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VA issues new regulations

On Tuesday, September 18, 2018 the VA released new regulations applicable to the VA pension benefit, also known as "aid and attendance." The regulations, which take effect on October 18, 2018, provide new rules regarding how much net worth a VA benefit applicant may retain before qualifying for benefits and provide new Medicaid-like transfer penalties.

New Net Worth Limits

Under the old rules an applicant's assets could not exceed $80,000.00. Now the VA will use the Medicaid Community Spouse Resource Allowance (CSRA) as a net worth limit. The CSRA is an amount set by the Centers for Medicare and Medicaid Services on an annual basis to determine the level of countable assets the spouse of a nursing home resident is allowed to retain while qualifying the nursing home resident for Medicaid. This year (2018) that amount is $123,600. Though the CMS Medicaid number is intended for use by a married couple (one spouse in the community, the other in the nursing home), in the VA context it applies to every applicant, regardless of marital status.

Transfer Penalties

Under the old rules, no penalties were imposed on any transfer. Thus Mom or Dad could transfer excess assets and apply for VA benefits the next day. The new rules impose penalties for any transfer made after October 18, 2018. Transfers of "covered assets" will be reviewed for a period of thirty-six (36) months to determine whether a transfer penalty (a period of ineligibility for VA benefits) should be applied.

The term used by the VA is "covered assets." A transfer penalty applies to those amounts transferred that exceeded the net worth limitation ($123,600) and only to the extent that, if retained, would have caused the applicant to exceed the limitation. Once the covered assets amount (the amount subject to the transfer) has been determined, we then divide that figure by $2169.67.

Suppose Robert transferred $50,000 to his daughter on October 20, 2018. He applies for VA benefits on November 1, 2018. At the time of the application, he has $100,000.00. Accordingly, since at the time of the transfer Robert had $150,000.00, we reduce the net worth limit of $123,600.00 to arrive at his covered assets of $26,400.00. This amount is subject to penalty, 26,400.00 / 2169.67 = 12 months.

The penalty begins to run on the first day of the month following the month of transfer. The penalty ends on the last day of the month in which the sanction expires and the applicant is again eligible for benefits on the first day of the following month. In our example, Robert's penalty begins on November 1, 2018 and expires during November, 2019. Robert would be eligible for benefits beginning December 1, 2019.

Trusts and Annuities

The new rules clearly says that a transfer that reduces net worth creates a penalty unless the applicant can liquidate the entire balance transferred for his or her own use. It is irrelevant that the transferred asset produces income back to the applicant.

In an annuity situation, the single premium is paid to the insurance company, and an annuity stream comes back to the annuitant. If the applicant can liquidate the annuity, then the assets is countable. If it can't be liquidated for the applicant's own use, it is a transfer, even though the applicant receives countable income.

With respect to trusts, if an applicant transfers assets to a trustee and surrenders all of his or her right to liquidate the trust for his or her own benefit, yet retains an income interest, the result is no different than the purchase of an annuity. Thus I believe it is now clear that the creation of an irrevocable "income only" trust is not countable, (although any income distributed to the applicant clearly is countable income), the funding of said trust is now a potentially sanctionable event. This depends on whether the assets transferred into trust are considered "covered assets" and whether the funding event occurred within 36 months of the application or whether the penalty may have run its course during the preceding 36 month look back period.

Trusts can still be a useful tool. But the potential applicant needs to plan early.

Sincerely yours,

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Elder Law Attorney & VA Qualified Attorney

Benjamin D. Eckman, Esq. concentrates his practice on Estate Planning & Elder Law - legal issues facing senior citizens. Elder law is intended to broadly assist “extended living”. An elder law practitioner provides the legal information necessary for persons whose lives will extend or have already extended beyond the time when all children are usually out of the house and when regular employment ceases. After the elder law attorney and client complete their work, legal documents have been drafted, tax considerations have been analyzed, and a plan to protect the elder's estate has been implemented.

Benjamin D. Eckman received his Bachelor's Degree in Business/Accounting from Touro College and his law degree from Seton Hall University School of Law. He is a member of the NY State Bar Association, the NJ State Bar Association, the National Academy of Elder Law Attorneys, the Elder Law Section and Real Property, Probate and Trust Section of the NJ State Bar Association, the Union County Bar Association, Passaic County Bar Association and the Bergen County Bar Association. He can be reached at (973) 709-0909, (908) 206-1000 or (201) 263-9161.