

*Presenting a live 90-minute webinar with interactive Q&A*

## Estate Planning for Medicaid and VA Benefits

Maximizing Benefits Through Succession Plan Strategies

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WEDNESDAY, MAY 2, 2012

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# **ESTATE PLANNING FOR MEDICAID AND VA BENEFITS**

## **SECTION I MEDICAID ELIGIBILITY REQUIREMENTS**



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# **THE PROBLEM: CRISIS IN LONG-CARE CARE**

- Nursing homes cost \$100,000/year
- Assisted living facilities cost \$50,000/year
- Medicare and health insurance do not pay

# NURSING HOME COST

➤ Pennsylvania (Official):

\$266.70/day

\$8,112.12/month

➤ Eastern Pennsylvania (Actual)

\$275 - \$330/day

\$8,500 - \$12,000/month

# ASSISTED LIVING COST

Eastern Pennsylvania

\$3,000 - \$5,500/month



# FUNDING SOURCES

- Long Term Care Insurance (LTCI)
- Veterans' Benefits
- Out-of-Pocket
- Medicaid

# **MEDICARE DOES NOT PAY FOR LONG TERM CARE**

- Health insurance for elderly & disabled
- “Acute” (short term) care – doctors, hospitals, and short term nursing home rehabilitation
- Federally operated
- Federally funded

# MEDICARE (CONTINUED)

Coverage for nursing home care IF –

- 3-day hospitalization
- 100 days maximum
- Co-pay after 20 days: \$144.50/day (2012)
- “Improvement” Standard vs. “Medically Necessary”

# HEALTH INSURANCE

- Acute (short term) care - doctors, hospitals, and short term nursing home rehabilitation
- “Medi-gap”/”Supplemental” – deductibles & co-pay
- Need Plan “C” or better for short-term nursing home co-pay

# **LONG TERM CARE INSURANCE (LTCI)**

## **Types of Policies –**

- **Individual**
- **Joint**
- **Rider to Life Insurance or Deferred Annuity**

# LONG TERM CARE INSURANCE (LTCI) CONTINUED

## Joint Policies –

- Single policy with 2 owners who share a pool of \$
- “Share Care” – 2 policies with sharing of benefits between owners
- 2 separate policies with discounted premium

# LONG TERM CARE INSURANCE (LTCI) CONTINUED

## Policy Features

- Types of care covered
  - ✓ nursing home
  - ✓ assisted living
  - ✓ home caregiver

# LONG TERM CARE INSURANCE (LTCI) CONTINUED

Policy Features (continued) –

- Benefit period
  - ✓ Lifetime
  - ✓ Fixed term – usually 3-5 years
  
- Benefit Amount
  - ✓ Daily
  - ✓ Inflation rider: simple or compound



# LONG TERM CARE INSURANCE (LTCI) CONTINUED

Policy Features (continued) –

- Reimbursement v Indemnity policies
- Elimination Period
- Waiver of premium
- Fixed premium unless raised for all similar policies

# LONG TERM CARE INSURANCE (LTCI) CONTINUED

- Pre-Existing Condition

- ✓ “You can’t buy fire insurance when your house is on fire.”

- Conditions likely to result in denial

- ✓ Dementia

- ✓ Stroke

- ✓ Osteoporosis

# LONG TERM CARE INSURANCE (LTCI) CONTINUED

- Benefit Triggers – what qualifies one to receive LTCI benefits
  
- “Chronically ill individual” – IRC 7702B
  - ✓ Inability to perform 2 or more activities of daily living (ADL)
  
  - ✓ Transferring/mobility, incontinence, toileting, bathing, dressing, eating

# LONG-TERM CARE INSURANCE (CONTINUED)

- LTCI – only 1 piece of the puzzle
  
- Not a substitute for Medicaid Planning
  - ✓ limited duration
  
  - ✓ Limited availability
  
  - ✓ Adverse claims experience

# MEDICAID ELIGIBILITY (GENERALLY)

- Age 65 & over, blind, disabled or parent of disabled child, U.S. Citizen or certain qualified aliens;
- Financial Qualifications
  - ✓ Income: below ability to pay monthly care (\$8,112.12)
  - ✓ Assets: below \$8,000 (PA) or \$2,400
- No disqualifying gifts/transfers

# EXEMPT ASSETS

1. Principal residence (Equity limited to \$525,000)
2. Property used in business if essential for self-support
3. Personal effects & household goods
4. One automobile
5. Life insurance (face value below \$1,500 or term or group)

