

Maximizing VA Benefits: Eligibility Requirements, Drafting Trusts, Asset Protection and Income Tax Savings

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Presented by:
Angela Manz
Valerie Peterson





VA Enhanced Pension Benefits

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Two Types of Disability Benefits

- Compensation
 - Service-Connection
 - Injured during Service
- Pension
 - A disability benefit for wartime veterans
 - NO Service-Connection
 - Means Tested

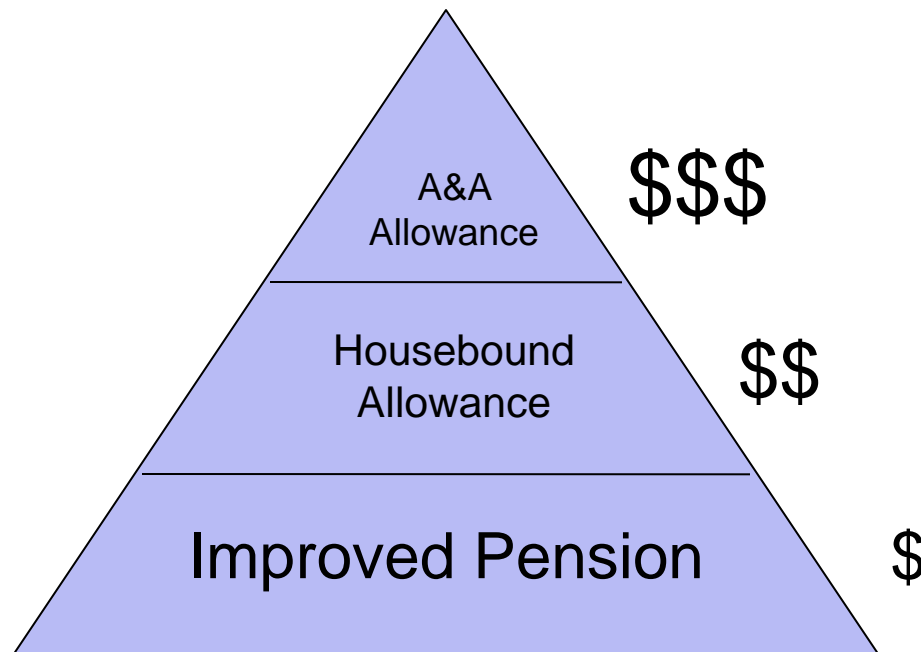
The Benefit

- Improved Pension
 - A base level benefit
- Allowances on top of benefit
 - Housebound allowance
 - Purposes of employment or disabilities totaling 100%
 - Aid & Attendance
 - Assistance with 2+ ADLs

The Benefit

Pension Benefit

(misnomer: Aid & Attendance Benefit)



What is the Aid and Attendance Benefit?

- 2018 Maximum Allowable Pension Rates (**MAPR**) for Aid and Attendance:
- Married Veteran - \$2,170
- Single Veteran – \$1,830
- Surviving Spouse – \$1,176

The Number of Potential Clients Over Age 65

- Approximately 1.7 million WWII Vets
- Approximately 2.2 million Korean Vets
- Widows of WWII and Korean Vets over 65 – last figures we found were 9.2 million
- Total prospective WWII and Korean War claimants – over 13 million
- 42% of the veteran population is 65 or over

Why We Do This Work

- From the 2011 GAO Report:
 - 2004 VA study found that while 62 percent of pension recipients might be eligible for these benefits, only about 22 percent received them. This study estimated that, in 2010, between 565,000 and 925,000 veterans and between 940,000 and 1.38 million surviving family members would be eligible for, but would not be receiving, VA pension benefits.
 - A portion of these veterans and surviving family members were expected to also qualify for enhanced monthly benefits. The study found, however, that the lack of awareness about the VA pension is the primary reason eligible veterans and their surviving family members may not be applying for enhanced monthly benefits.

Improved Pension

- Base Level Improved Pension
 - If 65 or over, disability does not have to be proven
 - 38 USC § 1513(a)

Improved Pension

- Less than 65 must show disability
 - Impairment that renders it impossible for the average person to follow a substantially gainful occupation
 - Must be “reasonably certain” to continue throughout life
 - See 38 CFR § 3.317(b)(2); 3.321(b)(2); 3.340; and 3.342

A Quick Comparison

Aid and Attendance	Housebound
Inability to dress or undress, keep oneself clean and presentable, frequent need of prosthetic adjustment, inability to feed oneself, inability to toilet, or	Substantially confined to his or her dwelling (or ward if institutionalized) and immediate premises
Incapacity (physical or mental) that requires care or assistance on a regular basis; or	Will continue throughout the claimant's lifetime
Bedridden	

