

# **ELDER LAW UPDATE - FEDERAL FOCUS**

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# NYSBA 2018 Fall Meeting National Elder Law Update

## The Must Know Cases & Legislative Changes for 2017-2018

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## We Plan to Cover

1. VA Pension Final Rule – Lookback and Penalty
2. Successful Defense Against Harmful Cuts
3. POMS Update – ABLE Accounts
4. POMS Update - Supplemental Needs Trusts
5. Medicaid Waivers
6. Mass. Decisions on Irrevocable Trusts
7. Medical Aid-in-Dying Update

## VA Pension Final Rule

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### **Veterans Pension – RIN 2900-AO73 – Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits**

- Initial Proposed Rule appeared in Federal Register on January 23, 2015
- The VA finally released draft final rule on 9/18/18
- Effective Date – October 18, 2018
- Not retroactive – very important – sigh of relief
- Advocates were speculating ever since February 15, 2018 as to when the final rule would be adopted!

  
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## Veterans Pension

- 36 Month Lookback Period (same as proposed)
- Penalty Period up to 5 years (proposed rule - 10 years) on transfers of "covered assets"
- Calculation
  - Amount transferred divided by MAPR for married veteran rate at time of application
  - $\$100,000/\$2,169 = 46$  months
  - Final rule avoids disparate treatment of surviving spouses (with lowest pension rate)
  - Final Rule provides guidance on curing and reducing penalty periods

## Veterans Pension

### Net Worth – equivalent to Medicaid CSRA (\$123,600)

- Penalizes those with higher expenses with no adjustment upward in net worth
- Increases will track SSA COLA increase
- Sum of claimant's assets **plus annual income**
- Eliminates guesswork re: asset limit

## Veterans Pension

### Primary Residence

- Not counted **even if claimant lives outside the home** (i.e., nursing home or ALF - change from existing policy – although inconsistently applied)
- If primary residence is sold, net sales proceeds not counted as an asset if used to purchase new home within same calendar year
- Timing of sale is of utmost importance

## Veterans Pension

### Covered Assets

- An asset that was part of claimant's net worth, was transferred for less than FMV, and if not transferred, would have caused or partially caused the claimant's net worth to exceed the net worth limit
- Spenddown – a claimant may decrease assets without penalty by spending them on an item or service for which FMV is received.

## Veterans Pension

### Trusts and Annuities

- Specifically identified in the new rule as instruments the VA considers transfers for less than FMV
- However, above will not apply if claimant retains ability to liquidate entire balance of trust or annuity
- Lump sum SPIAs are now ineffective!
- Veterans Asset Protection Trusts still viable

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## Veterans Pension

### Medical Expenses

- How VA calculates Income for VA Purposes remains the same
- However, medical expenses only include items that are
- Medically necessary
  - Improve a disabled person's functioning, or
  - Prevent, slow or ease an individual's functional decline

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## Veterans Pension

### Medical Expenses - Examples

- Payments to a health care provider
- Prescription and non-prescription medication
- Payments for adaptive services (including certain payments for service animals)

### Medicaid nursing home VA benefit – remains at \$90/month

- Beneficiary not liable for any pension payments in excess of \$90 by reason of the VA failure to reduce payments, unless the beneficiary willfully conceals the overpayment from the VA

## Successful Defense Against Harmful Cuts

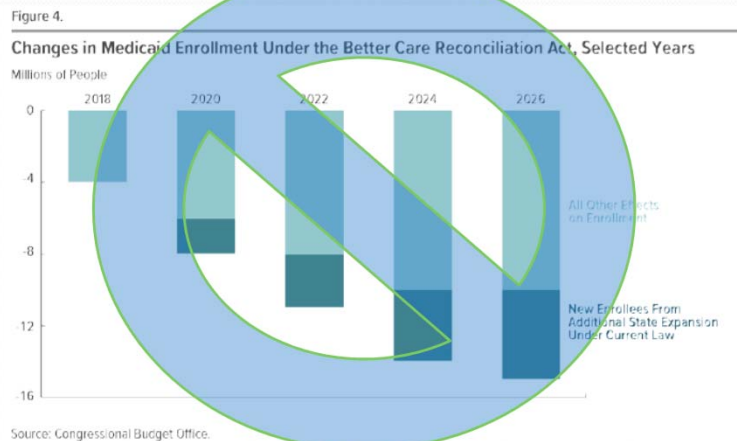


## Medicaid Block Grants

- Block grants and per capita caps were attempted in 2017
- Outcome of mid-term elections will determine if they return for next Congress
- If House remains Republican and Senate remains Republican, then we could see these proposals again