# EXEMPT ASSETS (CONTINUED)

6. Burial plots
7. Irrevocable burial reserve accounts or prepaid burial contracts
8. Community Spouse qualified retirement plans (PA)
9. Community Spouse Resource Allowance (CSRA) –  $\frac{1}{2}$  of total countable assets: \$113,640 (max) / \$22,728 (min)
10. Institutional Person's Allowance: \$2,400 (if gross income is  $<$ \$2,094), or in PA, \$8,000 (if gross income is  $>$ \$2,094)

# SPOUSAL ISSUES

- Institutional Spouse (IS)  
Spouse in the Nursing Home
- Community Spouse (CS)  
Spouse in the community  
(home or assisted living)



# **MEDICARE CATASTROPHIC COVERAGE ACT “MCCA”**

- Congress created a system for allocating income & resources between the IS & CS
- Goal: keep CS from becoming impoverished - Are CS' basic needs being met by their income & assets?
- States allowed to establish an allowance for the CS

# COMMUNITY SPOUSE PROTECTIONS

<u>Income:</u>	Min MMNA	\$1,891.25
	Max MMNA	\$2,841

\*Adjusted for Excess Shelter Costs – to make sure CS’ needs are met

Assets: Spousal Share or “CSRA”

½ of total countable assets valued as of the date of admission (“Snap Shot Date”)

Min CSRA:	\$22,728
Max CSRA:	\$113,640

# SAMPLE CSRA ANALYSIS

- Couple owns \$100,000 countable resources on date of admission
- CSRA = \$50,000 ( $\frac{1}{2}$  of \$100,00 total)
- Couple is eligible once resources are reduced from \$100,000 to \$47,600 (\$50,000 for CSRA and \$2,400 for IS)

# CS INCOME ISSUES: WHAT IF CS' INCOME IS NOT ENOUGH?

## ➤ Income First Rule:

- ✓ CS will only be allowed to retain resources above the CSRA to generate additional income if a gap exists after having been allocated the IS' income first
- ✓ Example: CS' income = \$500, IS' income = \$1500; MMNA = \$1,891.25; therefore, CS gets \$1,391.25 to make up the difference

# ASSETS

- With married couples, all assets, whether individually titled or jointly titled by both or with someone else, are countable.
- CSRA is determined by Resource Assessment at **DATE OF ADMISSION**; therefore best to maximize assets as of snapshot date and then spend-down

# RESOURCE TRANSFERS AFFECT ELIGIBILITY

If an individual transferred assets for less than fair market value before entering nursing home & within look-back period, DPW imposes a penalty of **ineligibility** for Medicaid benefits.

# RESOURCE TRANSFERS

Look-back period:

Transfers of assets for less than FMV on or after February 8, 2006 result in a 5 year (60 month) look-back; transfers before then are under the pre-DRA rules requiring a 3 year (36 month) look-back (expect for transfers to Trusts - 60 months)

# CALCULATING INELIGIBILITY

Divide the transferred amount by the penalty divisor, currently \$8,112.12/month or \$226.70/day

Example: \$25,000 gift results in a penalty of 3..08 months ( $\$25,000/\$8,112.12$ )



# CALCULATING INELIGIBILITY

The DRA requires that the penalty begin when the gift is made, or the date when the applicant would “otherwise be eligible” (i.e. medically and financially) for benefits, **whichever is later**.

Example: A \$25,000 gift today yields a 3.08 month penalty. If client applies for Medicaid 4 years from now, and is deemed medically and financially eligible, the penalty will begin at that time.



# **EXEMPT TRANSFERS (NON-PENALTY PRODUCING)**

1. Transfers between spouses
2. Transfer of residence to child under 21, blind or disabled
3. Transfers of residence to sibling w/equity interest
4. Transfer of residence to “care-giver” child
5. Transfer of assets for sole benefit of CS
6. Transfer of assets to a Trust for blind or disabled child



# **EXEMPT TRANSFERS (NON-PENALTY PRODUCING)**

7. Transfer of assets to someone under 65 who is disabled (SSI criteria)
8. Assets were intended to be transferred for FMV
9. Assets were transferred for purpose other than to qualify for MA

# TRANSFERS WITH SPECIAL TREATMENT

1. Loans, mortgage or promissory note: are not countable as assets where (a) actuarially sound repayment term, (b) payments in equal periodic amounts, and (c) prohibits cancellation upon lender's death
2. Annuities: Single Premium Immediate Annuity is not countable as an asset if (a) DPW is named remainder beneficiary in 1<sup>st</sup> position for amount of benefits paid to the IS, or 2<sup>nd</sup> position after CS or minor/disabled child, (b) irrevocable, (c) actuarially sound, and (d) equal periodic payments

# UNDUE HARDSHIP

DPW will not impose a penalty for a transfer where it would cause undue hardship

Undue Hardship exists where a denial would deprive an individual of medical care and endanger the individual's health or life (individual is deprived of food, clothing shelter or other necessities of life.)

