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Long Term Care For Senior Veterans

Since its establishment in 1930, the Department of Veterans Affairs has evolved to supporting and aiding the nation's veterans in numerous ways. One of these services for example, the Veterans Health Administration, is the largest single provider of medical care in the United States. Its 22 regions with 154 hospitals and their associated 875 outpatient clinics offer many different types of services, including hospital, outpatient medical, dental, pharmacy and prosthetic services, and nursing home, and community-based residential care. The Department of Veterans Affairs provides three types of long term care services for veterans.

The first are health care benefits provided to veterans who have service-connected disabilities, who are receiving VA Pension or who are considered low income. These services include free medical care, possible free prescription drugs, orthotics and prosthetics, home renovation grants for disabilities, home care, assisted living, domiciliary care, nursing home care, and a possible host of other services or benefits.

The second benefit is state veterans homes. The majority of these homes offer nursing care but some may offer assisted living or domiciliary care. The Department of Veterans Affairs in conjunction with the states helps build and support state veterans homes. Money is provided to help with construction and a federal subsidy of \$72.71 a day is provided for each veteran using state veterans nursing home services. These homes are generally available for most veterans and sometimes their spouses and in some cases for so-called "Goldstar parents." Veterans homes are run by the states, sometimes with the help of contract management. There may be waiting lists in some states.

The third benefit for veterans is disability income programs. The most familiar of these benefits is an income for service-connected disabled veterans called "Compensation." The least known of these is a program officially called "Pension" but popularly known as the "aid and attendance benefit."

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- All active-duty veterans who served at least 90 days during a period of war are eligible for Pension and the additional income from aid and attendance or housebound allowances. A single surviving spouse of such a veteran is also eligible.
- All qualifying veteran applicants over the age of 65 are eligible for pension but must meet income and asset tests. Applicants under the age of 65 must in addition be totally disabled to qualify. Disability does not have to be service-connected.
- A surviving spouse can be any age and there is no need for disability.

The aid and attendance benefit can pay additional income to provide for the costs associated with home care, assisted living, nursing homes, adult day care and other unreimbursed medical expenses. It can also pay for a family member other than a spouse to be the care giver. The amount of payment varies with the type of care, recipient income and the marital status of the recipient. Here are some examples of how this benefit can help veterans.

Example #1

A woman had been juggling her job and caring for her father in her home for over five years. She had just lost her job and with no income, did not know how she would keep her home or give her father the care he needed. A member of the family – not including a spouse – can be paid through VA to provide care for a loved one at home who is either a war veteran or the surviving spouse of a war veteran. Her father is a war veteran. When told that she could get an additional \$1,644 a month through her father by providing her father's care she was shocked. She found out about the benefit and realized it would help her keep her home and her father may probably get a check for her retroactive previous care from VA worth tens of thousands of dollars.

Example #2

A mother is 89 years old and has been in assisted living for four years. As a widow of a veteran she did not qualify

for the Aid & Attendance Pension 4 years ago because her assets were too high. In the meantime she has been using up her assets along with her income to pay for the assisted living. The local veteran's service office has not been helpful in getting this claim approved even though she had reached the allowable asset limit over two years ago. The family was considering putting her in a less desirable facility under Medicaid. The family knew this would be devastating for their mother. Her health was still good and she had many friends and comforts at the assisted living.

She called a more cooperative veterans service office that will submit the claim and likely get it approved retroactively so that this woman can get a check for roughly \$40,000 worth of previous care costs for which she was not reimbursed. In addition, she will likely get the full benefit of \$1,056 a month to help pay the cost of the assisted living where she is happy.

These types of claims require medical evidence in order to receive a rating for aid and attendance or housebound allowances. These ratings must be received or certain non-medical expenses associated with long term care are not deductible from income. Special rules also allow for deducting the annual anticipated cost of month-to-month long term care from household income in order to meet the income test. This special treatment requires special documentation and evidence. In addition, those households with substantial assets will be denied for a Pension income unless those assets are below a certain level determined for each case by VA. The personal residence, personal vehicles and personal property are exempted from this asset test. Finally, evidence must be supplied every year in January that the anticipated costs for the previous year were actually incurred or VA will likely demand for its money back.

Veterans who have substantial assets may need to do some estate planning and realigning of assets to qualify. An expert in this area should be sought to help with the application in order to avoid lengthy delays in awarding a benefit or a possible denial of benefits. Give us a call and we can help. Call 860-594-7995.

Annuity Purchase by Community Spouse Upheld in Federal Appeals Court Decision

In a much-anticipated decision, the Third Circuit Court of Appeals has affirmed a U.S. district court ruling allowing a community spouse to purchase an annuity to protect savings from the costs of her husband's nursing home care. *Weatherbee v. Richman* (3d Cir., No. 09-1399, Nov. 12, 2009).

When her husband entered a nursing home, Adeline A. Weatherbee purchased an annuity for approximately \$400,000 that complied with the requirements of the Deficit Reduction Act of 2005 (DRA). The annuity paid

her \$4,423 a a month in income. Her husband then applied for Medicaid to help pay for the cost of his care.

The Pennsylvania Department of Public Welfare denied the requested benefits, taking the position that under the DRA and Pennsylvania law, the \$4,423 in monthly payments Mrs. Weatherbee received was an available resource that she could sell. Thus, DPW argued, Mrs. Weatherbee had too much in the way of resources for Mr. Weatherbee to qualify for Medicaid with his nursing home costs.



