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Vet. Aff. Op. Gen. Couns. Prec. 64-91

TEXT:

Implementation of 38 U.S.C. § 5505; 38 C.F.R. § 13.109--Estates of Incompetent Veterans

QUESTIONS PRESENTED:

a. Should the value of a property that a veteran previously occupied as a home but does not currently occupy due to the veteran's institutionalization be excluded from the estate computation under 38 U.S.C. § 5505 (formerly § 3205) regardless of whether the structure is currently rented to or occupied by another? FN1

b. Can a property qualify as a veteran's "home" under the provisions of 38 U.S.C. § 5505 if the veteran does not actually occupy the property immediately upon acquisition?

c. (1) For purposes of estate valuation under 38 U.S.C. § 5505, should VA exclude the value of property owned by the veteran which is contiguous to a veteran's dwelling and which may be used for commercial purposes or as a residence for other occupants of a multi-family dwelling?

(2) If not, should VA impute a commercial value to commercial property not currently being used for that purpose?

d. Should unsecured debts be taken into account when determining the value of a veteran's estate?

e. For purposes of 38 C.F.R. § 13.109(d)(4), which state exemption statutes should VA consider in determining the value of a veteran's estate where the veteran's residence is not in the same state as the court exercising jurisdiction over the veteran's conservatorship?

f. For purposes of 38 C.F.R. § 13.109(d), when a veteran receives income as beneficiary of a private trust fund, should the entire value of the trust fund be included in the veteran's estate?

COMMENTS:

1. Your questions arise in the context of legislative action taken by the 101st Congress, as part of the Omnibus Budget Reconciliation Act of 1990, Pub.L. No. 101-508, 104 Stat. 1388 (the Act). Section 8001 of the Act, 104 Stat. at 1388-341, created a new

section 3205 (now § 5505) in title 38, United States Code, which generally requires the suspension of disability compensation to incompetent veterans without dependents, whose estates exceed \$25,000. The new section reads as follows:

In any case in which a veteran having neither spouse, child, nor dependent parent is rated by the Secretary in accordance with regulations as being incompetent and the value of the veteran's estate (excluding the value of the veteran's home) exceeds \$25,000, further payment of compensation to which the veteran would otherwise be entitled may not be made until the value of such estate is reduced to less than \$10,000.

2. We preface our analysis of this statute by noting that the basic principles of statutory construction hold that, after an authoritative text of law has been adopted, the text of that law is the starting point for addressing questions relating to the law's application. See 2A N. Singer, Sutherland Statutory Construction § 45.01 (4th ed. 1984).

Nonetheless, there may be disagreement about the correct application of that law to particular situations because the words of a statute generally do not have single, fixed, and immutable meanings. *Id.* This is because Congress legislates in general terms and relies on the executive departments to provide the specific interpretive guidance necessary to carry out its intent. See, e.g., 1A N. Singer, Sutherland Statutory Construction § 31.01 (4th ed. 1985). Here, the development of additional interpretive regulations to supplement part 13 of title 38, Code of Federal Regulations, is encouraged as section 5505 itself is not sufficiently detailed to address many of the issues arising in implementation of the statute. Exercise of the Secretary's authority under 38 U.S.C. § 210(c) to "make all rules and regulations which are necessary or appropriate to carry out the laws administered by VA " would assist VA personnel and the public in this developing area. FN2 We caution that the issues discussed herein are raised hypothetically and the facts of particular claims will have to be considered in applying the advice provided.

3. We also note that in establishing the statutory exclusion for the value of the veteran's home for estate valuation purposes under 38 U.S.C. § 3205 (now § 5505), Congress did not elaborate on what constitutes a "home" for purposes of the exclusion. The legislative history of the Act provides no interpretive guidance on this point. The conference report merely states:

(C)urrent VA regulations (38 C.F.R. 13.109) establish standards for determining the value of an estate for the purposes of section 3203(b) so as to exclude certain personal property. The conferees intend that this regulation be applied to the valuation of the veteran's estate (other than the veteran's home) for the purposes of the provision in the conference agreement.

