

# Medi-Cal and the Incapacitated Client

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# What we will cover

- Medi-Cal Basics and the application process
- A quick overview of SSI
- An overview of VA pension and the eligibility rules
  - All with an eye toward the incapacitated client

# The Basics of Medi-Cal

But first, a few housekeeping items...

- Thank you to Richard Littorno and Julie Fiedler, instructors of our 2016 “Medi-Cal Basics” course, as I borrowed heavily from the slides used in that program (because they are excellent).
- We won’t cover every slide, but I wanted to give you more rather than less.

# Medi-Cal

- Medi-Cal is a “needs-based” program.
- Medi-Cal is California’s version of Medicaid.
- It is a combined federal and California program.

# Medi-Cal

- Supplemental Security Income (SSI) rules indirectly impact Medi-Cal eligibility determinations because federal law provides that Medicaid (Medi-Cal) asset and income rules may be no more restrictive than those for the SSI program.

# Medi-Cal

- There are a variety of Medi-Cal programs.
- This presentation will only address LTC Medi-Cal, that is, the Medi-Cal benefit that pays for care in a Medi-Cal certified skilled nursing facility.

# Legal Authority

- Federal Medicaid Statutes (42 USC § § 1396-1396v) and Regulations (42 CFR § § 430.0-456.725)
- State Medicaid Manual and Centers for Medicaid and Medicare Transmittals
- SSI Statutes (42 USC § § 1382-1383d) and Regulations (20 CFR § § 416.101-416.2227)
- Program Operations Manual Systems (POMS)

# Legal Authority

- Medi-Cal Statutes (Welfare & Institutions Code Sections 14000-14029) and Regulations (22 CCR Sections 50000-58067)
- All County Welfare Directors Letters (ACWDL) and Medi-Cal Eligibility Division Information Letters (MEDILs) from Department of Health Care Services to county social services departments.

# Current California Law

- Medicare Catastrophic Coverage Act of 1988 and ACWDL 90-01 and 90-03
  - spousal impoverishment
  - transfer regulations
  - still Draft regulations, not yet coded in California Code of Regulations

# Current California Law

- Omnibus Budget Reconciliation Act of 1993 (OBRA 93)
  - trust regulations
  - recovery regulations
  - but NOT the transfer regulations

# Current California Law

## Deficit Reduction Act of 2005 (DRA)

- Amended Welfare & Institutions Code 14015(SB 483-Kuehl, 2008)
- Requires that regulations be implemented prior to enforcement
- Welfare & Institutions Code requires implementation to be prospective only
- Regulations have not been implemented except for proof of citizenship requirements

# Medi-Cal Eligibility Rules

- Technical Eligibility
- Medical Eligibility
- Financial Eligibility

# Technical Eligibility Rules

- Medi-Cal is available to qualified United States citizens and to nationals from American Samoa or Swains' Island.
- Proof of citizenship must be shown on or after July 1, 2006, such as US passport, certificate of naturalization, US birth certificate.

# Technical Eligibility Rules

- SSI beneficiaries, SSDI beneficiaries and Medicare beneficiaries are exempt because their citizenship has already been verified.
- California has chosen to continue Medi-Cal coverage for legal immigrants.

# Technical Eligibility Rules

- Must be a resident of California.
- Residency is defined as being present within the state with an intent to remain.
- Must be placed in a Medi-Cal certified skilled nursing facility.

# Medical Eligibility

- To receive Medi-Cal, a recipient must require “medically necessary” care.
- Must have deficits in at least three activities of daily living, i.e., bathing, eating, dressing, ambulating, transferring, or toileting (care which cannot be provided in a lower level of care facility).

# Medi-Cal Eligibility

- Must be admitted by a doctor's order
- Must remain or be likely to remain 30 days or more in a skilled nursing facility

# Financial Eligibility Rules

- Asset Rules
  - Exempt Assets
  - Nonexempt Assets
  - Unavailable Assets

# Financial Eligibility Rules

- Income Rules
- Transfer Rules
- Spousal Impoverishment Rules
- Recovery Rules

# Asset Rules

- “Property” must be distinguished from “income.”
- Receipts during a calendar month are considered “income;” they become “property” at the first moment of the next calendar month. Therefore, income received during the month should not be counted in determining property limits for that month.

# Exempt Assets

- Under Medi-Cal rules, many assets are considered exempt and thus not counted in determining eligibility.
- The primary exempt assets are:
  - principal residence (W&I C 14006)
  - vehicle (22 CCR § 50461(a))

# Exempt Assets

- Items used to furnish and equip the home (22 CCR § 50465)
- Personal effects, i.e., clothing, heirlooms, wedding and engagement rings, and any other item of jewelry with a net market of \$100 or less (22 CCR § 50467) (for married couples there is no dollar limit if one spouse is institutionalized (22 CCR § 50490.1 (DRAFT)))

# Exempt Assets

- Musical instruments (22 CCR § 50471)
- Burial insurance (22 CCR § 50476)
- Burial plots, vaults, and crypts (for any member of the immediate family) (22 CCR § 50477)
- Burial funds/contracts (22 CCR § 50479): less than \$1,500 or irrevocable burial trust

# Exempt Assets

- Life insurance if it has no cash surrender value or if the face value of all policies combined is less than \$1500 (ACWDL 08-02, 22 CCR § 50475)
- Income-producing property and property used for self-support (22 CCR § 50485; ACWDL 91-28 and 95-22)

# Principal Residence

- The most significant exempt asset.
- Means the home, including a multiple-dwelling unit, in which the individual resides or formerly resided if intent to return home exists.
- Also includes all contiguous property.

# Principal Residence

- The home continues to be the principal residence and continues to be exempt as long as the Medi-Cal recipient declares in writing that he/she intends to return home (22 CCR § 50425)
- California applies a subjective standard when determining intent, i.e., would she like to return home vs. can she return home? (ACWDL 95-48)

# Principal Residence

- The home also continues to be exempt if the Medi-Cal recipient has a spouse, child under age 21 or a dependent relative living there; or
- A sibling with equity interest or a child 21 or older who has continuously resided on the property for at least one year before the date the individual was admitted to the skilled nursing facility (22 CCR § 50425)

# Principal Residence

- The home is also exempt if it cannot be sold because of legal obstacles and evidence of attempts to overcome these obstacles;
- The home also remains exempt if the individual does not intend to return home, but has made a good faith effort to sell the property and it has not sold (22 CCR § 50425)

# Vehicle

- One vehicle is exempt from being counted as a resource (22 CCR § 50461(a))
- A vehicle does not have to be used for transportation to be exempt (ACWDL 96-55)
- Recreational vehicles and commercial vehicles are exempt only if other vehicles are not available for transport (22 CCR § 50461(a) but ACWDL 96-55)

# Household/Personal Effects

- Clothes
- Furniture/furnishings
- Electronic equipment
- Anything for the personal use of the applicant (22 CCR § § 50465, 50467, 50471, 50409.1(DRAFT))

