MEDICAID UPDATE

THE DEFICIT REDUCTION ACT OF 2005 AS ADOPTED BY MASSACHUSETTS REGULATIONS AND RELATED PLANNING OPPORTUNITITES

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Look back provision is extended to 5 years from 3 years for all transfer 130 CMR 520.019(B)

This regulation indicates that the transfers of resources are subject to a look back period, beginning on the first date the individual is both a nursing facility resident and has applied for/or is receiving MassHealth standard. This period generally extends back in time for 36 months. **For transfers of resources occurring on/or after February 8, 2006, the period extends back in time for 60 months.** The look back period for transfers of resources from a revocable trust to someone other than the nursing facility resident, or transfers of resources into an irrevocable trust where future payment to the nursing facility resident is prevented, is 60 months.

Planning Note: There appears to be no difference between the Federal Deficit Reduction Act language and the language as Massachusetts has adopted it in its current regulations. In essence, there is simply a 60 month look back period for all transfers whether they be made to an individual outright, into an irrevocable trust or out of a revocable trust.

Period of ineligibility due to a disqualifying transfer

1. Duration of ineligibility: Where the MassHealth agency has determined that a disqualifying transfer of resource has occurred, the MassHealth agency will calculate a period of ineligibility. The number of months in the period of ineligibility is equal to the total, cumulative, uncompensated value as defined by 130 CMR 515.001 of all resources transferred by the nursing facility

resident or the spouse, divided by the average monthly costs to a private patient receiving nursing facility services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency. (130 CMR 520.019 (G)(1)).

Example: If an individual transferred assets for less than fair market value to a child in the amount of $200,000, the related disqualification period would be approximately 24.3months ($200,000 ÷ $8,220). This calculation remains unchanged under both the deficit reduction act of 2005 and the newly enacted Massachusetts regulations adopting such act. The only difference is that the deficit reduction act prevents this ineligibility period from beginning to run on the date of the transfer.

9-27-07 letter from the Deputy Medicaid Director at MassHealth regarding the imposition of transfer penalties-does every transfer create a penalty period?

In general, the Masshealth workers do not review transfers of less than $250 unless there is activity that the worker deems to be questionable and thus requires further investigation. In addition. Masshealth's transfer review policy is to review all transfers of $1,000 or more, and only to review transfers including birthday, anniversary, holiday and charitable gifts, below that amount if there appears to be a recurring pattern of inappropriate transfers.

Planning Note: When making contributions to your church or birthday presents to loved ones please be sure to keep them under this $1,000 limit to avoid strict scrutiny by Masshealth. However, the good news from this letter is that at least some level of lifetime gifting can continue without necessarily creating a disqualification period as prior to this clarification it certainly appeared that all transfers of any amount would have resulted in at least a 5 year disqualification period in order to get beyond the lookback period.

2. **Determination of the beginning date of this period of ineligibility: 130 CMR 520.019(G)(3)**

Beginning date. For transfers occurring before February 8, 2006, the period of ineligibility will begin on the first day of the month in which resources have been transferred for less than fair market value. For transfers occurring on/or after February 8, 2006, the period of ineligibility will begin on the first day of the month in which resources were transferred for less than fair market value or the date on which the individual is **otherwise eligible** for MassHealth payment of long term care services, whichever is later. For transfers involving revocable trusts, the date of transfer is the date the payment to someone other than the nursing facility resident or the spouse is made. For transfers involving irrevocable trusts, the date of transfer is:

1. The date that the countable resources are transferred to someone other than the nursing facility resident or spouse; or

2. The latest of the following:

    i. The date that payment to the nursing facility resident or the spouse was foreclosed under the terms of the trust:
    ii. The date that the trust was established; or
    iii. The date that any resource was placed in the trust.

Planning note: The Deficit Reduction Act of 2005 defined the beginning date of the period of ineligibility to be "the first day of the month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the state plan and would otherwise be receiving institutional level care described in sub paragraph C based on an approved application for such care, but for the application of the penalty period, whichever is later (deficit reduction act of 2005, section 6011(B)(ii.)). Massachusetts's regulations are similar but indicate that the beginning date would commence when "the individual is otherwise is eligible for MassHealth payment"(130 CMR 520.019(G)(3)). The confusion surrounds the meaning behind otherwise eligible. MassHealth is following the federal definition. Therefore we are of the belief that by following the Federal rules and applying for MassHealth benefits and getting denied for the sole reason of having an unexpired period of ineligibility would be the safest approach to ensure the beginning of the running of such period of ineligibility.

3. **Multiple Transfers Occurring on or after February 8, 2006. 130.CMR 520.019 (G)(2)(i)**

This regulation indicates that for transfers occurring on or after February 8, 2006, the MassHealth agency adds the value of all resources transferred **during the look back period** and divides the total by the average monthly cost to a private patient receiving long term care services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency. The result will be a single period of ineligibility beginning on the first day of the month in which the transfer was made or the date on which the individual is otherwise eligible for long term care services, whichever is later (130 CMR 520.019(G)(2)(i)).

Planning note. It would appear the multiple transfer rules for transfers occurring on or after February 8, 2006 are less restrictive than the old rules governing periods of ineligibility that overlap (see 130 CMR 520.019(G)(2)(b)). In this regard, the new multiple transfer rules limit the MassHealth agency's ability to see multiple transfers to a period that exists

only during the look back period. This distinction may offer planning opportunities.

Example #1: Preplanning: John and Mary are married, both 62 years of age, own a home worth approximately $500,000 and other miscellaneous investments and savings and checking accounts worth in total approximately $100,000. In addition, John has an IRA rollover worth approximately $900,000. Finally, their combined pension, social security and investment income is approximately $5,000 a month. Their objectives are to reduce the cost associated with the probate process, reduce and if possible eliminate their estate tax exposure, as well as protect their assets from the cost associated with long term care. Finally, they are especially concerned with the fact that they have a large amount of assets in an IRA which can be difficult to protect.

Solution: On August 1, 2006 two irrevocable grantor income only trusts were prepared and the home was transferred equally to such trusts. This transfer would begin the running of the 5 year look back period. Assume further that based on their taxable income, John is able to withdraw an additional $70,000 of assets from his IRA without pushing them into the next higher income tax bracket. Therefore, on January 1, 2007 John makes a $70,000 distribution from his IRA followed by a contribution of that money to the irrevocable trusts and further assume that this procedure is followed annually for the next 5 years. These actions would undoubtedly fall within the multiple transfers regulation mentioned above. Nevertheless, on September 1, 2011 the home would be effectively outside of the 5 year look back period and thus protected from the cost of long term care. Even though there was another transfer made on January 1, 2007, based on the definition of multiple transfers occurring only during the look back period, it would appear that this home would be outside of such look back period and thus outside of the reach of Massachusetts regulation 130 CMR 520.019(G)(2)(i).

Furthermore, on February 1, 2012, the first $70,000 transfer to the irrevocable trusts should also be protected from the cost of long term care as it is now outside of the 5 year look back period. The benefit to this approach is that although each $70,000 transfer has its own 5 year look back period, at the end of every succeeding year, each such transfer should be protected in its own right. This would be an effective approach to try and protect assets in an IRA that are generally otherwise unprotected. This would also be preferable to waiting 5 years until the home is protected, then transferring $350,000 of withdrawn IRA money, or some portion of it, to the trusts, which would trigger a new 5 year look back period at a time when your client may be much older.

Example #2 Last Minute Planning: Lets assume the same facts as example #1 except that Mary and John have no IRA accounts and instead have total

investments of $500,000, and assume further that John has just entered a nursing home. What should Mary do?

Solution: The rules allow Mary to keep the house and the first $101,640 of assets while John can keep $2,000 of assets. Mary is then permitted to buy an annuity for the balance of the countable assets in the amount of $396,360 ($500,000 - $2,000 - $101,640) provided it meets the requirements of regulation 130 CMR 520.007(J). The term of the annuity is 2 years instead of her life expectancy, as a shorter annuity is permitted under regulation 130 CMR 520.007(J)(1)(b). This approach enables Jane to get the money back to her quicker so that it can be protected as part of her Medicaid plan. In this regard, Mary would then transfer each month the portion of the annuity payments that she does not need to live on into an irrevocable income only trust. In this case the annuity would be generating approximately $16,515 per month, (396.360 ÷ 2years ÷12months), which is far more than she needs to live. As explained above, under the multiple transfers regulation 130 CMR 520.019(G)(2)(i), each transfer should have its own 5 year look back period associated with it. Therefore, at the end of 60 months, Jane's home would be protected. In addition, on each successive month thereafter the corresponding annuity payment that was deposited into the trust should also be protected from the costs of long term care.

Trends in the Annuity Rules since the Deficit Reduction Act of 2005

1. Treatment of annuities established before February 8, 2006 130 CMR 520.007(J)(1): This regulation indicates that payments from an annuity are countable income in accordance with 130 CMR 520.009. If an annuity can be converted to a lump sum, the lump sum, less any penalties or cost of converting to a lump sum, is a countable asset. Purchase of an annuity is a disqualifying transfer of assets for nursing facility residents, as defined at 130 CMR 515.001 in the following situations:

a. When the beneficiary is other than the applicant, member or spouse;

b. When the beneficiary is the applicant, member or spouse, and when the total present value of projected payments from the annuity is less than the value of the transferred asset (purchase price). In this case, the MassHealth agency determines the amount of the disqualifying transfer based on the actuarial value of the annuity, compared to the beneficiary's life expectancy, using the life expectancy tables as determined by the Mass Heath agency, giving due weight to the life expectancy tables of institutions in the business of providing annuities;

c. When the terms of the annuity postpone payment beyond 60 days, the MassHealth agency will treat the annuity as a disqualifying transfer of assets until the payment start date; or

d. When the terms of the annuity provide for unequal payments, the MassHealth agency may treat the annuity as a disqualifying transfer of assets. Commercial

annuity payments that vary solely as a result of variable rate of interest are not considered unequal payments under 130 CMR 520.007(J)(1)(d).

Planning Pointer/interpretation of the above rule:

In essence in order to have a qualified annuity the annuitant must be either the healthy spouse or the institutionalized individual. The annuity must also ensure that the annuitant gets back all of the money over time that was used to purchase the annuity, which generally includes some interest. The time in which these payments must be made cannot exceed the life expectancy of the annuitant and must come out in equal installments. Finally, these payments must begin no later than 60 days after the annuity is purchased.

2. Treatment of Annuities Established on or after February 8, 2006 130 CMR 520.007(J)(2) This regulation provides that in addition to the requirements in 130 CMR 520.007(J)(1), the following conditions must be met:

   a. The purchase of an annuity will be considered a disqualifying transfer of assets when:

      i. Someone other than the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the **Institutionalized Individual;** {used to say Annuitant}
      ii. Someone other than the Commonwealth of Massachusetts is named beneficiary in the second position after the community spouse or minor or disabled children;
      iii. Someone other than the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor disabled children in 130 CMR 520.007(J)(2)(a)(ii) disposes of any such remainder for less than fair market value.

   b. The purchase of an annuity will be considered a disqualifying transfer of assets if the annuity does not satisfy 130 CMR 520.007(J)(1) and (J)(2)(a) and if the annuity is not irrevocable and non assignable 130 CMR 520.007(J)(2)(b).

   c. The purchase of an annuity will not be considered a disqualifying transfer of assets if the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and if the annuity is:

      i. Describe in subsection B or Q of section 408 of the Internal Revenue Code of 1986;
      ii. Purchased with the proceeds from an account or trust described in subsection A, C or P of
      Section 408 of the Internal Revenue Code of 1986;
      iii. Purchased with the proceeds from a simplified employee pension described in subsection K
      of section 408 of the Internal Revenue Code of 1986; or

iv. Purchased with the proceeds from a Roth IRA described in subsection A of section 408 of the
Internal Revenue Code of 1986 130 CMR 520.007 (J) (2) (C).

Planning Pointer/interpretation of the above rule

This section deals primarily with who must be listed as the designated beneficiary on these Medicaid annuities whether they are used for married couples or single people. With regard to single people the law is very clear that the beneficiary following the death of the annuitant, i.e. the person who bought the annuity and is in the nursing home, must be the state for at least the amount of money the state paid on behalf of that person. Any money left in the annuity after that state is paid can then go to family members.

However, with regard to married couples the law is not so clear. The regulations seem to indicate that the state would need to be named as the beneficiary following the death of the healthy spouse when the sick spouse is in the nursing home and receiving MassHealth benefits. However, since these new rules have been enacted, there have been some developments by the state that seem to allow the healthy spouse to purchase the annuity and name the kids or other family members as beneficiaries instead of the spouse following the healthy spouses death, provided the healthy spouse was not in the nursing home prior to death. If after the purchase of the annuity the healthy spouse were to enter a nursing home and apply for Medicaid benefits then they would be treated like a single person and would have to change the beneficiary to the state as discussed above. These developments are very important since it allows a much better chance of saving the assets not only for the healthy spouse but maybe even for the other family members. These recent state developments are explored below.

However, if the person purchasing the annuity has a disabled child or minor child then they could be named as the primary beneficiary ahead of the state. Finally, these annuities must be irrevocable and non assignable.

IMPORTANT FEDERAL LAW CHANGE UNDER THE TAX RELIEF AND HEALTH CARE ACT OF 2006 AND REMAINING PLANNING OPPORTUNITIES

Planning Note: President Bush signed into law the Tax Relief and Health Care Act of 2006 and as part of this act there was a clarification to the annuity portion of the DRA of 2005. The change was to remove from section 6012(b) of the DRA of 2005 the word "*annuitant*" and replace it with the words "*institutionalized individual*". It appears that this change is designed to allow MassHealth, upon the death of the community spouse, to recover Medicaid benefits paid on behalf of the institutionalized spouse even if the community spouse never received any Medicaid benefits. MassHealth Operations Memo 07-14 dated September 1, 2007 indicated that it will be issuing a revision to Mass Health regulation 130 CMR 502.007(J)(2)(a)(i) changing the word "*annuitant*" to "*institutionalized individual*". [The new regulations have been issued]

9-27-07 letter from MassHealth Director of Federal and National Policy Management clarifying when to name the state as the Designated the Beneficiary of an annuity.

The letter states that MassHealth generally does not like to address hypothetical questions. Nonetheless, if the community spouse is not receiving any MassHealth benefits and the community spouse is the owner and annuitant of a commercial annuity, so that the institutionalized spouse has no interest under the annuity contract, the current MassHealth policy is not to require the community spouse to name the state as the current beneficiary.

Caution: This policy does not appear to be consistent with what the MassHealth regulation says and we recommend that you name the state as the designated beneficiary even when the community spouse purchases the annuity in order to avoid any unnecessary complications during the application process. However, over time we have experienced that the state is allowing the healthy spouse who purchases an annuity to name the kids or other family members as the beneficiary following the death of the healthy spouse and not the state. The bottom line is that you should seek guidance when purchasing these Medicaid annuities as following the rules to a tee is crucial to saving the assets and obtaining Medicaid benefits at the same time.

MassHealth Eligibility Operations Memo 08-12 Dated July 15, 2008 Designed to Provide Guidance when Processing Long Term Care Cases with Annuities

When applying for MassHealth you must provide a copy of the annuity contract and verification of the primary and contingent beneficiaries of the annuity. The case worker will then identify the date of purchase, term of the annuity, owner, annuitant, and the beneficiaries. This operation memo further states that ***for all annuities purchased by the applicant*** the case worker must ensure that the annuity satisfies the requirements of MassHealth regulation 520.007(J)(1) and if the annuity was purchased after February 8, 2006 then it must also conform to MassHealth regulation 520.007(J)(2) which requires if there is a community spouse or a blind or disabled child that the Commonwealth must be named as the beneficiary in the second position but if not then the Commonwealth must be named as beneficiary in the first position.

Finally, the applicant must provide written confirmation, issued by the insurance company or financial institution, of the proper beneficiary designation as a perquisite to the approval of the application. Failure to provide such documentation will result in the denial of benefits. Failure to maintain the Commonwealth as the beneficiary may result in termination of benefits. The caseworker must then sign the Notice of Preferred Remainder Beneficiary/Annuity Tracking Form, ANN-3 and file it with the lifetime lien unit. This form, effective July 15, 2008 replaces the old ANN-1and ANN-2 forms.

Query: Can a healthy spouse purchase an annuity with excess assets after the institutionalized spouse has entered a nursing home, without being required to name the Commonwealth as the beneficiary?

