

**VA NON-SERVICE CONNECTED DISABILITY PENSION BENEFITS  
PLANNING TECHNIQUES**

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Lori speaks frequently in the Dallas area on issues related to seniors with the goal of providing education to the community. She also volunteers with organizations serving seniors. Lori currently serves as President of the Texas Chapter of the National Academy of Elder Law Attorneys, Board Chair for the Wellness Center for Older Adults in Collin County, and on the Executive Committee as Vice Chair responsible for the Care & Support Advisory Committee for the Dallas & Northeast Texas Chapter of the Alzheimer's Association. Lori was the Chair of the 2018 Grandscape Walk to End Alzheimer's located in The Colony, and has served previously on the Board of the Estate Planning Council of North Texas and as President of the Collin County Bar Association Estate Planning and Probate Section. Lori is a Fellow of the College of the State Bar of Texas, the Dallas Bar Foundation, and the Kansas Bar Foundation, a member of State Bar of Texas, Collin County Bar Association, Dallas Bar Association, Kansas Bar Association, Missouri Bar Association, Estate Planning Council of North Texas, and National Academy of Elder Law Attorneys (including Texas, Missouri, and Kansas chapters).

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Erin's strong beliefs in the value of education and service is evidenced by her involvement in the Dallas/Fort Worth community. She is an active volunteer with the Alzheimer's Association Dallas and Northeast Texas Chapter, serving on the Speaker's Bureau and being appointed as Chair of the 2019 Grandscape Walk to End Alzheimer's in The Colony. Erin has served previously as President of the Estate Planning Council of North Texas and as President of the Collin County Bar Association Estate Planning and Probate Section. She is an active member of the Dallas Bar Association and is a recipient of the Presidential Citation. Erin is a Fellow of the Dallas Bar Foundation, and a member of the College of the State Bar of Texas, State Bar of Texas, Collin County Bar Association, Dallas Bar Association, Estate Planning Council of North Texas, and National Academy of Elder Law Attorneys. She is a certified mediator in the State of Texas and a VA-accredited attorney.

Erin is licensed to practice law in Texas (2007).

## VA NON-SERVICE CONNECTED DISABILITY PENSION BENEFITS PLANNING TECHNIQUES

For every elder law attorney, it remains important to give advice about VA eligibility within the framework of other public benefits, including Medicaid. Each Veteran's individual needs and circumstances will determine whether it is most appropriate to file for VA benefits or Medicaid benefits. And, any Veteran who needs and can qualify for VA benefits now might very well need Medicaid benefits in the near future, so care should be taken not to handle assets in such a way that would prevent the Veteran from qualifying for Medicaid. This paper walks through the basic eligibility requirements and planning strategies for VA Non-Service Connected Pension Benefits.

### **A. Basic Eligibility Requirements**

The VA pension benefit is a non-service connected disability pension that is federally funded and regulated. The Veteran must meet the following basic eligibility requirements:

#### **1. Discharged from the service under other than dishonorable conditions.**

There are many types of military discharge, other than just honorable or dishonorable, such as a medical separation. The important issue for this benefit is that the discharge be of a type other than dishonorable.

#### **2. Served 90 days or more of active duty, with at least one day during an Eligible Wartime Period.**

The Veteran's military service must be active duty. Service in the Reserve or National Guard does not constitute active duty military service, even though those Veterans could have been deployed at any time. The minimum amount of time required for the benefit is a 90-day continuous period, with at least one day during an Eligible Wartime Period. It is not necessary that the Veteran be deployed to a combat area, only that the service is classified as "active duty."

