

THE INTERSECTION OF ESTATE PLANNING, SNTS AND VETERANS BENEFITS

“If you are confused, then you understand; If you think you understand, then you are confused.”¹

INTRODUCTION

Those of us who practice elder law often have our roots in either social services or estate planning. The same is true of attorneys who are now expanding their practice to include veterans benefits law.² Traditional estate planners usually emphasize the estate tax and asset protection implications of testamentary planning, often to the neglect of potentially disabled beneficiaries whose public benefits may be significantly negatively impacted by a direct bequest or even a bequest in the form of a support trust. While organizations like NAELA, elder law courses in some law schools and regular CLE symposiums sponsored by Stetson University College of Law and the University of Texas have brought the importance of elder law and disability planning to a position of increasing prominence, only a handful of attorneys are aware of what type of benefits are available to veterans and under what circumstances testamentary planning may cause a loss of benefits.

Until recently, much of the representation of veterans by attorneys has been done on a *pro bono* basis. Organizations including the National Veterans Legal Services Program (NLSP), The Veterans Consortium Pro Bono Program and National Organization of Veterans Advocates (NOVA)

¹Kenneth M. Carpenter, Esq., Quote during presentation at 2006 NAELA Symposium, “Veteran’s Services Available for the Elder or Disabled Client / Obtaining Income through the VA to Help Pay for Long-Term Care Expenses.”

² Veterans benefits law is codified in Title 38 of the United States Code (U.S.C.) and the applicable regulations are found in Title 38 of the Code of Federal Regulations (C.F.R.).

have undertaken the leadership role to represent, advocate and educate on behalf of our veterans. The absence of attorneys practicing in the area of veterans benefits law can be traced directly to the fact that lawyers cannot charge a fee for representing a veteran in applying for benefits.³ Indeed, to accept a fee at the wrong stage of a veteran's case is a federal criminal offense.⁴ While attorney representation rules have changed since the passage of some new laws by the 109th Congress in 2006 (effective on June 20, 2007), most attorneys – even elder law attorneys – know little about veterans benefits law.

Just as it is imperative that an estate planner determine the capacity of potential testamentary or trust beneficiaries, it is equally important that those of us who write Wills and Trusts become at least basically proficient in the concepts of veterans law in order to not only better serve our clients and their family members, but also to avoid creating an estate plan that may be a catastrophic event in the life of the client's beneficiary, who happens to be receiving veterans benefits.

TRADITIONAL ESTATE PLANNING

Historically, estate planners emphasized estate tax, asset protection and distribution planning. In recent years, changes in state law expanding the availability of non-testamentary transfers,⁵ treatises on retirement planning⁶ and increased use of various life insurance products have required the attorney to become more proficient in these ancillary fields in order to offer comprehensive estate planning services. These days, an individual can receive distributions as a beneficiary (1) named in a Will; (2) due to the failure to survive by a higher level named beneficiary; (3) named in a stand-alone or testamentary third-party trust; (4) named in a life insurance policy; (5) named in a "POD," "TOD" or "ITF" depository account; (6) named in an IRA, 401k, 403b or other retirement account;

³ Under the Veterans Judicial Review Act of 1988, which created the court now known as the Court of Appeals for Veterans Claims, a veteran could hire an attorney only after the first final Board of Veterans Appeals (BVA) decision, or for work in a court (most of the veteran's case is at the administrative level, rather than in a court).

⁴ 38 U.S.C. §5905.

⁵ Accounts categorized as "Joint Tenants with Rights of Survivorship," "Payable on Death," "Transfer on Death," "In Trust For" as well as planning with various types of beneficiary-driven annuities.

⁶ Natalie Choate, *Life and Death Planning for Retirement Benefits*, 6th Ed. (Ataxplan Publications, 2006). This is the "bible" for dealing with IRA distributions and related matters.

or (7) named in an annuity. While most people are happy to receive such gifts, those receiving public benefits, including medical care, can lose both income and medical if they are currently enrolled in a needs-based program. Given the foregoing, it is important for estate planning and elder law attorneys to understand how – and under what circumstances – distributions affect the various public benefit programs. This article will emphasize the veterans benefits programs.