Answer: Since Massachusetts has adopted the new federal language changing the word *Annuitant* to *Institutionalized individual,* in regulation 130 CMR 520.007(2)(a)(i) that the answer must be NO. We believe that this approach will result less complications during the application process. However, overtime there

have been many instances where the state seems to allow the annuity to go through when there is a healthy spouse without naming the state as the beneficiary. The trend in the field seems to be to not name the state as the primary beneficiary in these circumstances as the state seems to be following the letter by the state referenced above. However, there is not hard and fast rule on this as each case worker can take a different position. Always make sure you have the ability to change beneficiaries on the annuity contract just in case.

LAST MINUTE ANNUITY PLANNING FOR A MARRIED COUPLE IS ALIVE AND WELL EVEN UNDER THE NEW RULES

Example: A married couple, both age 75, own a home worth $300,000 and have investments of $300,000. Husband has a pension of $1,500 per month and the wife has social security income of $750 per month. Husband has just entered a nursing home with no advanced planning in place.

Planning Opportunities:

- **Transfer the home to the community spouse:**

This transfer still qualifies as a permissible transfer and will not create a disqualification period or a five year look back period pursuant to 130 CMR 520.019(D)(1). In addition, transfer assets in excess of community spousal resource allowance to the community spouse as this also qualifies as a permissible transfer. The community spousal resource allowance is currently $109,560. This is the amount of assets the healthy spouse is allowed to keep when the sick spouse enters a nursing home even though no advanced planning has been done.

- **Purchase Annuity in the Name of the Community Spouse:**

A) Amount of Annuity should be the total assets less the community spouse resource allowance [CSRA] which is the amount the institutionalized spouse is allowed to keep.

- Total Assets	$300,000
- Community Spousal Resource Allowance	< 113,640 >
- Amount institutionalized spouse can Keep	< 2,000 >
- Amount of Annuity	184,360
B) Result of Annuity Purchase	
- Amount of Annuity	184,360
- Term of Annuity Not to Exceed Life expectancy of 75 year old	÷ 4 Years
- Number of Months in a Year	÷12 Months
- Amount of Monthly Payment to the Community Spouse	$3,841

Planning Pointer:

Whether the state is named as the remainder beneficiary or not on these annuities purchased by the community spouse, it is important to make the term of the annuity as short as possible. Such an annuity would not result in a disqualifying transfer as it does

not violate the annuity rules as provided in 130 CMR 520.007(J)(1). Remember, the regulation simply says that the annuity must pay out for a term that is not longer than the annuitant's life expectancy it does not say anything about how short the term can be. By making the annuity term as short as possible helps to reduce the risk of there being any reminder left to go to the state following the death of the community spouse to pay for the benefits received by the institutionalized spouse. Plus, this shorter annuity term allows the money to be returned to the healthy spouse sooner to be either invested in a better way for her to live on or to be transferred to an irrevocable trust so that she can begin some advanced planning for her in the event she would need nursing home care prior to her death. Otherwise the use of commercial annuities with a married couple still work very similar to how they used to under the old rules.

MASSHEALTH TRENDS IN PRIVATE ANNUITIES AND YET ANOTHER ADDITIONAL ANNUTIY REGULATION 130CMR 520.007(J)(4)

MassHealth eligibility operations memo 07-014 dated September 1,2007 continued the trend of Masshealth becoming more strict with regard to annuities by requiring all non-commercial annuities, private promissory notes, and personal lifetime-care contracts to be sent to legal for review before determining eligibility for long term care benefits. (see Masshealth eligibility operations memo 07-14)

Does MassHealth operations memo 07-14 prohibit the use of private annuities?

While MassHealth's operation memo 07-14, which was issued in September of 2007, does not prohibit the use of private annuities it certainly tells planners to proceed with caution. In this regard it is important to take a closer look at the operations memo itself along with the actual MassHealth regulations that govern annuities. Finally, it is important to note that it does not appear that commercial annuities are under any additional scrutiny.

The memo indicates the when processing a long term care application that includes an annuity established on or after February 8, 2007, that the following steps must be followed. Review the annuity to see if it:

1. is actuarially sound according to the social security administration tables;
2. has equal payments;
3. is irrevocable;
4. is non-assignable; and
5. has no deferral or balloon payments.

The memo further indicates that if the annuity meets all of these requirements then complete the notice of preferred remainder beneficiary (ANN-3) form and list either the issuing company or the private annuity owner. Also list any preferred beneficiaries, such as a spouse, disabled child or minor child. MassHealth operations will then log in this annuity and send a copy of this form to either the issuing company or to the private annuity owner. Finally, the form notes that if there is a preferred beneficiary then Commonwealth will be named as beneficiary in the second position otherwise the

commonwealth will be named as the beneficiary in the first position. (See MassHealth operation memo 07-14).

Planning Note:

Nowhere in the MassHealth operations memo 07-14 does it prohibit the use of private annuities and in fact it seems to provide for there use as it directs the preferred remainder beneficiary form to list the private annuity owner and to send a copy of such form to the private annuity owner. It also does not appear the procedures for the use of a private annuity is any different than that of a commercial annuity other than the fact that a private annuity is to be sent to legal for review.

Based on a recently received denial letter invlovling the use of private annuities, it appears that MassHealth is attempting to deny such applications based on the applicant having made a disqualifying transfer pursuant to MassHealth regulation 130 CMR 520.019C. This regulation defines a disqualifying transfer as ".... any action taken that would result in making a formally available asset no longer available." (130 CMR 520.019C) It would appear that this regulation is all encompassing except that MassHealth has provided a specific exception when the assets transferred are exchanged for an annuity which meets the requirements of MassHealth regulation 130 CMR 520.007(J)(1)&(2) supra.

It is important to note the regulation does not provide for a distinction to be made between private and commercial annuities as they both must meet these same requirements. Furthermore, MassHealth regulation 130 CMR 520.007(J)(1)&(2) does not require the rules of contract formation to be applied to the formation of the private or commercial annuities. This regulation does not require an analysis of family circumstances nor does it require that either the private or the commercial annuity be secured or even be equal to fair market value. With regard to fair market value the regulation simply requires that the total present value of the projected payments not be less than the value of the transferred asset (purchase price). By applying an applicable interest rate to the term of the annuity, which shall not exceed the life expectancy of the applicant or spouse, should ensure that the amount returned will not be less than the value of the assets transferred.

In January 10, 2008 we had some certainty with regard to the use of private annuities as we have received a fair hearing decision that indicates as long as the above mentioned requirements are satisfied then the purchase of a private annuity will not be treated as a disqualifying transfer. The hearing officer also indicated that as long as these annuity requirements are satisfied then the intent behind the purchase of the annuity will not be considered nor does the rules of contract formation enter the picture. Nevertheless, it is important to note that MassHealth is scrutinizing them more closely than in the past.

Since then MassHealth has issued a new regulation that prompts us to warn practitioners not to create private annuities through the use of a durable power of attorney in which the same person is signing as the obligor and the oblige. On May 23, 2008 a

fair hearing decision stated that a private annuity purchased by a son on behalf of the mother through a power of attorney was in fact a disqualifying transfer as it failed to meet the requirements of Masshealth regulation 130 CMR 520.007(J)(4). *This regulations indicates* ***"that any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to by annuities, promissory notes, contracts, loans or mortgages is considered to be a disqualifying transfer of assets to the extent the transaction does not have an ascertainable fair market value or if the transaction is not embodied in a valid contract that is legally and validly enforceable by the applicant member or spouse..."*** It is important to note that this regulation did not exist either when the private annuity was created or when the fair hearing was heard.

While this new regulation 130 CMR 520.007(j)(4) is chilling it has been shown to not be as bad as it seems. In the the **George Clark v. Thomas Dehner, Director of Medicaid case,** that was decided on July 23,2009 the court found that private promissory notes between family members were not automatically disqualifying transfers. In addition the court said that such agreements were valid contracts that were binding and legally enforceable even thought they were between family members. The court went on to say that if the regulations meant that agreements between family members were to be deemed not permissible then they would have said that. Then on August 5, 2009 the **Margaret Wilson v. Thomas Dehner, Director Of Medicaid** also supported the use of private annuities between family members.

The most recent decision took place on June 28 ,2011 in the **Laura O'Brien v. Division of Medical Assistance Office of Medicaid,** in which the spouse of the applicant sold a large life insurance policy to an irrevocable trust and took back a private annuity that satisfied all the Massheath regulations discussed above. The court indicated that the agreement between family members was valid, binding, reasonably enforceable and had an ascertainable value. The court also stated that the annuity satisfied all the requirements of 130 CMR 520.007(J)(1) and (2) and thus allowed the plaintiffs motion for judgment on the pleadings.

While there seem to be many cases supporting private annuities there are cases that show when you do not follow the Medicaid regulations closely you will be denied generally based on the grounds that the transfer to purchase the private annuity was a disqualifying transfer. In **Susan M. Jackson v. Director of Office of Mediciad,** a recent Massachusetts appellate court decision, involved three transfers of money to the children of the applicant in exchange for promissory notes the largest of which was immediately converted to a private annuity. All of the transfers were determined to be disqualifying transfers as they were shown to be not actuarially sound. In addition, the promissory notes did not have language that prohibited cancellation on death, which is required by Masshealth Regulation 130 CMR 520.007(J)(3). Finally , the promissory note that was converted to an annuity was a disqualifying transfer simply because it did not name the state as the primary beneficiary.

Planning Note/Conclusions:

Private annuities are permissible within the MassHealth regulations and can be used for planning purposes. We suggest that the use of a commercial annuity when possible will result in fewer complications during the application process. However, when a commercial annuity is not available then the use of a private annuity is permissible. For example if you wanted to sell a home to an irrevocable trust in exchange for an annuity, or buy an insurance policy in exchange for an annuity instead of losing, for in these situations a commercial annuity would not be available thus the private annuity would work just fine; provided however that you follow the masshealth regulations very closely as the cases show such transactions are being highly scrutinized.

LAST MINUTE ANNUITY PLANNING FOR A SINGLE PERSON IS TOUGHER UNDER THE NEW RULES BUT IS STILL WORTH A LOOK

Example: A single female age 75 has $302,000 and has just entered a nursing home. The nursing home costs $9,000 per month and she gets $2,000 per month social security and a pension of $612 per month. In addition, assume the Medicaid rate for the same nursing home is $6,000 per month. This means that her money would be used up in 27 months:

(a) Monthly Cost for Nursing Home	$12,000
Less Social Security	$ 2,000
Less Pension	$ 612
Amount short each month	$ 9,388
Total Cash Available	÷$ 300,000
Numbers of month's money will last	31.95months

(A) Amount of Annuity: is $300,000 ($302,000-2,000) as the individual is permitted to keep $2,000

(B) Term of Annuity: A term certain not to exceed the individuals life expectancy pursuant to 130 CMR 520.007 (J)(1)(b)

(C) Irrevocable: the annuity must be irrevocable.

(D) Remainder Beneficiary: must be the state in the First position unless there is a community spouse or a blind or disabled child in which case the state to be a remainder beneficiary in the second position behind the said minor or disabled child. [130 CMR 520.007 (J)(2)(a)

Result of Annuity Purchase

- Amount of Annuity	300,000
- Life Expectancy of 75yr old Female using HCFA tables	/ 12 Years
- Number of Months in a year	/ 12 Months
- Amount of Monthly Payment At Risk to Nursing Home	$ 2,083.33

Amount of Medical Lien

- Monthly Cost MassHealth Pays Nursing Home	$ 6,000
- Less Social Security	$ <2,000>
- Less Pension	$ < 612>
- Less Annuity Payment	$ <2,083>

- Amount short each month that represents the Amount of the MassHealth Lien Building each Month — $ 1,305

Planning Benefit:

If the individual stays in the nursing home for 32 months the outstanding lien that the state would be entitle to would be $41,760 [1,305/month x 32 months]. In addition the annuity paid out $66,656 [2,083 x 32 months]. The total amount spent out of the annuity was $108,416 [41,760 + 66,656]. The total amount still left for the family would be $191,584 which is far better then nothing which is the amount that would have been left had the family not purchased the annuity. Finally, this approach at the very least will serve to reduce the cost of the nursing home by utilizing the MassHealth rate instead of the private rate.

Promissory notes, loans or mortgages 130 CMR 520.007(J)(3)

This regulation indicates that the value of any outstanding balance of a promissory note, loan or mortgage will be considered a disqualifying transfer of assets unless all of the following conditions are met:

a. The repayment terms of the promissory note, loan, or mortgage are actuarial sound, based on actuarial tables as determined by the MassHealth agency;

b. The promissory note, loan or mortgage provides for equal payment amounts during the life of the loan, with no deferral and no balloon payments; and
c. The promissory note, loan or mortgage prohibits cancellation of the balance upon the death of the lender.

Planning note: Although it appears that under the terms of a promissory note the state does not need to be named as the designated beneficiary, it does provide that such a promissory note or loan must not be cancelled upon death of the lender. This would simply mean that if the lender dies, that the estate would be entitled to the balance of the promissory note and Medicaid would be entitled to such balance under the estate recovery rules. It would also seem that any transfer of a promissory note to an irrevocable trust in an effort to avoid probate and/or estate recovery would be considered a disqualifying transfer resulting in a 5 year look back period. Finally, the Massachusetts regulations regarding this section appear to follow very closely the language used in the Deficit Reduction Act of 2005. (Deficit Reduction Act 2005 section 6016c)

Planning note/ promissory note vs. annuity: Instead of buying an annuity when one spouse enters the nursing home one may consider lending money to

a child in exchange for a promissory note, as now there would be no requirement to name a designated beneficiary. (130 CMR 520.007(J)(3) Although the note cannot be terminated at the healthy spouse's death at least there would be no obligation to use the balance of the money paid to the estate of the healthy spouse to reimburse the nursing home for the benefits received by the institutionalized spouse. Secondarily, once this promissory note is established, the healthy spouse should create a pour over will to a revocable trust so that the promissory note upon the death of the healthy spouse would fund the revocable trust. The trust would disinherit the institutionalized spouse and the remaining payments would be available for the family as this trust would not require any payment to be made to the institutionalized spouse. (see 130 CMR 520.024(A)(1)) There still remains the possibility of the state pursuing the forced share issue under the will, although this has rarely if ever been pursued, and even if it is challenged arguably the family would still have saved more assets than doing nothing. **Note** It is possible that Masshealth may consider the promissory note an asset in and of itself even though it is listed in the annuity section of the regulations, although it has not been addressed by Masshealth as of this printing.

B. Disqualification for assistance for individuals with substantial home equity 130 CMR 520.007(G)(3)

1. Fair market value and equity value: 130 CMR 520.007(G)(3)
   Massachusetts regulation 130 CMR 502.007(G)(3) indicates that the fair market value and equity value of all countable real estate owned by the individual and the spouse must be verified at the time of application and when it effects or may effect eligibility. For applications received on or after January 1, 2006, equity interest in the principal place of residence exceeding $750,000, renders an individual ineligible for payment of nursing facility and other long term care services, unless the spouse of such individual or the individual's child who is under age 21 or who is blind or permanently and totally disabled resides in the individual's home. The allowable equity interest amount will be adjusted annually, beginning in January 2011. The adjustment will be based year-to-year on the percentage increase in the consumer price index.

   a. The applicant or member must verify the fair market value by a copy of the most recent tax bill or the property tax assessment that was most recently issued by the taxing jurisdiction, provided that this assessment is not one of the following:

      i. a special purpose assessment;
      ii. based on a fixed rate per acre method; or
      iii. based on an assessment ration or providing only a range.

b. In the event that a current property tax assessment is not available or the applicant or member wishes to rebut the fair market value determined by the MassHealth agency, a comparable market analysis or a written appraisal of the value of the property from a knowledgeable source will establish the fair market value.

Planning note: The Federal Deficit Reduction Act of 2005 provided this same restriction, but also enabled the states to utilize a $750,000 value instead of the recommended $500,000 value. (Deficit Reduction Act 2005 section 6014B). It is important to note that Massachusetts has opted for the larger $750,000 value, but has otherwise followed the Federal rule when adopting this regulation.

Query: Is the fair market value of the home or the real estate tax assessed value of the home supposed to be used when determining the $750,000 equity interest for disqualification purposes?

Answer: Since this new equity value language has been adopted by Massachusetts into its existing regulation 130 CMR 520.007(G)(3), it appears clear that when determining the equity value in a home, we must use the most recent tax bill or property tax assessment that was most recently issued by the taxing jurisdiction – see 130 CMR 520.007(G)(3)(a).

