



NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

COMPLICATED DEPENDENCY ISSUES RELATED TO VA BENEFITS

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ALEXIS IVORY



- Staff Attorney, NVLSP Training Dept. & Lawyers Serving Warriors
- Previously served as Counsel to Board of Veterans' Appeals
- Helped develop NVLSP's VA Benefit Identifier App

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AGENDA

- Why Do We Care?
- Who Qualifies As A Dependent?
- Marriage
- Children
- Helpless Children
- Impact of Divorce
- Apportionment
- Death
- Fugitive Felon
- Simultaneously Contested Claims
- Real Life Questions



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WHY DO WE CARE?



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38 U.S.C. § 1115

• **38 U.S.C. § 1115**, Additional compensation for dependents, lists specific monthly allotments for Vets with at least 30% SC disability rating and:

- (a) a spouse, but no child
- (b) a spouse and one or more children
- (c) no spouse, but one or more children
- (d) a parent dependent upon the Vet for support

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ADDITIONAL BENEFITS

- Educational Assistance
- Accrued Benefits
- Dependency and Indemnity Compensation (DIC)
- Death Pension
- Health Care (CHAMPVA)
- Home Loan Guaranties




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WHO QUALIFIES AS A DEPENDENT?

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CATEGORIES OF QUALIFYING FAMILY RELATIONSHIPS


- Spouse/Surviving Spouse
- Child/Surviving Child
- Dependent Parent/Surviving Parent



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MARRIAGE



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SAME SEX COUPLES



- Can married same sex couples receive spousal and survivor benefits in the same manner as opposite sex couples?



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SAME SEX COUPLES



- Under 38 U.S.C. § 101 (31), it would appear that same sex couples would not be entitled to VA spousal or survivor benefits.
- However, since U.S. Supreme Court decision in *U.S. v. Windsor*, 133 S. Ct. 2675, 2693 (2013), the VA no longer follows 38 U.S.C. § 101 (31).

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VALID MARRIAGE




- Under 38 C.F.R. §§ 3.50(a) and 3.1(j), a marriage must be valid
- The two requirements for a valid marriage are:
 1. Free to marry at the time of marriage
 2. Formed a valid marriage
 - Traditional marriage
 - Valid common law marriage
 - This is state dependent




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STATES & COMMON LAW MARRIAGE




- 9 states + D.C. allow common law marriage
- 13 states never permitted common law marriage
- 28 states no longer permit common law marriages, but will recognize a domestic common law marriage if it was contracted in the state prior to the date of abolition



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STATES & COMMON LAW MARRIAGE



States that recognize common law marriage:


- Colorado: Colo. Stat. §14-2-109.5
- Iowa: Iowa Code §595.1A
- Kansas: Kan. Stat. §23-2502; Kan. Stat. §23-2714
- Montana: Mont. Stat. §40-1-403
- New Hampshire (for inheritance purposes only): N.H. Stat. §457:39



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STATES & COMMON LAW MARRIAGE



- Oklahoma: recognized, but after 1998 complicated
- Texas: Tex. Family Law §1.101; Tex. Family Law §2.401-2.402
- Rhode Island: recognized, but hard to prove
- Utah: Utah Stat. §30-1-4.5
- Washington, D.C.: DC § 46-401

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STATES & COMMON LAW MARRIAGE

No longer allow common law marriage, but will recognize such marriages if they existed prior to the prohibition date

- Alabama: prohibition date Jan. 1, 2017
 - Ala. Code § 30-1-20 (2018)
- Florida: prohibition date Jan. 2, 1968
 - Fla. Stat. Ann. § 741.21.
- Georgia: prohibition date Jan. 1, 1997
 - Ga. Code Ann. § 19-3-1.1
- Idaho: prohibition date Jan. 1, 1996
 - Idaho Code Ann. - Title 32 - Chapter 02 § 32-201

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STATES & COMMON LAW MARRIAGE

No longer allow common law marriage, but will recognize such marriages if they existed prior to the prohibition date

- Indiana: prohibition date Jan. 1, 1958
 - Ind. Code Ann. § 31-11-8-5
- Michigan: prohibition date Jan. 1, 1957
- Minnesota: prohibition date Apr. 27, 1941
- Mississippi: prohibition date Apr. 5, 1956
- Nevada: prohibition date Mar. 29, 1943

