

DATE: 7-15-92

CITATION: VAOPGCPREC 15-92
Vet. Aff. Op. Gen. Couns. Prec. 15-92

TEXT:

Subj: Effect on Pension Eligibility of Property Held as a Life Estate

QUESTIONS PRESENTED:

(a) Is the value of three properties in which the surviving spouse of a veteran holds a life estate countable in computing the net worth of the surviving spouse for purposes of determining eligibility for improved-pension benefits?

(b) If so, how should the value of the three properties be determined?

COMMENTS:

1. You have requested our assistance in determining whether a veteran's surviving spouse is eligible for improved-pension benefits. On October 4, 1989, the veteran and the veteran's spouse transferred title to three pieces of real property to their children for \$1 and "other valuable consideration." The warranty deed transferring each piece of property stated, "Grantor retains a life estate in the above described real property." We have been informed that none of the persons to whom the three properties were deeded resided in the spouse's household. The veteran died on August 6, 1990. The surviving spouse applied for VA death benefits on September 25, 1990. In a November 27, 1990, letter, VA denied improved-pension benefits because the surviving spouse's countable annual income exceeded \$4,535.00. The surviving spouse responded that, although income from the land was \$5,777, operating expenses totaled \$2,368. VA subsequently requested copies of a land-lease agreement which was entered into by the veteran, the veteran's spouse, and their son on April 16, 1990, and a formal appraisal of the current value of the land. In a September 13, 1991, letter to VA, the surviving spouse's representative argued that there is no need to determine the fair market value of the three pieces of property in which the surviving spouse holds a life estate since they should not be considered in determining net worth. The representative contended that the surviving spouse deeded away all right of ownership in the property, retaining only the right to farm the land.

2. Death pension is a need-based benefit and, as such, is subject to a net-worth limitation. Under section 1543(a)(1) of title 38, United States Code, pension will be denied or discontinued when "the corpus of the estate of the surviving spouse is such that under all the circumstances, including consideration of the income of the surviving spouse ..., it is reasonable that some part of the

corpus of such estate be consumed for the surviving spouse's maintenance." See also 38 C.F.R. §3.274(c). The criteria for evaluating net worth for improved-pension purposes are set forth at 38 C.F.R. § 3.275. Section 3.275(b), title 38, Code of Federal Regulations, defines "corpus of estate" and "net worth" as "the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant, except the claimant's dwelling (single family unit), including a reasonable lot area, and personal effects suitable to and consistent with the claimant's reasonable mode of life." Section 3.276(b), governing transfer of assets, provides that a gift of property to someone other than a relative residing in the grantor's household will not be recognized as reducing the corpus of the grantor's estate "unless it is clear that the grantor has relinquished all right of ownership, including the right of control of the property."

3. Consistent with section 3.276(b), this office has held that, as a general rule, property and income therefrom will not, in basic pension-eligibility 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 published and unpublished 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 veteran's spouse as trustees, not attributable to veteran for pension purposes where there was a complete divestment by veteran of all right, title, and interest in trust property) and Op. G.C. 30-57 (10-9-57) (neither mere fact of transfer to a family member, nor intent to make transferor eligible for pension, invalidates transfer; however, if interest in property or income therefrom is retained, transfer will be disregarded), all of which preceded enactment of the improved-pension law. As explained by the Assistant General Counsel in Undigested Opinion, 2-5-63 (Veteran), this principle is grounded on recognition that only property over which a claimant has some control to use for the claimant's own benefit can reasonably be expected to be consumed for the claimant's maintenance pursuant to the net-worth statute. Compare O.G.C. Prec. 73-91 (assets placed in a valid irrevocable trust for the benefit of a veteran's grandchildren, with the veteran named as trustee, where the veteran, in an individual capacity, had retained no right or interest in the property or income therefrom and could not exert control over the assets for the veteran's own benefit, were not countable in determining the veteran's net worth for improved-pension purposes), with Digested Opinion, 3-31-78 (8-25 Income) (corpus of a trust constituted net worth attributable to the claimant where the claimant could modify or amend the trust or revoke it and reestablish title to the property unencumbered by the trust at any time within the 20-year period during which the trust was to exist).

