

Elder Client PLANNER

Spidell's strategic tax advisor

Social Security recipients will get a raise next year

TAX: IRS, SSA, and HHS release key numbers for 2012.

By Tim Hilger, CPA

Editor

Social Security recipients will see a 3.6% increase in benefits starting in 2012,¹ and most Medicare enrollees will pay only \$3.50 more in Part B premiums.² These changes are the first changes since 2009 for most beneficiaries and enrollees.

The actual Part B premium amounts are dropping in 2012 (despite the fact that most enrollees see an increase). Most enrollees were held at the same \$96.40 rate for three years by the “hold harmless” provisions even though the true underlying rates had increased. However, with an increase in the Social Security benefits

in 2012, the hold harmless provision is inapplicable. Therefore, enrollees who were not protected by the hold harmless provision will see their rates drop from \$115.40 to \$99.90.

The drop in Medicare rates is also good news for high-income enrollees because the Medicare premium surcharge rates are dropping as well. In 2011 the top rate was \$369.10; in 2012 it drops to \$319.70.

On the flip side, the news isn't so good for employees and employers paying into the Social Security system. The FICA threshold increases from \$106,800 to \$110,100.

IRS announces index changes

In addition to the numbers announced by the Social Security Administration, the IRS has provided key index numbers for a host of non-retirement items³ and a separate pronouncement for pension plan limitations, including IRAs.⁴

See page 6 for all the index numbers.

See **Social Security**, page 2

Inequities and waste in current treatment of Social Security benefits in divorce settlements

SOCIAL SECURITY: Benefits should be treated as marital property.

By Thea Glazer, CFP®, CFA™, MS Accounting, and Adryenn Cantor, Esq., CFLS

Guest Contributors

EDITOR'S NOTE: This article originally appeared in *Family Law News* volume 31, number 3.

The current Social Security system as it applies to divorce is both wasteful and unfair. It is wasteful because multiple former spouses can collect benefits on the same worker's history. It is unfair because Social Security benefits are considered separate property, while all other retirement plans are considered part of the marital

estate. This particularly harms government employees who do not contribute to Social Security. This article discusses current law, economic waste, inequities, and a proposed solution.

Background

The Social Security Act of 1935 originally covered only certain job categories and reinforced traditional views of family life. Women generally qualified for insurance only through their husband or their children. In the 1939 amendments to the Act, women were included and were able to collect on their own record or 50% of their husband's. In 1950, Social Security benefits were extended to former spouses with children. In 1965, they were extended to former spouses without children who were married for at least 20 years. In 1977, the required length of marriage was reduced to 10 years, where it remains

See **Divorce**, page 2

In this Issue

Deducting the cost of long-term care for chronically ill

The annual certification requirements must be met in order to claim the deduction for qualified long-term care services.

Article on page 4

2011/2012 index numbers

Chart on page 6

Taxpayer Advocate's help will be more limited

Limited funding requires the Taxpayer Advocate Service to refer cases rather than accept them.

Article on page 8

Proposed regulations cover bundled fiduciary fees

Long-awaited regulations have come under heavy fire and may never become permanent.

Article on page 9

Taxpayer was not a trader despite his training

Article on page 10

IRS warns of Social Security scams

Article on page 10

Taxpayer hit with 10% additional tax for failing age 55 exception

Box on page 10

News Briefs

Article on page 11

July-Dec. Cumulative Index

Supplement

E-mail us:

ecplanner@spidell.com

Divorce, continued from page 3

those married less than 10 years and those penalized by the Government Pension Offset provision; and

- There is no defined contract for payments, so the government could change it – but some private and public pensions have changed their plans or have intentions to do so.

When the character of Social Security benefits changes to a marital asset, the state family law courts no longer have a problem. This happened with military pensions. A 1981 California case led to the enactment of the Uniformed Services Former Spouses Protection Act of 1982, which made military pensions marital property and marital income.

