not provide information to or take instructions from a third party. The SSA will not recognize the authority of a person under a power of attorney or a court-appointed guardian or conservator without the person being appointed as the individual's representative payee or being appointed a representative by completion of the proper SSA form signed by the individual. A representative can be appointed on Form SSA 1696, Claimant's Appointment of a Representative, which allows the representative to take any actions on behalf of the individual that the individual could take themselves. A representative payee can be appointed by filing Form SSA-11, Request to Be Selected as a Payee, which allows a third party, typically a relative or care organization, to receive and manage an individual's Social Security payment, but which also allows the payee to take actions on behalf of the individual with the SSA.

H. Coordinating Social Security with Private Retirement Benefits

In budgeting for retirement years and deciding when to begin taking Social Security payments, it is important to consider other retirement benefits besides Social Security. Many employees earn tax-qualified retirement benefits through their work

— for example, under 401(k), profit sharing or defined benefit pension plans. An individual may also own an individual retirement account (IRA), with a balance sheltered from tax until distributed. The payment of retirement benefits from these sources should be considered in overall retirement planning.

Employees typically receive their retirement benefits from private plans 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 a certain age. Owners of IRAs who reach age 73 after Jan. 1, 2023, must begin taking a minimum distribution at age 73 whether or not they are still working (for individuals who reached age 72 before Jan. 1, 2023, such age was formerly 72, and prior to Jan. 1, 2020, such age was 70 ½). For employees reaching age 73 in 2023, the first RMD must be taken by April 1, 2024. For all subsequent years, the RMD must be taken by Dec. 31 of that year. The minimum distribution age will increase to age 75 in 2033. Failure to take RMDs in a timely manner can subject an individual to a 25% penalty for the amount not withdrawn.

RMDs from private retirement plans 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. Failing to take RMDs in a timely manner can subject an individual to excise tax.

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 applicable qualified domestic relations order (QDRO) requiring the private plan to pay some portion of a worker's retirement benefits to an ex-spouse. Anyone who was married to an individual who died before receiving retirement benefits from their employer should contact that employer for information regarding any death benefit that may be due to the surviving spouse.

Financial and/or tax advisers can often help an individual evaluate their retirement options, considering available Social Security benefits, private

retirement benefits and an individual's needs to be able to "afford to retire."

I. Social Security Benefits and Government Pensions

Social Security retirement, spousal, and widow's or widower's benefits can be reduced if a worker earned a pension from "noncovered" work that was not subject to Social Security withholding taxes (FICA). The Windfall Elimination Provision (WEP) reduces the Social Security retirement benefits that a worker might otherwise receive because of noncovered work.¹⁷ The Government Pension Offset (GPO) reduces the Social Security benefits of a spouse, widow or widower who worked for a federal, state or local government and earned a pension.¹⁸

The WEP reduces Social Security retirement benefits of workers with fewer than 30 years of earnings at jobs subject to FICA. The reduction cannot exceed 50% of the amount of the pension received from public sector employment.¹⁹ If the worker paid FICA at jobs for more than 20, but fewer than 30, years of work, the reduction will gradually be eliminated. To calculate WEP reductions, please see the WEP Online Calculator or Detailed Calculator.²⁰ A worker with 30 or more years of work where earnings were "substantial" (See *Social Security Substantial Earnings Table* at www.ssa.gov/planners/retirel/wep-chart.html)²¹ and covered by FICA taxes is not subject to WEP reductions.

Social Security spousal and widow's or widower's benefits are reduced under the GPO by two-thirds of the amount of the individual's government pension. For example, if a government employee is entitled to a government pension of \$600 a month and a Social Security spouse's, widow's or widower's benefit of \$500 a month, the Social Security payment (\$500) will be reduced by two-thirds of the governmental pension (\$400), and the spouse, widow or widower will be entitled to \$100 of Social Security plus \$600 of the government pension. If two-thirds of the government pension is more than the individual's Social Security monthly amount, the Social Security benefit is reduced to zero.

There are some very narrow exceptions to the offset. For example, if an individual's government pension is not based on earnings, the offset does not apply.

For more information on any of the material presented in this chapter, please go to the Social Security website, www.ssa.gov, or call the SSA at (800) 772-1213 for specific information about your own benefit calculation.

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1. www.ssa.gov/planners/retire/retirechart.html.
 2. <https://www.ssa.gov/oact/cola/latestCOLA.html>.
 3. www.ssa.gov/oact/STATS/table4c6.html.
 4. www.ssa.gov/oact/cola/Benefits.html.
 5. www.ssa.gov/oact/cola/piaformula.html.
 6. www.ssa.gov/oact/quickcalc/early_late.html. The reduction formula is 5/9 of 1% for each month before normal retirement age, up to 36 months, and if the number of months exceeds 36, then an additional reduction of 5/12 of 1% per month. For example, if the number of reduction months is 60 (the maximum number for retirement at 62 when normal retirement age is 67), then the benefit is reduced by 30%.
 7. www.ssa.gov/planners/retire/1943-delay.html.
 8. www.ssa.gov/planners/taxes.html. This tax requirement has applied since 1993.
 9. www.ssa.gov/planners/retire/whileworking.html.
 10. *Id.*
 11. www.ssa.gov/planners/retire/applying6.html.
 12. www.ssa.gov/planners/retire/divspouse.html.
 13. www.ssa.gov/planners/retire/applying7.html.
 14. www.ssa.gov/planners/survivors/onyourown.html#h1.
 15. www.ssa.gov/planners/survivors/ifyou.html#h2.
 16. www.ssa.gov/pubs/EN-05-10085.pdf.
 17. www.ssa.gov/pubs/EN-05-10045.pdf.
 18. www.ssa.gov/pubs/EN-05-10007.pdf.
 19. www.ssa.gov/policy/docs/ssb/v74n3/v74n3p55.html.
 20. www.ssa.gov/planners/retire/wep-chart.html.
 21. www.ssa.gov/planners/retire/wep-chart.html.

CHAPTER 14

OLDER ADULT DRIVING

INTRODUCTION

As the older adult 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. Older drivers, their family members, practitioners, and society as a whole have an interest in both assessing an older adult's ability to continue to safely drive and 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 cognitive impairments, which often accompany the aging process, will gradually begin to diminish and affect an older adult's ability to drive. Therefore, older adults, families, physicians, police officers and lawmakers are growing increasingly aware of the indications that it may no longer be safe for an older adult to drive, in an effort to minimize the risks to the older driver, other drivers, passengers and pedestrians.

THE AGING PROCESS

The aging process is generally accompanied by physical and cognitive 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.¹ Drivers who take medications should be aware of the side effects of each medication and how exactly those side effects may impact driving abilities.² Among the various physical limitations that challenge safe driving are diminished vision, slower reflexes and arthritis. Cognitive impairment, such as memory loss or dementia, may also greatly challenge an older adult'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 older adult will no longer be able to adequately evaluate their own driving.³

Safe driving habits should be implemented by older adults who are able to, and who choose to, continue driving as they age. They may take proac-

tive measures to ensure their own safety and that of others by maintaining good health, enrolling in driver safety classes tailored to older adults, and adjusting driving patterns to avoid driving when traffic is heavy or when visibility is limited. However, some older 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 older 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 older driver in order to reinforce driving safety issues. While this conversation should be ongoing, family members should also be observing the older adult's ability to drive regularly by riding in the car with the older adult and observing the older adult's vehicle. Close calls while driving, getting lost and damage to the older adult's car are strong indicators that the older adult's driving abilities are diminishing. Family members do have the option to have the older adult's driving clinically evaluated at several area hospitals or by an occupational therapist.

This conversation must be structured so that the older adult 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 older adult 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 older adult to make safe decisions.⁴ It is important to determine who might be the best person to communicate with the individual about driving concerns.⁵ The conversation may be best received from a spouse, family member,

friend or trusted professional.⁶ In planning such conversations with older adults, family members should take into consideration the driver’s personality, level of cognitive impairment, driving record, family relationships, available resources and the geographic proximity of those resources.⁷ Unfortunately, in some cases, the older adult’s diminished insight, judgment and mood, as well as personality changes, may render the older adult unable to meaningfully participate in a conversation about driving. In these circumstances, with evidence of serious risk to self or others by continued driving, family members may need to take steps to remove the older adult’s access to keys and the vehicle. See www.alz.org/help-support/caregiving/safety/dementia-driving.

Even if an older adult does readily agree that it is no longer safe for them 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 older adult.⁸ Nearly one in four older drivers reported experiencing depression as a result of this conversation.⁹ 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.¹⁰

MASS. 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.¹¹ At the time of renewal, the licensee must either pass a vision screening or present a completed vision-screening certificate.¹² 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.¹³ 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 [their] ability to drive.”¹⁴ 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.¹⁵

RESOURCES

Resources are available to aid older adults and interested parties in dealing with the issues and challenges pertaining to older adult driving. Below is a list of several resources:

- The Massachusetts RMV has dedicated a part of its website to addressing the needs of, and providing resources concerning, older adult 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 older adults and their families with various services, including transportation.
- The American Automobile Association, the American Association of Retired Persons (AARP) and the Alzheimer’s Association, on both the state and national levels, are also helpful resources, as they have published brochures and feature websites that offer tips, guides and worksheets for addressing older adult driving issues and challenges.
- The Alzheimer’s Association’s website includes several helpful videos about different approaches to engaging in a conversation about driving and dementia, available at www.alz.org/help-support/caregiving/safety/dementia-driving. Its 24/7 Helpline also has experienced counselors who can provide expert advice on how to address the unique challenges each family may face. To speak to a 24/7 Helpline counselor about your individual situation, call 1-800-272-3900.
- AARP helps drivers stay safe, educated and confident behind the wheel with the AARP Smart Driver™ Course. These courses are designed to help drivers age 50-plus familiarize themselves with the current rules of the road, defensive driving techniques, and how to operate vehicles more

safely in today’s increasingly challenging driving environment. For more information or to register for classes, visit www.aarpdriversafety.org or call 1-888-AARP-NOW (1-888-227-7669).