H.R.Conf.Rep. No. 101-964, 101st Cong., 2d Sess. 981, reprinted in 1990 U.S.Code Cong. & Admin.News 2374, 2686.

4. The meaning of the term "home" is of some significance in addressing certain of the questions posed, and we therefore consider it helpful to review the commonly used

definitions of this term. Black's Law Dictionary 733 (6th ed. 1990) defines "home" as "(o)ne's own dwelling place; the house in which one lives, especially the house in which one lives with his family; the habitual abode of one's family; a dwelling house." Webster's Third New International Dictionary 1082 (1976) defines "home" as "the house and grounds with their appurtenances habitually occupied by a family; one's principal place of residence." The Restatement (Second) of Conflict of Laws § 12, comment (c) (1971), lists the following factors for use in determining whether a dwelling place is a person's home:

1. Its physical characteristics;
2. The time spent therein;
3. The things done therein;
4. The persons and things therein;
5. The mental attitude toward the place;
6. The intention when absent to return to the place;
7. Elements of other dwelling-places of the person concerned.

It is clear from these definitions that a "home" can generally be considered a structure used or maintained by a person (or persons) as a principal place of residence.

5. With regard to your question whether the value of a property previously occupied as the veteran's home but now rented to or otherwise occupied by another may be considered the veteran's home for estate valuation purposes, we consider the terms of 38 U.S.C. § 5505 to be significant. Section 5503(b)(1)(A) (formerly section 3203(b)(1)(A) of title 38, United States Code, which establishes the \$1,500-dollar estate limitation for incompetent veterans receiving institutional care from the government, excludes the value of the veteran's home from the estate computation "unless there is no reasonable likelihood that the veteran will again reside in such home." Congress was certainly aware of this provision when it enacted the closely related section 5505, having referred specifically to section 3203(b), now section 5503(b), in the legislative history of what is now section 5505. H.R.Conf.Rep. No. 101- 964, 101st Cong., 2d Sess. 980-81, reprinted in 1990 U.S.Code Cong. & Admin.News 2374, 2685-86. However, in the terms of section 5505, Congress called for exclusion of the value of the veteran's home for estate-valuation purposes without reference to consideration of whether there is a reasonable likelihood that the veteran will again occupy the home. The inclusion of the provision in one section of chapter 55 and its exclusion from the related, later-enacted provision of the same code chapter strongly suggests Congress intended that, in implementing section 5505, VA would refrain from making determinations as to the likelihood that a veteran would again occupy the home he occupied prior to institutionalization. 2A N. Singer, Sutherland Statutory Construction §

51.02 (4th ed. 1984). Thus, it appears that generally the value of the veteran's home should not be considered in estate valuation regardless of whether current occupancy or use of the structure is consistent with eventual reoccupancy by the veteran.

6. Congress has given no suggestion that use of the structure in a productive manner during the veteran's absence would change the character of the structure so that it could no longer be considered the veteran's home. However, we note there may be certain circumstances under which an institutionalized veteran's home might be considered to have lost its character as such by, for example, conversion to commercial use in such a manner that it could not again be occupied as a home. Such circumstances would have to be considered in light of the facts of the particular case as they arise. We also would question whether a veteran can be considered as having more than one home for purposes of section 5505 in situations where a veteran retains ownership of more than one property he or she previously occupied as a home. We believe such a broad interpretation would go beyond Congress' contemplation in creation of this exclusion and would be inconsistent with the accepted meaning of the term home as a principal place of residence.

