

# ASSISTED LIVING: Services, Regulations and Financing<sup>LE</sup>



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Revised January, 2009

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<sup>1</sup> This article was originally drafted in 1987 and has been updated numerous times with the assistance of Attorney Andrea J. Lehtonen, Attorney Kathleen L. Fitzgerald and Deborah Fins (LICSW).

## **ASSISTED LIVING: SERVICES, REGULATIONS AND FINANCING<sup>2</sup>**

Assisted living is a housing option for elders who require supportive services. Unlike nursing homes, assisted living residences do not provide 24-hour skilled nursing care. Because nursing homes are targeting their services to individuals who need more extensive sub-acute care, individuals who need only assistance with activities of daily living are being directed to assisted living residences. Some assisted living residences have specialized units for persons with dementia.

According to the Massachusetts Assisted Living Facilities Association there are currently 190 certified assisted living residences open in Massachusetts. The price for a non-subsidized assisted living unit ranges from approximately \$3,000 to \$7,200 per month depending upon the location, the size of the unit and the amount and type of services provided. According to the Executive Office of Elder Affairs (EOEA), in 2006 approximately 17% of the units were designated as special care units for individuals with Alzheimer's disease, dementia, or memory impairment. (See Elder Affairs Summary of 2006 Assisted Living Residence Aggregated Data at <http://www.massalfa.org/docs/members.htm>.)

There are several useful consumer guides and directories of Assisted Living Residences:

- Assisted Living In Massachusetts: A Consumer's Guide, by the Executive Office of Elder Affairs (617-727-7750 or 800-882-2003), [www.mass.gov/elder](http://www.mass.gov/elder);
- Guide to Assisted Living and Continuing Care Retirement Housing, by the Women's Educational and Industrial Union in partnership with the Massachusetts Extended Care Federation (617-558-0202 or 800-227-3367), [www.masseniorcare.org](http://www.masseniorcare.org); and
- Assisted Living in Massachusetts, by the Massachusetts Assisted Living Facilities Association (MASS-ALFA) (781-622-5999), [www.massalfa.org](http://www.massalfa.org).

### **REGULATION OF ASSISTED LIVING RESIDENCES**

Assisted living residences are regulated in Massachusetts pursuant to G.L. c.19D and 651 CMR 12. An assisted living residence is defined at 651 CMR 12.02 as an entity which:

- provides room and board;
- provides, directly by employees of the entity or through arrangements with

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<sup>2</sup> The article which is the basis of this chapter was originally drafted in 1987 and has been updated numerous times with the assistance of Attorney Andrea J. Lehtonen, Attorney Kathleen L. Fitzgerald and Deborah Fins (LICSW).

another organization which the entity may or may not control or own, personal care services for three or more adults who are not related to their care providers; and

- collects payments or third party reimbursements from or on behalf of residents to pay for the provision of assistance with activities of daily living or arranges for same.

651 CMR 12.02.

Continuing care retirement communities defined by G.L. c. 93 §76, licensed hospices as defined by G.L. c. 111 §57D, group homes under contract with DMH or DMR, congregate housing as authorized by G.L. c. 121B §39, various facilities for the mentally retarded licensed pursuant to G.L. c. 111 §71 and housing operated for only those duly ordained priests or for other members of the religious orders of the Roman Catholic Church, are explicitly excluded from the requirements of the law unless such entity seeks to have all or part of its premises advertised, operated, or maintained as an Assisted Living Residence.

All assisted living residences in Massachusetts are required to be certified by EOEA. 651 CMR 12.03. Individual units in elderly housing administered by local housing authorities may be certified as assisted living residences by EOEA.

### **Physical Requirements**

Assisted living residences are required to provide only single or double living units with lockable doors. Newly constructed residences are required to provide a full private bathroom for each living unit. All existing assisted living residences are required to provide, at a minimum, a private half bathroom and a full bathing room for every three residents. They must also provide, at a minimum, a kitchenette within the unit or access to cooking capacity for all residents. 651 CMR 12.04 (1).