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STATES & COMMON LAW MARRIAGE

No longer allow common law marriage, but will recognize such marriages if they existed prior to the prohibition date

- New Jersey: prohibition date Dec. 1, 1939
- Ohio: prohibition date Oct. 10, 1991
 - Ohio Rev. Code Ann. § 3105.12
- Pennsylvania: prohibition date Jan. 1, 2005
 - 23 Pa. Cons. Stat. § 1103
- South Dakota: prohibition date July 1, 1959
- South Carolina: prohibition date July 25, 2019
 - Stone v. Thompson, 426 S.C. 291 (2019)

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STATES & COMMON LAW MARRIAGE



- If a common law marriage is established in a state that recognizes common law marriage, and the couple moves to a state that does not recognize common law marriage, that new state might recognize the previously established common law marriage.

- Check state law!



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MARRIAGES DEEMED VALID



- Where an attempted marriage of a claimant to the Vet was invalid by reason of a legal impediment, the marriage will nevertheless be deemed valid if:

- a) The marriage occurred 1 year or more before the Vet died or existed for any period of time if a child was born of the purported marriage or was born to them before such marriage, and
- b) The claimant entered into the marriage without knowledge of the impediment, and

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MARRIAGES DEEMED VALID



- c) The claimant cohabited with the Vet continuously from the date of marriage to the date of his or her death as outlined in 38 C.F.R. § 3.53, and
- d) No claim has been filed by a legal surviving spouse who has been found entitled to gratuitous death benefits other than accrued monthly benefits covering a period prior to the Vet's death.

- 38 U.S.C. § 103(a)

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SURVIVING SPOUSE



- **Must be able to show that he/she was the valid or deemed-valid spouse of Vet at the time of Vet's death**
- **May have to satisfy one or more of:**
 - One year of marriage to Vet
 - Continuous cohabitation with Vet during the marriage or deemed-valid marriage
 - No remarriage after Vet's death (only in some cases)

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SURVIVING SPOUSE CONTINUOUS COHABITATION



- **Exceptions:**
 - Separations that occurred during the course of the marriage, regardless of fault, are irrelevant if no longer estranged at the time of Vet's death
 - If separation was due to the misconduct of Vet or procured by Vet
 - Lived apart for medical/business/other reasons that do not show intent on the part of the surviving spouse to desert the Vet
 - Living apart because of marital discord, but claimant not materially at fault

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REMARRIAGE BEFORE VET'S DEATH



- **If claimant remarried another individual before the Vet died, then he/she will be denied surviving spouse status**
- 38 U.S.C. § 101(3)

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REMARRIAGE AFTER VET'S DEATH

- **Exceptions to the general rule that remarriage bars entitlement to VA benefits:**
 - Remarriage is void or annulled
 - Remarriage or relationship terminated
 - Surviving spouse still remarried, but remarriage occurred on or after age 57 and initial claim for survivor benefits pending on or filed after 1/1/2004
 - For DIC and CHAMPVA, remarriage occurred on or after age 55


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CHILDREN




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WHO IS A CHILD?

- **A child is:**
 - An unmarried person
 - Meets age restrictions
 - Under the age of 18
 - Between 18 and 23, if pursuing higher education
 - Any age, if a "helpless child" (more on this later)
 - 38 U.S.C. § 101(4)(A); 38 C.F.R. § 3.57




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WHO IS A CHILD?

- **A child is:**
 - A biological child
 - A legally adopted child
 - A stepchild who is a member of the household or was a member at the time of the Vet's death
 - An illegitimate child in certain circumstances
- 38 U.S.C. § 101(4)(A); 38 C.F.R. § 3.57


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O'BRIEN v. WILKIE 948 F.3D 1339 (FED. CIR. 2020)

- Under a court order, Vet took legal guardianship of D.B., his stepdaughter's minor son, and sought additional dependent compensation for D.B.
- Vet asserted that the term "dependents" in 38 U.S.C. § 1115 should include any dependent in a Vet's family for whom he bears the costs of dependency


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O'BRIEN v. WILKIE

- Court held that dependency compensation is only available for spouses, children, and dependent parents of eligible Vets
- D.B. did not fit into any of the categories of dependents, so Vet could not receive additional compensation from VA based on D.B.