Unfortunately, it appears that a majority of estate planners fail to inquire regarding incapacitated beneficiaries⁷ and even fewer ask whether any potential or contingent beneficiary is a veteran. While speaking at a SNT conference last month, I explained that I include either a direct or contingent disability trust in every Will that I write. Each time I discuss this during a presentation, I am asked to explain why I include such a trust and if I will provide a “form” to go by. While elder law attorneys always ask such questions as “Are any of your children or grandchildren disabled or receiving SSI?” my experience has shown that few attorneys include similar questions regarding service as a veteran, potential service-related disabilities or receipt of veterans benefits. Becoming more knowledgeable in this field will not only help prevent potential loss of benefits by a beneficiary who is also a veteran, but may also open a new source of clients and the option to expand one’s practice.

SPECIAL NEEDS TRUST PLANNING

In order to properly advise an elderly or disabled client, the elder law attorney must be thoroughly familiar with (1) the benefits available to the client; (2) the eligibility requirements for programs providing the benefits; (3) the tools which facilitate eligibility for the programs; and (4) all relevant considerations necessary to determine which specific planning tool should be implemented to achieve or maintain the desired public benefits goal. Benefit programs for the elderly and disabled vary significantly, as do the tools which may be utilized to obtain eligibility. Attempting to use the wrong tool for a specific facts situation is like trying to fit a round hand grenade into a square hole: It won’t work and will probably explode in the process.

⁷ This conclusion is based upon questions I ask other attorneys when I am speaking, as well as similar experiences of other elder law attorneys as related at NAELA, SNT and similar events.

Trusts are utilized by estate planning attorneys to achieve a diverse array of goals: (1) Income and Estate Tax savings; (2) Competent management by non-beneficiaries for the benefit of those not deemed capable; (3) Asset protection from creditors and potential ex-spouses; and (4) Guardianship avoidance to name a few. Elder Law attorneys use trusts as planning tools to assist the client in acquiring or maintaining public benefits which would otherwise be denied to the client if he or she owned - or could access - the assets outright, in the beneficiary's individual capacity. Trusts are used to define or limit both countable income and countable resources for public benefits eligibility. If an applicant receives too much income or owns assets of too much value, that individual will not qualify for the public benefit program.

As a general rule, disability planning with trusts applies only to "means tested" programs. In order to facilitate eligibility for public benefits, trusts may be used to limit countable income or to limit countable resources. As described in more detail below, individuals who are aged, blind or disabled and who have few assets and low income may qualify for public benefits which they need but cannot afford. The primary benefit is health care, through Medicaid. SSI recipients also receive monetary benefits.

The trusts most often utilized by elder law attorneys are referred to as "Special Needs Trusts."⁸ These trusts – which most of us call SNTs – are divided into two primary types: Self-settled or Third-party. "Self-settled" trusts are trusts which are funded with the beneficiary's own property. The "beneficiary" may, or may not, be the "grantor." In the traditional living trust, the grantor is usually the beneficiary and funds the trust with his own property, which can be money, real estate or personalty.

In contrast to the general rules, self-settled SNTs are governed by specific statute.⁹ Such trusts are often referred to as a "d4A trust." The d4A SNT must be created by a parent, grand-parent, guardian or a court, but the property funded into the trust belongs to the beneficiary. An example would be a typical SSI case where an individual becomes totally incapacitated due to a medical mistake and a malpractice suit results in a substantial recovery. The money recovered belongs to the plaintiff individually. The fact situation may call for the creation of a SNT. The trust may be created by the court in which the suit is pending. The trust is funded with the recovery from the law suit

⁸ Some prefer to use the term "Supplemental Needs Trust."

⁹ 42 U.S.C. §1396p(d)(4)(A).

which would otherwise belong to the beneficiary. Therefore, the trust is “self-settled” because the money belonging to the beneficiary has been used to fund a trust to benefit the owner of the assets conveyed into the trust.

“Third-party” trusts are trusts which are funded with property owned by someone other than the beneficiary. An everyday example is a parent who leaves assets to his child in trust under the terms of the parent’s Will. In this case, the money belongs to the parent. The parent has no obligation to leave the property to the child. The parent chooses to create a trust under his Will. Therefore, the trust is (1) testamentary, (2) irrevocable and (3) third-party – funded with money belonging to the parent, not property belonging to the beneficiary.

The area of SNTs is extensive. There are multi-day conferences offered each year which are devoted exclusively to issues involving SNTs. In summary, however, it can be stated that SNTs are used to be the recipient of assets to be managed for the benefit of an elderly or disabled individual in order to maintain the public benefits being received by that individual; when, but for the SNT, receipt of such assets would render the individual ineligible to receive the benefits.

