



# The QVap Trust: Having Your Cake and Eating It, Too!

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### Introduction

It is often the case that a Veteran who owns a home wishes to receive the [Veterans Non-Service Connected Disability Pension](#). Many times this Veteran is in an Assisted Living Facility (ALF). There is nothing wrong with this and the home is a non-counted asset for this VA program. However, in many of these cases, the Veteran and his family need the money from the home to help pay for the Veterans living expenses at the ALF. That usually means that the home needs to be sold. If the Veteran is receiving the pension at the time the home is sold and the proceeds received, that typically will cause disqualification from the program. This problem can be avoided by transferring the house to the children before applying for the pension, the children sell the house, and the children use the proceeds to assist the Veteran.

### Capital Gain Exclusion

This procedure will work but, unfortunately, the exclusion from capital gain for income tax purposes (up to either \$500,000 or \$250,000 depending on whether the Veteran is married or not) will not be available and tax will have to be paid. This additional tax could cost the family as much as \$100,000 assuming a 15% Federal and 5% state income tax. This places the family in a dilemma: wait to apply for the pension while the home is being marketed (maybe 8 months or more) or apply for the pension now and pay extra income tax.

### Living Trusts

When I first became involved with this area of the law and noted this dilemma, I set out to find a solution. Basically, when a client has more than one goal, in this case, obtain the pension now and avoid paying extra income tax, a Trust of some type is the answer. It was, too, with this problem. However, your garden variety Living Trust would not work. Assets in that type of Trust are totally within the control of the Veteran and, therefore, looked upon by the VA as still owned by the Veteran. Assuming the assets were more than the VA allowed; this would disqualify the Veteran from the pension.

### Irrevocable Trusts

We needed another type of Trust. Irrevocable Trusts were already being used extensively in this field. This type of Trust typically places the assets beyond the control of the Veteran and does



## About Living Trusts

San Diego estate planning, wills, trusts, probate, elder law attorney, lawyer Merwyn Miller  
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not interfere with qualification for the pension. There were many reasons that these types of Trusts were being used in lieu of simply transferring all of the Veteran's assets to his children. For example, cases in which the Veteran has more than one child but the desire is for only one to manage the assets, one of the children is a spendthrift or cannot handle money, the Veteran desires to protect the assets being transferred from being taken by his child's "ex" in a divorce or by a creditor of his child in a lawsuit. Sometimes the Veteran just likes the idea of the assets being in a Trust rather than in the children's pockets, at least until the Veteran dies. Although Irrevocable Trusts do not interfere with qualification for the VA pension, typically they do not avoid the increased income tax problem when the home is sold.

### QVap Trust

We needed another type of Trust for the income tax problem. To resolve this difficulty, I developed the QVap Trust. By adding several special clauses, the Trust avoids the increased income tax by allowing the Veteran to claim the exclusion from capital gain. It, also, does not interfere with pension eligibility.

### QVap Trust-Other Benefits

As I continued to research this type of Trust, I realized that there were a number of other benefits to it. If the family was not sure whether the house would have to be sold or not, the QVap would be a much superior method than the alternative. Traditionally, in these situations, the house would simply continue to be held by the Veteran while the pension was being received. But if the Veteran had lost mental competence when the time came to sell it, there would be a problem. In most cases there would be no documents in place, or the wrong documents to resolve the problem. So the family would have to go to court to obtain a court order allowing the sale. This could cost many thousands of dollars. Further, the problem usually would not be recognized until a buyer was found. What if the buyer was lost while the court case was being processed (a few weeks to a couple of months)? Would another eight months of marketing time be necessitated? With the QVap, the house could be sold without the Veteran's signature, so his mental incompetence would cause no delays in the sale. And if the house never needed to be sold to raise cash to take care of the Veteran, on the Veteran's death the children could sell the house and avoid all income tax on the pre-death capital gain (referred to as the step up in income tax basis). That's sort of like having your cake and eating it, too! And as a bonus, the Veteran can retain some control on the assets and the children with a QVap.

The pension referred to in this article is known as the "death pension" when being collected by the surviving spouse and both are sometimes referred to as the aid and attendance benefit. The Department of Veterans Affairs was formerly known as the Veterans Administration.

2007