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ADVOCACY ADVICE




- **Dependency allowance can only be paid for individuals who meet the definitions in 38 U.S.C. §§ 101(4)(A) and 1115**
- **A minor in the custody of a court-appointed guardian who is receiving VA benefits does not meet this definition**
- **Possible option to qualify minor as a “child” for VA purposes: Adoption of minor by Vet**
- **If no adoption, do not pursue dependency allowance**

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HELPLESS CHILD

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SURVEY #1


- **When must a person become “helpless” in order to be considered a helpless child for VA purposes?**
 - A. Prior to age 18
 - B. Prior to age 23, if in school
 - C. Age does not matter



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ANSWER







- A helpless child is a biological child, stepchild, or adopted child of a Vet who, before turning 18, became permanently incapable of self-support.
- The child may fit within this category due to either a physical or mental disability.
- 38 U.S.C. 101(4)(a)(II); 38 C.F.R. 3.315(a) (2020)

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HELPLESS CHILD




- In order to qualify a child as a helpless child, a claimant should submit medical or psychiatric reports, vocational or educational assessments, and lay evidence showing that the child had mental or physical incapacity before he or she turned 18.
- 38 U.S.C. § 101(4)(a)(II)
- 38 C.F.R. § 3.315(a) (2020)




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HELPLESS CHILD



- The question of whether a child is permanently incapable of self-support is one of fact to be determined by the VA rating agency based on competent evidence of record.
- A married person cannot attain helpless child status.

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HELPLESS CHILD

3) The fact that a child supports himself or herself undermines the argument that the child is permanently incapable of self-support.

- Employment that is only casual, intermittent, tryout, or terminated after a short period by reason of disability should not preclude entitlement to helpless child status.
- VA must bear in mind that certain children, because of their poverty or other reasons, might be forced or allowed to work, even though the child could properly be deemed incapable of self-support
- 38 C.F.R. § 3.356(b)(2)

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HELPLESS CHILD

• A child loses “helpless child” status if the child marries, becomes employed, or is deemed capable of self-support


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IMPACT OF DIVORCE




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SURVEY #2

- What can be divided as an asset/property in divorce?
 - VA disability compensation
 - Regular military retirement pay
 - Military disability retired pay
 - All of the above
 - None of the above



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ANSWER

B

- VA compensation is NOT an asset that can be divided in a divorce.
- Military disability retired pay is NOT an asset that can be divided in a divorce.
- Regular (non-disability) military retirement pay IS an asset that can be divided in a divorce.
 - Uniformed Services Former Spouses' Protection Act

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CHILD/SPOUSAL SUPPORT

- For purposes of determining spousal support (alimony) and child support:
 - VA compensation can be counted as income, because it is designed to replace lost income that would have been used to support the Vet's family.
 - Check your state's laws!
 - States can enforce payment of court-ordered support by jailing a Vet for contempt until payment is secured, even if Vet's sole source of income is VA benefits.
 - Rose v. Rose*, 481 U.S. 619 (1987)
 - VA Gen. Coun. Prec. 74-90 (July 18, 1990)

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GARNISHMENT

- VA compensation can be garnished by the state when the Vet does not make alimony or child support payments:
 - Only if Vet has waived military retired pay to obtain the VA compensation
 - Only the VA compensation paid in place of military retirement pay can be garnished
 - Remainder of the disability compensation is protected
 - If Vet has *not* waived his or her military retired pay, VA benefits *cannot* be garnished at all

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HOW MUCH IS GARNISHED?

- The amount garnished is up to VA
 - Usually between 20% and 50%
- VA considers:
 - Other sources of income
 - Special needs of both parties
 - Income available to former spouse



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HOW MUCH IS GARNISHED?

- Outside of military retired pay, garnishment is not permitted when:
 - It would cause Vet undue financial hardship
 - Former spouse is living with another and acting like they are married
 - Former spouse guilty of “cheating” or infidelity
 - There has been no claim for apportionment


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APPORTIONMENT CLAIMS


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WHAT? WHEN?

- **Apportionment is when VA assigns part or sometimes all of a competent Vet's benefits to a family member**
- **This is done when:**
 - Vet is not living with his/her spouse
 - Vet is failing to support a family member for whom the Vet is responsible
 - Vet is incarcerated
 - Vet is barred from receiving benefits
 - Incompetent Vet is hospitalized and has no fiduciary or guardian

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WHO?