# Jewelry

- For a single person: heirlooms, wedding and engagement rings, and any other item of jewelry (with a net market value of \$100 or less)(22 CCR § 50467)
- For married couples: no dollar limit (22 CCR § 50471)

# Life Insurance

- Exempt if no cash surrender value
- Exempt if term insurance that has no cash value
- Exempt if face value of all policies combined is less than \$1500 (22 CCR § 50475)

# Burial Plots or Contracts

- A burial plot, vault, or crypt for use by any member of the applicant's immediate family is exempt from being counted (22 CCR § 50477, ACWDL 93-71)
- An irrevocable burial trust or irrevocable prepaid burial contract for funeral, cremation, or interment expenses is exempt (22 CCR § 50479)

# Burial Plots or Contracts

- An additional \$1500 in funds set aside for funeral/cremation/burial expenses (a “designated burial fund”) is also exempt (22 CCR § 50479(b))
- Any appreciation or interest earned on these accounts are also exempt (22 CCR § 50479(d))

# Property Used in Trade/ Business

- There is an unlimited exemption for property used in a trade or business (42 USC 1382b(a)(3), ACWDL 91-28, 95-22)
- This exemption can apply to real property, motor vehicles, cash, as well as equipment, inventory, licenses and materials (22 Cal Code Regs 50485)

# Property Use in Trade/Business

- An entire family farm could be excluded (22 CCR § 50485)
- Property used in a trade or business is excluded regardless of value or rate of return as long as it is in current use, or, if not in use for reasons beyond the individual's control, as long as there is a reasonable expectation that the use will resume (POMS SI 01130.501, ACWDL 91-28)

# Rental Property

- If property produces income, but fails to meet the test of property “used in a trade or business,” it is considered nonbusiness income-producing property and different rules apply.

# Rental Property

- This property is exempt if the net market value of the property is \$6,000 or less and is receiving income of at least 6% of net market value. (22 CCR § 50416, 50427)
- The excess value can sometimes be eliminated by borrowing against the equity to bring the net market value down to the required \$6,000 limit.

# Cash Reserve

- A single person is allowed to retain a cash reserve of \$2,000 (22 CCR § 50419)

# Nonexempt Assets

- If an asset is not exempt or unavailable, then it will be counted for eligibility purposes.

# Promissory Notes/Deeds of Trust

- Promissory notes and deeds of trust are counted as resources.
- The value of such notes is the lower of the principal amount remaining on the note or its appraised value (22 CCR § 50441(c))
- Often, unsecured notes are very significantly discounted in the market.

# Unavailable Assets

- An asset can only be counted in determining eligibility if it is actually “available.” (22 CCR § § 50402, 50402(a)(DRAFT))
- An asset is considered available if the applicant has the legal power and authority to liquidate it.(22 CCR § 50402(a) DRAFT))

# Unavailable Assets

- “Other real property” is considered “unavailable” if it can be shown that there has been a bona fide effort to sell the property and bona fide offers within two-thirds of the fair market value have been accepted.

(22 CCR § 50402(d)(DRAFT))

# IRAs and Pensions

Medi-Cal divides retirement assets into two types:

- work related (“pension funds”)
- non work related

Work related funds include IRAs, Keoughs, 401(k) accounts, 403 (b) accounts, and traditional pensions.

# IRAs and Pensions

- If the funds are held in the name of the Medi-Cal beneficiary's spouse, they are regarded as exempt assets (22 CCR § 50458(DRAFT))
- If the funds are held in the name of the applicant and payments are deferred, then the funds are treated as available.

# IRAs and Pensions

- If, however, the applicant takes steps to start periodic payments of the principal and accumulated interest, Medi-Cal will treat the payments as income and consider the remainder of the principal and interest as unavailable property. (22 CCR § 50458(DRAFT), ACWDL 02-51)
- Roth IRAs must have periodic payments of interest and principal regardless of age. (ACWDL 02-51, Q&A 10). Any amount will suffice if interest + principal.

# Annuities

- Nonwork-related retirement assets, primarily commercial annuities, are governed by much more complex rules than work-related assets.(22 CCR § 50489, as amended, MEPM, Letter No. 159, 179, 192)
- Medi-Cal annuity rules distinguish between annuities purchased before August 11, 1993 and those purchased on or after that date.(22 CCR § 50489(b)(3))

# Annuities

## Annuities purchased before August 11, 1993

- The cash surrender value, regardless of value, is considered unavailable if the applicant is receiving any amount of periodic payments of interest and principal (22 CCR § 50402(e)(DRAFT))
- Immediate annuities would not be counted, but deferred annuities would be counted.

# Annuities

## Annuities Purchased Between August 11, 1993 and March 1, 1996

- If payments are deferred at any time, the cash surrender value is considered available.
- The undistributed value is considered unavailable if contract is annuitized on the life expectancy of the applicant or for a shorter time period (22 CCR § 50489.5(g),(2)(A))

# Annuities

- If the annuity is annuitized for a period longer than the life expectancy, as determined by DHCS tables, and the annuity cannot be restructured, then the payments in excess of the annuitant's life expectancy are considered a transfer for less than fair market value (MEPM Letter No. 159,179 and 192)

# Annuities

- Even if the annuity is annuitized within the allowable life expectancy, its cash surrender value is still counted as available unless the annuity makes equal monthly payments (or payments that increase by no more than 5 percent annually) (22 CCR § 50489(b)(2))

# Annuities

- Rules regarding annuities will change significantly when new regulations are implemented under DRA so purchase of annuities should be made with caution at this time.

# Income

- In California, there is no income limit preventing qualification for Medi-Cal.
- Although there is no income limit, an individual must pay his excess income as a “share of cost.” (22 CCR § 50605)

# Income

- The portion of one's income that must be spent on medical care before Medi-Cal will pay for any remaining medical costs is called "share of cost."
- The "share of cost" functions much like the payment of an insurance deductible in that it must be paid each month before Medi-Cal will pay the provider.

# Income

- Medi-Cal counts all gross earned and unearned income (22 CCR § § 50503, 50507)
- Deductions for income tax obligations are not allowed. (Medical deductions are almost always sufficient to eliminate any income tax)
- Only income that is “available” is counted (22 CCR § 50513)

# Allowable Deductions

- Medi-Cal allows certain deductions from the applicant's gross income before determining "Share of Cost."
  - \$35 as a personal needs allowance;
  - Health insurance premiums, including Medicare Part B and D premiums (unless paid by Medi-Cal);(22 CCR § 50555.2)

# Allowable Deductions

- Where appropriate, an allocation of income to the community spouse (22 CCR § 50561 (DRAFT)), including a support order
- Rental real property expenses (22 CCR § 50508)
- Certain uncovered medical expenses. (ACWDL 89-54, Johnson v. Rank and Hunt v. Kizer)

# Medical Expenses

- All legitimate medical bills, including nursing home care, and payments for medical services not covered by Medi-Cal are allowable deductions under Johnson v Rank (current medical bills) and Hunt v. Kizer (past medical bills)

# Example

- Doris did not pay her skilled nursing home bill for 3 months prior to qualifying for Medi-Cal even though she had “excess” property. She can now use her monthly income to amortize the old private nursing home debt instead of paying for her current care through share of cost.