4. A life estate is an estate which is limited in duration to the life or lives of a particular individual or individuals and is non-inheritable. The life tenant is the owner of the property during his or her life. 31 C.J.S. Estates § 30 (1964). "The

life tenant is entitled to exclusive possession and control while his or her life estate continues, and he or she has the remedies necessary to protect his or her interest." 1 American Law of Property § 2.16 a. (A. James Casner ed., 1952). "The remainderman or reversioner who has in the same property a future interest which will ripen into an estate in possession on the termination of the life estate, has no right of possession or enjoyment while the life estate exists." Id.; see also Restatement of Property § 117 (1936). The life tenant cannot injure or dispose of the property to the injury of the rights of the remainderman; however, the life tenant may use the property for his or her exclusive benefit and take all the income and profits from the property. 31 C.J.S. Estates §§ 34, 41 (1964); see also Slocum v. Bohusky, 164 Neb. 156, 82 N.W.2d 39, 44 (1957); Perigo v. Perigo, 158 Neb. 733, 64 N.W.2d 789, 794-95(1954). Unless the instrument creating the estate contains a valid restraint, it is generally permissible for a person holding a life estate in real property to make a valid sale or conveyance of his or her life estate in the property. The grantee obtains a life estate for the lifetime of the life tenant. 31 C.J.S. Estates § 51; Restatement of Property § 124 and § 124, comment b.

5. Viewing the surviving spouse's interest in the three properties in light of these principles, we find this case is governed by the last sentence of 38 C.F.R. § 3.276(b). The surviving spouse has not relinquished all rights of ownership in the three properties conveyed on October 4, 1989, and instead maintains complete control over the life estates retained in the properties. Those estates include the right to all income from the properties, including the right to lease the properties for consideration. The application of section 3.276(b) is not confined by the terms of the regulation to transfers occurring after a claim for pension has been filed and thus applies regardless of the fact that the transfer in this case preceded the filing of the surviving spouse's death-pension claim. Further, although the regulation refers to a "gift of property," the nominal consideration accompanying the transfer in this case was so grossly inadequate that the transaction must be considered tantamount to a gift. For these reasons, we conclude that the transfer of the three properties should be disregarded in determining the net worth of the surviving spouse for improved-pension purposes.

6. Pursuant to 38 C.F.R. § 3.276(b), the subject transfers of property should not be recognized as reducing the corpus of the grantor's estate. Accordingly, the surviving spouse's net worth must be computed based upon the value of the fee interest in the properties, rather than upon the value of the life estates actually retained. Under 38 C.F.R. § 3.275(b), this requires determination of the market value of the properties, less mortgages or other encumbrances, as if the surviving spouse had retained full ownership. On the issue of mortgages and encumbrances, we note the December 26, 1990, letter in the C-file from Purdum State Bank referring to a "ranch loan" to the surviving spouse.

7. While we conclude that current regulations require that the subject transfers of

property be disregarded in their entirety in determining the claimant's net worth for pension purposes, we note that the Secretary would have the authority under 38 U.S.C. § 501(a) to amend section 3.276(b) so that, where a transferor retains a distinct interest in property having an ascertainable value, only the value of the interest retained would be considered in determining net worth. Such a rule would limit the ability of claimants to circumvent eligibility requirements while permitting net-worth determinations to be based more closely on claimants' actual financial situation. Such a regulation could specify the particular means to be used in valuing a life estate.

8. Although other methods have been used, see 51 Am. Jur. 2d Life Tenants and Remaindermen § 31 (1970) (noting the common-law rule of valuing the life estate at one-third the value of the whole), the modern approach is to compute the value of a life estate by reference to tables which give the present value of an annuity of one dollar for the life of any person of the different ages listed in the table. The value of the life estate is determined by multiplying the net annual rent or income received from the property by the figure given in the table for the age of the life tenant. 1 American Law of Property § 2.25; see also 31 C.J.S. Estates § 36; Restatement of Property § 133, comment f; 26 C.F.R. § 20.2031-7(a) and (c) (fair market value of life estate for Federal tax purposes is present value determined from tables). The Internal Revenue Service (IRS) uses Table A of 26 C.F.R. § 20.2031-7(f) for computing the present value of a life estate which is dependent on the life of one person. The Secretary could provide, for example, that the value of a life estate may be calculated by multiplying the annual rent or income received from the property by the amount given in Table A of 26 C.F.R. § 20.2031-7(f) based upon the owner's age as of the date the life estate is created. Use of the IRS table would provide a uniform basis for determining net worth for improved- pension purposes. Such regulations would also be useful in determining the value of life estates in cases where such interests are created other than through transfers governed by section 3.276(b).

HELD:

(a) Where a claimant transfers an interest in property to someone other than a relative residing in the claimant's household, retaining a life estate in the property, 38 C.F.R. § 3.276(b) requires that the transfer be disregarded in determining the claimant's net worth for improved-pension purposes because the life tenant retains an ownership interest in the property and retains exclusive possession and control over the property during his or her lifetime.

(b) The value of the property for improved-pension purposes will be computed based on the market value of the property, less mortgages and encumbrances, without regard to the purported transfer.

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