The Eligible Wartime Periods are as follows:

- Mexican Border Period (May 9, 1916 – April 5, 1917, for veterans who served in Mexico, on its borders, or adjacent waters)
- World War I (April 6, 1917 – November 11, 1918)
- World War II (December 7, 1941 – December 31, 1946)
- Korean conflict (June 27, 1950 – January 31, 1955)
- Vietnam era (August 5, 1964 – May 7, 1975, except for veterans who served in the Republic of Vietnam, whose period begins February 28, 1961)
- Gulf War (August 2, 1990 – through a future date to be set by law or Presidential Proclamation)

Veterans who entered active duty after September 7, 1980, must also have served at least 24 months of active duty, or if less, have completed their entire tour of active duty. Also eligible are Veterans who were officers and started on active duty after October 16, 1981, and had not previously served on active duty for at least 24 months.

#### **3. At least 65 years old, permanently and totally disabled, blind, patient in a nursing home, or receiving Social Security disability benefits.**

Because this is a disability benefit, the Veteran must meet one of the following criteria: (1) 65 years of age or older, (2) permanently and totally disabled, (3) patient in a nursing home for long-term care because of a mental or physical disability, (4) limited eyesight (5/200 or less in both eyes, even if corrected), or (5) receiving Social Security Disability Insurance or Supplemental Security Income (both of which require a disability determination by the Social Security Administration).

#### **4. Meet the Net Worth requirements.**

As set forth in further detail below, the Veteran's Net Worth (composed of countable assets and annualized income) must be less than \$150,538.00<sup>1</sup>. This amount is adjusted each year by the same percentage as the Social Security cost-of-living increase.

**5. Additional requirement for surviving spouse.**

A surviving spouse must meet the additional requirement of having been married to the Veteran when the Veteran died and not having remarried, even if the remarriage was terminated by death or divorce. However, there are limited exceptions that allow surviving spouse eligibility to be reestablished if, between January 1, 1971, and November 1, 1990, the marriage was (1) annulled or declared void, or (2) terminated by death or divorce.

**B. Levels of Payment**

There are three levels of payments, depending on need: (1) Basic Service Pension, (2) Housebound, and (3) Aid & Attendance. Like the Net Worth limit, the payment levels increase each year in the same percentage as the Social Security cost-of-living increase. Unlike Medicaid benefits, the VA pension benefit is paid directly to the Veteran or surviving spouse as reimbursement for medical and other health care, rather than directly to a health care provider. (See Appendix A for a complete chart of 2023 benefit amounts.)

**1. Basic Service Pension**

Eligibility for the Basic Service Pension requires that the Veteran or surviving spouse meet the basic eligibility requirements. These individuals may still have the ability to handle many of their needs, but their unreimbursed medical expenses are high enough that they need some additional financial assistance. For 2023, the maximum benefit amounts for Basic Service Pension are as follows:

	<u>Monthly</u>	<u>Annually</u>
Single Veteran	\$ 1,336	\$ 16,037
Married Veteran	\$ 1,750	\$ 21,001
Surviving Spouse	\$ 896	\$ 10,757

**2. Housebound**

The Veterans or surviving spouses who are considered Housebound are those who, in addition to qualifying for the Basic Pension Benefit, are substantially confined to their homes because of a permanent disability. These individuals may still be able to attend to many of their needs at home, but they are unable to transport themselves out of the home without assistance. For 2023, the maximum benefit amounts for Housebound are as follows:

	<u>Monthly</u>	<u>Annually</u>
Single Veteran	\$ 1,633	\$ 19,598
Married Veteran	\$ 2,046	\$ 24,562
Surviving Spouse	\$ 1,095	\$ 13,147

**3. Aid & Attendance**

The highest level of benefit, known as Aid & Attendance, is for Veterans and surviving spouses who, in addition to qualifying for the Basic Pension Benefit, require the assistance of another person to perform at least two activities of daily living, or are bedridden, a patient in a nursing home due to a mental or physical incapacity, or blind. For 2023, the maximum benefit amounts for Aid & Attendance are as follows:

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<sup>1</sup> Net worth limit from December 1, 2022, to November 30, 2023. This amount is recalculated every year with a cost of living adjustment.