### **Resident Service Plan**

Prior to a resident taking occupancy, the service coordinator must conduct an initial screening and assessment to determine the prospective resident's service needs, preferences, and the ability of the residence to meet those needs. A service plan based on that assessment must be developed before the resident moves in. The assessment must be based not only on information provided by the resident or representative but also an evaluation of the physical, cognitive, and psychosocial condition provided by the resident's physician within the past three months. 651 CMR 12.04 (7).

The residence must develop and maintain a written individualized service plan for each resident which details the services needed including the minimum service package provided for a monthly fee and any additional services the resident needs, the resident's goals and the frequency and duration of all services provided to address the resident's physical, cognitive, psychological and social needs. The plan should include

- details of the manner in which the facility will provide (1) for 24 hour per day on site staff capability and (2) for personal emergency response devices or procedures,
- the types of medication to be provided,
- description of services that will be provided by a person or entity not affiliated with the facility if the resident has arranged for such services,
- the need for a therapeutic diet, and
- for residents in special care units, the enrichment activities to be provided.

The service plan must be reviewed at least every six months. 651 CMR 12.04(8).

### **Service Requirements**

Assisted living residences are required to provide or arrange for the following services:

- service coordination through a designated service coordinator,
- supervision and assistance with activities of daily living when appropriate as part of the service plan,
- self-administered medication management of prescription or over-the-counter medication when appropriate as part of the service plan,
- up to three meals a day, and
- timely assistance to residents and response to urgent or emergency needs by the presence of 24 hour per day on-site staff capability and personal emergency response system when appropriate as part of the service plan.

651 CMR 12.04(3).

Assisted living residences are allowed to arrange for, but not permitted to directly manage, resident funds with the exception of funds for personal use of the resident that do not exceed \$200. 651 CMR 12.04(6)(c).

### *Skilled Care*

An assisted living residence is prohibited from admitting or retaining any resident who needs skilled nursing care unless:

- the care will be provided by a licensed hospice or a certified provider of ancillary services as defined by 651 CMR 12.02 such as a Medicare-certified home health provider, and
- the certified provider of ancillary health services does not train the staff of the assisted living residence to provide skilled nursing care.

The assisted living residence may arrange for the provision of these services from a certified provider of ancillary health services or a licensed hospice.

651 CMR 12.04(4)

### *Special Care Services*

An assisted living residence may provide special care services for persons who need assistance in directing their own care due to cognitive or other impairments only if the facility has submitted an operating plan to EOEAA that explains how the special care residence will meet the specialized needs of its resident population. In addition to certain physical, staffing, and operational requirements, a residence offering special care must prepare a planned activity program that provides activities on at least a daily basis to address the following areas of resident function, as applicable

- gross motor activities,
- self-care activities,
- social activities, and
- sensory and memory enhancement activities.

651 CMR 12.04(5).

### **Residency Agreement**

The law requires a written agreement between the resident and the sponsor of the assisted living residence. 651 CMR 12.08 (2). It must describe the rights and responsibilities of the resident and the sponsor as well as :

- the charges, expenses and other assessments for resident services, personal care services, lodging and meals,
- agreement of the resident to pay for the specified services,
- arrangements for payments,
- a grievance procedure,
- a clear explanation of the services included in the base fee and the fee for additional services as well as an explanation of any limitations on services

that will be provided specifically including any limitation on service to address specific activities of daily living (ADLs) and behavioral management,

- a copy of the residence's medication management policy including its policy with regard to self-administered medication management,
- conditions under which the agreement may be terminated by either party,
- an explanation of the eligibility requirements for any available subsidy programs, and
- conditions under which fees, deposits, and/or other charges are refundable.

The residence agreement shall be for a maximum period of one year and may be renewable upon the agreement of both parties.

### **Resident's Rights**

The regulations set forth the resident's rights in 651 CMR 12.08 (1). Among them are the right to retain and use personal property in the resident's unit, to unrestricted private communications, to manage her/his own financial affairs, to confidentiality of all records, to directly engage or contract with licensed or certified health care providers and to privacy during medical treatment or other services and within the resident's unit.