Aid & Attendance Allowance

- Presumptions
- Blind or nearly so;
 - Patient in a nursing home
 - 38 CFR § 3.351(c)

Aid & Attendance Allowance

- Factors to meet criteria
 - Inability to dress or bathe
 - Incontinence
 - Need protection from hazards incident to daily environment
 - Bedridden
 - 38 CFR § 3.352(a)

Aid & Attendance Allowance

- Can a Veteran get A&A allowance based on the needs of their spouse?
 - No – disability prong is as to Veteran ONLY
 - However, expenses can be used for the Means Test

Housebound Allowance

- Substantially confined to dwelling and immediate premises
 - *Hartness v. Nicholson (2006)*
- Over 65 and additional disability(ies) rated at 60% or more
 - Examples: hepatitis, maculopathy, HIV
 - If less than 65
 - See 38 CFR § 3.351(d)

Housebound Allowance

- Hartness v. Nicholson (2006)
 - Blind, but was able to dress, bathe and feed himself
 - Could walk 100 ft; could mow lawn
 - Left home with assistance, did not drive

Housebound Allowance

- Hartness v. Nicholson (2006)
 - Disability rating of 70% (plus he was 65, so had an additional 100% disability)
 - Held: no requirement to show P&T disabled if 65 or over
 - Dicta: housebound should mean unable to leave home for purposes of employment

Medical Evidence

- May be based on medical reports and findings from non-VA facilities
- Statements from private physicians will be accepted for ratings purposes
- See list of VA forms for specific conditions at
 - http://www.va.gov/vaforms/search_action.asp?FormNo=21-0960&tkey=&Action=Search

Medical Evidence

- Use VA Form 21-2680 to document medical needs
 - If in ALF, make sure doctor notes that claimant needs “protective environment”
 - Part V, Subpart iii, Chapter 1 Section G.43.h

Medical Evidence

- Form 21-2680 should also substantiate need for A&A or that claimant is housebound
- If in a nursing home, only need form 21-0779



Eligibility Requirements

Purpose of Pension Program

- From the 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.
- M21-1MR, Part V, Subpart i, Chapter 3, Section A

Eligibility Requirements

3 Part Qualification Process:

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

Service Requirements

3-Part Qualification Process Veteran

- Service Requirements
- Disability Requirements
- Means Test

3-Part Qualification Process

Service Requirements

- Service Requirements
- 1) Veteran
 - “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)

3-Part Qualification Process

Service Requirements

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

31

3-Part Qualification Process

Service Requirements

- 2) Active duty wartime service
 - 90 days of continuous active duty (before 9-7-80)
 - At least one day during a declared war period
 - No need for combat
 - No need to be in-country

Periods of War

	Begin	End
World War II	12/7/41	12/31/46
Korea	6/27/50	12/31/55
Vietnam	8/5/64 2/28/61 if in-country	5/7/75

3-Part Qualification Process

Disability Requirement

- Minimum requirement
 - 65 or older
 - or, permanently and totally disabled

3-Part Qualification Process

Means Test

- Two Aspects of Means Test
 - Income
 - Net Worth

3-Part Qualification Process

Income

- IVAP “Income for VA Purposes”
 - VETERAN + SPOUSE **GROSS** INCOME
 - Minus UNREIMBURSED MEDICAL EXPENSES

3-Part Qualification Process Recap

	SERVICE
	Veteran
	Honorable Discharge
	90 Days Active Duty
	DISABILITY - 65+
	MEANS TEST
	Income
	Net Worth

3-Part Qualification Process

Surviving Spouse

- Service Requirements for Veteran
- Marriage Requirements
- Means Test

3-Part Qualification Process

Service Requirements – Surviving Spouse

- Service Requirements
- 1) Veteran
 - “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)

3-Part Qualification Process

Service Requirements – Surviving Spouse

- 2) Active duty wartime service - veteran
 - 90 days of continuous active duty
 - At least one day during a declared war period
 - No need for combat
 - No need to be in-country

3-Part Qualification Process

Marriage Requirement – Surviving Spouse

- Married to veteran at veteran's death
- Married at least one year
- Continuous Cohabitation
- Not remarried
 - Some exceptions

3-Part Qualification Process

Marriage Requirement – Surviving Spouse

- Remarriage Exceptions
 - Remarriage void or annulled
 - Remarriage after 1/1/1971 and terminated prior to 11/1/1990
 - Age 57 irrelevant

38 CFR 3.55(a)(10)

3-Part Qualification Process

Means Test – Surviving Spouse

- Two Aspects of Means Test
 - Income
 - Net Worth
 - Same requirements as veteran would have to meet

3-Part Qualification Process

Income

- IVAP “Income for VA Purposes”
 - **GROSS INCOME**
 - Minus UNREIMBURSED MEDICAL EXPENSES

3-Part Qualification Process

Recap - Surviving Spouse

	SERVICE OF VETERAN
	MARRIAGE
	Married at veteran's death
	Not remarried
	Married at least 1 year, continuous cohabitation
	MEANS TEST
	Income
	Net Worth

Reminder – Start With Basics

- Veteran
 - 90 days of active military service, one day during period of wartime (unless after 9-7-80 then 24 months)
 - Periods of war: See 38 CFR § 3.2
 - Discharged under conditions other than dishonorable

Reminder – Start With Basics

- For a surviving spouse: Veteran had to meet the basic requirements on prior slides

Disability Requirements

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 two or more activities of daily living.

