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CITATION: VAOPGCPREC 73-91
Vet. Aff. Op. Gen. Couns. Prec. 73-91

TEXT:

Subj: Effect on Pension Eligibility of Transfer of Assets into a Trust

QUESTIONS PRESENTED:

(a) Would proceeds from a life-insurance policy received by a veteran and shares of stock inherited by a veteran, which are placed into a valid irrevocable trust for the benefit of the veteran's grandchildren with the veteran as trustee, be counted as income of the veteran for purposes of determining entitlement to improved-pension benefits?

(b) Would these assets be considered in determining the veteran's net worth for improved-pension purposes?

COMMENTS:

1. We have received an inquiry on behalf of a veteran who is currently receiving improved VA disability pension. The veteran's son, recently deceased, named the veteran as the beneficiary of two life-insurance policies, the proceeds of which total approximately \$80,000. The veteran also inherited from the son shares of stock in the corporation in which the son was employed. The veteran contemplates using the entire amount of the insurance proceeds and the stock to set up an inter vivos irrevocable trust for the maintenance, care, and education of the deceased son's three children. The trust would be administered by the veteran as trustee. On the date that each of the three grandchildren named in the trust reaches age 21, the trustee would pay and distribute one third of the principal and any accumulated income of the trust estate to said child. The trustee would be authorized to apply for the benefit of the named grandchildren as much of the net income and principal of the trust estate as the trustee shall consider necessary or advisable to assure the adequate comfort, care, support, maintenance, education, and medical attention of such grandchildren until they attain the age of 21 years. Payments for these purposes would be authorized directly to the grandchildren, to a legal guardian or relative of the grandchildren, or by the trustee, i.e., the veteran, for the benefit of the grandchildren. The trust document would further state the intention of the veteran that the corpus of the trust estate be kept intact so far as possible. The veteran reportedly wishes to know the impact of receipt of the insurance proceeds and stock and establishment of the contemplated trust on the veteran's pension eligibility.

2. Disability pension, a need-based benefit payable under chapter 15 of title 38, United States Code, is subject to income limitations as provided by 38 U.S.C. § 1521 (formerly § 521). Section 1503(a) (formerly section 503(a)) of title 38, United States Code,

provides that in computing annual income for improved-pension purposes, "all payments of any kind or from any source" shall be included unless specifically excluded under that provision. See also 38 C.F.R. §§ 3.271(a) and 3.272. No exclusion is allowed under the statute or implementing regulations for income received by inheritance or as proceeds of life insurance. Under 38 C.F.R. § 3.273(c), an inheritance is given as an example of nonrecurring countable income to be added to the beneficiary's annual rate of income. Further, this office has specifically held that inheritances and proceeds of life-insurance policies are to be considered as income for improved-pension purposes. O.G.C. Prec. 4-89 (inheritance of marketable securities); O.G.C. Prec. 15-89 (life-insurance proceeds).

3. Section 3.272 of title 38, Code of Federal Regulations, which provides for exclusion of certain classes of income from countable income for improved-pension purposes, contains no provision for exclusion from income of sums placed in trust subsequent to receipt. Subsequent disposition of income, either through gift or expenditure, has no impact under governing statutes and regulations on whether assets are counted as income. For income purposes, it is the receipt of the assets, not their subsequent disposition which is the operative event. See, e.g., 38 C.F.R. § 3.271(a) (referring to period in which payments are "received").

4. For improved-pension purposes, nonrecurring income, such as proceeds from a life-insurance policy, would be countable as income for the twelve-month period from the last day of the month of its receipt. O.G.C. Prec. 15-89. Where such income causes a veteran's pension to be terminated, benefits are terminated effective the end of the month in which the excess income was received. 38 C.F.R. § 3.660(a)(2); O.G.C. Prec. 15-89. Since income determinations under the improved-pension program are made on a twelve-month basis rather than by calendar year, the veteran could reapply twelve months following the termination of pension benefits.