2. Impact of this legislation The effect of this rule is simply to deny eligibility if there is one dollar of equity over $750,000.

3. Waiver of the period of ineligibility due to excess equity value in the principal place of residence causing undo hardship. (Massachusetts regulation 130 CMR 520.007(G)(13)

   a. The MassHealth agency may waive the denial of payment of long term care services for excess equity value in the principal place of residence if ineligibility would cause the individual undo hardship when the following conditions exist:

      i. The denial of long term care services would deprive the nursing facility resident of medical care such that his or her health or life would be endangered, or the nursing facility resident would be deprived of food, shelter, clothing or other necessities such that he or she would be at risk of serious deprivation; and
      ii. The institution has notified the nursing facility resident of its intent to initiate discharge of the resident because the resident has not paid for his or her institutionalization; and
      iii. There is no less costly non institutional alternative available to meet the nursing facility residents needs.

b. Undo hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing facility resident, without putting the nursing facility resident at risk of serious deprivation.

c. Where the MassHealth agency has issued a denial notice based on the equity value in the principal place of residence, the individual may request a hardship waiver.

    i. The individual must submit a written request for consideration of undo hardship and supporting documentation to the MassHealth enrollment center listed on the notice of denial within 15 days after the date of notice.
    ii. Within 30 days after the date of the request, the MassHealth agency will inform the individual in writing of the decision and of the right to a fair hearing. The MassHealth agency will extend this 30 day period if the MassHealth agency requests additional documentation or if extenuating circumstances, as determined by the MassHealth agency, require additional time.

d. The nursing facility may appeal the MassHealth agency's hardship decision and denial of payment of long term care services by submitting a request for a fair hearing to the board of hearings within 30 days after the receipt of MassHealth agency written undo hardship notice, in accordance with 130 CMR 610.000. The nursing facility residents request for consideration of undo hardship does not limit his or her right to request a fair hearing.

Planning note: It would appear very difficult to obtain a waiver under these rules as the nursing facility resident should always be able to afford the nursing home costs by simply selling their home and using the proceeds to pay for their care.

C. Non countable assets: 130 CMR 520.008(A)

1. The home: Massachusetts regulation 130 CMR 520.008(A) provides that the home of the applicant or member and the spouse and any land pertinent to the home, as determined by the MassHealth agency, if located in Massachusetts and used as the principal place of residence, are considered non-countable assets, except when the equity interest in the home exceeds the amount described at 130 CMR 520.007(G)(3). The home is subject to lien rules at 130 CMR 515.012. If the home is placed in a trust or in an arrangement similar to a trust, the MassHealth agency will apply the trust rules at 130 CMR 520.021-520.024.

Planning Note: It is important to realize the home, although once a non-countable asset is now exempt from this status when the equity value exceeds $750,000.

D. Ability to purchase the home for two thirds the assessed value 130 CMR 520.007(G)(1-4)

1. Real estate as a countable asset: All real estate owned by the individual and the spouse, with the exception of the principal residence as described in Masshealth regulation 130 CMR 520.008(A), as mentioned above, but only when the equity value is less than the allowable $750,000 limit as described in regulation 130CMR 520.007(G)(3), also mentioned above, is a countable asset. However, business and nonbusiness property essential to self support as described in regulation 130CMR 520.008(D) is a non countable asset. (130 CMR 520.007(G)(1)).

2. Nine month Exemption: The value of any such real estate shall be exempt for nine calendar months after the date of notice by the Masshealth agency, provided the individual signs an agreement with the Masshealth agency within 30 days after the date of notice, to dispose of the property at fair market value. Massehalth agency will extend the nine month period as long as the individual or spouse continues to make a good faith effort to sell, as verified in accordance with 130 CMR 520.007(G)(4). (130CMR 520.007(G)(2)).

Planning Note: what is fair market value: Based on conversations with supervisors at Massehealth, they have determined that fair market value for purposes of the nine month exemption shall be either the realtors valuation or an appraisal of the property. In addition, if an individual accepts an offer for less that the stated fair market value then any such difference shall be treated as a disqualifying transfer. In other words, an individual would not be in violation of 130 CMR 520.007(G)(2) by not accepting any offer that is below the fair market value as defined above.

3. Good faith effort to sell real estate. The individual or spouse must verify his or her good faith effort to dispose of countable real estate by such evidence as advertisements or documentation of the listing of the real estate with licensed real estate agents or brokers, including a report of any offer from prospective buyers. The Masshealth agency will terminate eligibility if, at any time, the individual rejects a reasonable offer to buy the real estate. An offer to buy the real estate is considered reasonable if it is at least two thirds of the fair market value, unless the individual proves otherwise to the Masshealth agency's satisfaction. (130 CMR 520.007(G)(4).

Planning Note: what is a good faith effort to sell real estate? Massehealth reads this regulation together with regulation 130 CMR 520.007(G)(2) so as to mean that the property must have been listed with a licensed broker for at least nine months before one would be able to extend the nine month exemption period described in 130 CMR 520.007(G)(2). In addition, the individual must show that

there has not been an offer equal to the fair market value or asking price as described above. Once this criteria has been satisfied Masshealth will not only extend the nine month exemption period for the real estate but also will now mandate that the individual accept any offer so long as it is at least two thirds of the fair market value otherwise the individual will be terminated from Masshealth benefits. However, fair market value is now determined by the real estate tax bill value in accordance with regulation 130 CMR 520.007(G)(3).

> **Example**: Jane is a single person who just entered the nursing home and the Children are interested in how to save the home as that was always their mother's wish. The home has been appraised for $400,000 and is assessed by the town for $350,000. Jane has social security and a pension totaling $3,000 per month income and the Medicaid rate for her at the nursing home is $5,500 per month. Jane has less than $2,000 of other assets.
>
> **Solution**: Apply for Medicaid and sign the notice indicating that Jane will sell the property for fair market value and provide and appraised value of the property in accordance with 130 CMR 520.007(G)(2)(4). Provided all other eligibility requirements are satisfied Jane should be approved for Masshealth benefits right away. The property should now be listed with a broker for the next nine months and it should be unlikely that someone will offer the asking price, which is equal to the fair market value set by the appraisal mentioned above. During this nine month period, a lien will be accruing against the property but only at a rate of $2,500 per month which is the difference between Jane's income and the Medicaid rate. At the expiration of the nine month period there will be a lien against the property in the amount of $22,500 (9months x $2,500per mt). However, a child could now by the property for two thirds of the assessed value as shown on the real estate tax bill which is $233,310 (350,000 x 66.66%). Even if the child could only sell the property for $350,000 that would be a savings of $116,690 (350,000-233,310). More importantly, it may be a better investment to hold on to or maybe the child simply needed a place to live.
>
> **Additional Planning Benefit:** Once the lien has been paid off one could purchase an immediate annuity for the balance of the Jane's life expectancy in an effort to try to save some of the proceeds from the sale of the house that went to her.

Inclusion of transfers to purchase life estates 130 CMR 520.019(I)(3)

This regulation indicates that the MassHealth agency considers the purchase of a life estate in another individual's home made on or after April 1, 2006 a disqualifying transfer, unless the purchaser resides in the home for a period of at least one year after the date of purchase. This language tracks the Federal statute. (Deficit reduction act 2005 section 6016d).

Planning note: It appears that this statute offers some planning opportunities as there is only a 1-year waiting period rather than the newly enacted 5-year look back period. For example, if a parent had recently sold his home and had approximately $200,000 that wanted to give it to his child, that would result in a 5 year look back period for Medicaid eligibility purposes. However, if this individual instead purchased a life interest in his child's home for the same $200,000, it would be protected from the costs of long-term care in 1 year provided he is able to reside in that home for one year from the date of purchase.

Caution: It is however important to note that in the event the child would need to sell his or her home while their parent is in a nursing home and on Medicaid, that portion of the proceeds based on the institutionalized individuals age at the date of sale would be allocated to that parent. Those proceeds would then be available to pay the costs of long term care. Furthermore, it is possible to actually expose more assets to the costs of long term care at the time of sale than were ever transferred to the child. For example, if the child sells the home for $500,000 and the life tenant is age 79, at the time, table 90 CM indicates that approximately 50% of the proceeds (i.e. $250,000) would be allocated to the life tenant thus as risk.

Income Tax Caution: Internal Revenue Code Section 121(d)(8) indicates that the sale of a life estate interest in the taxpayers primary residence does not qualify for the capital gains exclusion associated with the sale of the primary residence IRC 121(d)(8). Therefore, the sale of a life interest by a child to a parent is subject to capital gains tax.

Recent Fair Hearings yields good news and bad news with use of half of loaf coupled with an annuity technique. (Hearing Decision is in Appendix)

Although the recent fair hearing, discussed above, approved the use of private annuities by indicating that the purchase of such an annuity would not be a disqualifying transfer, it delayed the applicant's eligibility based on the applicant meeting a long term care deductible in accordance with Masshealth regulations 130 CMR 520.027-035. This is a 6 month deductible period that is established by Masshealth when the applicant's income exceeds the Medicaid or public rate at the long term care facility. This deductible is generally calculated by taking the total income of the applicant less the personal needs allowance (i.e $72.80) multiplied by 6 months (see 130 CMR 520.030). Once the deductible is satisfied and all other eligibility requirements continue to be meet, Masshealth will notify the applicant that he or she is eligible for Masshealth benefits. (130 CMR 520.035).

In this case, although the hearing officer decided that the purchase of a private annuity would not be treated as a disqualifying transfer there is no dispute that the balance of the countable assets were gifted to the family thereby resulting

in a disqualifying transfer. The question then becomes when does the period of ineligibility begin to run due to the disqualifying transfer? The Masshealth regulation indicates that such a period begins to run on the first day of the month in which resources were transferred for less than fair market value or the date on which the applicant was *otherwise eligible* for long term care benefits. (130 CMR 520.019(G)(3)) Therefore, the hearing officer determined that once the applicant has satisfied the deductible and becomes otherwise eligible for Masshealth benefits then the period of ineligibility due to the disqualifying transfer shall commence. This would effectively defeat the half a loaf coupled with an annuity technique.

However, since the issuance of this fair hearing we have had another fair hearing to resolve whether or not Masshealth was able to apply this long term care deductible period prior to starting the period of ineligibility related to the disqualifying transfer. Masshealth regulation 520.035 indicates that once enough medical bills have been submitted to satisfy the deductible **and all other eligibility requirements continue to be met,** then Masshealth will notify the applicant that he or she is eligible. This is the point at which the fair hearing officer indicated that the applicant would be otherwise eligible for Masshealth benefits and could start the running of the disqualification period. However, a close reading of the regulations reveals that one cannot satisfy a deductible period if during the deductible period all other eligibility requirements are not continuously being met. Therefore, we argued that in this case it would be impossible for the applicant to satisfy a deductible period that could not have been established because all other eligibility requirements are not being met due to the disqualifying transfer that took place the same time Masshealth is attempting to start the 6 month deductible period.

Although the actual decision has not been issued as of the date we went to print, during the hearing some insights have been obtained and will be explored in more detail below. Rather than deal with the long term care deductible arguments laid out above, the hearing officer attacked the begin date statute 130 CMR 520.019(G)(3). In essence this regulation, read in conjunction with its federal counter part, indicates that the period of ineligibility for transfers occurring on/or after February 8, 2006, will begin on the first day of the month in which resources were transferred for less than fair market value or the date on which the individual is **otherwise eligible** for MassHealth payment of long term care services, whichever is later. The federal regulation indicates that one is otherwise eligible for benefits provided you have made a transfer, apply for medical assistance under a state plan and would be approved for such assistance but for the disqualifying transfer. (42 US 1396p(c)(1)(D)(ii)) In this case, the applicant would have met all of these requirements on the date the transfer was made except that her income was in excess of the Medicaid or public rate and thus not otherwise eligible.

Conclusion: It appears that regardless of the long term care deductible argument, mentioned above, the begin date cannot begin to run on the transfer because the applicant's income exceeds the public rate and would not be otherwise eligible for Masshealth at the time of the transfer, thereby effectively defeating the half a loaf coupled with an annuity technique.

Planning pointer: How does the long term care deductible work and is there a planning benefit?

Example: Assume the nursing home costs $10,000 per month ($333.33 per day x 30 days), the applicant's income is social security, pension, annuity and rent from a building totaling $7,072 per month and the nursing home Medicaid rate is $5,500 per month ($183.33 per day x 30 dyas). The building should be considered a non countable assets as its income is essential to self support of the applicant, see regulation 130 CMR 520.008(D).

Solution: This deductible is generally calculated by taking the total income of the applicant less the personal needs allowance (i.e $72.80) multiplied by 6 months. The deductible in this case should be $42,000 (6 months x $7,000). During this 6 month period the nursing home will be collecting the money and allocating back each month a portion of the money it receives to make the short fall that was incurred from prior months. Since the nursing home is $10,000 and the applicant's monthly income is only $7,000 there will be a $3,000 per month short fall. On the second month of this deductible period the nursing home will receive a $7,000 payment and allocate $3,000 to the previous month, thereby having that month paid in full while generating a $6,000 ($10,000 –[$7,000-$3,000]) short fall for the second month. If this approach is applied until the end of the 6 month deductible period the nursing home would be paid in full for 4 months and would have received $2,000 for the fifth month, which would cover 6 days ($2,000\$333.33 per day) of private pay and no money for the sixth month. Therefore, Masshealth would pay the nursing home $5,500, (i.e. the public rate), for the sixth month and would pay the remaining 24 days (30 days – 6days covered) at the public rate of $183.33 per day for a total of $4,400 for the fifth month.

Planning Benefit: At the end of the six month deductible period, there would only be a Medicaid lien against the building for $9,900. If this individual stayed in the nursing home for say 3 years the total lien would only be $59,400 verses private paying for 3 years, assuming no cost increases, would be $360,000.

Medicaid Update

Federal Deficit Reduction Act of 2005 and Related Planning Opportunities

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A. Massachusetts Exemption is Really $2,000,000 and is not $1,000,000

The Massachusetts Exemption amount for 2006 is $1,000,000 and it will stay at $1,000,000 indefinitely. Nevertheless, because the Massachusetts taxes are based upon the decedent's total estate prior to the add-back for post-1976 gifts, the Massachusetts exemption can effectively be increased to $2,000,000 with proper planning. Here, the decedent simply needs to give away $1,000,000 worth of assets prior to death (preferably high basis assets and not low basis assets so as not to jeopardize an increased step-up in basis).

This has the effect of reducing the exemption amount for purposes of Massachusetts estate tax return filing requirements, but, since the Massachusetts estate tax is based upon the decedent's remaining assets, without regard to lifetime gifts, $1,000,000 given away effectively escapes estate taxation. For example, if the decedent owned $2,000,000 worth of assets and gave away $1,000,000, the estate tax savings would be $66,400.

B. New Massachusetts Uniform Principal and Income Act

Effective January 1, 2006 and applicable to all estates and trusts existing on that date, the Massachusetts Uniform Principal and Income Act now permits a trustee to adjust between principal and income. In effect, this authority gives a trustee the power to allocate short term and long term gains to income in the trustee's discretion, provided it can be done "fairly" as to both the income beneficiaries and the remainder beneficiaries.

This statute was enacted in response to a dilemma faced by a trustee when a trust required that "income" be paid to a beneficiary and the Massachusetts rule that income

included only interest, dividends, rent and the like, and not short term or long term gains. Trustees often were confronted with conflicting a goal, that is to increase income to the income beneficiary but, at the same time, invest a portfolio for a total return to provide an overall reasonable return for the remainder beneficiaries. The Massachusetts Uniform Principal and Income Act now gives the trustee discretion to allocate gains to income provided it is done "fairly."

Insofar as a Medicaid income only trust, is concerned, if the trustee in its discretion can pay income to the grantor, the income is considered a countable resource. This was not usually a problem because income did not include capital gain items. Now, since the trustee can allocate capital gains to income, the definition of income probably includes capital gains, both short term and long term. For example, if the trust owns a home or a second home and/or low basis securities, which are sold, it now appears that the gain attributable to the sale would be considered income a result not usually intended.

To prevent this, it is suggested that the term "income" be defined to exclude long term and short-term capital gains, notwithstanding the power to adjust under the Massachusetts Uniform Principal and Income Act.

