

DATE: 07-18-90

CITATION: VAOPGCPREC 72-90
Vet. Aff. Op. Gen. Couns. Prec. 72-90

TEXT:

Subject: Trust Property, Countable Income and Net Worth

(This opinion, previously issued as General Counsel Opinion 1-88, dated February 10, 1988, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 4.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTIONS PRESENTED:

(1) Are the trust assets at issue in this case which are being held for the benefit of the veteran countable as income in determining the veteran's entitlement to improved pension?

(2) If so, at what point?

(3) Are these trust assets countable in the veteran's estate for purposes of the \$1,500 limitation provision of 38 U.S.C. § 3203(b)(1)(A)?

(4) Is the trustee of the estate a fiduciary within the meaning of 38 C.F.R. § 3.557(c)(1)(iv)?

COMMENTS:

For reasons to be discussed, the answer to issues a, b, and c is that they are countable only after they are actually allocated to the veteran's use. The answer to d is no.

The facts are these. In 1982 the veteran, incompetent and without dependents, became the beneficiary of a testamentary trust of over \$22,000. Under the terms of the trust, the trustee, in the trustee's sole discretion, is to provide funds for the veteran's comfort, but not as a substitute for support and maintenance to which the veteran is legally entitled from other sources. The veteran has been in a VA medical facility for several years. Effective November 1, 1982, the veteran's improved pension was cut off because, taking into account funding of the trust, the veteran's income was considered excessive and the veteran's estate was considered to exceed the \$1,500 estate limitation of 38 U.S.C. § 3203(b)(1)(A).

On April 15, 1983, the Adjudication Division requested of the District Counsel "a determination as to how much access the veteran has to funds based on trust agreement." On October 16, 1983, the District Counsel responded with an opinion to the

effect that availability of the property was irrelevant; that the value of the veteran's interest was the criterion for determining the value of the veteran's estate. The District Counsel opined that, because under the laws of New York a trust beneficiary had the right to enforce the terms of the trust, the veteran had a property interest therein the value of which was to be counted for purposes of the 38 U.S.C. § 3203(b)(1) estate limitation. Based on that opinion, the Adjudication Officer, on November 21, 1983, ruled that receipt of the trust inheritance constituted an income bar to pension and upheld the previous determination.

Then, on April 27, 1984, the Surrogate's Court of Erie County, New York, ruled that the veteran had no valuable property interest in the trust subject to the estate limitations of section 3203(b)(1). The court's decision was forwarded by the District Counsel to Adjudication Division " f or your action." Notwithstanding the ruling, the Adjudication Officer reaffirmed the prior decision. The case is before the Board on appeal filed by the VA Medical Center Director who had served as institutional payee until pension was discontinued.

This office agrees with the Erie County court that the veteran had no title to or property interest in the assets held in trust. In a trust, the trustee owns the legal title to the trust property, and the beneficiary owns only an equitable interest. La Fortune v. C.I.R., 263 F.2d 186, 191 (10th Cir.1958); 76 Am.Jur.2d Trusts § 2 (1975). Concerning a discretionary trust, such as the one under consideration, the beneficiary has at most a mere expectancy. In re Marriage of Rosenblum, 602 P.2d 892, 894 (Colo.1979); In re Will of Duncan, 362 N.Y.S.2d 788 (1974); Estate of Johnson, 17 Cal.Reptr. 909, 198 Cal.App.2d 503 (Cal.1962).

Disability pension is payable under 38 U.S.C. Chap. 15 It is a need-based benefit. The rates and income limitations for improved disability pension are set forth in 38 U.S.C. § 521. Implementing this section are 38 C.F.R. §§ 3.23(a)(1)-(4). In computing income for improved pension purposes, "all payments of any kind or from any source" shall count unless specifically excluded. 38 U.S.C. § 503, 38 C.F.R. § 3.271(a).

Improved pension also employs a general net-worth limitation. 38 U.S.C. § 522. Under section 522, pension will be denied to a veteran when "the corpus of the estate of the veteran ... and of the veteran's spouse is such that under all the circumstances ... it is reasonable that some part ... be consumed for the veteran's maintenance." The basic implementing regulations for this provision are 38 C.F.R. §§ 3.274-3.276. Even though this net-worth limitation is not at issue, we mention it because it is closely related to the provisions under consideration.