Income and Asset Requirements

50

Income Requirements

- Defined
- Payments of any kind from any source
 - 38 CFR § 3.271
- VA counts “household” income
 - Claimant plus spouse and/or dependent child

Types of Income

- Recurring Income
 - Regularly received – wages, pensions
- Irregular Income
 - Received or anticipated, but in unequal amounts or at irregular intervals
- Non-recurring Income
 - One-time basis – inheritance, sale

How the VA Computes Income

- When a claimant applies, the application (claim) asks for projected income for the next 12 months.
- Annualization of income
 - Recurring income multiplied by 12

How the VA Computes Income

- Initial period starts on the first day of entitlement and runs through the end of the month the following year
- Example: Claim received April 15, 2014. Initial period runs May 1, 2014 through April 30, 2015.

Why the Initial Period is Important

- The claimant can submit additional information for that period, even after the period has expired.
- Initial period runs from 4-15-14 through 4-30-15. If the claimant incurred additional medical expenses during that time, she has until 12-31-16 to report them. **Part V, Subpart iii, Chapter i, Section A**
- This is also the period that the VA will count any additional income received.

Exclusions to Income

- See 38 CFR § 3.272 and 38 USC § 1503
- Most important: unreimbursed medical expenses

Unreimbursed Medical Expenses

- Most medical expenses only allowed after they have been paid
 - But a claim for benefits covers the next 12 months, not the last
 - Recurring medical expenses allowed as exclusion if they are reasonably certain to recur
 - Expenses counted like income, quasi-household

Unreimbursed Medical Expenses

- At the time of application the claimant reports UMEs that will be incurred the next 12 months
- Once approved, can get additional medical expenses deducted from income

Initial Period Rules Apply to UMEs

- The same initial period applies to UMEs as to income.
- Claim date is 4-15-14. Initial period runs through 4-30-15. Can submit additional evidence up to 12-31-16 for this period.

Allowable UMEs – In-Home Care

- If claimant is rated Housebound or A&A
 - Wages paid to the caregiver are proper UMEs
 - Caregiver does not have to be a licensed health care provider – may be a family member
 - Caveat: cannot be spouse
 - Wages to spouse are counted as income

Allowable UMEs – In-Home Care

- If claimant is not rated Housebound or A&A (rated only for base level pension)
 - Caregiver must be a licensed health care professional in order to deduct the wages as UMEs

Allowable UMEs – In-Home Care

- No deduction from income if the care is free
- Receipts are required to be allowed as countable UME:
 - A receipt bill
 - Statement on the provider's letterhead
 - Computer summary
 - Ledger, or
 - Bank statement

Allowable UMEs – In-Home Care

- Information needed on receipts:
 - The amount paid
 - Date payment was made
 - Nature of product or service provided
 - Name of person for whom service provided
 - Identification of the provider to whom payment was made

Allowable UMEs – In-Home Care

- Documenting the evidence
 - Personal Care Agreement
 - Invoices
 - Cancelled Checks
 - Caregiver Statement or Attendant Affidavit

Allowable UMEs – Independent Living

- October Fast Letter
 - Clarified treatment of room and board costs at facilities that do not qualify as nursing homes when considering UMEs
 - Room and board counted only when facility provides custodial care
 - Bathing, showering, dressing, eating, getting in or out of bed or a chair, toileting

Allowable UMEs – Independent Living

- Room and board counted only when facility provides custodial care
- Custodial care is assistance with 2 or more of:
 - bathing
 - showering
 - dressing
 - eating
 - getting in or out of bed or a chair
 - toileting

Allowable UMEs – Independent Living

- Can also count room and board as UME if:
 - Physician states in writing that claimant must reside in that facility to receive **custodial care** from a third party provider

Allowable UMEs – Independent Living

- What custodial care is NOT
 - Meal preparation
 - Medication management
 - Telephone assistance
 - Transportation assistance
 - Housework or laundry
 - 24-hour emergency assistance
 - *Instrumental Activities of Daily Living*

