



**JULIAN GRAY ASSOCIATES**

ELDER LAW ♦ ESTATE & DISABILITY PLANNING

AVOID MISTAKES. PROTECT ASSETS.

## CONSIDERING VETERANS BENEFITS?



### READ THIS FIRST

*(and save yourself some headaches)*

*Integrating VA Aid and Attendance benefits into an estate plan requires a balance of various legal, tax and financial decisions that should be made in consultation with a VA Accredited Elder Law Attorney. Here are some examples of common issues facing VA claimants and reasons to consider using an Elder Law attorney to navigate the VA planning process.*



### **Be Aware of Advisors Giving Incorrect Advice about Veteran Benefit Qualification**

So-called “Veteran benefit planners” are giving unknowing seniors advice on what to do in order to qualify for Veteran benefits. In doing so, Veteran benefit planners may cross the line into the practice of law, by preparing legal documents such as personal services contracts and durable power of attorneys. Unlike attorneys, these Veteran benefit planners are unregulated and are not trained to prepare these legal documents properly. In addition, such planners may not be trained to properly address the numerous tax and legal consequences of VA benefits planning.

Since Veteran benefit planners are unregulated and lack the training to properly service the elderly population in a comprehensive manner, seniors should avoid using these advisors when attempting to qualify for Veteran benefits.

Always assess your attorney’s experiences by checking their credentials. Examples of acceptable credentials are membership and training with the National Academy of Elder Law Attorneys ([www.NAELA.COM](http://www.NAELA.COM)) or [www.AVVO.com](http://www.AVVO.com).

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## VA Benefits for Care at Home:

In order for a VA claimant to obtain Aid and Attendance while living at home, he must be paying for unreimbursed medical expenses (UME's). This involves a complex analysis of household income and UME's. Frequently these UME's are payments to home health/home care or a family member other than the spouse. If payments are being made to a family member, these payments must be documented in a legal document referred to as a "Caregiver Agreement". This document must be prepared by an attorney. In addition, the caregiver and VA claimant must be apprised of their relative legal responsibilities under the contract, including income tax consequences of such payments. While the VA does not require a formal contract, if the VA claimant later requires Medicaid long term care benefits within the 5 year look back period, the payments will be considered gifts without a contract and this can result in substantial penalties and delays in receiving coverage for skilled nursing care.

## Dealing with Excess Resources:

The VA Aid and Attendance program is "means" tested, and therefore, the value of assets (other than the primary residence and a care) are countable for eligibility determination. The amount of assets a claimant can keep varies depending on the claimant's age and monthly care costs. However, the general rule is that claimants with more than \$80,000 in countable assets may not receive a VA benefit due to excess resources. Since many VA claimants own assets in excess of this amount (and the VA does not currently have a "look back" period like the Medicaid program), they may engage in strategic transfers of assets (i.e. gifts) to expedite eligibility. However, when contemplating gifting, numerous factors must be considered.

Since the non-attorney VA advisor cannot draft legal documents, such as a trust, the default choice is typically to either gift away assets to children or add children's names jointly with the Veteran's name on the ownership of financial accounts. Beware – for all the reasons mentioned above dealing with gifting real estate, the same dangers apply to gifting monetary assets outright to children. Once again, the much safer route is to utilize a properly drafted VA Trust to hold the funds. And there's another important reason that is not always realized until several years after gifts are made – future Medicaid eligibility.

It is common that VA claimants who need care at home or in a Personal Care Home will eventually need a higher level of care provided by a skilled nursing facility. Almost all nursing homes accept Medicaid to assist in paying for this care (currently about \$100,000/year). However, when VA claimants simply gift money to their children without the use of the trust (there is currently no VA look-back period for gifts), and then need skilled nursing care within 5 years, a substantial penalty for Medicaid will be imposed. Thus, one option is to try to have the children give back the money to the VA claimant to "cure" the gift. This may work if all family members cooperate. But what if they don't? What if one of the children spent the money? Or, even worse, what if one of the children is now involved in a divorce or bankruptcy or other lawsuit and the funds are unable to be returned? These situations are common and can lead to unintended disastrous consequences for the VA claimant.