# Transfer Rules

- The purpose of the transfer rules is to discourage people from giving assets away in order to meet the financial requirements of long-term care Medi-Cal.
- The transfer rules have been tightened over time. (MCCA, OBRA, DRA)

# Transfer Rules

- In Medi-Cal language, “transfer” means gift, disposing of an asset for less than fair market value.
- “Penalty” means period of time where the individual is rendered ineligible for Medi-Cal (disqualified).
- Currently, transfer penalties only apply to long-term care Medi-Cal.

# Transfer Rules

- Currently effective transfer rules in California:
  - Medicare Catastrophic Coverage Act (MCCA) of 1988, before the 1989 amendments.
  - MCCA rules were implemented in ACWDL 90-01; 22 CCR § § 50408.5-50411.5 (DRAFT).

# Transfer Rules

- NOT the transfer rules of OBRA 93 and DRA.
- “Look-back period” means the amount of months from the date of the application that Medi-Cal can review the applicant’s records to find any gift transfers.

# Transfer Rules

- The look-back period under MCCA rules is 30 months from the date of the Medi-Cal application. (22 CCR § 50408.5(b)(Draft))
  - gifts must be disclosed on the application;

# Examined Transfers

- Transfers of exempt assets are not penalized. (22 CCR § § 50408 and 50411.5(a)(2) (DRAFT)): e.g. primary residence; the only car.
- If a transfer was made for a purpose other than to qualify for Medi-Cal, it is not penalized. (22 CCR § 50411.5(a)(4)(B) (DRAFT)): e.g. primary residence to prevent estate recovery.

# Does it matter to whom the transfer was made?

- A transfer of non-exempt property to certain persons is non-disqualifying. (22 CCR § 50411.5 (DRAFT))
  - To the community spouse;
  - To a blind or disabled child;

# Transferee Issues

- To a non-community spouse before admission to long term care, provided that the non-community spouse did not re-transfer to another individual.
- A transfer of nonexempt property to certain trusts is non-disqualifying. (42 USC § 1396p(c)(2)(B)(iii) and (iv))

# Transferee Issues

- To a trust for the sole benefit of a blind or disabled child;
- To a trust for the sole benefit of any disabled individual under the age of 65 (42 USC 1396p(d)(4)(A))
- To a “pooled trust” established and administered by a nonprofit organization (42 USC 1396p(d)(4)(C))

# Transferee Issues

- These transfers are authorized in Medi-Cal Procedures Manual, Art 9J, page 72, et seq., but cannot be found in California draft regulations.
- To a testamentary trust (trust created by will) (22 CCR § 50489.5(a)(1))

# How is the transfer penalty period calculated?

- Divide the amount of each gift transfer by the Average Private Pay Rate (APPR), currently \$8,189. (2016) (ACWDL 16-11)
- APPR represents the average monthly cost of care in a skilled nursing facility throughout the state of California. AKA “penalty divisor”

# Penalty Calculations

- The APPR rate is set forth each year in a ACWDL in the Spring.
- Round down all fractional months to next whole number; i.e. drop all fractions.
- Start the penalty period from the month when the transfer was made.
- Stop the penalty period at a maximum of 30 months.

# Example

- Bob gives away \$75,000 to his son this month (October 2015)
  - \$75,000 is divided by the \$8,189 APPR
  - The result is 9.16 months, which is rounded down to 9 months.
  - The disqualification period runs for 9 months from 10/2015 to 6/2016.

# Example 2

- What if Bob had fragmented the \$75,000 gift into four gifts of \$18,750-on different days or to different donees or from different accounts?
  - \$18,750 is divided by \$8,189
  - The result is 2.29 months, rounded down to 2 months.

# Example 2 (continued)

- This gift generates a disqualification period of 2 months from 10/15 through 11/15.
- Each \$18,750 gift generates the same disqualification period that runs for 2 months, with the periods running concurrently, not consecutively.
- Thus, Bob was eligible for Medi-Cal on December 1, 2015.

# Example 3

- What if Bob's gift of \$75,000 had been fragmented into 10 gifts of \$7500-on different days, or to different donees, or from different accounts?
  - \$7500 is divided by \$8,189
  - The result is .92 months, which is rounded down to zero.

# Example 3 (continued)

- Each \$7500 gift generates the same disqualification period-zero months.
- These gifts generate no period of disqualification.
- Thus, if all these gifts were made in October,2015, Bob was eligible for Medi-Cal in October of 2015.

# Problems with Fragmented Transfers

- Often greeted with hostility by eligibility workers.
- May not pass the “smell” test.
- May generate claims of elder abuse, undue influence, or unethical practice.

# Proceed With Care

- Use independent attorneys for the donor and donee;
- Be sure the donor has capacity or that the power of attorney/trust documents specifically authorize gifting and self-dealing

# Spousal Protections

- When one spouse is institutionalized, federal and state rules are in place to ensure the other spouse does not become impoverished

# Spousal Protections

- MCCA's spousal impoverishment provisions distinguish between the "institutionalized spouse" and the "community spouse."
- The "community spouse" is the noninstitutionalized spouse who is still living in the community, incl. independently or ALF.
- Now applies to same sex couples (ACWDL 12-36)

# Community Spouse Protections

- The protections for community spouses fall into three categories:
  - Income
  - Resources
  - Transfers

# Income Protections

- The Minimum Monthly Maintenance Needs Allowance (MMMNA) is the minimum amount of income that is determined by the state, under federal guidelines, to be needed by the well spouse to live in the community. (42 USC 1396r-5(d), W&I C 14005.12(d)(5))

# Income Protections

- California has chosen to adopt the maximum MMMNA allowed. Each year there is usually a cost of living increase.
- The MMMNA is \$2,981 in 2016 (ACWDL 15-04)
- Medi-Cal applies the “name on the check” rule (22 CCR § 50512 (DRAFT))
  - “If the payment of income is in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse.”
  - If both names are on the check the income is generally attributed one-half to each spouse (22 CCR § 50512 (DRAFT))

# Income Protections

- If the amount of monthly income in the name of the community spouse is less than \$2981, income may be allocated from the institutionalized spouse to the community spouse where necessary to increase the community spouse's income to the MMMNA level (ACWDL 90-03, 22 CCR § § 50601 (DRAFT), 50653.5 (DRAFT))

# Example

A community spouse receives \$700 in Social Security income as her only monthly income. The institutionalized spouse receives \$1,400 in Social Security and a \$1,000 pension. The income that can be allocated to the community spouse from the other spouse is  $\$2,981 - \$700 = \$2,281$ .

# Example (continued)

The institutionalized spouse's share of cost would then be  $\$1,400 + \$1,000 = \$2,400$  minus  $\$35$  minus the allocation of  $\$2,281$  to the community spouse =  $\$84$ , minus all health insurance premiums of ill spouse.

