

SNA Summary of VA Changes to 38 CFR Part 3

(Asset Transfers and Income Exclusions for Needs Based Benefits)

Among other things, our Special Needs Alliance is focused on the estate planning objectives to protect public benefits eligibility for clients affected by disability as defined in applicable statutes, regulations, policies and agency interpretations. With that focus, the 2015 public notice from the Department of Veterans Affairs generated substantial interest in the effort by the VA to “ensure the integrity of VA’s needs-based benefit programs.”¹

In recent years, the VA has been considering whether some strategies for estate planning are abusive of the VA benefits system. Effective October 18, 2018, changes to 38 CFR Part 3 are intended to stop such abuses.²

The following are important considerations for SNA members when interviewing clients who may be currently eligible, or could become eligible by proper asset planning adjustments, for “needs based pension” VA benefits. This introduction to the changes is to emphasize to estate planners, who in the past may have depended on asset transfers and asset adjustments to qualify veterans for pension benefits. Some strategies that were previously useful are no longer effective and may, in the long term, negatively impact the client’s ability to qualify for those benefits without corrective measures.

VA Pension “Planning”

In recent years VA pension planning has become a staple for many elder law attorneys and other veteran advocates to enhance income, security and stability for clients, or their surviving spouses, who were considered “war time” veterans. Those veterans served at least one day, with at least 90 days of qualified consecutive service (not for training), usually [although there were other eligible services] Army, Navy or Marines during a VA defined period of war.³ These periods of war include specific date ranges for World War II, the Korea War, and the Vietnam War and now continuously the Gulf conflicts which continue thru the current period. Older veterans may seem to be a focus, but we are seeing more Viet Nam vets coming for help. In order to qualify for the benefit often referred to as “Aid and Attendance” or “Enhanced Pension,” the VA considers the ability of the veteran or a surviving spouse to provide financially for their health and welfare.

Enhanced Pension is not a VA “compensation” award. It is similar to other “needs based” public benefits such as SSI and Medicaid. One must qualify as “disabled” and with low income and assets. An applicable veteran is automatically “disabled” if over age 65. But disability may come from other effects.

¹Page 1 *Summary* introducing the new provisions of Part 3 of 38 CFR. On March 24, 2015, as President of SNA, Richard Courtney submitted a letter of comment on behalf of the SNA listing recommended changes to the proposed regulations.

² “VA pension is a needs-based benefit and is not intended to preserve the estates of individuals who have the means to support themselves. Accordingly, a claimant may not create pension entitlement by transferring covered assets. VA will review the terms and conditions of asset transfers made during the 36 month lookback period to determine whether the transfer constituted a transfer of a covered asset. However, VA will disregard asset transfers made before October 18, 2018.” 38. CFR 3.276(a)(8)(b).

The new rules impose a 36 month “look-back” period for transferring assets, similar to the 5 year Medicaid look-back. But the VA has imposed a maximum 5 year penalty period. The penalty duration is determined by dividing the annual pension amount into the value of the transfer.

There is a base pension, a supplement for “homebound” assistance to reach community and the fully enhanced payment amount with “aid and attendance” supplement for paying caregiver support to those who need pay for additional personal services to assist with “ADL’s.”⁴ There is a reduced pension available for similarly qualified surviving spouses. Unlike Social Security, divorce terminates a former spouse’s right to the benefit. The benefit has been used effectively to help veterans and surviving spouses afford the ever-increasing costs of home care and assisted living when Medicaid may not pay for that level of care. Unfortunately, as in so many cases of public benefits, some have stretched the rules to create eligibility beyond what the VA believes the program intended. Most notable to the elder law community is the use of annuities and trusts to exempt large sums from being considered “assets,” converting savings to “income” or exempting trust corpus which leads to eligibility under strict language of the current regulations. By amending 38 CFR Part 3, the VA is trying to avoid any abuses.

SNA Considerations

Assets of an otherwise eligible veteran, that are transferred into a special needs trust for a disabled dependent child, within three (3) years of applying for VA pension benefits, will not be considered to penalize the veteran or the surviving spouse if the dependent child is rated by the VA as incapable of self-support so long as the trust cannot be used for support of the veteran or surviving spouse.⁵ In the future, this caveat should cause review of any “revocable” third party SNT planning when counseling the otherwise eligible veteran.

Any estate planner must be aware of the client’s (or deceased spouse’s) status with the VA, if available, and of possible eligibility for VA benefits that past military service creates that non-veterans do not have access to. As in special needs planning, these benefits can have life changing effects for some families. Also, as with expertise necessary in special needs planning, one may not be familiar with specific VA benefits but should be able to recognize the advantage some benefits can bring and a good referral source with the necessary expertise.

Some new provisions of the VA regulations dramatically change asset protection strategies. Whether the attorney does Medicaid and/or VA asset protection planning or not, familiarity with these changes can help a specific client make decisions to assist other planning.

Planners should be aware that an eligible deceased veteran’s surviving child(ren) with disabilities may be eligible for low income benefits similar to surviving spousal benefits. But care should be given as these benefits relate to SSI eligibility, but as in Medicaid long term benefit planning, there is a \$90 benefit that would not be considered by SSI as additional income.

The following changes should be understood by the special needs planner: Keep in mind that the goal of these changes is to protect the “integrity of the program.” The points are only an introduction to issues

⁴ The changes include specifically adding that payment for valid ADL support is a legitimate “medical expense” deducted from income. This deduction will reduce the amount of assets the VA limits for an applicant.