So, when contemplating VA benefits, consider that obtaining these benefits is just one piece of a much larger puzzle in the elder care journey and that comprehensive planning involving a VA Accredited Elder Law Attorney encompasses multiple legal, tax, financial and family issues that simply cannot be accomplished by a non-attorney. While completing the actual VA application on behalf of a claimant is always done at no charge, regardless of who assists the Veteran, the substantial benefits derived from the other counsel provided by the attorney is an investment providing peace of mind.

# Dealing with The Family Home:

One of the most common issues facing VA claimants is the disposition or sale of their home. For residents of Independent Living Facilities, Personal Care Homes or Skilled Nursing Facilities, eventually the home must be sold or otherwise transferred for a variety of reasons. These include: the resident needs the funds generated from the sale of the home to pay for his own future care; and the cost to maintain the home (i.e. taxes, insurance, utilities and maintenance) is a drain on monthly income and existing liquid assets.

While it is common knowledge that the value of a VA applicant's home is exempt from consideration when applying for VA benefits, what is less apparent is what happens to the VA claimant's benefits once the house is sold? Even though the house is exempt, once it is converted to cash, this transaction must be reported to the VA. Even a modest home which generates \$80,000 from the sale could cause the VA claimant to be over resourced. The result – **the Veteran loses his benefits for one year!** This translates into a loss of approximately \$20,000 for a single Veteran (under 2013 figures)! In addition to losing at least a year of VA income, the claimant must go through the VA application process all over again – which could take several months or more for approval. All the while, the Veteran has lost the important monthly income to pay for his ongoing care expenses. This could lead to a decrease in living options, or the need for other family members to support the Veteran. How can this result be avoided?

A common but dangerous piece of advice often given to Veterans by non-lawyers is to simply give away the house to the Veteran's children before applying for benefits. While this may accomplish the goal of avoiding recognition of the sales proceeds by the Veteran when the house is sold, this "plan" is short sighted and does not address several other important factors. Here are some disadvantages of outright gifting of the home:

1. Since the Veteran used the home as his primary residence before moving to facility care, he may sell the home and will not pay any capital gains tax on the first \$250,000 of gains (\$500,000 if married). However, if the home is gifted to children who then sell the home later, they will have to pay capital gains tax of 15% on the difference between what the Veteran paid for the home and what it was sold for by his children.
2. Once the home is gifted to children, it is legally owned by them. Therefore, it is subject to all of the things that may occur involving the children's lives, such as: Divorce, Bankruptcy, Death (now included in children's estate) and just bad decisions. In addition, if more than one child takes ownership of the home, the children may not agree as to how to maintain the house, who shares in the costs, and ultimately, what price to sell the house for in the future.

A smarter way to plan for both avoiding a break in VA payments while addressing the additional issues stated above is to have the Veteran transfer ownership of his home to a "VA Qualified" Trust. Under this trust instrument, the Veteran can still enjoy the capital gains tax exemption upon the sale of the house and maintain benefits. In addition, the home is not subject to all of the dangers listed above of children owning the home. Also, the Veteran can maintain control of how the home is used, sold, etc. However, only an attorney can draft a legal trust document, so this is just another reason to utilize an Elder Law attorney in this scenario.

## A Comparison of Using a VA Accredited Elder Law Attorney versus Non-Attorney

|  | VA Accredited Elder Law Attorney | Non- Attorney |
|--|----------------------------------|---------------|
| Accredited by VA   | YES                              | YES           |
| No Obligation Initial Consultation                             | YES                              | ?             |
| Can Complete Application on behalf of claimant                 | YES                              | YES           |
| Provide Legal Advice on:                                       |                                  |               |
| o Probate  | YES                              | NO            |
| o Tax  | YES                              | NO            |
| o Creditor Protection  | YES                              | NO            |
| o Children/Spouse Protection                                   | YES                              | NO            |
| o Medicaid/Medicare Laws                                       | YES                              | NO            |
| o Social Security Laws   | YES                              | NO            |
| Safeguards to obtain VA Retro payment if death before approval | YES                              | NO            |
| Draft legal documents to accomplish goals                      | YES                              | NO            |

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