

Veterans Issues with Proceeds of the Cobell Settlement

When the Cobell Settlement was crafted, none of the crafters considered the potential impact of these funds on Indian veterans. While the vast majority of Indian veterans who receive funds from VA receive Compensation rather than Pension, it is still an apparent issue as to those receiving need or means tested services and benefits. Compensation for conditions that may be connected to a veteran's military service is not diminished by the receipt of other income.

Pension under Title 38 U.S.C. has five basic eligibility criteria: 1) The veteran must be discharged under other than dishonorable conditions; 2) An individual who enlisted in the military service for the first time after September 8, 1980, is required to complete a minimum period of service, either twenty-four months of continuous active duty or the "full period for which the veteran was called or ordered to active duty." The veteran must also have active service that includes a total of ninety days during one or more periods of war, ninety or more consecutive days, one of which is during a period of war, or at least one day of wartime service that results in a discharge for a service-connected disability; 3) The veteran must have limited income and a net worth that does not provide adequate maintenance (a need test); 4) The veteran must be totally and permanently disabled at the time of the application for pension; and 5) The permanent and total disability may not be the result of his own willful misconduct.

Income has been calculated differently under three separate Pension programs. These are currently improved Pension, Section 306 Pension and old-law pension. Improved pension is the only one for which new applications may be made. It dates from 1979 and provides a higher income than the others, yet also counts virtually every dollar that comes into a household in determining financial eligibility. Not only income is counted, but there is a cap of \$80,000 on the "corpus of the estate" of the veteran. Section 306 pension was in effect from July 1, 1960 and December 31, 1978. Spousal income was counted at that time unless unavailable to the veteran or to count the spousal income would cause a hardship for the veteran. Veterans receiving pension prior to 1960, are considered to be under "old law" pensions. The distinguishing feature of these is that spousal income was not considered. The Section 306 and "old law" pensions are protected pensions. They do not yield the income that the improved pension does, but neither do they have the offset of spousal and other household income.

Calculating the improved pension (Maximum Improved Pension Rate) is a complicated process and generally is done annually with a prospective based on who is in the household and how much aggregate income is coming into the home from all sources. While some income is exempt, for medical expenses and the like, the exceptions are very limited and strictly applied.

The General Counsel of VA has issued an Opinion to provide a guide for accounting of income received under Cobell. The guide tracks the language pertaining to the IRS in the implementing legislation. Essentially, it provides for the exemption of any income for one year from the month in which it is received. Thus, if a veteran is in the Historic Class, and has an IIM account and receives

\$1,000.00, that money is exempt from the annual MIPR accounting. With the receipt of additional monies by household members, it also would not be included in the MIPR for one year from the date of receipt. However, after that one year, VA will calculate whatever is carried over as "resource." Those residual funds will be counted as "resource" and balanced against the \$80,000 cap on the maximum value allowed as the "corpus of the estate."

There are potential problems with the fact that the "corpus of the estate" includes virtually everything – liquid assets, personal property and land. The resolution of fractionated land and the ensuing re-redistribution of ownership may provide a very real pitfall for veterans receiving any kind of pension and their families, as the fair market value of any land ownership in the immediate household will be calculated as part of the "corpus of the estate." Had the Department of Veterans Affairs been consulted early on in the crafting of the Settlement what pitfalls are found may have been avoided. As it is, there may be very little impact on a very few families, but any impact on anyone is too much.

Federal Bar Association
38th Annual Indian Law Conference
April 11-12, 2013

Speaker Commitment Form

Each presenter must complete and return this form by February 8, 2013

GENERAL INFORMATION:

☐ Contact Name Carol Wild Scott ☐ Title Chair

☐ Organization Veterans and Military Law Section, FBA
Veterans Law Section

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CONFERENCE INFORMATION:

☐ Moderator / Panelist (circle one)

☐ I will be involved in the following session(s)

Implementation of Cobell (?)