C. Current Medicaid Numbers

Community Spouse Resource Allowance:		
	Minimum	$22,728.00
	Maximum	$113,640.00
Resource Allowance for Individual:		
		$2,000.00
Monthly Maintenance Needs Allowance:		
	Minimum	$1,838.75
	Maximum	$2,841.00
Allowance for Personal Needs:		$ 72.80
Shelter Standard:		$ 547.00
Standard Utility Allowances:		
	Heat	$375.00
	Non-Heat	$611.00
Divestment Penalty Divisor:		$274.00 Daily

D. The Tortured History of the Deficit Reduction Act

On Monday, January 31, 2006, the Boston Globe reported that the "New Act would reduce Medicaid fraud by elders who give away property to become eligible for Medicaid." (Talk about spin control!) The Deficit Reduction Act was to save the Government $40,000,000,000.

On Wednesday, February 1, 2006, the House of Representatives passed the Deficit Reduction Act on a roll call, but over an objection, written votes had to be cast. Later in the day, the Act passed 216 to 214 with 13 Republicans voting against.

On Thursday, February 2, 2006, less than 24 hours later, the Senate voted to give the savings away by voting an income reduction bill, which would cost the government $70,000,000,000.

On Wednesday, February 8, 2006, President Bush holds a "signing" ceremony to "prevent Medicaid fraud."

On Tuesday, March 21, 2006, a second law suit was filed in Federal Court claiming that the Deficit Reduction Act of 2005 is unconstitutional because the House of Representatives did not approve the exact same version of the legislation passed by the Senate. According to the claim, as the legislation moved from the Senate to the House of Representatives, a Senate clerk mistakenly changed a 13-month restriction on leases for medical equipment funded by Medicare to 36 months.

Apparently, in light of the narrow victory in the House of 216 to 214 votes to approve the legislation, President Bush simply decided to sign the version and make it the "law." The lawsuit asserts that, "under the constitution, the same version of a bill has to be passed by both Houses of Congress." On the contrary is an 1892 case, *Field v. Clarke*, which States generally that legislation is considered passed as long as the House Speaker and the Senate leader certify passage.

Oh well! Lets look at the Act!

E. Summary of the Act Provisions

1. Lookback Period is extended to 5 years from 3 for all transfers!

The lookback period for all transfers is being extended to five years from three years. Previously, there was a five-year look back only for transfers into a trust, and out of a revocable trust, whereas a three-year lookback applied to transfers to individuals.

The impact will be to extend the penalty/disqualification period beyond three years when the value of the property gifted exceeds $276,480, ($7,680 x 36 months), if a Medicaid application is filed before the expiration of the five year look back period. Under prior law, if $400,000 had been transferred to children, the tentative penalty period

would be 52 months, but effectively would end in 36 months, provided a Medicaid application was not filed until the 37th month after the transfer. [***Act Section 6011(a)***] Deficit Reduction Act of 2005 (hereinafter the "Act"):

The effective date applies to transfers made on or after the date of enactment of the Act.

2. Beginning Date of Penalty is date of nursing home admission:

The beginning date for the purpose of determining the penalty period has been changed from the date of the transfer to the date of admission in the nursing home and at such time as the individual is eligible for medical assistance, but for the transfer, or the first day of a month during which or after assets have been transferred, whichever period is later. This means that the penalty will not begin to run until the individual is admitted to the nursing home and is otherwise eligible but for the transfer (based on an approved application) so it is important that the application not be filed within 5 years of the transfer.

The effective date of this amendment applies to transfers made on or after the date of enactment of the Act. [***Act Section 6011(b)***]

3. Annuities:

Under prior law, the purchase of an annuity by an individual applying for MassHealth was not considered a disqualifying transfer provided the annuity payment period did not exceed the individual's life expectancy. Additionally, the annuity itself was not considered an "asset."

The usual beneficiary of the annuity was the children so that, if the individual died before the life expectancy (a likely scenario in the case of a Medicaid patient), the remaining annuity payments would be paid to the children thereby by-passing the estate recovery provisions.

The Act now requires that the State be named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the "institutionalized individual" [note italicized word added to the federal law in the Tax Relief and Health Care Act of 2006] or the State be named as a beneficiary in the second position after the community spouse or minor or disabled child are named in the first position if such spouse or representative of such child disposes of any such remainder for less than fair market value. Otherwise, the purchase of the annuity will be considered a disqualifying transfer of assets. [***Act Section 6012(b)***]

4. Notification Requirements:

Under the Act, the new notification rules seem to add an additional substantive rule not set forth in 6012(b). A State must require as a condition of medical assistance that the application of the individual discloses a description of any interest the individual

or community spouse has in an annuity, regardless of whether the annuity is irrevocable or was treated as an asset. The application form must include a Statement that the State becomes a remainder beneficiary under any such annuity or similar financial instrument by virtue of the provision of such medical assistance. [***Act Section 6012(a)***]

Practice Note: We believe that the answer must be based on the assumption that Massachusetts adopts the new federal language changing the word *Annuitant* to *Institutionalized individual,* as mentioned above. In this regard then when the community spouse dies during the term of the annuity it appears that the state would be able to recover from that annuity any MassHealth benefits paid on behalf of the institutionalized spouse.

Example: A married couple has $300,000 in cash/countable assets, $104,400 is exempt for the community spouse and the institutionalized spouse is permitted to keep $2,000 for a total of $106,400. The difference of $193,600 will be considered excess resources, which, unless annuitized by and for the benefit of the community spouse, will need to be spent on nursing home care before the institutionalized is eligible for assistance. Here, the community spouse should purchase an immediate annuity payable for a short term to get his or her money back as quickly as possible to avoid having any remaining balance of the annuity used to pay for the benefits received by the institutionalized spouse.

> The Act also requires the State to then notify the issuer of the annuity of the right of the State as a preferred remainder beneficiary in the annuity for medical assistance furnished and the State may require the issue to notify the State when there is a change in the amount of income or principal being withdrawn.
>
> The effective date of the annuity sections apply to transactions (including the purchase of an annuity) occurring on or after the date of enactment of the Act except that the State will have until 1/1/08 to comply with the new procedure rules.

5. Hardship Waivers.

Under prior law, there were no standards or procedures by which to establish a hardship waiver.

Under the Act, each State shall provide for a hardship waiver if the application of the transfer of assets provision would deprive the individual of medical care such that the individual's health or life would be endangered or of food, clothing, shelter or other necessities of life.

The State must establish a procedure, which provides for notice to recipients that an undue hardship exception exists; a timely process for determining whether an undue

hardship waiver will be granted; and a process under which an adverse determination can be appealed. [*Act Section 6011(d)*]

The Act also provides that the State procedure must permit the nursing home to file an undue hardship waiver with the consent of the individual or such individual's representative and the State may provide for payment for services to hold the bed for no more than thirty days. [*Act Section 6011(e)*]

The effective date of this section cannot be later than 1/1/08.

6. Income First Rule Required:

Under existing rules, the community spouse is deemed to need at least a certain minimum amount of income each month. The minimum amount is $1,712 and the maximum amount is $2,610. This rule has not changed.

If the community spouse's income (meaning social security and retirement income) is less than this amount, the community spouse is permitted to keep not only the $104,400 community resource allowance, but any other assets whether or not they otherwise would be considered excess resources, to the extent such assets, when invested at a bank monitor rate generates income to bring the community spouse to the applicable minimum or maximum income level. This was an alternative to having the community spouse purchase an annuity.

The Act will require that before the community spouse is permitted to keep additional so-called excess resources, any income payable to the institutionalized spouse, such as social security and retirement income, would first be allocated to the community spouse to bring the community spouse to the applicable income level before any excess resources are permitted to be retained.

The result here is devastating because when the institutionalized spouse dies, the income stream ends and, since the community spouse was not permitted to retain assets, all assets, with the exception of the $101,640, will likely be spent on care and now the community spouse becomes a welfare recipient. A terrible result! **[Act Section 6013]**

The effective date applies to transfers and allocations made on or after the date of enactment of the Act by individuals who become institutionalized spouses on or after such date.

7. Disqualification for Assistance for Individuals with Substantial Home Equity:

Under existing law, an individual (and more importantly an individual's spouse) can retain ownership of a home with no limit on its value. The Act changes this rule by limiting the amount of home equity to $500,000 (or $750,000 if the State chooses to make an adjustment from the federal rule of $500,000). The effect of this rule is to

simply "deny eligibility" if there is $1 of equity over $500,000. The Act specifically authorizes an equity loan or a reverse mortgage to reduce the amount of the equity.

Under prior law, while a single individual who owned a home would be eligible for Medicaid immediately, notwithstanding the ownership of the home and without regard to value, the home was always subject to estate recovery if the home was a so-called "probate asset." In the case of a couple, however, the property could be transferred to the community spouse (who would then disinherit the institutionalized spouse) and fortunately, the new maximum value rule does not apply if the home is lawfully occupied by the spouse of such individual or by such individual's child who is under age 21 or a child who is blind or permanently and totally disabled and the transfer of the home to the community spouse is still permitted.

> Practice Note. The amount of equity, which can be retained, is to be adjusted by the Consumer Price Index each year, provided the increase is rounded to the nearest $1,000 and the State is required to establish a process whereby the value limitation is waived in the case of undue hardship.
>
> The effective date of this section applies to individuals who are determined eligible for medical assistance with respect to nursing facilities based on an application filed on or after January 1, 2006. **[Act Section 6014]**

8. Requirement to Impose Partial Months of Ineligibility:

(a) States will not be permitted to round down or otherwise disregard any fractional period of ineligibility as a result of the disposal of assets. [***Act Section 6016(a)***]

(b) If an individual makes multiple fractional transfers of assets in more than one month for less than fair market value, the State may determine the period of ineligibility by treating the total cumulative uncompensated value of all assets transferred by the individual during all months on or after the lookback date, and the beginning date will be the earliest date applicable to any such transfers. [***Act Section 6016(b)***]

9. Inclusion of Transfers of Certain Notes and Loans:

The term "asset" is now defined to include (i) funds used to purchase a promissory note, loan or mortgage, unless such note, loan or mortgage has a repayment term that is actuarially sound (meaning likely to be paid before the death of the individual based upon life expectancy tables), (ii) provides for payments to be made in equal amounts during the term of the loan with no deferral and no balloon payments made, and (iii) prohibits the cancellation of the balance upon the death of the lender. [***Act Section 6016(c)***]

10. Inclusion of Transfers to Purchase Life Estates: The term "asset" will include the purchase of a life estate interest in another individual's home, unless the purchaser resides in the home for a period of at least one year after the date of purchase.

The effective dates for 8,9 and 10 apply to payments made for calendar quarters beginning on or after the date of enactment of the Act, without regard to whether Final Regulations to carry out such amendments have been promulgated by such date. [*Act Section 6016(d)*]

11. Default effective date:

If it is determined that a State law amendment is needed to carry out the provisions of this Act, the effective date will be delayed until the first day of the first calendar quarter beginning after the close of the first regular session of the State Legislature that begins after the date of enactment of this act. This date is July 1, 2008 in Massachusetts.

12. Comparison of Private Pay, Medicaid & Medicare Payments

The differential between the amount paid by a private pay patient and a Medicaid patient is surprisingly small. Information provided to me by a national operator of nursing homes indicated that, out of approximately 10,000 beds, approximately 62% are Medicaid 20% are covered by Medicare (within the 100 day period following a three day hospital stay), and 13% are private pay. Also, while the average Massachusetts private pay rate is now set at $246, for this nursing home operator, the average rate for a Medicaid patient is $172, a Medicare patient is $380 (which includes medicals, rehabilitation and drugs) and a private pay Patient is $200. The differential is approximately 16% to 20%.

13. Take a second, third and fourth look at long term care insurance!

The Deficit Reduction Act should be a boon to long-term care insurance providers. Unfortunately, the industry has been somewhat shaken in light of the fact that many carriers have decided to increase rates even for existing policyholders. Remember, long-term care contracts provide that the carrier can increase rates but only if it increases rates for all customers. Nevertheless, some consideration should be made to purchasing a long term care policy, if obtainable at a reasonable price, for at least a five year period, after which the policyholder may allow the policy to lapse at a total cost between $10,000 to $15,000, depending upon the policy benefits.

14. A Closer Look at Life Estates – Long Term Care Planning and Reverse Mortgages

Reverse mortgages are becoming more popular than ever and for good reason. A reverse mortgage allows an elder to convert the equity in his or her home to an income stream by eliminating the wide spread problem of being house rich and cash poor without selling the home. While reverse mortgage programs vary, the fundamental objective is always the same and that is to provide the elder with cash flow to maintain a dignified quality of life and to eliminate payments on mortgage debt.

Consider the case of an elder with a small $50,000 balance on a mortgage with equity in the home and the home worth $500,000. The mortgage payments could be as much as $500 to $600 per month since the mortgage payments were based upon the original loan at the time the loan was transacted. As a result, virtually all of the elder's social security and pension is being used to pay the mortgage leaving little money for quality of life events and financial independence.

A reverse mortgage will eliminate the mortgage payments. Now the Deficit Reduction Act of 2005 specifically sanctions the use of reverse mortgages as part of the Medicaid plan.

While, on the one hand, the Deficit Reduction Act imposes a limit on the amount of equity an applicant may have in his or her home to $500,000 (possibly increased to $750,000 by State action), provides:

> "Nothing in this subsection shall be construed as preventing an individual from using a **reverse mortgage or home equity loan** to reduce the individual's total equity interest in the home."

A home equity loan does not seem to be of any benefit since monthly payments will need to be paid. This leaves the reverse mortgage as the primary choice.

15. When does a reverse mortgage reduce the equity?

One solution is to use the reverse mortgage to not only pay off existing debt and eliminate burdensome payments, but also to make home improvements. In most cases, the elder's home has fallen into substantial disrepair so that making even substantial home improvements will not result in increasing the fair market value of the property. Note also that the statute provides only that "The individual shall not be eligible for such assistance if the individual's equity interest in the individual's home exceeds $500,000." There is no definition of "equity." Is this based on fair market value or assessed value?

Throughout all of the Medicaid regulations, assessed value is used to determine fair market value for purposes of determining the penalty period in the case of real estate that is transferred and for the purpose of determining the value of nonresidential property. It seems, therefore, that in determining the individual's equity, the assessed value will be used. Clearly making even substantial home improvements will not increase the assessed value (at least not right away).

Another issue is whether the individual's equity in the home should be considered a countable asset. Stated otherwise, does obtaining a reverse mortgage or even an equity line create a countable asset? The answer here should be "no." It has long been a common practice for an individual looking to apply for Medicaid to use countable assets to "pay off" the mortgage. It would be illogical to assume that the equity in one's home

is or would ever be considered a countable resource. In fact, the regulations provide to the contrary that one's home is a noncountable asset.

16. Value of a Life Estate

Retaining a life estate will result in a reduction of an individual's equity interest in the home. Consider the case of an individual whose home has an assessed value of $750,000. At age 75, the life interest portion using Table 90 CM is .60449 of $750,000 (or $453,367.50). This life estate also avoids estate recovery and will provide the heirs with a "step-up in basis" upon death so that a post sale death will not give rise to any capital gain tax to the heirs, provided the sale price is equal to the fair market value on the date of death and the property is sold shortly after the date of death.

As the individual ages, the value of the life estate decreases. For example, at age 85, the life estate portion is worth .31770 of the fair market value. Again, assuming the property has increased to $850,000, the life estate would only be worth $270,045.

17. Using a Life Estate Will Not Disqualify an Individual From Obtaining a Reverse Mortgage

FHA allows the property to be held in a life estate in lieu of a fee simple, under certain conditions. In fact, the guidelines issued the largest provider of reverse mortgages State: "A life estate is an interest in real property allowing the owner of the life estate to use and enjoy the property during his or her lifetime. On the death of the owner of the life estate, his or her rights in the property cease, leaving fee simple title to the property and the holders of the interest of the property. HUD permits mortgages to be insured if the borrower's interest in the property is a life estate. However, to encumber fee simple interest in the property, the borrower and all holders of any future interest in the property, must execute the mortgage at closing. Holders of future interests do not execute the note or loan agreement."

The guidelines State that a reverse mortgage would not be permitted if the remainder interest is held by an income only irrevocable trust, but this problem can be solved simply by having the trustees of the trust make a distribution of the remainder interest to individual beneficiaries. A distribution of the property from the trust would represent a completed gift of the remainder interest valued at the time of the transfer (since the income only irrevocable trust usually is considered an "incomplete gift" for gift tax purposes). Unless the value of the remainder exceeded $1,000,000, there will be no gift tax consequences.