# The Community Spouse Resource Allowance (CSRA)

- The Community Spouse Resource Allowance (CSRA) is the amount of countable nonexempt resources that the community spouse may retain when the institutionalized spouse qualifies for Medi-Cal.

# CSRA

- All community property and the separate property of both spouses is counted in determining the CSRA at the time of application.
- California has adopted the maximum CSRA allowed under federal law, currently \$119,220.

# CSRA

- A couple can retain the same types of exempt assets as the single person.
- The CSRA may be increased through an administrative hearing or a court hearing under certain circumstances, but the standard is much more stringent in a fair hearing and thus more difficult.

# Medi-Cal Estate Recovery

- Planning to render an applicant eligible for Medi-Cal benefits is not enough! Planning must always incorporate the impact of the state's ability to seek reimbursement for Medi-Cal benefits paid upon the death of the Medi-Cal beneficiary via Estate Recovery.

# Estate Recovery

- Medi-Cal is entitled to recover the value of the benefits it has paid for a beneficiary (W&I C 14009.5)
- California has always had a recovery program even prior to the mandatory estate recovery provisions of OBRA 93. The most recent revision of recovery rules was on May 10, 2006 when recovery regulations became final (22 CCR § § 50961-50966)

# Estate Recovery

- The state's claim is limited to the services that the Medi-Cal beneficiary received on or after the beneficiary's 55<sup>th</sup> birthday (unless the services were for long-term care.)
- The state is barred from making a claim during the life of the surviving spouse.

# Medi-Cal Claims

- California originally chose the expanded definition of “estate” allowed under the federal rules. As of January 1, 2017, it is only the probate estate.

# Crisis Planning (2016)

An overview of strategies currently  
available in California

# Eligibility Strategies

- “Conversion”: of countable asset or funds to non-countable assets or funds, i.e. wise spending to lower countable
- Transfer of countable assets with a plan
- Expansion of Community Spouse Resource Allowance

# Examples of conversion

- Home maintenance or improvements
- Pay off debts, esp. on exempt assets
- Trade car in on new car
- Buy appliances
- Prepaid irrevocable funeral plan
- Burial plots, crypts, caskets

# Other conversions

- IRA/401k/403b/Roth IRA of person who needs nursing home care:
  - Schedule RMDs if RMDs are not being taken
  - If RMDs are not required (under age 70.5 or a Roth IRA): order nominal monthly distributions of principal plus interest.

# Common Sense on Conversion

- Don't leave elder with unmet needs if there are funds to pay for needs that have been put off due to concerns about money.
- Plan for both spouses' present and future needs.

# Devise a Gifting Plan

- Structure a plan of gifts that will not create any period of ineligibility (penalty) in a crisis case or that will create small penalty.
- Gifts can be outright or to an irrevocable Medicaid Asset Protection Trust.
- No penalty for any gifts to disabled child or to a trust for a disabled person. Be careful of their needs-based benefits!

# Concurrent Penalty Periods

- Take advantage of concurrent penalty periods (periods of ineligibility):
  - Break a larger gift down to smaller gifts on different days
  - Break a larger gift to one person into gifts to multiple persons on one day
  - Use multiple accounts on one day

# Concurrent Penalty Periods

- Structure gifting plan to take advantage of fact that multiple penalty periods can run in parallel lines at the same time and be finished in shorter period of time
- Working off the penalty periods all at once: more frequent gifts create shorter total penalty period

# Reminder Regarding Gifts

- Cashier's checks are the only checks that you can control when the account is encumbered. Personal checks are big risks to create higher penalty periods.
- Always make copies of all gift checks and get account activity reports.

# Married Person Gifting

Understand unique re-gifting rule

- H not in SNF = re-gifting after transmutation incurs normal penalty.
- H in SNF = re-gifting of transmuted assets (W's newly separate property) is not a disqualifying gift. DRA: probably not so.

Expansion of CSRA:  
Probate Code 3100 Petitions:  
Helping Married Clients Achieve  
Maximum Asset Protection  
in Crisis Medi-Cal Cases

# Benefits to Your Clients

1. Protect assets and accelerate Medi-Cal eligibility with highest Community Spouse Resource Allowance (CSRA)
2. Protect income with lowest Share of Cost (SOC)
3. Prevent Medi-Cal estate recovery for institutionalized spouse benefits

# Benefits to Your Clients

4. Empower community spouse &/or agent to act for nursing home spouse on IRAs/401Ks/insurance policies
5. Make gifts from spouse in SNF
6. Create/fund/revoke trusts for couple or spouse
7. Avoid conservatorship of estate

# Benefits to Your Clients

8. Retroactive orders extend higher CSRA and eligibility backwards and/or extend lower SOC backwards to the first month for which nursing home spouse would be eligible after court order.
9. Bonus: Full/partial refunds from SNFs for pre-order SOC or private payments.

# Benefits to Your Clients

10. And most important of all:

PEACE OF MIND

Financial Security

Self-Control and Autonomy

Protection of Legacy

# What is a Petition under Probate Code 3100-3154?

- A petition in the Probate Division of Superior Court for an order authorizing particular transaction involving community property, any or all (and separate property if good cause shown). PC 3100.

# What is required to file a Petition under PC 3100-3154?

1. One spouse is alleged to lack legal capacity *for the **proposed** transaction, whether or not* spouse has conservator;  
AND
2. Other spouse *has capacity* for proposed transaction or *has a conservator.* PC 3100 (a).

# What is required to file a Petition under PC 3100?

## 3. Some Community Property

- Real or personal property
- Tangible or intangible property
- Interest therein
- Lien or encumbrance thereon

Must show good cause to include sep. prop.

# PC 3100 vs. Conservatorship

- PC 3100 Petition is not conservatorship.
- PC 3100 Petition lacks the inflexibility and future accountability of a conservatorship. Does more for less.
- PC 3100 Petition is more permissive, flexible, creative, broad, and malleable.

# Main Uses of PC 3100-3154

1. Estate planning or community property transactions for married couples where one spouse is incapacitated
2. Crisis Medi-Cal planning: elder law attorneys have created these uses not mentioned in the statute

# Most important transaction listed in PC 3102

- PC 3102(f): Conveyance or *transfer, without consideration*, to provide gifts for such purposes and to such charities, relatives (including one of the spouses), friends, or other objects of bounty, as would be *likely beneficiaries of gifts from the spouses* (like PC 2580 – Substituted Judgment)

# Married Clients who can benefit

1. Couples with EP Needs
2. Couples with Medi-Cal Needs

# Couples with EP Needs

- One spouse incapacitated, and
- Other spouse has capacity or conservator, and
- Some community property, and
- Need to do EP or gifting, and
- May or may not need Medi-Cal

# Couples with Medi-Cal Needs

Couples with Medi-Cal needs: same as couples with EP needs, plus need to:

- Increase CSRA &/or
- Increase well spouse income &/or
- Remove ill spouse name from assets &/or
- Avoid M/C Estate Recovery, &/or
- Prevent loss of M/C if well spouse dies first.
- Latter two require transmutation.

