

Pennsylvania Bar Institute

Family Caregiver Agreements and Use of Real Estate

September 26, 2018

Critical news Veterans Administration issues new regulations effective October 18, 2018.

Disclaimer: These notes are meant to alert you to critical changes which have just been issued by the Veterans Administration on September 18, 2018 in the Federal Register which can be found at <https://www.federalregister.gov/documents/2018/09/18/2018-19895/net-worth-asset-transfers-and-income-exclusions-for-needs-based-benefits>. This is an overview of some of the changes as they relate to the family caregiver agreements and use of real estate. You must however review the new regulations yourself and not rely upon this summary.

Highlights:

1. VA is implementing 36-month lookback as to transfers after October 18, 2018. For transfers for other than fair consideration there will be a penalty period for the needs-based VA benefits.
2. The general asset rule for either a sole veteran or married veteran is similar to the Community Spouse Resource Allowance under Medicaid which in 2018 is \$123,600. (Be careful because they will use the annualized income and add to other assets or resources to arrive at the asset level.) The primary home is an exempt resource, however the lot size is limited to two acres unless the additional land is not marketable.
3. When someone is paying for care at home (or in a facility), you must have receipts and documentation. 95% of unreimbursed medical expenses are an offset against income. In order to avoid the payment counting as an uncompensated transfer or to be able to utilize as a medical expense, you will need the necessary verifications and documentations.
4. Most care received at home is essentially ADLs (activities of daily living) which means basic self-care activities such as bathing and showering, dressing, eating, toileting, transferring; **OR** assistance with IADLs (instrumental activities of daily living) which means independent living activities such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes. Normally assistance with ADLs and IADLs will not be considered deductible medical expenses for the VA unless a physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that, due to a physical, mental, developmental or cognitive disorder, the individual requires the health care or custodial care that the in-home attendant

provides. Payments for assistance with ADLs and IADLs for an in-home attendant are medical expenses as long as the attendant provides the disabled individual with health care or custodial care. Payments must be commensurate with the number of hours that the provider attends to the disabled person. The attendant must be a health care provider unless:

- the disabled individual needs A&A, or is house bound, or
- the physician, physician assistant, certified nurse practitioner, or clinical nurse specialist states in writing that due to a physical, mental, developmental, or cognitive disorder, the individual requires the health care or custodial care that the in-home attendant provides.

5. The VA has set a standard to judge the reasonable payment for in-home care at the hourly rate not to exceed the average hourly rate for home health aides published annually in the Market Survey of Long-term Care Cost published by the MetLife Mature Market Institute. (NOTE: The last found published rate by the MetLife Mature Market Institute was dated November 2012.)

6. The period of the penalty will be the amount of the uncompensated transfer divided by the pension payment to a single veteran with one dependent. In 2018 that figure is \$2,000 per month. Therefore, a \$24,000 gift would result in 12 months of ineligibility starting with the month after the date of the gift. The VA also allows for the gift to be returned. At one section it appears to require a total return of gift, but at another it appears that partial returns will reduce the penalty period. The maximum penalty imposed is five years.

7. The VA has not addressed Life Estates and valuation of Life Estates.

8. Trust and annuities.

Dana M. Breslin, Esquire
Robert J. Breslin, Jr., Esquire
Christopher M. Murphy, Esquire
Christina B. Roberts, Esquire
Pappano & Breslin
3305 Edgmont Avenue
Brookhaven, PA 19015-2801
610-876-2529; fax 610-876-3746
e-mail: pappanoandbreslin@outlook.com
<http://pappanoandbreslin.com>