# ESTATE RECOVERY

Personal Representative of an Estate is personally liable if DPW claim is not properly satisfied.

Personal Representative is required to give notice to DPW to receive the claim.

DPW once properly notified must submit it's claim within 45 days of receipt thereof or forfeit right to collect.

# WAIVER PROGRAMS

- State specific
- General Cost Considerations (Aging in Place)/Medicaid is “payor of last resort”
- Waivers = Medical Assistance will pay for services in-home (in Assisted Living) or in Nursing care when a person is “otherwise eligible” for such services.
- So, if a person “otherwise” qualifies for medical assistance, they can get help with covering the costs from the MA program for services delivered in the home or in an assisted living facility (state specific).

# Estate Planning for Medicaid and VA Benefits

## VA benefits eligibility requirements



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# Overview

- When talking about VA Benefits for the purposes of this CLE, we are referencing the Non-Service Connected Pension Benefit, commonly known as Aid and Attendance
- This benefit does not require that the veteran have a service-connected disability or injury
- This pension is available to a veteran, surviving spouse or dependent child

# Why would clients want Aid and Attendance?

- Medicaid typically has some home care benefits, but either limited or virtually no assisted living benefits
- Aid and Attendance can help your clients pay for home care, assisted living or nursing home care
- Can keep your clients out of the nursing home and extend their resources
- Aid and Attendance is paid directly to the veteran or surviving spouse (whereas Medicaid reimburses the provider)

# Why would clients want Aid and Attendance?

- No estate recovery from the VA (unlike with Medicaid)
- VA is sometimes easier to obtain than Medicaid and offers the client more flexibility with their long term care options
- If a veteran is eligible for Aid and Attendance, he is automatically eligible for healthcare benefits through the VA (though he must file a separate application)

# Why would clients want Aid and Attendance?

- Aid and Attendance benefit is tax-free
- Roughly one-third, or more, of assisted living facility clients would qualify for Aid and Attendance benefit
- Most do not even know about the benefit or how to obtain it

# What is the Aid and Attendance Benefit?

- Improved Pension – a base level benefit for those with low income
- Allowances on top of benefit:
- Housebound – for purposes of employment
- Aid and Attendance – needing assistance with 2 or more activities of daily living (ADL's)

# What is the Aid and Attendance Benefit?

- 2012 Maximum Allowable Pension Rates **(MAPR)** for Aid and Attendance:
- Married Veteran - \$2019
- Single Veteran – \$1703
- Surviving Spouse – \$1094

# A&A Eligibility Requirements

## 3 Part Qualification Process:

- Service Requirement
- Disability Requirement
- Means Test – Income and Asset Requirements



# A&A Eligibility: Service Requirement

- A veteran is a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions, other than dishonorable.” 38 CFR 3.1(d)
- 90 days of consecutive active duty service
- At least one of those 90 days served during a “period of conflict” (although the veteran does not have to have been in combat)
- Received a discharge that wasn’t dishonorable



# A&A Eligibility: Service Requirement

## Dates of Wartime:

- World War II – December 7, 1941 through December 31, 1946, extended to July 25, 1947, when continuous with active duty on or before December 31, 1946
- Korean War – July 27, 1950 through January 31, 1955
- Vietnam War – August 5, 1964 – May 7, 1975, and \*February 28, 1961 – May 7, 1975 (for those who were in Vietnam)
- Persian Gulf War – August 2, 1990 to date yet to be determined

# A&A Eligibility: Disability Requirements

- Claimant must be 65 or older, or be permanently and totally disabled. See 38 USC § 1513(a), 38 CFR § 3.317(b)(2); 3.321(b)(2); 3.340; and 3.342
- Must show that have a medical need
- Person must need assistance with some activities of daily living
- And/or person is not safe in their environment without assistance or supervision due to a cognitive impairment

