

Elders

Part I - Needs

Almost 35 million people age 65 or older live in the United States, about 13% of the population or one in eight Americans.¹ Three out of five elders are women² -- 58% of all elders, and 70 percent of elders 85 and older.³ Minority populations represent about 16% of the elder population: 8% African-American, 5.5% Hispanic (of any race), 2.1% Asian-Pacific Islander, and less than 1% American Indian and native Alaskan.⁴

¹ "Older Americans 2000: Key Indicators of Well-Being: Population" ("Older Americans 2000") aoa.dhhs.gov/agingstats/chartbook2000 This Report is the first in a continuing series planned by the Federal Interagency Forum on Aging-Related Statistics, a consortium of U.S. Government agencies working together to improve the quality and usefulness of data on older Americans. It covers 31 key indicators of elder health and well-being. The indicators are grouped into five subject matter areas: population, economics, health status, health risks and their behaviors and health care. Published on 8/10/00 the entire report can be accessed at aoa.dhhs.gov/agingstats/chartbook2000/default.htm. You also may view the report at agingstats.gov. Single printed copies of are available from the National Center for Health Statistics, at (301) 458-4636 or by sending an e-mail request to nchsquery@cdc.gov.

² www.aoa.dhhs.gov/factsheets/ow.html "Older Women: A Diverse and Growing Population" (AoA 2000)

³ Older Americans 2000: Population at footnote 2. aoa.dhhs.gov/agingstats/chartbook2000/population.html

⁴ *A Profile of Older Americans: 1999--Racial and Ethnic Composition. A Profile of Older Americans: 1999 (Profile 99)* aoa.dhhs.gov/aoa/stats/profile/default.htm#older was prepared by the Program Resources Department, AARP and the Administration on Aging (AoA), U.S. Department of Health and Human Services. The annual Profile of Older Americans was originally developed and researched by Donald G. Fowles, AoA. The 1999 edition was updated by Alfred Duncker and Saadia Greenberg, AoA, reviewed by Ed Evans of AARP, with production by Felo Madrid, AARP For up to 10 free copies of this brochure, write: A Profile

About half of all elders live in nine states: California 3.5 M, Florida 2.7 M, New York 2.4 M, Texas and Pennsylvania almost 2 M, and Ohio, Illinois, Michigan, and New Jersey over 1 million. Elders constitute over 14% of the total population in 11 states: Florida (18%); Pennsylvania (16%); Rhode Island, West Virginia and Iowa (15%+); North Dakota, Connecticut, Arkansas, South Dakota, Maine, and Massachusetts (14%+).⁵

About 3.4 million elders or 11% have income below the federal government poverty levels. This percentage rises with increasing age: 9% (ages 65 to 74), 12%, (ages 75 to 84), and 14% age 85 or older.⁶ Another 2.1 million or 6.3% are classified as "near-poor" -- 125% of poverty levels. In total, one of every six or 17% of elders are poor or near-poor.⁷

One of every eleven (8.9%) elder Whites is poor compared to 26.4% of African-American elders and 21% of elder Hispanics. Older women had a higher poverty rate (12.8%) than older men (7.2%).⁸

Higher than average poverty rates for elders also correlate with not being married, living alone or with non-relatives, and living in central cities, rural areas, and in the South.⁹

In 1998, about 19 percent of white older women who lived alone were in poverty and approximately half of older black and Hispanic women who lived alone were in poverty. The highest poverty rates (49.3%) are

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⁵ *Profile 99--Geographic Distribution* at aoa.dhhs.gov/aoa/stats/profile/default.htm#older

⁶ Older Americans 2000: Poverty at aoa.dhhs.gov/agingstats/chartbook2000/economics.html

⁷ *Profile 99--Poverty* at aoa.dhhs.gov/aoa/stats/profile/default.htm#older

⁸ *Id.*

⁹ *Id.*

experienced by older African-American women who lived alone.¹⁰

The elder population will continue to grow as people live longer due to advanced medical technology. The most rapid increase is expected between 2010 and 2030 when the "baby boom" generation reaches age 65. The size of the elder population is projected to double, growing to 70 million by 2030.¹¹