7. Regarding your question concerning the purchase of property not currently occupied by the veteran, common sense dictates that the primary factor is the intent of the veteran or the veteran's guardian to make the structure the veteran's home as that term is commonly understood. If facts suggest that the veteran is able to occupy the premises, is taking steps in preparation for occupancy, or can be expected to occupy the structure as a home within a reasonable amount of time, then the structure can reasonably be considered the veteran's home and would qualify for the exclusion. On the other hand if the veteran's physical or mental condition is such that there is no reasonable prospect that the veteran will reside in the property, it should not be considered the veteran's home.

8. Your question concerning whether the "contiguous part of the real estate" should be excluded in estate calculation as forming a part of the veteran's home is necessarily closely tied to the facts of the particular case. However, as a general rule, we believe it may be helpful to consider the exclusion in terms of what is viewed, in legal terminology, as the "curtilage" of the residential structure. Curtilage is a term generally used to describe the area surrounding a structure. It has been defined as:

A piece of ground commonly used with the dwelling house. A small piece of land, not necessarily inclosed, around the dwelling house, and generally including the buildings used for domestic purposes in the conduct of family affairs.

Black's Law Dictionary 346 (5th ed. 1979). Under this definition, land and structures outside the curtilage would not qualify for the exclusion regardless of whether they were used for commercial purposes. Reference to the term curtilage is consistent with the generally accepted definition of "home" discussed above. Further, such reference is consistent with the apparent congressional objective of assuring that an incompetent veteran is not rendered homeless by operation of the statute by excluding the value of

the veteran's home from the veteran's estate. See, by analogy, S.Rep. No. 98-604, 98th Cong., 2d Sess., reprinted in 1984 U.S.Code Cong. & Admin.News 4479, 4518 (concerning home exclusion under 38 U.S.C. § 3203 (b) (now § 5503(b)). We also note the definitions of "corpus of estate" for pension purposes as excluding the claimant's dwelling "including a reasonable lot area," 38 C.F.R. §§ 3.263(b) and 3.275(b). (This is an area in which regulatory development may be of particular value in view of the absence of specific congressional guidance.)

9. Cases involving multi-family dwellings or real estate containing areas that could be used for commercial purposes will generally require factual review. In some situations, it may be necessary to impute the value of some portion of the property in question to the veteran's estate. The terms of section 5505 make clear that Congress contemplated that veterans covered by that provision would be required to spend down their estates to a certain level before compensation benefits would be resumed. Excluding the value of the veteran's home from the estate computation assures that the veteran will not be required to sell his or her home before the minimum estate value specified in the statute is reached and benefits are resumed. Those portions of a property which are subject to commercial use or occupancy by persons other than the veteran and his or her household, if any, may fall outside the scope of what is generally considered the veteran's home, and to the extent the property is divisible and portions of the property are subject to sale without requiring the veteran to sell the portion which constitutes his or her home, the commercial value of the salable portion of the property may be included in the estate computation. FN3 For purposes of Congress' objective of requiring the veteran to consume some portion of his or her estate before benefit payments are resumed, it appears to be of no consequence whether portions of the property are actually being used for commercial purposes at the present time if some portion of the property is readily convertible to such use, that portion has an ascertainable commercial value, and commercial use of the portion of the property would not interfere with the veteran's enjoyment of the remainder of the property as a home. Consistent with the objective of assuring the veteran is not forced to sell his or her home to obtain funds for subsistence, valuation of such property should be limited to portions of the property that have commercial market value independent of the portion constituting the veteran's home. Likewise, the value of a multi-family structure, independent of the portion of the property which constitutes the veteran's home, may be counted in the estate valuation only to the extent of its value if sold independent of the portion constituting the veteran's home. FN4

10. Turning to the treatment of unsecured debts, the prefatory language of 38 C.F.R. § 13.109 states: "(e)xcept as stated in paragraph (d) of this section, all funds, ... as well as other property, both personal and real (which is capable of being liquidated), and interest therein owned by the veteran, will be included in arriving at the value of the veteran's estate." There is no reference to deduction of liabilities. You correctly indicate that 38 C.F.R. § 13.109(a) requires a veteran's property to be appraised at the veteran's net equity in the property. However, that regulation speaks to net equity in the particular property. Since there is no property functioning as collateral for an unsecured debt, such a debt does not diminish equity in particular property. Subsection (a) thus does not

provide guidance as to whether unsecured debts may be deducted from the value of the estate. We are therefore left with the question of whether the term "estate" as used in that regulation refers to net estate after deduction of enforceable debts.