## Per Capita Caps



## Making Half the Income of a CS Annuity Available to the IS – HR 181

- Included in 2017 House version of health reform bill
- NAELA and Chamber Hill (NAELA Lobbyist) advocated to have it pulled from inclusion by raising enough issues to prevent it from going forward
- It is still very much alive as a so-called “pay-for”, and continues to come up in discussions with legislators

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## Ending a State's Ability to Increase the Home Equity Exemption – HR 1082

- Included in 2017 House version of health reform bill
- Ends option for state to expand home equity limit for “single individuals” above 572k up to 858k (inflation adj.)
- NAELA and Chamber Hill (NAELA Lobbyist) advocated to have it pulled from inclusion in the Senate version of the bill – the Better Care Reconciliation Act
- Trump Budget (February 2018) included this provision – Congress does not follow these budgets however

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## Ending 3 Month Retroactive Medicaid Coverage Rule

- Included in 2017 House version of health reform bill
- NAELA and Chamber Hill (NAELA Lobbyist) advocated to have 3 month retroactive coverage retained in the Senate version of the bill – the Better Care Reconciliation Act
- Was modified to exclude persons with disabilities and LTSS (nursing home eligibility) – a victory for our clients
- But – see waiver requests later on...

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## NAELA Stops the Elimination of the Medical Expense Deduction

*“Suzanne Hollack moved her husband, who has front temporal dementia, to a memory care facility 18 months ago. His long term care and medical expenses cost the couple \$90,000 last year”*



New York Times  
Ending Medical Tax Break Could Be a ‘Gut Punch’ to the Middle Class  
November 8, 2017

## Ending the Medical Expense Deduction

- The House sought to eliminate the Medical Expenses Deduction as part of tax reform
- NAELA played a central role in educating Congress and the press on its devastating impact on those who need LTSS (ARC missed this)
- Final tax bill not only kept the deduction, but expanded it for two years (AGI threshold went from 10% to only 7.5% for 2 years)
- AARP trying to make this a permanent change

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## Updated POMS on ABLE Act

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## SI 01130.740 Achieving a Better Life Experience (ABLE) Accounts

- An Achieving a Better Life Experience (ABLE) account is a type of tax-advantaged savings account that an eligible individual can use to pay for qualified disability expenses.
- The eligible individual is the owner and designated beneficiary of the ABLE account.
- An eligible individual may establish an ABLE account provided that the individual is blind or disabled by a condition that began before the individual's 26th birthday.

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## Utilizing a Special Needs Trust with an ABLE Account

**NOTE** - A transfer of funds from a trust, of which the designated beneficiary is the beneficiary and which is not considered a resource to him or her, to the designated beneficiary's ABLE account generally will be considered a third party contribution for ABLE purposes.

**RATIONALE** - the contribution is made by a person or entity other than the designated beneficiary (namely, the trustee) and because the designated beneficiary does not legally own the trust.

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## Qualified Disability Expenses

### Education

### Housing

### Transportation

Employment training and support

Assistive technology and related services

Personal support services

### Health

Prevention and wellness

Financial management and administrative services

### Legal fees

Expenses for ABLÉ account oversight and monitoring

### Funeral and burial

### Basic living expenses

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## Housing Expenses

Housing expenses for purposes of an ABLÉ account are similar to household costs for in-kind support and maintenance purposes, with the **exception of food**.

Housing expenses include expenses for:

1. Mortgage (including property insurance required by the mortgage holder);
2. Real property taxes;
3. Rent;
4. Heating fuel;
5. Gas;
6. Electricity;
7. Water;
8. Sewer; and
9. Garbage removal.

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## Do Not Count ABLÉ Account Distributions as Income

- A distribution from an ABLÉ account is not income but is a conversion of a resource from one form to another. See SI 0110.600B.4.
- Do not count distributions from an ABLÉ account as income of the designated beneficiary, regardless of whether the distributions are for a QDE not related to housing, for a housing expense, or for a non-qualified expense.

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## Example

- Barry has been disabled from birth, and receives \$750 per month in SSI.
- He is a beneficiary of a self-settled special needs trusts.
- He would like to move to a nicer apartment that would cost \$1,000 per month.
- He will need some financial assistance in order to make the move.



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## Example (cont.)

- If Barry's parents were to give him **\$1,000** per month directly it would be counted as unearned income and eliminate his SSI completely.
- If his parents were to pay the landlord directly – the payments would count as ISM and his benefits would be reduced by \$270.
- If instead they were to contribute \$1,000 per month to his **ABLE Account**, and in turn the funds from the account were to pay the landlord **then there would be no reduction of SSI.**

  
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## Updated Trust POMS

  
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## What are the key areas that have changed in the new POMS?