This concept is consistent with the underlying premise that a life interest is a property interest rather than some type of interest in a trust. Remember, if the property is sold during life, a portion of the proceeds must be paid to the holder of a life interest for his or her property interest. The amount is to be determined based upon the relative values of the life interest versus the remainder interest using Table 80 CM.

If property is sold during life that is subject to a life estate, the portion payable to the life tenant is eligible for the $250,000 income tax capital gain exclusion while the remaining portion would not be eligible so that the remainderman would need to pay capital gain taxes on their share.

Any amount paid to the life tenant is not subject to recovery inasmuch as a lien should not have been placed against the property unless the member cannot reasonable be expected to return home to the property. 130 CMR 515.012(A)(2)(c).

To the extent the proceeds become payable to the life tenant, at least one-half of these assets should be given away triggering a disqualification period. The applicant will be bumped off MassHealth and a new penalty will begin to run if the individual is then institutionalized. The usual half-a-loaf theory will apply so that the funds not transferred will run out simultaneously with the expiration of the penalty period.

Even if the holder of a life interest is not in a nursing home, but nursing home care is likely within the next five years, at least half of the proceeds should be given away even if the applicable penalty period is suspended until admission.

If an individual is in a nursing home and a reverse mortgage is in place, the property technically will need to be sold since "moving" out of the home triggers a default under most reverse mortgage documents. It is unclear for how long the person must move out, but clearly moving into a nursing home would be considered moving out of the home.

There does not appear to be any type of a negative here since, in reality, most homes likely will be sold after the individual moves out with families citing concern over disrespectful tenants and concern over leaving the property vacant.

18. Purchase a life estate in another's home

Consider purchasing a life interest in another's home. In some cases, properties are sold simply because the life tenant cannot continue to live in the property on his or her own. Here, the Deficit Reduction Act provides another excellent planning opportunity. Section 6016 provides that:

> "For purposes of this paragraph, with respect to a transfer of assets, the term "assets" includes the purchase of a life estate interest in another individual's home unless the
> purchaser resides in the home for a period of at least one year after the date of purchase."

Let's assume that the property is sold at a time when the individual is age 85 and the property sells for $750,000. An amount equal to $161,570 becomes payable to the owner of the life interest.

If one child was living in a home worth $1,000,000, the purchase price for a life interest in the home for an individual age 85 would be $317,770. If the individual does not have enough money to purchase a life estate, a term interest should be purchased using IRS Tables (Table B), Book ALEPH, IRS Publication 1457. Assuming a 7520 rate of 6.4%, the term interest would be slightly over seven years.

The sale will be a taxable event to the child representing a capital gain transaction with a maximum federal rate of 15% and a maximum State rate of 5.3% IRC §121(d)(8). This, of course, provides a better result than a life care contract where the entire amount would be considered ordinary income.

From the individual's point of view, the life interest would be considered the individual's home and therefore would not be considered a countable resource. No amount attributable to the home would be includible in the individual's estate under IRC § 2036 or IRC § 2038, since the life estate was not "retained."

Medicaid Update –Deficit Reduction act of 2005! New Rules Coupled with Old Rules and Remaining Planning Opportunities

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Use and Determination of Penalty Periods

Disqualifying Transfer of Resources: The Division considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owed by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(K). The division may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversions of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the Division will consider the specific circumstances involved. A disqualification transfer may include any action taken which would result in making a formerly available assets no longer available. [130 CMR 520.019(C)]

Period of Ineligibility Due to a Disqualifying Transfer.

Duration of Ineligibility: Where the Division has determine that a disqualifying transfer of resources has occurred, the Division will calculate a period of ineligibility. The number of months in the period of ineligibility is equal to the total, cumulative. Uncompensated value as defined in 130 CMR 515.001 of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the Division. [130 CMR 520.019(G)(1)]

Planning Pointer: What constitutes a disqualification transfer and how to calculate the related period of ineligibility has not been changed by Deficit Reduction act of 2005. In this regard, a transfer of assets today for less than fair-market value freeze the value of the asset transferred and fix the related disqualification period, which maybe important in the event the individual does not make the new 5 year look back period associated with transfers made under the Deficit Reduction Act of 2005.

Old Beginning Date of Period of Ineligibility:

Begin Date: The period of ineligibility will begin on the first day of the month in which resources have been transferred for less than fair-market value. For transfers involving revocable trusts, the date of transfer is the date the payment to someone other than the nursing-facility resident or the spouse is made. For transfers involving irrevocable trusts, the date of transfer is:... [130 CMR 520.019(G3)]

New Beginning Date of Ineligibility Period is Date of Nursing Home Admission

The beginning date for the purpose of determining the penalty period has been charged from the date of the transfer to the date of admission in the nursing home and at such time as the individual is otherwise eligible for medical assistance based on an approved application for such care, but for the transfer, or the first day of the month during which or after assets have been transferred, whichever period is later. This means that the penalty will not begin to run until the individual is admitted to the nursing home. The effective date of this amendment shall apply to transfers made on or after the date of enactment of the Act. [Act Section 6011(b)]

Why Understanding the Penalty Period Remains Important with Regard to Advanced Planning Under the Deficit Reduction Act of 2005

Example: Jane is a single 79 year old and owns her home worth $400,000, with a town assessed value of $350,000 and miscellaneous investments and cash of $200,000.

Planning Opportunities: Transfer the home today to Jane as trustee of a nominee realty trust with a reserved life estate in the deed and the schedule of beneficiaries being Jane's irrevocable income only trust. Jane would also be the Donor and trustee of the irrevocable trust. Under the new rules the there should never be a reason to transfer the property to the children. The irrevocable income only trust is and remains the planning vehicle of choice.

Calculation of Period of Ineligibility:

(A) Use Assessed value of home see 130 CMR 520.007(G)(3(a)

(B) Calculate the value of the remaining interest in the home as this the only portion that qualifies as a disqualifying transfer. The remainder interest is determined in accordance with life estate tables used by the Division of medical assistance. [130 CMR 520.019(I)(1)] There is some confusion regarding the tables used which are either the old HCFA tables or the recently adopted IRS table CM90.

(C) Assessed Value	$350,000
Remainder Percentage79 yr Old IRS Table CM90	x 50.057%
Value of Remainder Interest	$175,200
Average Monthly Cost Nursing Home MA	/ 7,680
Period of Ineligibility	= 22.8 Months

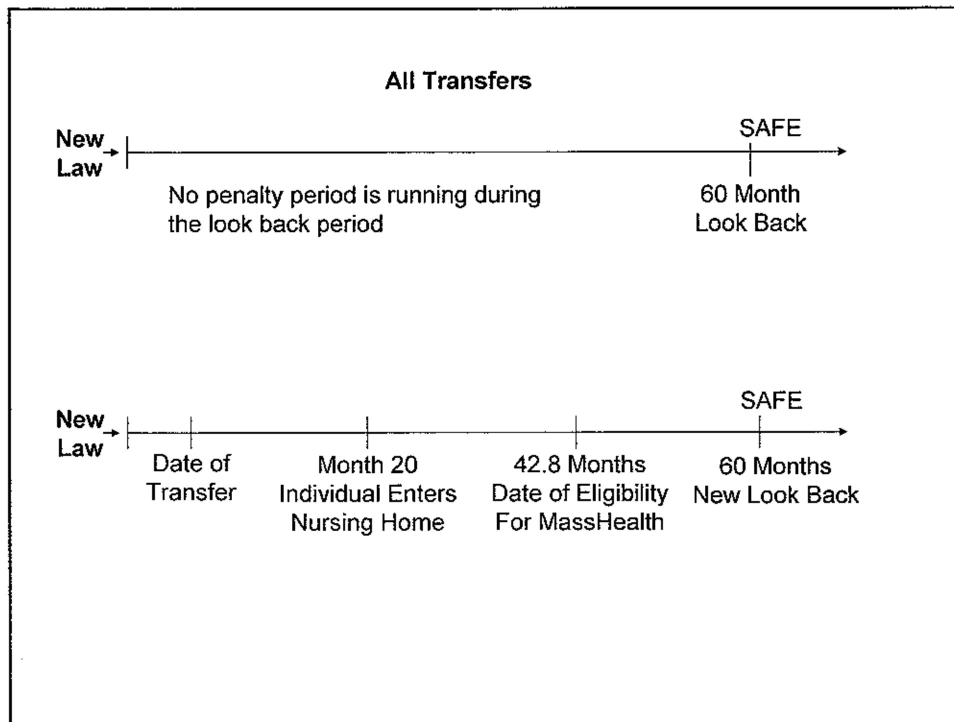
Planning Notes:

Transfer To Individual

Old Law → | — 22.8 Month Penalty Period — 36 Month Look Back — SAFE →

Transfer To Irrevocable Trust

Old Law → | — 22.8 Month Penalty Period — 60 Month Look Back — SAFE →



Although the period of ineligibility of 22.8 months will not begin to run under the new rules, the transfer does start the look back clock running. Nevertheless, Jane enters the nursing home on month 20 and applies for MassHealth which should start the 22.8 month penalty period running. The benefit of the advanced planning was to freeze the age of the individual and the value of the real estate which keeps the penalty period as short as possible. Instead of Jane private paying for 40 more months to reach the 60 months look back period, she needs only pay for 22.8 months. The cost to Jane would be $8,500/month x 22.8 months or $193,800 of which she has in investments. The result of this plan would save a $400,000 home and all of its related appreciation. In the event no life estate was retained the penalty period beginning on month 20 would have been 45.5 months [350,000 / $7,680], which is longer than waiting the 40 month balance of the 60 month look back period.

Does Medicaid Application Start Period of ineligibility

General Rule: The period of ineligibility for a disqualifying transfer will begin to run based on an approved application for such care but for the application of the penalty period..."[Section 6011(b) Deficit reduction Act 2005]. According to MassHealth Regulation 130 CMR 520.019(G)(3) this period of ineligibility begins to run on the date which the individual is **otherwise eligible** MassHealth benefits...

Query: If Jane applies for Medicaid and is denied because she has 200,000 and is over assets, even though she has also made a prior disqualifying transfer, would that application still begin the running of the period of ineligibility? Answer: the penalty period would not run.

Solution/Planning Pointer: The old school of thought would be to make a gift of the balance of her assets and then cure back half to ensure that the filing of the application would produce a denial letter starting the period of ineligibility. However, since we now know the reverse half a loaf does not appear to work the answer would be to follow the half a loaf coupled with an annuity as outlined on page 13. Simply buy an annuity with Jane's investments equal to the 22.8 month penalty period created from the home transfer and the annuity and penalty period will expire at the same time then reapply.

Curing a Transfer:

After Issuance of the Notice of the Period of Ineligibility: After the issuance of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances. [130 CMR 520.019(K2)]

Curing a Transfer: If the full value or a portion of the full value of the transferred resources is returned to the nursing-facility resident, the Division will rescind or adjust the period of ineligibility and will apply the countable-assets rule at 130 CMR 520.007 and the countable-income rules at 130 CMR 520.007 to the returned resources in the determination of eligibility. The Division will rescind or adjust the period of ineligibility as follows [130CMR 520.019K(2)(b)]

(i) The division will use the original application date if the nursing-facility resident provides proof within 60 days after the date of the notice of the period of the ineligibility that has the transfer had been fully or partially cured, the Division will recalculate the period of the ineligibility based on the transferred amount remaining after deduction the cured portion, beginning with date of transfer, or for cures occurring on or after February 8, 2006 either the date of transfer or the date in which the individual would is otherwise eligible for MassHealth benefits. [130CMR 500.019 K(2)(b)(i)]

(ii) If the nursing-facility resident provides proof later than the 60th day after the date of the notice of a period of ineligibility that the transfer had been fully or partially cured, the nursing-facility resident must re-apply. The Division will recalculate the period of ineligibility based on the amount of the transfer remaining after the cure, beginning with the date of transfer, or for cures occurring on or after February 8, 2006 either the date of transfer or the date in which the individual would is otherwise eligible for MassHealth benefits[130 CMR 520.019K(2)(b)(ii)]

Does the reverse half a loaf planning technique really work and what does the state provide?

The state will send a denial notice that actually calculates the period of ineligibility and tells you when it is ok to reapply. See an actual denial letter from the state. The brief outlining our position in an actual cure case is attached for reference. Recently the fair hearing officer denied the application leading us to believe this technique does not work. However, the explanation was less than convincing and leaves the opportunity for court determination. Finally, we have been working on the half a loaf coupled with an annuity approach as an alternative, but recent fair hearings have effectively put and end to this approach as well. See section one of these materials for a detailed analysis as to the states position on this technique and the use of a long term care deductible.

Requirements of Partial Months of Ineligibility

Old Rule: The period of ineligibility would begin to run on the first day of the month in which resources have been transferred for less then fair market value, [130 CMR 520.019(G)(3)].

New Rule under the Deficit Reduction Act 2005

(a) States will not be permitted to round down or otherwise disregard any frictional period of ineligibility as a result of disposal of assets. [Act Section 6016(a)]

(b) If an individual makes multiple fractional transfers of assets in more than one month for less than fair market value, the states may determine the period of ineligibility by treating the total cumulative uncompensated value of all assets transferred by the individual. However, Massachusetts regulations limit the period in which such transfers will be added together to the "60 month look back period". 130 CMR 520.019(G)(2)(i).

Understanding Annuities under the Deficit Reduction Act 2005

General rule which still applies:

[130 CMR 520.007(J)(1)]

Annuities: Payments from an annuity are countable in accordance with 130 CMR 520.009. If the annuity can be converted to a lump sum, less any penalties or cost of converting to a lump sum, is a countable assets. Purchase of an annuity is a disqualifying transfer of assets for nursing-facility residents as defined at 130 CMR 515.001 in the following situation:

(a) when the beneficiary is other than the applicant, member, or spouse.

(b) when the beneficiary is the applicant, member, or spouse and when the total present value of projected payments from the annuity is less than the transferred asset (purchased price). In this case, the Division determines the amount of the disqualifying transfer based on the actual value of the annuity compared to the beneficiary's life expectancy using the life-expectancy tables of institutions in the business of providing annuities;

New Notification requirements for Annuities:
A state shall require, as a condition to receive medical assistance for an individual, that the application of the individual for such assistance shall disclose a description of any interest the **individual or community spouse** has in an annuity. In addition, such application must include a statement that the state becomes a remainder beneficiary under such annuity [Act Section 6012(a)].

Practice Pointer: Since this section specifically refers to an individual or community Spouse's interest in an annuity, one can only assume that the purchase of an annuity by the community spouse, must also list the state as a remainder beneficiary.

Requirement for State to be named as remainder beneficiary:
The purchase of an annuity shall be treated as a disqualifying transfer of assets unless the state is named as the remainder beneficiary in the first position or the state is named as such beneficiary in the second position after the **community spouse** or minor or disabled child. [Act Section 6012 (b)(f)(i) and (ii)]

Practice Pointer: Some may think since this section indicates that only the community spouse can be listed as a beneficiary ahead of the state and does not mention the institutionalized spouse's ability to fill that position, that maybe the community spouse could buy an annuity and not list the state as beneficiary at all? However, due to the disclosure requirements listed above, the safe assumption is that the state must be listed as a beneficiary on an annuity purchased by the community spouse at least in the second position.

How Annuities Can still be an effective planning tools under the Deficit Reduction Act of 2005

Example: A single female age 75 has $202,000 and has just entered a nursing home. The nursing home costs $9,000 per month and she gets $1,000 per month social security and a pension of $612 per month. This means that her money would be used up in 27 months:

(a) Monthly Cost for Nursing Home	$9,000
Less Social Security	$1,000
Less Pension	$ 612
Amount short each month	$7,388
Total Cash Available	/ $200,000
Numbers of month's money will last	27.07 months

Purchased an Annuity in Accordance with

[130 CMR 520.007(J)(1)]

(A) Amount of Annuity: is $200,000 as the individual is permitted to keep $2,000 = [202.00 - 2,000]

(B) Term of Annuity: A term certain not to exceed the individuals life expectancy pursuant to 130 CMR 520.007 (J)(1)(b)

(C) Irrevocable: the annuity must be irrevocable.