All of these organizations have excellent resources that may be of help in addressing the sensitive issue of when an older adult should no longer be driving.

1. “Dangers of Driving After Taking Prescription Drugs or Over-the-Counter Medicines,” National Highway Traffic Safety Administration, www.nhtsa.gov/drug-impaired-driving/dangers-driving-after-taking-prescription-drugs-or-over-counter-medicines.
2. *Id.*
3. “We Need to Talk: Family Conversations with Older Drivers,” AARP, www.aarp.org/auto/driver-safety/info-2016/when-to-stop-driving-in-older-age.html.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. “We Need to Talk: Family Conversations with Older Drivers,” AARP, www.aarp.org/auto/driver-safety/info-2016/when-to-stop-driving-in-older-age.html.
9. *Id.*
10. *Id.*
11. “Older Driver Overview,” Mass. Registry of Motor Vehicles, www.mass.gov/info-details/older-drivers.
12. *Id.*
13. *Id.*
14. *Id.*
15. “Report a medically impaired driver,” Mass. Registry of Motor Vehicles, www.mass.gov/how-to/report-a-medically-impaired-driver.

CHAPTER 15

OVERVIEW OF COMMON BANKRUPTCY AND DEBT ISSUES FOR THE OLDER ADULT

INTRODUCTION

A catastrophic medical event, unemployment, or some other unforeseen event, such as the death of a spouse, could result in the creation of debt that is beyond an individual's ability to repay. 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 your own overwhelming debt, or confusion as to which bills you are legally obligated to pay upon the death of a spouse, it is important to 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. Also, you must consider whether you are legally responsible to pay the debts of a spouse or family member upon death, due to their failure to make payment during their lifetime.

A. What Is Bankruptcy?

Bankrupt is a term that describes the legal status of a person or other entity (such as a business) that cannot repay some or all of their debts to creditors. Bankruptcy is imposed by a court order, and is often initiated by the debtor. The Merriam-Webster Dictionary defines bankruptcy, in part, as the administration of an insolvent debtor's property by the court for the benefit of creditors.

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 older adults.

Chapter 7 bankruptcy is often referred to as a "straight" or "liquidation" bankruptcy. Chapter 7 is typically considered when a debtor has no hope of repaying debts. Under a Chapter 7 bankruptcy filing, some or all of the debtor's non-exempt assets are sold (liquidated) to pay the lenders (creditors). It is a quick way for a debtor to get a fresh financial start. Additionally, in many Chapter 7 cases, all of a debtor's assets are retained by the debtor.

Chapter 13 bankruptcy is a reorganization bankruptcy designed for debtors with regular income who can pay back at least a portion of debts through a three- to five-year repayment plan. Chapter 13 allows debtors to keep their property while they are completing the repayment plan. Once the payment plan is complete, unsecured creditors cannot force the debtor to pay additional monies, and the obligations owed to creditors will be discharged and uncollectable.

Most people would prefer to voluntarily 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.

Persons considering bankruptcy incorrectly believe that everyone will find out, but the reality is that usually the only people who may learn that you filed for bankruptcy are your creditors and the people you tell.

Also, if you file 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 petition is filed. 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 filed, you will begin to improve your credit score immediately. Your credit score is the number lenders and credit extenders, including banks, use when deciding to loan you money. The point is, although you may have a bankruptcy notation on your credit

report, if your credit score is within an acceptable range for a lender by the time you seek credit, you may be able to qualify for extensions of credit, including car loans, and even mortgages.

B. Some General Considerations

1. Pros of Bankruptcy

Before we discuss the specifics of Chapter 7 and Chapter 13 bankruptcy, the following 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 by creditors, including phone calls, visits, bills and threatening letters.
- **Elimination of Medical Bills:** 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, if you need ongoing medical care, you may want to plan ahead to determine the best time to file for bankruptcy.)
- **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 determining the amount that you can afford to pay a creditor, such as credit card debt, if you decide not to file bankruptcy. There are many other exemptions that may be claimed in order to protect assets, which are immune from the reach of creditors, whether or not bankruptcy is filed. (See Section C-3 regarding exemptions.)
- **The Credit Card Cycle is Stopped:** A bankruptcy discharge can free up funds in 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 relying 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, many assets can be protected, which means that you will be able to keep those protected assets and avoid having them sold by court order to pay all or some of your creditors.

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 are fully protected and generally may be retained by you. In most cases, the value of 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 those assets as long as you continue to pay for them.

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 because there is no equity in excess of the debt owed. If there is no equity, then there is nothing of value to be protected. However, if you file bankruptcy and fail to make payments on an “upside-down asset,” the secured creditor may seek relief from the stay and ask the court for an order allowing foreclosure and sale of the “upside-down asset.”

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

If you fail to pay secured creditors, they are allowed to take back or repossess the property that you purchased and was used as security for the money they loaned to you. Secured creditors always have at least two avenues to collect the amount owed from you, namely collecting based on the promissory note or contract you signed, or seizing and selling the asset for which they loaned

you the purchase money. Secured creditors that have properly filed their documents in the right place and in correct form have a lien upon 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; 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 the equity in your primary residence up to \$500,000. *(See Chapter 8 for a discussion of this law.)*

4. Debts Related to Deaths of Spouses and Estates of Decedents

- (i) Be aware that you may not be responsible to pay the unsecured debts standing only in the name of a deceased person, or spouse, except in limited circumstances.
- (ii) Generally, for an unsecured creditor to be able to collect a debt of a decedent, such unsecured creditor must, within one year of an individual’s date of death, file a formal claim against the estate of the decedent with the probate court where the decedent’s estate is subject to probate (except Medicaid, which has three years). Such unsecured creditors must also take certain additional steps to “perfect” their claims against an estate in order for the decedent’s estate to be legally bound to pay the debt. Accordingly, it is important to consult with an attorney prior to paying any debts of a decedent.

C. How Chapter 7 Liquidation Bankruptcy Works

When you file a Chapter 7 bankruptcy case, a federal court order goes into effect immediately, making it illegal for your creditors to contact you in any way, or commence or continue any actions to collect from you or repossess your property. This provides breathing room and alleviates pressure. There are some types of creditors who can still collect from you. If you are under 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 with no distributable assets 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. Generally, 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: TransUnion, Experian and Equifax. These reports can be obtained online, and in some states, including Massachusetts, you are entitled to one free report per year from these reporting agencies. Certain websites and lenders provide unlimited free credit reports.

1. What Documentation Is Needed?

Generally, you will be required to produce two years of tax returns, proof of your income, bank statements, your driver’s license or other government-issued photo identification card, and proof of your Social Security number, as well as a host of other documents that may apply to your case, such as deeds and 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 from a court-appointed trustee in a conference room

setting. Most people filing bankruptcy never see the inside of a courtroom. And these days, the meetings of creditors are held telephonically or by Zoom or other videoconferencing platforms so that debtors do not even have to leave their homes.

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, if not all, of what they own, but they get rid of their debts forever. The bankruptcy laws have a long and generous list of exemptions that let people keep much of their real 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 court. Bankruptcy rarely terminates 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 to a secured lender 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 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 court-appointed Chapter 13 trustee, who will keep track of your payments and pay off your creditors over a three- to five-year timetable.

Filing a Chapter 13 bankruptcy can be an effective way to save your home from foreclosure and get three to 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 that you want to keep. The bankruptcy court generally has no authority to lower your monthly mortgage payment or to change the terms of your loan or mortgage.

EXAMPLE 1

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, whom you will have to pay because you agreed to do so 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 additional auctioneer fees and advertising fees. 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. The plan payment would also include a 10% fee to the trustee, whom you pay each month, bringing the total payment to about \$10,000. In most cases, the repayment plan would require you to repay that \$10,000 by dividing the payments over three to five years. So, for a three-year plan, 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 \$278 each month for the next three years in order to catch up on your mortgage arrears. If you miss more than two or three payments, the court may dismiss your case, which means you are no longer protected by the bankruptcy court and the bank may seek to 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 produce and be up to date on filing tax returns and provide paystubs or other evidence of income, a binder for your homeowners and vehicle 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 owe, such as alimony or child support.

2. Reverse Mortgages in Bankruptcy

An older adult who has taken out a reverse mortgage may be uncertain about the circumstances under which a lender can foreclose. It is important for the homeowner to understand that, while there is no monthly mortgage payment due on a reverse mortgage, payment must still

be made for real estate taxes, homeowners insurance and basic maintenance on the property. If the homeowner fails to pay real estate taxes, the reverse mortgage company, or the municipality, 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 their 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 to five years, plus pay the real estate taxes on time in the future. 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 10 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 debts, you may also have to pay a portion of those back. After you complete the three- to five-year repayment plan, any remaining balances on your credit card debts or other unsecured debts are discharged.

EXAMPLE 2

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 on your credit cards. The amount 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 additional amount that must be paid to the Chapter 13 trustee. The amount paid also must provide at least as much as the creditors could have received in a Chapter 7 case. The Chapter 13 trustee earns a 10% commission on the total amount to be paid to your creditors through the plan, 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 of your debts, both secured and unsecured, as well as the amount of your regular monthly income. A calculation of how much your monthly payment will be is then required. As soon as your plan is agreed upon by the Chapter 13 trustee and the bankruptcy 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. 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 determination order 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 co-signers receive the same bankruptcy court protection that you do, even though they are not filing bankruptcy. This is true when only one spouse files bankruptcy and the other spouse, who is a co-signer, is also granted bankruptcy court protection, even though the non-filing spouse did not file bankruptcy.

E. Alternatives to Bankruptcy

Explaining and documenting your financial hardship with your creditor will assist them in evaluating your settlement offer. Hardships that are ongoing, such as chronic medical conditions, loss of income from a business closure, the death of a bread-winning partner, or situations that have had a permanent impact on your finances, are among the most persuasive. It may be more helpful to demonstrate to your creditor that your financial situation is unlikely to improve, and that your offer to settle is often the proverbial “bird in hand” for your creditor. If you have multiple creditors, you can explain to

them that your settlement offers are on a first-come, first-served basis, and that once the money is gone, then no further offers will be forthcoming. This may motivate a creditor to take your offer, because they are usually able to obtain your credit report to confirm how many other creditors you have and how much you owe them.