	<u>Monthly</u>	<u>Annually</u>
Single Veteran	\$ 2,229	\$ 26,752
Married Veteran	\$ 2,642	\$ 31,714
Surviving Spouse	\$ 1,432	\$ 17,192

### C. Net Worth Calculation

Net Worth is defined as the sum of the claimant’s assets and annual income.<sup>2</sup> The term “claimant” includes the applicant (Veteran or surviving spouse), a dependent spouse, and any dependent children.<sup>3</sup> For purposes of asset and income calculations, the application must include assets and income in the individual or joint names of the applicant (Veteran or surviving spouse), the dependent spouse, and any dependent children (to the extent the qualified medical expenses of those children will be included to obtain a higher payment). Net Worth will be calculated as of the date of receipt of (1) an original pension claim, (2) a new pension claim after a period of non-entitlement, (3) a request to establish a new dependent, or (4) information that Net Worth has increased or decreased.<sup>4</sup> If Net Worth increases after the granting of VA pension benefits, any reduction or discontinuance of benefits will not be effective until the last day of the calendar year in which Net Worth exceeds the limit.<sup>5</sup>

Under the rules implemented in 2018, Net Worth was set at the maximum spousal protected resource amount under the Medicaid rules, which is the maximum amount a community spouse can retain in assets to allow the institutionalized spouse to qualify for Medicaid benefits. When the 2018 rules became effective, that amount was \$123,600.<sup>6</sup> However, the VA amounts change in accordance with the Social Security cost-of-living adjustments. For example in 2019, the Social Security cost-of-living increase was 2.8%, and in 2020, the Social Security cost-of-living increase was 2%. Since 2019, it has increased each year by the Social Security cost-of-living increase. Therefore, the 2023 Net Worth limit for the VA pension benefit is \$150,538, which increased by 8.7% from the 2022 Net Worth limit. Each year the Social Security cost-of-living adjustments have created an even greater gap between the Medicaid maximum spousal protected resource amount under the Medicaid rules and the VA Net Worth limit. Unfortunately, this may cause confusion in states like Texas, because the Texas Health & Human Services Commission does not specifically follow the Social Security cost-of-living increase when adjusting the maximum spousal protected resource amount. Thus, it is important for those who provide advice on both Medicaid and VA pension benefits to keep up with the different levels.

#### 1. Asset Calculation

“Assets” are defined to mean the fair market value of all property that a claimant owns, including all real and personal property, unless excluded, less the amount of mortgages or other encumbrances specific to the property.<sup>7</sup> The following assets are excluded from the calculation of Net Worth:<sup>8</sup>

##### a. Primary Residence

The value of the primary residence (regardless of the amount or location of the residence) is excluded from the asset calculation. This exclusion includes the residential lot area, which is defined to include only two acres or less, unless the claimant can provide the additional acreage is not marketable.<sup>9</sup> A mortgage or other encumbrance on the primary residence will not be deducted from the asset calculation,<sup>10</sup> because the primary residence is not included in that calculation. The

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<sup>2</sup> 38 C.F.R. §3.274(b)(1).

<sup>3</sup> 38 C.F.R. §3.275(a)(2).

<sup>4</sup> 38 C.F.R. §3.274(e).

<sup>5</sup> 38 C.F.R. §3.274(h).

<sup>6</sup> 38 CRF §3.274(a).

<sup>7</sup> 38 C.F.R. §3.275(a)(1).

<sup>8</sup> Also excluded are Radiation Exposure Compensation Act payments, Ricky Ray Hemophilia Relief Fund payments, Energy Employees Occupational Illness Compensation Program payments, payments to Aleuts, and other statutory exclusions. 38 C.F.R. §3.275(b)(3) – (7).

<sup>9</sup> 38 C.F.R. §3.275(a)(3), (b)(1).