VETERANS BENEFITS PROGRAMS

The quotation which opens this article was made by Kenneth Carpenter during a panel presentation on veterans benefits at the 2006 NAELA Symposium in Washington.¹⁰ While those outside the practice of elder law consider our area to be “another world,” the same can be said concerning veterans law. The generally accepted “bible” of veterans practice is the *Veterans Benefits Manual*¹¹ which consists of 1,999 pages. Its companion volume, entitled *Federal Veterans Laws, Rules and Regulations*¹² covers 1,971 pages. While few will become experts in veterans law, it is important that estate planning and elder law attorneys understand the basic concepts of veterans benefits in order to more adequately represent clients and to avoid preparing a plan which could result in the loss of benefits being received by a veteran.

¹⁰ Written materials and audio presentation on CD or mp3 are available through NAELA in Tucson, AZ.

¹¹ Barton F. Stichman and Ronald B. Abrams, *Veterans Benefits Manual* (National Veterans Legal Services Program / LexisNexis 2007).

¹² NVLSP Editors, *Federal Veterans Laws, Rules and Regulations* (LexisNexis 2007).

The Department of Veterans Affairs (VA) offers two major disability benefits programs for veterans: service-connected disability compensation (generally referred to as “compensation”) and non-service-connected disability pension (generally referred to as “pension”).¹³ In the world of elder law, our clients may receive benefits under a needs-based program (SSI) or a non-needs-based disability program (SSD). Similarly, veterans may qualify for benefits for service-connected disabilities (Compensation) or due to a total and permanent disability resulting in low levels of income and assets (Pension). These programs will be discussed separately.

A. COMPENSATION

“Service-connected compensation” is a monthly payment made by the VA to a veteran with a physical or mental disability that was incurred in or aggravated by service.¹⁴ In a manner similar to workman’s compensation, the veteran is assigned a percentage of disability (i.e. 10% disability rating for loss of hearing). Each rating level is assigned an amount of monthly compensation. The veteran may have several concurrent disability rating for different injuries. Additionally, the disability ratings may increase as the injury grows worse over the years.

The heart of the controversy is often whether or not a disability is determined to be “service-connected.” I am currently handling a case where the WWII veteran had a service-connected knee injury. He received compensation for that knee injury over the years, and over the years the disability increased, causing regular falls as he aged. On his last fall, he hit his head and died. The issue has been whether or not the death was connected to the knee injury. The VA says “no” while we say “yes.” These cases take years to adjudicate.

As is the case with SSD, a veteran who qualifies for service-connected compensation is not going to lose benefits by reason of receiving a lump-sum settlement or an inheritance. Accordingly, since veterans compensation is not a needs-based program, there is no necessity to shield assets through implementing a SNT.

¹³ Stichman and Abrams, *supra*. at 49.

¹⁴ NVLSP, *Basic Training Correspondence Course in Veterans Benefits* (NVLSP 2003) at 23.

B. PENSION¹⁵

VA pension benefits are designed to supplement the income of disabled veterans who had to forego career opportunities while they served their country during a time of war and were unable to advance their careers or accumulate enough resources to support themselves adequately after they became disabled.¹⁶ Unlike Compensation, the Pension benefit does not require that the disability be connected to the time period during which the veteran was on active duty.¹⁷

Much like the SSI program, the Pension benefits program is “needs-based.” Generally, there are five threshold eligibility criteria:

- The veteran must be discharged under other than dishonorable conditions;
- The veteran must have served during wartime;¹⁸
- The veteran must be permanently and totally disabled;
- The disability must not be due to the willful misconduct of the veteran; and
- The veteran must have limited income (the “income test”) and a net worth that does not provide adequate maintenance (the “needs test”).¹⁹

Since Pension is a needs-based program, receipt of newly-acquired assets will reduce or eliminate benefits. In order to determine eligibility for Pension, the VA considers the claimant’s net

¹⁵ There are actually 3VA Pension programs: Old-law pension (prior to 1960); Section 306 Pension (1960 - 1978); and Improved Pension (1979 - present). A detailed discussion of the differences in these programs is beyond the scope of this article, but can be found in the Manual, §6.3, p. 483.

¹⁶ Stichman and Abrams, *supra.* at 451.

¹⁷ Barbara A. Isenhour, “Veterans and Special Needs Trusts,” *The Voice, The Office Newsletter of the SNA*, Vol. 1, No. 4 (Nov. 2007).

¹⁸ The veteran must have served at least 90 consecutive days on active duty, at least one day of which was during a period of war, or at least one day of wartime service that resulted in a discharge for a service-connected disability; or having served for at least 90 days in more than one period of service and more than one period of war. See NVLSP, *Basic Training Correspondence Course in Veterans Benefits*, at 49.