(D) Remainder Beneficiary: must be the state in the First position unless there is a community spouse or a blind or disabled child which would cause the state to be a remainder beneficiary in the second position. [Section 6012(b)(f)(i)(ii)]

Result of Annuity Purchase

- Amount of Annuity	200,000
- Life Expectancy of 75yr old Female using HCFA tables	/ 12 Years
- Number of Months in a year	/ 12 Months
- Amount of Monthly Payment At Risk to Nursing Home	$ 1,388.88

Amount of Medical Lien

- Monthly Cost MassHealth Pays Nursing Home	$ 6,000
- Less Social Security	$ <1,000>
- Less Pension	$ < 612>
- Less Annuity Payment	$ <1,389>
- Amount short each month that represents the Amount of the MassHealth Lien Building each Month	$ 3,000

Planning Benefit:

If the individual stays in the nursing home for 27 months the outstanding lien that the state would be entitle to would be $81,000 [3,000/month x 27 months]. In addition the annuity paid out $37,503 [1,389 x 27 months] The total amount spent out of the annuity was $118,503 [81,000 + 37,503]. The total amount still left for the family would be $81,497 which is far better then nothing which is the amount that would have been left had the family not purchased the annuity.

The half a loaf method although no longer works did require a case by case study under the old laws and such analysis still applys today when deciding between the annuity or private paying

If instead of the annuity assume a gift of $100,000 was made that would have created a disqualification period of 12.1 months [100,000 /8,220]. This assumes that the total $200,000 was gifted, the individual applied for Medicaid, was denied and cured $100,000 of the initial transfer. The result would be that the individual private pay the amount he is short each month for the next 12.1 months. Total spent by the individual would be $89,394 [7,388/mt x 13 months]. Conclusion, each case must be analyzed separately. Although this approach use to save the family approximately half the assets but this does not work any more. However, the annuity would have saved the family the same or more provided the individual died within the first 15 months of admission to the nursing home. The decision to use an annuity must generally take into account the individuals actual health situation, for the annuity generally provides more assets for the family the sooner an individual passes away and is generally better than simply private paying and doing nothing.

Annuity for married couples

Example No. 2:

A married couple both age 75, own a home worth $300,000 and have investments of $300,000. Husband has social security income and a pension of $1,500 per month and the wife has social security income of $750 per month. Husband has just entered a nursing home with no advanced planning in place.

Planning Opportunities:

- **Transfer the home to the community spouse:**

This transfer still qualifies as a permissible transfer and will not create a disqualification period pursuant to 130 CMR 520.019(D)(1). In addition, transfer assets in excess of community spousal resource allowance which also qualifies as a permissible transfer.

- **Purchase Annuity in the Name if the Community Spouse:**

A) Amount of Annuity is the total assets less the community spouse resource allowance [CSRA] and the amount the institutionalized spouse is allowed to keep.

- Total Assets	300,000
- Community Spousal Resource Allowance	< 109,560 >
- Amount institutionalized spouse can Keep	< 2,000 >
- Amount of Annuity	188,440

B) Result of Annuity Purchase

- Amount of Annuity	188,440
- Term of Annuity Not to Exceed Life expectancy of 75 year old	/ 3 Years
- Number of Months in a Year	/ 12 Months
- Amount of Monthly Payment to the Community Spouse	$5,234.44

Planning Pointer:

Since it appears that the Deficit Reduction Act of 2005 requires the state to the named as a remainder beneficiary of an annuity, even though purchased by the community spouse, [Act Section 612a], it is important to make the term of the annuity as short as possible. Such an annuity would not result in a disqualifying transfer as it does not violate the annuity rules as provided in 130 CMR 520.007(J)(1). By making the annuity term as short as possible helps to reduce the risk of there being any reminder left to go to the state as the reminder beneficiary. However, see page 8 of these materials as a recent letter from Masshealth indicates that the state not be named as the designated beneficiary if the annuity if purchased by the community spouse.

A Primer on Income, Estate and Gift Tax Consequences of Life Estates and Whether or not they should still be used as a Planning Tool.

by

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1A. What is a Life Estate?

A life estate is not a trust according to the MassHealth Regulations.

Life Estate –a life estate is established when all of the remainder legal interest in a property is transferred to another, while the legal interest for life rights to use, occupy or obtain income from the property is retained.

Trust – a legal device satisfying the requirements of state law that places the legal control of property or funds with a trustee. It also includes, but is not limited to, any legal instrument, device, or arrangement that is similar to a trust, including transfers of property by a grantor to an individual or a legal entity with fiduciary obligations so that the property is held, managed, or administered for the benefit of the grantor or others. Such arrangements include, but are not limited to, escrow accounts, pension funds, and similar devices as managed by an individual or entity with fiduciary obligations.

Trustee – any individual or legal entity that holds or manages a trust. See 130 CMR 515.001 (Definitions).

Liability of Remainderman – A remainderman owes no duty of care to the life tenant's tenants, absent a duty voluntarily assumed by the remainderman. *Delprete, Adm. v. Ferrante, et al* LW No. 16-106 King.J Suffolk No. 90-2152B

1B. Benefits of a Life Estate.

•Protects the grantor.

•Step-up in basis at death (usually no estate tax since value is less than Massachusetts and Federal exemptions).

•Reduced value for gift tax purposes (usually not a factor, but gift tax return is required).

•No probate – so no estate recovery (repealed retroactive to July 1, 2003).

•Recent development can still get reverse mortgages by the life tenant with signatures of the remainder interest holders.

1C. Disadvantages of a Life Estate.

•If the property is sold, a portion of the proceeds must be paid to life tenant and must get children's permission prior to sale if they own the remainder interest.

•Portion paid to life tenant will be eligible for capital gain tax exclusion but will be a countable resource if in the nursing home and would reset the 5 year look back clock.

•Portion paid to life tenant may be subject to recovery under lifetime lien.

•Loss of control and cannot change beneficiary after established without kids permission.

2. How to Compute the Value of a Gift of a Partial Interest in Property for Gift Tax Purposes

A. Life Estates and Remainder Interests

A transfer of a partial interest in property, such as a remainder interest in the case of a deed with a reserved life estate, must be valued using actuarial tables provided by the IRS. These tables have built-in mortality assumptions and interest rate assumptions. The assumed rate of interest changes monthly with the relevant rates being the "applicable interest rate equal to 120% of the federal mid-term rate under IRC § 1274(c)(1) for the month in which the valuation occurs." IRC § 7520(a)(3). This is the so-called "7520 rate."

Planning Note: For May, 2009, the IRC 7520 rate is 2.4%.

Examples

In this case, if the property was transferred by the taxpayer (age 66) with a single life estate reserved, the gift valued would be $204,548.00.

Transfer Date:	5/2009
§ 7520 Rate:	2.4%
Calculation Type:	Life
Principal:	$400,000
Lives:	1
Ages:	66

	Life Estate	Remainder
Factor:	0.31079	0.68921
Value:	$124,316.00	$275,684.00

If the transfer was made by the younger spouse at age 62, the gift would be $259,012.00.

Transfer Date:	5/2009
§ 7520 Rate:	2.4%
Calculation Type:	Life
Principal:	$400,000
Lives:	1
Ages:	62

	Life Estate	Remainder
Factor:	0.35247	0.64753
Value:	$140,988.00	$259,012.00

B. How to compute the amount of the Transfer for MassHealth Purposes

- Operation memo 07-18 December 1, 2007 indicates that we use the applicable federal rate from IRC section 7520 and the interest rate on the date of transfer or sale example based on May 2009 interest rate 2.4% and IRS Table S both in table in appendix.
- Use assessed value, not fair market value based on most recent real estate tax assessment – no confusion. Assume assessed value is $300,000 even though fair market value is $400,000.
- Results – Depending upon Which Table is Used:

	66	62	JOINT*
AFR May	$300,000	$300,000	
2009	x ..68921	x .64753	
	$206,763	$192,259	

Conclusion, by using the interest rates and these tables remainder interest have a much higher value than when using the old HCFA tables.

- Determine penalty period by dividing this amount by penalty rate.

*Use the average of the two ages since neither HCFA nor 90 CM have a joint and survivorship table.

- May even need to use IRC Section 7520 rates – See appeal decision dated 5/6/05 (attached).
- Property sold for $320,000.
- Life estate was determined to be $133,026 based on a table for an 82 year old.
- MassHealth representative said he was "told to use it by his supervisor and he had been using it for some time."
- Not good enough – Hearing Officer said to use IRC Section 7520 Rate.
- So, where are we?
- It depends on where you are!
- Different offices use different methods.

  See Appendix for current summary by Attorney Michael Fleming of Cushing & Dolan.

3. Sale of real Estate Subject to Life Interest and Remainder Interest

If the property is sold, the gain (and proceeds) will be split between the life interest and the remainderman using the actuarial tables and IRC § 7520 rate applied for the month in which the sale occurs. In addition, the sale by the life tenant would require the signature of the remainderman. Basis also would be allocated at the time of the sale using the 7520 rate. Rev. Rul. 71-122. The gain allocated to the life interest is eligible for exclusion under IRC § 121 but the gain allocated to remainder interest is not unless the remainderman is a grantor trust. Rev. Rul. 66-159; Rev. Rul. 85-45; PLR 9118017.

4. Exclusion From Gain on Sale of Principal Residence

The one time exemption of $125,000 applicable to home sellers age 55 and older, and the 24 month rollover provisions applicable to the sale of the taxpayer's principal residence have been repealed effective for sales which occur on or after May 7, 1997. The new rules are quite simple, as follows.

The property owner (of any age) can exclude up to $250,000 of gain attributable to the sale of the taxpayer's principal residence. This amount is increased to $500,000 for joint filers in certain situations. To be eligible, the taxpayer must have owned and used the property as his or her principal residence for at least two of the last five years before the sale. The ability to exclude the gain is available only once every two years.

The principal residence can include a single family structure, trailer, mobile home, house boat, condominium, cooperative duplex or row house and will include any other boat if the boat contains facilities for cooking, sleeping and sanitation (as long as the facility is the taxpayer's principal residence).

5. **Gift Tax Filing Regulations**

A. Federal

A federal gift tax return (Form 709) must be filed for any calendar year (due 4/15 of the year following the year in which the gifts are made), unless the gift is less than the annual exclusion amount of $11,000 per year per donee (IRC § 2503(b)) was for education or medical expenses (IRC § 2503(e)), or eligible for either a charitable deduction under IRC § 2522 or the gift tax marital deduction under IRC § 2523. IRC § 6019.

A gift tax return must be filed if the gift is not a present interest, regardless of amount. If spouses transfer property held by them as either joint tenants or tenants by the entirety, both spouses must file a gift tax return.

Spouses may elect to so-called "gift split." This means if one spouse makes a transfer, the non-donor spouse may consent to the gift treated as being made on behalf of both spouses. As to filing, only the donor is required to file the return with the non-donor spouse's consent by signing the return, unless the total gift by the donor to any one donee exceeds twice the amount of the annual exclusion, and all gifts are gifts of a present interest. Regs. 25.2513-1(c).

A gift tax return must be filed even if the gift is incomplete:

"If a donor contends that his retained power over property renders the gift incomplete (see § 25.2511-2) and hence not subject to tax as of the calendar year of the initial transfer, the transaction should be disclosed in the return for the calendar quarter or calendar year of the initial transfer and evidence showing all relevant facts, including a copy of the instrument of transfer, shall be submitted with the return. The instructions printed on the return should be carefully followed. A certified or verified copy of each document required by the instructions printed on the return form shall be filed with the return. Any additional documents the donor may desire to submit may be submitted with the return. Regs. 25.2511-3(a)."

Planning note: If the member had established an irrevocable trust and reserved a right in the trust to designate the final beneficiaries by a will after the execution of the irrevocable trust, the trust would be a grantor trust under IRC 674 and an incomplete gift under IRC 2511 and Regs 25.2511-2(2).

Planning Note: Gifts of remainder interest to children is a completed gift.

B. Massachusetts Rules

There is no filing requirements for Massachusetts but the "taxable gift" (meaning the amount of the transfer in excess of the annual exclusion gift) will reduce the Massachusetts estate tax filing threshold.

6. **Estate Tax Rules**

A. Property subject to a life estate will be includible in the decedent's gross estate under IRC § 2036(a)(1) at the fair market value on the date of the decedent's death. Additionally, property in a trust in which the decedent had retained the power, as trustee or otherwise, to affect the beneficial enjoyment will be includible at fair market value on the date of death under IRC § 2036(a)(2). Therefore, this inclusion into the estate will ensure the full step up in basis for capital gains tax purposes under IRC 1014.

B. Section 2036 Entity Transfers With Retained Life Estates and retained power to affect beneficial enjoyment. Section 2036 provides as follows:

"(a) GENERAL RULE – The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death – (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."

C. If spouses who owns property as tenants by the entirety transfers property together, they each will be deemed to have retained a life estate in one-half of the property. *Glaser v. Commissioner*, 306 F.2d 57-61 (7th Cir. 1962); *Sullivan's Estate v. Commissioner*, 175 F.2d 657, 659 (9th Cir. 1999).

7. **Special Rules**

A. Implied retained life estates without written agreements

A unique planning opportunity may exist in the case residential real estate. With growing concern over the continued attack on such Medicaid planning, planners may wish to utilize the principles in the Estate of Guynn, 437 F.2d 1148 (4th Cir. 1971). See also Rev. Rul. 70-155, 1979-1 C.B. 189. Generally, where the donor/decedent and the donee are husband and wife, the continued occupancy by the donor does not imply an agreement as to retain an interest in the property. However, when the donor and the donee are other than a husband and wife, such as a transfer of a home from a single parent to a child, then the IRS has asserted that there is an implied agreement as to retained enjoyment by the transferors. This rule would apply even though there was no legal life estate or written documents concerning the arrangement. The benefit here is that for estate tax purposes, the transferee may obtain a stepped up basis while at the same time the asset clearly is placed beyond the reach of Medicaid creditors under existing law.

In Estate of Maxwell, 98 T.C. 39 (1992), the Tax Court ruled that the value of the decedent's former home had to be included in the decedent's estate even though the decedent "sold" the property to a child for $270,000; required payments of interest only at 9% per year (no principal was required); the decedent's will forgave the rule at death and the decedent canceled $20,000 of the note each year. The problem was that the decedent did not move out of the house and the Court found an implied agreement to use and occupy the home under IRC § 2036(a).

In *Estate of Powell v. Commissioner*, 63 T.C.M. 3192 (1992), the decedent transferred approximately 60% of his ownership interest in his principal residence to his children and their relatives. At the time of his death, the decedent owned approximately 40%. The decedent continued to live in the home until he was forced to move because of his physical condition. The decedent paid all expenses including real estate taxes, maintenance and upkeep. The Service argued that the decedent retained a life estate under IRC § 2036. The tax court disagreed finding that his continued occupation of the residence was consistent with his ownership as a tenant in common with his children. Earlier cases have ruled that such an arrangement was in effect a transfer with a retained life estate and therefore the full value of the property will be includible in the decedent's estate under IRC § 2036(a)(1). See also *Estate of Wineman*, 79 TCM 2189 (2000) (Decedent gifted 24 more than 20 years before death held not includible.)

B. Consider the benefits of Gallenstein.

Real estate in which the decedent owns an interest will be includible in the estate at fair market value. At death, all assets must be reported at fair market value without regard to historical cost or other basis. In the case of jointly owned real estate by persons other than spouses, 100% of the value will be includible in the estate of the decedent unless an affidavit of contribution is filed and accepted by the taxing authorities. For example, if two partners own real estate jointly, 100% of the value will be includible with a deduction equal to 50% based on the affidavit of contribution by the surviving co-owner filed with the estate tax return.

There is an exception to this rule in the case of jointly held property owned by spouses. Both Massachusetts and the IRS include only one half of the fair market value of such property jointly owned. IRC §2040(b) Note, however, in _Gallenstein v. United States_, 91-2 U.S.T.C. ¶60,088 (E.D. Kentucky 1991), aff'd 975 F.2d 286 (6th Cir. 1992), the 6th Circuit Court of Appeals ruled that property acquired as joint tenants before 1977 was eligible for treatment under the pre-1977 jointly held property rules. As such, the contributing owner was required to include the full value of the assets in the estate rather than under current law where one-half of the value is included regardless of which spouse contributed the consideration. This provided the taxpayer with a full §1014 basis step-up while qualify for the unlimited marital deduction. IRC §2040(b) had been amended in 1981 to require inclusion of 50% on the death of the first qualified joint tenant to die. This case provides a significant planning opportunity to obtain a full step-up in basis with no estate tax costs.

Apparently, there is no need to amend the estate tax return in order to achieve the favorable results of _Gallenstein_. In _Patten_, 1996-1 USTC ¶60,231 (DC Va. 1996), and _Anderson_, 96-2 USTC ¶60,235 (DC MD 1996), the decedents and spouse had owned property as tenants by the entirety acquired before 1977. The husband died in 1989, at which time the wife became the sole owner of the property. At that time, the value of the property was $500,000, of which 50% was included in the decedent's spouse's gross estate.