# A&A Eligibility: Disability Requirements

- Needing assistance with medications will work as well (as that is generally due to a cognitive impairment)
- Being blind or in a nursing home carries the presumption that claimant needs Aid and Attendance. See 38 CFR § 3.351(c)
- Being in assisted living or having home care is not enough. Must also have a doctor's verification of the medical need

# A&A Eligibility: Means Test – Income Requirements

- Aid and Attendance is based on the household income for a married couple *(unlike Medicaid which generally only counts income of the Medicaid recipient)*
- Household income includes payments of any kind from any source. See 38 CFR § 3.271
- Social Security, pension, IRA RMDs, dividends, interest income, business or farm income, rental property income, working income, etc.

# A&A Eligibility: Means Test – Income Requirements

- When claimant applies, income is projected for the next 12 months
- Claimant's Income for VA purposes (IVAP) is the claimant's total household income minus unreimbursed medical expenses (UMEs)
- Unreimbursed medical expenses are subject to a deductible equal to 5% of MAPR for pension

# A&A Eligibility: Means Test – Income Requirements

- In order to be eligible, claimant's IVAP cannot exceed the Maximum Allowable Pension Rate (MAPR)
- Claimant receives the max pension when his/her income has been reduced to zero by deductible medical expenses
- Attorney's goal is to help claimant reduce their IVAP below the MAPR by finding or creating allowable recurring medical expenses

# A&A Eligibility: Means Test – Income Requirements

- Veteran can deduct expenses for both himself and his spouse
- At the time of application the claimant reports UMEs that will be incurred during the next 12 months
- If IVAP is more than zero, but less than the MAPR, claimant will receive the difference between the two figures

# A&A Eligibility: Means Test – Income Requirements

Deductable medical expenses include:

- Health insurance premiums (including Medicare premium)
- Long term care insurance premiums
- Home care – Caregiver does not need to be licensed if claimant is rated as needing aid and attendance. Caregiver may be a family member, including a child, but not a spouse



# A&A Eligibility: Means Test – Income Requirements

- Assisted living community rent
- Independent living community rent – if the community provides enough medical services, such as assistance pull cords in the room, meals, transportation, housekeeping, etc.
- Prescription drugs, vitamins, supplements
- Nursing home payments
- Diabetes and incontinence supplies
- Other recurring medical expenses
- *\*There is no deduction for non-medical expenses such as a mortgage, credit card or car payment*

# A&A Eligibility: Means Test – Income Requirements

- Example – Veteran client and spouse have total income of \$3,000 per month. Client and spouse move to assisted living where they pay \$3,500 per month. The MAPR is \$2019. Their IVAP is now -\$500 per month. They will qualify for the maximum pension benefit of \$2019 per month

# A&A Eligibility: Means Test – Income Requirements

- Example – Single surviving spouse has income of \$1500 per month. Her medical expenses are as follows: Medicare and Supplemental health premium - \$250, home care - \$1400. The MAPR is \$1094. Her IVAP is -\$150. She will qualify for the maximum benefit.

# A&A Eligibility: Means Test – Income Requirements

- Example – Single veteran has income of \$3,750 per month. His UME's total \$600 per month. His IVAP is \$3150 and that is more than the MAPR of \$1703 for a single veteran. Therefore, he does not qualify for A&A at this time.



# A&A Eligibility: Means Test – Asset Requirements

- From the VA Manual, M21: The pension program is intended to afford beneficiaries a minimum level of security, and not intended to protect substantial assets or build up the beneficiary's estate for the benefit of heirs. The Veterans Service Representative (VSR) determines whether or not the claimant's financial resources are sufficient to meet his/her basic needs without assistance from VA. If a claimant's assets are large enough that the claimant could use those assets to pay living expenses for a reasonable period of time, net worth is considered a bar. See M21-1MR, Part V, Subpart i, Chapter 3, Section A



# A&A Eligibility: Means Test – Asset Requirements

- No definite threshold of assets (*unlike with Medicaid*)
- Over \$80,000 for a married couple will likely disqualify the claimant
- Over \$40,000 for a single person (veteran or surviving spouse) may disqualify the claimant, but not always

# A&A Eligibility:

## Means Test – Asset Requirements

- The VA uses a life expectancy calculation to determine what assets are appropriate for a claimant.
- The VA looks at the claimant's age, income, medical expenses, number of dependents and potential rate of asset depletion
- This means that a 90 year old claimant will not be allowed to have the same asset threshold as a 70 year old claimant, even if all other factors are the same
- Very subjective test – leaves a lot of discretion for the VA