A solution

Just as the Federal Employees Retirement System (FERS) and military pensions are characterized as marital property, Social Security benefits need to be characterized as marital property as well, with no length of marriage requirement. Marital property should be marital property. This makes economic sense, and rights a wrong, for the following reasons:

- Once Social Security benefits are considered part of the marital estate, the benefits, or their

equivalent present value, will be divided based on a time rule formula. That means only 100% of a worker’s benefits will be paid out per each earnings record, not the 150% or more that can be paid under current law. That saves the U.S. government money.

- Successive ex-spouses would only be entitled to the portion of the Social Security benefits that were earned during their marriage to the worker. This is very easy to compute using the excellent calculators on the Social Security Web site.
- Ex-spouses married less than 10 years, currently excluded from any former spouse benefits, would share in the benefits as the Social Security earned during their marriage would be part of the marital estate.
- Social Security benefits, as well as government pension plans such as CalSTRS, would be included in the marital estate, so a truly equitable division of property is possible.
- If both spouses were eligible for Social Security benefits, the present value of each of their benefits would be considered even though they may have different values. This is currently done with 401(k), FERS, and corporate pension plans.

Social Security was enacted at a time when divorce was rare and most women were full-time homemakers. Times have changed and so should the Social Security laws. **§**

About the authors

Thea Glazer is the principal of Glazer Financial Advisors. For more than 25 years, she has provided analytical services and advice on the financial aspects of divorce for clients and their attorneys/mediators. She has specialized expertise in valuing and dividing stock options, deferred compensation, retirement plans other complex assets and income for divorce settlements. She can be reached at: (858) 485-0814, thea@glazerfa.com.

Adryenn Cantor specializes in litigation, collaborative law and mediation services for all Family Law matters. She is a Certified Family Law Specialist with over thirty years experience. She is a former Chair of FLEXCOM. She can be reached at: (619) 546-7652, adryenn@adryenncantor.com.

¹ *Cornbleth v. Cornbleth* (1990) 397 Pa. Super. 431, 580 A.2d 369

² *Eickelberger v. Eickelberger* (1994) 93 Ohio App. 3d 221

Deducting the cost of long-term care for chronically ill

TAX: The annual certification requirements must be met in order to claim the deduction for qualified long-term care services.

By Richard B. Malamud, CPA, J.D., LL.M

Guest Contributor

Prior to 1997, deductions for nursing homes and other costs for the chronically ill were governed by the general rules under IRC §213 applicable to medical expense deductions. Generally, medical care means amounts paid for the diagnosis,

cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure or function of the body.¹

IRC §213(d) was amended for tax years after 1996 to explicitly include as medical expense deductions amounts paid for “qualified long-term care services” (as defined in IRC §7702B(c)). IRC §7702B(c)(1) defines deductible “qualified long-term care services” as necessary diagnostic, preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services that are required by a “chronically ill individual” and are provided pursuant to a plan of care prescribed

by a licensed health care practitioner.² Obviously, there is considerable overlap between the general definition of medical expenses and the long-term care definition. The principal difference pertains to “maintenance or personal care services,” which can be deductible only if they qualify as long-term care services.

Who qualifies as a ‘chronically ill individual?’

IRC §7702B(c)(2)(A) defines a “chronically ill individual” as any individual who has been certified by a licensed health care practitioner as either one of the following:

1. Being unable to perform without

See Illness, page 5

Illness, continued from page 4

substantial assistance from another individual at least two out of six specific activities of daily living (ADLs)³ for a period of at least 90 days due to a loss of functional capacity. Notice 97-31; states that the 90-day period does not establish a waiting period before which services qualify as deductible amounts. It is just the testing period.

The six listed ADLs are:

- a. Eating;
- b. Toileting;
- c. Transferring;
- d. Bathing;
- e. Dressing; and
- f. Continence.