# Increasing CSRA

- One spouse (only) in SNF, or soon to be in SNF in some counties, and
- Combined countable assets exceed CSRA (\$119,220 in 2016) plus \$2,000.
- CS gross fixed income must be less than MMMNA (\$2,981 in 2016).
- One spouse must lack capacity for transaction.

# Cautions for Increasing CSRA

- You need a Community Spouse!
- One spouse must be in a SNF; other must be in community (not in SNF).
- No spouse in SNF: No community spouse according to federal definition (spouse of institutionalized spouse).
- Some counties (e.g. LA) order CSRA increase prior to admission to SNF.

# Cautions for Increasing CSRA

- The Community Spouse's fixed gross monthly income in own name must be less than the MMMNA (\$2,981 in 2016).
- Income in own name: own Social Security, pension, IRA/401k RMDs, own annuity income. "Name on check rule"

# Increasing Well Spouse Income

- Community Spouses who need more gross monthly joint income than the Minimum Monthly Maintenance Needs Allowance (\$2,981 in 2016) because they have higher living expenses (which must be documented)

# Removing the Ill Spouse Name from CSRA Assets

- Community spouse must remove ill spouse's name from all assets included in CSRA within 90 days of Medi-Cal approval, but cannot do so because of incapacity of ill spouse and no good POA or other problem.

# Preventing Loss of Medi-Cal if Well Spouse Dies First

- After transmutation to CS, new estate plan for well spouse to disinherit IS or leave all or part of estate to SNT for ill spouse through new Will/Trust: probate the Will to establish and fund the SNT.
- Transmutation is the key.

# Nothing in PC 3100-3154 mentions Medi-Cal

- BUT this is the doorway that elder law attorneys use to go to court for orders supporting Medi-Cal planning for married couples when one spouse lacks capacity for proposed transaction especially where one spouse is in SNF

# And So . . .

- Our Petitions and Memoranda of Points and Authorities must educate the court as to the federal and state laws and regulations relating to Medicaid and Medi-Cal.
- Many courts have seen many of these petitions and readily grant the orders.

# Basic Requirement for Petition

- PC 3101(a):
  - One spouse lacks legal capacity for proposed community property transaction (whether or not conserved); AND
  - Other spouse *has legal capacity* for proposed transaction *or a conservator*.

# Increasing the CSRA

- Standard CSRA is \$119,220 in 2016.
- Above that, no Medi-Cal eligibility for nursing home spouse without a judge's order by one of two paths:
  - Fair hearing (ALJ order) or
  - PC 3100 (Court order)

# Increasing the CSRA

- The old MCCA provisions and the CA regulations based on them are for the explicit purpose of preventing the impoverishment of the community spouse, i.e. the spouse of an institutionalized individual (in SNF).

# The court order increasing CSRA must be phrased in a particular way.

- The court order increasing the CSRA must be made “against the institutionalized spouse for the support and benefit of the community spouse.”

# Requirements for Increasing the CSRA

- One spouse in SNF; one not (usually)
- Gross fixed income of community spouse is less than MMMNA: (\$2,981 in 2016).
- The standard CSRA (\$119,220 in 2016) is not adequate to generate enough income at going 6-month CD rate (now well under 1%) to bring CS to \$2,981 gross/month.

# How To Compute New CSRA

- MMMNA minus CS fixed monthly gross income = monthly deficit in income.
- Times 12 months = annual deficit
- Divided by going 6-month CD rate - now 0.1% (one tenth of 1%). Confirm rates.
- Equals new CSRA possible

# Example: CSRA Computation

MMMNA:	\$2,981/mo
Minus well spouse income of:	<u>-1,981/mo</u>
Equals monthly deficit	<u>=1,000/mo</u>
Times 12 months	x 12 mo
<b>Equals annual deficit</b>	<b>=12,000/yr</b>

# Example: Continuation

$$\begin{array}{r} \text{Annual Deficit} \qquad \qquad \qquad \$12,000/\text{yr} \\ \div .1\% \text{ (going 6-mo CD rate)} \qquad \underline{\qquad \qquad \qquad \div} \\ \underline{.1\%} \\ = \text{New CSRA:} \qquad \qquad \qquad \$12,000,000 \end{array}$$

With a 1% going 6-mo CD rate:

$$\$12,000 \div 1\% = \text{New CSRA } \$1,200,000$$

# Or Even Higher

- If well spouse's gross income were only \$981 instead of \$1,981, there would be a monthly deficit of \$2,000 and an annual deficit of \$24,000.
- $\$24,000 \div 1\% \text{ CD rate} =$
- New CSRA of \$2,400,000

# Inverse Relationship between CS income and new CSRA

- The lower the CS income in own name, the higher the CSRA can be raised.
- The higher the CS income in own name, the less the CSRA can be raised.

# Inverse Relationship between going CD rate and new CSRA.

- The lower the going 6-month CD rate, the higher the CSRA can be raised.
- The higher the going CD rate, the less the CSRA can be raised.

# Increasing Income for the Community Spouse

- The MMMNA is the Minimum Monthly Maintenance Needs Allowance, not a ceiling for Community Spouse income.
- Some Community Spouses make more than that, and all belongs to CS and does not affect ill spouse's Share of Cost (SOC): "Name on check rule."

# Increasing Income for the Community Spouse

- Other community spouses make less than the MMMNA (\$2,981 in 2016), and they are entitled to a spousal allocation of income from ill spouse to CS to increase CS income up to \$2,981 per month, without a judge's order. This in turn decreases the ill spouse SOC.

# Increasing Income for the Community Spouse

- For some community spouses, getting \$2,981 per month from own income and possibly ill spouse's income is enough.
- But other community spouses need more than \$2,981 per month because of documented higher expenses.

# Increasing Income for the Community Spouse

- If CS can document that total expenses exceed \$2,981, then a judge's order can increase the amount of income that CS can keep from couple's income.
  - Fair hearing/ALJ order: Very restricted standards to increase the MMMNA.
  - Court order: Unrestricted standards

# Increasing Income for the Community Spouse

- Court order to increase income for community spouse is unrestricted as to the reasons or amount. It is up to the court, using its discretion.
- Court order is an order for monthly income support order against the ill spouse for the support of the well spouse.

The court order increasing the spousal income must be phrased in a particular way.

- The order must be an order of “monthly support to be enforced against the institutionalized spouse for the support and benefit of the community spouse.”

# CAUTIONS on Increasing Income with Court Order

- Do not phrase the order of support as “increasing the MMMNA or spousal allocation.” Only an ALJ can do that, but fair hearings use restrictive standards. DHCS could fail to approve the order as written, and then you must go back to court: Nunc Pro Tunc order

# Other Pointers

- Appointed counsel/GALs who represent institutionalized spouse and who do not know Medi-Cal can become overly zealous in protecting the IS from the CS. Must educate them.
- Declarations from Relatives: to support petition and waive notice of hearings.

