Understanding the New VA Pension Rules

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Topics Covered

- Why VA pension benefits matter
- Changes to the VA pension rules
- Planning Opportunities

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The difference VA Pension makes

- Bob's story

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Additional Benefits

- Choose your caregiver
- Choose your facility
- Tax free payments
- No recovery
- Can protect the home

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Biggest Changes

- A lookback and penalty period
- Bright line net worth limit

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Net Worth

- Includes all income and assets
- Assets: FMV of all property owned by the claimant and any dependents, less mortgages or other encumbrances
  - Exclusions: Home plus two acres, personal effects (rules specifically mention family transportation vehicles)

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Net Worth

- Net worth limit is $129,094 (started in 2018 as the maximum CSRA)
  - Increases per the Social Security benefit increase percentage each year
- Home is not included
- “Reasonable lot area” defined as not more than two acres unless the additional acreage is not marketable

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Net Worth

- Life estate rules haven’t changed
- A life estate interest in your own property means you own it outright (see Gen. Counsel Opinion 15-92)

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Lookback and Penalty Period – Covered Assets

- 36 month lookback period
  - Triggered by the receipt of an original claim or a new claim following a period of non-entitlement
- Will not apply to transfers made prior to 10-18-18
- 5 year cap
- Only ”covered assets” that are transferred will be penalized
  - An asset that was part of the claimant’s net worth and if not transferred would have caused net worth to be over the limit

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Penalty Divisor

- The maximum annual pension rate (divided by 12 and rounded down) for a married Veteran who qualifies for aid and attendance ($2,266 in 2020)
- Penalty starts the month after the transfer
- Gift made on February 15, 2019, penalty begins in March

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Example of Covered Assets

- Claimant has $120,000 and annual income of $0 at the time of the VA application (UMEs reduced income to 0)
- Gave a friend $30,000 prior to applying for VA pension
  - If $30,000 hadn't been transferred before application, net worth would have been $150,000 and would have been excessive.
  - Covered asset amount is $20,906 ($150,000-$129,094) and will incur a penalty
  - Current penalty divisor is $2,266, so penalty would be 9.2 months, rounded down to 9 months

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Lookback and Penalty Period

- Veteran has $110,000 in total assets, $12,000 in income
  - Total net worth = $122,000
  - Transferred $50,000 on Nov. 1, 2018
  - Applied for VA pension on Nov. 15, 2018
  - Approved!
- Because the amount transferred was not from assets over the net worth limit (covered assets), no penalty will be imposed

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Exceptions to the Transfer Penalty

- The result of fraud or unfair business practice
- Transfer to a trust established for a child incapable of self-support prior to 18
  - No circumstances that the Veteran, Veteran's spouse or surviving spouse can benefit
- Transfer was did not include covered assets

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Annuities

- The purchase of an annuity after 10-18-18 will be penalized unless the claimant retains control and the ability to liquidate – then an asset
- Defined as "a financial instrument that provides income over a defined period of time for an initial payment of principal."
  - The uncompensated value is equal to the amount transferred.

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Trusts

- As with annuities, transfers to a trust will incur a penalty unless all the claimant retains control and the ability to liquidate – then an asset
  - Revocable trust assets would be considered as assets part of net worth

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Curing a Gift

- Curing Gifts
  - May be a partial or total cure
  - Cure must be made before the claim was filed or within 60 days of the notice of penalty
    - Evidence of the return/cure must be received not later than 90 days after the notice of decision

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Medical Expenses

- Far more generous than the proposed rules
- "Those that are medically necessary; that improve a disabled individual's functioning; or that prevent, slow, or ease an individual's functional decline."
- One addition to ADLs: "ambulating within the home or living area"

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Medical Expenses

- Prescriptions are deductible, as is a non-prescription medication obtained lawfully
- Medically necessary food, vitamins and supplements are deductible as long as prescribed by a valid health care professional
- Service animal payments are deductible
- Transportation expenses for health care purposes are deductible

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Medical Expenses

- No limit on hourly rate for home health care
- Caregivers can be paid for IADLs – rules note shopping, meal prep, laundry, housekeeping, handling finances, using the phone and medication assistance may be compensated
  - Must be receiving health care or custodial care from an appropriate provider as outlined in the rules for ADLs or IADLs to be deducted

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More Options for Medical Expense Deductions in Independent Living Facilities

- Referred to as "care facilities other than a nursing home or assisted living facility."
  - Care provider can be a non-health care provider if patient is in need of A&A or HB, or a qualified medical professional (as designated in the statute) states that "due to a physical, mental, development or cognitive disorder, the individual needs to be in a protected environment"
- Meals and lodging may also be deductible, but strict requirements apply

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Planning – How to Reduce Net Worth

- Divided into “blessed by the rules” and “maybe” strategies

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Crisis Planning – How to Reduce Net Worth