# A&A Eligibility: Means Test – Asset Requirements

- However, the above figures could still be too high for a particular claimant. Each case is different
- Therefore, you should not assume that if the claimant has \$80,000 or less, they will automatically qualify
- Best practice is to make certain that client's assets are low enough to not cause any issues when applying for VA





# A&A Eligibility: Means Test – Asset Requirements

## Exempt Resources:

- One vehicle is exempt
- Home (and reasonable lot size) is exempt, as long as it is not rented out to a 3rd party (*unless certain restrictions are met*)
- Prepaid irrevocable funeral/burial/cremation
- All other assets with cash value will be countable (*similar to Medicaid*)



# A&A Eligibility: Means Test – Asset Requirements

- Life estates are countable and the VA will count the total value of the property, not just the value of the life estate
- Unsecured debt does not decrease net worth
- IRAs are both assets and income
- The claimant must NOT apply for Aid and Attendance until their assets have been repositioned so that they are eligible



# Aid and Attendance Planning Strategies

- As discussed, Medicaid has a 5 year lookback period for all gifts and transfers. Uncompensated gifts made during this period will incur a penalty.
- The VA currently has no lookback period at this time and no penalty for making uncompensated gifts or transfers
- To be effective, transferor must relinquish all rights of ownership, including control and the right to receive income. See 38 CFR § 3.276
- Transfers to a relative living in the home are ineffective



# Aid and Attendance Planning Strategies

- Typical planning strategies include:
- Irrevocable Trusts
- Gifting to children or family members
- Partial Interest Transfers
- VA Compliant Annuities
- Payments to a caretaker child
- Purchasing funeral/burial and personal item and spending additional assets down

# A&A Planning Strategies: Irrevocable Trust Planning

- Irrevocable trusts for VA purposes must be set up very carefully
- Different than the types of trusts we may use for someone only trying to achieve Medicaid eligibility in the future
- No rules or regulations to give guidance
- Only guidance is general counsel opinions – 72-90, 64-91, 73-91, 15-92, 33-97
- Trust assets will be countable unless claimant has relinquished all incidents of ownership

# A&A Planning Strategies: Irrevocable Trust Planning

- Claimant may not be the trustee
- The claimant/grantor cannot receive or even be taxed on any income that the trust generates (unlike with Medicaid)
- The VA checks tax returns of all claimants and the VA could argue no total relinquishment because income is being reported on the tax return
- The claimant/grantor may not have any rights to receive the principal

# A&A Planning Strategies: Irrevocable Trust Planning

## Residence Trust Planning:

- For the home only, a traditional Intentionally Defective Grantor Trust (IDGT) would work
- However if home is sold, then proceeds may not stay in the IDGT because it would cause ineligibility for VA benefits
- Proceeds must pay out to beneficiaries (not claimant) or be held in trust that is not defective for income tax purposes



# A&A Planning Strategies: Irrevocable Trust Planning

## Strategy with Two Irrevocable Trusts:

- Trust 1 holds the principal residence only
- Trust 1 is an IDGT, no income to grantor, limited power of appointment for the step-up in basis
- Upon sale of the home, proceeds are distributed out to beneficiaries or into the 2nd irrevocable trust
- Trust 2 holds all other assets, mandatory payment of income to lifetime beneficiaries, limited power of appointment for the step-up in basis





# A&A Planning Strategies: Irrevocable Trust Planning

- Under the two trusts strategy, the two trusts may be combined into one instrument for ease of administration
- The trust will name a Trustee and a Lifetime Beneficiary or Beneficiaries
- The Lifetime Beneficiary is the beneficiary of the trust income and principal while the grantor is living, will be taxed on the trust income and may remove trust principal according to the terms of the trust



# A&A Planning Strategies: Irrevocable Trust Planning

- The trust can be set up so that appreciated assets will receive a step up in cost basis at the grantor's death through a testamentary limited power of appointment to change beneficiaries
- No power to distribute accumulated income, only principal and executed by Will only (to avoid having it treated as a grantor trust)
- May include a trust advisor who can appoint a trustee or make certain changes to the trust if necessary in the future