The U.S. District Court for the Western District of Pennsylvania rejected DPW's arguments and precluded it from denying the requested benefits. The court found that DPW's interpretation of the DRA was unreasonable, writing that the provision of the DRA upon which DPW was relying to deny eligibility "is unambiguous and does not support DPW's reading of it."

In addition, the district court found that the Pennsylvania statute upon which the DPW relied in treating the income from an otherwise compliant annuity as an available resource is inconsistent with the treatment of annuities under the Medicaid Act. Thus, section 441.6(b), which attempts to void anti-assignment provisions in annuities, is preempted by the Medicaid Act. DPW appealed.

The Third Circuit Court of Appeals fully affirmed the district court's decision.

Since 1994, federal law has allowed a community spouse to purchase a properly structured immediate annuity in order to accelerate qualification for Medicaid and protect assets from the cost of long term care. Although states are supposed to follow federal law, officials at the DPW have nevertheless long attempted to prevent or discourage this type of Medicaid planning. These attempts have failed. Six separate federal and state courts have now considered the legality of the various procedures used by DPW to limit community spouse annuity purchases. Every one of these courts has found that the DPW limitations violate federal law.



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2009 Rates for Long Term Care Costs and Assisted Living

Each year, MetLife publishes a detailed report on average costs for various types of long term care, including care provided in nursing home and assisted living facilities, home care, and adult day care. Here are highlights from the 2009 report:

Daily private-pay rates for long-term (custodial) nursing home care were obtained for private and semi-private rooms in licensed facilities throughout the United States. National average rates for a private room increased by 3.3% from \$212 daily or \$77,380 annually in 2008, to \$219 daily or \$79,935 annually in 2009. National average rates for a semi-private room increased by 3.7% from \$191 daily or \$69,715 annually in 2008, to \$198 daily or \$72,270 annually in 2009. This compares to an average semi-private room rate in Connecticut of \$340. Don't weep: Alaska retains its top spot at \$618/day but Connecticut, unfortunately, retains its #2 ranking at \$340/day. If you want to save money you can try Arkansas (\$128/day) or Louisiana (\$130/day).

Assisted living communities had monthly private-pay base rates, which are defined as room and board (and typically include at least two meals per day, housekeeping, and personal care assistance), for one-bedroom apartments or private rooms with private baths. National average assisted living base rates increased by 3.3%, from \$3,031 monthly or \$36,372 annually in 2008, to \$3,131 monthly or \$37,572 annually in 2009.

Hourly rates were obtained for home health aides from licensed agencies and for agency-provided homemaker/companion services. The 2009 national average hourly rate for home health aides increased by 5.0% from \$20 in 2008 to \$21 in 2009. The national average hourly rate for homemaker/companions increased by 5.6% from \$18 in 2008 to \$19 in 2009. Daily rates were obtained for adult day services. Adult day services national average daily rates increased by 4.7% from \$64 in 2008 to \$67 in 2009. Rates varied greatly, both locally and statewide. However, it is important to note that licensure requirements and other regulations vary from state to state and this will account for some of these rate differences.

For a full copy of the report you can go to:

<http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-market-survey-nursing-home-assisted-living.pdf>

Health care is not cheap and is not projected to lessen over time.

Daughter's Challenge to Mother's Capacity Does Not Violate Trust's No Contest Clause

The Supreme Court of California holds that a daughter's challenge to her mother's mental capacity to exercise powers under a family trust did not amount to an attack on the trust that would trigger the no contest clause. *Johnson v. Greenelsh* (Cal. No. S166747, Oct. 29, 2009).

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In 1993, Walter and Florence Warren created the Warren Family Trust, naming themselves and their two children, William Warren and Kathryn Greenelsh, as co-trustees. Both children and Florence's son by a previous marriage, Robert Johnson, were named as remainder beneficiaries of the trust, which also contained a no contest clause barring distribution to any beneficiary who sought to set aside the trust or its provisions.

After William's death in 2003, Florence resigned as co-trustee and appointed her son Robert from her prior marriage as her successor co-trustee. She then exercised a right under the trust to withdraw trust property for distribution to herself. Ms. Greenelsh, believing that her mother lacked the mental capacity to appoint Robert as her successor trustee or to withdraw trust funds, applied to the probate court for a determination as to whether a proposed petition to compel Robert to arbitration to address the dispute would violate the no contest clause. Mr. Johnson opposed the petition and the petition was eventually denied by the court without prejudice.

Ms. Greenelsh subsequently sought a declaratory judgment that she was the sole trustee of the family trust. Mr.

Johnson countered that the request violated the no contest clause by attempting to invalidate the provisions in the trust that gave Mrs. Warren the right to appoint a successor trustee. The probate court agreed with Mr. Johnson and denied the petition. Nevertheless, Ms. Greenelsh served a notice of arbitration on Mr. Johnson, to which he responded by petitioning the probate court to enforce the no contest clause, asserting that Ms. Greenelsh violated the clause by initiating arbitration to set aside his appointment and the withdrawal of the trust assets. The court granted Mr. Johnson's petition and Ms. Greenelsh appealed. An appeals court affirmed, finding that the arbitration initiated by Ms. Greenelsh directly attacked provisions in the trust in an attempt to change Mr. and Mrs. Warren's testamentary plan and thus violated the no contest clause. Ms. Greenelsh appealed again.

The Supreme Court of California reverses. Analogizing to cases in which a settlor withdrew trust assets as a result of fraud, duress or mistake, the court holds that Ms. Greenelsh's challenge to her mother's mental competence to appoint a successor trustee and to withdraw trust assets does not amount to an attack on the trust itself, which would trigger the no contest clause.

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