Allowable UMEs – Independent Living

- Cost of assistance with iADLs is a UME
 - If claimant meets Housebound or A&A disability requirements; **OR**
 - Physician certifies claimant needs protective environment; **AND**
 - Facility provides medical services or assistance with activities of daily living to the individual

Allowable UMEs – Independent Living

- Documentary evidence
 - 21-2680 or statement from physician
 - Need for protective environment
 - Need to receive 3rd party care at facility
- Facility Statement
 - Signed by veteran and facility

Allowable UMEs – Nursing Home

- Need for A&A presumed if in Nursing Home
- Use form 21-0779 to document nursing home care
 - 21-2680 Medical Report not needed

Allowable UMEs – Other

- Health insurance premiums
- Long term care insurance premiums
- Prescription drugs
 - But has to be “reasonably certain to recur”
 - You need additional documentation from doctor that patient will continue to need the prescription or VA will not count prescription costs as UMEs

Example

\$2,100 (Gross Income)

- 1,148 (UME)

\$ 952 IVAP

\$1,830 (MAPR for A&A, no dependents)

- 952 (IVAP)

\$ 878 Pension Benefit

Net Worth

- Pension shall be denied or discontinued when the corpus of the estate of the veteran and veteran's spouse are such that, when considering annual income, it is reasonable that some part of the corpus be consumed for the veteran's maintenance.
 - 38 CFR § 3.274

Net Worth

- Factors
 - Income
 - Whether property can be readily converted into cash at no substantial sacrifice
 - Life expectancy
 - Number of dependents
 - Potential rate of depletion

Net Worth

- If Net Worth is less than \$80,000 and benefits are denied, VSR must complete VA Form 21-5427 (Corpus of Estate Decision)
- Otherwise, totally subjective

Net Worth

- Board of Veterans Appeals Case
 - DOCKET NO. 09-48 617
 - Net worth of \$105,632 was excessive
 - Claimant's expenses exceeded her income by \$9.10/month. Board reasoned that it would take her 967 years to deplete her assets.

Net Worth

- Unsecured debts do not decrease net worth
- Although no regulation in writing, VA currently treats an annuity in payout status as income rather than an asset
- Joint assets are counted proportionately
- IRAs are asset and income

Net Worth

- Home is exempt
 - Includes home and “reasonable lot size”
 - Will not include farm land
- Assets in trust
 - Will be included unless claimant has relinquished all incidents of ownership

Net Worth Transfers

- There are no penalties or look back periods for transferring assets Yet
- Transfer to a relative living in the home is ineffective
- To be effective, transferor must relinquish all rights of ownership, including control and the right to receive income
- - 38 CFR § 3.276

Net Worth Transfers

- The transfer of a partial interest will reduce the claimant's net worth and income in proportion to the amount transferred
 - Example: Veteran has a CD worth \$40,000. He adds his son who does not live with him to the title. Veteran's CD is now counted as \$20,000.

Net Worth Transfers

- Life estate interests: Transfers disregarded because the life tenant retains an ownership interest in the property.
 - Part V, Subpart iii, Chapter 1, Section I.65.h

Net Worth Tips

- VA will question a claimant if
 - Report interest-bearing assets of \$5,000 or more and does not report interest or dividend income equal to at least 3% of amount reported
 - Assets are reported that may be earning interest, but it is not clear whether or not they are
 - Report interest or dividend income, but does not report the source in assets



Asset Protection Planning

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What We Will Cover

- Planning strategies to protect assets for a veteran enabling him/her to qualify for VA benefits while considering the effect the planning strategy will have on the veteran's ability to qualify for Medicaid.

Reducing Net Worth

- Transfer to a relative living in the home will not reduce net worth
- Transferor must relinquish all rights of ownership, ***including control and the right to receive income.***
 - 38 CFR § 3.276

Outright Gifting

- Pro: No transfer penalties for VA, immediate eligibility
- Cons
 - Transfer penalty for Medicaid
 - Loss of basis with appreciated assets
 - Donee could get sued, divorced or pass away and money could be lost

Purchasing Items for Claimant

- Works for VA claims and (usually) Medicaid
- Possible purchases:
 - New car
 - Wheelchair, walker, hand rails
 - Chairlift for home with stairs
 - New bed or furniture
 - Other home renovations

Home Repairs

- Could include adding an addition for caregiver
- Adding on to a child's home if parent is moving in
 - Make sure this will be an allowable spend down if Medicaid is contemplated in the future. In some states this would be considered as an uncompensated transfer.

Joint Accounts

- Adding a joint owner reduces the value of the account for VA purposes
- Example: Bill owns a \$100,000 money market account. If he adds his son as an owner, the account is now worth \$50,000 for VA purposes.
- However, this has been problematic lately so proceed with caution.