1. Debt Settlement

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

(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. Some creditors may allow periodic payments on a lesser amount than the full balance owed, but that must be negotiated and reduced to writing for your protection. Whether the creditor will agree to waive interest and late fees that are still accumulating depends on how well you negotiate an agreement with your credit card company. This type of settlement can be long and drawn out, and may not 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 canceled and they can pursue you immediately for the full past-due balance. 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 if they filed for bankruptcy earlier.

(ii) Lump-Sum Settlements

The more beneficial 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 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 final 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 may be called twice weekly by your creditors. Creditor calls to your place of employment are permitted, unless you inform the creditor in writing not to do so. Oral requests to creditors asking them not to communicate with you at your place of employment are valid for 10 days. Written requests are valid until you remove the restriction. 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 income 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 the IRS requires that any amounts of debt in excess of \$600 that are forgiven by your creditors be included in your gross income in the year that the debt was forgiven, and that income may be taxable. The credit card company will issue an IRS 1099-C form to you for the amount of forgiven debt. You should check with your tax preparer to see how much tax, if any, you will have to pay as a result of the debt forgiveness.

Withdrawals from your retirement accounts to pay off credit card or other debts can have adverse consequences. Making such a withdrawal is generally a poor decision because you are using funds that were set aside for your future and will usually create income tax liability when withdrawn. Furthermore, depending on your age, you could suffer penalties and the tax consequences for using the retirement funds to pay the debts. Consult an experienced financial adviser to assess your situation.

2. Mortgage/Loan Modification

A loan modification is typically a request by a borrower for a lender to change the terms of the borrower's 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/or auctioneer fees. A loan modification can also change your loan from an adjustable rate to a fixed rate in some instances. The decision to grant or not grant a loan modification is entirely the lender's decision. In the case of real estate, the mortgage and promissory note that you originally signed when you bought your real estate or refinanced are the legally binding documents that control your relationship with your lender. Thus, the lender may simply refuse any change you 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, for example, you are currently past due on your home mortgage, being in arrears 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 and expenses, to show your lender that you have money left over at the end of each month.

Also, it may be helpful for you to write a “hard-

ship letter” to explain to the lender what caused you to fall behind with your mortgage payments, how you have resolved those problems, and why you 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, one difficulty usually lies in the constant follow-up that will be required from you to make sure that the bank has your completed package. Lenders often lose paperwork, and requests from them for you to resubmit your loan modification package are quite common, frequently due to the lender's processing delays, so be sure to make legible copies of everything that you send to your lender in case you need to send the paperwork again. It may take between three months to well over a year to get an answer from your lender on whether your modification has been granted.

Even though your lender is reviewing your loan modification application, the lender can still pursue its legal right to foreclose on your real estate. That is why some people are confused when they receive notice of a foreclosure proceeding from their lender's attorneys at the same time a loan modification is being processed. Remember that the lender is going to take the necessary steps to protect what is best for the lender, and you should take the necessary steps to protect what is best for you. You should consult with an experienced attorney to fully explain your rights and legal options.

(iii) Dealing with Debt Collection Correspondence — Sample Letter

(Name and address of Debt Collector)

RE: Your Name; Creditor's Name,
Account #: 1234567

Dear Sir or Madam,

I am writing to your company regarding its collection efforts on the above-referenced account and my ability to pay this debt.

I am unable to make any further payment because (state reasons for inability to pay, such as no ownership of or interest in any real estate or other assets that would not be exempt from pro-

cess under Massachusetts law; or monthly income consisting of Social Security, public assistance, unemployment compensation, workers' compensation, veterans benefits, railroad retirement benefits, a pension or wages that are exempt from garnishment).

I clearly cannot afford to make even a minimum monthly payment on the balance. Further, my monthly income is entirely exempt from this process, and it is extremely unlikely that any judgment obtained against me would ever be collectible.

In light of the above, I will not make any further payments on your accounts and will not use the accounts anymore. My credit cards have been destroyed and the accounts are closed.

This letter is to request that you cease all contact with me regarding the collection of the above-referenced account, pursuant to the Fair Debt Collections Practices Act (15 U.S.C. section 1692). This letter is also to request that the creditor write off the balance owed by me as uncollectible and notify me in writing of this disposition.

Thank you for your attention to this matter.

Very truly yours,
(name of debtor)

3. Do Nothing

Another option for someone in debt is simply to do nothing. Waiting for a summons and complaint to arrive may be the best alternative. It may never arrive, and the creditor may close the case as uncollectible. But you could wait and see what the creditor does to collect. If all of your assets are either exempt or without value, disclosing that to the creditor may lead the creditor to close the case against you. You may draw from the letter on this page and send such a letter, certified mail, to the creditor or the creditor's representative. If a lawsuit is filed and the debt is admitted, and if you are insolvent, handling the matter yourself may be a reasonable choice. On the other hand, if you have attachable assets, such as a bank account or motor vehicle, and you earn enough wages so that it is worthwhile for a creditor to attach your pay, then you would be wise to seek an attorney who can explain the wage or bank account attachment process to you and teach you how to avoid a wage

attachment or defend the lawsuit.

In the meantime, attending education courses and learning about money management, financial affairs, budgeting skills and payment plans would be extremely helpful in dealing with communications by creditors and their aggressive representatives.

Of course, if a debt is denied either as to liability or as to the amount of the claim, then doing nothing would not be the best course of action. An attorney is needed to defend you in court if none of the alternatives suggested above apply. However, keep in mind that if you ignore a creditor, it is possible that your creditor will contact your family members, neighbors, people you live with, and others who they believe can assist them in locating you. They are allowed to do this, but they are not allowed to inform others about your debt.

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 or collection attorney to help you assess your specific situation and determine your best strategy.

The death of a spouse or a family member may cause creditors to communicate with you to pay a debt that you believe is not your responsibility. An attorney can advise you as to your rights, insofar as your legal obligation to pay these bills.

The Resource Directory on page 130 lists some agencies to contact for further information.

CHAPTER 16

WHAT TO CONSIDER WHEN PLANNING FOR RETIREMENT

Retirement is a major life transition. The questions below are meant as a starting point and are followed by both relevant information and helpful resources. While not a comprehensive list of topics, the questions provide a guide to additional information on retirement planning.

Retirement decisions are made more complicated by the COVID-19 pandemic. The *Wall Street Journal* (WSJ) predicts that the pandemic “is going to make people rethink retirement, and result in so much uncertainty about financing retirement that most people will work as long as possible.” This report sets out in detail how leaders in aging-related fields expect the pandemic to reshape retirement and aging. See *WSJ Encore Report, Monday, Nov. 16, 2020*.

CAN I AFFORD TO RETIRE?

The first question many of us have is, “Can I afford to retire?” In considering this question, you should initially estimate your future income and expenses.

First, list your current expenses and income. Make a note of which income is guaranteed and which is not. Next, consider the changes to income and expenses that may occur with retirement. Expenses that may change in retirement might include an increase in health insurance costs, additional travel and vacation expenditures, and perhaps a decrease in income taxes. Other costs may stay the same, such as the cost of your mortgages, utilities and property insurance. Also consider potential inheritances as part of your financial picture.

For married couples, it is critical to look at the changes in expenses and income that will occur upon the death of the first spouse. This is especially important to consider in planning for future Social Security benefits or pensions, and the impact the death of a spouse will have on that income.

Expenses can be grouped into three categories: 1) Fixed monthly expenses (such as your mortgage payment), 2) Variable monthly expenses (such as your basic needs and wants), and 3) Discretionary expenses (such as your optional expenses and those things or services you would “love to have”).

Once you have those lists in place, consider using online retirement calculators. These are tools de-

signed to help you develop a well-formulated budget and help make some reasonable financial projections. The calculations frighten many people because the planners often suggest that much more money is needed in retirement than the average person has saved. The median amount of retirement savings for Americans in their 60s is \$172,000. See www.nasdaq.com/articles/lverage-retirement-savings-by-age.

What are the reasons for the large difference? One is that some calculators are based on your current lifestyle, rather than your retirement lifestyle. Also, there may be some motivation on the part of investment firms to market their services. Your own calculations may be considerably different from those obtained from web calculators, but it is important to understand and evaluate all the data.

UNDERSTANDING TIMING FOR CLAIMING SOCIAL SECURITY BENEFITS AND TAKING DISTRIBUTIONS FROM RETIREMENT BENEFITS

While there are, of course, other sources of income available to retirees, three of the most common sources of income for retiring individuals are Social Security benefits, pension plans and retirement accounts, such as 401(k)s, IRAs, 403(b) accounts, etc. Part of your planning for retirement should entail considering the timing of when you will need to start relying on this income. If you have other assets upon which you can rely, you will need to consider whether it would be advantageous to delay taking funds from these particular sources.

If you will be eligible for Social Security benefits, you may claim benefits as early as age 62. If you are financially able to do so, however, it can be advantageous to wait until your full retirement age, which is described in further detail in Chapter 13. At full retirement age or later, you will receive a larger monthly benefit. Depending on your other income (including retirement benefits, pensions and investment income), up to 85% of your Social Security benefit may be considered taxable income.

The timing of when to begin withdrawing from your pensions or retirement accounts should also be considered. With respect to retirement accounts,

Congress passed what is known as the SECURE 2.0 Act in December 2022. While its full implications are beyond the scope of this chapter, it is important to note that the mandatory date by which you must begin taking “required minimum distributions” from your retirement accounts has been raised to age 73 beginning in 2023 (and age 75 in 2033). This can be important, because it can allow for further savings without prematurely drawing down on your accounts. Keep in mind that for many retirement accounts, such as 401(k)s and traditional IRAs, the amounts of the entire distributions are taxable income. You may want to consider developing a tax efficient plan for the timing of withdrawing from such assets versus withdrawing from assets with different tax implications, such as Roth IRAs and non-qualified assets.

