

**PUBLIC INTEREST LAW INITIATIVE
GUARDIANSHIP BASICS AND BEYOND
DEPARTMENT OF VETERANS AFFAIRS
FIDUCIARY PROGRAM REGULATIONS
JUNE 20, 2019 AT DANVILLE AREA
COMMUNITY COLLEGE**

I Background

A. The Department of Veterans Affairs (VA) in past years had two programs

1. State Guardianship Programs

- a. For accounts with larger amounts of VA Benefits in the veterans name (usually amounts in excess of (\$100,000.00) where the veteran lacked capacity, the VA would seek to establish Guardianships in State Courts
- b. Both the VA and the State Court would exercise authority over funds derived from VA
- c. In most cases 100% of funds came from VA Benefits
- d. VA and not State rules applied to allowed investments.
- e. VA had to be consulted before court orders sought for expenditure of funds
- f. Accountings had to be submitted to VA first for approval
- g. VA had to approve fees before court
- h. Courts sometimes would not appoint a GAL, but did on occasion

2. VA Fiduciary Accounts

- a. Similar to a Representative Payee in the Social Security Administration
- b. No formal adjudication of disability by court needed, the VA made the determination
- c. Normally used when veterans saved funds were under \$100,000 and VA Benefits were sole source of income
- d. VA would appoint a VA Fiduciary
- e. Fees limited to 4% of income
- f. VA would work with VA Fiduciary to establish monthly budgets and bill paying for veteran

- g. VA permission needed to expend larger amounts of money for veteran
- h. Annual accounts sent to VA for approval with any court involvement
- i. If there was a subsequent petition filed in a State Court for Guardianship for veteran, it was the position of the VA that this had no Effect on the VA Fiduciary Account and it continued with VA Appointed Fiduciary

B. Current VA Fiduciary Program and Regulations

1. Proposed Regulations

- a. On January 3, 2014 the VA published the Proposed Regulations
- b. Was a comprehensive rewrite of former rules governing payment of monetary benefits to veterans
- c. Comment period ended on March 4, 2014
- d. Twenty six comments were received by VA
- e. VA took comments under advisement and made certain revisions to the Proposed Rule
- f. On July 13, 2018 VA published the Final Rule with an effective date of August 13, 2018
- g. Final Rule can be found in 38 CFR §§13.10 to 13.600 with the title “Part 13 – Fiduciary Activities”
- h. This replaced the former regulations with the title “Incompetents, Guardianship and Institutional Awards”

II Fiduciary Activities Rule – Discussion of Selected Comments

- 1. If the veteran is in the Fiduciary Program solely on account of a State Court determination of disability and the State Court at a later time removes the determination of disability, then the veteran can be removed from the Fiduciary Program
- 2. If VA has made the determination that the veteran is in the Fiduciary Program, a State Court’s finding and order has no effect on the VA determination
- 3. As to a comment that the Fiduciary Rule may be in conflict with a State’s Laws, the VA stated “... however, under the Supremacy Clause of the Constitution, Federal Law is controlling.” (citations omitted) (Federal

Register/Vol 83, No. 135/Friday, July 13, 2018, p.3217)

- a. VA Fiduciary Accounts are not subject to State Court jurisdiction
- b. VA Fiduciary is not subject to State Court jurisdiction
- c. VA Fiduciary Funds are not controlled by Guardian appointed by State Court
- d. Only when the VA Fiduciary and the State Court Guardian are the same person or entity is the VA Fiduciary subject to State Court jurisdiction

III Review of Fiduciary Activities Rule

1. Purpose of Rule – 38 CFR §13.10

“The purpose of the fiduciary program is to protect certain VA beneficiaries who, as a result of injury, disease, or infirmities of advanced age, or by reason of being less than the age of majority, cannot manage their VA benefits. Under this program, VA oversees these vulnerable beneficiaries to ensure their well-being, and appoints and oversees fiduciaries who manage these beneficiaries’ benefits.”

2. Fiduciary definition – 38 CFR §13.20

- a. “Fiduciary means an individual or entity appointed by VA to receive VA benefits on behalf of a beneficiary for the use and benefit of the beneficiary and the beneficiary’s dependents.”
- b. “In the fiduciary program means, with respect to a beneficiary, that the beneficiary: (1) Has been rated by VA as incapable of managing his or her own VA benefits as a result of injury, disease, or the infirmities of advanced age; (2) Has been determined by a court with jurisdiction as being unable to manage his or her own financial affairs; or (3) Is less than the age of majority. Rating authority means VA employees who have authority under §3.353 of this chapter to determine whether a beneficiary can manage his or her VA benefits.”