Joint Accounts

- **Pros:**
 - Quick eligibility for VA without making an outright gift
 - Can add more than 1 owner to reduce the value
- **Cons**
 - Could be considered a gift for Medicaid purposes
 - Account is subject to joint owner's creditors
 - VA is asking for documentation that cannot be readily provided

Deferred Annuity

- This is a countable asset (Medicaid and VA)
- Income taxes
- Surrender penalties if surrendered during the initial term of the annuity

Immediate Annuity

- Money is given to the insurance company to purchase guaranteed income for a fixed period of time, such as life or five years
- This purchase will convert a countable asset to income for both VA and Medicaid
- Medicaid requires the payments to be actuarially sound.
- VA does not require actuarially sound payments.

Immediate Annuities

- Often used to convert a countable asset to income when the IVAP is a negative number.
- Bob has income of \$1500 and UMEs of \$2000. This gives him - \$500 in IVAP.

Immediate Annuities

- Bob has \$85,000 in assets. He could take a portion of those countable assets and purchase an immediate annuity that would pay no more than \$500/per month.
- Bob would still qualify for the maximum A&A benefit.

Promissory Notes

- Can be used like an annuity – to take a countable asset and convert it into an income stream.
- If Medicaid is anticipated, then you should follow the appropriate Medicaid rules (more strict than VA).

Promissory Note

- How they work:
 - Bob could take a portion of the \$85,000 in extra assets, loan it to a family member, and take back a promissory note for payments less than \$500/month.

Promissory Notes

- Benefits:
 - No transaction fees
 - Can keep it in the family
 - If Medicaid is not contemplated, then it could be a self-cancelling note at death.

IRAs and Qualified Plans

- The “double whammy”
- These are countable assets for VA purposes
- RMDs or other payment from the account is considered income

IRAs and Qualified Plans

- Possible strategies:
- Cash them in (in part or in whole) and take the income tax hit (claimant's income tax bracket is most likely lower than beneficiary's)
- Annuitize the IRA – but beware of the effect on IVAP

Residence

- Not a countable asset
- Gifting it means giving up stepped-up basis at the owner's death.
 - Bob paid \$100,000 for his home 20 years ago. It is now worth \$200,000. If he gives his home to his daughter, her basis becomes \$100,000 and she will pay capital gains when it sells. If she inherits it, her basis becomes fair market value at the time of Bob's death.

Residence

- Keeping it in the veteran's name may not be a good option if Medicaid is in the future due to estate recovery.
- Consider transferring the home only to a Veterans Asset Protection Trust that is intentionally defective as to income.
 - Maintain step-up in basis (with a limited POA) and protect the 121 exemption.

Excess Income

- If receiving LTC insurance, consider foregoing or reducing payments
- Increase unreimbursed medical expenses
 - Increase the hours of care (the family will appreciate it)
 - Move into facility (if no longer safe at home)
- Reducing payments can stretch out LTC insurance benefits

Excess Income

- May submit new evidence within one year
 - 38 CFR 3.660(b)
- Look at examples in Part V, Subpart iii, Chapter 1, Section A for timing requirements for new evidence

Planning Strategies to Avoid

- Purchasing life estate interest in the home of another. Will be disregarded for VA purposes and the whole value of the property will be counted
 - M21-1MR, Part V, Subpart iii, Chapter 1.

Planning Strategies to Avoid

- Purchasing income producing property.
- This will count as income and as an asset.

Planning Strategies to Avoid

- Making a gift to a family member who resides in the home (could eliminate some exempt transfers available to Medicaid applicants)
- Self-settled special needs trusts
- Irrevocable trust where claimant receives income or is taxed on the income.



The Use of Irrevocable Trusts

What We Will Cover

- How irrevocable trusts may (or may not) be used and the pros and cons of using an Irrevocable trust.

VA and Irrevocable Trusts

- The guidance we have for VA benefits and irrevocable trust planning comes from general counsel opinions, such as 72-90, 73-91, and 33-97. These opinions are included in your Appendix.
- The guideline for VA irrevocable trust planning is that trust assets will be countable unless claimant relinquishes "all rights of ownership" and "the right of control of the property." 38 C.F.R § 3.276 (b)

Why We Use Trusts

- Putting assets in name of children has significant risks
 - Kids have access to the funds (and can use funds for mom or dad if they choose) but more protection is provided from unintentional creditors of the children
- A fiduciary (the trustee) is responsible for management of all assets (more effective way of managing assets)
- Reduce administration expenses at the death of the grantor

Most Commonly Used Irrevocable Trusts

- Intentionally Defective Grantor Trust (IDGT)
- Nongrantor Trust
- Self-Settled SNT
- 3rd Party SNT

VA Trust Issues

- No rules or regulations to give guidance
- Only guidance is General Counsel Opinions
 - 72-90
 - 64-91
 - 73-91
 - 15-92
 - 33-97

VAOGCPREC 72-90

- Claimant was the beneficiary of a testamentary discretionary trust.
- Funds held in this trust were not countable in the claimant's estate for VA purposes.
 - Under 38 CFR 3.276(b), this office has held that, as a general rule, property and income therefrom will not, in basic pension- eligibility determinations, be countable as belonging to the claimant unless-- (1) it is actually owned by the claimant; (2) the claimant possesses such control over the property that the claimant may direct it to be used for the claimant's benefit; or, (3) funds have actually been allocated for the claimant's use.