WILL I BE ABLE TO AFFORD TO STAY IN MY HOME?

One of the primary concerns for individuals contemplating retirement is whether they will be able to afford to maintain their home. For many, the home represents security and a lifetime investment that is difficult to give up. Special consideration should be given to the expenses required to maintain the home and whether it will be realistic to afford the bills after retirement. There are potential resources that can help you. You may consider refinancing your mortgage, obtaining an equity loan or applying for a reverse mortgage if you need liquidity (see Chapter 10 for further discussion regarding reverse mortgages). Your city or town may have abatement programs for seniors relative to real estate taxes (see Chapter 9 for further discussion regarding tax abatements). If you are considering selling your property as part of retirement planning, you should be sure to consider any potential capital gains taxes upon sale in evaluating the decision to sell.

DO I NEED A FINANCIAL PLANNER?

A financial planner is a professional who works with clients to help them manage their money and reach their long-term financial goals. Financial planning includes help with budgeting, investing, saving for retirement, tax planning, insurance coverage and more. Some financial planners may hold a “CFP” or other professional designation to establish their professional qualifications.

If you have been successfully managing your money, you may not need a financial planner for your investments. But, as you get older, you may want a relationship with a financial professional or trusted (perhaps younger) family member, as your ability or desire to continue managing your finances in the same way may change. A financial planner can also be valuable in the continuity of financial management over time as you age and for your family members, as they may become involved in assisting with your financial affairs.

If you would like a personalized or second opinion regarding your financial plan and situation, you should consider a consultation with a financial planner. Many financial planners offer free/complimentary consultations and analyses/proposed plans.

What should you consider in selecting a financial planner? There are numerous financial professionals competing for the attention of older adults to assist in retirement planning. The fees charged are often confusing. Conflicts of interest can be hard to detect. In some instances, vulnerable and/or unaware older adults are financially exploited. If you ever have any concerns about this, you should immediately contact the Massachusetts Division of Securities.

How do you locate a trustworthy financial professional? Word-of-mouth recommendations from friends and relatives are one starting point. You may also receive sound recommendations from your attorney and tax professional.

Due to the large number of titles and designations of those who specialize in providing financial advice and guidance, space limitations prevent listing them here. However, the American Association of Retired Persons (AARP) has a comprehensive guide available online. See www.aarp.org/money/investing/info-2021/complete-guide-to-financial-advisors.html.

UNDERSTANDING FEES AND EXPENSES

If you choose to have a professional assist you with your financial planning, one of the most important discussions with prospective financial advisors is regarding their fees. You should feel comfortable understanding how an advisor charges for their services and how such fees will affect the total return of your investments. You should expect full disclosure and complete transparency. Fees may be structured based on a fee for services, based on a percentage of assets managed, by the trade, or some combination

thereof. If your advisor is investing your funds in individual stocks, you should ask what fee you would pay for each trade (purchase or sale) of a stock. Excessive trading of stocks can be costly and reduce your total return. The practice is known as “churning” an account to benefit the advisor.

Fees may not be directly stated as charges to you and instead may be built in to the financial products a planner is recommending (such as commissions for sales of annuities or so-called 12b-1 fees for mutual funds), so you should also inquire about such considerations in determining the overall cost of employing a financial planner. Such fees can substantially impact your savings over time. For example, if you were to invest \$500,000 over a 20-year span, with average annual growth of 5%, with a 1.5% investment advisory fee, your portfolio would grow to \$994,898 (assuming you made no deductions during the term). However, if the fees amounted to 2.5%, that same \$500,000 would only grow to \$810,309. It is often helpful to get several opinions at the outset to understand the various potential investment options and their relative costs.

You should also ask an advisor for the “ADV” brochure and “Relationship Summary” that list the firm’s and advisor’s disciplinary events. Also, ask about potential conflicts of interest and compensation arrangements (regulatory requirements); these should be readily available. It’s a good idea to go to the Financial Industry Regulatory Authority (FINRA) BrokerCheck site to see the disciplinary history and licenses held for any potential advisor. The site is <https://brokercheck.finra.org>.

If the advisor seems reluctant to discuss any of these matters to your satisfaction, that should raise a red flag.

USING BINDERS AND ORGANIZERS

It is important to make sure that all your essential documents and papers, whether they are stored electronically or organized on paper, are in one place. A large, three-ring binder with tabs listing legal, financial, home and personal may work best. Your original documents, including your health care proxy, power of attorney, will, and any trusts and deeds to your home, as well as all insurance policies and a list of your assets and important passwords, should be in the binder. The binder should also include important documents that your personal rep-

resentative or named agent, fiduciary or loved one will need to know about upon your death. You also should tell that person where this binder is located so it can be found in an emergency or upon death.

Since this contains sensitive financial information, the binder should be kept in a secure location. Buying a fireproof security file box would be a good idea.

ADDITIONAL RESOURCES

These SEC websites are easy to understand and have many embedded links with additional, unbiased information.

- Status of investment advisers and related professionals at www.sec.gov/investor/seniors/guideforseniors.pdf.
- See also for excellent information on this topic: www.investor.gov/additional-resources/information/seniors.
- “Brokers and Investors Face a Crazy Quilt of State Regulations,” by Barley McCann, *Wall Street Journal*, May 7, 2021.

NOTE: Four states — Massachusetts, New York, New Jersey and Nevada — now have their own state regulations that must be followed by financial advisors. The 2019 SEC rule on “Best Interests” of the client states that financial advisors’ actions “must align with client interest and clear disclosure of fees and conflicts.”

- “A Simple Framework for Financial Advice,” by Eugene Scalia and Jay Clayton, *Wall Street Journal*, Dec. 15, 2020 (note former secretary of labor and SEC director, respectively).
 - “Seven Questions to Ask When Picking a Financial Advisor,” by Shelly Banjo, *Wall Street Journal*, April 13, 2009.
 - “SEC focuses attention on conflicts of interest in financial advice for seniors, retirement savers,” See <https://www.cnbc.com/2021/03/03/sec-sets-focus-on-conflicts-of-interest-in-advice-for-seniors.html>.
- Note that the focus is on sales practices, exchange funds, real estate trusts, annuities, digital assets, municipal and other bonds, as well as accounts that carry commission vs. annual fees.
- Another site that sets out key questions, advisor background and disciplinary history is <https://adviserinfo.sec.gov/>.

CHAPTER 17 PENSION CONCERNS FOR RETIREES

This chapter focuses on pensions and retirement plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA). This includes most pensions and retirement plans that are sponsored

by private employers or unions. Except as indicated, the material in this chapter does not pertain to plans that are sponsored by state or federal government employers, nor does it include so-called “church plans,” which are sponsored by religious entities. Please review the resources included in the “Seek Outside Help” portion of this chapter for advice regarding these non-ERISA plans.

DIFFERENT TYPES OF PENSIONS

Private pensions weren’t always protected by federal law as they are today. Before ERISA took effect in 1976, pensions were largely subject to the employer’s rules, with few federal legal requirements. After ERISA, plan participants received a number of significant protections under federal law.

Most workers today will earn some kind of retirement benefit during their working lives. The most common types of benefits are defined benefit plans and defined contribution plans. Defined benefit plans (often called “pensions”) provide a fixed, monthly benefit payment upon retirement, with the amount determined based on a formula that typically considers the retiree’s earnings and years of service. Defined contribution plans provide individual accounts for each worker who chooses to participate that are funded by worker contributions and may also include employer contributions. At retirement, the worker has access to the full balance in the account. The most common defined contribution plans are 401(k) and 403(b) plans.

This chapter focuses primarily on defined benefit pension plans (“pensions”). Many people who are reaching retirement age now earned a pension during their working years. Current private sector workers are much less likely to have access to a defined benefit pension. Nowadays, private sector employers are more likely to offer a 401(k) or other defined contribution plan.

EARNING A PENSION

Not every worker has access to a pension. You will only have access to a pension if your employer

has decided to include a pension in the benefits that it offers its employees. The number of private employers that offer a defined benefit pension has fallen dramatically since the 1970s. Most public employers, however, continue to offer pensions to their employees.

In order to earn a pension benefit, plan participants must vest in a pension. Generally, workers vest in a pension by working for their employer for a required number of years. The specific requirements to vest in a pension are determined by law, but some pension plans may be more generous than the law requires. It is important to review your Summary Plan Description or Plan Document to determine how much service you need to complete in order to vest. After you have earned a vested benefit, that pension becomes yours even if you leave the company and work somewhere else. The pension then becomes a deferred vested benefit that you will be able to collect when you reach retirement age, regardless of where you work for the rest of your career.

The age at which a worker can retire and collect their benefit differs between plans, but most plans set Normal Retirement Age at 65. A few months before you plan to retire, you should contact your plan to start your benefit. It typically takes at least a few months from applying to receive your benefits to receiving your first check.

FORMS OF BENEFITS

Your pension will likely have different options for how you may receive your benefit. The most common types of benefit payments are a single life annuity, a joint and survivor annuity, a year certain and life annuity, and a lump sum payment.

If you are married, then the default form of benefit is a joint and survivor annuity (J&S). A J&S annuity pays a fixed monthly benefit to the participant during the participant’s lifetime. If the participant’s spouse lives longer than the participant, then the spouse will continue to receive a monthly benefit — a “survivor benefit” — after the spouse dies. The survivor benefit must be at least 50% of the amount

that the participant received while alive.

A single life annuity typically pays the participant a larger amount each month than the J&S annuity. However, if the participant is married, the single life annuity will not provide a survivor benefit for the spouse. In order for a married participant to elect a single life annuity, the participant's spouse must sign a waiver before a notary, consenting to the form of benefit.

Many plans offer other annuity options in addition to the J&S annuity and the single life annuity. It is very important to carefully read and understand the benefit options. For example, some benefit options may not provide a benefit that continues throughout the participant or beneficiary's lifetime, or the benefit may not continue at the same level. Once you have elected a form of benefit, the choice usually cannot be changed.