# A&A Planning Strategies: Irrevocable Trust Planning

- A VA trust is best used when we want to maintain asset protection during grantor's lifetime and when there are appreciated assets, such as real property or stock
- Transfers to a trust will cause a penalty period for Medicaid, if Medicaid is needed during the 5 year lookback period. After 5 years, the funds are protected from Medicaid



# A&A Planning Strategies: Gifts to Children and Family

- The claimant can transfer funds outright to a child or other family member without penalty (as long as person not living in claimant's home)
- Typically done when there are limited family issues or limited funds to transfer
- Best used for cash and other non-appreciated assets



# A&A Planning Strategies: Gifts to Children and Family

- No step up in cost basis at grantor's death
- No asset protection for family member holding gifted funds – could be subject to creditors, divorcing spouse, etc
- Outright gifts will cause a penalty period for Medicaid, if Medicaid is needed during the 5 year lookback period. After 5 years, the funds are protected from Medicaid



# A&A Planning Strategies: Partial Interest Transfers

- Transfer of a partial interest will reduce the claimant's interest in proportion to the amount transferred.
- Ex. Veteran has a bank account worth \$50,000. He adds his son's name to the account (son does not live in the veteran's home). The veteran's portion of this account is now \$25,000
- Quick and simple way to lower claimant's countable assets
- However, no asset protection from family member added to account – money could be subject to creditors, divorcing spouse, etc

# A&A Planning Strategies: VA Compliant Annuity

- The claimant may purchase certain types of annuities to reduce their countable assets
- Ex. Single premium immediate annuities, some balloon annuities
- Annuity may not have cash value because the cash value is countable resource
- Can work well for life insurance with taxable gain, IRA's or current annuities
- Often used to convert a countable asset to income when the IVAP is a negative number



# A&A Planning Strategies: VA Compliant Annuity

- Must ensure that the annuity is Medicaid compliant (or can be made Medicaid compliant) if the claimant or spouse may need Medicaid within 5 years otherwise the annuity purchase would be an uncompensated and penalized transfer
- Caution – purchasing an annuity will raise the claimant's income which can then disqualify the claimant for VA benefits if not careful. The claimant must have enough medical expenses to still qualify for VA benefits after the annuity is purchased





# A&A Planning Strategies: Payments to a Caretaker Child

- The claimant may pay his/her child for caring for them
- This raises the claimant's medical expenses for VA purposes, which can then allow them to be eligible where they otherwise may not have been

# A&A Planning Strategies: Payments to a Caretaker Child

- Claimant must be able to provide invoices to the VA, signed by the caregiver that show:
  - The amount paid
  - Date payment was made
  - Identification of the provider to whom payment was made
  - Name of person for whom service provided
  - Nature of product or service provided (description of care service)



# A&A Planning Strategies: Payments to a Caretaker Child

- The VA is not as stringent as Medicaid in requirements for paying a caregiver
- However, because many clients may need Medicaid in the future, make sure that you comply with the Medicaid rules for paying caregivers
- Must use written agreement which sets hourly market rate, must have accompanying physician's statement and person must not be in a LTC facility

# A&A Planning Strategies: Personal Purchases

- As with Medicaid, the claimant may spend down additional funds
- Home repairs, vehicle, personal items, prepaid funeral and burial/cremation, medical equipment, etc.

# Intersection of VA with Medicaid and Estate Planning

- VA planning will always intersect with Medicaid planning because we simply cannot take the risk that a client will never need Medicaid
- So all VA planning must be done with Medicaid in mind
- Planning for the VA's asset limitation could create a long term period of ineligibility for Medicaid benefits if not done correctly which would cause serious problems for you and your client (must have a backup plan in case Medicaid is needed)



# Intersection of VA with Medicaid and Estate Planning

## Planning Options to Avoid: Life Estates

- Life estates may be an exempt resource for Medicaid, but that is not the case with the VA
- The VA will count the total equity value of the property as an asset, so a life estate may not lower the claimant's resources
- You may still utilize a life estate for the claimant's primary residence, as that is exempt for VA purposes, but an irrevocable trust would likely be a safer option if the home may be sold in the future

# Intersection of VA with Medicaid and Estate Planning

## Planning Options to Avoid: Annuities

- Avoid annuities if the client's medical expenses are not high enough to maintain eligibility after the annuity is purchased
- Avoid annuities that are not Medicaid compliant or that cannot be made Medicaid compliant if your client needs Medicaid within 5 years
- Avoid placing all client's liquid funds into an annuity and leaving no cash for emergencies



