

# The ElderCounselor

"Helping Seniors and Families Find Solutions"

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## A Review of Important Elder Law Stories From 2013

A Very Happy New Year! 2013 was an important year for news that affected our senior, Veteran and disabled populations. Many stories affecting these groups made national headlines. This edition of The ElderCounselor will review some of the top stories that made headlines in 2013 and why they may continue to do so in 2014.

### The DOMA Decision

One of the US Supreme Court's highlighted decisions of the year was *US v. Windsor*<sup>1</sup>. This case stemmed from a widow from a same-sex marriage who was denied tax relief under the "Defense of Marriage Act (DOMA)." The Supreme Court determined DOMA to be unconstitutional, ruling in favor of Edith Windsor and striking down the part of the law defining marriage as a union between a man and a woman. The Court noted that the law deprived same sex couples of both rights and responsibilities.

The well-publicized ruling of this case impacted many federal laws which fell under the Act's definition of marriage. The affected federal laws include benefits such as Medicaid, Social Security, housing, food, stamps, tax laws, federal employee benefits and Veteran's benefits. The changes to these laws have already started to impact seniors throughout the country who are in same-sex marriages. Whether there is a change to the individual in a same sex marriage will depend on a few factors. One factor is based on the benefit in question and whether the state in which the individual resides recognizes same-sex marriage. Another factor is whether the couple was validly married in a state that recognized same-sex marriage at the time they got married.

For example, Medicaid will likely not recognize a marriage unless it is being administered in a state that recognizes an otherwise valid same-sex marriage. However, some states do provide hardship protections to a partner of a person in long term care. In some states that recognize civil unions or registered domestic partnerships, Medicaid *may* treat the couple as married. Each state continues to have authority as to whether or not to recognize marriage for same sex couples.

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<sup>1</sup> *US v. Windsor*, 570 U.S. 12 (2013)

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Where the state recognizes a same-sex marriage, however, the impact in terms of Medicaid is great. In regards to Medicaid financial eligibility, the change means an increased allowance of assets from that of a single person (approximately \$2,000) to those of a married couple (up to \$117,920). The sword cuts both ways, though, as Medicaid will consider assets of both parties to the marriage and not just the applicant. Legal counsel can help assess the strategies available to potential Medicaid applicants and their spouses.

### **Affordable Care Act**

We have all been inundated by information regarding the Affordable Care Act (ACA). Regardless of your feelings on the new law, your senior clients will likely be affected by its implementation.

More impactful to the senior population than the individual mandate, are the changes to Medicare, the prohibition against pre-existing conditions clauses, nursing home care changes, changes to community-based long term services and supports, and the funding of the ACA.

#### *ACA and Medicare*

The changes in Medicare include prescription drug coverage that will eventually reach 25% across the board for all prescription drugs. The increase in coverage will be felt by those who spend more than \$2800 per year on prescription drugs. Where there was no coverage by Medicare when the prescription drug expense of an individual was between \$2800 and \$4550, there will eventually be coverage of 25% for all such expenses for those receiving Medicare.

Another Medicare change under the ACA is increased coverage of preventive care. These now-covered services include annual wellness visits, flu shots, tobacco use cessation counseling, cancer screenings, diabetes screenings and screenings for other chronic diseases.

Finally, the ACA's changes to Medicare include a cut to Medicare Advantage Plans. The ACA restricts the options that can be provided by these plans. This may result in fewer choices to seniors and it makes uncertain the future of Medicare Advantage Plans.

#### *ACA and the Prohibition Against Pre-Existing Conditions Clauses*

The ACA's prohibition against pre-existing conditions clauses received a great deal of attention in the news. This part of the law prohibits insurance companies from considering health when one applies for health care coverage. It also prohibits insurance companies from charging varying amounts to individuals based on health, sex, age or other factors. The elderly will benefit from this portion of the law as the risk of insuring them will now be evenly distributed among the entire population, old and young alike.

#### *ACA and Nursing Homes*

Another major change affecting seniors under the ACA concerns nursing homes. The ACA requires the Center for Medicare and Medicaid Services to provide a consumer-friendly website, posting comprehensive information regarding nursing homes. This website is to provide data regarding the nursing home's inspections, complaints and number of violations received. It will also identify the owner of the home and

show expense reports comparing resident care costs versus administrative costs. In addition, the ACA will make it easier to file complaints against a nursing home.

In the event a nursing home decides to close its doors, the ACA has built in protections for residents of the home. The ACA mandates notice far enough in advance that all its residents can relocate. Further, it requires that the home ensure all residents have successfully relocated prior to closing.

There are other parts of the ACA that will potentially benefit those in need of nursing homes as well, including additional federal funding (at the option of the state) to help with background checks of staff.

#### *ACA and Long Term Care Services and Supports*

The ACA provides several options to states to expand home and community-based care under Medicaid. These options will fall largely to the states to exercise and implement.

#### *Funding the ACA*

The portions of funding of the ACA that will be felt by our senior clientele include: the cuts to Medicare Advantage Plans<sup>2</sup>; a surcharge tax of 3.8% to unearned income<sup>3</sup>; an increase in the floor for medical expense deductions from 7.5% to 10% of AGI; and a .9% Medicare payroll tax on high income earners.<sup>4</sup>

#### **Proposed VA Pension Changes**

There have been two bills introduced this past year that would make changes to Veterans pension benefits. The house introduced H.R. 2189 and the Senate introduced S. 944. Both bills propose essentially the same changes. The bills, if passed, will affect wartime Veterans and surviving spouses of wartime Veterans who apply for pension benefits in a number of ways.

First, the proposed law would impose a penalty against the claimant who disposes of property for less than fair market value if that transfer reduces the amount of the claimant's estate. There is currently no penalty if a pension applicant gives away assets and then applies for benefits.

Second, the bill imposes a 36-month look-back period for transfers made prior to the submission of an application. Under this portion of the law, the VA will review the applicant's gifts and other transactions over the past 36 months to ensure no penalties described in the prior paragraph should apply.

Finally, the bill describes transfers to a trust, annuity or other financial instrument or investment as a transfer of an asset. There are exceptions, but the goal appears to be to discourage some Veterans pension planning strategies that currently exist and, according to bill proponents, are being misused.

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<sup>2</sup> The cuts to Medicare Advantage Plans are to be \$145 billion over a ten (10) year period.

<sup>3</sup> This surcharge will be applied to unearned or investment income of singles with an annual income of over \$200,000 and of couples with an annual income of over \$250,000.

<sup>4</sup> High income earners are defined as taxpayers with over \$200,000 in earned income for a single taxpayer and over \$250,000 for families.

There are other aspects of the proposed law that would further affect Veterans, and their spouses, applying for these benefits. However, the bottom line for our senior clientele is that new planning strategies may be required to assist them in obtaining these benefits. We will keep you posted on the progress of these bills. For more information about Veterans pension benefits, please contact our office.

### Conclusion

Several big changes occurred in 2013 that will impact our senior clientele in the coming months and years. While some of the changes will have a positive impact on the senior and Veteran population, others will not. We can help guide your clients to needed legal resources and information. If you have a client, or know of someone who could benefit from our services, please contact us to see how we might be able to help.

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