The improved pension program was established in Pub.L. No. 95-588 (1978), the Veterans' and Survivors' Pension Improvement Act of 1978." However, the broad language of section 503, as well as the net-worth limitation of section 522, applicable to improved pension, derived from Pub.L. No. 86-211, §§ 2, 3 (1959). In enacting both public laws Congress was concerned with providing a fairer test of "need" than that contained in earlier provisions. See H.R.Rep. No. 1225, 95th Cong., 2d Sess. 9,

reprinted in 1978 U.S.Code Cong. & Ad.News 5589; S.Rep. No. 666, 86th Cong., 1st Sess. 1, et seq., reprinted in 1959 U.S.Code Cong. & Ad.News 2190, et seq. Congress did not address the status of trust property in either enactment.

The above provisions relate, of course, to basic pension entitlement, while the \$1,500 estate limitation, imposed by 38 U.S.C. § 3203(b)(1)(A), affects a wider scope of benefits. It provides for the discontinuance of any title 38 monetary benefit to an incompetent veteran without spouse or child, who is being maintained in a tax-supported institution, if the veteran's estate (with specified exception) equals or exceeds \$1,500. Basic implementing regulations for this provision are 38 C.F.R. §§ 3.557-3.559; 13.109.

The \$1,500 estate limitation provision began with Pub.L. No. 71-522, § 14 (1930). It has undergone various refinements by subsequent legislation, but its purpose has remained the same: to prevent gratuitous VA benefits payable to such incompetent veterans receiving care at public expense from accumulating in excessive amounts and passing upon the death of the veteran to collateral or remote heirs. Op.G.C. 5-85; see also e.g., History of Pub.L. No. 86-146, s 2 (1959), S.Rep. No. 344, 86th Cong., 1st Sess. 1, 2, reprinted in 1959 U.S.Code Cong. & Ad.News 2048, 2049.

Opinions of this office have consistently held that property and income therefrom, including that held in trust, will not, in basic pension-entitlement and \$1,500 estate-limitation considerations, be countable as belonging to the claimant unless--

- (1) it is actually owned by the claimant;
- (2) the claimant possesses such control over the property that the claimant may direct it to be used for the claimant's benefit; or
- (3) funds have actually been allocated for the claimant's use.

See Op.G.C.'s 5-62, 30-57; unpublished opinions of the General Counsel dated November 16, 1964, February 5, 1963, February 19, 1962.

As discussed, the veteran in this case does not hold legal title to or control of the trust property. Therefore, in view of the foregoing, we conclude that only the portion of the trust property, including trust-related income, that has actually been made available for the veteran's use, is, at the time of its allocation, countable for purposes of the income and net-worth provisions of 38 U.S.C. §§ 503, 521, 522, and 3203(b)(1)(A).

Finally, you asked whether a trustee of an estate is a "fiduciary" within the meaning of 38 C.F.R. § 3.557(c)(1)(iv). This provision specifies that, for purposes of the \$1,500 estate limitation, countable estate includes, but is not restricted to: "(i) Funds in a 'Funds Due Incompetent Beneficiaries' (FDIB) account; (ii) Funds in a 'Personal Funds of Patient' (PFOP) account; (iii) Funds on deposit with the chief officer of an institution; and (iv) Funds or other property in the control of a fiduciary" (emphasis supplied). Our

review of the history of this language indicates that the term "fiduciary" in this provision refers only to fiduciaries recognized to receive VA monetary benefits.* * One must not conclude from this that non-trust property in the hands of a fiduciary who is not recognized for VA-benefit purposes, or trust property a trustee has allocated to the claimant's use, or property which the claimant may control for the claimant's own benefit, is excluded. These may be included because of the language "but is not restricted to" of section 3.557(c)(1). See, e.g., 38 C.F.R. §§ 3.557(c)(4) (1959), 3.267 (1951); transmittal sheets 736 (1985), 198 (1959). Accordingly, in our opinion the term "fiduciary" in 38 C.F.R. § 3.557(c)(1)(iv) refers to a person or entity recognized as such for the payment of VA-benefit funds.

HELD:

(1) For purposes of the income and net worth limitations applied under 38 U.S.C. § 503, 521, 522 to determinations of eligibility for improved pension, and for purposes of the \$1,500 estate limitation provisions imposed by 38 U.S.C. § 3203(b)(1)(A), the property held in a discretionary trust, and income therefrom, is not countable until it is actually allocated for the claimant's use, unless the claimant possesses such control over the property that the claimant may direct it to be used for the claimant's benefit.* * For the same reasons, the principles enunciated above apply to determinations of eligibility of surviving spouses and children to improved death pension.

(2) The term "fiduciary" in 38 C.F.R. § 3.557(c)(1)(iv) refers to a person or entity recognized as such for the payment of VA-benefit funds.

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