TAKING YOUR DEFINED BENEFIT PENSION AS A LUMP SUM¹

Some plans give their participants the option to receive all or part of their defined benefit pension as a single lump sum. Plans are not required to offer benefits in a lump sum, and a participant cannot force a plan to offer a lump sum. If a plan does offer a lump sum, the amount will be calculated according to a plan formula, and will often represent the present value of the amount that a participant would receive as a single life annuity during their life expectancy. Once a plan pays out a lump sum, there are no additional benefits due a participant.

Sometimes, pension plans will offer deferred vested retirees a "lump sum buyout" or "lump sum window." For a limited period of time, deferred vested participants and/or retirees who wish to take advantage of the offer may receive a lump sum, generally instead of receiving a monthly annuity. Often, these lump sum windows are limited-time offers. Participants may only take advantage of the offer by submitting their lump sum paperwork within a limited window of time.

The decision of whether to take a lump sum should be considered carefully, ideally with assistance from a financial advisor or tax planner. Some factors that you may want to consider include:

- **Guaranteed income:** Choosing a life annuity means guaranteed income each month that will not vary as a result of market performance.

Coupled with Social Security benefits, lifetime pension payments generally ensure that you will have a fixed amount of monthly income for the remainder of your life. Taking a one-time lump sum cash payment leaves it up to you to ensure that the money lasts as long as you need it.

- **Longevity:** Your health and expected longevity should play an important role in determining which form of payment is right for you. Monthly annuity payments may be a prudent choice if you are in good health and expect to have an above average life span. You cannot outlive lifetime annuity payments; as long as you are alive, you will have the comfort of knowing you will receive a monthly pension. You can also elect a joint and survivor annuity with your spouse, which means your spouse will continue to receive monthly benefits after your death. Most experts would agree that, for most retirees, a guaranteed stream of income for life is a better option than a lump sum. However, a few factors that might weigh in favor of taking a lump sum option include: if you are in poor health or do not expect to have a long lifespan, and you will not have a surviving spouse who will need lifetime income; or if you already have a substantial nest egg or other secure source of adequate income, such as a spouse's pension.
- **Investment risk:** If you choose to invest your lump sum payment, the value of your investments will be subject to market fluctuations. This means that while the value of your investments may increase, it also may decrease. If you elect annuity payments, the investment risk remains with your company and the pension plan. If the market struggles, your annuity payments will remain the same, and your company will likely be required to make greater contributions to the pension plan to compensate for lower-than-expected investment returns. If you take a lump sum, no one is responsible for taking care of your money other than you.
- **Taxation of benefits:** Taking a lump sum payment will result in being taxed on the entire amount all at once unless the payment is rolled over into an IRA or another employer-sponsored retirement plan. Depending on the size of the lump sum, you may be pushed into a higher tax bracket. Also, if you take a lump sum distribu-

tion before age 59½, you may be subject to a 10% early withdrawal penalty in addition to the taxes owed. In the case of annuity payments, you will also be taxed each year on the value of monthly payments you receive, though given their smaller size, they are less likely to impact your tax bracket.

- **Financial health of your company and your pension plan:** If your company is struggling financially and is no longer able to meet its required contributions to the pension plan, the plan may be turned over to the Pension Benefit Guaranty Corporation (PBGC). The PBGC has limits on the benefits that it can pay, so your monthly benefit might be reduced (see here for current limits: <https://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee>). It is important to understand that the vast majority of retirees who get their benefits from the PBGC receive the same amount that they would have received if the plan had not terminated.

THIRD-PARTY INTERESTS

In addition to participants, there are other people who may have rights under a pension plan. This includes surviving spouses, surviving beneficiaries, and people who receive all or part of their former spouse's pension post-divorce (often called "alternate payees").

Spousal survivor benefits for married participants are protected by law, and the spouse of a participant is guaranteed to receive at least 50% of a J&S annuity. In order to receive this benefit, however, in most instances, the participant must have been married to the spouse for at least one year prior to retirement. Pension plans are not required to provide benefits for non-spousal beneficiaries (such as children or domestic partners). However, some pension plans do provide options to leave a survivor benefit to a non-spousal beneficiary.

Pensions and 401(k) plans must be handled very specifically during divorce proceedings in order for the non-participant spouse to receive benefits under the participant's plan. If you are getting divorced and there is a pension benefit at issue, it is important to speak with an attorney who has experience in this area of the law.

LOST PENSIONS

Sometimes, pension plans can be hard to track down when the participant reaches retirement age. Sometimes it's because a company goes out of business, changes its name or merges into another company. Sometimes the pension plan has mistakes in its employment records, and no longer has a record that a former employee is entitled to a pension. While ERISA protects participants and their vested status, a participant is sometimes required to prove their employment, years of service or entitlement to a benefit prior to receiving their benefits.

The protections under ERISA are very strong, and you will not lose your right to a pension simply because your company has gone out of business, merged with another company, or lost your employment or pension records. There are steps that you can take to protect your rights.

Sometimes plans are terminated or frozen. Often, when a plan is frozen, benefits earned are locked in place, and workers no longer are able to earn additional benefits. When a plan is frozen, the freeze is either a soft freeze (meaning the plan is discontinued for newer employees joining the company and employees who have not yet vested in the plan, but the plan continues for current vested employees) or a hard freeze (meaning the plan is frozen for all employees, and vested employees no longer accrue benefits). If your employer does elect to freeze its pension plan, it may only freeze benefits going forward. Under no circumstances may an employer retroactively freeze a pension plan or reduce pension benefits that have already been earned. In the event of a plan freeze, it is strongly recommended that you request and obtain a statement from your company that details your frozen accrued benefit calculation. Keep this statement in a safe place until you are ready to commence your retirement benefits.

Many defined benefit pension plans have been terminated by the employers that sponsor their plans. A terminated plan, often the next step after a plan is frozen, is the complete shutting down of a pension plan. Terminating a plan is a complicated process that requires the involvement of the PBGC, which is an agency of the U.S. government. Once a plan is properly terminated, either all benefits will be paid out to participants as a lump sum, or a group annuity contract at an insurance company will be

purchased for the remaining participants, and annuity certificates will be mailed to them.²

COMPILE YOUR DOCUMENTS

There are many important documents that you receive during employment concerning your pension. One of the most important documents you may receive is called a vesting letter. This is usually a document or certificate that your employer sends to you to acknowledge your vested status. This document will usually show the date you are eligible to receive your pension, the amount you will receive, and confirmation that you have vested in the pension. It is very important to keep this document in a safe place. Other important documents include W-2 forms, which can be used to prove employment and years worked, and 1099-R forms from your tax returns. This part of your tax return will show what, if any, retirement distributions you received during the year.

Tax returns are incredibly important and helpful to hold onto. If you have a pension, you should try to maintain copies of all tax returns during your working years, and keep the documents in a safe place.

The Social Security Administration can be a helpful resource to get additional information to help prove your years of employment or to help determine if you may have a potential pension. You can request an Itemized Statement of Earnings to prove years of employment with the employer you worked for and the total earnings for each year of employment. As of the publication of this chapter, Social Security charges \$92 for this record. This document can be completed at any Social Security field office, or can be printed and mailed online at: www.ssa.gov/forms/ssa-7050.pdf. The other document is a Statement of Potential Private Retirement Benefit, which is a helpful first step in determining if you or a spouse has earned a pension. It is free to request, and you will receive a document in return that explains your potential benefit and the amount recorded. A form letter that you can use to ask for this statement is included in the appendix to this chapter.

Share your documents with your pension plan or former employer

Once you've collected your documentation, contact your pension plan or former employer to share

the information and explain why you are entitled to a benefit. If your company has merged with another company, you may need to contact the successor company. Keep copies of any written communications in your files.

If your initial attempts to obtain your pension are not successful, you may want to file a formal claim pursuant to ERISA. A claim for benefits is an official argument to persuade the plan to pay benefits. The plan must answer the claim with either an award of benefits or a denial of benefits. After the claim is denied, there is a right to appeal the plan's denial, and the argument is reconsidered, often with input from the plan's Board of Trustees or legal advisors. The claims and appeals process is protected by ERISA and found in the Code of Federal Regulations (29 CFR § 2560.503-1). Every pension plan has a claims and appeals process, which you can request and which the plan must give to you upon request.

SEEK OUTSIDE HELP

There are several government agencies and other organizations that may be able to help you locate your pension. Please review the agencies and organizations below for further information.

- **Pension Benefit Guaranty Corporation (PBGC)**

- o The PBGC is a government agency in Washington, D.C., that insures private defined benefit pensions. In some cases, they are responsible for paying benefits, usually when a plan sponsor has declared bankruptcy.
- o If the PBGC is responsible for your pension benefit, or you are the beneficiary to a pension benefit administered by the PBGC, then call their Customer Contact Center. Its hours are between 8 a.m. and 7 p.m. Monday through Friday, and the number is 1-800-400-7242. Please have your Social Security number and pension plan's name or number ready to share when you call.
- o Email: CustomerService@pbgc.gov
- o PBGC
P.O. Box 151750
Alexandria, VA 22315-1750

Include your full name, customer ID, or the last four digits of your Social Security num-

ber at the top of each document, along with your request. Please allow four to six weeks for PBGC to respond to your request.

- **U.S. Department of Labor, Employee Benefits Security Administration (DOL-EBSA)**

- o DOL-EBSA is available to answer questions if you believe that you have been inappropriately denied a retirement, health, disability or other ERISA employee benefit.
- o 1-866-444-3272
Assistance is available in over 105 languages. If you are deaf, hard of hearing or have a speech disability, please dial 7-1-1.
- o Ask a question online:
https://www.askebsa.dol.gov/WebIntake/?_ga=2.163257278.323340782.1670360177-1857761670.1669841835

- **The Pension Action Center**

- o The Pension Action Center provides free legal counseling for workers and retirees who live or worked in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont and Illinois.

- o To request assistance, call 1-888-425-6067, or submit an online request for assistance through their website: www.umb.edu/pensionaction.