Notice 97-31 defines “substantial assistance” to mean hands-on assistance and standby assistance. “Hands-on assistance” means the physical assistance of another person without which the individual would be unable to perform the ADL. “Standby assistance” means the presence of another person within arm’s reach of the individual that is necessary to prevent, by physical intervention, injury to the individual.

2. Requiring substantial supervision to protect the individual from threats to health and safety due to severe cognitive impairment. Notice 97-31 provides that:

- a. “Severe cognitive impairment” means a loss or deterioration in intellectual capacity that is (a) comparable to (and includes) Alzheimer’s disease and similar forms of irreversible dementia, and (b) measured by clinical evidence and standardized tests that reliably measure impairment in the individual’s (i) short-term or long-term memory, (ii) orientation as to people, places, or time, and (iii) deductive or abstract reasoning; and
- b. “Substantial supervision” means continual supervision (which may include cuing by verbal prompting, gestures, or other demonstrations) by another person that is necessary to protect the severely cognitively impaired individual from threats to his or her health or safety (such as may result from wandering).

As if this isn’t complicated enough, amounts paid for a “qualified long-term care service” are not deductible if provided by a spouse or a relative as defined in IRC §152(d)(2)(a)–(g) unless they are a

licensed professional. This only applies to chronically ill taxpayers, so it appears you can pay a relative for short term care and get a deduction.⁴

Certification required

Here’s the catch: Even if someone is a chronically ill individual, no deduction is allowed unless within the “preceding 12-month period” a licensed health care practitioner has *certified* that such individual meets the requirements of being chronically ill. A licensed health care professional includes any physician⁴ and any registered professional nurse, licensed social worker, or other individual who meets the IRS requirements (which have not yet been published).

Many taxpayers, medical professionals, and even tax advisors are unaware of this

can that be done if someone is admitted to a long-term care facility or hires in-home assistance? A doctor’s advice is often given prior to the changed circumstances. If that advice is in written form that should qualify as a certificate. It wouldn’t hurt to have that doctor sign a certification listing when the advice was given.

Conclusion

Following the enactment of HIPAA, chronically ill patients represent a separate category of medical expense that applies to two types of long-term conditions. Either someone lacks the ability to perform two of the six ADL functions or the person is a risk to themselves, as is the case with dementia or Alzheimer’s disease.


“There is considerable overlap between the general definition of medical expenses and the long-term care definition. The principal difference pertains to “maintenance or personal care services,” which can be deductible only if they qualify as long-term care services.”

annual certification requirement. That is the major point of this article — get one annually. There does not appear to be any guidance as to how that 12-month period is calculated or what must be included in the certification. In a recent case, it appears that the court accepted the patient’s medical records as the certification.⁵

What if the IRS challenges clearly deductible medical costs for chronic long-term care because the taxpayer did not obtain a certification? There are several options. In *Baral*, the court states that medical records can be used as a “certification” of the condition. Alternatively, nursing home records may be sufficient certification if signed by a registered nurse.⁶

Another alternative may be to claim the deductions under IRC §213 as medical costs, but not claim the IRC §7702B expenses. It is not clear if this new provision prohibits the use of the old law. It would apply to any short-term conditions which don’t require a certificate.

There does not appear to be any guidance as to when the certification should be obtained, just that it must be obtained in the preceding 12-month period. How

If either condition exists, the deductible medical expenses require that for each “preceding 12-month period,” the taxpayer obtains a certification of the chronic illness by a qualified medical professional. 

A client letter and a certification form can be found at www.elderclientplanner.com

About the author
Richard Malamud is a professor in the Department of Accounting and Finance at California State University Dominguez Hills, where he teaches federal income tax law. You may reach him at: (310) 243-2239 or rmalamud@csudh.edu.

¹ IRC §213(d)(1)(A)
² IRS Publication 502, Medical and Dental Expenses
³ IRC §7702B(c)(2)(B)
⁴ IRC §213(d)(11)
⁵ Physician as defined in §1861(r)(1) of the Social Security Act
⁶ *Estate of Baral v. Comm.* (2011) 137 TC 1