11. The meaning of the term "estate" varies with the context in which it is used. In guardianship matters, the term may refer to the property of an incompetent which is to be preserved by the guardian. However, use of the term in the context of a particular statute may require a technical meaning applicable in that context. 28 Am.Jur.2d Estates § 1 (1966). In the context of estate valuation for certain need-based veterans' benefits, the terms "corpus of estate" and "net worth" are used interchangeably. See 38 C.F.R. §§ 3.263(b) and 3.275(b). The latter term has a well-accepted meaning, referring to the difference between total assets and liabilities. Black's Law Dictionary 1041 (6th ed. 1990). In this case, a narrow interpretation of the term "estate" would undermine the safeguards Congress built into section 5505 to assure that incompetent veteran's estates would not be reduced to such a level that their ability to meet their financial needs would be jeopardized. If an incompetent veteran's enforceable debts were not taken into account in estate computation for purposes of section 5505, assets which served to place the veteran above the estate limitation for suspension of compensation benefits could be consumed by creditors claims, leaving the veteran without the \$10,000 cushion which Congress built into section 5505 for the veteran's financial protection. Accordingly, the term "estate" for purposes of section 5505 should be considered as referring to the veteran's whole financial status or condition, including debts and obligations, secured or unsecured, as well as possessions and rights. See 31 C.J.S. Estates § 2 (1964).

12. With regard to the question concerning which state exemption statutes apply where a veteran resides in a different state than that of the court exercising jurisdiction over the conservatorship, the term "state exemption statutes" refers to the laws enacted by individual states describing the property of a debtor that cannot be attached by a judgment creditor to satisfy a debt. Black's Law Dictionary 572 (6th ed.1990) (exemption laws). In attachment proceedings, the location of the property in question is of crucial importance as such an action cannot be maintained against property outside the jurisdiction of the court, i.e., outside the state in which a state court sits. 6 Am.Jur.2d Attachment and Garnishment § 19 (1963). In such an action, it is generally held that the local law of the forum (which will be the state where the property in question is located) determines what property of a debtor within the state is exempt. Restatement (Second) of Conflict of Laws § 132 (1971). Therefore, the applicable state exemption statute would normally be that of the state where the property in question is located. This would be the case even if the court exercising jurisdiction over the conservatorship was located in another state, as that court would not normally have jurisdiction over property located outside that state.

13. The final question posed in your inquiry concerns whether the value of trust assets held for the benefit of the veteran should be included in the veteran's estate. The General Counsel previously examined a similar issue concerning whether the value of trust assets held by a trustee for the benefit of an incompetent veteran should be

included in calculating the veteran's net worth for purposes of determining a veteran's entitlement to improved pension. The General Counsel determined that, where the veteran does not hold legal title to or control of the trust property, only such portion of the trust property as has been made available for the veteran's use is countable for purposes of the income and net-worth provisions of 38 U.S.C. § 503, 521, 522, and 3203(b)(1)(A) (now s 5503(b)(1)(A)). O.G.C.Prec. 72-90 (previously issued by the General Counsel as Op.G.C. 1-88 (2-10-88)). In O.G.C.Prec. 72-90, the General Counsel correctly observed that a trust instrument normally transfers legal title to the trustee while maintaining equitable title in the beneficiary. E.g., 89 C.J.S. Trusts §§ 2 and 9 (1955). In light of the beneficiary's lack of legal title to the trust assets, the General Counsel concluded that the value of trust assets should not be included in estate valuation under the referenced statutes except to the extent trust assets may have been allocated for the beneficiary's use. In enacting what is now 38 U.S.C. § 5505 Congress clearly expressed its intention that estate-valuation rules then in use under the provisions of 38 U.S.C. § 3203(b)(1)(A) (now § 5503(b)(1)(A)) would, with one exception relating to the veteran's home, be used under the new section 3205 (now § 5505). H.R.Conf.Rep. No. 101-964, 101st Cong., 2d Sess. 981, reprinted in 1990 U.S.Code Cong. & Admin.News 2374, 2686. Accordingly, we conclude that the rationale advanced in O.G.C.Prec. 72-90 concerning the treatment of trust assets would be equally applicable to estate- value computations under 38 U.S.C. § 5505 and that the value of such assets should not be included in the veteran's estate except to the extent trust assets are allocated for the veteran's use.