# Intersection of VA with Medicaid and Estate Planning

## Planning Options to Avoid:

- Payments to children, or other caregivers, without a written care agreement that meets Medicaid's requirements



# Intersection of VA with Medicaid and Estate Planning

## Planning Options to Avoid: SNT

- The VA will count all funds in a Supplemental Needs Trust as an asset for the claimant (including self settled SNT and testamentary SNT)

# Intersection of VA with Medicaid and Estate Planning

## Planning Options to Avoid: Other

- Purchasing income producing property – the property will count as income and an asset for VA purposes
- Gifting to a family member who resides in the claimant's home
- Irrevocable trusts where the claimant receives or is taxed on the income or where the claimant is the trustee

# Intersection of VA with Medicaid and Estate Planning

- Avoid outright gifts and transfers to an irrevocable trust if client or spouse will need Medicaid in the immediate future (unless the transfer is part of a specific Medicaid penalty spend down strategy, such as the reverse half a loaf Medicaid planning, or you have a strategy for obtaining Medicaid if the client's needs change within 5 years)
- If client or spouse will need Medicaid in the immediate future, a Medicaid complaint annuity may work well



# Aid and Attendance vs. Medicaid

Consider Aid and Attendance first when:

- Claimant is at home receiving care or is in assisted living
- Claimant is at home and needs care but is not yet receiving it
- Child is providing most of Claimant's care



# Aid and Attendance vs. Medicaid

Consider Medicaid first when:

- Claimant is married with a high household income and Medicaid will provide in-home care for the spouse with the lower income
- Claimant is in a nursing home

# Aid and Attendance vs. Medicaid

## Example of Medicaid first

- Veteran's income is \$3,500 per month. Spouse income is \$500 per month.
- For VA purposes, they would need to spend at least \$4,000 per month on medical expenses to receive the max VA pension
- If spouse is the one who needs care, Medicaid home care may be a better and more cost-effective option



# Aid and Attendance vs. Medicaid

- Can have both Aid and Attendance and Medicaid if eligible for both
- A single person on Medicaid in a nursing home will only receive \$90 per month of A&A. That is not countable income for Medicaid
- A married couple, where one spouse is in a nursing home on Medicaid, may still receive the full A&A benefit (no automatic reduction for married claimant)



# Practice Tips

- Any person who acts as a representative of a veteran in the preparation, presentation or prosecution of a VA claim must be accredited.
- This can be accomplished by sending in VA Form 21a  
<http://www.va.gov/vaforms/va/pdf/VA21a.pdf>
- For more information on becoming accredited with the VA, please see  
<http://www.va.gov/ogc/accreditation.asp>





# Practice Tips

- Once accredited, attorney must obtain a minimum of 3 hours of CLE in the next 12 months and additional 3 hours not later than 3 years from the date of initial accreditation, and every 2 years thereafter



# Practice Tips

- Make sure your intake questionnaire asks if the client (or their spouse) served in the military and if so, what branch did they serve and what were their dates of service?
- This allows you to screen your estate planning clients and determine whether they may be eligible for the benefit now or in the future



# Practice Tips

- If your clients may be eligible, you can let them know about the benefit and how you, or another attorney, may be able to assist them in applying
- Also discuss preplanning using irrevocable trusts to protect assets before clients need care



# Practice Tips

- Make sure that your clients execute a power of attorney with extensive planning powers
- Specifically, we want the POA to give the agent the ability to make unlimited gifts, create and fund an irrevocable trust and change the ownership and beneficiary of life insurance and annuities
- If we don't have these powers, our ability to plan for VA benefits is severely limited



# Practice Tips: Charging Fees

- **Attorneys may not charge a fee for filling out the VA application. See 38 CFR 14.636 and 14,637**
- **Attorneys who assist a veteran with a claim are required to do so pro bono until the claim is initially denied**
- **After denial, attorneys may charge reasonable fees**



# Practice Tips: Charging Fees

- Attorneys may charge a consultation fee before client has decided to file a claim
- Fees may be also charged for planning, such as preparation of a care agreement, irrevocable trust or other estate planning documents. Fees may also be charged for Medicaid planning (which generally coincides with VA planning)
- Typically, attorneys will charge for the other estate and long term care planning work and then prepare the VA application at no charge for their planning clients



# Thank You For Attending!



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# Estate Planning Best Practices to include VA & Medicaid planning



