

## **Guidance on Exemptions from Title 5 System Inspections for Certain Inter-family Transfers of Residential Property**

### **Background**

Beginning with the 1995 revisions to 310 CMR 15.000 (“Title 5”), septic systems must be inspected at the time of transfer of title to the facility served by the system. The requirements for such system inspection are set forth in 310 CMR 15.301. This section of Title 5 includes an identification of transactions or other circumstances that do not require a system inspection at the time of property transfer [see 310 CMR 15.301(2) and (4)] and the applicability of the system inspection requirement to a range of specific transfers of title [see 310 CMR 15.301(3)(a) through (i)].

Effective July 1, 2004, the Massachusetts Legislature amended the statute authorizing MassDEP to promulgate Title 5, Massachusetts General Laws Chapter (M.G.L. c.) 21A, s.13, to exempt additional inter-family transfers of residential property from the requirement that the systems serving such properties be inspected at the time of transfer of ownership. Thus, these statutory exemptions have been in place since July 1, 2004. MassDEP has also incorporated these new exemptions into its most recent set of revisions to Title 5, effective April 21, 2006, at 310 CMR 15.301(4)(d).

These four (4) new statutory exemptions are set forth below, together with MassDEP’s guidance on the meaning and scope of the exemptions and their applicability to specific circumstances.

### **The Statutory Exemptions**

Effective July 1, 2004, M.G.L.c. 21A, s.13 provides in pertinent part:

“[MassDEP] shall not require an inspection of a system for the treatment and the disposal of sanitary sewage below the ground surface if the transfer is of residential property, and is between the following relationships:

- (1) between current spouses;
- (2) between parents and their children;
- (3) between full siblings; and
- (4) where the grantor transfers the real property to be held in a revocable or irrevocable trust, where at least one of the designated beneficiaries is of the first degree of relationship to the grantor.”

MassDEP has interpreted the scope and meaning of the above exemptions as follows:

- **The exemption from system inspection applies to transfers of *residential* property only.**

In order to qualify for the exemption, the facility served by the system must be residential in character. This means that the property has to be used as a residence by the family members involved in the transfer (e.g., by the parents originally and by the child when the property is transferred to him or her).

Scenarios eligible for the exemption include, but are not limited to: (1) the transfer of a family vacation home from the parents to their children (and jointly to their children's spouses), or between full siblings (and jointly to their spouses); or (2) the transfer of a two family house from a parent to a child who will continue to use the home as a residence, even if the child rents out a portion of the house to tenants.

The exemptions do *not* apply to situations where the property, while residential in character (e.g., an apartment complex or a condominium), is owned for business purposes and has not and will not be used as an actual residence by family members. MassDEP considers these situations to be transfers of commercial or investment property that are subject to system inspection at the time of transfer, unless otherwise exempted under 310 CMR 15.301.

- **The exemption from system inspection applies to transfers of residential property between *current* spouses.**

The language of the exemption make clear that the property transfer must be between "current" spouses. Transfers of residential property from one spouse to the other for estate planning purposes or as part of a divorce settlement or related court order are also covered under the exemption.

- **The exemption from system inspection applies to transfers of residential property between *parents and their children*.**

Transfers of residential property between parents and "their children" are exempt. In comparison to the language of the exemptions applying to transfers between "current" spouses and between "full" siblings, this exemption uses the more general terms "parents" and "their children". MassDEP interprets the words "their children" to encompass any biological children of the parents, any adopted children of the parents, and/or any stepchildren of the parents. Thus, the exemption applies whenever there is a transfer of residential property between parents and their biological children, adopted children, and/or stepchildren. In addition, the exemption still applies if the property transferred from the parent(s) is held in joint ownership of the child and his or her spouse.

- **The exemption from system inspection applies to transfers of residential property between *full* siblings.**

Consistent with the express, limiting language of this exemption, the transfer of residential property must be between *full* siblings – that is, between brothers and/or sisters of the same two parents. While the exemption would apply to a transfer between a sibling who is the biological child of the same parents and a sibling who is the adopted child of the same parents, it does *not* apply to transfers between half siblings who share only one of the same biological parent.

- **The exemption from system inspection applies to transfers of residential property to a revocable or irrevocable *trust*, where at least one of the designated beneficiaries is of *the first degree of relationship* to the grantor.**

This exemption applies the transfer of residential property by any property owner to a revocable or irrevocable trust, provided at least one of the beneficiaries of the trust is of *the first degree of relationship* to the property owner who granted the property to the trust.

A trust is a legal instrument that authorizes real or personal property to be held by one party (the trustee) for the benefit of another (the beneficiary). The party who owns and transfers the property to the trust is called the grantor. The trustee is the party that holds legal title to property” in trust” for the beneficiaries. A “revocable” trust can be terminated at the discretion of the grantor. An “irrevocable” trust cannot be terminated at the discretion of the grantor.