Assisted living residences are governed by the provisions of the state's landlord/tenant law at G.L. c. 186 and 239.

### **Assisted Living Ombudsman Program**

G.L. c. 19D §7 provides for an Assisted Living Ombudsman to receive and mediate complaints filed by assisted living residents or persons acting on their behalf. As a condition of maintaining certification, the sponsor of an assisted living residence must assist the Ombudsman Program in its duties. 651 CMR 12.04 (7). To contact an Assisted Living Ombudsman call (617) 727-7750 or 1-800 AGE-INFO (243-4636).

### **FINANCING ASSISTED LIVING**

One of the major deterrents to the utilization of assisted living is its expense. There is no single source of financial help to subsidize the cost of these residences. Because they are not medical residences, MassHealth does not pay for the cost although, in some instances, MassHealth provides a partial subsidy

through the Group Adult Foster Care Program (GAFC) discussed below. In addition to GAFC, partial "subsidies" may be available to some residents through Supplemental Security Income Living Arrangement G (SSI-G) - an income supplement administered by the Social Security Administration, through the VA Aid and Attendance Program, and through below-market rent programs mandated of developers who (1) obtain construction and permanent financing at below-market interest rates from the MassHousing and/or (2) receive four percent low-income housing federal tax credits.

## **SSI - G**

The **Supplemental Security Income Program** (SSI) is a joint federal and state program intended to provide eligible blind, disabled and persons 65 and older with a minimum income. If an individual has no other source of income, an eligible individual would receive a full monthly SSI grant. If an individual receives other income but that income is less than the full monthly SSI-benefit level, SSI can supplement that income. An individual who receives SSI automatically qualifies for MassHealth and, if clinically appropriate, also meets GAFC financial eligibility rules. The same is not true in reverse: a person who qualifies for GAFC does not automatically satisfy the SSI-G financial eligibility rules.

There are both resource and income factors considered in determining SSI eligibility. In brief, an individual's income must be less than the applicable SSI benefit level plus \$20.00. An individual can have no more than \$2,000 of countable resources (a couple is limited to \$3,000). In addition, since the Foster Care Independence Act of 1999 was passed on December 14, 1999, a transfer of resource penalty has been imposed in the SSI program on all transfers made after that date. As a result, any SSI applicant who gives away resources within 36 months of applying for SSI will not qualify for a certain period of time unless the resources were transferred to certain persons or trusts. The length of the penalty is determined by dividing the amount of the transfer by the monthly SSI federal benefit rate plus the SSI state supplement (total of \$1,128 in 2009) commencing the month after the date of the gift. The maximum penalty is 36 months. The Foster Care Independence Act also changed the rules relative to the treatment of trusts.

There is no transfer of resource penalty in the GAFC program. However, if a person transfers resources to become eligible for GAFC, it may now disqualify him or her from receiving the SSI-G benefit. Because many facilities are reluctant to process a GAFC application unless a person will also qualify for SSI-G, the reinstatement of a transfer of resource policy in the SSI program has had an unintended impact on the utilization of the GAFC program.

SSI-G is a payment category for eligible individuals living in assisted living residences who have been found clinically eligible for GAFC. The 2009 benefit level for SSI-G is \$1,126 per month: that is the amount that a person with no other income would receive monthly. If an otherwise SSI-G eligible individual has gross income of less than \$1,148<sup>3</sup> per month, the individual could receive SSI-G as a supplement.