### Updates to reflect changes in law

- Introduction of ABLE accounts
- Assignability of U.S. Military Survivor Benefit to a first party SNT
- The Special Needs Fairness Act, now allowing an individual on his/her own, or through a power of attorney, to establish a first party SNT

## What are the key areas that have changed in the new POMS?

### Updates to SSA policy

- Sole benefit rule
- 90 day amendment period
- Family caregivers
- Third party travel expenses
- Assignment of income
- ABLE Accounts and trusts



## What else is changed in the new POMS?

### Instructions and reminders to SSA staff in evaluating trusts

- No originals necessary
- Notices must identify what part of the trust is a problem and what POMS section applies
- Reiterating instructions not to impose overpayment during 90 day amendment period
- Making POMS easier to search, such as by making lists (such as the glossary) alphabetical, and
- Commentary on application of rules

## SI 01120.201F. Sole Benefit Rule

- Interpretation of sole benefit - definition and restatement of circumstances in which payments from a trust related to third parties do not violate the sole benefit rule. **SI 01120.201F.**
- This section has been largely rewritten and provides useful explanation and direction in interpreting text and reviewing use of trust assets.
- **SI 01120.201F.3.1.** provides - *“The key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else, e.g., if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there; if the trust buys a television, that no one else can watch it.”*

## 90-Day Amendment Period

### SI 01120.200K.

- POMS now allows a 90-day amendment period for trusts previously reviewed and found not to be a resource, but due to a change in policy, a policy clarification, or the reopening of a prior erroneous determination, are now found to be a resource (because something in the trust conflicts with current requirements).
- During this period, the trust should continue to not be a resource, and there is to be no overpayment imposed. **SI 01120.200K2.**
- Good Cause Extension - There is also the opportunity for a good cause extension of the 90 period, such as when a court order may be required and the case cannot be docketed within this timeframe. **SI 01120.200K2c.**
- Also reiterated in **SI 01120.201F5** in context of third party travel rules. And adds the instruction to not impose an overpayment during the amendment period.

## SI 01120.201F.

## Family Caregivers

- This section makes clear that a third party service provider may be a family member, a non-family member or a professional entity; the same rules apply for all.
- Next, this section states that “companion care’ can be a valid expense, and although family members may often provide this without compensation, a trustee may validly pay for this. Incidental expenses for the companion, such as admission to events that the beneficiary can only attend with assistance.
- No medical training or certification is needed for a family member who is paid to provide care.
- Staff should not routinely question the reasonableness of the service provider’s compensation; however if there is reason to question this, take into consideration the time and effort involved as well as the prevailing rate of compensation where the care is being provided.

### SI 01120.201F3b. Third Party Travel Rules

- Payment of third party travel expenses to accompany the trust beneficiary and provide services or assistance that is necessary due to the beneficiary's medical condition, disability or of minority age do not violate the sole-benefit rule.
- Travel expenses means transportation, food and lodging (under the companion care allowance, a trustee could also pay for entrance fees for activities for the beneficiary).
- Accept a trustee's statement that a service or assistance is necessary, absent evidence to the contrary. No medical letter or documentation is required, nor is medical certification of the third party required.
- Reasonableness Test - Instructions apply a reasonableness test for the number of people required to accompany the beneficiary - may be more than one person. But those accompanying have to be providing services or assistance; example that trust may pay for parents to accompany beneficiary, but not other minor children, as they are not providing services or assistance.



### Travel for Third Parties to Visit a Trust Beneficiary

#### SI 01120.201F3c

- For purposes of ensuring the safety or medical wellbeing of a beneficiary – for a “service provider,” which could be a family member or someone else, to oversee the trust beneficiary's living arrangements when the beneficiary is living in a supported environment and not living independently.
- Also adding travel for a trustee, trust advisor named in the trust, or successor to exercise his fiduciary duty to ensure the wellbeing of the beneficiary when the beneficiary does not live in an institution.



## Court Orders Establishing a Trust

- Clarifying that a court order to establish a first party trust for a capable beneficiary is not considered an action by the beneficiary (this issue is now largely moot due to the Special Needs Fairness Act.) **SI 01120.203B8.**
- This section also makes clear that if a trust has already been executed and funded, a court order cannot undo that.
- Stating that an individual may establish her own d4 trust effective December 13, 2016, as a result of the enactment of the Special Needs Fairness Act, as part of the 21st Century Cures Act of that date.
- Also that a POA may establish the trust as an agent of the individual, if the POA document allows. **SI 01120.203C2a., SI 01120.203C3.**

## SI 01120.201.11e. True Link Cards

- Addressing Administrator managed prepaid cards, like True Link.
- *Key here is who owns the prepaid card account. If the trustee is the owner of the account, the card is not the beneficiary's resource, and the effect of disbursements from the card depends on how funds are spent: if for food and shelter, individual will be charged for ISM. If for cash, treated as unearned income.*
- If for items that would not be countable resources in the following month, then not income in month received.

