

Date: December 15, 1995

VAOPGCPREC 26-95

From: General Counsel (021)

Subj: VA Housing Loans and Specially Adapted Housing Grants for Property Held in Revocable Family Living Trusts

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

May the Secretary (1) guarantee a loan; or (2) approve a Specially Adapted Housing grant for an otherwise eligible veteran to purchase a residence when title to the property will be held in a Family Living Trust?

DISCUSSION:

1. This office has received a number of inquiries from our Regional Counsels where the title to a residence will be held in a Family Living Trust. In some cases, the veteran wishes to purchase the property with the proceeds of a VA guaranteed loan. In the other cases, the veteran will be purchasing and modifying the property in part with the proceeds of a Specially Adapted Housing grant. We have been advised by a number of Regional Counsels that these trusts are becoming more common. We believe uniform guidance is needed on whether this arrangement is acceptable for VA housing purposes.

2. These trusts go by a variety of names, and the details may vary slightly. For purposes of this opinion, we will refer to them as "Living Trusts." These trusts are an estate planning technique designed to avoid the expense and time-consuming procedures associated with probate upon the death of the party or parties creating the trust (the "trustor" or "settlor"). *See*: 18A West's Legal Forms *Elderlaw* § 30.04 (1994) (discussion of the advantages and disadvantages of the Living Trusts as a method to avoid probate). Generally, all assets, including bank accounts, stocks, bonds, and other securities, and real and personal property of the trustor are transferred to the trust. *See*: definition of "Family estate trust," 76 Am. Jur. 2d *Trusts* § 11 (1992). Title to the real property is then held in a manner similar to the following: "[Veteran and Spouse], Trustees of the [Veteran's surname] Family Living Trust."

3. The trust is administered by a trustee who, at least initially, is usually the settlor. Income from the trust property which is not reinvested may be periodically distributed to the settlor. The settlor retains the right to use the real and personal property in the trust for life. In the case of a married couple, they have the exclusive right to use during their joint lives. Upon the death of one settlor, the surviving settlor becomes the beneficiary for the remainder of his or her life. The settlors may amend or revoke the trust at any time during their joint lifetimes. If one of the joint settlors dies, the surviving settlor retains this power to amend or revoke the trust. Upon the death of the settlor (or the last surviving joint settlor), the trust property is distributed to beneficiaries named in the trust instrument who are normally the children or grandchildren of the settlor.

4. With respect to guaranteed home loans, section 3710(a)(1) of title 38, United States Code, authorizes the Secretary to guarantee loans made to veterans "[t]o purchase or construct a dwelling to be *owned and occupied* by the veteran as a home." (Emphasis added.) Other

paragraphs of section 3710(a) provide additional eligible purposes for such loans. In all cases, the loan must be used in connection with a dwelling *owned* and occupied by the veteran. The statute does not specify what degree of ownership the veteran must obtain.

5. By regulation, VA has provided that:

(a) The estate in the realty acquired by the veteran, wholly or partly with the proceeds of a guaranteed . . . loan, or owned by him and on which construction, or repairs . . . or improvements are to be made, shall be not less than:

- (1) A fee simple estate therein, legal or equitable; or
- (2) A leasehold estate running or renewable . . . for a period of not less than 14 years from the maturity of the loan . . . ; or
- (3) A life estate, provided that the remainder and reversionary interests are subjected to the lien.

The title to such estate shall be such as is acceptable to informed buyers, title companies, and attorneys, generally, in the community in which the property is situated

38 C.F.R. § 36.4350(a).

6. With regard to Specially Adapted Housing, the statute refers to assisting a veteran “in acquiring a suitable housing unit” 38 U.S.C. § 2101(a). Although the statute does not specifically require that the veteran “own” the adapted dwelling, VA regulations require that:

(4) The veteran has or will acquire an interest in the housing unit [purchased or adapted with assistance under chapter 21 of title 38, United States Code] which is:

- (i) A fee simple estate, or
- (ii) A leasehold estate, the unexpired term of which . . . is not less than 50 years, or
- (iii) An interest in a residential unit in a cooperative or a condominium . . . which . . . provides a right of occupancy for . . . not less than 50 years;

Provided, The title to such estate or interest is or shall be such as is acceptable to prudent lending institutions, informed buyers, title companies, and attorneys, generally, in the community

38 C.F.R. § 36.4402(a)(4).

7. When the veteran uses a Living Trust, the veteran does not have the *legal* title interest specified in the statute and regulations. We do not, however, end our inquiry there. The law recognizes that persons who lack legal title may nevertheless be considered to have equitable

<Page 3>

title. George A. Pinder, *American Real Estate Law* § 7-11 at 217 (1976). The concept of an equitable estate recognizes the simultaneous existence of two ownership interests in the same

property, one “legal” and the other “equitable.” Courts will recognize the equitable estate as the functional equivalent of real ownership, with “the legal . . . title no more than a shadow.” *Id.* n.1 at 217-218 (citations omitted).