For instance, a person with a gross income of \$900 per month from Social Security (cash benefits plus Medicare premium) would receive \$246 per month from SSI-G calculated as follows:

Social Security	\$900.00
- Unearned income disregard	<u>(\$20.00)</u>
Countable income	\$880.00
SSI-G (full grant)	\$1,126.00
- Countable income	<u>(\$880.00)</u>
SSI-G grant	\$246.00

If the individual is residing in a \$2,400/month assisted living residence receiving GAFC and SSI, the individual is theoretically short each month by \$26.00 as follows:

Monthly assisted living charge	\$2,400.00
- Social Security	(\$900.00)
- SSI-G	(\$248.00)
- GAFC	<u>(\$1,226.00)</u>
Amount of charge resident can't pay	\$26.00

Unlike MassHealth, SSI-G treats payments made by third parties for food or shelter as in-kind income to the recipient. The receipt of in-kind income reduces an SSI-G grant by the full value of the in-kind income up to a ceiling of \$244.67<sup>4</sup>

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<sup>3</sup> (\$1,148/month is the \$1,128/month SSI-G level plus the \$20/month unearned income disregard).

<sup>4</sup> 2009 Federal benefit level of \$674/3 = \$224.67 + \$20 = \$244.67.



per month.

If the \$26.00 per month shortfall in the above example is paid to the residence by family members, it will be treated as in-kind income and will reduce the SSI-G grant. Because of the circular nature of the calculations if private subsidies are available, assisted living facilities often accept the ordinary income, SSI-G and GAFC, as full payment. The assisted living facility often requires residents in this situation to occupy “companion” units.

A potential applicant for SSI-G must be residing in an assisted living residence. The applicant's clinical eligibility for GAFC must first be determined by the designated Home Care Corporation/ASAP<sup>5</sup>. Once the assisted living residence receives verbal approval for GAFC participation, the individual can initiate an SSI application through the Social Security Administration. The assisted living residence must submit a Verification of Residence Form to the Social Security Administration which will indicate the date the applicant moved to the residence and the approval date for GAFC. Assuming the resident is otherwise eligible for SSI-G, the resident will receive SSI-G beginning with the month after application and for so long as the individual remains eligible for GAFC at the assisted living residence.

There are a number of additional technical requirements. For example, the individual must pay a fixed, nonseparable fee for rent and supportive services and the individual cannot receive assistance under any other federal or state rental assistance program.

### **Group Adult Foster Care<sup>6</sup> (GAFC)**

Through the GAFC Program, the Division of Medical Assistance (DMA) pays approved agencies to provide assistance with activities of daily living (ADLs) to elderly and/or disabled MassHealth recipients living in residential settings who are at risk of institutional placement. Approximately 110 assisted living facilities

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<sup>5</sup> Currently Coastline Elderly Services, Inc.

<sup>6</sup> *Adult Foster Care* is a separate MassHealth funded program. It is a community program that provides room, board, personal care and case management to individuals who need assistance to live independently in the community. In contrast to group adult foster care, the room and board is provided in individual, rather than in group, settings. The resident must pay privately for room and board, the cost of which averages about \$10.00 per day. MassHealth, through the adult foster care program, pays for personal care in the home and for medical oversight by a registered nurse and social worker. The applicable MassHealth eligibility rules are the same as for GAFC as described in this chapter.

participate in the Group Adult Foster Care Program.

A GAFC provider is reimbursed \$40.33<sup>7</sup> per member per day for personal care services and case management. (This number changes periodically.) Therefore, in a thirty-day month, the MassHealth reimbursement paid to the provider is \$1,209.90, whereas in a thirty-one-day month, the monthly reimbursement rate is \$1,250.23. Since the average month has 30.4 days, the average monthly reimbursement would be \$1,226.

In order for an individual who is living in an assisted living residence which is an approved GAFC provider to have MassHealth make payments to the residence, the individual must meet both **financial** and **clinical** criteria and the residence must have an available slot.

There are no regulations governing the GAFC program. The guidelines under which it operates are contained in a subregulatory document entitled *Draft Guidelines: Group Adult Foster Care*.

#### *Clinical Criteria*

In order for an individual to meet the **clinical** guidelines for GAFC, the individual's physician must confirm that the individual may be at risk of institutional placement and that GAFC services are appropriate to meet the physical and psycho-social needs of the participant. The individual must have a medical diagnosis and a daily need for assistance with at least one activity of daily living.