# Legal Planning Documents

- Are powers of attorney for health care decision making in place to allow for appropriate medical decisions and placement decisions to be made?
- Is the individual likely to object to placement so as to make court intervention necessary?

# Legal Planning Documents

- Have HIPAA waivers been signed giving access to medical records and so that discussions with medical providers can occur?
- Are there powers of attorney for finances and/or living trusts which contain appropriate authority to engage in Medi-Cal planning?

# Legal Planning Documents

- Is there a will or living trust providing for the disposition of assets after death? If so, are there any unusual provisions?
- Is there provision for the disposition of personal property prior to death?

# Legal Planning Documents

- Do the beneficiary designations of IRA's, etc. mesh with the estate planning documents?
- Are the agents/trustees named still appropriate?

# The Medi-Cal Application

# Steps

- Collecting the initial information;
- Obtaining and filling out a Medi-Cal application packet;
- Setting an appointment for a face-to-face interview if needed; (no longer required)
- Attending the interview;

# Steps

- Collecting all verification material;
- Supplying all supplemental material as requested by the county eligibility worker;
- Reviewing the Notice of Action to determine its correctness as to coverage and share-of-cost;
- If needed, filing an appeal;

# Application Process

- In applying for Medi-Cal, one of the first steps is to obtain a Medi-Cal application packet.
- Some counties will mail packets on request; others will require that packets be picked up in person.
- The forms are also available at <http://www.dhcs.ca.gov/formsandpubs/forms/pages/medi-calforms.aspx> and I provided a sample packet with your materials (SAWS 1 and 2).

# Application Process

- California regulations state that the date of application is the date the completed application form is received by the county department.
- The application form (SAWS 1) is one of the many forms in the packet.

# Application Process

- Some counties require that the packet be picked up and the SAWS 1 is signed at the time of pick up to fix the application date.
- In other counties, a telephone call requesting an application triggers the application date.
- Other counties do not fix the application date until the entire packet is returned.

# Application Process

- The application date is important because it begins the 45 day period during which the county must make a determination on the application.
- The starting date is particularly important in cases where the full three months of retroactive eligibility is needed (22 CCR § 50193(c)(d))

# Application Process

- The difference between setting the application date on the last day of the month and the first day of the following month can mean a whole month of coverage.
- Some counties have certain eligibility workers who only process long-term care applications- this is very helpful!

# Authorized Representative

- Because the Medi-Cal application process is confidential, in order for the eligibility worker to communicate with someone other than the applicant, the applicant or the person applying on behalf of the applicant, must appoint another person as an authorized representative.

# Authorized Representative

- This is done by signing an Appointment of Representative (MC306) form. This enables the authorized representative to:
  - submit requested verifications to the eligibility worker;
  - accompany the applicant to any face-to-face interviews;

# Authorized Representative

- obtain information from the county welfare department, the State Department of Social Services, Disability Evaluation Division, regarding the status of the application;
- provide medical records and other information regarding medical problems and limitations to the county;
- receive a copy of the Notices of Action

# Authorized Representative

- A law firm may be an authorized representative and represent the applicant, but an individual in the firm must be designated as the contact person to act on the applicant's behalf.
- There is a slightly different authorized representative form for a fair hearing.

# Application

- The Application for Medi-Cal (MC210) is the next most important form, and is the most complex.
- Approval or denial is generally based on this form.
- The Statement of Facts is signed under penalty of perjury.

# Application

- It is in the Application for Medi-Cal that all assets and income are reported, and intentional failure to report completely can lead to civil or criminal penalties.
- Income-producing assets should appear on a report that is available to the eligibility worker, called the IEVS report.

# Application

- The IEVS report is not always accurate and may list an account that does not belong to the applicant. The Medi-Cal applicant must then look for the assets listed on the IEVS report and submit an explanation for each item listed to the eligibility worker.

# Application

- All currently owned assets and all assets owned by the applicant and applicant's spouse in the last two and one-half years must be reported, and if assets are no longer owned, the statement must indicate what happened to them, i.e., whether they were sold, transferred or given away, and to whom.

# Personal Items

- Generally, there will be no personal items to report, unless the applicant or spouse owns items of very significant value, i.e., a coin collection or a collection of valuable art works.
- All items used to furnish and equip a home are exempt and do not need to be reported.

# Personal Items

- All motor vehicles, boats, campers, trailers and motor homes must be reported.
- Even exempt assets such as burial funds and plots must be listed.
- Providing the eligibility worker with a summary sheet listing all income, all exempt and nonexempt assets is very helpful.

# Retroactive Coverage

- All questions in the Statement of Facts must be answered carefully, but certain questions require special attention. For example, there is a question about medical expenses incurred during the three months prior to the application.

# Retroactive Coverage

- The question is there because three months of retroactive Medi-Cal coverage is available to the qualified applicant. The applicant must have received health services, and must not have previously been denied Medi-Cal for the month in question unless it was due to county error.

# Retroactive Coverage

- If any retroactive coverage is requested, a Supplement to Statement of Facts for Retroactive coverage/ Restoration (MC210A) or other form required by the county must be completed to show that the Medi-Cal applicant qualified during these months.

# The Home

- The important question regarding the home on the application is whether the applicant intends to return there.
- The answer to this question should always be “yes,” as a “yes” answer maintains the exempt status of the residence.

# The Home

- If the applicant lacks capacity to sign a writing, the applicant's representative may do so.
- If written indication of this intent has not been made in the initial application, the applicant may correct the statement at any time.
- Subjective intent to return home is sufficient to preserve the exemption.

# Transfers

- A critical section of the form involves the question, “Has anyone closed, given away, transferred, sold or traded money, vehicles, property or other resources?” during the last 30 months.
- All closed accounts, transfers between accounts, or sold assets must be reported as well as gifts.

# Trusts

- The Statement of Facts will also contain questions about trusts. If the applicant or spouse has a revocable living trust, or if either is the beneficiary of any other trust, this must be reported.
- A copy of the trust document must be submitted.

# Trusts

- All trusts should be carefully reviewed before submission.
- The Schedule of Assets on any trust submitted should be updated to show current assets in the trust. Otherwise, if there are assets no longer owned on the schedule, it will raise questions by the eligibility worker, creating a great deal of unnecessary work.

# Other Required Forms

- Other required forms vary greatly from county to county.
- There may be forms concerning citizenship, bank accounts, burial funds, health insurance and voter registration.

# Notice of Action

- The eligibility worker will determine the applicant's eligibility and share-of-cost after the applicant has applied, completed the Statement of Facts and provided all the essential information.

# Notice of Action

- The county can deny the application for lack of information, noncooperation or loss of contact, so prompt cooperation with the eligibility worker is essential.
- The county must also be prompt, and must complete the determination of eligibility and share-of-cost calculation within 45 days of the date of application.

# Notice of Action

- This time can be extended for good cause, and frequently is extended.
- The county must send a written notice, called a Notice of Action, to advise the applicant of his Medi-Cal eligibility or ineligibility, of any changes in eligibility status, and of share-of-cost.

