



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2008-1005

To: Larry T. Harley
Executive Director
Southwest Virginia Legal Aid Society, Inc.
227 West Cherry Street
Marion, VA 24354

Date: December 8, 2008

Subject: Receipt of Court Ordered Guardian Fees

This Opinion is provided in response to your letter regarding whether guardianship fees granted by the court would violate LSC's attorney fees restriction.

Brief Answer

No, the definition of "attorney fees" provided in 45 C.F.R. § 1642.2 does not extend to guardianship fees granted by the court. Receipt of fees by SWVLAS as a result of participating in the Virginia Department of Aging's ("DOA") Guardianship of Last Resort ("GOLR") project does not violate the LSC Act or regulations.

Background

As we understand the situation from the information you provided to us, you have inherited GOLR, a grant-funded guardianship program regulated by the DOA, to serve as the guardian for 20 incapacitated indigent adults. At this time, the DOA is encouraging you to petition for receipt of a guardianship fee that is awarded by order of the circuit court pursuant to Virginia law. The funds received will help pay for services for the incapacitated people. You now wish to petition for the customary 5% guardianship fee awarded to guardians for only those clients who have Medicaid auxiliary grants and aggregate such fees in a separate fund to be used for the direct benefit of GOLR's clients.

Analysis

Section 504(a)(13) of LSC's 1996 Appropriations Act prohibits any recipient from claiming, or collecting and retaining attorneys' fees permitted or required under Federal or State law.¹ This restriction has been incorporated by reference in all subsequent LSC appropriations. LSC revised 45 C.F.R § 1642 to implement this restriction. The regulation defines attorneys'

¹ PUB. L. 104-134, 110 STAT. 1321 (1996).

fees as “an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the awarding of such fees...”² Additionally, the regulation defines the term “award” as used in the definition of attorneys’ fees to mean “an order by a court or an administrative agency that the unsuccessful party pay the attorneys’ fees of the prevailing party or an order by a court or administrative agency approving a settlement agreement of the parties which provides for payment of attorneys’ fees by an adversarial party.”³ The accompanying definition of “award” in the regulation serves to emphasize the circumstances in which attorneys’ fees apply. In your situation, the guardianship fee is not being awarded in compensation for your legal services or resources. Instead, the aggregate funds will be more in the nature of reimbursement for costs since they will be used to directly benefit the client for expenses not covered by the DOA grant. Thus, the definition of attorneys’ fees does not extend to guardianship fees.

The most relevant portion of the regulation to your situation is 45 C.F.R. § 1642.2(b)(2) which states what is not included within the meaning of attorneys’ fees. This section states that attorneys’ fees do not include “payments made to a recipient or an employee of a recipient pursuant to a grant, contract or other agreement by a governmental agency or other third party for representation of clients.”⁴ The guardianship fees for which you seek to petition does not fall within the ambit of the statutory and regulatory attorneys’ fees prohibition. Instead, such fees clearly fall under 45 C.F.R. § 1642.2(b)(2). The preamble to the regulation specifically notes that a payment by a governmental agency or other third party to a recipient to represent clients is not an attorneys’ fee because such payments are generally made under a grant or contract.⁵ Furthermore, such a payment does not consist of an award ordered by a court or administrative party that the unsuccessful party pay attorneys’ fees to the prevailing party.

In addition, 45 C.F.R. § 1642.3 prohibits LSC recipients from claiming, or collecting and retaining attorneys’ fees in any *cases*. Upon revision of the prohibition section of the regulation, the Corporation decided to replace “cases or matters” with “cases” to clarify the situations in which attorneys’ fees would apply. In distinguishing between “cases” and “matters,” the Corporation turned to 45 C.F.R. § 1635.2. A case is defined as a “program service in which the attorney of a recipient provides legal services to 1 or more clients.”⁶ On the other hand, a matter refers to “an action which contributes to the overall delivery of program services but does not involve direct legal advice to or legal representation of 1 or more specific clients.”⁷ The Corporation intended for attorneys’ fees to apply to actual cases and parties in dispute where

² 45 C.F.R. § 1642.2(a).

³ 45 C.F.R. § 1642.2(c).

⁴ 45 C.F.R. § 1642.2(b)(2).

⁵ 62 Fed. Reg. 25863 (May 12, 1997).

⁶ 45 C.F.R. § 1635.2.

⁷ *Id.*

direct legal advice is involved. Furthermore, the preamble to the regulation specifically notes that “the rule uses the term ‘cases’ and does not refer to ‘matters,’ as does the underlying statute, because attorneys’ fees may only be derived from cases.”⁸ Therefore, your role as guardian and receipt of guardianship fees constitutes a non-legal matter and is not a “case” to which attorneys’ fees apply. Additionally, acceptance of the guardianship fees would not violate the LSC Act or regulations.

Very truly yours,



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