1. Income

Elder median income in 1998 was \$18,166 for males and \$10,504 for females. About one of every seven (13.7%) family households with an elderly head had incomes less than \$15,000 and 44.6% had incomes of \$35,000 or more. In 1996, Social Security benefits accounted for 40% of elder aggregate income. The bulk of the remainder consisted of earnings (20%), pensions (18%); and assets (18%).¹²

Among older Americans in the lowest fifth of the income distribution, Social Security accounts for 82 percent of income, and public assistance accounts for another 10 percent.¹³

Many women have problems qualifying for social security because they worked full time raising their children or because they worked in low paying, part-time positions. Many women who held low paying and part-time positions do not qualify for pension benefits.

Spousal Impoverishment

Many women fail to get a portion of pension benefits from their ex-spouses which

contributes to the higher poverty rates among older women.

Many older people develop chronic conditions that require continual medical care. Often times the spouse of the person in need of care is forced into poverty by the expense of such care.

2. Housing

Of the 20.9 million households headed by older persons in 1997, 79% were owners and 21% were renters. The median family income of older homeowners was \$20,280. The median family income of older renters was \$10,867. About 50% of homes owned by older persons in 1997 were built before 1960 (33% for younger owners) and 6% had physical problems.¹⁴

The elder poor need safe, affordable, habitable housing. A significant number of elders are denied housing because of perceived inability to live independently. Many units are inaccessible to elders because of physical barriers and lack of modifications that can make the difference between independent living and institutionalization.

State and local zoning ordinances and health and safety regulations are used by people who adhere to the "Not-In-My-Backyard" philosophy (NIMBYs) to prevent nursing homes and other elder care facilities from operating in neighborhoods, e.g., neighbors lobbying against an elder care facility from getting parking permits.

Generally, elder renters appear to be ideal tenants: quiet and long-term with a stable source of income. However this stability can make them victims of eviction. As affordable housing becomes scarcer, some landlords evict older tenants to get higher rents. In some rent control jurisdictions, limits are placed on the rent increases based on the amount paid at the

¹⁰ Older Americans 2000: Poverty at aoa.dhhs.gov/agingstats/chartbook2000/economics.html

¹¹ Older Americans 2000: Population: Number of Older Americans aoa.dhhs.gov/agingstats/chartbook2000/population.html

¹² Profile 99--Income at aoa.dhhs.gov/aoa/stats/profile/default.htm#older

¹³ Older Americans 2000: Income Distribution at aoa.dhhs.gov/agingstats/chartbook2000/economics.html

¹⁴AARP based on Department of Health and Human Services Agency on Aging statistics (<http://www.aoa.dhhs.gov/aoa/stats/profile/default.htm>)

time of original occupancy. Therefore, more stable long-term tenants in those rent-controlled areas may be paying rent that is far below the market value, causing the landlords to evict them to get higher rent.

Twenty-four percent of all persons 85+ live in nursing homes. The conditions of these homes for the elder poor often are not adequate. They receive poor care and their property is not secure. Their spouses and families can themselves become poor because of the cost of nursing home care.

3. Health

Although elders 65 and older comprise approximately 12% of the population, they account for about 36% of the total personal health care costs, representing 36% of hospital residents and 48% of all days of care in hospitals. Estimates in 1989 suggested that 3 million elder Americans could not afford to buy medical insurance. Moreover, much of the insurance that elders purchase have gaps in coverage.

To save costs, the last five years have seen an influx of Medicare beneficiaries into joined managed care plans (HMOs) (about 2.3 million in 1995 -- double the number in 1993). Elders have suffered severe restrictions on provider choice and services covered with little or no opportunity for appeal. A significant number of elders have been coerced into plans with little information about the plan..