8. The beneficiary of a trust is deemed to have an equitable title interest in the trust property. Pinder, § 7-11 at 217. 76 Am. Jur. 2d *Trusts* § 49 (1992). Thus, we can view the veteran who is a beneficiary of a living trust as having an equitable interest in the home. In a case such as this where the veteran (or veteran and spouse) are the settlors and also the trustees, the equitable interest must generally be in another, or the legal and equitable interests would merge and the trust would fail. 76 Am. Jur. 2d *Trusts* §§ 49, 116 (1992). There would be no merger, however, if the legal and equitable interests were different, or the equitable interests of another were involved. 76 Am. Jur. 2d *Trusts* § 116 (1992). Merger generally requires that the legal and equitable estates be “coextensive and commensurate”; *i.e.*, they must be the same estates. 28 Am. Jur. *Estates* § 376 (1966). We must, therefore, determine the nature of the veteran’s equitable interest.

9. The Living Trust generally provides the settlor with full use of the property during his or her life, or, if the settlors are husband and wife, their joint lives. The settlors, as trustees, normally retain broad power to mortgage, pledge, or dispose of the property, or revoke the trust. Upon the death of the settlor, or last surviving of the joint settlors, the property is distributed to other beneficiaries who are normally but not necessarily the children of the settlor(s). Providing these powers to deal with the security are common, and will not normally defeat the trust. 76 Am. Jur. 2d *Estates* § 33 (1966). Even though the remainder equitable interest of the children or other beneficiaries can be defeated by the acts of the settlors, these other beneficiaries do appear to have some equitable interest in the property. Thus, the interest of the veteran in the property to be purchased or improved with a VA home loan or Specially Adapted Housing grant would be less than a fee simple interest. Although the veteran-settlor retains broad powers to deal with the property, the veteran’s interest appears to be an equitable life interest. *See*: Harold Weinstock, *Planning an Estate*, 2d ed. § 7.4 (1982). 76 Am. Jur. 2d *Estates* § 33 (1966).

10. As quoted above, the regulations applicable to guaranteed home loans permit the veteran to acquire a life estate in a dwelling with the loan proceeds, provided the remainder interest is subject to the lien. Our review of sample documents for Living Trusts suggests this would not normally be a problem. It would be necessary, however, that the documents in each case be reviewed to ensure that the lien will attach to the entire estate. In addition, a determination must be made under State law that such an arrangement is legally acceptable. Since VA does not normally review the adequacy of the lien in each case, we would have no objection to the lender making the determination that the entire estate is subject to the lien. VA would retain the right to adjust any claim otherwise payable if the lien is not adequate. 38 C.F.R. § 36.4325(b).

<Page 4>

11. Specially Adapted Housing grants present a more difficult problem. Although our review leads us to conclude that nothing in the statute mandates a result that is different from our conclusion regarding guaranteed loans, VA has specified in regulations that only a fee simple or long-term leasehold is acceptable for Specially Adapted Housing grants. 38 C.F.R. § 36.4402(a)(4). The regulations do not permit the veteran to obtain a grant where the veteran's interest in the home is a life estate. We must, therefore, conclude that, under current regulations, an equitable life interest in the property under a Living Trust is not an acceptable title interest for the veteran to qualify for a Specially Adapted Housing grant.

12. We stress our conclusion regarding Specially Adapted Housing cases is based on the current regulations. We urge that consideration be given to amending the regulations for both guaranteed loans and Specially Adapted Housing to address living trusts.

HELD:

1. An otherwise qualified veteran may obtain a VA guaranteed housing loan where the title to the property will be held in a Family Living Trust that ensures the veteran, or veteran and spouse, an equitable life estate, provided the lien attaches to any remainder interest and the trust arrangement is valid under State law and title is otherwise generally acceptable to lenders, attorneys, title companies, and informed buyers in the community where the property is located. The initial decision regarding validity of the lien and trust arrangement under State law may be made by the lender, subject to VA's right to adjust the claim under 38 C.F.R. § 36.4325 if the lien proves not to be valid.

2. Due to current regulations, the Family Living Trust arrangement will not provide the veteran with sufficient ownership interest in the unit to qualify for a Specially Adapted Housing grant.

3. The Secretary is urged to consider amending the regulations to specifically address Living Trusts in both the loan and grant programs.

Mary Lou Keener