- Increase UMEs
- Income counts toward total net worth, UMEs reduce income and increase the potential award available
  - Increase hours of care provided in the home
  - Room and board in an independent living facility may also be deductible, and/or home care provided in the facility
  - ALF expenses are normally deductible
  - See final rule for more detail: https://www.federalregister.gov/documents/2018/09/18/2018-19895/net-worth-asset-transfers-and-income-exclusions-for-needs-based-benefits

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Ways to Reduce Net Worth – “Blessed by the Rules”

- Paying for goods and services for the claimant, spouse, or other relatives living in the home
  - Vehicle(s), burial plans, other personal property items

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Ways to Reduce Net Worth – "Blessed by the Rules"

- Purchase of a home
- Renovations to the home
- Transfer to an irrevocable trust for a child incapable of self-support prior to age 18
  - Veteran or spouse can receive no benefit from trust assets

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Ways to Reduce Net Worth – Maybe

- Purchase a life estate interest in someone else's home
  - Not addressed in the rules

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Half a Loaf Planning

- Transferring part of a claimant's countable assets, and using the rest to pay through the penalty period

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Example of Half a Loaf Planning

- First have to calculate net worth (income – UMEs (-5% deduction) + plus assets)
- What are total monthly expenses (including UMEs - income)
- Calculate the burn rate to determine whether we can qualify within 36 months or after

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Half a Loaf Planning

- Claimant with $150,000 in excess assets (over the net worth limit)
- $5,000/month in total living expenses and $2,000/month in income
- Burn rate: $3,000/month
- Penalty divisor: $2,266/month
  - Penalty period = $150,000 / ($3,000+$2,266) = 28.48 mos.
  - Gift amount = 28.48 x $2,266 = $64,535
  - Retained amount = $150,000 – $64,535 = $85,465 (double check: $86,465 / $3,000 = 28.48 mos.)

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When Should a Claimant Wait 37 Months?

- When penalty period is 36 months or greater
- Excess assets: $300,000 (total assets = $429,094)
- Monthly living expenses: $5,000, Income = $2,000
- Burn rate: $3,000; penalty divisor: $2,266
  - Penalty period = $300,000 / ($3000+$2,266) = 56.96 mos.
  - Retained amount = $3000 x 36 = $108,000 (plus $129,094)
  - Gift amount = $300,000 – $108,000 = $192,000
  - We only need to wait 36 months (apply in 37th month)

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What to Do With the Gifted Amount

- Outright gift vs. transfer to self-settled irrevocable trust

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Transfers – Trusts

- **Why** Use a Trust?
  1. **Less risky than outright transfers**
     - Not subject to death, divorce, or bankruptcy of kids
     - Less people holding the assets
  2. **Tax Savings**
     - Retain capital gains exemption on sale of primary residence
     - Retain step in basis on appreciated assets upon death of senior(s)
  3. **Convenience**
     - Reduce administration expenses at the death of the grantor

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VA Trust Issues

- The best guidance is General Counsel Opinions and BVA opinions
- Bottom line: No income to the grantor, no benefit from trust assets

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Opportunities Under the New Rules

- We can finally advise clients with confidence
- Balancing Medicaid with VA pension just got simpler (proactive planning)
- Balancing Medicaid with VA pension just got simpler (crisis planning)

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Opportunities

- Proactive planning using an irrevocable trust (like the Veterans Asset Protection Trust®) will be used more often for VA and Medicaid
- Unmarried claimants can more easily qualify for Medicaid and VA pension

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Proactive Planning: Balancing Medicaid with VA

- You have a client who is a wartime Veteran, starting to show signs of mental and physical decline, but still able to live independently. You discuss the benefits of protecting assets now in the event her health fails in the future. Previously, this discussion was all about Medicaid (or trying to avoid using the word "Medicaid.") Now, the conversation can be about planning now, and using a Veterans Asset Protection Trust to qualify for Veterans pension benefits in 36 months.

- In 60 months, if her health is worse and nursing home care is necessary, she can then qualify for Medicaid.

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Crisis Planning: More Opportunities for Unmarried Veterans

- Under 38 CFR 3.276, only transfers of assets that would have caused net worth to be excessive will be penalized.
- An unmarried wartime Veteran living in an assisted living facility in a state that has a Medicaid waiver program for assisted living, could transfer $129,094 and not be penalized for VA purposes
- Depending on the nature of the transfer, the Veteran may have a penalty for Medicaid, but could begin receiving VA pension while waiting out the Medicaid penalty.

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Opportunities for Unmarried Veterans

- The same is true for a Veteran living in a nursing home who transfers assets to qualify for Medicaid.
  - As long as the transfer involves assets that would have otherwise been counted as net worth and not covered assets, there will be no penalty for VA purposes and that Veteran can begin receiving monthly payments to help defray nursing home costs during the Medicaid penalty period

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Balancing VA with Medicaid – Unmarried Veteran

- Veteran has $110,000 and is currently in assisted living
- Could transfer all of it and start receiving VA pension benefits immediately
- Can trigger the penalty for Medicaid and VA pension will help pay through the penalty period

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Thank You!

Should you have any questions, please don't hesitate to reach out to our team. We want you to be successful and have the information you need to do so.

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