While only 4.2% of the elderly reside in nursing homes, this percentage increases with age; 19.8% of the 85 and older population live in nursing homes. For those who are trying to prepare for the possibility, Long Term Care Insurance (LTCI) exists, but the coverage does not usually keep up with the rise in health care costs and the inflation rate. The cost for LTCI ranges from approximately \$2000/year for those who are 65 to over \$4000/year for 75 year olds. Various elder advocacy groups

estimate between 58-84% of elders cannot afford LTCI. Moreover, LTCI probably has the lowest benefit pay out per premium of any kind of insurance.

As age increases, elders often need help with personal care activities such as bathing, dressing, eating, transferring from bed or chair, using the restroom, walking, and getting outside. They also need help with home management activities such as preparing meals, shopping, managing money, using the telephone and doing housework.

4. Self-Determination

All elders need to maintain dignity and deserve respect. In many instances, because of stereotypes such as inability to live independently with advancing age, their wishes, values, preferences and need for autonomy are not respected.

Once they receive medical treatment or are in nursing homes, elders frequently object to the resulting loss of control over their treatment and other aspects of their lives. The need for self-determination includes the need to be fully informed of the type and course of treatment to rejection of life sustaining treatment (LST).

The situation is complicated by questions concerning the patient's competence to understand and direct their treatment.

5. Protection From Crime

Elder Abuse

Nursing Home Abuse

Elders are faced with actual physical abuse to reckless disregard for their standard of living from many nursing home staff members. However fear of retaliation in the form of discharge from the home prevents elders from complaining.

Family Members

Most victims of this type of abuse are the frail and very elderly. Too often elders feel

so dependent on their abusers, that they are afraid of reporting the incidents to anyone.

Nursing Home Fraud

Often elders or their family members are targeted by nursing homes that prey upon the family's desire to place them in a good nursing home. Nursing homes are frequently guilty of coercing patients to pay the higher private patient cost by playing up the stigma that some elderly associate with Medicaid (welfare) or demanding additional money above Medicaid payment to reserve space in a nursing home.

Other Fraud

Elders are targets for various kinds of rip-offs. For example, taking advantage of the elder's dependence on medical aid, services claim to speed up the transfer to the hospital during emergencies. However this same service can be provided at a significant discount directly from the hospital. Often what these services provide is an operator who picks up emergency calls from the elder and then simply calls the hospital, which then provides the service. Furthermore, these companies often tell customers that they provide certain services that are not provided.

Elders have been susceptible to numerous telemarketing frauds including boiler room penny stock fraud, "sweepstakes" entry and similar techniques for bilking the most vulnerable.

6. Civil Rights

As with other minority populations, older Americans suffer from discrimination in employment, housing, and other areas. This discrimination intensifies the problems faced by this group and increases their likelihood of poverty.

Elders

Part II – Laws

1. INCOME

PUBLIC BENEFITS

[See Chapter 7: Public Benefits]

Social Security

Supplemental Security Income

OTHER INCOME SOURCES

Home Equity Conversion Mortgage Insurance Program

[12 U.S.C. §1715z-20 et seq.]

A program of the Cranston-Gonzales National Affordable Housing Act of 1990, this demonstration provides FHA insurance for home equity conversion (reverse mortgages) permitting elder homeowners to convert their home equity into cash without having to sell their homes. See Fairbanks, Home Equity Conversion Programs: A Housing Option for the "House-Rich, Cash-Poor" Elderly, 23 Clearinghouse Review 481 (Special Issue 1989)

■ Employee Retirement Income Security Act (ERISA)

[29 U.S.C. §1001 et seq.; 29 C.F.R. Parts 256, 2520]

This Act is designed to protect employees' interests and rights in private pension benefit plans. It gives participants and beneficiaries a cause of action in federal court to enforce their rights under a private pension plan. It also sets out civil and criminal penalties for noncompliance with the Act.

■ Spousal Impoverishment

The Federal Office of Personnel Management (OPM) issued regulations that simplify the process for dividing federal government pensions and providing for survivor benefits upon divorce. [57 Fed. Reg. 33570 (July 29, 1992)]

The **Medicare Catastrophic Coverage Act of 1988 (MCCA)** [42 U.S.C. Chapter 1396r(c)(1)(B)(i)] provides for certain rules regarding the mandatory income and resource protections for the spouse of a nursing home resident applying for Medicaid/Medi-Cal. It also sets out a new transfer of assets rule.