<sup>10</sup> 38 C.F.R. §3.275(b)(1)(i).

primary residence will still be excluded, even if rented,<sup>11</sup> so long as the claimant resides in a nursing home, other care facility, or the home of a family member for the purposes of obtaining health care or custodial care.<sup>12</sup> If the primary residence is sold, the proceeds will be included in the asset calculation to the extent not reinvested in another primary residence by the last day of the same calendar year.<sup>13</sup>

For those attorneys who also handle Medicaid applications, note the significant difference in the VA primary residence exclusion rules. The Medicaid rules limit the exclusion for a single individual to a residence located in the State of Texas with an equity value no greater than \$688,000 in 2023, with no limit on the amount of contiguous acreage. Medicaid also has a requirement of reinvesting sales proceeds within three months following the month of receipt to avoid an increase in countable resources. Further, under the Medicaid rules, if the residence is sold, the proceeds must be reinvested in another residence with three months or they become part of the countable resources. For VA, the sales proceeds must be reinvested by the last day of the calendar year, regardless of when within the year the residence was sold. It is important not to confuse these requirements when advising clients on their options.

**b. Family Transportation Vehicles**

The value of all vehicles necessary for the family's transportation are excluded from the asset calculation.<sup>14</sup> This differs from the Medicaid rules, which allow the exclusion of only one vehicle from the resource calculation.

**c. Personal Effects**

The value of personal effects consistent with a reasonable mode of life, including appliances and other home goods, are excluded from the asset calculation.<sup>15</sup>

**2. Income Calculation**

The income portion of the Net Worth includes the annual income of the Veteran, spouse, and all dependents who will be included in the claim for purposes of calculating the monthly payment. The amount of income to be included in the Net Worth calculation can be reduced by the amount of reasonably predictable unreimbursed medical expenses to the extent the total of such expenses exceeds Five (5%) Percent of the applicable maximum annual pension rate for the particular level of benefits.<sup>16</sup> Regardless of the amount of the reasonably predictable unreimbursed medical expenses, they can be used only to reduce the income portion of the Net Worth calculation, not the asset portion. Further, the medical expenses must be unreimbursed to be deductible from income.<sup>17</sup>

**D. Unreimbursed Medical Expenses**

The list of items that can be included as reasonably predictable unreimbursed medical expenses under the new regulations appear to be broader than previously allowed. The amount to be deducted for allowable medical expenses includes payment for items or services that are medically necessary, improve a disabled individual's functioning, or prevent, slow, or ease an individual's functional decline.<sup>18</sup>

**1. Care by a Health Care Provider**

Payments for services that are performed within a health care provider's professional capacity can be included as unreimbursed medical expenses.<sup>19</sup>

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<sup>11</sup> However, rental income will be included in the annual income calculation. 38 C.F.R. §3.275(b)(1)(i).

<sup>12</sup> 38 C.F.R. §3.275(b)(1)(ii).

<sup>13</sup> 38 C.F.R. §3.275(b)(1).

<sup>14</sup> 38 C.F.R. §3.274(b)(2).

<sup>15</sup> *Id.*

<sup>16</sup> 38 C.F.R. §§3.274(f)(3), 3.278.

<sup>17</sup> 38 C.F.R. §3.278(a).

<sup>18</sup> 38 C.F.R. §3.278(c).

<sup>19</sup> 38 C.F.R. §3.278(c)(1).

## **2. Medications, Medical Supplies, Medical Equipment, and Medical Food, Vitamins, and Supplements**

Payments for lawfully obtained prescriptions and non-prescription medications and supplies, including medically necessary food, vitamins, and supplements directed by a health care provider who is authorized to write prescriptions can be included as unreimbursed medical expenses.<sup>20</sup>

## **3. Adaptive Equipment**

Payments for adaptive devices or service animals used to assist with an ongoing disability can be included as unreimbursed medical expenses.<sup>21</sup>

## **4. Transportation Expenses**

Payments for transportation for medical purposes, including mileage, parking, and tolls for privately owned vehicles can be included as unreimbursed medical expenses.<sup>22</sup>

## **5. Health Insurance Premiums**

Payments for health, medical, hospitalization, and long-term care insurance premiums can be included as unreimbursed medical expenses.<sup>23</sup>