# Medicaid Waivers

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## 1115 Waivers Basics

- “Experimental, pilot, or demonstration project”
- Likely to assist in promoting the objectives of the Medicaid program.
- Can waive Medicaid requirements under 42 U.S.C 1396a
- Budget neutral (HHS Policy Not Law)



## How does this impact Elder Law? 1396a

- (a)(1) Statewideness
  - (a)(3) Fair hearings
  - (a)(7) Confidentiality
  - (a)(8) Reasonable promptness for decisions
  - (a)(10) (a) Categories of eligible individuals
  - (a)(10)(B) Equality of amount, duration and scope
  - (a)(10)(C) Comparability with SSI
  - (a)(14) Fees, copayments, deductions only per 1396o
  - (a)(17)(D) Responsibility of relatives & spend down of incurred medical expenses
  - **(a)(18) Liens, recoveries,**
- transfers & trusts only per 1396p**
- (a)(23) Freedom of choice
  - (a)(25) Claims against third party payers
  - **(a)(34) Three month retroactivity**
  - (a)(43) Early & periodic screening, diagnosis & treatment for those under 21
  - (a)(45) Mandatory assignment of support rights per 1396k
  - (a)(50) Personal needs allowances

  
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## 42 USC §1396p (SSA §1917)

### **1396p affects Numerous Areas in Elder Law/Special Needs Practice**

- Excluding Residence as a Resource and State Liens on Property
- Estate Recovery for LTSS recipients 55 and older
- Transfer Penalty Rules
  - Annuities
  - Promissory Notes
  - Transfers to Spouses
- Supplemental Needs Trusts (d4A and d4C) and Miller Trusts (d4B)

  
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## CMS Actions to Date

Approved new limits, primarily for Medicaid expansion, including:

- Work requirements
- Premiums
- Lock-outs (if you fail to comply with premium payment you can be kicked off for 6 months)
- Retroactive coverage (including for LTSS)
- Ending non-emergency medical transportation

### Denial

- Lifetime limits



## 3 Month Retroactive Payments

States are using Sect. 1115 to attack 3-month retroactive payments

For the first time, CMS approved three states that requested authority to waive 3-month retroactive payments -

1. Kentucky (since struck down so no longer)
2. Indiana
3. New Hampshire

Florida and Arizona have waivers pending on this issue alone





## 1115 Waivers – Lifetime Caps on Medicaid Benefits

- Kansas attempted to impose a lifetime cap on Medicaid benefits for those “able to work”
- UT, WI, ME, and AZ also requested lifetime limits
- CMS denied Kansas’ request, encouraged work requirements instead

## 1115 Waivers – Kentucky Waiver Litigation

DC Federal Court Judge Overturns Kentucky Waiver Proposal, *Stewart v. Azar*, USDC, DC, Civil Action No. 18-152 (JEB), June 29, 2018

- Kentucky Waiver
  - Imposed work requirements
  - No 3 month retroactive coverage
  - Up to 6 month lockouts
  - No non-emergency medical transportation
- Judge reaffirmed that purpose of Medicaid is to provide health coverage, not something amorphous like “promoting health”

## Lawsuit Against CMS



<http://www.healthlaw.org/>



## Joint Amicus Brief

NAELA joined Justice in Aging, AARP, AARP Foundation, The Disability Rights and Education Defense Fund (DREDF).

### Key Points Raised

- Harm to persons with disabilities and older adults
- retroactive coverage
- non-emergency Medical transportation
- lock-outs



## Judge Rules Against HHS

- Primary purpose of Medicaid is to provide health coverage
- Approval was arbitrary and capricious
- Ruled on waiver as a whole
  - Means 3 month rule standing alone might still survive scrutiny
  - Court never analyzed each of the components of the waiver request individually



## Maine Waiver

### Most concerning waiver proposal

- Initially contained repeal of three month retroactive eligibility
  - Some success - updated waiver would not apply to LTSS
- Annuity Limit - limits annuity length to at least 80 percent of life expectancy (CS or IS), essentially eliminating short-term annuities even if actuarially sound

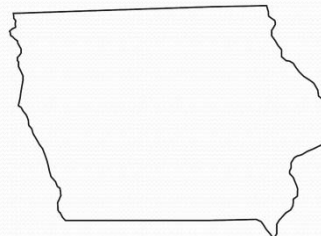


## Maine Waiver

- Would be first time Section 1917 of the Social Security Act ever got rewritten using an 1115 waiver
- Dangerous precedent – most protections that exist for beneficiaries, such as SNTs, are part of the Social Security Act
- Waiver is still pending