As explained below, “first degree of relationship” means the relationship between a parent and their biological or legally adopted child. Under Massachusetts probate law, the system for determining the order of succession when distributing property to family members is based on the “degree of kindred,” which is used interchangeably with the Title 5 statutory term “degree of relationship” when referring to the above system. Thus, the “first degree of kindred” and the “first degree of relationship” both mean the relationship between a parent and their child. Additionally, under Massachusetts probate law, a legally adopted child is treated as if they had been born to their adopting parent. For these reasons, MassDEP believes that it is appropriate to interpret “first degree of relationship,” in the context of the above Title 5 system inspection exemption, as including a parent and their legally adopted child.

Accordingly, this exemption allows a transfer to a trust that may include beneficiaries that have no family connection to the grantor, provided that one of the beneficiaries is either the biological or legally adopted child of the parent/grantor, or, conversely, one of the beneficiaries is the parent of their biological or legally adopted child/grantor. However, because the language of this statutory exemption is so specific on this point, the exemption does *not* apply

to situations where the only “family” related beneficiary is a stepchild or, conversely, a stepparent beneficiary of the stepchild/grantor.

### Questions and Answers

**Q. Is a system inspection required when parents transfer ownership to their child of an apartment building that has been used by the parents as a source of income rather than as their personal residence?**

A. Yes, a system inspection is required because the above scenario does not constitute an exempt inter-family transfer of *residential* property. The apartment building has been used by the parents as a source of income rather than as a personal residence. Accordingly, while the property is used by others for residential purposes and is being transferred from the parents to a child, it is not exempt from a system inspection because it is an inter-family transfer of *commercial* or *investment* property.

**Q. The parents intend to transfer ownership of their home to their child. The parents use the home as their personal residence, but also rent out a portion of the house to tenants. The child also intends to use the home as their personal residence and rent out a portion of the house to tenants. Is a system inspection required?**

A. No. A system inspection is not required in the above scenario because the property has been used by the parents as a residence and is being transferred to their child who will also use it as a residence. MassDEP would still consider it to be an inter-family transfer of *residential* property. The fact that the parents have and their child will rent out a portion of the house for income purposes does not make it the property commercial in character. The key is that the home has and will be used as a personal residence by family members.

**Q. Is a system inspection required if, in transferring residential property from parents to a child, the child will hold the property in joint ownership with his or her spouse?**

A. No, a system inspection is not required. MassDEP still considers the above scenario covered by the exemption applicable to transfers of residential property between parents and their children, even though the child’s spouse will be a joint owner of the property.

**Q. One spouse is transferring his or her ownership interest in the residential home to the other spouse pursuant to a divorce proceeding. Is a system inspection required?**

A. No. A system inspection is not required. Even though the transfer arises out of a divorce, it still constitutes a transfer of spousal property. However, if subsequent to the final divorce, an ex-spouse transfers residential property to his or her ex-spouse, and such transfer of ownership is not pursuant to a court order or settlement agreement arising out

of the original divorce proceeding, such transfer is not considered one between “spouses” and would require a system inspection.

Please note that under 310 CMR 15.301(2)(d) the following transactions between spouses are not considered property transfers and do *not* require a system inspection:

- adding or deleting a spouse as an owner or beneficiary;
- a transfer between spouses during their life times, out right or in trust; or
- the death of a spouse.

**Q. Is a system inspection required when a parent transfers residential property to an adopted child or to a stepchild?**

A. No system inspection is required in either case. Transfers of residential property between parents and “their children” are exempt. MassDEP interprets the words “their children” to encompass biological children, legally adopted children, and/or stepchildren of the parents.

**Q. Is a system inspection required when a grandparent transfers residential property to a grandchild?**

A. Yes, a system inspection is required. Transfers of residential property between parents and their children are exempt. Transfers of residential property between *grandparents* and their *grandchildren* are not covered by that exemption or by any other of the above described inter-family exemptions.

**Q. Does the exemption applicable to transfers of residential property between full siblings cover transfers between half siblings?**

A. No, the exemption does not apply. A transfer of residential property between half siblings would require a system inspection. Unlike the more broadly stated exemption applicable to transfers between parents and “their children,” the language of this exemption is more narrow in scope. The transfer of residential property must be between *full* siblings – that is, between brothers and/or sisters of the same two parents. Given this express qualification in the statute, it cannot be reasonably read to cover transfers between half siblings.

**Q. Is a system inspection required if a parent transfers residential property into a trust that has as beneficiaries a child of the parent but also business associates of the parents?**

A. No, a system inspection is not required, provided the child beneficiary is of *the first degree of relationship* to the parent/grantor – that is, he or she is the biological or legally adopted child of the parent/grantor. Because of this express qualification, the

exemption would *not* apply if the only family-related beneficiary was a stepchild of the parent/grantor. In addition, the property being transferred must be residential in character, meaning that it has been used by the parent/grantor as a residence and will also be used as a residence by the child beneficiary.