2. HOUSING

■ Federal Housing Programs

[See Chapter 6: Housing]

Federal housing programs are a primary source of shelter for the elder poor. These programs include subsidized housing and conventional public housing. One program directed toward elders is Chapter 202 Housing [Chapter 202 of the Housing Act of 1959, 12 U.S.C. §§1701 et seq.]

HUD issued final rules implementing new statutory provisions authorizing PHAs with approved allocation plans to designate specific buildings or portions of buildings for "elderly families," "disabled families" or "elderly and disabled families." (59 Fed.Reg. 17652 (April 13, 1994))

■ Services Coordinators Under 42 USCA § 13631 Owners of federally assisted housing are required to provide services coordinators to assist provision of elderly or disabled tenants with supportive services.

■ Fair Housing Amendments Act of 1988 (FHAA) [42 U.S.C. §§ 3601 et seq.][24 C.F.R. Pt. 105]

Prohibits discrimination against persons with disabilities in virtually any housing activity or transaction and prohibits the refusal to make reasonable accommodation in rules, policies, practices, or services, when accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling. Discrimination against the disabled through state and local zoning, land use and other regulations is also prohibited.

The elderly are protected by FHAA if they have a physical or mental impairment which substantially limits one or more major life

activities, have a record of having such an impairment or are regarded as having such an impairment. One court has held that elders as a group are regarded as disabled, they are covered by the FHAA. The Act exempts certain housing for older persons from the prohibitions against families with children. HUD has promulgated regulations defining the significant facilities and services such housing must provide to meet the physical and social needs of older persons to qualify for the exemption.

■ Chapter 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794]

Used together or apart, the FHAA and Chapter 504 protect clients against discrimination based on disability or perceived disability at all stages of the landlord-tenant relationship. However, some courts, such as the 6th Circuit Court of Appeals in **Beckert v. Our Lady of Angels Apartments, Inc.** 192 F.3d 601 (1999) issued rulings implying that it is reasonable for a facility receiving federal funding under the National Housing Act to serve some but not all handicaps, thus allowing such facilities to discriminate against clients.

HUD issued final regulations that provide for enforcement of Chapter 504 for all HUD programs and activities. The standard for excluding a person from participation in a HUD program because the person is a "direct threat to the health or safety of others." 59 Fed.Reg. 31306, 31308 (June 16, 1994)

■ Eviction Defense

In cases where local rent control ordinances limit rent increases, a companion ordinance that requires "good cause" for eviction also exists. Wanting elders out to get more rent does not constitute good cause.

3. HEALTH

[See Chapter 4: Health]

■ Medicaid/Medi-Cal

■ Medicare

Although Medicare provides critical health care coverage to elders, it pays less than 50%

of the total health care costs of the elderly and does not cover important services such as eye glasses and hearing aids. Medicare has only minimal coverage of nursing home care. This coverage is generally rehabilitative stays of less than 30 days.

Seniors look to Medicare supplemental health insurance, known as "Medigap," to cover gaps in Medicare. Medigap policies in 1989 only covered about 6% of total elder health costs. Medigap policies are not good purchases for poor or low income elders. Poor elders often times can qualify for Medi-Cal to cover some gaps in Medicare insurance.

Medicare+Choice

Congress created the Medicare+Choice program in the Balanced Budget Act of 1997 [42 U.S.C.A. §§ 1395b *et seq.*] to broaden patient access to a variety of health plans. Theoretically the program would provide greater flexibility and greater benefits for Medicare recipients. In reality many Healthcare Maintenance Organizations (HMOs) which saw Medicare recipients as a lucrative new source of income have seriously miscalculated the costs of services they would have to provide and the amount of potential profit. Coupled with complex regulations and reduction in federal reimbursements, this has led to a mass exodus of HMOs from the program, deepening the health care crisis for the elderly.