The Division of Medical Assistance must give prior approval in order for payments to be made for GAFC services. At the current time the Division of Medical Assistance has delegated the prior approval function to Coastline Elderly Services.

A denial of clinical eligibility for GAFC can be appealed through the fair hearing process of the Division of Medical Assistance.

#### *Financial Criteria*

In order for a person to receive MassHealth/GAFC to subsidize the cost of assisted living, the individual must meet financial criteria for MassHealth under the community MassHealth rules. Note that financial eligibility rules for those 65 and over differ from those for the younger population in several respects,

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<sup>7</sup> As of April 1, 2008 the rate is \$40.33 per day.

including the fact that an older person is not eligible for MassHealth for any month in which his or her countable assets exceed \$2,000.

If an individual is both financially and clinically eligible for MassHealth, and lives in or moves to a residence which has an available GAFC slot, MassHealth will pay an average of \$1,226 per month regardless of the monthly cost of the residence or the individual's inability to pay the balance due.

For instance, assume a 75-year old individual is living in an assisted living residence charging \$2,400/month. Assume that individual has income of \$900/month from a combination of Social Security and pension. Assume the person cannot qualify for SSI due to prior gifts. GAFC will pay a monthly average of \$1,226 to the residence. Between the individual's income and MassHealth (GAFC), there is only \$2,126 available monthly to pay a \$2,400 bill.<sup>8</sup>

In theory, friends or family members could make a contribution to the facility to take care of the difference. So long as the payments are made directly to the residence, rather than to the assisted living resident, they should not affect MassHealth eligibility. In-kind payments on behalf of a MassHealth recipient are not considered income to the recipient. 130 CMR 506.004 (D) and 520.015 (C).<sup>9</sup>

### *Deductible*

For all persons who do not qualify for SSI-G but whose income exceeds the low MassHealth income standards, MassHealth's contribution is reduced by the individual's deductible. For instance, assume an individual with a monthly income of \$1,079.32 per month from Social Security and a pension is living in an assisted living residence. If a GAFC unit is available to that individual and the individual qualifies for GAFC, MassHealth will pay nothing toward the residence's \$1,226 per month "medical cost" until the individual has paid a deductible of \$537.22 a

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<sup>8</sup> In these cases, the facility would insist that the resident apply for SSI-G. If the individual qualified, there would be \$2,200.60 available to pay for assisted living as follows:

Social Security and Pension	\$900.00
GAFC	\$1,226.00
SSI-G	<u>\$248.00</u>
	\$2,374.00

<sup>9</sup> However, because the receipt of this subsidy would reduce SSI-G due to of the SSI in-kind income rules, private subsidies are usually, though not always, rejected by assisted living due to administrative difficulties. See the Section on SSI-G, above.

month calculated as follows:

Total Income	\$1,079.32
- Unearned Income Disregard	<u>(\$20.00)</u>
Total Unearned Income	\$1,059.32
- MassHealth Income Standard for one person	(\$522.00)
<b>MONTHLY DEDUCTIBLE AMOUNT</b>	<b>\$537.32</b>

This means that of the \$1,226 "medical component" of the assisted living cost, MassHealth (GAFC) will only pay \$688.80 (\$1,226 - \$537.32) monthly. Assume, for instance, that the cost of the residence is \$2,400 a month. If MassHealth's monthly contribution is only \$688.80, the total available to pay for assisted living is \$1,768.12 which is \$631.88 short.

As if this is not complicated enough, the Division of Medical Assistance analyzes cases involving deductibles in six-month segments. For instance, in the previous example the resident had a \$537.32 deductible. Viewed from a six-month perspective, the individual's deductible (the amount the individual must pay toward the medical component) is \$3,223.92. MassHealth will pay the balance of the "medical component" or \$4,132.80 ( $[\$1,226 - \$537.32] \times 6$ ) once the deductible has been incurred. Because of the complexity of the calculation of the GAFC subsidy for persons who do not also qualify for SSI-G, the reality is that subsidized units are usually made available only to persons who are dually eligible.

