VA Regional Counsel (348/02) 1220 S.W. Third Avenue, Suite 1224 Portland, Oregon 97204

SUBJ: Treatment of Assets Placed in a Special Needs Trust in Determining Eligibility for Improved Pension XXXXX, XXXXXX X. XX XXX XXX

QUESTION PRESENTED:

Are assets which are placed in an irrevocable special needs trust includable in the claimant's net worth for purposes of determining eligibility for improved pension?

COMMENTS:

- 1. This matter arose as a result of a question posed by the Portland, Oregon, Regional Office to the Portland Regional Counsel concerning the impact of an "irrevocable living trust," created on behalf of the surviving spouse of the above-referenced veteran, on the surviving spouse's eligibility for Department of Veterans Affairs (VA) improved pension. ¹ A review of the surviving spouse's VA claims file reveals that the surviving spouse has been determined incompetent by VA but, as of this date, a Federal fiduciary has not been appointed by VA, and, to our knowledge, there is no court-appointed guardian or conservator.
- 2. An "Irrevocable Living Trust" dated November 19, 1992, was prepared on the surviving spouse's behalf by an Oregon attorney. The trust document names a child of the surviving

¹ Following a review of the tentative opinion prepared by the Portland Regional Counsel, we determined that the complexity of this topic and the potential for repetition in other jurisdictions called for issuance of a General Counsel opinion.

spouse as trustee and authorizes the trustee to "sell, encumber, convey, exchange, invest, reinvest, partition, divide, improve, and repair the property constituting the trust estate." Trust document ¶5.1. The terms of the trust also provide that some or all of the income and principal of the trust fund may be paid by the trustee to or for the benefit of the surviving spouse only for the surviving spouse's "special needs for health, safety and well being when such requisites are not presently being provided by any public entity, office or department of the beneficiary's state of residence, or of any other state, or of the United States." Trust document ¶3.2.1. This subsection of the trust further provides:

"Special needs" shall include, but not be limited to, medical and dental expenses; equipment; programs of training, education and treatment. Trustee shall have no discretion in Trustee's distribution of income and principal for special needs . . . The express purpose of this trust shall be to provide for beneficiary's extra and supplemental needs for health, safety and well being in addition to and over and above the benefits provided by any public entity, office or department of the beneficiary's state of residence . . . or of the United States. It is the express purpose of the Trustor to use this trust estate only to supplement other benefits . . .

Distributions to beneficiary . . . are to be considered as from a discretionary, and not a basic support, trust, and the beneficiary's trust interest shall not be used to provide basic food, clothing and shelter, nor be available to the beneficiary for conversion for such items, unless all governmental and nongovernmental benefits for which the beneficiary is eligible as the result of disability or handicap have first been fully expended for such purposes.

3. Estate planning for the elderly has been used by persons with large estates to preserve assets for heirs while taking advantage of Medicaid benefits designed to assist

the poor. See Jane Bryant Quinn, Paring Loopholes That Let the Well-off into Medicaid, Wash. Post, Oct. 3, 1993, at H3. Because

<Page 3>

of the escalating costs associated with the Medicaid program, Congress has enacted various revenue saving provisions, including amendments to the Social Security Act, to close some Medicaid-eligibility loopholes. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13611, 107 Stat. 312, 622 (OBRA 1993). The OBRA 1993 amendments specified that assets placed in an irrevocable trust will be considered as part of the individual's estate if "there are any circumstances under which payment from the trust could be made to or for the benefit of the individual." Id. at § 13611(b). Although the amendments made by section 13611 of Pub. L. No. 103-66 do not apply to trusts, such as that at issue here, which were established on or before August 10, 1993 (Pub. L. No. 103-66, § 13611(e), 107 Stat. at 627), they demonstrate Congress's concern with the impact of trusts on need-based Federal programs.

- 4. Pursuant to 38 C.F.R. § 3.3(b)(4)(iii), a surviving spouse of a veteran may qualify for improved death pension if, among other criteria, the surviving spouse "meets the net worth requirements of § 3.274 and has an annual income not in excess of the applicable maximum annual pension rate specified in §§ 3.23 and 3.24." Section 3.274(c) of title 38, Code of Federal Regulations, the VA regulation addressing evaluation of net worth for purposes of pension awards to surviving spouses, provides that pension payable to a surviving spouse shall be denied or discontinued when "the corpus of the estate of the surviving spouse is such that under all the circumstances . . . it is reasonable that some part of the corpus of the surviving spouse's estate be consumed for the surviving spouse's maintenance."
- 5. VA regulations do not establish specific criteria governing when trust assets are to be considered in net worth determinations. VA regulations do, however, define net worth as "the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant." 38 C.F.R. § 3.275(b) (emphasis added). The

question then becomes whether the surviving spouse's transfer of assets to the trust effectively resulted in divestiture of ownership of the assets such that they cannot be reasonably expected to be used for the surviving spouse's care. Language found in 38 C.F.R. § 3.276(b) reflects the view that certain gifts and transfers to relatives should not, for VA pension purposes, be considered to reduce the

<Page 4>

size of an estate. Although the regulation does not address the situation of transfer of assets to a trust, the regulation does reflect VA's interpretation of the pension statutes that the circumstances of a transfer of property may be considered in determining eligibility for pension. The fact that the surviving spouse transferred property to a trust, as opposed to a friend or relative, would not be conclusive on the issue of whether the surviving spouse has relinquished all rights of ownership in the property.