- **Massachusetts State Retirement Board**

- o The Massachusetts State Employees' Retirement System (MSERS) administers the Massachusetts State Employee Retirement System (MERS) for all municipal and state employees, as well as employees of the state judiciary.
- o (617) 367-7770 (8 a.m.–5 p.m.)
- o Email: srb@tre.state.ma.us
- o Members of the MSERS may visit the MSRB offices to drop off completed retirement applications, forms and other documents at: the MSRB's Boston office at One Winter St., Downtown Crossing; or the MSRB's Springfield office: 436 Dwight St., Room 109A. Drop-off hours at both offices are Monday through Friday from 10 a.m.–3 p.m., except on state holidays.

1. The following information on lump sum payments was previously published in the Pension Action Center Fact Sheet, "Lump Sum vs Annuity Payments: Which Is Right for Me?" (2017), which is available on the Pension Action Center website, www.umb.edu/pensionaction.

SAMPLE PENSION BENEFIT REQUEST LETTER

Name: _____

Street Address: _____

City, State and Zip: _____

Today's Date: _____

OCO

Office of Earnings Operation

ATTN: ERISA Correspondence Group

P.O. Box 33007

Baltimore, MD 21290-3007

Dear Sir or Madam:

Please provide me with a copy of the SSA Notice SSA-L99-C1 regarding my potential pension benefits from _____ in _____.
(name of employer) (city and state where employer was located)

In support of my request, I am submitting the following facts:

Name: _____

Social Security Number: _____

Date of Birth: _____

Parents' Names: _____

I certify that I am the person to whom the record pertains, or that person's legal guardian, or a person who is authorized to sign on behalf of that individual. I know that the knowing and willful request or acquisition of records under false pretenses is a criminal offense subject to a fine of up to \$5,000.

Please send the information to me at the address noted above. I am enclosing a copy of my _____ as proof of my identity. Thank you.
(government-issued photo ID, such as driver's license)

Sincerely,

Signature: _____

REMEMBER TO ATTACH A COPY OF YOUR PHOTO ID TO THIS FORM BEFORE MAILING.

CHAPTER 18

HEALTH CARE DECISIONS, MEDICAL INFORMATION AND END-OF-LIFE CHOICES

INTRODUCTION

As people age, a major area of concern for older adults is addressing health care decisions and end-of-life considerations. In Massachusetts, there are a number of documents that older adults should implement as part of their health care decision planning.

TIP: For those who have just learned they have cancer, there is a booklet from the American Bar Association which details steps in determining the right type of care for an individual at: https://linkprotect.cudasvc.com/url?a=https%3a%2f%2fwww.americanbar.org%2fgroups%2fhealth_law%2finterest_groups%2feducational_outreach%2fhlcancer%2f&c=E,1,VjDaKt78V-Lu8o-GVFQr5xAnO106w-3-g1U9G1qE3dnqq4coo2c9sQWfJeE3F0guRiqnmlBp0F60uzHx92LBTVXwclvgFU1hFg0LiBsx3j1w&typo=1.

THE HEALTH CARE PROXY

The key document governing the delegation of health care decisions in Massachusetts is a Health Care Proxy. Using 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. A sample Health Care Proxy is included as an exhibit to this chapter.

The Health Care Proxy is activated upon your incapacity. Your lack of capacity must be determined by an attending physician in consultation with others. If you have not executed a Health Care Proxy prior to incapacity, a court-appointed guardian may be required to make your medical decisions.

The agent you select must be 18 years of age or older. You can also appoint an alternate agent if the first person becomes unavailable to act. You may only select one agent to act a time to serve as your health care agent. The agent will be permitted to

make a wide range of medical decisions on your behalf. You are free to limit in your proxy the decisions your agent is authorized to make. Your agent makes decisions for you only when and for as long as you cannot do that for yourself. If and when you regain the capacity to make medical decisions, the authority over such decisions shifts from your agent back to you individually.

You can also indicate other wishes in a Health Care Proxy, such as whether or not you wish to have your organs donated upon your passing (but should also ensure that if you wish to be an organ donor, that your wishes are reflected with the Massachusetts Registry of Motor Vehicles.) To be an organ donor, you can register at any time through the Registry of Motor Vehicles (RMV). Many people register when they apply for or renew their Massachusetts driver's license or ID. You can also register online at RegisterMe.org/MA.

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 as a “living will” (see below).

An agent under a Health Care Proxy will generally have access to your medical records in connection with their authority to make medical decisions on your behalf. If you wish, you may restrict the scope of this authority within your Health Care Proxy.

If you wish for additional individuals beyond your Health Care Proxy to have access to your medical information, you may consider executing a HIPPA release form to authorize such release of information. A sample release form is included as an exhibit to this chapter. See page 121 regarding personal and health care professional access to medical records.

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.)

WHAT ARE THE DIFFERENCES BETWEEN A HEALTH CARE PROXY AND AN ADVANCE DIRECTIVE? DO I NEED A LIVING WILL ALSO?

There are other ways for you to provide a statement of your preferences regarding medical-related decisions, such as life-sustaining or do-not-resuscitate measures, to a health care agent or medical provider in case you cannot communicate your wishes. If you wish to refuse the use of feeding tubes, respirators and/or cardiac resuscitation, these decisions can be expressed not only in your Health Care Proxy, but also in an advance directive or living will. An advance directive makes an incapacitated individual's treatment preferences known to the health care agent in a set of limited and specific circumstances and provides written evidence of the principal's wishes, values, beliefs and specific instructions. Whether to include provisions regarding these matters in a Health Care Proxy or in a separate living will or advance directive is a matter, to be discussed with an elder law attorney. A living will can be helpful if you anticipate a potential dispute among family members regarding your health care treatment.

MEDICAL ORDERS FOR LIFE-SUSTAINING TREATMENT ("MOLST")

MOLST is the acronym used for medical orders for life-sustaining treatment. It is a standardized form that provides for a 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 their physician about a MOLST.

Your physician may ask you to complete a MOLST. If you are uncomfortable in doing so, you should decline but ensure that your physician is

aware that you have a Health Care Proxy and that a copy is in your file.

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. Guardianship can be a costly and time-consuming process and can be avoided by having the proper health care documents in place.

Accessing Medical Information

- (i) 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, usually upon a 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.
- (ii) You may be asked for permission for your medical record to be shared with your other providers. Some hospitals and physicians use the Mass HIway (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.
- (iii) 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. You generally have the right to see your records made by a psychologist or psychiatrist unless the provider feels that the inspection would "lead you to serious harm."

- (iv) There are situations where your medical provider must report certain conditions, such as injuries due to guns, burns on more than 5% of a person's body, rape, sexual assault or opioid overdose. Results of HIV/AIDS tests cannot be disclosed without first obtaining your written permission.

DOCUMENTS, LISTS AND OTHER ITEMS TO BRING WITH YOU IF YOU ARE TO BE HOSPITALIZED:

1. Your Health Care Proxy, living will (if any) and/or other advance medical directives. A sample Health Care Proxy is included at the end of this chapter.
2. A document with your name, age, address and phone number, as well as the names of close relatives or friends and their phone numbers; your Medicare or MassHealth insurance numbers; and any other health insurance cards.
3. The list of current medications you are on, including all ones for heart and blood-thinning, as well as any chronic illnesses you have.
4. Your cell phone, tablet and/or computer with applicable chargers, because visitors are not allowed to see you in the hospital or recovery rooms.

COMMUNICATING WITH YOUR HEALTH CARE PROVIDERS, HEALTH CARE AGENT, AND FAMILY AND FRIENDS

It is very important to communicate with your health care agent as to what decisions you want them to make on your behalf in the event you cannot make or communicate the decision for yourself. They cannot respect your wishes if you have not made choices for them to follow and told them clearly. You should also consider sharing your medical wishes and directives with your family, friends and caregivers so that they will be aware of and respect your wishes. There are several resources available to help you do this. One is the Conversation Project — whose website is <https://theconversationproject.org/>, which specifically records your wishes. A copy of that form is included at the end of this section, along with a sample health care proxy with instructions and a Medical Orders for Life-Sustaining Treatment (MOLST) form, which, if presented to you, should be reviewed with your physician.

Choices when faced with Cancer: For those who have just learned they have cancer, there is a booklet from the American Bar Association which details steps in determining the right type of care for an individual at https://link-protect.cudasvc.com/url?a=https%3a%2f%2fwww.americanbar.org%2fgroups%2fhealth_law%2finterest_groups%2feducational_outreach%2fhlcancer%2f&c=E%2c%2f%2fVjDaKt78V-Lu8o-GVFQr5xAnOIO6w-3-g1U9G1qE3d-nqq4coo2c9sQWfJeE3F0guRiqnmlBpOF60uzHx92LBT-VXwclvgFU1hFgOLiBsx3j1w&typo=1.

Choices at the End of Life

Learning that you have a serious or terminal illness is life-changing. We all avoid talking about death, especially with our spouse, children and those closest to us. However, it is most important to have these conversations about our wishes, in fact our responsibility to initiate and have them.

While a person cannot live forever, there are quality-of-life decisions a person can make when faced with poor outcomes. Your family, care givers, physicians and medical teams have limited power to change outcomes, but each and all can honor your wishes and instructions.

You must decide on the path you wish to take, given this news. Is there any specific event, activity, person you wish to see, or plan you want to finalize? Identify them and make a list. Discuss this list, and its time-frame with your providers. Most likely, they will be hopeful that you can achieve it all, but you should ask about their experience with others and the offered treatment alternatives. Be specific. For example, how will you be affected by the progression of the disease? Will you be able to read, walk or feed yourself? These questions seem harsh, but they are necessary to establish what you value as quality of life. Where will you receive this care? Can you return home? Is your family unit able to care for you, or will you need assistance beyond what they can provide?

Our focus here is on heroic measures/aggressive care, clinical trials, palliative care, and hospice. Quality-of-life decisions do not include physician-assisted suicide in Massachusetts.