*Illustrations*

As the following charts illustrate<sup>10</sup>, the subsidy programs work best for individuals who qualify for SSI-G, as such individuals will receive not only SSI-G but also a full GAFC grant. If an individual's gross income exceeds \$1,768.00, the individual will not qualify for a subsidy from any program.

- (1) Best outcome for a person receiving some SSI-G

\$1,148.00	SSI & other income (SS = \$900 & SSI = \$248)
<u>\$1,226.00</u>	GAFC (\$40.33/day x 30.4 days in a month)
<b>\$2,374.00</b>	<b>Total Funds Available</b>

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<sup>10</sup> These charts are current as of January 2009

- (2) Best outcome for a person who is not eligible for SSI-G (due, for example to excess assets or transfer penalties) whose income is less than 100% of poverty plus \$20

\$886.00	Income of less than 100% of poverty (\$867 per month) <sup>11</sup> plus \$20
\$1,226.00	GAFC
\$2,112.00	<b>Total Funds Available</b>

- (3) Best outcome for a person who is not eligible for SSI-G (due, for example to excess assets or transfer penalties) who has income above 100% of poverty (\$867) but less than \$1,768

\$542.00	“Income Disregard” (\$522 plus \$20)
\$1,226.00	Maximum total income in excess of \$542 “income disregard” plus GAFC
\$1,768.00	<b>This is the average monthly amount (income and GAFC) that will be available over a six month period to pay for assisted living.</b>

*Deductible Example*

In the final illustration above (3), since the individual's income exceeds 100% of poverty, the individual must meet a six month deductible before GAFC will pay out any subsidy. This is true for every person 65 years of age or older who does not qualify for SSI-G and who has monthly income which exceeds 100% of poverty plus \$20. Every six months a new deductible has to be met. For example, consider an assisted living resident who has income of \$888 per month. This individual's income is more than 100% of poverty (\$867) plus \$20. Thus, this individual will have a deductible of \$2,076 [(\$888 - \$542) x 6 months = \$2,076] which means the amount the individual will receive from GAFC for each month of the six month period is as follows:

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2008 HHS Poverty Guidelines		
Size of Family Unit	48 Contiguous States and D.C. Annually	Monthly
1	\$10,400	\$867
2	\$14,000	\$1,167

<b>MONTH</b>	<b>GAFC PAYMENTS</b>	<b>AMOUNT APPLIED TO DEDUCTIBLE</b>
1	\$0.00	\$888.00
2	\$0.00	\$888.00
3	\$588.00	\$300.00
4	\$1,226.00	\$0.00
5	\$1,226.00	\$0.00
6	\$1,226.00	\$0.00
	\$4,266.00	\$2,076.00

### **Veterans Aid and Attendance Benefits**

The Veteran's Administration administers a disability income benefit for veterans and their dependents called the Improved Disability Pension Program. The amount of the pension benefit can be enhanced for persons who are homebound or in need of assistance with ADLs. The latter enhancement is called Aid and Attendance (A&A) and is an important source of funding for certain veterans, dependents, or surviving spouses residing in assisted living facilities. A veteran is presumed to need A&A if he or she is living in an assisted living facility, but the need for such assistance must be documented by the claimant's primary physician unless the veteran is over 65 years of age.

The Improved Pension Program is intended to afford beneficiaries a minimum level of financial security. A Veterans Services Representative determines whether or not the claimant's financial resources are sufficient to meet his or her basic needs without assistance from the VA. If the net value of a claimant's assets is large enough so that the claimant could use these assets to pay living expenses for a reasonable period of time, net worth is a bar to eligibility.

In order to qualify for the Pension a veteran must be permanently and totally disabled or be age 65 or over and meet all of the financial eligibility and military service criteria. The VA will not pay both Compensation (available only to veterans with service connected disabilities) and an Improved Pension concurrently so the veteran who is eligible for both must choose between the two.