¹⁹ Stichman and Abrams, *supra.* at 452. The eligibility requisites, along with the federal statutes upon which each is based is discussed in Section 6.1.2 of the manual.

worth. The VA examines the “corpus” of the veteran’s estate²⁰ in order to determine if the net worth is “excessive.”²¹ Although the determination of asset limitation is based upon a case by case basis, the general rule of thumb is that the veteran is entitled to have countable resources of no more than \$80,000.²² In a manner similar to nursing home Medicaid and SSI, there are exclusions from the computation of net worth (non-countable resources), such as the homestead and one vehicle.²³

In addition to the Pension benefits described above, some veterans with severe disabilities are entitled to increased benefits known as “special monthly pension” (SMP). The two programs under SMP are “Housebound” and “Aid and Attendance.”

1. HOUSEBOUND

Housebound benefits are available to veterans with a single permanent disability rated as 100% disabling who are essentially confined to their homes. A veteran may also qualify for housebound if he or she has a single 100% rating and an additional disability rating of 60% or greater. In the later case, the claimant does not actually have to be confined to home.²⁴

2. AID AND ATTENDANCE (A&A)

A&A benefits are available to veterans who (1) require the assistance of another person to perform their ADL’s; (2) who are blind; or (3) who are confined as a patient in a nursing home.²⁵

These SMP benefits are important because they can significantly increase the monthly income of the veteran, which may in turn allow the veteran to live in an assisted living facility which would otherwise be too expense under his or her monthly income.

²⁰ 38 C.F.R. §3.275(b)(2007).

²¹ 38 U.S.C. §1522(a); 38 C.F.R. §3.275(b)(2007).

²² Stichman and Abrams, *supra*. at 456.

²³ Isenhour, *supra*. at 1.

²⁴ NVLSP, *Basic Training*, *supra*. at 53.

²⁵ *Id.* at 54.

SNT PLANNING TO MAINTAIN VETERAN BENEFITS

Elder law attorneys know from experience with Medicaid and SSI that an unplanned receipt of assets can have an adverse effect on the benefits being received which may disqualify the individual from public benefits eligibility. A comparison of the veterans benefits programs outlined above demonstrates a parallel between the needs-based programs. For example, the receipt of an inheritance which increases the net worth of a veteran above the \$80,000 threshold will disqualify the veteran from receiving Pension benefits in the same manner as it will disqualify the Medicaid or SSI recipient.

Since assets passing into a SNT are not considered as a “countable resource,” just as we implement third-party SNTs in testamentary planning for testators with beneficiaries who are disabled, we should determine if any such beneficiaries are veterans whose circumstances indicate that the use of a SNT is appropriate to protect their current or future veterans benefits. Likewise, personal injury attorneys contemplating a settlement should inquire not only as to the disability status of the plaintiff, but also as to the veteran status to determine if veteran Pension benefits might be available to the client. While the trust cannot distribute cash²⁶ to the veteran, the trust can pay some expenses and purchase goods and services that the veteran cannot otherwise afford on the statutory Pension income. This might include the purchase of an exempt residence or vehicle.²⁷ In this regard, it is imperative to understand that utilizing a “support trust” in an effort to accomplish these planning goals will simply not work. Specific veteran cases have held that assets administered in a support trust to be “countable” as “available” for the support needs of the veteran. For planning purposes, the attorney must be familiar with the difference between a SNT and a support trust.²⁸

²⁶ Cash distributions offset Pension benefits dollar-for-dollar. See Isenhour, *supra*. at 1.

²⁷ *Id.*

²⁸ Randy Drewett, “The Anatomy of a Third-Party Special Needs Trust” (University of Texas CLE, *Special Needs Trusts Course* - May 2007) for a discussion of the differences between SNTs and the various types of traditional support trusts.

Finally, it is good planning to recommend that any client also inform other family members about the importance of SNT planning if they intend to name a disabled or veteran relative (such as a grandchild) as a potential beneficiary under their Will or Living Trust.²⁹

²⁹ For more information on these and other veterans topics, visit the following websites: (1) National Organization of Veterans Advocates (www.vetadvocates.com); (2) National Veterans Legal Services Program (www.nvlsp.org); (3) Veterans Consortium Pro Bono Program (www.vetsprobono.org); and (4) The VA WARMS Manual (www.warms.vba.va.gov).