⁵ 38 CFR 3.36.

of effect to special needs planners, not to the extent of VA pension eligibility planning. There are many new rules that apply to eligibility that do not affect special needs planning but certainly affect the veteran's eligibility and any need for asset planning for eligibility.

- 1) Although the VA has always given consideration to available assets ("net worth") when an application is filed, planning strategies made adjustments. Formerly, where there was a generic "\$80,000" asset amount estimated for married couples in VA eligibility, there is now a fixed connection to an equivalent Medicaid asset amount, \$123,600, which is the 2018 spousal asset maximum for Medicaid eligibility (likely \$126,420 for 2019). However, this number is reached using the sum total available family assets (savings and investments of both spouses) and adding it to the annual household income of both the veteran and spouse.⁶ In Medicaid, the spouse's income is not counted against the applicant. For instance, a veteran needing care, with family assets of a \$100,000 CD could have total household income of \$28,000 and be considered asset eligible for VA pension. But if the family had \$30,000 income from all sources, the total of \$100,000 and \$30,000 would exceed the \$123,600 limit for eligibility.⁷ When applying for benefits for a surviving spouse, only that individual's assets are considered.⁸ Assets can be adjusted with certain excluded expenses, including acceptable unreimbursed medical expenses which exceed 5% of pension rate for the veteran that year.⁹ This 5% limit also applies to any child dependent living with the veteran.¹⁰
- 2) An important consideration for use is that a "Revocable" SNT, created by the veteran or spouse for the benefit of a dependent child will be considered an "asset" to the veteran because the veteran or spouse can "access" the fund by "revoking" the trust.
- 3) If a child of the veteran has assets in excess of the asset limit, that child will not be considered a "dependent" of the veteran. However, as set out in paragraph 7 below, assets in a special needs trust will not be considered available if the VA has determined the child as unable to support themselves.
- 4) As in Medicaid, transfers of assets that could be used for support will be presumed to be reducing assets in order to qualify for pension benefits. The transfer of assets rules are set out in 38 CFR 3.276. A major difference is that the "look-back" period with the VA is three (3) years, not the 5 year period for Medicaid transfers.¹¹ Disqualifying transfers may be "corrected" similar to Medicaid rules.¹²
- 5) Purchasing an annuity with a large amount of cash savings, in order to convert savings into income is addressed as a "transfer" of assets, possibly leading to ineligibility.¹³
- 6) The divisor for such transfers to determine a shorter disqualification would be the maximum pension benefit divided into the value of the transfer.
- 7) Under 38 CFR 3.276(d)(1) and (2), a transfer of assets by the veteran or spouse, into a trust for a child who has been determined by the VA to be incapable of self-support, is not considered a disqualifying transfer.

⁶ 38 CFR 3.274(c)(1).

⁷ See, a similar example set out in 38 CFR 3.275(b)(4).

⁸ 38 CFR 3.274(c)(2).

⁹ 33 CFR 3.272 (g)(1)(iii) and 38 CFR 3.278(b) and (c). A medical expense may now simply include expenses necessary to slow the decline of the veteran's functional abilities.

¹⁰ 33 CFR 3.272 (g)(2).

¹¹ 38 CFR 3.276(a)(7).

¹² See, 38 CFR 3.276(e)(5).

¹³ 38 CFR 3.276(a)(6), addresses purchasing annuities and transferring assets into trusts.

- 8) SNA members need to consider any effect of distributions from a special needs trust for a dependent resident in the veteran's home. If a distribution from a special needs trust is to pay for a child to stay in the home of the veteran, such as rent or utility sharing, or for caregiver service, it is likely "income" to the veteran and when added to other household income from whatever source, can cause ineligibility for the veteran.
- 9) There are updated definitions for what constitutes an "asset."¹⁴ Generally only the equity an applicant has in an asset is counted. Excess acreage for a residence (unless not marketable) would be considered an asset.¹⁵ Whereas, the personal residence with its 2 acres is excluded even if the veteran is not living in the residence. Any additional acreage, if marketable will be counted as an "asset." But any mortgage on the personal residence will not reduce asset value.¹⁶ There are additional exclusions worth reviewing, such as special compensation income recognized by the VA if doing asset planning.¹⁷
- 10) Additional language of the regulation acknowledges some previously denied assistance payments for home care agents, including family members and redefining care facility benefit.¹⁸
- 11) The regulation includes a list of expenses expressly excluded from being "medical" in nature and are thus, not deductible from the income total added to assets.¹⁹
- 12) SSI income of a dependent is not counted when tabulating "income" for purposes of totaling the "assets limit."²⁰
- 13) The veteran's home can always be transferred without penalty because it is not a "covered" asset.

Strategies no longer available in planning:

- 1) Adding another's name to an account will not help reduce asset calculation, except to help pay through a penalty period
- 2) Purchasing an annuity or using a Medicaid trust will not shield assets immediately.

Some planning strategies are still available:

- 1) Purchase a new home or renovate
- 2) Buy funeral plans
- 3) Purchase items for the veteran or other household relatives that will not be considered an increase in household "assets."
- 4) Use an installment contract to sell property.

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¹⁴ 38 CFR 3.275.

¹⁵ 38 CFR 3.275(a)(3).

¹⁶ 38 CFR 3.275(b)(ii).

¹⁷ See, 38 CFR 3.279, *et.seq.*

¹⁸ 38 CFR 3.278(d)(3).

¹⁹ See, 38 CFR 3.278(d)(3)(iv)(A) and (B).

²⁰ 33 CFR 3.272(a). Referred to as "Welfare" in the regulation.

