



Texas Young Lawyers Association

TYLA

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PREVENTING  
FRAUD ON  
VETERANS

## **I. Declaring a Veteran Incompetent**

The term “incompetent” describes an adult who is deemed unable to manage his or her own financial affairs. A veteran may be deemed incompetent if the VA determines that the veteran cannot handle or otherwise manage the monthly benefits paid by the VA. Because VA benefits may also be paid to the veteran’s spouse and minor children, e.g., “beneficiaries,” the VA’s incompetency determination may extend to the veteran’s children who are shown to be permanently incapable of self-support or who are under the age of 18.

The VA’s determination that a veteran is incompetent is not final and can be appealed. Once the VA makes this determination, they will send a notice proposing to appoint a fiduciary. More information on the appointment of a fiduciary is included below.

### **How is a beneficiary rated as “incompetent” or unable to manage his or her own financial affairs?**

The VA will review a beneficiary’s financial “competency” after receiving medical evidence indicating that the beneficiary may be unable to manage his or her own financial affairs. The medical evidence received by the VA is generally provided by the medical professional conducting a physical or mental examination for VA benefits. If the VA determines, based on the evidence provided, that a beneficiary is unable to manage his or her own financial affairs, the beneficiaries will receive a notification letter stating that they may:

- Submit new medical evidence;
- Request a hearing (within 30 days of notification letter);
- Waive 60 day due process; or
- Not respond

If the beneficiary did not respond, waived due process, or medical evidence was determined insufficient then the beneficiary will enter the VA’s Fiduciary Program. That program begins with a field examination by a representative from a Veteran Service Center and a fiduciary will be appointed through this process.

### **How can I appeal the VA’s decision of incompetency?**

A beneficiary may submit a written request for competency along with new evidence detailing the beneficiary’s ability to manage his or her financial affairs to the VA regional office or Veteran Service Center.

For more information on the VA process visit the following link: [https://iris.custhelp.com/app/answers/detail/a\\_id/2905/kw/incompetent/related/1](https://iris.custhelp.com/app/answers/detail/a_id/2905/kw/incompetent/related/1)

## **Appointment of a Fiduciary**

A veteran or a veteran's beneficiary (spouse, child, or other dependent) may be unable to manage his or her own financial affairs, including managing benefits paid by the VA, because they are mentally ill, under 18 years of age, or are otherwise legally incompetent. Depending upon the circumstances, it may be appropriate to initiate court proceedings, such as a guardianship or other similar proceeding, to secure the appointment of a person to manage the affairs of the veteran or beneficiary. In other instances, court intervention may not be necessary. This publication does not address court proceedings.

The regulations governing the VA provide for the appointment of a "federal fiduciary." Under those regulations, a fiduciary may be appointed to manage VA funds on behalf of a veteran or beneficiary who is not otherwise able to do so. The primary goal of the fiduciary is to ensure that VA benefits are used for the veteran's or the beneficiary's best interests.

## **Who can be appointed a fiduciary?**

In general, the following persons can be selected to serve as a fiduciary:

- A spouse or family member;
- A person who was previously appointed by a Court to serve as a fiduciary;
- Another interested person, such as a close friend; or
- A professional or corporate fiduciary, such as a Bank.

## **What factors are considered and how is a fiduciary selected?**

The decision to select and appoint a particular person as a fiduciary is made by the Veteran Service Center Manager in the area where the veteran resides. The officials with the Veteran Service Center oversee the fiduciary appointment process. That process may include: (1) an interview with a VA representative; (2) a review of the applicant's credit report; (3) a review of the applicant's criminal history; and (4) interviews with character witness.

Further, the applicant must demonstrate a willingness to serve and a willingness to abide by all agreements.

## **Are there reporting requirements for fiduciaries?**

Yes. A fiduciary may be required to submit accountings to the VA detailing how the fiduciary is managing the funds.

## **Can a fiduciary's appointment be terminated?**

Yes. A Veterans Service Center Manager is authorized to terminate an appointment where it is necessary for the protection of the beneficiary's interest. This may occur where the evidence shows that a fiduciary has

misappropriated funds for his or her own benefit, failed to carry out their duties, or violated federal laws. Further, some misconduct by the fiduciary will be reported to the VA's Regional Counsel and may ultimately be referred to the local United States Attorney who may initiate criminal proceedings.