VAOPGCPREC 73-91

- Claimant received life insurance proceeds and wanted to place them in an irrevocable trust for the benefit of his grandchildren
- VA allowed it, but we do not know whether it was an IDGT

VAOPGCPREC 64-91

- Dealt with how the claimant's home should be counted when veteran does not live there.
 - Provides authority for not counting the home as an asset if the claimant is no longer living there.
- Claimant was also beneficiary of a private trust.
 - Reiterated the holding in 72-90: where the veteran does not hold legal title to or control of the trust property, only such portion of the trust property as has been made available for the veteran's use is countable for purposes of the income and net-worth provisions.

VAOPGCPREC 15-92

- Analyzed how life estate interests will be treated.
- Life estate interests count as if the claimant owned the property outright.

VAOPGCPREC 33-97

- Claimant created a self-settled SNT
- VA is not bound by the federal SSA rules, and held the SNT assets were available to the claimant.

Intentionally Defective Grantor Trust (IDGT)

- Irrevocable Trust
- Claimant will be grantor
- All income taxed to the grantor regardless of who receives it
- 121 exemption on sale of grantor's residence (as long as the trust is "wholly-owned")
- Step-up in basis at death of grantor if grantor receives the income or reserves the right to determine beneficial enjoyment of the property (often through a testamentary limited power of appointment)

Why IDGTs Are Dangerous in VA Pension Planning

- The VA defines relinquishment as total relinquishment, including the right to income.
- Income is reported on the veteran's tax return.
- The VA checks tax returns of all claimants.
- The VA could argue no total relinquishment because income is being reported on the tax return.

When Would an IDGT Be Used in VA Pension Planning?

- For the Principal Residence Only
 - Hold residence so proceeds from sale will not disqualify claimant
 - Sale of residence will qualify for 121 exemption

What About the Other Assets?

Nongrantor Irrevocable Trust

- Claimant is the grantor
- Claimant not a beneficiary of the Trust
- Mandatory payment of income to lifetime beneficiaries
- Assets are not countable
- Income taxed to trust (higher rate)
- Step-up in cost basis can be achieved through a testamentary limited power of appointment

Power of Appointment

- We suggest a limited testamentary power of appointment to change beneficiaries
- No power to distribute accumulated income, only principal (to avoid having it treated as a grantor trust)
- Executed by Will only (again to avoid grantor trust treatment)

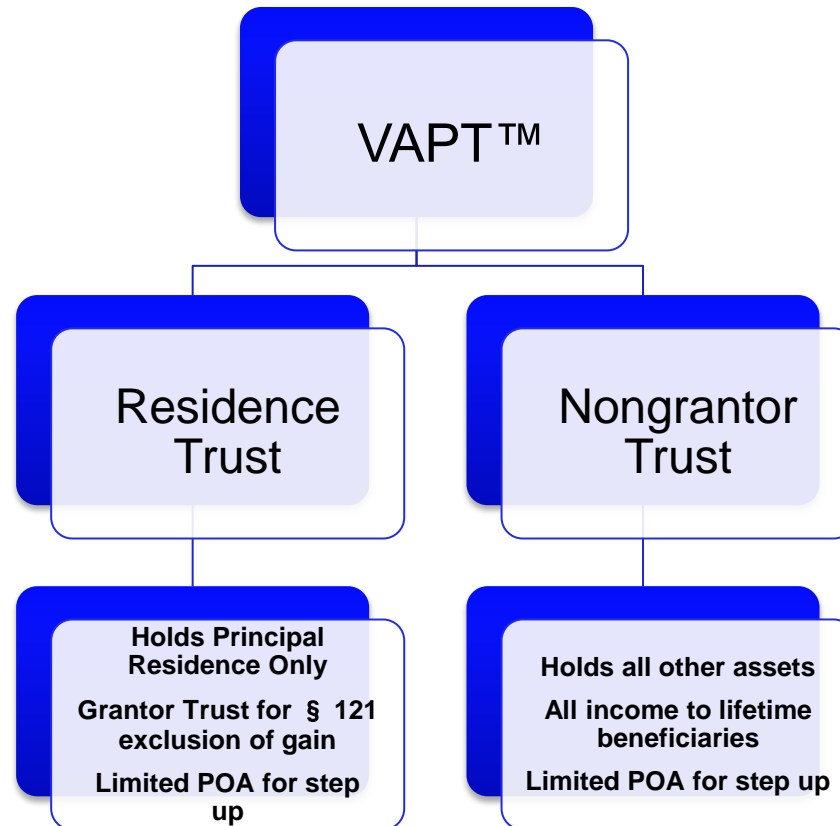
Two-Trust Strategy

- Trust 1 holds the principal residence only. Trust 1 is an IDGT, no income to grantor, limited power of appointment for the step-up.
- Upon sale of the home, proceeds are distributed out 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.

