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## **ELDER LAW – DETAIL**

### **The Principal Residence**

The asset that most concerns the vast majority of our clients is the principal residence. As noted, in almost all cases it is not countable as long as:

1. The community spouse or other dependent relative continues to reside in the home; or
2. The applicant intends to return home after his nursing home stay [it does not matter that the institutionalized spouse may never actually return to the home – it is only the intent as expressed upon applying for MassHealth].

The bottom line – since the home is usually non-countable – it does not have to be sold in order to qualify for MassHealth.

### **The Community Spouse – Additional Protections**

The spouse of a nursing home resident is entitled to additional protections over the \$2,000.00 in countable assets. The specific entitlement depends upon the particular circumstances of each situation.

#### **I. Assets**

First, the community spouse is entitled to keep an additional portion of the countable assets either jointly held or owned by the institutionalized spouse. **The basic rule is that the community spouse may keep one-half of the assets owned in this manner at the time the other spouse enters the nursing home.** This basic rule is subject to a maximum and a minimum. Currently the maximum amount available to the community spouse is \$92,760.00 and the minimum is \$18,552.00. **What does this mean?** If the total of the countable assets is between \$18,552.00 and \$37,104.00, then the community spouse is entitled to keep \$18,552.00. Once you exceed \$37,104.00 the community spouse is entitled to one-half of the total. However, based upon the present law, the community spouse can never keep more than \$92,760.00.

## **II. Income**

The important thing to remember is that all of the income of the community spouse belongs to the community spouse. It is not used to determine MassHealth eligibility. Also, in some circumstances the community spouse may share in the institutionalized spouse's income. This is based on a formula that the Division of Medical Assistance [DMA] uses to determine what is needed to support the community spouse. The result of the calculation is known as the Minimum Monthly Maintenance Needs Allowance. Currently the minimum MMMNA is \$1,515.00 and the maximum is \$2,319.00. When the community spouse's income falls below the MMMNA, then the institutionalized spouse's income will make up the difference. There is also an appeal process if the community spouse believes that the DMA's determination is not proper.

## **III. The Use of an Annuity**

It is also possible to turn otherwise countable assets into income for the community spouse through the purchase of an annuity. In order to qualify the purchase must be [1] irrevocable, [2] for a term of years less than the lifespan of the healthy spouse, and [3] the guaranteed payout must equal or exceed that amount of the purchase price. If you are considering an annuity it should not be purchased until the spouse enters the nursing home.

## **IV. The Use of a Life Estate**

One method of preserving the principal residence of a potential **MassHealth** applicant has been the transfer of the property to the desired person(s) while retaining a life estate in the transferor. This accomplishes many things. First, it moves the majority of ownership out of the older individual's name to [usually] the next generation. At the same time the transferor retains complete control over the property throughout the remainder of his/her life. The only thing that the original owner cannot do is to sell, otherwise transfer or refinance without the permission of all owners. In addition, the life estate process also precludes the DMA from using the residence to obtain reimbursement for amounts paid out as benefits. Whether this is still the case is unclear, Massachusetts has passed something known as expanded estate recovery, although it is not yet in effect. If the law does take effect, then the DMA would be able to place a lien in a life estate – something that until now it has not been able to do.

## **V. Spending Down Assets**

Another method that can be implemented to become eligible for MassHealth benefits is to simply spend down assets to the extent possible. Personal property can be purchased or gifts of personal property can be made. For example, if the principal residence is in need of any maintenance or repair, it is perfectly legitimate to spend assets on such items.

You may prepay for the cost of a funeral and burial. You can purchase furnishings. You may make certain gifts. Before doing these types of things, however, you should always check with your attorney, but many options in this area do exist and you are entitled to take advantage of these applicable regulations.