6. The General Counsel's reasoning in VAOPGCPREC 15-92 (O.G.C. Prec 15-92) is helpful in assessing whether the assets in the trust should be included in the computation of the surviving spouse's net worth for purposes of eligibility for improved pension. That opinion concluded that the transfer of three properties in which a surviving spouse retained a life estate should be disregarded in determining the surviving spouse's net worth. The trust document at issue here establishes a so-called "living trust," an arrangement somewhat analogous to a life estate. ² In VAOPGCPREC 15-92, the General Counsel, referencing a series of published and unpublished General Counsel opinions, including VAOPGCPREC 72-90 (O.G.C. Prec. 72-90), indicated that property and income from property may be countable as

One of the similarities between the trust at issue here and the life estate which was the subject of VAOPGCPREC 15-92 is that, in both instances, persons eligible to receive property or assets upon the death of another have no right to possession or enjoyment of the property or the assets until after that individual dies. Significantly, both the beneficiary of the trust in this case, i.e., the surviving spouse, and the holder of the life estate discussed in VAOPGCPREC 15-92, retained a distinct interest in property having an ascertainable value until death.

belonging to a claimant if the claimant possesses such control over the property that the claimant may direct that it be used for the claimant's benefit. Such control may be considered a sufficient ownership interest to bring the property within the scope of the pension laws. It follows that only property over which a claimant, or someone with legal authority to act on the claimant's behalf, has some control to use for the claimant's benefit can reasonably be expected to be consumed for a claimant's maintenance and thus be includable in the claimant's estate. <Page 5>

- 7. In this case, it appears that the surviving spouse does not have sufficient mental faculties at this time to exercise any control over the trust property. We note, however, that the surviving spouse could be considered as exercising control over the trust assets if the surviving spouse gave the trustee control over the assets while the surviving spouse retained sufficient mental faculties and provided specific instructions concerning the circumstances under which trust assets would be used for the surviving spouse's benefit, or if someone lawfully empowered to act on her behalf established the trust. In this manner, the surviving spouse could be considered to exercise "control" over the trust assets even though the surviving spouse is now completely incapacitated. The circumstances of the creation of the trust should be examined in this regard.
- 8. As to the degree of control exercised over the property, the trust document authorizes the trustee to expand trust assets for various "special needs" of the surviving spouse and also states that "special needs" are "not . . . limited to" those specifically listed in the trust document. Trust document ¶3.2.1. Accordingly, although the trust is clearly designed to preserve estate assets by maximizing the use of other available resources, the trust does authorize the use of trust assets to benefit the surviving spouse. Indeed, the literal terms of the trust authorize the use of trust assets to provide for the surviving spouse's "special needs" and permit the use of trust assets "to provide basic food, clothing and shelter" if other resources are not available to meet those needs. Id.
- 9. In light of the above discussion, VA should include the trust assets in net-worth calculations if trust assets are

available for use for the claimant's support. In this case, the trust permits the use of trust assets for the surviving spouse's benefit. Further, if the funds available to the surviving spouse from governmental sources other than VA are so limited that the surviving spouse meets the income criteria for improved pension, it may reasonably be presumed that sufficient resources are not otherwise available to meet the surviving spouse's basic needs for food, clothing, and shelter and trust assets may be applied to meet the surviving spouse's needs. In our view, this provides the necessary basis to support consideration of the trust assets in

<Page 5>

calculating the surviving spouse's net worth for purposes of determining entitlement to improved pension.

10. We also note that, although the trust document states that "no part of the income and principal of the trust estate shall be considered available" to the trust beneficiary for purposes of determining eligibility for public benefit programs, trust document ¶3.2.2., such a unilateral declaration has no legal effect with respect to VA's determination of entitlement to benefits, which is governed by Federal law. Entitlement must be determined based on the statutes and regulations governing improved pension, as applied to the circumstances presented with respect to the claim at issue.

HELD:

Assets transferred by a legally competent claimant, or by the fiduciary of a legally incompetent one, to an irrevocable "living trust" or an estate-planning vehicle of the same nature designed to preserve estate assets by restricting trust expenditures to the claimant's "special needs," while maximizing the use of governmental resources in the care and maintenance of the claimant, should be considered in calculating the claimant's net worth for improved-pension purposes.