## Iowa Waiver

- Includes repeal of three month retroactive eligibility for all beneficiaries
- NAELA led a group of aging and disability advocates in opposing
- CMS approved; Congressional Democrats Raise Alarm
- If Democrats take over House or Senate, expect them to hold hearings and oversight on abuse of 1115 waivers



## Waivers Going Forward

- Maine could be the crack in the door for modifications to 1396p to happen.
- Much of focus of new limits has been on the “able-bodied” population.
- End of 3 month retroactive coverage being asked for by many states.
- Kaiser Family Foundation tracking 1115 waivers
- <https://www.kff.org/medicaid/issue-brief/which-states-have-approved-and-pending-section-1115-medicare-waivers/>

## Ending the Institutional Bias in Medicaid

## Reauthorizing Money Follows the Person

- NAELA seeking extension
- Ended in 2016
- Provides grants to states to assist people transitioning from nursing homes
- Main bill – S. 2227/HR 5306 – The Empower Care Act
- House action – passed out of Committee.
- NAELA hoping for an end of year package that authorizes a one year extension of program (additional \$450,000 for all 50 states)



## Disability Integration Act

- Introduced by Senate Minority Leader Chuck Schumer
- Would make access to home and community based care a civil right
- Bottom Line – people would have an enforceable right to HCBS
- Considered Olmstead 2.0 with additional enforcement mechanisms



## New CMS Guidance on the HCBS Penalty Period

- 2006 CMS guidance – effectively created an “infinite” penalty period for transfers of assets in the context of eligibility for HCBS waiver slots
- Penalty period should only start after
  - **State has determined person meets financial and non-financial eligibility criteria**
  - **Person-centered plan has been developed**
  - **Waiver slot has been identified**
- Not possible to trigger penalty unless all apply (or very delayed start)
- Recently CMS revised guidance to “fix” issue per the above, but still very hard to trigger penalty under revised guidance
- **Not relevant in New York due to no lookback period**



## Spousal Impoverishment Protections for Medicaid HCBS

- Set to expire on December 31, 2018
- Congress mandated spousal protections for HCBS for the first time in 2010
- Would result in forced institutionalization if not extended to HCBS going forward in order to receive spousal impoverishment protections
- NAELA advocating for permanency in Medicaid program
- Particularly important in New York due to extensive home care program



## Massachusetts Decisions on Irrevocable Trusts

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### Key Cases and Impact on Planning

**Daley and Nadeau** cases (consolidated), 477 Mass. 188, 74 N.E.3d 1269 (SJC 5/30/2017)

- Both cases involved irrevocable trusts done prior to needing Medicaid
- In each case, Medicaid held the home was a countable asset due to certain trust provisions

  
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## Nadeau Trust

- Income payable to the grantors as the trustee determines
- Principal held in trust until the death of the grantors
- Lifetime power to appoint all or any part of the trust property to charitable beneficiaries
- Nadeau reserved the right to “use and occupy” any residence held by the trust

## Daley Trust

- Funded their irrevocable trust with a remainder interest in their home
- Reserved Life Estate
- Income payable to the grantors as the trustee determines
- Principal held in trust until the death of the grantors
- Trustee could reimburse them for income tax liability

## MassHealth Arguments

- HCFA Transmittal No. 64 states that use and occupancy of a home is a payment from the trust
- This payment equals access to the corpus, thus the home is countable
- Trust terms trigger countability of trust assets as a result of the **“any circumstances” test** of 42 USC 1396(p)(d)(3)



## MA Supreme Court's Decision

- MassHealth misinterpreted the meaning of “payment from the trust” in HCFA 64 and 42 USC 1396p(d)(3)
- HCFA Transmittal No. 64, p. 8  
**Where there is the right to use and occupy, the grantors have the right to receive income that may be generated from the rental of the home, as well as the right to that rental income by residing in the home themselves.**



## MA Supreme Court Decision

- HCFA Transmittal No. 64 accurately recognizes that, where a trust grants the use or occupancy of a home to the grantors, it is effectively making a payment of rent to the grantors in the amount of the fair market value of that property
- **Only a payment from income of the trust, not the corpus. Can only affect how much an applicant pays toward her share of cost, not eligibility.**

## MA Supreme Court Decision

Regarding the Special Power of Appointment to charitable beneficiaries -

- Court hypothesized a situation where Mr. Daley could have received care at a nonprofit nursing home, and that nursing home could have received trust property
- Will this fall under the “*any circumstances*” *test of 1396(p)(d)(3)*?