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# Identify prospect

- ▶ Veteran's Benefits
  - Know service and disability requirements
    - Keep an eye out
    - Most who qualify have no idea benefit exists
  - not good fit for skilled nursing need

# Identify prospect

- ▶ Medicaid– skilled nursing care
  - Preplanning (more than one year till expected admission)
  - Crisis (admission in a year or less)

# Identify prospect

- ▶ Identify Non–prospect–
  - no reliable family for Irrevocable Trust,
  - lots of LTC insurance.
  - Income sufficient to pay for care out of pocket.
  - Lots of resources
  - No temperament for following instructions
  - Does not care
  - ‘bad gut feeling’

# Know your client

- ▶ If you are an Estate Planner who has not done VA or Medicaid Clients, you have passed up business, whether you realize it or not.

# Know your client

- ▶ On your client information form–
  - Ask if they are a veteran or widow of vet
  - Ask if their parent is a veteran or widow
- ▶ Ask if they have Long Term Care Insurance
- ▶ Ask “what is important to you.”

# Learn how to explain plan to client

- ▶ Make sure you can explain complex quickly and simply
- ▶ Use simple diagrams

# Learn how to explain plan to client

- ▶ Irrevocable trusts
- ▶ Annuities
- ▶ Gifting

# Process

## Decide how you will do intake

- Long first meeting, or
- Short (3 meeting system)
  - triage/engage
  - Recommendations meeting
  - Implementation meetings



# Process

- ▶ Why do short first meeting?
  - Avoid giving free advice
  - Avoid wasting time with ‘tire kickers’

# Process

- ▶ Medicaid and VA Planning requires a lot of information:
  - Account statements
  - Property valuations
  - Insurance Agreements
  - Pension and Social Security Statements
  - Marriage, Death Certificates
  - DD-214
  - Physician Evaluations
  - Care Agreements
  - MANY MORE

# Process

- ▶ Avoid paper overload or mistakes:
  - Decide when you want the info and
  - Decide who supervises the collection (i.e. you or paralegal)
  - Clearly set expectations

# Process

- ▶ Make and use a Checklist
  - To make sure you get all the info you need
  - To make sure you send out all the paper you promised.

# Process

- ▶ Engagement letters are critical
  - They will determine when you are ‘on the hook’ and when you are off
- ▶ Your Engagement letter should
  - Define client (who you promised)
  - Define scope of engagement (what you promise)
    - what you will do
    - When it will be done
    - Defines fee and when earned

# Process

- ▶ Engagement letters should also define
  - When you are done “Success Criteria”
  - Whether you are filing an application

# Process

- ▶ Engagement letter Caveats
  - Remember that you cannot charge for a VA application. Make sure your engagement letter says so.
  - Be sure to exclude appeals, etc., from the initial engagement.
  - If you charge an advance fee, be sure to define when you can take it out of escrow.

# Billing

- ▶ Flat fee v. hourly
- ▶ Ethics of fees
  - i.e. 'Retainer' may not be allowed
  - Must be fair and reasonable
  - Check with colleagues and local bar.
    - Clients will also tell you if you are billing too much or too little



# Billing

## ▶ Practicalities

- Different from Trust Fee quoting
  - Client is more stressed, which means:
    - More likely to buy, but
    - More likely to be emotional
- Avoid collections– get paid up front
- Beware the trap of giving free advice

# Build your practice

- ▶ Train self. And staff.
- ▶ Get VA accredited

<http://www.va.gov/ogc/accreditation.asp>

# Build your practice

- ▶ Co-counsel while you learn
- ▶ Join Elder law organizations i.e.:
  - NAELA
  - ElderCounsel
  - state bar sections

# Build your practice

- ▶ Decide if will do Medicaid crisis or preplan or both
- ▶ This decision will affect your
  - Advertising
  - referral network

# Ethics concerns

- ▶ Attorney–Client issues:
  - Clearly Identify client
    - Is it sick, spouse, healthy spouse, both, kids or whom?
    - Make sure you know and they know.
  - Representing a client with reduced capacity.
- ▶ Fee ethics

# Ethics concerns

## ▶ Problems

- Undue influence
- Fraud
  - pre dating gifts
  - Intentional misrepresentation of value

# Review

- ▶ Identify prospect
- ▶ Know your clients
- ▶ Learn to explain Medicaid planning to client
- ▶ Develop your own process
- ▶ Decide how you will bill
- ▶ Build your practice
- ▶ Be ethical