In 1990, the decedent sold the real estate using an adjusted basis $256,982 based on one-half of the fair market value which had been included in her husband's estate. In 1994, after the decedent's death, the administratrix filed an amended income tax return that increased the basis of $500,000. The Court held for the taxpayer stating that for tenancies created before 1977, IRC §2040 included the entire value of the joint property in the deceased joint tenant's estate except to the extent the surviving joint tenant furnished consideration for the property.

For Massachusetts income tax purposes, the same rules will apply as to property acquired from a decedent who died on or after January 1, 1997. Prior to this date, the survivor would only have obtained a partial step-up in basis. _Treat v. Commissioner_, 52 Mass. App.208 (2001) (decedent died in 1993).

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Massachusetts Medicaid Update-The Deficit Reduction Act of 2005

A Functional Analysis of the New Rules and the Old Rules for Practitioners
And Remaining Planning Opportunities
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REPEAL OF EXPANDED ESTATE RECOVERY RULES AND A RETURN TO PROBATE ESTATE RECOVERY.

1. Legislative History:

   A. Prior to July 1, 2003, the Division of Medical Assistance (hereafter "Division") could only recover MassHealth benefits paid attributable to a decedent from the decedent's probate estate ("probate estate"). In 1993, the Omnibus Budget Reconciliation Act ("OBRA") allowed any state to choose under its estate recovery provisions to include so-called "non-probate" assets.

   B. OBRA expressly defined an estate to include any asset "in which the member had any legal title or interest at the time of death, including living trusts."

   C. Up until July 1, 2003, Massachusetts had specifically declined to broaden or expand the definition of estate beyond probate assets.

   D. General Laws Chapter 118E, §31 was amended by striking subsection (c) (which limited estate recovery to "probate assets") and inserted in place thereof, the following two subsections:

"- (c) this subsection shall apply to the estates of members dying prior to July 1, 2003. For purposes of this section, "estate" shall mean all real and personal property and other assets includible in the decedent's probate estate under the General Laws.

"- (c½) this subsection shall apply to the estates of members dying on or after July 1, 2003. For purposes of this section, "estate" shall mean any interest in real and personal property and other assets in which the individual immediately prior to death had any legal title or interest, to the extent of such interest (emphasis added). This includes interests in real and personal property and other assets that would pass to a survivor, heir or assignee of the decedent through joint tenancy, tenancy by the entirety, life estate, living trust, right of survivorship, beneficiary designation or other arrangement."

E. Since the date of the enactment of these expanded estate recovery provisions until the present, there has been an on-going battle to have these expanded estate recovery rules repealed. In November, 2003, legislation was introduced to repeal these expanded estate recovery provisions. As the Bill made its way through the House and the Senate, changes were made, the most important of which was to change the language from a repeal of the expanded estate recovery rules to a delay of the implementation of such rules until July 1, 2004. The House of Representatives voted for the delay of the implementation of these expanded estate recovery rules while the Senate voted to repeal these rules. However, after the Bill made its way through Committee, a final version, which landed on Governor Romney's desk, was simply authorizing the delay of the implementation of these rules rather than the repeal of them, of which was promptly vetoed by Governor Romney. Finally, during the 2005 Budget debates, legislation was once again introduced to completely repeal the expanded estate recovery regulations. Once again, Governor Romney vetoed the legislation, but this time Congress overwhelmingly overrode the Governor's veto, thereby effectively repealing the expanded estate recovery rules in Massachusetts and a return to the probate estate recovery rules. In other words, life estates, private and commercial annuities are once again viable Medicaid planning tools.

F. It is important to note that these law changes do not apply to the portion of the legislation, which became effective July, 2003, that enabled Massachusetts to ask the federal government, Secretary of the United States Department of Health and Human Services, for a waiver so as the Commonwealth of Massachusetts may make rules which are more restrictive than the federal government permits. In fact, such a waiver has been submitted to the Secretary of the United States Department of Health and Human Services, which requests significant changes to the transfer of asset rules and related penalty and look-back period calculations along with placing severe restrictions, if not eliminating the use of annuities as a Medicaid planning tool. This aspect of the 2003 legislation remains in full force and effect. However, as of the printing of this material, there has been no response from the federal government regarding Massachusetts's request for these changes, therefore they are not current law. Nevertheless, it is important to keep these requested changes in mind when doing future planning as we are unclear whether or not there will be any grandfathering provisions in place in the event such legislation becomes effective. The specific changes requested in the waiver will be addressed in more detail below.

2. Impact of the Expanded Estate Recovery Rules:

The estate recovery provisions apply to the estate of individuals dying on or after July 1, 2003. This means that the techniques implemented prior to July 1, 2003, such as life estates, joint tenancies, and the like, **are not grandfathered.** All existing planning techniques must be revisited.

Planning Note: One of the primary reasons Congress overrode Governor Romney's veto of the expanded estate recovery rules was because of the lack of a grandfathering provision which resulted in the legislation penalizing people for prior planning. Nevertheless, it is important to note that, once the state shows they are interested in getting something, it is possible that we will see additional attempts in the future to either go after life estate interests or simply attempt to implement expanded estate recovery rules once again. However, this time the hope would be that a grandfathering provision would be included in any such legislation.

3. Real Estate Liens:

Under present law, the Division is permitted to place a lien against any property in which the member has a legal interest, subject to the following conditions:

A. Pursuant to Court Order or Judgment; or

B. Without a Court Order or Judgment, if all of the following requirements are met:

(1) the member is an in-patient receiving long term care or chronic care in a nursing facility or other medical institution;

(2) none of the following relatives lives in the property:

(a) a spouse;

(b) a child under the age of 21 or blind or permanently and totally disabled;

(c) a sibling who has a legal interest in the property and has been living in the house for at least one year before the member's admission to the medical institution;

C. The Division's determination that the member cannot reasonably be expected to be discharged from the medical institution and return home; and

D. The member has received notice of the Division's determination that the above conditions have been met and that a lien will be placed. This notice must include the member's right to a fair hearing. 130 CMR 515.012.

4. Exceptions to Real Estate Liens:

There can be no recovery for a nursing facility or other long term care services if the member:

A. was institutionalized;

B. notified the Division that he or she had no intention of returning home; and

C. <u>on the date of admission</u> to a long term care institution had long-term care insurance who's coverage met the requirements of 130 CMR 515.014 and the Division of Insurance Regulations at 211 CMR 65.09(1)(e)(2). (Emphasis added.)

<u>Planning Note</u>: 130 CMR 515.014 provides that, "There must be at least $125 per day for two years in coverage remaining under a long term care policy on the date of admission for this provision to apply." This means that care must be taken not to spend too much of the benefit for home care prior to the admission to the nursing home since the pre-nursing home payments from the long term care policy could result in less than $125 per day, which is determined by dividing the remaining benefit under the long term care policy by 730 days.

<u>Planning Note</u>: Under the Deficit Reduction Act of 2005, this technique will not protect homes with equity of $500,000 or more as such legislation simply prohibits an individual with such a home from being eligible for Masshealth benefits, thus no lien would arise.

<u>Example 2</u>:

"A" purchases a long-term policy with three years of coverage at $125 per day with $62.50 per day available for home care. After three years at home, this remaining benefit would be as follows:

Total Benefit	$136,875
Benefits Used	<u>$ 68,438</u>
Total Benefits Remaining	$ 68,437

Since $68,437 ÷ 730 is only 93.75, the policy will not prevent the lien.

5. Recovery Under the Lifetime Lien:

If property against which the Division has placed a lien under 130 CMR 515.012(a) is sold during the member's lifetime, the Division may recover all payment for services provided on or after April 1, 1995. (<u>This provision does not limit the Division's ability to recover from the member's estate in accordance with 130 CMR 515.011</u>.)
130 CMR 515.011(B)

6. Repayment Might Be Deferred:

In certain situations, even in the case of a lien on a member's home, repayment is not required while any of the following relatives are still lawfully living in the property:

A. a sibling who has been living in the property for at least one year before the member's admission to the nursing facility or other medical institution; or

B. a son or daughter;

(1) who has been living in the property for at least two years immediately before the member was admitted to a nursing facility or other medical institution;

(2) establishes to the satisfaction of the Division that he or she provided care that permitted the parent to live at home during the two year period before institutionalization; and

(3) has lived lawfully in the property on a continual basis while the parent has been in the institution. 130 CMR 515.012(D)

Planning Note: This provision does not apply in the case of the Division's ability to recover from the member's estate.

Planning Note: If you meet the requirement of paragraph 10. B. (1) and (2) above (i.e., the caretaker child exception of 130 CMR 520.019(D)(6)(d)), the house should be immediately transferred to the caretaker child as this is a permissible transfer which would prevent it from ever being subject to estate recovery liens in the first place.

7. Discharge of Lien:

The Division will discharge a lien placed against property under 130 CMR 515.012(A) if the member is released from the medical institution and returns home. 130 CMR 515.011(E)

Planning Note: In light of these regulations, it generally is not considered a good idea to sell the member's home during life while a lien had been placed against the property.

8. Estate Recovery – Regulations as Recently Reenacted:

The Division is required to recover the amount of payment for medical benefits correctly paid from the estate of a deceased member. Recovery, however, is limited to payment for all services that were provided;

A. while the member was 65 or older; except, on or after October 1, 1993, while the member was aged 55 or older;

B. or on or after March 22, 1991, while the member, regardless of age, was institutionalized and the Division determined that the member could not reasonably be expected to return home.

Section (2) provided that the "estate" included all real and personal property and other assets in the member's probate estate. 130 CMR 515.011(A)(2).

9. On August 15, 2003, the Division of Medical Assistance issued a revised Regulation 130 CMR 515.011(A)(2),which has now been repealed, but nevertheless provided:

"The estate includes all real and personal property and other personal assets in the member's probate estate and, for persons who die on or after July 1, 2003, any other real and personal property and other assets in which the member, immediately prior to death, had any legal title or interest, to the extent of such interest."

10. Exception:

The Division is not permitted to recover for nursing facility or other long term care services from the estate of any person who:

A. was institutionalized;

B. notified the Division that he or she had no intent of returning home; and

C. on the date of admission to the long term care institution, had long term care insurance that met the requirements of 130 CMR 515.014. 130 CMR 515.011(B).

11. Deferral of Estate Recovery:

Recovery is not required until after the death of the surviving spouse, if any, or while there is a surviving child who is blind, permanently and totally disabled, or under 21 years of age. 130 CMR 515.011(C)

Planning Note: It should never come to this because the home should have been transferred to the healthy spouse or to the blind or disabled child, which are permissible transfers.

12. Waiver of Estate Recovery Due to Hardship:

For claims presented on or after July 1, 1997, estate recovery will be waived if:

A. a sale of real property would be required to satisfy a claim against the member's probate estate; and

B. an individual who was using the property as a principal place of residence on the date of the member's death, meets all of the following conditions:

(1) the individual lived in the property on a continual basis for at least

one year immediately before the now deceased member became eligible for MassHealth;

(2) the individual was left an interest in the property in the deceased member's Will or inherited the property from the deceased member under the laws of intestacy;

(3) the individual was not being forced to sell the property by other devisees or heirs at law; and

(4) at the time the Division first presented it's claim for recovery against the deceased member's estate, the individual's annual gross countable income was less than or equal to 200% of the applicable federal poverty level income standard. 130 CMR 515.011(D)

DISCUSSION & ANALYSIS

1. Life estates are once again excluded from the definition of "estate" for estate recovery:

Individuals who have established a life estate arrangement for their home (i.e., the residence which must be located in Massachusetts) provided the disqualification period has expired, will have protected their entire home from the costs associated with long term care. In other words, even though the life interest in real estate may have a value associated with it, since it avoids probate and Massachusetts is once again limited to recovering assets from a decedent's probate estate, the home would be fully protected from such recovery.

Example 3:

The individual died on September 11, 2003 at age 83 and the Division had paid $300,000 in benefits. The fair market value of the property on the date of death is $500,000. The value of the individual's life estate "immediately prior to death" would be $189,970 determined using the life interest factor under the "new" life expectancy tables being used by the Division ($500,000 x .37994).

Query: Under the expanded estate recovery rules, there was a question as to whether or not only the actuarially determined fair market value of the decedent's life interest was at risk or was the entire value of the property at risk? Probably, only the value of the life interest since the recovery is against the individual's legal title or interest and to the extent of such interest. However, this question becomes irrelevant under probate estate recovery rules since the entire value of the home will be protected form the estate recovery provisions, as a life interest avoids the probate estate.

***Query*:** Is it safe to assume that life estates will remain protected from the estate recovery rules in the future? Should practitioners continue to recommend life estates to clients in light of recent legislative activity?

Solution: It may be advisable to simply transfer the entire residence to an irrevocable income only trust in which husband and wife serve not only as donor, but also as trustee. Since husband and wife are serving as trustee, they would be in charge of the assets inside the irrevocable trust and could thereby live there as long as they remain trustees. The life estate use to provide a shorter disqualification period, but under the new Deficit Reduction Act of 2005 the look back period is 5 years regardless of the value of the asset transferred. Therefore, there appears to be little downside to transferring the whole property to the trust as the real benefit to this approach is to protect the client in the event similar retroactive expanded estate recovery legislation is passed in the future, as transferring the whole asset currently will get it all protected without the fear of having to fix it later, which may be too late.

2. Exceptions to Penalty Period Rules for a Transfer of the Home:

A. Permissible Transfers. The nursing facility resident may transfer title to the home, which he or she used as the principal residence at the time of transfer to one of the following persons:

(1) the spouse;

(2) the nursing facility resident's child who is under age 21, who is blind or permanently and totally disabled;

(3) the nursing facility resident's sibling who has a legal interest in the nursing facility resident's home and was living in the nursing facility resident's home for at least one year immediately before the date of the nursing facility resident's admission to the nursing facility; or

(4) the nursing facility resident's child who was living in the nursing facility resident's home for at least two years immediately before the date of the nursing facility resident's admission to the institution and who, as determined by the Division, provided care to the nursing facility resident that permitted him or her to live at home rather than in a nursing facility. 130 CMR 520.019(D).

B. Periods of ineligibility that overlap. When transfers of resources result in periods of ineligibility that overlap, the Division will add the value of all the transferred resources and divide the total by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the Division. The result will be a single period of ineligibility beginning on the first day of the month in which the first transfer was made. 130 CMR 520.019(G)(b).

Planning Note and Query: Although this rule remains in effect, since the penalty periods will not begin to run on the date of transfer under the new Deficit Reduction Act of 2005 it would seem that this rule will have less of an impact. Furthermore, under the new 5 year look back rule it would seem that serial transfers would not be as big of a problem. For example, if an individual made three consecutive monthly transfers on the 61st month it

would seem that the first transfer is protected as it is clearly beyond the 5 year look back period?

Planning Note: An outright transfer of the home will not result in the loss of a step-up in basis because of the implied life estate rules of IRC § 2036. Estate of Guynn, 437 F.2d 1148 (4th Cir. 1971); Rev. Rul. 70-155; Estate of Maxwell, 98 T.C. 39 (1992); and transfers to properly designed irrevocable grantor trusts will also insure the step up in basis and you would not have to give the home to the children.

3. Pension Plans:

An IRA and a Keogh plan are considered countable assets in their entirety less the amount of any penalty for early withdrawal unless the Keogh plan was established for employees other than the spouse of the applicant or member. 130 CMR 520.007(C)(2). In such a case, the Keogh is not counted as an asset.

A pension plan is treated differently. A pension fund that is set aside by an individual's current employer is not countable as an asset. Pension funds from an individual's former employer are countable in their entirety less any penalties for withdrawal, provided such funds are accessible. As such, even though a pension plan would start out initially as a noncountable asset, the institutionalized individual would no longer be considered currently employed and therefore the pension would move from a fund set aside by the individual's current employer to funds from an individual's former employer and therefore would become countable. 130 CMR 520.007(C)(2).

4. Life Insurance Policies:

With the expanded estate recovery rules being effectively repealed, practitioners, when dealing with life insurance, should simply direct their attention to Medicaid Regulation 130 CMR 520.007(E). This Regulation simply indicates that, in the event there is a life insurance policy in place with a face value that exceeds $1,500, then the total cash surrender value of the policy as of the date of admission to a nursing home is considered a countable asset. With regard to term insurance, since it does not have a cash surrender value, this would be deemed a non-countable asset. In addition, term insurance would have a designated beneficiary and avoid probate, thereby avoiding the recently reenacted probate estate recovery provisions.