Consider these four alternatives:

1. **Heroic Care** — This is aggressive care, which often has side effects. Ask your providers what are the side effects of this care, and how many people taking this care have survived for 6 months, a

year or more. What were they able to do – if you were to do this, would you enjoy your quality of life after enduring the side effects? Ask if this aggressive care would disqualify you from a clinical trial.

2. **Clinical Trials** — Ask if the care being discussed is an approved experimental treatment of the Food and Drug Administration. Will you be receiving the experimental treatment or a different treatment? What percentage of patients are alive six months/one year after receiving this treatment? What are the side effects? What happens if you discontinue this? Note that you may not qualify for a clinical trial or you may decide against it.
3. **Palliative Care** — This care is primarily intended to reduce pain. You can continue on your plan of treatment, but the main emphasis is to make you comfortable. Palliative care can begin at any time that you and your physician decide.
4. **Hospice Care** — This care ends any treatment for the disease, and emphasizes pain management and quality of life. For example, a patient who has terminal cancer will not receive chemotherapy, but will receive their standard medications, including anti-depressants, insulin, etc. Hospice requires a Do Not Resuscitate (DNR) order. Hospice care supports terminally ill patients and their families. In order to qualify for hospice, a physician must certify that the patient has a life-limiting condition and is unlikely to live beyond six months. If the patient continues to live beyond six months, the patient is reevaluated. Hos-

pice does not end automatically at the end of six months. Hospice is covered by Medicare, most Medicare Advantage plans, and if the patient is qualified, by MassHealth. <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/Hospice>.

Please refer to other sections of this guide regarding documents and forms which will be needed. Most importantly, be clear with your family and providers about your wishes. Following your wishes will be a comfort for those who love and care for you.

HELPFUL RESOURCES:

How to start the conversation about end of life:

<https://hospicefoundation.org/Hospice-Care/Starting-the-Conversation>

<https://samaritannj.org/resources/end-of-life-conversation-starters/>

<https://lifecare.org/news-events/hospice-end-of-life-discussion-guide/>

Five Wishes: Asks you to answer questions — such as how do you want people to treat you, what you want them to know, etc. (paid site)

<https://www.fivewishes.org/for-myself/>

Further information on the difference between palliative care and hospice:

<https://www.vitas.com/hospice-and-palliative-care-basics/about-palliative-care/hospice-vs-palliative-care-whats-the-difference>

VNA hospice care: <https://vnacare.org/>

Massachusetts Health Care Proxy Instructions and Document

Instructions: Every competent adult, 18 years old and older, has the right to appoint a Health Care Agent in a Health Care Proxy. To create your Health Care Proxy, print this two page form and place the instructions page and the blank document in front of you. Follow the step-by-step instructions and sign and date the Health Care Proxy in front of two witnesses, who sign and date the document after you.

1. Your Name and Address *(Required)*

Print your full name in the blank space. Print your address.

2. My Health Care Agent is: *(Required)*

Print the name, address and phone numbers of your Health Care Agent.

- Choose a person you trust to make health care decisions for you based on your choices, values and beliefs, if you cannot make or communicate decisions yourself;
- Your Health Care Agent and Alternate Agent cannot be a person who is an operator, administrator or employee in the facility where you are a patient or resident or have applied for admission, unless they are related to you by blood, marriage or adoption.

3. My Alternate Health Care Agent *(Not required, but helpful to have an Alternate Agent)*

If possible, appoint a person you trust as a back-up or Alternate Agent, who can step-in to make health care decisions if your Health Care Agent is not available, not willing or not competent to serve, or is not expected to make a timely decision. Print the name, address and phone numbers.

4. My Health Care Agent's Authority *(Required)*

Here's where you give your Agent either the broadest possible decision-making authority to make "any and all" decisions including life sustaining treatments, or limit his/her authority:

- If you want to give "any and all" decision-making authority, just leave this area blank.
- If you do not want to give "any and all" decision-making authority, describe the way in which you want to limit your Agent's authority and write it down in the space provided.

5. Signature and Date *(Required)*

Do NOT sign ahead. Sign your full name & date in front of two adult witnesses who sign after you.

- You can have someone sign your name at your direction in front of two witnesses.

6. Witness Statement and Signature *(Required)*

Any competent adult can be a witness except your Health Care Agent and Alternate Agent.

- Two adults must be present as witnesses when this document is signed. They watch as you sign the document, or as another person signs at your direction, and sign after you to state that you are at least 18 years old, of sound mind, and under no constraint or undue influence.
- Have Witness One sign, then print his or her name and the date;
- Then have Witness Two sign and print his or her name and the date.

7. Health Care Agent Statement *(Optional)*

This section is not required, but it can help your doctors and family know the Agents you appointed have accepted the position. Your Agent(s) signs and prints the date in the spaces provided.

Important: Keep your original Health Care Proxy. Make a copy and give it to your Health Care Agent. Give a copy to your doctors and care providers to scan in your medical record so they know how to contact your Agent if you are ill or injured and unable to speak for yourself.

Massachusetts Health Care Proxy

1. I, _____ Address: _____,

appoint the following person to be my Health Care Agent with the authority to make health care decisions on my behalf. This authority becomes effective if my attending physician determines in writing that I lack the capacity to make or communicate health care decisions myself, according to Chapter 201D of the General Laws of Massachusetts.

2. My Health Care Agent is:

Name: _____ Address: _____

Phone(s): _____; _____; _____

3. My Alternate Health Care Agent

If my Agent is not available, willing or competent, or not expected to make a timely decision, I appoint:

Name: _____ Address: _____

Phone(s): _____; _____; _____

4. My Health Care Agent's Authority

I give my Health Care Agent the same authority I have to make any and all health care decisions including life-sustaining treatment decisions, except (list limits to authority or give instructions, if any):

I authorize my Health Care Agent to make health care decisions based on his or her assessment of my choices, values and beliefs if known, and in my best interest if not known. I give my Health Care Agent the same rights I have to the use and disclosure of my health information and medical records as governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d. Photocopies of this Health Care Proxy have the same force and effect as the original.

5. Signature and Date. I sign my name and date this Health Care Proxy in the presence of two witnesses.

SIGNED _____ **DATE** _____

6. Witness Statement and Signature

We, the undersigned, have witnessed the signing of this document by or at the direction of the signatory above and state the signatory appears to be at least 18 years old, of sound mind and under no constraint or undue influence. Neither of us is the health care agent or alternate agent.

Witness One

Signed: _____

Print Name: _____

Date: _____

Witness Two

Signed: _____

Print Name: _____

Date: _____

7. Health Care Agent Statement (Optional):

We have read this document carefully and accept the appointment.

Health Care Agent _____ Date _____

Alternate Health Care Agent _____ Date _____

**MASSACHUSETTS MEDICAL ORDERS
for LIFE-SUSTAINING TREATMENT**

(MOLST) www.molst-ma.org



Patient's Name: _____

Date of Birth: _____

Medical Record Number if applicable: _____

INSTRUCTIONS: *Every patient should receive full attention to comfort.*

- This form should be signed based on goals of care discussions between the patient (or patient's representative signing below) and the signing clinician.
- Sections A–C are valid orders only if Sections D and E are complete. Section F is valid only if Sections G and H are complete.
- If any section is not completed, there is no limitation on the treatment indicated in that section.
- The form is effective immediately upon signature. Photocopy, fax or electronic copies of properly signed MOLST forms are valid.

A	CARDIOPULMONARY RESUSCITATION: for a patient in cardiac or respiratory arrest	
Mark one circle →	<input type="radio"/> Do Not Resuscitate <input type="radio"/> Attempt Resuscitation	
B	VENTILATION: for a patient in respiratory distress	
Mark one circle →	<input type="radio"/> Do Not Intubate and Ventilate <input type="radio"/> Intubate and Ventilate	
Mark one circle →	<input type="radio"/> Do Not Use Non-invasive Ventilation (e.g., CPAP) <input type="radio"/> Use Non-invasive Ventilation (e.g., CPAP)	
C	TRANSFER TO HOSPITAL:	
Mark one circle →	<input type="radio"/> Do Not Transfer to Hospital (<i>unless needed for comfort</i>) <input type="radio"/> Transfer to Hospital	
PATIENT or patient's representative signature D <i>Required</i>	<p>Mark one circle below to indicate who is signing Section D:</p> <p><input type="radio"/> Patient <input type="radio"/> Health Care Agent <input type="radio"/> Guardian* <input type="radio"/> Parent/Guardian* of minor</p> <p>Signature of patient confirms this form was signed of patient's own free will and reflects their wishes and goals of care as expressed to the Section E signer. Signature by the patient's representative (indicated above) confirms that this form reflects their assessment of the patient's wishes and goals of care, or if those wishes are unknown, their assessment of the patient's best interests. <i>*A guardian can sign only to the extent permitted by MA law. Consult legal counsel with questions about a guardian's authority.</i></p>	
Mark one circle and fill in every line for valid Page 1.	<input checked="" type="checkbox"/>	Signature of Patient (or Person Representing the Patient) _____ Date of Signature _____ Legible Printed Name of Signer _____ Telephone Number of Signer _____
CLINICIAN signature E <i>Required</i>	Signature of physician, nurse practitioner or physician assistant confirms that this form accurately reflects their discussion(s) with the signer in Section D.	
Fill in every line for valid Page 1.	<input checked="" type="checkbox"/>	Signature of Physician, Nurse Practitioner or Physician Assistant _____ Date and Time of Signature _____ Legible Printed Name of Signer _____ Telephone Number of Signer _____
Optional	<p>This form does not expire unless expressly stated. <i>Expiration date (if any) of this form:</i> _____</p>	
Expiration date (if any) and other information.	Health Care Agent Printed Name _____ Primary Care Provider Printed Name _____	Telephone Number _____ Telephone Number _____

SEND THIS FORM WITH THE PATIENT AT ALL TIMES.
HIPAA permits disclosure of MOLST to health care providers as necessary for treatment.