### Doris A. Mass. Fair Hearing 1615178 (11/30/17)

- Joint Irrevocable Trust
  - No principal to grantor
  - Mandates income to grantor
  - Reserved “use and occupancy” right
- MassHealth denied MA due to excess resources focusing on Daley/Nadeau payment of imputed income from “use and occupancy” – fair rental value taken from HUD Fair Market Rent Tables for 2016

### Doris A. Mass. Fair Hearing 1615178 (11/30/17)

- $\$1,565$  (Fair Rental Value) x 12 months x 7.76 years  
=  $\$145,919.04$  excess resources

## Doris A. Mass. Fair Hearing 1615178 (11/30/17)

### Hearing Officer's Decision

- Mass Health misinterprets Daley/Nadeau as they do not stand for availability of assets! Instead, an "income of the corpus" means the amount MA is required to contribute to care on a monthly basis.
- Trust must be read as a whole so accumulated income is NOT available.
  - Under Regs - Income in month received then principal
  - Trust prohibits distribution of principal



## Doris A. Mass. Fair Hearing 1615178 (11/30/17)

### Proper calculation of monthly contribution would be:

- Fair Market Value of Rent divided by 50% - since this is a **JOINT** Trust
  - $\$1,567/50\% = \$783.50$
- However, MA must be given opportunity to deduct business expenses since trust only can distribute NET income (depreciation, taxes, expenses and other liabilities)



## Aid in Dying Developments

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### Physician Assisted Suicide

*Myers v. Schneiderman, NY Court of Appeals, 2017 NY slip OP 06412, 30 NY3d 1, September 7, 2017*

- Plaintiffs, including three mentally competent terminally ill patients, individual medical providers, and the End of Life Choices organization, petitioned for declaratory and injunctive relief seeking a constitutional right to "aid-in-dying."
- Aid-in-dying allows a competent terminally-ill person to obtain a prescription for a lethal dosage of drugs to be taken voluntarily to cause death, and would insulate physicians who provide aid-in-dying from criminal liability under New York's assisted suicide statutes.
- The New York Supreme Court granted the Attorney General's motion to dismiss, which was affirmed on appeal. The New York Court of Appeals affirmed as well.

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## Physician Assisted Suicide

*Myers v. Schneiderman, NY Court of Appeals, 2017 NY slip OP 06412, 30 NY3d 1, September 7, 2017*

- The court held that the relief requested by plaintiffs is not a fundamental constitutional guarantee. Accordingly, assisted suicide statutes need only be rationally related to a legitimate government interest.
- The court said the state legislature has a rational basis for criminalizing physician-assisted suicide.
- The statute guards "against the risks of mistake and abuse" and in preserving life while preventing suicide. Note: The New York Chapter of NAELA appeared as amici curiae.

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## Physician Assisted Suicide

- **o Federal Law on Euthanasia and Assisted Suicide**
- **36 States have laws prohibiting PAS**
- **3 States (AL, MA and WV) prohibit assisted suicide by common law**
- **States (NV, NC, UT, and WV) have no specific laws regarding PAS, may not recognize common law, or are otherwise unclear on the legality of assisted suicide**

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## Physician Assisted Suicide

### 6 States and D.C have legalized Physician Assisted Suicide

1. California (9/11/2015)
  - May 15, 2018 court decision invalidates statute so PAS not legal
  - June 15, 2018 court decisions stayed the May invalidation, so PAS again legal in CA
2. Colorado (11/8/2016)
3. D.C. (10/5/2016)
4. Hawaii (4/5/2018)
5. Oregon (11/8/1994)
6. Vermont (5/20/2013)
7. Washington (11/4/2008)

Montana has PAS via court ruling (12/31/2009)

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# Questions?

Thank you!





## **Comments on Changes to the VA Pension Rules Effective October 18, 2018**

Prepared by:

Felicia Pasculli, Esq.

On January 23, 2015, the Department of Veterans Affairs (VA) published a comprehensive set of rules proposing to amend 38 CFR Part 3. Part 3 covers net worth, asset transfers and income exclusions for needs-based benefits. The VA asserted that the changes were necessary to “maintain the integrity of the pension program and to implement recent statutory changes” and to “respond to recent recommendations made by the Government Accountability Office (GAO), to maintain the integrity of VA’s needs-based benefit programs, and to clarify and address issues necessary for the consistent adjudication of pension and parents’ dependency and indemnity compensation claims.” The VA claimed that veterans, their spouses, and their dependents were being preyed upon by unscrupulous organizations selling them unnecessary annuities or trusts. The fact that the GAO stated these abuses affected perhaps 1% of the pension recipients, had no bearing on their determination to implement these changes.

During the 2015 Comment Period, NAELA’s (National Academy of Elder Law Attorneys) VA task force, among many other individuals and organizations, submitted arguments against the changes. Among our contentions were that the VA lacked statutory authority to create look-back and penalty periods; the gift and other transfer rules were too harsh, net worth limits were harsher than Medicaid’s, the VA lacked the funds and personnel to process applications with a three-year lookback period resulting in a net loss to taxpayers, and, that the VA doesn’t make veterans and their families more aware of this benefit. In fact, a study in 2010, estimated that between 525,000 and 925,000 veterans and as many as 1.3 million surviving family members would be eligible for, but not receive, VA pension benefits.