HELD:

- a. A property that is owned by a veteran but not currently occupied by the veteran due to the veteran's institutionalization may be excluded from the estate valuation under 38 U.S.C. § 5505 (formerly § 3205; see Pub.L. No. 102- 40, s 402(b)(1), 105 Stat. 187, 238 (1991), for purposes of the limitation on compensation payments for certain incompetent veterans without dependents where estates exceed \$25,000, if the structure in question was the veteran's home prior to institutionalization, regardless of whether the property is currently rented or otherwise occupied by another.
- b. The value of a residential structure recently purchased by a veteran may be excluded from the estate valuation under 38 U.S.C. § 5505 even though the veteran is not currently residing in the home, if it can be expected that the veteran will occupy the structure as a home within a reasonable period of time.
- c. (1) Those portions of a property which are subject to commercial use or occupancy by persons other than the veteran and his or her household, if any, may fall outside the scope of what is generally considered the veteran's home, and to the extent the property is divisible and portions of the property are subject to sale without requiring the veteran to sell the portion which constitutes his or her home, the commercial value of the salable portion of the property may be included in the estate computation for purposes of 38 U.S.C. § 5505.

(2) VA may impute a commercial value to such property regardless of whether it is currently being used for that purpose, if some portion of the property is readily convertible to such use, that portion has an ascertainable commercial value, and commercial use of the portion of the property would not interfere with the veteran's enjoyment of the remainder of the property as a home.

d. VA may consider the veteran's legally enforceable unsecured debts in determining the value of the veteran's estate for purposes of 38 U.S.C. § 5505.

e. The exemption laws of the state where the veteran's assets or property are situated are generally controlling in decisions concerning whether the value of particular property may be excluded from the veteran's estate pursuant to 38 C.F.R. § 13.109(d)(4), regardless of where the court exercising jurisdiction over the conservatorship is located.

f. Where a trust instrument vests legal title to assets in a trustee, the trust assets are not included in estate valuation for purposes of 38 C.F.R. §13.109, unless those funds have been allocated and are available for the veteran's use.

1 The Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub.L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238 (1991), redesignated each section in, among other chapters, chapter 55 of title 38, United States Code, so that the first two digits of the section number are the same as the chapter number of the chapter containing that section.

2 VA Circular 27-91-2, entitled "Limitation on Compensation Payments for Certain Incompetent Veterans (Public Law No. 101-508)," provides useful interim procedural and policy guidance on this subject. However, matters affecting substantive rights should normally be addressed by regulations.

3 In the event the value of commercial property is included in the estate-valuation computation, it should be kept in mind that commercial value is subject to change due to a variety of factors. For example, unforeseen economic factors such as a declining real-estate market, the loss of tenants, or the need for substantial improvements in the property could alter the veteran's ability to dispose of the property or could alter its value. Under certain circumstances, property once considered commercial could change character. Such a fundamental change in the veteran's situation should result in a recomputation of the value of the veteran's estate.

4 We note that income, i.e., rent, derived by the veteran from the use of any property is includable in the estate valuation. See note, 38 C.F.R. § 13.109.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 64-91

