

STATE OF TENNESSEE

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Opinion No. 05-185

DCS' Authority to File CICA Claim on Behalf of Children in State Custody

QUESTIONS

1. If a court awards the Department of Children's Services (DCS) custody of a child, may DCS be considered the guardian of the child for the limited purpose of signing and filing a Criminal Injuries Compensation ("CICA" or "the Act") claim on behalf of the child pursuant to Tenn. Code Ann. § 29-13-102(2)?
2. If yes, does the Department have the authority to request private attorneys, including the child's guardian ad litem ("G.A.L.") appointed pursuant to Tenn. Code Ann. § 37-1-149, to represent DCS as the guardian of the minor child in filing a CICA claim?
3. If yes, are these attorneys eligible for attorney's fees pursuant to Tenn. Code Ann. § 29-13-112?

OPINIONS

1. Yes. DCS has the authority to file CICA claims on behalf of children in its custody.
2. Yes. DCS has the authority to request a private attorney, including a Title 37 guardian ad litem, to represent DCS, the child's guardian for purposes of filing a CICA claim.
3. Yes. Any attorney, including a Title 37 guardian ad litem, requested by DCS to represent a child in its custody in a CICA claim can recover attorney's fees under the Act.

ANALYSIS

The Criminal Injuries Compensation Act provides compensation for losses and expenses incurred by crime victims. *See* Tenn. Code Ann. §§ 29-13-101 through 119. The Act is remedial legislation. *See Big Fork Mining Co. v. Tennessee Water Quality Control Bd.*, 620 S.W.2d 515, 520 (Tenn. Ct. App. 1981) (quoting 82 C.J.S. *Statutes* § 388 (1975) to define a remedial statute as "one 'designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good, and generally to be liberally construed'"). Tennessee courts have held that remedial statutory schemes should be construed liberally in favor of individuals claiming the compensation afforded by such schemes. *See, e.g., Betts v. Tom Wade Gin*, 810 S.W.2d 140, 142-43

(Tenn. 1991) (holding that workers compensation statutes should be interpreted liberally to “ensure that injured employees are justly and appropriately reimbursed for debilitating injuries”); *Weaver v. Wallace*, 565 S.W.2d 867, 869-70 (Tenn. 1978) (holding that unemployment benefits statutes should be liberally construed in order to ensure that a limitation on benefits would not cut off claimants who were not clearly intended to be excluded). Accordingly, the Act should be liberally construed to enable victimized children in state custody to access any compensation to which the Act entitles them.

The Act intends that victimized children may recover compensation. It defines a “claimant” for compensation to include not only a crime victim but also “the guardian of a victim if the victim is a minor.” Tenn. Code Ann. § 29-13-102(2). The Act does not define the term “guardian;” presumably in the ordinary case the term would refer to a child’s parent. The Act also provides that in addition to compensation to the claimant, “reasonable attorney’s fees shall be determined and allowed to the attorney representing the claimant.” Tenn. Code Ann. § 29-13-112(a)(1). Thus, under the Act a child’s guardian plays a role separate from that assigned to the child’s attorney.

You have asked first whether DCS may qualify as a guardian of a child in DCS custody for purposes of the Act. As noted above, the Act does not define the term “guardian.” Moreover, there is no unitary definition of the term “guardian” or related terms such as “guardianship” elsewhere in Tennessee law; instead the term has different meanings to suit the different purposes of various chapters of the Tennessee Code. *See, e.g.*, Tenn. Code Ann. § 34-1-101(11) (defining the term “guardian” for purposes of guardianship and conservatorship as “a person . . . appointed by the court to provide partial or full supervision, protection and assistance of the person or property or both of a minor”); Tenn. Code Ann. § 36-1-102(24) (setting out an additional definition, for purposes of adoption, of “guardian” as “a person or entity appointed as guardian(s) as the result of a surrender, parental consent, or termination of parental rights”).

The purpose underlying CICA is to enable crime victims, including children, to recover compensation. It thus seems appropriate to the Act’s purpose that the term “guardian” as used in the Act should be defined broadly to include an individual or entity with legally established rights in and obligations to a child. DCS is such an entity. When a juvenile court awards custody to DCS under Title 37, the relevant statute defines the term “custody” to mean “the control of actual physical care of the child and includes the right and responsibility to provide for the physical, mental, moral and emotional well-being of the child.” Tenn. Code Ann. § 37-1-102(b)(8). Thus, DCS meets the definition of “guardian” for purposes of CICA when it obtains court-ordered custody of a child.

You have also asked whether DCS may request a private attorney, including the child’s guardian ad litem appointed pursuant to Tenn. Code Ann. § 37-1-149, to represent DCS in its role as the child’s guardian for purposes of filing a CICA claim. Ordinarily, the Attorney General is responsible for “the trial and direction of all civil litigated matters . . . in which the state of Tennessee or any . . . agency . . . of the state may be interested.” Tenn. Code Ann. § 8-6-109(b)(1). Here, however, the child is the interested party, not the State. In a CICA proceeding the attorney’s obligation is to represent the best interest of the child — the real party at interest. While “the

claimant's attorney" in a CICA proceeding may be perceived to be representing the guardian because the Act defines a minor victim's guardian to be the claimant, both the attorney and the guardian act on behalf of the minor victim. *See* Tenn. Sup. Ct. R. 8, Rule of Professional Conduct 1.14 cmt. 4. Inasmuch as the attorney would not be representing the State or a state official, DCS may request the attorney's representation without the involvement of the Office of Attorney General. *See* Tenn. Code Ann. §8-6-106.

A G.A.L. can act as both a child's guardian ad litem in certain juvenile court proceedings under Title 37 and the guardian's attorney in a CICA claim filed with the Department of Treasury. Supreme Court Rule 40 provides that it is the G.A.L.'s responsibility in various juvenile court proceedings to "advocat[e] for the child's best interest and ensur[e] that the child's concerns and preferences are effectively advocated." Tenn. Sup. Ct. R. 40(c)(1). If there is no conflict between the child's best interest in the juvenile court proceeding and the child's best interest in the CICA proceeding, a G.A.L. may represent the child in both.

Finally, you have asked whether private attorneys, most notably Title 37 guardians ad litem, whom DCS requests to represent a child can claim compensation under CICA. The answer is yes. The Act explicitly provides that an attorney for a claimant may be eligible for fees, setting out procedures to request fees and a fee structure. Tenn. Code Ann. § 29-13-112. The Act exempts certain classes of attorneys from fees, but not Title 37 guardians ad litem or attorneys otherwise representing children in DCS custody. Tenn. Code Ann. § 29-13-112(b). It is irrelevant that a Title 37 guardian ad litem is paid separately under Title 37 to represent children in Title 37 proceedings. *See generally* Tenn. Code Ann. §§ 37-1-149 and 37-1-150; Tenn. Sup. Ct. R. 40. Title 37 funds should no more compensate the guardian ad litem for performing Title 29 functions than Title 29 funds should compensate the guardian ad litem for performing Title 37 functions. Accordingly, an attorney, including a Title 37 guardian ad litem who files at DCS' request a CICA claim on behalf of a child in DCS custody, is eligible for attorney's fees pursuant to Tenn. Code Ann. § 29-13-112.

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