## **II. Prosecution and Civil Lawsuits**

The Department of Justice, United States Attorneys Office, and the Department of Education are just a few of the federal agencies that are focused on enforcing the law in this area and protecting students and taxpayers from for-profit institutions manipulating federal aid available. The False Claims Act, or Qui Tam, allows for private citizens to file whistleblower suits to provide the government information about wrongdoing. Under Federal law the may government investigate and then take over the prosecution of the allegations. Alternatively, the government may decline to pursue them and allow the whistleblower to proceed. If the government proves that a defendant has knowingly submitted false claims, it is entitled to recover damages and penalties per claim. When the government intervenes in a lawsuit brought by an individual, the whistleblower can collect a share of 15 to 25 percent of the government's recovery.

### **How can I recoup funds from VA?**

Federal law provides a basis for recouping misused funds from the Secretary of the VA. The Secretary then seeks recoupment from the fiduciary on the beneficiaries' behalf. 38 U.S.C. § 6107(d).

### **What is misuse of funds?**

For purposes of the statute, misuse of benefits by a fiduciary is when "the fiduciary receives payment . . . for the use and benefit of a beneficiary and uses such payment, or any part thereof, for a use other than for the use and benefit of such beneficiary or that beneficiary's dependents." 38 U.S.C. § 6106.

The first basis for reissuing benefits is negligence by the Secretary. "In any case in which the negligent failure of the Secretary to investigate or monitor a fiduciary results in misuse of benefits by the fiduciary, the Secretary shall pay to the beneficiary or the beneficiary's successor fiduciary an amount equal to the amount of benefits that were so misused." 38 U.S.C. § 6107(a). The statute specifies two types of negligence: the failure of the Secretary to review a fiduciary's accounting within sixty days, and the failure to act to terminate a fiduciary within sixty days of being notified of misuse of funds. The statute provides, however, that those are not the only two bases for a finding of negligence.

If there is no evidence that the Secretary was negligent, the veteran can still recoup his benefits if the fiduciary is not an individual (such as a bank) or is an individual who acts as a fiduciary for ten or more beneficiaries. 38 U.S.C. § 6107(b). The beneficiary need not prove negligence by the Secretary, rather the beneficiary only needs to prove that the funds were misused by the fiduciary.

### **How much can you recover?**

The only limitation on the amount paid under either section is that it cannot exceed the total benefit amount misused by the fiduciary. 38 U.S.C. § 6107(d). Nonetheless, the VA has said that since 2008, only fifteen beneficiaries have been reimbursed a total of \$652,685 under the law.

### **How do you go about getting the funds?**

The beneficiary will most likely have to file a claim with the VA. 38 C.F.R. § 18.550. If the VA does not act within 180 days of the beneficiary's filing, or after it gives a final decision either granting or denying the beneficiary's benefits, then the beneficiary can file a claim in court. 38 C.F.R. § 18.550.

## **III. Veterans' Education Assistance**

"You pick the school, we'll pick up the bill." This slogan has provided hope to many veterans who would not otherwise attend college. However, the promise of a cost-free education (or education at a greatly reduced cost) should not be entered into blindly.

### **Who is eligible for educational assistance and what types of aid are available?**

There is more than one type of educational assistance offered by the VA and the qualifications are different depending on the type of tuition assistance you apply for— Post-9/11 G.I. Bill, Montgomery G.I. Bill (active duty or select reserve), or other education assistance programs (such as Reserve Educational Assistance Program "REAP"), Veterans Education Assistance Program ("VEAP" and others). The newest educational assistance benefit is the Post-9/11 G.I. Bill, and it is modeled after the G.I. Bill that President Franklin Roosevelt signed into law in 1944.

For more information about the criteria required to apply for educational assistance for veterans or their families, visit: <http://gibill.va.gov/>. For example, the Post-9/11 G.I. Bill has the following provisions:

- Post-9/11 G.I. Bill is a VA education benefit for individuals who served on active duty after 09/10/2001.