BBA-1997 also included several experimental expansions of services to the elderly, including Programs for All-Inclusive Service to the Elderly (PACE) [42 U.S.C.A. § 1395eee] which provided limited coverage for nursing home care.

Managed Care

"Patients' Bill of Rights" have been proposed in various bills in Congress and in State legislatures (including California). As of 6/00 none have been enacted into law.

Nursing Home Care

Congress passed the Nursing Home Reform Law, (OBRA '87) and subsequent amendments, 42 U.S.C. Chapter 1395 *et seq.* Some of these provisions include:

- Providing rehabilitative care for physical, mental and psychological well-being.
- Restricting the use of physical and chemical restraints.
- Allowing the patient and family to participate in treatment and care decisions.
- Regulating involuntary transfers and discharges.

The California Department of Health Services refused to implement the Act, resulting in a class action in Valdivia v. Department of Health Services (E.D. CA, CIV S-90-1226 EJJ). The District Court granted partial summary judgment. The remaining claims were settled before trial and were subsequently approved by the District Court in April 1993. A holding in this case is that OBRA '87 largely preempts state law in this area, requiring California to enforce the OBRA '87 provisions.

Nursing Home Conditions

All states regulate nursing home conditions and the conduct of nursing home employees. Such regulations governing homes in California are found in the **Health & Safety Code and Welfare & Institutions Codes**; additional controls over doctor and nurse conduct are found in the **Business and Professions Code**.

In Home Supportive Services (IHSS)

Many states provide money to people who need help with personal care and household chores. In California, each county welfare department must develop a plan that is approved by the State Department of Social Services in order to receive money to fund such a program. People in need can also

qualify for In Home Supportive Services through Medi-Cal eligibility.

The County Welfare Department determines how many hours a person needs with personal care and household chores and that person in turn hires a chore worker. The welfare department contracts with particular agencies to screen and provide chore workers.

Although the person in need has the right to choose their own in-home helper, they usually obtain them through such an agency. Many also choose friends or relatives to fill these positions.

The California statutes concerning In Home Support Services to the aged, blind, and disabled can be found in **Welfare and Institutions Code §§ 12300-12308**.

4. SELF-DETERMINATION

Recognizing people's rights to retain control over their own health care, financial situation, and other aspects of their lives has grown recently. Of particular importance is the right to maintain control of over one's health care. Since the elderly constitute a disproportionately large percentage of those hospitalized, this trend affects them more than most other legal service clients. Statutes governing patients' rights are found in both federal and state laws.

■ Patient Self-Determination Act (PSDA)

[42 U.S.C. Chapters 1395 et seq.]

PSDA requires all Medicare and Medicaid providers to provide written information to patients and have policies and procedures about their rights under state law to decide about medical care. These rights include the right to accept or refuse medical or surgical treatment and the right to formulate advanced directives.

■ Guardianship

[See Chapter 4: Family]

Through guardianship procedures, courts determine that persons are incompetent to decide about their property or person and delegates the right to decide to a substitute

decision maker. The substitute decision maker may be called a guardian, conservator, committee or curator. They may have full or limited powers over the incapacitated person or ward.

■ Durable Power of Attorney [California Probate Code Chapter 4600-4621.]

The most flexible and least complicated way for elders to appoint their own guardian is via the Durable Power of Attorney. This allows people to choose their own guardians instead of having the court appoint one. Also, it avoids the cost and time of going to court. Most importantly, one can specify exactly which powers shall be given to the guardian. Furthermore, one can specify which medical treatment they want and which treatment they do not want.

Many Durable Powers of Attorney contain "no resuscitation orders" so that CPR will not be used on a patient whose heart has stopped beating. The latest revision of California Code incorporates the former **Natural Death Act** into statutes enabling Durable Power of attorney. Commonly, people create a springing durable power of attorney to take effect at the time that person becomes incapacitated. By creating a Durable Power of Attorney, a person does not give up their own powers. The Durable Power of Attorney creates a duty in the guardian to act in the best interest of the client.