### ***Improved Pension***

The non-financial eligibility criteria for an Improved Pension are:

- 90 days of consecutive active military service with at least one day during

- “wartime”,
- discharged for any reason other than dishonorable,
- permanently and total disability.

### *Wartime*

Wartime is defined in 38 USC §1101 which sets the starting and ending date for each conflict period. See also 38 CFR §3.2.

### *Permanent and Total Disability*

A veteran is presumed to be permanently and totally disabled if he or she

- is a patient in a nursing home for long term care because of a mental or physical disability,
- has been determined disabled by the Social Security Administration,
- is unemployable as a result of disability reasonably certain to continue for the veteran’s life,
- suffers from either a permanent disability which would render it impossible for the average person to follow a substantially gainful occupation or the veteran has a disease or disorder considered by the VA to justify a determination of permanent and total disability, or
- is over age 65. 38 CFR 3.3(vi)(B).

### ***Aid & Attendance Benefits***

In order to qualify for A&A benefits the veteran or widow(er) of the veteran must satisfy the following additional non-financial eligibility criteria.

- blindness, or
- living in a nursing home due to physical or mental incapacity, or
- bedridden because the disability requires that the veteran remain in bed apart from any prescribed course of convalescence or treatment, or
- in need of the aid of another person to perform personal functions required in everyday living such as bathing, feeding, dressing, toileting, adjusting prosthetic devices, or protecting himself or herself from the hazards of his or her daily environment. 38 CFR §3.351 and 3.352.

### ***Financial Eligibility for Improved Pension and A&A Benefits***

In order to qualify for the Pension and A&A benefits the Veteran or widower must satisfy the financial eligibility criteria which considers both income and assets.

### *Benefits*

The Improved Pension and the A&A benefit rates, effective 12/1/2008, are as follows :

	Improved Pension Annual	Improved Pension Monthly	A&A Annual	A&A Monthly
Veteran with no dependents	\$11,830	\$986	\$19,736	\$1,645
Veteran with one dependent	\$15,493	\$1,291	\$23,396	\$1,950
Widow with no dependents	\$7,933	\$661	\$12,681	\$1,057

### *Income*

A veteran seeking A&A benefits must have countable income less than the maximum A & A benefit rate in order to qualify. Income includes recurring, irregular, and nonrecurring income. 38 CFR §3.271. Income of the spouse and dependent children is taken into account.

Certain payments are excluded from income including SSI, the value of maintenance payments if paid by someone other than the pension recipient, and reimbursements for casualty losses. 38 CFR §3.272. Certain unreimbursed expenses can be deducted from countable income including (1) medical expenses actually paid by the veteran if they exceed 5% of the maximum annual pension rate for the veteran or \$591.50 and (2) educational expenses for the veteran. Certain income of a dependant child can also be excluded. 38 CFR §3.272(j) and (m).

Countable income reduces and offsets the benefit rate dollar for dollar.

### *Assets*

Assets of the veteran, spouse, and dependent children are taken into account in determining need but there is no specified asset limit. Assets that are counted include bank accounts, CDs, money market accounts, investment accounts, annuities, retirement accounts and life insurance. The net value of an estate is defined as the market value, minus mortgages and encumbrances, of all real and personal property owned by the claimant and spouse other than the primary home, a reasonable amount of surrounding land, and personal effects. 38 CFR §3.275(b). If assets are held in joint names with a person who does not live in the same household, then the assets will be divided by the number of joint owners and only the applicant's fractional share will be counted. 38 CFR §3.262(k).



The standard for eligibility is whether the estate of the veteran, and of the veteran's spouse, is such that under all circumstances, including consideration of the annual income of the veteran, the veteran's spouse, and the veteran's children, it is reasonable that some part of the estate be consumed for the veteran's maintenance. 38 CFR §3.274(a). The general rule of thumb is that countable assets should not exceed \$80,000 but the factors that the adjudicator should take into account include (1) whether the property can reasonably be converted to cash without substantial sacrifice, (2) the veteran's life expectancy, (3) the number of dependents of the veteran, and (4) the likely rate of depletion of the assets 39 CFR §3.275(d). Age is gaining more attention as a factor in determining financial need. Thus, a younger person with a certain level of assets may be determined eligible whereas an older person with assets of the same value may not.