- **An apportionment may be paid to or for a Vet's**
 - Estranged spouse
 - Child that is in an estranged or former spouse's custody
 - Child that is not living with the Vet or the Vet's surviving spouse, or
 - Dependent parent
- **VA disability benefits will not be garnished for alimony or child support payments until Vet's former spouse first elects to receive the apportioned share of it**

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HOW?

VA will consider a claim for an apportionment only upon receipt of VA Form 21-0788, Information Regarding Apportionment of Beneficiary's Award



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APPORTIONMENT

VA may apportion benefits to a Vet's dependent, even if the dependent is not on the beneficiary's award, as long as the dependent's relationship to the Vet is properly established

VA cannot add such a dependent to the award unless the beneficiary submits the appropriate form.

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DEATH

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BENEFITS AFTER VET'S DEATH



- **Accrued Benefits Claim**
 - Claim for monthly VA benefit that was due and unpaid based on the evidence in the c-file at the time of the death of Vet (or other VA claimant)
 - If claim on appeal, adverse decision(s) vacated and adjudication starts anew at RO
- **Substitution Claim**
 - If claim for a monthly VA benefit is pending at the time of death, a survivor can step into Vet's shoes and continue the claim at the stage the Vet was in
 - Substitute can add new evidence!

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BENEFITS AFTER VET'S DEATH



- **DIC**
 - Monthly benefits from VA if the Vet's death was:
 - Service-connected, or
 - Vet had a totally disabling SC disability for the 10 years, 5 years, or in limited cases 1 year, prior to death, or
 - Due to negligent VA medical treatment or VR&E


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BENEFITS AFTER VET'S DEATH



- **Death Pension**
 - Available to surviving spouse of a Vet whose death is not service-connected
 - Need based
 - Wartime service required
 - Minimum length of active duty service required
 - 24 months continuous service for entry after 9/7/1980 (some exceptions)
 - 90-days of service for earlier entry

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SURVEY #3

• When a survivor files a claim using VA Form 21P-534EZ, which of the following benefits are included in that claim?


- A. DIC only
- B. DIC and death pension
- C. DIC and accrued benefits/substitution
- D. DIC, death pension, and accrued benefits/substitution

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ANSWER



• Claim on VA Form 21P-534EZ includes: DIC, Death Pension, and Accrued Benefits/Substitution

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DIC – ADDITIONAL ALLOWANCES

• Monthly DIC payment can be increased based on any of the following:

- At time of death, Vet had SC disability rated totally disabling (including TDIU) for a continuous period of at least 8 years immediately preceding death AND surviving spouse was married to Vet for those same 8 years
- For each dependent child
- If surviving spouse needs A&A
- If surviving spouse is housebound

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DIC EFFECTIVE DATES

- Claim for DIC is automatically construed as a claim for death pension and accrued benefits/substitution; and vice versa
- If survivor filed claim for DIC, and death pension claim was not adjudicated, the effective date for death pension claim will be preserved from the date of original filing
- 38 U.S.C. § 5101(b); 38 C.F.R. § 3.152(b)(1)


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WHAT HAPPENS IF SUBSTITUTE DIES?

- If substitute dies, another member of the same joint class or a member of the next lower category of substitutes listed in § 3.1000(a) may file a request to be substituted for deceased substitute
- A request to be substituted for deceased substitute must be filed no later than one year after date of substitute's death (not claimant's death)

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WHAT ABOUT REPRESENTING A SURVIVOR?

- Representation does not automatically transfer from deceased claimant to survivor claimant
- To represent survivor, even if substitution granted, a new VA Form 21-22a, "Appointment of Individual as Claimant's Representative," is required, even if you previously represented the deceased claimant

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DIC ELIGIBILITY: SPOUSES



- To qualify as a surviving spouse, claimant must first show he or she was valid spouse of Vet at time of Vet's death
- If spouse was divorced from Vet at time of death, spouse is NOT eligible for DIC
 - Regardless of who was at fault for divorce
- Surviving spouses who remarry on or after age 55 are not barred from receiving DIC

