

WHITE PAPER
Legislative Changes to §744.602 et. seq.

I. SUMMARY

The issue presented is a set of technical amendments to §744.604(4) and (7). Specifically, these sections of the statutes relate to definitions of “Benefits” and “Income” under the VA Guardianship Law.

These changes are required to correct an inconsistency in existing statute and its unfair interpretation by the Department of Veterans Affairs Regional Office in Florida related to the payment of commissions to professional guardians/fiduciaries on receipt and management of Social Security benefits paid on behalf of disabled veterans. These changes have no fiscal impact on state funds.

II. CURRENT SITUATION

The Department of Veterans Affairs (DVA) has the statutory power to appoint VA guardians of disabled veterans who the DVA considers incompetent to manage their government benefits. This power results in the appointment by a judge of VA Guardians for incompetent veterans, such guardians reporting to both the Florida court and the DVA. (§744.602 et. seq.)

Some years ago an issue of receipt and management of Social Security benefits by VA Guardians was resolved by adoption of §744.622, which provides that the VA Guardian may claim and manage moneys due from the U.S. Government, *payable through its agencies and entities*” (emphasis supplied). The section was adopted to clarify that the VA Guardian should have priority to receive Social Security funds, which otherwise could be paid directly to the veteran or to another representative payee. The purpose was to assure that such funds would be in the hands of a single responsible party who is accountable to the courts and the DVA, providing additional financial safeguards for the veteran.

§744.641 provides for payment of VA Guardian fees as a commission of 5% on the monthly income received and managed by the VA Guardian for the veteran’s benefit. These payments are automatic, in that they may be taken each month without petition to the court having jurisdiction over the guardianship.

In November 2006 the DVA Regional Office in St. Petersburg assumed a limited interpretation of §744.641 that *excluded* Social Security as commissionable income for which fees may be automatically taken. The DVA’s reasoning was that Social Security

was not specifically defined as “income” in the definitions section of the statute. §744.604 (4) and (7).

A) Impact of the Current DVA Policy

The result of excluding Social Security income from the aggregate commissionable income has resulted in denial of legitimately earned fees for services provided to disabled veterans, or alternatively, the requirement of unnecessary legal services and court hearings to vindicate the right of the VA Guardian to be paid for managing Social Security benefits for his/her veteran ward.

While in individual cases exclusion of Social Security income commissions is anywhere from \$100 to \$650 a year, in the aggregate over 20 or more guardianships this amounts to a loss of thousands of dollars in fee income each year. The guardian’s loss of Social Security fee income does not necessarily benefit the ward, as the guardian is doing a sometimes very difficult job managing the care of each disabled veteran, most of whom have psychiatric disabilities. Many VA Guardians care for up to 25% of our caseload *pro bono* where their VA benefits are less than the maximum allowed for 100% disability.

An attempt to resolve this issue with the Regional Counsel of the DVA in St. Petersburg has not reached an agreement that would negate the need for the legislative change. Currently, in each case where the DVA disapproves an accounting only for taking payment of guardian fees on Social Security benefits, the VA Guardian is forced to litigate before the court the issue of payment of commissions on Social Security benefits pursuant to §744.641 under one of two theories:

- a) The receipt and management of Social Security funds under §744.641 should be read *in pari materia* with §744.622 which empowers the guardian to receive and manage Social Security funds, and is therefore commissionable for guardian fees; or
- b) Receipt and management of Social Security funds constitutes *extraordinary guardian services* under §744.641 for which guardian fees may be claimed by petition to the court (with or without approval by the DVA). Such petition requires attorney services and court appearances, for which attorney fees are properly levied. This alternative is substantially more costly to the guardianship and the ward.

To date the courts at the time of a hearing are authorizing the guardian to claim that portion of Social Security income to be commissionable and payable under the 5%

clause of §744.641.

The current policy at the DVA Regional Office requires its Legal Instrument Examiners (LIE's) who audit the annual accountings to specially audit Guardian Fee commissions, separately calculate the amount of Social Security funds received, and require that commissions on Social Security funds be pled as extraordinary guardian services for which the VA approved amount will be equivalent to the 5% commission. This process adds substantial unnecessary time and labor to the process of auditing an annual accounting, to the detriment of efficient workflow for the DVA and cost to the taxpayer. Additionally, if the guardian has paid himself/herself commissions on Social Security funds, some LIE's require the guardian to refund such Social Security commissions to the veteran's account and obtain a separate court order authorizing payment of that same commission. This requires several hours of attorney services preparing the pleadings and the time of a court hearing and other legal process, wasting limited court resources. The DVA generally does not object to the payment of such commissions, and in fact executes Waivers and Consents for payment of such commissions.

III. PROPOSED STATUTORY CHANGES

This problem may be easily fixed by amendment to §744.604(4) and (7) to coordinate with the powers granted by §744.622 related to moneys due from the United States Government, "*payable through its agencies or entities. . .*"

The effect of these statutory changes allows VA Guardians to be paid commissions on all benefits and income under §744.641, eliminates the need for separately calculating income that is otherwise commissionable, and reduces the amount of guardian, accountant, guardian's attorney and DVA staff time and resources in preparing and auditing annual accountings. It also eliminates the utilization of court time and a resource in adjudicating a matter that has which is generally decided in favor of the guardian.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this statutory change has the potential of savings of court time and resources by eliminating the requirement of separate pleadings and hearings on payment of guardian fees that is otherwise already defined and decided by statute under §744.641.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This statutory change has no direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

None

VII. OTHER INTERESTED PARTIES

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