5. Eligibility for improved-pension benefits is also subject to a net-worth limitation. Under section 1522 (formerly section 522) of title 38, United States Code, pension will be denied or discontinued when "the corpus of the estate of the veteran ... is such that under all the circumstances ... it is reasonable that some part of the corpus of such estate be consumed for the veteran's maintenance." Criteria for determining net worth for improved- pension purposes are found at 38 C.F.R. § 3.275.

6. Should the veteran lose pension eligibility as a result of nonrecurring income, establish the contemplated trust, and subsequently reapply for pension, the question would then arise whether the items placed in trust, i.e., the stock and the proceeds from the insurance policies, would be counted in evaluating the veteran's net worth. As a general rule, this office has held that property and income therefrom, including that held in trust, will not, in basic pension-entitlement determinations, 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. O.G.C. Prec. 72-90. This principle, as set out in O.G.C. 72-90, is based on several

General Counsel opinions, including Op.G.C. 5-62 (3- 2-62) (income from trust established by veteran for veteran's child, with veteran and spouse as trustees, not attributable to veteran for pension purposes); Op.G.C. 30-57 (10-9-57); and several unpublished opinions, all of which preceded enactment of the improved-pension law. We consider that principle legally sound on the basis that, as explained by the Assistant General Counsel in Undigested Opinion, 2-5-63 (Veteran), only property over which the veteran has some control to use for the veteran's own benefit can reasonably be expected to be consumed for the veteran's maintenance per 38 U.S.C. § 1522.

7. Among the essential elements for the creation of an express trust is the definite and complete present disposition of the property. 76 Am. Jur. 2d Trusts § 35 (1975). It is essential to the creation of an express trust that the settlor (creator of the trust) presently and unequivocally make a disposition of property by which he divests himself of the full legal and equitable ownership. Id. Legal title to the property is vested in the trustee as a fiduciary of the trust, Chicago M & St. P. Ry. V. Des Moines Union Ry., 254 U.S. 196, 208 (1920), Sun First National Bank of Orlando v. United States, 607 F.2d 1347, 1357 (Ct.Cl.1979), with an equitable interest held by the beneficiary. 76 Am.Jur.2d Trusts § 101. Where the settlor is trustee, the equitable interest must rest in another. 76 Am.Jur.2d Trusts § 36.

8. We are informed that the contemplated trust will name the veteran as trustee, with all equitable interest going to the grandchildren. The veteran, as trustee, would be required to use the trust estate in accordance with the terms of the trust for the benefit of all beneficiaries. 76 Am.Jur.2d Trusts § 97. Under the circumstances described, the veteran in an individual capacity, as distinguished from a fiduciary capacity, would have no legal ownership of the property and no authority or right to use, control, or dispose of the property or the income therefrom for the veteran's own benefit after the proposed transfer. Under these circumstances, subject to the following discussion, the trust assets would not be considered a part of the veteran's estate. Further, income derived by the trust from trust assets would not be counted as income of the veteran for pension purposes. See O.G.C. Prec. 72-90.

9. Prior to the enactment of Pub.L. No. 95-588, which established the improved-pension program, the General Counsel held that the completeness, but not the intent or purpose, of a transfer of property would be considered for pension purposes. Op.G.C. 30-57. The General Counsel presumably reasoned that a subjective test of the validity of a transfer would be unworkable and not authorized by statute or regulation. Nothing in Pub.L. No. 95-588 specifically authorized consideration of intent in evaluating transfers. Section 3.276(b) of title 38, Code of Federal Regulations, implementing the improved-pension program, did make use of the Secretary's general rulemaking authority to place certain limitations on transfer of assets for pension purposes. That section provides that "a gift of property made by an individual to a relative residing in the same household shall not be recognized as reducing the corpus of the grantor's estate." However, while this regulation serves to limit certain transfers made for the purpose of creating pension entitlement, it does not include an element of intent, relying instead on objective criteria.