### *Transfer of Assets*

The Improved Pension Program does not include a regulation prohibiting a veteran from transferring assets in order to qualify for pension benefits. However, transfers to a relative residing in the same household will not be recognized as reducing the corpus of the estate. Nor will gifts to someone other than a relative residing in the grantor's household unless it is clear that the grantor has relinquished all rights or ownership and control. 38 CFR §3.276(b).

### *Trusts*

The VA has no regulations on the treatment of trusts. However, in 1997 the VA Office of General Counsel issued an opinion as to whether assets placed in an irrevocable special needs trust by a claimant or the fiduciary of an incompetent claimant are includable in the claimant's net worth for purposes of determining eligibility for Improved Pension. The General Counsel found that

Assets transferred by a legally competent claimant, or by the fiduciary of a legally incompetent one, to an irrevocable "living trust" or an estate-planning vehicle of the same nature designed to preserve estate assets by restricting trust expenditures to the claimant's "special needs," while maximizing the use of governmental resources in the care and maintenance of the claimant, should be considered in calculating the claimant's net worth for improved pension purposes. 1997 VAOPGCPREC Lexis 656.

### ***Filing a Claim***

An application for VA Improved Pension benefits may be filed with the Veteran's Affairs Office or submitted on line. In either case, supporting documentation must

be sent separately to the VA. This includes

- original or certified copy of the discharge paper,
- proof of all income,
- all traditional and retirement account statements,
- life insurance policies,
- birth certificate, marriage licenses, divorce decrees and/or death certificates, and
- all medical expense paid on behalf of the applicant including the pharmacy print out for all medications taken, and military discharge papers.

It can take several months before a successful applicant will receive an award letter, although it will be retroactive to the first day of the month after the date of application. It can take longer to actually see the funds. In addition, if the claimant has a diagnosis of dementia, the VA must approve a fiduciary. The VA will not process an application signed by an attorney-in-fact.

Neither VA organizations nor lawyers are permitted to charge fees for assisting a client with the application process.

## **MassHousing**

MassHousing (MHA)<sup>12</sup> provides construction and permanent financing to developers of assisted living residences through its ElderCHOICE program. In order for a developer to utilize this financing, the developer must agree to set aside at least 20% of the units in the development for low income residents. Low income is defined as households receiving less than 50% of the area family median income as adjusted for family size. Area median incomes are published annually by the U.S. Department of Housing and Urban Development. MassHousing The developers are allowed to target low-income occupancy to individuals who qualify for GAFC.

An individual must meet financial criteria in order to qualify for a below-market rent unit in an MHA-financed assisted living residence. The financial criteria are much the same as the criteria for eligibility for Section 8 financing:

- a person's income must be below 50% of the area's median family income as adjusted for family size,
- there is no asset limit,
- income is imputed from assets, and
- income is also imputed from transferred assets for two years following the transfer of an asset.

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<sup>12</sup>Formerly Massachusetts Housing Finance Agency

The selection and eligibility determination of applicants for this type of housing is carried out by the housing manager, not by a state or federal agency. As such it is unlikely that there will be uniform interpretation of the rules and one should not expect consistency in the administration of this program.

## **CONCLUSION**

The growth in the number of units of assisted living in Massachusetts is explosive. With each new residence comes the opportunity for more aging citizens to obtain services in a homelike rather than a medical setting. The state has responded to the problem of affordability by expanding the Group Adult Foster Care Program, promoting information relative to SSI-G, and by requiring developers who use MHA financing to set aside a percentage of the units for lower income residents. The Veteran's Aid and Assistance Program is also expanding. Still, there are many elders who are not able to afford this desirable alternative to a nursing home placement. Hopefully, the state and federal governments will continue to monitor the issue of affordability and expand the available subsidies.

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