■ Living Will

Most states' living will statutes provide additional authority when needed and allow patients to declare that they want life-sustaining equipment withheld. (See Arizona's A.R.S 36-3201 to 36-3210; Delaware's 16 Del. C. §§ 2501-2517; Hawaii's HRS §§ 327D-1 to 327D-27 and others.)

5. PROTECTION FROM CRIME

■ Nursing Home/Medicaid Fraud

Both federal and state statutes have been enacted to protect elders from nursing home fraud, such as preventing homes from

imposing deposits. [42 U.S.C. §1396r(c)(5)(iii); Health & Safety Code §1599.70(a); California Welfare & Institutions Code §14110.9]

■ **Other Fraud**

[See Chapter 1: Consumer]

Consumer law remedies such as Unfair and Deceptive Trade Practices Acts and rescission statutes which are available against those who prey on seniors. In addition, laws which allow attorneys to collect fees from fraudulent defendants who target the elderly help deter such practices. [California Welfare & Institutions Code § 15657 provides for such attorney's fees.]

6. CIVIL RIGHTS

■ **Age Discrimination Employment Act**

[29 U.S.C. § 621; 29 C.F.R. 1626.1 et seq.]

Congress found that it was very difficult for older people to retain employment or regain employment when they are displaced from their jobs. This Act was designed to promote employment of older persons based on ability instead of age and to prohibit arbitrary age discrimination in employment. The Equal Employment Opportunity Commission (EEOC) is the agency in charge of implementing the Act. The Act provides for criminal penalties to be enforced by the

EEOC and gives a private civil cause of action that can be pursued by either an individual or through the EEOC.

■ **Americans with Disabilities Act (ADA)**

[42 U.S.C. §§12117, 12133, 12188]

This Act covers elders insofar as they are disabled. Remedies available under the **Civil Rights Act of 1964** [42 U.S.C. §§ 2000e et seq] and the **Rehabilitation Act of 1973** [29 U.S.C. § 794a] also are available to enforce rights under ADA. Other state or federal statutes that provide greater or equal protection for the rights of people with disabilities are not preempted by ADA.

■ **Older Americans Act of 1992 (OAA)**

[42 U.S.C. § 3001; 45 C.F.R. §901.1 et seq.]

This Act is designed to assist elders by enhancing state and nation wide elder advocacy services. It establishes elder resource centers with increased focus on elder abuse and minority elders, particularly Native Americans.

It also establishes funding and guidelines for state programs directed at protecting the rights of the older population. Advocacy areas include the statewide ombudsman program, elder abuse protection, elder rights and legal assistance development, income maintenance, pension issues, outreach, counseling, and assistance in obtaining public benefits. The state programs must include specific activities set out in Title VII of the Civil Rights Act.

ELDER RESOURCES

National Senior Citizens Law Center

Washington, DC Office

1101 14th St., NW Suite 400
Washington, DC 20005
(202) 289-6976
(202) 289-7224 fax

Los Angeles Office

3435 Wilshire Blvd., Suite 2860
Los Angeles, CA 90010-1938
(213) 639-0930
(213) 639-0934 fax

Oakland Office

510 16th St., Suite 400
Oakland, CA 94612
(510) 663-1132
(510) 835-8045 fax

NSCLC offers technical assistance on legal problems faced by low-income seniors.

www.nslc.org has short articles on hot topics and a list of publications and manuals for sale.

California Advocates for Nursing Home Reform (CANHR)

1610 Bush Street
San Francisco, CA 94109
415/474-5171

www.canhr.org summarizes the latest legislation on nursing homes, estate planning for long term care, living trusts, lists its training and publications for sale. Some publications free to California IOLTA funded legal services programs.

California Office of Aging

www.aging.state.ca.us contains comprehensive links and general information about state and federal offices on aging. Links to Health Insurance Counseling and Advocacy Programs (HICAP) throughout California who can help with Medicare, health insurance and Long Term Care issues.

ABA Commission on the Elderly

www.abanet.org has materials and links on Elder Law.

Kansas Elder Law Network

www.ink.org/public/keln is a winner site with Journal articles and bibliographies that will save hours of legal research; great links. Contains kansas law but is very national in scope.