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ADULT CHILDREN



- Adult children are not eligible for substitution, DIC, or death pension
- Can receive accrued benefits / substitute if they paid the expenses of the deceased's last sickness and burial, but can only receive benefits up to the amount of those expenses
 - 38 U.S.C. § 5121(a); 38 C.F.R. §§ 3.1000(a)–(b)
- If no surviving spouse of claimant, can receive *Nehmer* benefits (retroactive benefits awarded to deceased claimant under *Nehmer*)
 - 38 C.F.R. § 3.816(f)

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FUGITIVE FELONS



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FUGITIVE FELON

- **An individual who is a fugitive and is:**
 1. Fleeing to avoid prosecution, custody, or confinement after conviction for a felony or an attempt to commit a felony (under the law of the place from which the person flees); or
 2. Violating a condition of probation or parole imposed for commission of a felony under federal or state law.
- **"Felony" includes a high misdemeanor if the offense would be considered a felony under federal law**


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FUGITIVE FELON

- **A Vet's dependent or survivor who is otherwise eligible for death pension, DIC, CHAMPVA, life insurance, or dependents' educational benefits may not be paid that benefit for any period during which the Vet or the dependent/survivor is a fugitive felon**
- **No apportionment permitted even if Vet and dependent are estranged**

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FUGITIVE FELON


- **If a child becomes a fugitive felon, DIC and death pension payments to the child's siblings are not affected**
- **If surviving spouse loses eligibility for DIC or death pension, additional payments to spouse for the children of Vet also stop**
- **BUT children would have independent eligibility and could file claim for benefit in their own right**

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SIMULTANEOUSLY CONTESTED CLAIMS


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WHAT IS A SIMULTANEOUSLY CONTESTED CLAIM?

- When the allowance of one claim results in the disallowance of another claim involving the same benefit, or the allowance of one claim results in the payment of a lesser benefit to another claimant
- 38 C.F.R. § 20.3(1)

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WHAT IS A SIMULTANEOUSLY CONTESTED CLAIM?

- Contested claim automatically arises if two people file a claim for the same benefit and:
 - Allege to be a deceased Vet's legal surviving
 - Spouse
 - Mother
 - Father
 - Manual M21-1, III.vi.6.A.1

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WHO APPROVES CONTESTED CLAIMS?



- **Veterans Service Center Managers (VSCMs) and Pension Management Center Managers (PMCMs) are responsible for approving all administrative decisions regarding a contested claim**
- **VSCMs and PMCMs may delegate authority to approve these decisions to a supervisor not lower than a coach**

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NEXT STEPS



- **If one of the claimants in a contested claim establishes entitlement, VA will:**
 - Deny the claim of the other claimant(s), and
 - Notify all claimants and other interested persons of the actions taken
 - **See VA Form 20-0998 (Right to Further Review)**

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SIMULTANEOUSLY CONTESTED CLAIMS



- **Special rules for appealing rating decision on a simultaneously contested claim:**
 - Review option limited to BVA appeal
 - **No HLR or Supplemental Claim option**
 - **NOD must be filed w/in 60 days**
 - **Brief/argument/request for different BVA lane due w/in 30 days after substance of NOD provided to other party**

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SIMULTANEOUSLY CONTESTED CLAIMS

- **BVA lane/docket:**
 - If either party requests hearing: Hearing docket
 - If one party requests to submit evidence, but other wants record review: Evidence docket
 - If both parties request record review: Direct docket
- **Favorable findings NOT binding**
 - Finding favorable to one claimant may be unfavorable to other claimant


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REAL LIFE QUESTIONS



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MARRIED VETERANS

- **Vet A and Vet B are married to each other and have a school-aged child**
 - Vet A is SC at 90%
 - Vet B is SC, permanent and total (P&T)
- **Both Vets are correctly being paid at the rate for a Vet with a spouse and child**
- **Child starts to use Chapter 35 VA education benefits based on Vet B's P&T status**

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MARRIED VETERANS



- Vet A and Vet B are married to each other and have a school-aged child
 - Vet A is SC at 90%
 - Vet B is SC, permanent and total (P&T)
- Both Vets are correctly being paid at the rate for a Vet with a spouse and child
- Child starts to use Chapter 35 VA education benefits based on Vet B's P&T status

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SURVEY #4



- Can Vet A (90% SC) continue to receive compensation rate for Vet with a child and spouse?
 - A. Yes
 - B. No
 - C. Maybe
 - D. Don't Know



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ANSWER



No!