One Trust

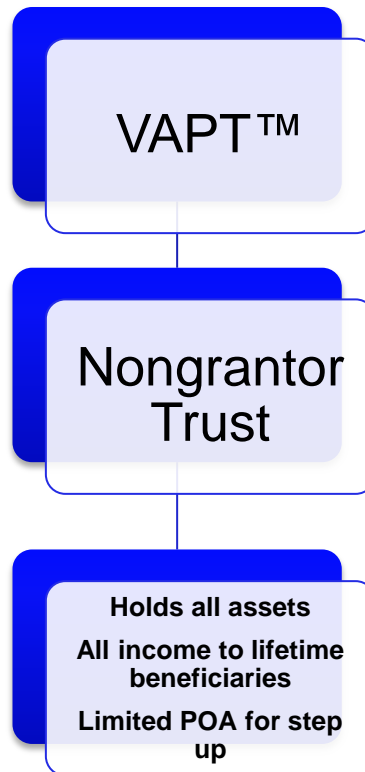
- The Veterans Asset Protection Trust™ (“VAPT”)
- Contains a subtrust for the principal residence and a subtrust for the nongrantor trust that holds all assets except the principal residence
- Eliminates having to draft 2 trusts
- Principal Residence subtrust can only hold the claimant’s principal residence

Veteran or Surviving Spouse, Principal Residence and Other Assets



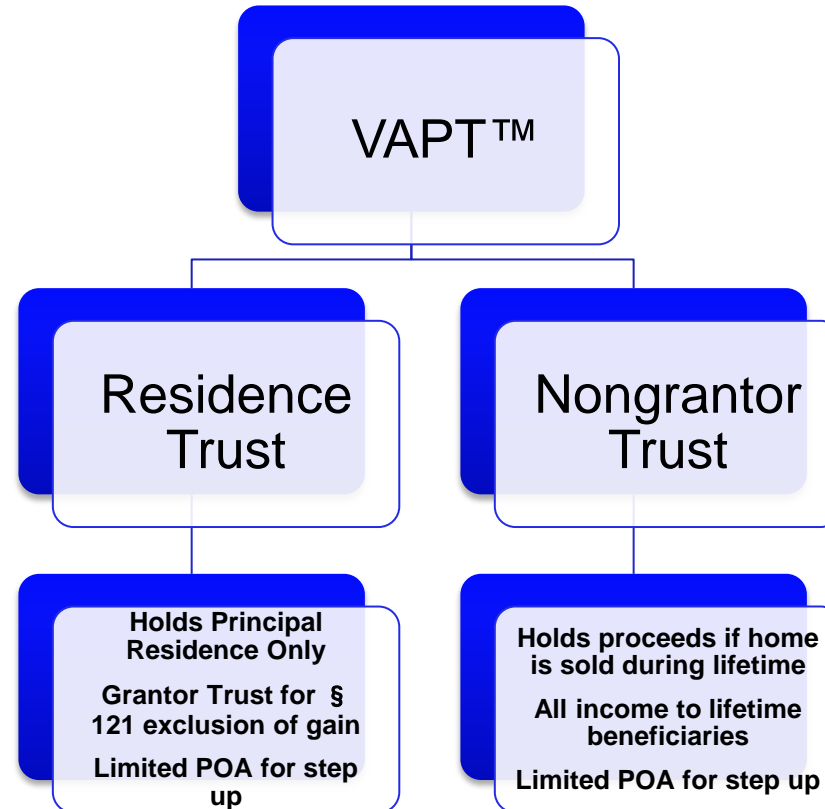
127

Veteran or Surviving Spouse, No Principal Residence



128

Veteran or Surviving Spouse, Principal Residence Only



The VAPT™

- Principal residence subtrust can use grantor's tax id number
**** Based on recent decisions regarding subsequent sale of the residence, a separate TIN is suggested*
- Nongrantor subtrust uses a new tax id number
- Mandatory payment into the nongrantor trust upon the sale of the principal residence
- No ability to rent the principal residence.
- Includes decanting powers in both subtrusts.