## **6. Smoking Cessation Products**

Payments for items and services specifically related to smoking cessation can be included as unreimbursed medical expenses.<sup>24</sup>

## **7. Institutional Forms of Care and In-Home Care**

Institutional forms of care and in-home care typically need to include the provision of assistance with activities of daily living (ADLs) and instrumental activities of daily living (IADLs). ADLs are defined as basic self-care activities that include bathing/showering, dressing, eating, toileting, transferring (moving from one position or location to another), and ambulating within the living area.<sup>25</sup> IADLs are defined as independent living activities that include shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes.<sup>26</sup>

### **a. Hospitals, Nursing Homes, Medical Foster Homes, and Inpatient Treatment Centers**

All payments associated with care in hospitals, nursing homes, medical foster homes, and inpatient treatment centers, including the costs of meals and lodging, can be included in unreimbursed medical expenses.<sup>27</sup> A “medical foster home” is defined as a privately owned residence “that offers a non-institutional alternative to nursing home care for Veterans who are unable to live alone safely due to chronic or terminal illness.”<sup>28</sup> Care in a facility other than a nursing home can be provided by the facility, a third-party provider, family, or friends, and the provider of the care does not need to be a health care provider. The cost of assistance with ADLs and IADLs can be included as medical expenses, if the claimant is receiving health care or custodial care in the facility and is Housebound or needs Aid & Attendance, or a health care provider states

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<sup>20</sup> 38 C.F.R. §3.278(c)(2).

<sup>21</sup> 38 C.F.R. §3.278(c)(3).

<sup>22</sup> 38 C.F.R. §3.278(c)(4).

<sup>23</sup> 38 C.F.R. §3.278(c)(5).

<sup>24</sup> 38 C.F.R. §3.278(c)(6).

<sup>25</sup> 38 C.F.R. §3.278(b)(2).

<sup>26</sup> 38 C.F.R. §3.278(b)(3).

<sup>27</sup> 38 C.F.R. §3.278(d)(1).

<sup>28</sup> 38 C.F.R. §3.278(b)(6).



in writing that the claimant needs to be in a protected environment. Payments for meals and lodging can be included if the facility provides or contracts for health care or custodial care for the claimant, or a health care provider states in writing that the claimant must reside in the facility to be able to receive health care or custodial care.<sup>29</sup> This was an important change in the rules in 2018, as it allowed for the inclusion of the cost of an independent living facility within the calculation of unreimbursed medical expenses. However, caseworkers appear to be requiring the claimant to contract with the independent living facility for the provision of health care or custodial care in order to allow the inclusion of the cost of meals and lodging in an independent living facility.

**b. In-Home Care Assistance**

Payments associated with in-home care assistance with ADLs and IADLs can be included in unreimbursed medical expenses, if such assistance is provided by an in-home attendant who provides health care or custodial care and payments are based on the number of hours worked. The attendant need not be a health care provider if the claimant is Housebound or needs Aid & Attendance or if a health care provider states in writing that the claimant needs the health care or custodial care that the attendant provides.<sup>30</sup>

**E. Asset Transfers**

The amount of assets included in the Net Worth calculation can be reduced by purchasing items or services for the Veteran, spouse, or other relative of the Veteran within the same household.<sup>31</sup> However, if fair market value is not received in exchange for an asset, a transfer penalty may apply. The VA will assess a penalty period if a claimant transfers a “Covered Asset” within 36 months of filing a claim. The 36-month lookback period begins on the date the VA receives the claim for pension benefits.<sup>32</sup> If a “Covered Asset” was transferred out of the Veteran’s name within the 36-month lookback period, a penalty period of up to five years will be imposed.<sup>33</sup> Importantly, transfers made prior to the effective date of October 18, 2018, will not be penalized, even if the claim is filed after October 18, 2018.