☐ We need a short paragraph describing your presentation for the program and promotional materials:

I will discuss the effects of the receipt of settlement funds on the means tested benefits accruing to veterans receiving VA Pension and other means tested VA services

☐ Audio Visual Requirements: (i.e. laptop, screen, microphone...)

NONE else

*** Your conference paper, bio, and this speaker commitment form are due by February 8, 2013. Please send materials to Kate Koch at kkoch@fedbar.org, 571-481-9100 (phone). Thanks!**

CAROL WILD SCOTT

Carol Scott has served as the Chair of the Veterans Law Section of the Federal Bar Association since 2004. The Federal Bar Association is a 16,000 member organization of attorneys and judiciary in private and government practice. As Chair of the Veterans Law Section she has provided written and oral testimony before the Veterans Affairs committees of the House and the Senate and the Senate Committee on Indian Affairs, proposed legislation on issues involving veterans and the Veterans Law bar.

While Chair of the Veterans Law Section, the Section has provided programming for the Federal Bar Association and coordinated submissions to The Federal Lawyer's special issue on Veterans Law, providing an article for that publication. She has engaged in joint projects with the National Congress of the American Indian, advocating before the BIA, and DOJ for the establishment of Veterans Centers on the reservations. In 2010, Ms. Scott honored with The President's Award by Lawrence Baca and the Federal Bar Association. In February, 2012 she testified before the Tribal Law and Order Commission, advocating for the integration of Veterans Courts into the implementation of the Tribal Law and Order Act.

Ms. Scott has served as Deputy Director of the Case Evaluation and Placement Component of The Veterans Consortium Pro Bono Program since 1995. A Congressionally chartered organization which is funded within the LSC network, the Pro Bono Program provides *pro bono* case review and representation to veterans appealing the denial of benefits by the Department of Veterans Affairs. As Deputy Director she coordinates assignment of cases within a network of volunteer attorneys from across the country.

Prior to joining The Veterans Consortium, Ms. Scott took a sabbatical from the Law and was a small business owner providing services to the insurance and trucking industries. She also volunteered as a National Registry Paramedic in the Fauquier County, VA. EMS, and was active in canine search and rescue and humane investigations.

Ms. Scott served as the Supervisory Attorney at the U.S. Court of Appeals for the Eleventh Circuit from its inception in 1982 to 1984, during which she established the office of the Central Legal Staff of the Court in conjunction with the U.S. Court of Appeals for the Fifth Circuit and coordinated the organization of the function and support mechanisms for it within the Court.

From 1976 to 1982, Ms. Scott was a member of the Central Legal Staff of the U.S. Court of Military Appeals, during which time she served on the Working Group of the Joint Services Committee of DOD as a co-author of the revised Military Rules of Evidence. Other activities included service as Vice-Chair of the Military Law Committee of the ABA General Practice Section, and Chair of the (now) Committee of Appellate Staff Attorneys under the ABA Appellate Judges Conference.

As General Counsel to the Southern Center for Military and Veterans Rights in Atlanta, GA, 1975 – 1976, Ms. Scott oversaw the legal staff's representation of veterans with Discharge Upgrading issues, provided representation before travelling Discharge Review Boards and instructed groups of veterans incarcerated in Louisiana, Florida and Georgia in Discharge Upgrading law. She also held the position of Southern Regional Vice-president of the National Lawyers Guild and served on the Women and the Law and Prison Law committees.

After earning her JD from the University of Florida College of Law in 1970, Ms. Scott was a sole general practitioner in Gainesville, Florida until 1975, focusing on the areas of Criminal, Domestic Relations, Prison, Selective Service and Military Law. She was a founding member of "Store-front Legal Aid" (now Three Rivers Legal Services) and Executive Secretary of the Drug Abuse Advisory Council, a licensing advisory body for drug treatment and educational programs across North Florida.

Ms. Scott has three children, seven grandchildren and five great-grandchildren. Her oldest grandson has served three deployments in Iraq and Afghanistan with the US Army. Her husband is a Vietnam veteran from Ft. Belknap, MT