# Notice of Action

- The Notice of Action must include the reason the action was taken.
- If the action is a denial, discontinuance, or increase in share-of-cost, the law or regulation that requires the action must be indicated in the notice.

# Share-of-Cost and Allocation

- When an application is approved, most of the Medi-Cal recipient's income will be paid to the nursing home for share-of-cost.

# An Overview of SSI

# A Primer on Public Benefits

## Needs Based Benefits

## Benefits based on Entitlement

**Cash Assistance**

**Supplemental Security Income**

**SSD**

(Social Security Disability)

**CDB**

(Childhood Disability Benefits)

**Medical Assistance**

**Medicaid**

**Medicare**

# Supplemental Security Income

- SSI is a federal program, administered by the states, and based on sufficient evidence of disability and financial need



# Supplemental Security Income

- SSI is intended to pay for the beneficiary's food and shelter, and nothing more



# Supplemental Security Income

- The SSI rate for 2017 is \$735 per month (see handout)



# Supplemental Security Income

- Many states have supplements and SSI recipients in those states receive a higher amount





# 3 Part SSI Test



Meet Definition of Disability

Resource test determines eligibility

Income test determines how much is received.

# Social Security

## Definition of Disability

- A benefits recipient must be a person under the age of 65 who is not be able to engage in substantial gainful activity (SGA) because of a medically-determinable physical or mental impairment(s) that is expected to last a year or longer or end in death.



# Social Security

## Definition of Disability

- Monthly SGA amount for non-blind individuals
  - \$1,170 in 2017
- Monthly SGA amount for blind individuals is \$1,950.



# Basics of SSI Eligibility Resources

- Cash, or anything that can be converted to cash for support, is a resource
- If resources exceed \$2,000 on the first day of a calendar month, the beneficiary's public benefits will be lost until resources are reduced

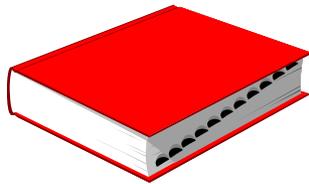
# Basics of SSI Eligibility Resource Exemptions

- A home is exempt if the beneficiary has an ownership interest and it serves as his/her principal residence



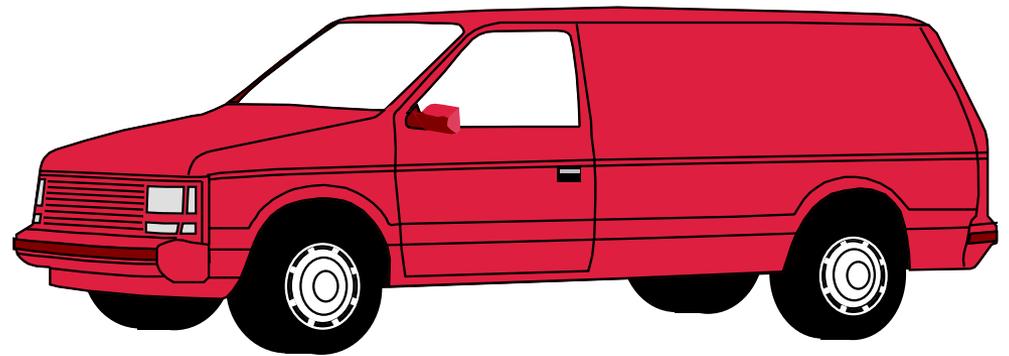
# Basics of SSI Eligibility Resource Exemptions

- Household goods of any value
- Clothes and accessories
- Items held for their intrinsic values are not exempt



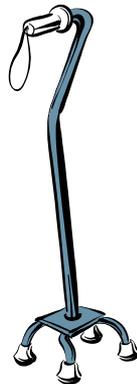
# Basics of SSI Eligibility Resource Exemptions

- One automobile of any value



# Basics of SSI Eligibility Resource Exemptions

- Items related to the disability



# Basics of SSI Eligibility Resource Exemptions

- Life insurance policies with cumulative cash surrender value of less than \$1,500
- All term life insurance
- A burial plot, or other burial space, worth any amount
- Up to \$1,500 set aside for expenses



# Types of SSI Income

<b>Unearned Income</b>	<b>Earned Income</b>	<b>In-Kind Support &amp; Maintenance</b>
Includes cash gifts, payments from annuities and pensions, alimony & support payments, dividends, interest, rents, awards and payment from other benefit programs.	Consists of wages, royalties, net earnings from self-employment, and any honoraria received for services rendered.	Actual receipt of food or shelter, or something that can be used to get one of these.
Reduces benefits dollar for dollar after the first \$20	Reduces benefits one dollar for every two dollars after the first \$65 earned monthly	Reduces benefits dollar for dollar up to a maximum of \$264.34 in 2015/2016

# In-Kind Support & Maintenance

- Payment of food or shelter from a source other than the benefits recipient (including SNT) will reduce the recipient's SSI dollar for dollar capped at what SSA calls the Presumed Maximum Value (PMV)
  - The PMV amount is  $\frac{1}{3}$  of the federal benefit amount + \$20. In 2017 – the PMV is \$265
  - In some cases, a loss of \$265 is a minor price to pay
  - In some cases, the reduction would be devastating

# 10 Items = Food & Shelter

- Food
- Mortgage (including property insurance)
- Real property taxes (less any tax rebate/credit)
- Rent
- Heating fuel
- Gas
- Electricity
- Water
- Sewer
- Garbage removal

# ISM Example #1

- Jane is eligible for full SSI of \$735
- She asks Bob, her trustee, to have her SNT pay her rent of \$1,200
- Jane understands that her benefits will be reduced by \$265 – but she feels that the benefit of living in a decent apartment outweighs the reduction of her SSI

# ISM Example #2

- Jane receives \$700 of SSDI and \$53 of SSI
- She asks Bob to have her special needs trust pay her rent of \$1,200
- Payment of her rent will cause complete loss of SSI, but Jane will still receive her \$700 of SSDI

# Overview of VA Pension Benefits

# Veterans Pension Benefits

- Sometimes referred to as “aid and attendance”

# VA Pension

- The VA provides a monthly cash benefit to wartime veterans who are 65 or older and require assistance with activities of daily living.
- Often referred to as “Aid and Attendance” but its proper name is VA Pension with an Aid and Attendance Allowance.