## IMPACT STATEMENT

1. **The regulation takes effect on October 18, 2018**, amending 38 CFR Part 3, which covers net worth, asset transfers and income exclusions for needs-based benefits. The new regulation institutes a three (3) year look-back on asset transferred for less than market value. **It is imperative that any transfers to individuals or irrevocable trusts presently anticipated as part of benefit eligibility planning take place before October 18<sup>th</sup>.**
2. **There is no retroactive period.** Therefore, it is imperative that any planned transfers to individuals or irrevocable trusts for future eligibility for VA pension benefits be completed before October 18<sup>th</sup>.
3. **Net worth calculations have changed:** Presently, the VA is using a bright line net worth value (resource allowance) of \$80,000.00. Under the new regulation, the net worth limit is \$123,600.00.
4. **Allowable Medical Expenses:** The final rules expanded the definition of Activities of Daily Living (ADLS) to add “ambulating within the home or living area”. 38 CFR § 3.278(c).
5. **Calculating penalty periods:** The VA has decided to use a penalty calculation divisor equal to the Maximum Annual Pension Rate (MAPR) now paid to a veteran receiving aide and attendance with one dependent. For 2018, the annual amount is \$26,028.00. However, when divided by 12, the monthly amount is \$2,169.00.
6. **Transfers to Trusts for a “Helpless Child” incapable of self-support are an exception to the transfer penalty rules.**



## CHANGES TO VA PENSION ELIGIBILITY REGULATIONS

### 1. **Three-Year Look-Back For Asset Transfers Beginning October 18, 2018:**

The regulation takes effect on October 18, 2018, amending 38 CFR Part 3, which covers net worth, asset transfers and income exclusions for needs-based benefits. The new regulation institutes a three (3) year look-back on assets transferred for less than market value. There may be opportunities to reduce net worth with certain authorized expenditures.

### 2. **No retroactive period:**

Therefore, it is imperative that any planned transfers to individuals or irrevocable trusts for future eligibility for VA pension benefits be completed before October 18<sup>th</sup>.

### 3. **Net worth calculations have changed:**

Presently, the VA is using a bright line net worth value (resource allowance) of \$80,000.00. Under the new regulation, the net worth limit is \$123,600.00. The VA claims they are using the CSRA as an example. However, there are important distinctions. The VA's resource allowance counts the assets of the household, whereas Medicaid's CSRA refers to a community spouse. "A veteran's assets include the assets of the veteran as well as the assets of the veteran's spouse, if the veteran has a spouse." 38 CFR §3.274 9(c) (1). Presently, the VA offers a higher pension amount to veterans with dependent children. However, if the assets or income of the dependent child are determined to be sufficient, the pension recipient will not get a higher rate. It seems that if the dependent child has excessive net worth it "shall not be considered as the veterans (or surviving spouse's) child for pension purposes." 38 CFR § 3.274 (d). The asset limit includes all assets, exempting the primary residence and personal belongings like cars. Similar to Medicaid, there are statutory exclusions. However, the asset test now includes annual gross income, minus permissible unreimbursed medical expenses.

**Example:** The net worth limit is \$123,600.00 and the MAPR is \$2,169.00. *(The VA has decided to use a penalty calculation divisor equal to the Maximum Annual Pension Rate (MAPR) now paid to a veteran receiving aide and attendance with one dependent. For 2018, the annual amount is \$26,028.00.)*

A claimant has assets of \$122,000.00 and annual income of \$15,000.00. Adding annual income to assets produces a net worth of \$137,000.00, which exceeds the net worth limit. The claimant pays unreimbursed medical expenses (UMEs) of \$25,000.00 annually. UMEs are deductible from annual income under section 3.272(g) to the extent that they exceed 5 percent of the applicable MAPR. Annual UMEs of \$25,000.00 are divided by the MAPR of \$26,028.00. In this case, medical expenses exceed 9% of the annual income, therefore UMEs over 5% are deductible. \$1,301.40 is the 5% deductible. Medical expenses may also be deducted from assets. VA applies the expenditures to annual income first, which decreased the annual income to 0. This decreases net worth to \$113,301.40 - (\$137,000.00 - \$25,354 = \$11,646.00) rendering the veteran eligible for pension.