5. Transfers of Jointly Held Resources:

The Division will determine the amount of the nursing facility resident's ownership interest of jointly held resources as defined in 130 CMR 515.001 in accordance with the ownership rules at 130 CMR 520.005. The Division will consider as a transfer any action taken by any person that reduces or eliminates the nursing facility resident's ownership or control of the resource. The Division will then determine whether the transfer was made at less than fair market value in accordance with the transfer rules.

6. Determining Joint Ownership of Assets Other Than Bank Accounts:

Assets owned exclusively by an applicant or member and the spouse are counted in their entirety when determining eligibility for MassHealth. 130 CMR 520.005(A) Any asset, other than a joint bank account, jointly owned by two or more individuals, is presumed to be owned in equal shares and counted proportionately, unless a different distribution of ownership is verified or unless the assets are being assessed in accordance with 130 CMR 520.016 (in a case in which a couple's assets are being counted to determine eligibility for one spouse who is institutionalized). 130 CMR 520.005(B).

7. Joint Bank Accounts:

When the applicant or member is a joint owner of a bank account, the entire amount on deposit is considered available to the applicant or member, except when assessing assets in accordance with 130 CMR 520.016. If the applicant or member claims partial ownership of the funds in the joint account, he or she must verify the amount owned by each joint depositor. When such a partial ownership is verified, the countable value of the assets is attributed to each owner in proportion with the ownership interest. 130 CMR 520.005

8. Income Only Discretionary Trusts:

Regulations 130 CMR 520.021 through 130 CMR 520.023, explains how to treat the principal of and payments from a revocable or irrevocable trust established by the individual or by the spouse for trusts created before August 11, 1993. Regulation 130 CMR 520.022, below, explains how to treat the assets and expenses of a trust or similar legal device created before August 11, 1993.

The assets and income of an individual or spouse in a revocable trust are countable. (Emphasis added.) The fair market value of the home or former home of the nursing facility resident or spouse in a revocable trust is a countable asset. Where the home or former home is an asset of the trust, the home or former home is not subject to the exemptions of 130 CMR 520.007(G)(2) or 130 CMR 520.007(G)(8). 130 CMR 520.022(A)

9. Medicaid Qualifying Trusts:

A Medicaid qualifying trust is a revocable or irrevocable trust, or similar legal device, created or funded by the individual or spouse, other than by Will, under which:

A. the individual is a beneficiary of all or part of the discretionary or required payments or distributions of the trust; and

B. a trustee or trustees are permitted to exercise any discretion to make payments or distributions to the individual.

The maximum amount of payments or fair market value of property that may be permitted under the terms of the trust to be distributed to the individual, assuming the full exercise of

discretion by the trustee or trustees for the distribution of the maximum amount of the individual, is countable in the determination of eligibility. 130 CMR 520.022(B)(2)

Planning Note: This is the provision, which gave rise to income only discretionary trusts.

In an income only discretionary trust, the individual establishes an irrevocable trust, which provides that only income is either payable without discretion or payable in the discretion of the trustee. No distributions of principal are permitted. In such a case, income would be considered a countable asset but the principal would not. The principal would be considered inaccessible and therefore a completed transfer would be deemed to have been made with respect to the principal on the date of transfer to the trust.

10. Trust or similar legal device created on or after August 11, 1993:

The following rules apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by Will. (Emphasis added.) Generally, resources held in a trust are considered available if, under any circumstances described in the terms of the trust, any of the resources can be made available to the individual. 130 CMR 520.023

Planning Note: A typical by-pass trust will be a countable asset of a surviving spouse if the trust was funded before death.

11. Irrevocable Trusts / Portion Payable:

Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset. 130 CMR 520.023(C)(1)(a)

Planning Note: The transfer of assets into an income only discretionary trust is subject to a 60- month look back period rather than a 36 month look back period.

> "The look back period is 60 months for the following trusts:
>
> (a) where payments are made from a revocable trust to other than the nursing facility resident and are not for the benefit of the nursing facility resident; and
>
> (b) where payments are made into an irrevocable trust where all or a portion of the trust principal or the income from the principal cannot, under any circumstances, be paid to or for the benefit of the nursing facility resident." 130 CMR 520.023(A)(2)(a), (b).

Planning Note: Expanded estate recovery rules, although no longer in effect, were in place long enough to test the benefits of these income only irrevocable trusts. An individual who had been on Medicaid for three years, but had established an irrevocable income only trust and had transferred to it rental property worth approximately $1,000,000, died in 2003 during the period in which these expanded estate recovery rules were in effect. The result was that the assets inside the income only trust were completely protected. We have included in your materials an article entitled "*Medicaid Income Only Trusts Prevail*

Against Expanded Estate Recovery Rules." Therefore, if these trusts can prevail against expanded estate recovery rules, it would stand to reason that they would most certainly be a successful planning tool in a probate estate recovery world.

In a recent article, "Get Medicaid Without Giving Up the Farm," Sandoval, Dennis M., Trusts & Estates, July, 2003, p.29, it was stated:

> "For states that have extended their recovery abilities to non-probate assets, recovery would be limited to the value of the client's income interest in the trust as of the date of his death."

CHANGES TO THE TREATMENT OF MARRIED COUPLES ASSETS WHEN ONE SPOUSE IS INSTITUTIONALIZED

1. Recent law change effecting the calculation of the Community Spousal Resource Allowance CSRA effective July 1, 2006:

   If a spouse is institutionalized, all of the couple's assets initially are considered countable but, from the couple's combined countable assets, the DMA must attribute to the community spouse an asset allowance. As of January 1, 2006, the asset allowance was $99,540. The state legislature has recently overrode Governor Romney's veto and have voted to go back to allowing the community spouse the maximum asset resource allowance. The new calculation will provide in determining the community spouse's asset allowance, that the first $99,540 of assets will be attributed to the community spouse. This new rule and related calculation will be effective July 1, 2006. The new community spousal resource allowance is $109,560 effective January 1, 2008. However, new regulations were issued as of July 1, 2006 showing the calculation change but still have the old amount. It is important to note that this community spousal resource allowance is generally increased each November.

2. Increasing the Community Spouse's Asset Allowance:

   The amount of the community spouse's asset allowance is now determined by allocating assets to the community spouse until such spouse has no more than $109,560. This amount can be increased if the income of the community spouse is less than the minimum monthly maintenance needs allowance, currently $1,750 per month and only after the institutionalized spouses income has been shifted to the community spouse, but such increase will not be more than the maximum monthly maintenance needs allowance of $2,739 per month.

   To obtain an increase in the community spouse's asset allowance, after the institutionalized spouse has applied for MassHealth and has received a notice of denial, either spouse may appeal for "an adjustment" to the asset allowance. 130 CMR 520.017(A). The purpose of the adjustment was to hypothetically determine how much in assets are needed to generate sufficient income as determined by the DMA so the community spouse can remain in the community.

3. Minimum Monthly Maintenance Needs Allowance:

The minimum monthly maintenance needs allowance is the amount needed by the community spouse to remain in the community. This amount is based on a calculation that includes the community spouse's shelter and utility costs in addition to federal standards. The procedure is set forth in 130 CMR 520.017. If either spouse claims that the amount of income generated by the community spouse's asset allowance, as determined by the DMA, is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, the hearing officer must determine the gross income available to the community spouse.

Under prior law, this amount was determined by reference to the community spouse's income only. Under the new Regulations, the institutionalized spouse's income must first be attributed to the community spouse's income prior to any authorization to increase the community spouse's asset allowance in order to determine the amount of the adjustment. The hearing officer must include the amount of the income that will be generated by the spouse's asset allowance if the asset allowance were invested in an account and generated income equal to the highest rate quoted in the bank rate monitor index as of the hearing date. (This amount is the 2 ½ year CD rate.) See generally, 130 CMR 520.017(A) et seq.

4. Increase the Community Spouse's Gross Income:

If the community spouse's gross income is less than the minimum monthly maintenance needs allowance, then the fair hearing officer must allow an amount of income from the institutionalized spouse (after the personal needs deduction of $72.80) that would increase the community spouse's total income to equal, but not exceed, the minimum monthly maintenance needs allowance. If, but only if, after the fair hearing officer has increased the community spouse's gross income as hereinbefore provided, the community spouse's gross income is still less than the minimum monthly maintenance needs allowance, then the fair hearing officer will increase the community spouse's asset allowance by the amount of additional assets that, if invested in a 2 ½ year CD, at the average rate quoted in the bank rate monitor index as of the hearing date, would generate sufficient income to raise the income total to the minimum monthly maintenance needs allowance.

Example 4:

Husband and wife own a home worth $300,000 and have countable assets of $300,000 for a total of $600,000. Husband is age 80 and wife is age 76. Husband has $1,200 in combined social security income and pension while the wife has social security income of only $500 and no pension. Husband is about to be admitted to a nursing home. Assume the Bank Monitor Rate for a 2 ½ year CD is 2.50%.

Planning Opportunities:

(1) Transfer the home to the community spouse and simultaneously have the community spouse sign a new Will disinheriting the husband.

Planning Note: The transfer of the home to the community spouse is a permitted transfer under Regulation 130 CMR 520.019(D)(6).

(2) Have the community spouse purchase an annuity with so-called "excess" resources or apply for MassHealth and appeal for an increase in the community spouse's asset allowance.

Since the combined total of countable assets of the institutionalized spouse and the community spouse exceeds $109,560 that constitutes the community spouse's asset allowance, as the new rule requires that the first $109,560 of assets be used to make up the CSRA. The institutionalized spouse is permitted to retain $2,000 so that a total of $111,560 is protected. In this case, there would be $188,440 of excess resources, which, generally must be spent on nursing home care in the absence of further planning.

In the first option, the $188,440 can be transferred to the community spouse whereupon the community spouse could purchase an immediate annuity. Provided the annuity payments do not last longer than the life expectancy of the community spouse, and all other annuity requirements have been met, the purchase of the annuity would not be considered a disqualifying transfer and the husband would be eligible for Medicaid immediately. (130 CMR 520.007(J)(1) and (2))

Planning Note: It is important to note that, since the expanded estate recovery provisions have been repealed, this annuity option is once again a valid and accepted last minute Medicaid planning tool. However, it is important to note that, this technique should still remain an effective planning tool even if the remainder beneficiary must be the state under the new Deficit Reduction Act of 2005 as the state can only get the balance of such and annuity if the community spouse receives MassHealth benefits prior to dying. This technique would provide protection for at least the healthy spouse and if the annuity period used is as short as possible it may provide protection for the children as well. This short period would allow for the funds to be reconveyed to the community spouse quickly and then planned for properly. Remember, the only limitation when using this annuity technique is that the payouts not be longer than the individual's life expectancy. There is no mention of how short a time the payment period can be. Finally, a private annuity can be used as well as a commercially sold annuity and, when using a private annuity, it is important to note that no interest payments are required to make the annuity valid.

Planning Note: It is also important that when having the healthy spouse purchase an annuity that it not be purchased until after the institutionalized spouse has been admitted to the nursing home and the amount of countable assets has been determined under Regulation 130 CMR 520.016(B)(1)(a), otherwise you may end up with less than the full community spousal resource allowance for the healthy spouse.

Another option would be to combine the community spouse's income ($500) with the spouse's minimum monthly maintenance needs allowance $1,750. This amount may be increased to the maximum monthly maintenance needs allowance of $2,739 per month. Let's assume that there is no ability to increase the amount from minimum

monthly maintenance needs allowance to the maximum monthly maintenance needs allowance. In this case, under the old law, all of the couple's assets would be protected without the need for an annuity determined as follows:

I. Initial Computation

MMMNA	$1,750
Community Spouse Income	$ 500
Shortfall	$1,250

II. Determine Income From Initial Asset Allowance

$109,560 x 2.5% = $2,739 ÷ 12 =	$228.25 per month
Shortfall	$1,021.75

III. Determine the Hypothetical Income Generated by Excess Resources

$188,440 x 2.5% = $4,711 ÷ 12 =	$352.58 per month
Shortfall	$669.17

Attributing part of the institutionalized spouse's income to the community spouse can make up the shortfall.

Under the new rule, income is attributed first before assets with devastating consequences. In this case, none of the so-called countable assets would be attributed to the stay at home spouse. The only option would be for the community spouse to purchase a commercial annuity or undertake a private annuity with respect to the excess resources. The real problem with this rule is that if the institutionalized spouse dies and a portion of his pension expires with him, then the community spouse will be without the assets that went to the nursing home and without the required income.

Planning Note: This new "income first" rule will be effective for all fair hearings on or after September 1, 2003.

Planning Note: In Robbins v. DeBuono, 218 F.3d 197 (2nd Cir. 2000), the United States Court of Appeals for the Second Circuit ruled that New York's income first policy violated the anti-alienation provisions of the Social Security Act. **NO MORE CONFUSION FOR MASSACHUSETTS**: BIANCONI v. PRESTON followed the Supreme court's ruling in Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler which ruled that income deeming by Massachusetts does not violate the said anti-alienation provisions.

Planning Note: It is extremely important for the community spouse to transfer all of the assets that are allocated to the community spouse as part of the community spouse's asset allowance, no later than 90 days immediately after the date of the notice of approval. During the 90-day period, the DMA will exclude these assets in the determination of

continuing eligibility; and will not apply any transfer rules to the assets transferred to the community spouse. 103 CMR 520.016(3)(B)(ii). If the assets are not transferred within the 90-day period, the DMA will count all assets that remain in the institutionalized spouse's name in determining his or her eligibility. 130 CMR 520.016(3)(e).

6. Effect of an inheritance received by an institutionalized spouse already receiving MassHealth benefits:

When an individual currently eligible for MassHealth benefits receives an inheritance, the immediate effect would be to disqualify such individual from MassHealth benefits. However, if there is a community spouse still living, you would not need to consider the asset shift calculation described above, but, instead, could simply transfer an unlimited amount of the inherited money to the community spouse. The result of such transfer would make the institutionalized spouse once again immediately eligible for MassHealth benefits.

Let's review the applicable Medicaid regulations. Regulation 130 CMR 520.009(E) states that a lump sum payment is a one time only payment that represents either win-fall payments (such as inheritance or legacies) or the accumulation of reoccurring countable income (such as retroactive unemployment compensation or federal veterans retirement benefits). Generally, lump sum payments are counted as unearned income in the calendar month received and as an asset in subsequent months, except as provided in 130 CMR 520.009(E)(1), which is marked "exceptions." It is important to note that inheritance does not fall under one of the exceptions. Therefore, an inheritance will be considered either unearned income in the calendar month or a countable asset in subsequent months.

MassHealth Regulation 130 CMR 520.019(D)(1) is entitled "permissible transfers" and indicates that resources transferred to the spouse of a nursing facility resident or to another for the sole benefit of the spouse, is considered a permissible transfer, which would not result in the creation of an ineligibility period for Medicaid benefits for the transferor.

Finally, MassHealth Regulation 130 CMR 520.016(B)(1) entitled "treatment of a married couple's assets when one spouse is institutionalized," indicates that the Division is required to complete an assessment of a total value of a couple's combined countable assets and compute the spousal share as of the date of the beginning of the most recent continuous period of institutionalization of one spouse. It is important to note that, just because an individual receives an inheritance and is disqualified for MassHealth benefits, does not mean that they have broken the most recent continuous period of institutionalization.

In other words, provided the institutionalized spouse does not leave the institution after the completion of the assessment of their countable assets, they will no longer be considered married for purposes of this regulation. However, they will still be considered married for purposes of MassHealth Regulation 130 CMR 520.019 permissible transfers. Therefore, when these statutes are read together, it translates into enabling the institutionalized spouse to make a transfer of the inheritance to the community spouse and have such transfer qualify under the permissible transfer regulation, thereby resulting in no ineligibility period for the institutionalized spouse.

The real benefit of this apparent loophole is that, by not having to comply with the asset shift calculation rules mentioned above, there is no limit on the amount of assets that may be transferred due to the inheritance. In other words, an individual can inherit $600,000 and transfer the entire amount to the community spouse the very next day and, in essence, never really lose Medicaid eligibility, for the institutionalized spouse.

***Planning Note*:** It is important to note that an individual is not considered in receipt of an inheritance on the date of the decedent's death, but, instead, must wait until the individual actually receives a distribution from the estate.