The VA concept of a “Covered Asset” is unique in the public benefits realm. “Covered Asset” means an asset that (1) was part of the claimant’s Net Worth, (2) was transferred for less than fair market value, and (3) if not transferred, would have caused or partially caused the claimant’s Net Worth to exceed the Net Worth limit.<sup>34</sup> The amount that will be used to calculate the transfer penalty is the amount by which the claimant’s Net Worth would have exceeded the limit if the uncompensated value of the Covered Asset had been included in the claimant’s Net Worth.<sup>35</sup> If a claimant has less than \$150,538 in Net Worth, the claimant can transfer assets for less than fair market value without any penalty, because such transfers would not cause the claimant’s Net Worth to drop below the limit. Likewise, because the primary residence is excluded from the calculation of Net Worth and, thus, is not a Covered Asset, the claimant should retain the ability to transfer the primary residence at any time, before or after the filing of the application for pension benefits, without penalty. Again, Covered Assets do not include the primary residence, family transportation vehicles, personal items, or any asset that does not cause the claimant’s Net Worth to exceed the Net Worth limit. Transfers of those excluded items prior to or after the filing of a claim should not invoke a transfer penalty.

The 2018 rules specifically identify transfers to irrevocable trusts and purchases of annuities as transfers for less than fair market value.<sup>36</sup> Transfers of Covered Assets into any financial instrument or investment will result in a transfer penalty, unless the claimant retains the ability to liquidate the entire balance of the asset for the claimant’s benefit, in which case the asset remains included in Net Worth.<sup>37</sup> Transfers of Covered Assets into a revocable living trust would be acceptable, because the asset remains part of the claimant’s Net Worth. Transfers of Covered Assets into an irrevocable trust, an annuity, or any other vehicle that removes the claimant’s ability to access and liquidate the entire balance for the

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<sup>29</sup> 38 C.F.R. §3.278(d)(3)

<sup>30</sup> 38 C.F.R. §3.278(d)(2).

<sup>31</sup> 38 C.F.R. §3.275(f)(1).

<sup>32</sup> 38 C.F.R. §3.276(a)(7).

<sup>33</sup> 38 C.F.R. §3.276(e).

<sup>34</sup> 38 C.F.R. §3.276(a)(2).

<sup>35</sup> 38 C.F.R. §3.276(a)(3).

<sup>36</sup> 38 C.F.R. §3.276(a)(5)(A) and (B).

<sup>37</sup> 38 C.F.R. §3.276(a)(5).

claimant's benefit (without payment of fees or withdrawal penalties) will result in a transfer penalty.

## **F. Transfer Penalties**

The penalty period begins on the first day of the month following the date of the transfer.<sup>38</sup> If there was more than one transfer, the penalty period begins on the first day of the month following the date of the last transfer.<sup>39</sup> This method differs from the current Medicaid method of beginning the penalty period on the first day of the month of full Medicaid eligibility and, instead, follows the pre-DRA method that applies to transfers prior to February 8, 2006. Because the penalty period could be as long five years, and the lookback period is 36 months, it is important to calculate the penalty period prior to filing a claim to determine the effect it will have on pension benefits. If the penalty period will exceed the 36-month lookback period, the claim for pension benefits should not be filed until the expiration of the lookback period. Otherwise, the claimant will be penalized longer than necessary for the transfer.

The length of the penalty period is determined by dividing the amount by which the Net Worth would have exceeded the limit if the uncompensated value of the Covered Asset had been included in Net Worth by the monthly penalty rate, then rounding the result down to the nearest whole number. The result will be the total number of months of the penalty period during which the claimant is not eligible to receive VA pension benefits.<sup>40</sup> The monthly penalty rate is the maximum rate for a married Veteran in need of Aid & Attendance.<sup>41</sup> For 2023, the monthly penalty rate is \$2,642. Therefore, as an example, if the Covered Asset amount over the Net Worth limit was \$30,000, after dividing by \$2,642, the penalty period would be 11 months ( $30,000/2,642 = 11.36$ ).