- The individual must have served for an aggregate period of at least 90 days after 9/10/2001, or serve at least 30 continuous days on active duty after 9/10/2001, and receive a discharge for disability.
- Benefit payment rates range from 40% of the maximum benefit for an individual with at least 90 days but less than 6 months of aggregate service, up to 100% of the benefit for individuals with at least 36 months of aggregate service or 30 continuous days and a discharge due to a service connected disability.
- In general, individuals will remain eligible for benefits for 15 years from the date of last discharge or release from a period of active duty of at least 90 continuous days.

Each source of VA funding has different criteria to determine whether you qualify, so you should research which benefit is the best fit for you.

### **How has the government responded to the deceptive recruitment of military students?**

Congress and President Obama saw a need to protect veterans and their families who were becoming increasingly viewed as easy targets for enrollment in higher education institutions given the financial assistance available to those applicants. A growing number of for-profit institutions were aggressively recruiting current and former soldiers and their families to apply for tuition assistance in light of the federal funding veterans are eligible to receive under the G.I. Bill, Tuition Assistance Program, and Military Spouse Career Advancement Account Program.

Recent statistics reveal that for-profit institutions received a disproportionate amount of tuition assistance versus public institutions when considering the percentage of veterans enrolled. It is believed that one of the driving forces behind these statistics was the result of the private assistance, method of how the assistance is paid (to the institution or individual), types of assistance (tuition, fees, books, housing, additional stipends, etc.), duration of benefits, and the type of educational training covered.

There are specific rules governing the election of benefits between the various educational assistance programs, and some involve an irrevocable choice (meaning once you opt for one tuition aid, you are unable to get other assistance under a VA program). Therefore, it is important to weigh your options early to compare what is appropriate based on your individual military service and education needs.

It is also important to note that Yellow Ribbon schools provide additional tuition assistance under the Post-9/11

G.I. Bill, and you may be eligible for that aid depending on the institution you apply to attend.

- Schools may voluntarily enter into an agreement with VA to pay established charges not covered under the Post-9/11 GI Bill.
- Under this agreement, VA will match each additional dollar provided by the school (up to 50 percent of the established charges not already covered under Chapter 33).
- This benefit is only available to individuals entitled to the 100 percent benefit rate.

#### **IV. Pension Fraud**

##### **What is a pension?**

A pension is a benefit paid to veterans who have limited or no income, and who are either (1) age 65 or older, or (2) under 65, and are permanently and totally disabled, or a patient in a nursing home, or, are receiving Social Security disability payments. Veterans who are more seriously disabled may qualify for Aid and Attendance or Housebound benefits.

The VA veteran pension program is means tested, so to qualify, veterans must meet certain low-income criteria as outlined by federal law.

##### **What Is DIC?**

Dependency and Indemnity Compensation is a monthly benefit paid to eligible survivors of

- a military service member who died while on active duty, active duty for training, or inactive duty training, OR
- veteran whose death resulted from a service-related injury or disease, OR
- veteran whose death resulted from a non service-related injury or disease, and who was receiving, or was entitled to receive, VA Compensation for service-connected disability that was rated as totally disabling for at least 10 years immediately before death, OR
- since the veteran's release from active duty and for at least five years immediately preceding death, OR
- for at least one year before death if the veteran was a former prisoner of war who died after September 30, 1999.

##### **What should you watch out for?**

Unfortunately, there are many individuals and for-profit businesses operating illegal veterans benefit scams. These individuals and companies most often come from the senior financial services industry. An almost certain give-

away is that they will speak about “Aid & Attendance” and will want very detailed information regarding your finances. The main goal of these groups is to convert your assets into an annuity.

More information about the income and other requirements can be found here: <http://www.military.com/benefits/veteran-benefits/veterans-pensions.html>

Insurance companies pay these groups a generous commission on these sales. In some cases, an annuity may permanently disqualify a VA claimant for Medicaid in the future. If you are approached by any individual or group proposing to offer VA assistance, demand to see their VA accreditation credentials. If they cannot produce these credentials, do not do business with them.

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