STATEMENT OF PATIENT PREFERENCES FOR OTHER MEDICALLY INDICATED TREATMENTS		
F	INTUBATION AND VENTILATION	
	Mark one circle → <input type="radio"/> Refer to Section B on Page 1	<input type="radio"/> Use intubation and ventilation as marked in Section B, but short term only <input type="radio"/> Undecided <input type="radio"/> Did not discuss
	NON-INVASIVE VENTILATION (e.g., Continuous Positive Airway Pressure — CPAP)	
Mark one circle → <input type="radio"/> Refer to Section B on Page 1	<input type="radio"/> Use non-invasive ventilation as marked in Section B, but short term only <input type="radio"/> Undecided <input type="radio"/> Did not discuss	
Mark one circle →	DIALYSIS	
	<input type="radio"/> No dialysis <input type="radio"/> Use dialysis <input type="radio"/> Use dialysis, but short term only	<input type="radio"/> Undecided <input type="radio"/> Did not discuss
	ARTIFICIAL NUTRITION	
Mark one circle → <input type="radio"/> No artificial nutrition	<input type="radio"/> Use artificial nutrition <input type="radio"/> Use artificial nutrition, but short term only	<input type="radio"/> Undecided <input type="radio"/> Did not discuss
Mark one circle →	ARTIFICIAL HYDRATION	
	<input type="radio"/> No artificial hydration <input type="radio"/> Use artificial hydration <input type="radio"/> Use artificial hydration, but short term only	<input type="radio"/> Undecided <input type="radio"/> Did not discuss
	Other treatment preferences specific to the patient's medical condition and care: -	

PATIENT or patient's representative signature G <i>Required</i> Mark one circle and fill in every line for valid Page 2.	Mark one circle below to indicate who is signing Section G: <input type="radio"/> Patient <input type="radio"/> Health Care Agent <input type="radio"/> Guardian* <input type="radio"/> Parent/Guardian* of minor Signature of patient confirms this form was signed of patient's own free will and reflects their wishes and goals of care as expressed to the Section H signer. Signature by the patient's representative (indicated above) confirms that this form reflects their assessment of the patient's wishes and goals of care, or if those wishes are unknown, their assessment of the patient's best interests. <i>*A guardian can sign only to the extent permitted by MA law. Consult legal counsel with questions about a guardian's authority.</i>	
	<input checked="" type="checkbox"/>	Signature of Patient (or Person Representing the Patient) _____ Date of Signature _____ Legible Printed Name of Signer _____ Telephone Number of Signer _____
	<input type="checkbox"/>	_____

CLINICIAN signature H <i>Required</i> Fill in every line for valid Page 2.	Signature of physician, nurse practitioner or physician assistant confirms that this form accurately reflects their discussion(s) with the signer in Section G. <input checked="" type="checkbox"/> Signature of Physician, Nurse Practitioner or Physician Assistant _____ Date and Time of Signature _____ <input checked="" type="checkbox"/> Legible Printed Name of Signer _____ Telephone Number of Signer _____
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ADDITIONAL INSTRUCTIONS FOR HEALTH CARE PROFESSIONALS	
→ Follow orders listed in A, B and C and honor preferences listed in F until there is an opportunity for a clinician to review as described below.	
→ Any change to this form requires the form to be voided and a new form to be signed. To void the form, write VOID in large letters across both sides of the form. <i>If no new form is completed, no limitations on treatment are documented and full treatment may be provided.</i>	
→ Re-discuss the patient's goals for care and treatment preferences as clinically appropriate to disease progression, at transfer to a new care setting or level of care, or if preferences change. Revise the form when needed to accurately reflect treatment preferences.	
→ The patient or health care agent (if the patient lacks capacity), guardian*, or parent/guardian* of a minor can revoke the MOLST form at any time and/or request and receive previously refused medically indicated treatment. <i>*A guardian can sign only to the extent permitted by MA law. Consult legal counsel with questions about a guardian's authority.</i>	

Massachusetts Department of Public Health
Authorization for Release of Information
Permission to Share Information

If you want the _____ to share information about you with another person or
(Fill in name of person or organization)
organization, please make sure that you fill out all of the sections below (Sections I-VI). This will tell us what
information you want us to share and who to share it with. If you leave any sections blank, with the exception of
Section II (B), your permission will not be valid, and we will not be able to share your information with the person(s)
or organization you listed on this form.

SECTION I

I, _____, give my permission for _____
(print your name) (Fill in name of person or
organization)
to share the information about me that I list in Section II with the person(s) or organization that I list in Section V.

SECTION II

A. Health and Personal Information

Please describe the information you want the _____ to share about you.
(Fill in name of person or organization)

Please include any dates and details you want to share.

B. Permission about Specific Health Information. Only if you choose to share any of the following information, please write your initials on the line:

____ I specifically give permission, as required by M.G.L. c. 111, § 70F, to share information in my record about HIV antibody and antigen testing, and HIV/AIDS diagnosis or HIV/AIDS treatment.

____ I specifically give permission, as required by M.G.L. c. 111, §70G, to share information in my record about my genetic information.

____ I specifically give permission to share information in my record about alcohol or drug treatment. If this information is shared, I understand that a specific notice required by 42 CFR, Part 2 shall be included prohibiting the redisclosure of this confidential information.

SECTION III – Reason for Sharing this Information

Please describe the reason(s) for sharing this information. If you do not want to list reasons, you may simply write: "at my request," if you are initiating the request.

SECTION IV – Who May Share This Information

I give permission to the person or organization listed below to share the information I listed in Section II:

Name

Organization

Address

**Massachusetts Department of Public Health
Authorization for Release of Information**

SECTION V – Who May Receive My Information

The person or organization listed in Section IV may share the information I listed in Section II with this person(s) or organization:

Name

Organization

Address

I understand that the person(s) or organization listed in this section may not be covered by federal or state privacy laws, and that they may be able to further share the information that is given to them.

SECTION VI – How Long This Permission Lasts

This permission to share my information is good until _____.
Indicate date or event

If I do not list a date or event, this permission will last for one year from the date it is signed.

- I understand that I can change my mind and cancel this permission at any time. To do this, I need to write a letter to _____, and send it or bring it to the place where I am now giving
(Fill in name of person or organization)
this permission (or fill in specific location) If the information has already been given out by, I understand that it is too late for me to change my mind and cancel the permission.
- I understand that I do not have to give permission to share my information with the person(s) or organization I listed in Section V.
- I understand that if I choose not to give this permission or if I cancel my permission, I will still be able to receive any treatment or benefits that I am entitled to, as long as this information is not needed to determine if I am eligible for services or to pay for the services that I receive.

SECTION V – Signature

Please sign and date this form, and print your name.

Your Signature

Date

Print Your Name

If this form is being filled out by someone who has the legal authority to act for you (such as the parent of a minor child, a court appointed guardian or executor, a custodial parent, or a health care agent), please:

Print the name of the person filling out this form: _____

Signature of the person filling out this form: _____

Describe how this person has legal authority for this individual: _____

CHAPTER 19

RESOURCE DIRECTORY

GENERAL INFORMATION

MassOptions: For Mass. Older Adults and Their Families

www.MassOptions.org

Alzheimer's Association

(800) 272-3900, (617) 868-6718 (Waltham),
(508)799-2386 (Central & Western MA),
(603) 635-3026 (New Hampshire)

www.ALZ.org

Executive Office of Elder Affairs in Mass.

(617) 727-7750 • (800) 243-4636

www.Mass.Gov/Elders

National Council on Aging

(571) 527-3900

www.NCOA.org

National Multiple Sclerosis Society

(800) 344-4867

www.NationalMSSociety.org

www.NationalMSSociety.org/Chapters/MAM

LEGAL INFORMATION

Justice in Aging

www.JusticeInAging.org

LGBTQ Resources

GLBTQ Legal Advocates & Defenders

GLAD Answers

(800) 455-GLAD

617-426-1350

www.glad.org

Legal Assistance: Massachusetts Bar Association Lawyer Referral Service

(617) 654-0400

Toll-free: (866) 627-7577

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

Mass. Chapter of the National Academy of Elder Law Attorneys (MassNAELA)

(617) 566-5640

www.MassNAELA.com

National Academy of Elder Law Attorneys

www.NAELA.org

ELDER ABUSE PREVENTION AND REPORTING INFORMATION

Attorney General Elder Hotline

(888) 243-5337

www.mass.gov/service-details/the-attorney-generals-elder-hotline

Executive Office of Elder Affairs/Elder Abuse and Protective Services

(800) 922-2275

www.Mass.gov/Reporting-elder-abuse-neglect

Long-Term Care Ombudsman

(617) 727-7750

www.mass.gov/service-details/ombudsman-programs

Massachusetts Bank Reporting Project

www.mass.gov/service-details/the-massachusetts-bank-reporting-project

SOCIAL SECURITY INFORMATION**Martin on Social Security**

www.Law.Cornell.edu/socsec_treatise

Social Security Prescription Help

www.SSA.gov/benefits/medicare/prescriptionhelp/

U.S. Social Security Administration

(800) 772-1213

www.SSA.gov

MEDICAL INSURANCE INFORMATION**MassHealth: Customer Service Center**

(800) 841-2900

Massachusetts Health Care for All

Health Care Resources

(800) 272-4232

(617) 350-7279

www.HCFAMA.org

MEDICARE AND MEDICAID SERVICES**Centers for Medicare and Medicaid Services**

www.cms.gov/

Prescription Drug Coverage: General Information

www.CMS.gov/PrescriptionDrugCovGenIn

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

(800) 633-4227

www.Medicare.gov

MCPHS Pharmacy Outreach Program

(866) 633-1617

www.MCPHS.edu/Patient-centers/Pharmacy-outreach-program

Medicare Rights Center: Prescription Drug Plan

National Helpline: (800) 333-4114

www.MedicareRights.org

SHINE (Serving Health Insurance Needs of Everyone)

(800) 243-4636

www.Mass.gov/Health-insurance-counseling

VETERANS INFORMATION**City of Boston Veterans' Services**

(617) 635-3026

www.Boston.gov/Departments/Veterans-services

Mass. Department of Veterans' Services

(617) 210-5480

www.Mass.gov/Orgs/Massachusetts-department-of-veterans-services

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