10. The possible impact of section 3.276(b) would have to be considered if the veteran's grandchildren reside in the veteran's household. Trust principles would be controlling in determining whether Section 3.276(b) would require the property to be counted as part of the veteran's estate. As noted above, the trustee owns the legal title to trust property; an equitable interest is vested in the beneficiaries. The contemplated trust agreement would provide that trust principal and income may be dispensed at the trustee's discretion to the veteran's grandchildren in such amounts as the trustee shall deem necessary or advisable for specified purposes, until each grandchild reaches age 21, at which time the grandchild would receive a share of the trust property. If any of the grandchildren dies before reaching age 21, that grandchild's share would be distributed to the surviving grandchildren when they reach that age. These terms suggest that the gift to the grandchildren is a future interest in the property. Although the trust provides for the possibility that some of the principal and income may be distributed to the grandchildren before they reach age 21, such distribution is within the discretion of the trustee. The grandchildren would have no power to demand that the funds be paid or expended. Further, the share of each grandchild is subject to defeasance if he or she dies before reaching age 21. Thus, under the circumstances described, the gift to the grandchildren would be in the nature of a future interest, with no legal title and no definite right to enjoyment of the property passing to the grandchildren. See La Fortune v. C.I.R., 263 F.2d 186, 189-192 (10th Cir.1958); Gilmore v. C.I.R., 213 F.2d 520, 521 (6th Cir.1954) (comparing meaning of "future interest" and "present interest" in trust situations). In O.G.C. Prec. 72-90, we concluded that the beneficiary of a discretionary trust had only an expectancy in the trust assets and that, despite the existence of an equitable interest, the beneficiary would not be considered to have a property interest in the trust assets for purposes of estate computation under 38 U.S.C. § 5503(b)(1) (formerly § 3203(b)(1)) (\$1,500 estate limitation applicable to certain institutionalized veterans). The legal principles upon which that conclusion was reached would be equally applicable in estate valuation under the improved-pension program.

11. An additional issue which would arise if the grandchildren reside in the veteran's household is whether the trust is being implemented in such a manner that the veteran is deriving benefit from the trust assets. Under the contemplated trust agreement, payments would be authorized directly to the grandchildren, to a legal guardian or a relative of the grandchildren for the benefit of the grandchildren, or directly by the trustee for the benefit of the grandchildren. If the grandchildren were members of the veteran's household and trust funds were paid to the veteran as legal guardian or relative, or expended directly by the veteran as trustee, such funds could be used for groceries, housing, recreational activities, or other items the benefit of which would be shared by the veteran. Under the circumstances of the particular case, the veteran could be considered to be exercising such control and use of the trust assets that the complete disposition necessary for creation of a valid trust could be found lacking. See supra., paras. 6 and 7; O.G.C. Prec. 72-90. We also note that a trust may be invalid if its purpose is to defraud the government or evade a statute. Restatement (Second) of Trusts § 63(1) and comments c and d (1969); see also Perkins v. Hilton, 329 Mass.291, 107 N.E.2d 822 (1952) (trust void where fraudulent means to obtain GI loan); Faulk v.

Rosecrans, 264 P.2d 300 (Okla.1953) (trust disregarded to the extent it represented fraud against the state to qualify for old-age assistance); G. Bogert & G. Bogert, The Law of Trusts & Trustees, § 211 (2d rev. ed. 1979). Such an issue could arise if the veteran were in fact receiving benefit from the distribution of the trust assets. Resolution of these issues would turn on the facts presented.

HELD:

(a) Where a veteran in receipt of improved pension inherits marketable shares of stock and receives the proceeds of life-insurance policies, the value of the stock and life-insurance proceeds must be counted as income of the veteran in the year in which they are received, regardless of whether they are subsequently placed in trust for the benefit of another. If such income causes termination of pension, the effective day of discontinuance is the end of the month in which the income was received.

(b) Generally, where a veteran places assets into a valid irrevocable trust for the benefit of the veteran's grandchildren, with the veteran named as trustee, and where the veteran, in an individual capacity, has retained no right or interest in the property or the income therefrom and cannot exert control over these assets for the veteran's own benefit, the trust assets would not be counted in determining the veteran's net worth for improved-pension purposes, and trust income would not be considered income of the veteran.

(c) If the beneficiaries of the trust are residing in the veteran's household and the veteran is receiving benefit from expenditures from the trust, a determination must be made under the facts of the particular case whether the veteran is exercising such control and use of the trust assets that the trust may be considered invalid for purposes of determining pension eligibility.

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