#### 4. **Allowable Medical Expenses:**

The final rules expanded the definition of Activities of Daily Living (ADLS) to add “ambulating within the home or living area”. 38 CFR § 3.278(c). ADLSs include “independent living activities, such as shopping, food preparation, housekeeping, laundering, managing finances, handling medications, using the telephone, and transportation for non-medical purposes”. 38 CFR § 3.278(b) (3). Medical expenses also encompass those that are “medically necessary; that improve a disabled individual’s function; or that prevent, slow, or ease an individual’s functional decline.”

- Also:
1. Health care provider payments.
  2. Medications, medical supplies, medical equipment, medical food, vitamins and supplements.
  3. Adaptive equipment.
  4. Transportation expenses.
  5. Health insurance premiums.
  6. Smoking cessation products.

#### 5. **Calculating penalty periods:**

The VA has decided to use a penalty calculation divisor equal to the Maximum Annual Pension Rate (MAPR) now paid to a veteran receiving aide and attendance with one dependent. For 2018, the annual amount is \$26,028.00. However, when divided by 12, the monthly amount is \$2,169.00. Only “covered assets” that are transferred will be subject to a penalty period. A “covered asset” is defined as an asset that “was part of the claimant’s net worth, was transferred for less than fair market value, and if not transferred, would have caused or partially caused the claimant’s net worth to exceed the net worth limit...”. 38 CFR §3.276(a)(3)(i).

**Example:** The net worth limit is \$123,600.00. A claimant’s assets total \$113,000.00 and his annual income is zero. However, the claimant transferred \$30,000.00 by giving it to a friend. If the claimant had not transferred the \$30,000.00, his net worth would have been \$153,600.00 which exceeded the net worth limit. The claimant’s asset amount, “covered amount” is \$19,400.00. In English, this is the amount by which the claimant’s net worth would have exceeded the limit due to the covered asset. How do we calculate the period of ineligibility? The VA will calculate the length of the penalty period by dividing the total covered asset amount by the monthly penalty rate (\$2,169.00) and rounding the number down to the nearest whole dollar. The penalty period in this example is  $\$19,400.00 \div \$2,169.00 = 8.94$  months or hopefully, 8 months.

#### 6. **Annuities:**

The VA refers to three different types of Annuities. The first kind of annuity is a deferred annuity which can be cashed in at any time. The new regulations do not apply to these kinds of annuities. They are treated as countable assets. If the owner of a deferred annuity can take a structured payout that makes regular payments, such as monthly, but reserves the right to change the payout method, the VA says it is still a deferred annuity and for VA pension analysis, the remaining value is treated as an asset.

The other two annuities are immediate annuities which are not deferred but have fixed regular periodic payments, usually monthly over a defined period of time. These are referred to in new Reg. 3.276(a)(5)(ii)(A) which states, “Annuity means a financial instrument that provides income over a defined period of time for an initial payment of principal.” There are two kinds of immediate annuities: those that can be cashed in less a penalty and those which cannot. The latter kind are also non-transferable. These are sometimes used in Medicaid planning since they are not divestments but are treated as income for Medicaid purposes. The first kind of the commutable (right of beneficiary to change the payout) immediate annuities are referenced in Reg. 3.276(a)(5)(ii) which says that this kind of annuity is one which the claimant “establishes that he or she has the ability to liquidate the entire balance of the asset [annuity] for the claimant’s own benefit. If the claimant establishes that the asset can be liquidated, the asset [annuity] is included as net worth.” Therefore, a commutable immediate annuity is not a divestment at all but is treated as if it were a deferred annuity.

A voluntary purchase of a non-commutable annuity within the 3 year look back period is subject to a transfer penalty. This applies to the claimant’s purchase of such an annuity after October 18, 2018 and would apply to the annuitization of a deferred annuity after that date but only when the amount divested into the annuity was considered an excess amount above the claimant’s \$123,600 asset limit. This penalty also applies to the Community Spouse.

Interesting exception - “Annuity Purchases as a Result of Fraud or Unfair Business Practices”

Reg. 3.276(c), “An asset transferred as the result of fraud, misrepresentation, or unfair business practices related to the sale or marketing of financial products or services for the purpose of establishing entitlement to VA pension will not be considered a covered asset. Evidence supporting this exception may include, but is not limited to, a complaint contemporaneously filed with the state, local, or federal authorities reporting the incident.”

#### **7. Supplemental Needs Trusts (Positive Change):**

There’s an exception for transfers to certain trusts. The VA will not consider as a covered asset an asset that a veteran, a veteran’s spouse, or a veteran’s surviving spouse transfers to a trust established on behalf of a child of the veteran, if (1) VA rates or has rated the child incapable of self-support under § 3.356; and (2) There is no circumstance under which distributions from the trust can be used to benefit the veteran, the veteran’s spouse, or the veteran’s surviving spouse. The VA’s definition of a child incapable of self-support, or “helpless child” is one considered to be deemed disabled before the age of 18.