- Vet A (and Vet B) will no longer be eligible increased compensation based on child.
- "The commencement of a program of education ... shall be a bar (1) to subsequent payments of compensation, [DIC], or pension based on the death of a parent to an eligible person over the age of eighteen by reason of pursuing a course in an educational institution, or (2) to increased rates, or additional amounts, of compensation, [DIC], or pension because of such a person whether eligibility is based upon the death or upon the total permanent disability of the parent."
- 38 U.S.C. § 3562

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CHILDREN ADOPTED FROM VET



- Can a Vet receive additional compensation for a biological child who was adopted out of the Vet's family?
- Could that child qualify for DIC benefits based on the Vet's death?

QUIZ TIME

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CHILDREN ADOPTED FROM VET



- Vet cannot be paid additional comp for a biological child who has been adopted out of the Vet's family
- BUT, the child can qualify for VA benefits payable to the child in the child's own right, such as DIC
- 38 C.F.R. § 3.57(a)(4)
- 38 C.F.R. § 3.58

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APPORTIONMENT



- Can DIC be apportioned by VA?



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APPORTIONMENT

- This may occur when a child of a Vet is in the legal custody of, but not living with, a surviving spouse who is receiving DIC and not reasonably contributing to the child's support
- 38 C.F.R. § 3.450

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HELPLESS CHILD

- If a helpless child is working through a disability program and only able to work with accommodations, will VA sever "helpless child" status?

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HELPLESS CHILD

- If the child earns enough to support himself or herself, VA can sever helpless child status. If not, VA will still consider the individual a helpless child.
- The fact that a child supports himself or herself undermines the argument that the child is permanently incapable of self-support.

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HELPLESS CHILD

- You can try and argue that the employment is:
 - Only casual
 - Intermittent
 - Tryout
 - Terminated after a short period by reason of disability
 - 38 C.F.R. § 3.356(b)(2)

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HELPLESS CHILD

- Remember, VA must bear in mind that certain children, because of their poverty or other reasons, might be forced or allowed to work even though the child could properly be deemed incapable of self-support
- Review Manual M21-1, III.iii.7.5.c for the steps the RO must take when a helpless child becomes employed

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MARRIAGE & DIVORCE

- What if a Vet and spouse were married to each other multiple times, including at the time of the Vet's death, but the most recent marriage occurred less than one year prior to the Vet's death?

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MARRIAGE & DIVORCE



- When a surviving spouse has been legally married to a Vet more than once, the date of original marriage will be used in determining whether the statutory requirement as to date of marriage has been met.

• 38 U.S.C. § 103(b)

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MARRIAGE & DIVORCE



• Example:

- Vet and spouse were married in January 1990
- They divorced in January 2012
- They married again in January 2016
- Vet died in July 2016
- Spouse qualifies as a “surviving spouse,” even though most recent marriage only lasted 6 months, because the date of the first marriage used for calculation

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MARRIAGE




• One-year marriage rule also does not apply to:

- Death pension claims, if the marriage took place before certain specified dates
 - 38 U.S.C. § 1541(f)(1); 38 C.F.R. § 3.54(a)(3)
- DIC claims, if the marriage occurred w/in 15 years after the period of service in which the injury or disease that caused the Vet’s death was aggravated or incurred
 - 38 U.S.C. §§ 1102(a)(1), 1304(1); 38 C.F.R. § 3.54

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SURVEY #5

- If a Vet was divorced at the time of the Vet's death, is the former spouse entitled to DIC benefits?
 - A. Yes
 - B. No
 - C. Not Sure


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ANSWER

- No - if they were not married at the time of the Vet's death, former spouse do not qualify for DIC and most other VA benefits.
- For example: Vet and spouse were married for 50 years, including during Vet's period of active service; Vet is extremely abusive and they divorce due to the fault of the Vet; the divorce is finalized on Oct. 26, 2020; and the Vet dies on Oct. 27, 2020
- The former spouse is NOT entitled to DIC, because he or she does not meet the definition of "surviving spouse"

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NVLSP VA BENEFIT IDENTIFIER

- Questionnaire/App: Helps Vets and VSOs figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- 3 WAYS to Access:
 - [NVLSP Website](#)
 - 
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- NVLSP offers private in-person and webinar training tailored to the needs of your organization
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