The claimant is not required to take any action to start the penalty period. Thus, it would be possible for a transfer to occur within the 36-month lookback period, but for the penalty period to have run prior to the filing of the claim for VA pension benefits. The penalty period ends on the last day of the last month of the penalty period, so that the claimant is entitled to receive VA pension benefits the first day of the month following the expiration of the penalty period.<sup>42</sup>

The VA recognizes only two exceptions to the imposition of the penalty period, and allows no hardship exception, as is sometimes applied in Medicaid applications.

### **1. Exceptions to Imposition of a Penalty Period**

#### **a. Transfers as a Result of Fraud or Unfair Business Practice**

As part of the apparent intention to target the “poachers” without penalizing the Veterans who fall victim to those poachers, the 2018 rules contain an exception for transfers that resulted from “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.”<sup>43</sup> Such transfers will not incur a penalty, if the claimant presents evidence of the filing of a contemporaneous complaint with State, local, or Federal authorities reporting the incident.<sup>44</sup> Thus, if the claimant will report the individuals or entities that sold or advised the use of the financial products or services, the claimant will be able to avoid the transfer penalty.

#### **b. Transfers to Certain Trusts**

The only type of irrevocable trust to which a Covered Asset can be transferred without invoking a transfer penalty is a trust that (1) was established on behalf of a child of the Veteran who was permanently incapable of self-support prior to the age of 18, and (2) allows no circumstance under which trust distributions could benefit the claimant.<sup>45</sup> The transfer

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<sup>38</sup> 38 C.F.R. §3.276(e)(2).

<sup>39</sup> 38 C.F.R. §3.276(e)(2).

<sup>40</sup> 38 C.F.R. §3.276(e).

<sup>41</sup> 38 C.F.R. §3.276(e)(1).

<sup>42</sup> 38 C.F.R. §3.276(e)(3).

<sup>43</sup> 38 C.F.R. §3.276(c).

<sup>44</sup> *Id.*

<sup>45</sup> 38 C.F.R. §3.276(d).

of Covered Assets into any other type of irrevocable trust would violate the VA transfer rules.

## **2. Recalculation of Penalty Period**

The VA will recalculate a penalty period only if the original calculation was shown to be in error, or if the claimant provides evidence of the return of some or all of the Covered Assets before the filing of the claim or within 60 days after receiving VA notice of the penalty period.<sup>46</sup> The VA must receive evidence of the return within 90 days after the date of the VA notice.<sup>47</sup>

## **F. Assistance with Filing Claims**

The VA regulations limit who can help Veterans or their surviving spouses obtain assistance with preparing for and filing claims for pension benefits. Individuals must be accredited by the VA to assist a claimant in the preparation, presentation, and prosecution of a claim for VA benefits. There is a one-time exception for individuals who seek to assist only one claimant for one application. Typically, that exception is used by a family member who is helping a loved one with the application and who has no intention of helping anyone else file a claim.

The VA accredits (1) representatives of VA-recognized veterans service organizations, (2) independent claims agents, and (3) private attorneys. A list of accredited representatives, agents, and attorneys can be found at [www.va.gov/ogc/apps/accreditation/index.asp](http://www.va.gov/ogc/apps/accreditation/index.asp). In general, even if accredited, the VA prohibits an individual from charging the Veteran or surviving spouse a fee for the preparation and presentation of a VA claim (gathering the information necessary to file the claim, completing the claim application, submitting claim information to the VA, and communicating with the VA on behalf of the claimant). A disinterested third party can pay a fee if the third party would not benefit financially from the successful outcome of the claim.

## **G. Conclusion**

The rules governing eligibility for VA pension benefits allow more certainty in advising clients of their planning options for public benefits. Because of the way in which the VA rules can work with Medicaid planning, every attorney who provides advice on public benefits should consider becoming a VA-accredited attorney to ensure the clients receive comprehensive advice regarding available public benefits. Even if the attorney does not complete and file VA claims, it is important to understand the role VA benefits can play in ensuring Veterans and their surviving spouses receive the assistance they may need.

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<sup>46</sup> 38 C.F.R. §3.276(e)(5).

<sup>47</sup> *Id.*