3. Representation of beneficiaries in the fiduciary program – 38 CFR §13.40

- a. “(a) Accreditation. Only VA-accredited attorneys, claims agents, and accredited representatives of VA-recognized veterans service organizations who have complied with the power-of-attorney requirements

in §14.631 of this chapter may represent beneficiaries before VA in fiduciary matters.”

b. Information and forms to become accredited can be found at these websites:

<https://www.va.gov/ogc/accreditation.asp>

https://www.va.gov/ogc/accred_faqs.asp

Also there are attachments with the forms

b. It takes between 60 to 120 days for an attorney to be accredited

c. Fees are governed by 38 CFR §14.636

“(e)*Fees permitted.* Fees permitted for services of an agent or attorney admitted to practice before VA must be reasonable. They may be based on a fixed fee, hourly rate, a percentage of benefits recovered, or a combination of such bases. Factors considered in determining whether fees are reasonable include:

(1) The extent and type of services the representative performed;

(2) The complexity of the case;

(3) The level of skill and competence required of the representative in giving the services;

(4) The amount of time the representative spent on the case;

(5) The results the representative achieved, including the amount of any benefits recovered;

(6) The level of review to which the claim was taken and the level of the review at which the representative was retained;

(7) Rates charged by other representatives for similar services;

(8) Whether, and to what extent, the payment of fees is contingent upon the results achieved; and

(9) If applicable, the reasons why an agent or attorney was discharged or withdrew from representation before the date of the decision awarding benefits.”

d. Appears to be a similar standard as found in the Bankruptcy Code

4. Fiduciary Appointments – 38 CFR §13.100

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a. Made by the VA Hub Manager – in this area the HUB is in Milwaukee,

b. Local Field Agent will contact the proposed Fiduciary

c. Order of preference for appointments – 38 CFR §13.100 (e)

“(e) Order of preference in appointing a fiduciary. The Hub Manager will consider individuals and entities for appointment in the following order of preference, provided that the proposed fiduciary is qualified and willing to serve and the appointment would serve the beneficiary’s interest: (1) The preference stated by the beneficiary in the fiduciary program, if the beneficiary has the capacity to state such a preference. If the beneficiary has a legal guardian appointed to handle his or her affairs, the Hub Manager will presume that the beneficiary does not have the capacity to state a preference and will consider individuals and entities in the order of preference prescribed in paragraphs (e)(2) through (10) of this section; (2) The beneficiary’s spouse; (3) A relative who has care or custody of the beneficiary or his or her funds; (4) Any other relative of the beneficiary; (5) Any friend, acquaintance, or other person who is willing to serve as fiduciary for the beneficiary without a fee; (6) The chief officer of a public or private institution in which the beneficiary receives care or which has custody of the beneficiary; (7) The bonded officer of an Indian reservation, if applicable; (8) An individual or entity who has been appointed by a court with jurisdiction to handle the beneficiary’s affairs; (9) An individual or entity who is not willing to serve without a fee; or (10) A temporary fiduciary, if necessary.”

5. The VA Hub Manager will determine the level of supervision that the veteran requires to manage the monthly VA funds – 38 CFR §13.110

a. Can be limited or full management

b. Is reassessed after the first year

6. The responsibilities of a fiduciary – 38 CFR §13.140

a. The responsibilities are similar to a Guardian

b. “(b) Financial responsibilities. The fiduciary’s primary financial responsibilities include, but are not limited to: (1) The use of the beneficiary’s VA benefit funds under management only for the care, support, education, health, and welfare of the beneficiary and his or her dependents. Except as authorized under §13.220 regarding fiduciary fees, a fiduciary may not derive a personal financial benefit from management or use of the beneficiary’s funds; (2) Protection of the beneficiary’s VA benefits from loss or diversion; (3) Except as prescribed in §13.200 regarding fiduciary accounts, maintenance of separate financial accounts to prevent commingling of the beneficiary’s funds with the fiduciary’s own funds or the funds of any other beneficiary for whom the fiduciary has funds under management; (4) Determination of the beneficiary’s just debts. For purposes of this section, just debts mean the beneficiary’s legitimate, legally enforceable debts; (5) Timely payment of the beneficiary’s just debts, provided that the fiduciary has VA benefit funds under management for the beneficiary to cover such debts; (6) Providing the beneficiary with information regarding VA benefit funds under management for the beneficiary, including fund usage, upon request; (7) Providing the beneficiary with a copy of the annual accounting approved by VA under §13.280; (8) Ensuring that any best-interest determination regarding the use of funds is consistent with VA policy, which recognizes that beneficiaries in the fiduciary program are entitled to the same standard of living as any other beneficiary with the same or similar financial resources, and that the fiduciary program is not primarily for the purpose of preserving funds for the beneficiary’s heirs or disbursing funds according to the fiduciary’s own beliefs, values, preferences, and interests; and (9) Protecting the beneficiary’s funds from the claims of creditors as described in §13.270.”

c. If the Fiduciary is also appointed by a State Court as Guardian, the Fiduciary must send to the VA Hub a certified copy of the State Court’ order approving the Account.

7. Fiduciary Investments – 38 CFR §13.210
 - a. Accounts that have FDIC Insurance
 - b. US Savings Bonds
8. Fiduciary Fees – 38 CFR §13.220 limited to 4% of income from VA
9. Accountings – 38 CFR §13.280
 - a. Requirements are similar to State Court
 - i. Beginning Inventory or Account Balance
 - ii. Itemization of income
 - iii. Itemization of expenses
 - iv. Ending Inventory or Account Balance
 - v. Copies of financial institutions records showing receipts and disbursements (copy of checking statements for individual fiduciary)
 - vi. Copy of receipts and bills when required by HUB Manager
 - b. Due 30 days after the end of the accounting period