# VA Pension

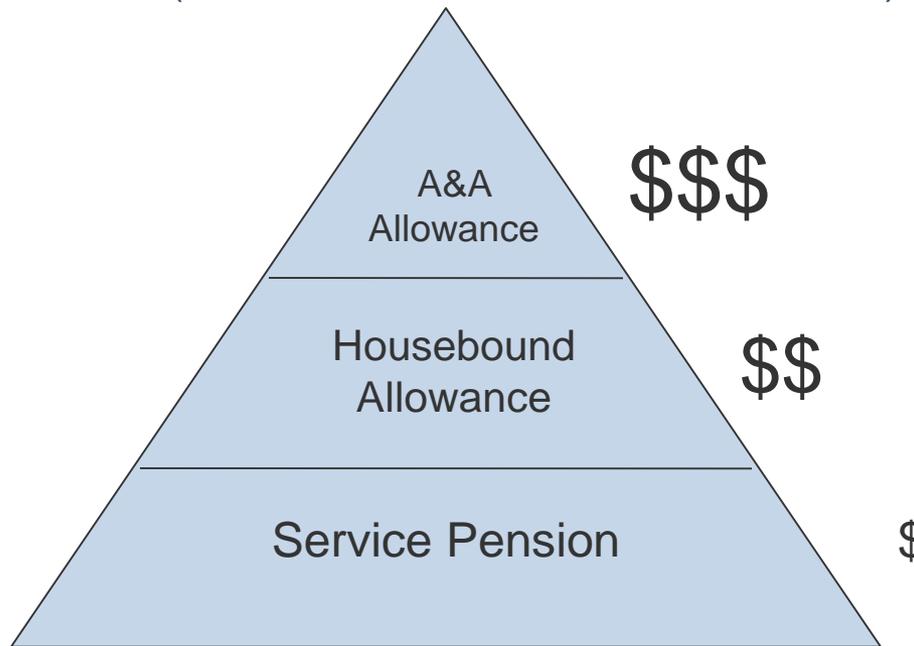
- Different than VA Compensation
  - Compensation is a monthly benefit awarded to Veterans who are currently disabled due to an activity that occurred or was aggravated by active duty service.
  - No income or asset limitations

# Simplified View of Aid and Attendance

- Howard, age 90, is a WWII veteran. He currently moved into an assisted living facility that costs \$3,500 per month. His income is \$2,000 per month.
- If Howard has minimal other assets (under \$50,000, for example), he could qualify for \$1,794 per month (2017) in pension benefits with an aid and attendance allowance.

# Basic Eligibility Pension Benefit

(misnomer: Aid & Attendance Benefit)



# Basic Requirements for VA Pension - Overview

- 90 days of active duty service, 1 day of wartime service (until September 7, 1980 – increases to 24 months of active duty)
- Other than dishonorable discharge
- Must meet financial and medical criteria

# Service Requirements

- Active duty wartime service
  - 90 days of continuous active duty (up to 9-7-80, then 24 months)
  - At least one day during a declared war period
    - No need for combat
    - No need to be in-country

# Periods of War

	Start	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 earlier	5/7/75

# Disability Requirement

- Basic Pension
  - 65 or older
  - or, permanently and totally disabled
- This is the starting place for an aid and attendance claim, which has more medical requirements.

# Medical Requirements – Overview

- Depends on the benefit the Veteran is applying for
  - Basic pension: Disabled or over age 65
  - Housebound allowance: 1 disability rated at 100%, second or subsequent disabilities totaling 60%; or unable to leave the home
  - Aid and Attendance allowance: Blind or nearly so; bedridden; a patient in a nursing home; or who needs help with 2 or more activities of daily living

# Aid and Attendance Allowance

- 2 presumptions will satisfy the medical requirements:
  - Blind or nearly so (<5/200), or
  - Patient in nursing home

38 CFR § 3.352(c)(1) & (2)

If neither presumption exists, then we look at activities of daily living.

# Aid and Attendance Allowance

- Establishing the need for aid and attendance:
  - Inability to dress or undress, keep oneself clean and presentable, frequent need of prosthetic adjustment, inability to feed oneself, inability to toilet, or
  - Incapacity (physical or mental) which requires care or assistance on a regular basis; or
  - Bedridden
    - 38 CFR § 3.352

# Medical Evidence to Support a Claim

- Evidence submitted may be based on medical reports and findings by private physicians or from non-VA facilities
- Statements from private physicians will be accepted for rating purposes

# Big Picture: Financial Criteria

- No set limit on net worth – subjective test by the VA
- Income must be less than the benefit the Veteran is applying for
  - Easier way to think of this: Unreimbursed medical expenses must exceed income to get the maximum benefit.
- Most commonly used method to reduce income = out of pocket recurring medical expenses

# Income

- Gross Income
  - Rounded down to next whole dollar
- Includes household income: Veteran, Spouse, and Dependents
- Definition:
  - “Payments of any kind from any source” unless excluded

38 CFR § 3.271(a)

# Reporting Income

- Reporting Income – First Application
  - When applying, the claimant is stating what income will be for the next 12 months
  - The VA may use prior year's tax return to verify income

# Calculating Income

- Calculating Income for VA Purposes (IVAP)
  - Gross income less permissible exclusions
    - 38 CFR § 3.272 and 38 USC § 1503
  - Most common exclusion: recurring unreimbursed medical expenses (UME)
- The income limit is the maximum rate allowed for the benefit the claimant is seeking

# Income Limits

- Maximum benefit (Maximum Annual Pension Rate) allowed is the income limit
  - MAPR (divided by 12) for a married Veteran in 2017 who needs aid and attendance: \$2,127
  - Claimant/Veterans IVAP cannot be over \$2,127
- Goal: IVAP of 0 or a negative number (UMEs equal or exceed income)

# IVAP Calculation

- Veteran's household income = \$2,500
- Her recurring out of pocket medical expenses = \$3,500
- Her IVAP = (\$1,000)
- She would qualify for the maximum benefit allowed

# IVAP Calculation #2

- Veteran's household income = \$2,500
- Her recurring out of pocket medical expenses = \$1,500
- Her IVAP = \$1,000
- She is not married and is filing a pension with aid and attendance application
- Maximum benefit available= \$1,794
- How much would she get? \$794

# Net Worth

When is it excessive?

- 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 – What's Included

- Market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant, except the claimant's dwelling, including a reasonable lot area, and personal effects consistent with claimant's reasonable mode of life.
- No bright line limit
- VA uses a subjective test to determine when it is excessive
  - 38 CFR § 3.275

# Net Worth

Factors the VA considers:

- Amount of claimant's income
- Whether the property can be readily converted into cash at no substantial sacrifice
- Life expectancy
- Number of dependents
- Potential rate of depletion

# Transfers

- No penalties for transferring assets prior to application (currently – new rules have been proposed)
- A transfer to a relative residing in the claimant's home will not be considered a complete relinquishment
- Transferor must relinquish all rights of ownership, including control and the right to receive income
  - 38 CFR 3.276

# Death Pension

- Available to surviving spouses or dependent children of deceased veterans are eligible

# Death Pension – Surviving Spouse

- Requirements:
  - Valid marriage at time of veteran's death
    - No remarriage, with limited exceptions (38 CFR § 3.50(b), 38 CFR § 3.55(a)(2))
  - Veteran meets wartime and disability requirement for Service Pension
  - Spouse meets income and net worth requirements

# Death Pension

- If surviving spouse applies within one year of veteran's death, benefits will be paid retroactively to the first day of the month of the veteran's death
- If life insurance will be paid, may make sense to wait to apply

# Change is coming

- Lookback and transfer penalty
- Original rules published in January, 2015
- Final rules expected this spring

# 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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