Self-Settled SNT

- Irrevocable trust
- Claimant is grantor and sole beneficiary
- Typically used by persons under 65 who are disabled and receiving government benefits
 - Grantor receives a lump sum of money and needs to protect it or lose government benefits
- These do not work for VA benefits.

Self-Settled SNT

- Because of General Counsel Opinion 33-97 assets in a self-settled SNT count for VA pension purposes
- No cases on how assets in a pooled trust would be handled, but would most likely receive the same treatment.

Veteran as Beneficiary of a Third Party Trust

- Gift made to children who then set up a trust for the benefit of the Veteran
- Only the portion of the trust property that has actually been made available for the veteran's use will be counted for VA purposes (Gen.Co.Op. 72-90)

Claimant as Beneficiary of Third Party Trust

- Biggest advantage: Provides another layer of separation between the veteran and the assets, and will work for both Medicaid and VA.
- Disadvantage: Any payments from the trust will count toward IVAP. Does it really help the veteran?

So What Will Work?

- IDGT: Best used for a home which could be sold in the future.
- Nongrantor Irrevocable Trust: Consider using for all other assets. Retain limited power of appointment to change beneficiaries in any irrevocable trust to preserve the step-up.
- Outright gift to kids who set up a 3rd party trust for the benefit of claimant (as long as they are not obligated to do so).



New Proposed Rules: Lookback and Penalty Period

New Proposed Rules

Lookback and Penalty Period

- 36 month lookback period
 - Triggered by the receipt of an original claim or a new claim following a period of non-entitlement

New Proposed Rules

Lookback and Penalty Period

- Penalty period based on the MAPR for aid and attendance, starts the month after the transfer is made
 - MAPR is divided by 12 to come up with the monthly amount
 - MAPR with one dependent used for a married veteran (\$2,120)

New Proposed Rules

Lookback and Penalty Period

- Amount of assets transferred that exceed the net worth limit are subject to penalty
 - Includes transfers to a trust or annuity
- Net worth limit is equal to the maximum CSRA amount (currently \$119,220)
 - Increases per the Social Security benefit increase percentage each year

New Proposed Rules Transfer Penalty

- Presumption that all transfers were made for the purpose of obtaining eligibility
 - Very limited ability to rebut the presumption
 - Claimant must show by clear and convincing evidence that the transfer “was the result of fraud, misrepresentation, or unfair business practice related to the sale or marketing of financial products or services for purposes of establishing entitlement to VA pension”

New Proposed Rules Transfer Penalty

- Exception to the trust transfer rules:
 - Transfer to trust to a child incapable of self-support prior to age 18 allowed
 - Veteran only, not surviving spouse

New Proposed Rules Net Worth

- Home is still not counted as part of net worth
- “Reasonable lot area” defined as not more than 2 acres

New Proposed Rules Net Worth

- Annuities – generally countable unless purchase with home proceeds and wouldn't have been over the net worth amount, or purchased from assets already part of net worth

New Proposed Rules

Curing a Gift

- Curing Gifts
 - Cure for gifts must be in total – no partial cures allowed
 - Cure must be made within 30 days of application
 - VA will give you 90 days after inquiry to show return was made within 30 days of claim

New Proposed Rules

Medical Expenses

- No ILF room and board expenses allowed if the ILF does not provide custodial care or medical care

New Proposed Rules

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

New Proposed Rules

Medical Expenses

- Limit on hourly rate for home health care
 - In-home care rates may not exceed the average hourly rate for home health aides published annually by the MetLife Mature Market Institute Market Survey of Long-Term Care costs.

New Proposed Rules

Medical Expenses

- Instrumental Activities of Daily Living (IADLs) may be deducted from IVAP if the claimant meets HB or A&A requirements and the primary responsibility of the attendant is to provide health care services or custodial care

New Proposed Rules Medical Expenses

- “Qualified relative” health care expenses may be deducted
 - Dependent spouse or child, other relatives who are household members or constructive household members (i.e., living in a nursing home, away at school)

New Proposed Rules Non Medical Expenses

- General health maintenance expenditures, cosmetic procedures, meals and lodging (including payments to independent living facilities that do not provide medical care or custodial care), assistance with IADLs (except as previously noted), and VA fiduciary fees.

What We Don't Know

- The effective date
- How long it will take to pass this rule
- Whether the VA has authority – differences of opinion on that issue
 - We won't let it go unchallenged

What Now?

- 911 Comments submitted during public comment period
- The VA must respond to each comment in writing
- The last change to VA Pension regulations received less than 1 dozen comments and the VA took 4 years to respond to them all
- We will be in a holding pattern for a long time.

Advising Clients While the Rules are Pending

- Always disclose pending changes and recommend actions, but advise leaving ultimate decision up to client

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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154