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## PERSONAL CARE SERVICE CONTRACTS FOR NURSING HOME RESIDENTS

A recent Louisiana appellate case provides insight regarding the use of personal care service contracts for persons residing in nursing homes and who may be receiving Medicaid assistance.

In *Brewton v. State of Louisiana Department of Health and Hospitals* (No. 06-CA-804, March 13, 2007), the Fifth Circuit Court of Appeal for the State of Louisiana considered the denial of Medicaid benefits on behalf of Mary Dancy Brewton. In 2003, Ms. Brewton was admitted to a nursing home as a Medicaid patient. Her husband remained at home until April 2003, when he entered the same nursing home as a private pay patient. The family home was listed for sale in July 2003. In August 2003, the Brewtons entered a personal care service agreement (PCSA) with their niece, the niece's husband, and a nephew. The three relatives were to provide personal services to the Brewtons over their lifetimes. The agreement was specific regarding the services to be provided, and a lump sum payment of \$150,000 was to be made after the sale of the Brewtons' home. The nephew was the agent under Ms. Brewton's general power of attorney.

The Brewtons' residence was sold in November 2003, and a total of \$118,805.22 was paid to their niece, the niece's husband and their nephew under the terms of the personal care service agreement. When Mr. Brewton applied for Medicaid in May 2004, the Department of Health and Hospitals (DHH) became aware of the sale of the residence, as well as the PCSA and the payments to the care providers. DHH imposed a transfer of assets penalty for the payments to the providers, stating that the agreement "was not actuarially sound because recipients [were] unable to receive agreed services due to nursing home admission." Ms. Brewton's penalty period was 13 months, beginning in March 2004.

DHH's determination was appealed to an Administrative Law Judge (ALJ), who upheld DHH's decision. Ms. Brewton appealed to the district court, which reversed the ALJ's decision. DHH appealed the district court's ruling. The ALJ had held that the services provided in the PCSA were already provided to Ms. Brewton by Medicaid when the agreement was entered into, and thus had no value. The ALJ also held that the payments to the providers, made more than seven months after the agreement was signed, and four months after the house was sold, supported her conclusion. The district court found that the only issue properly before the ALJ was whether or not the payment of funds to the providers was uncompensated so as to trigger a penalty period. The court found that the ALJ's assertion that any personal care services rendered to a nursing home resident are of no value when the nursing home is receiving Medicaid is unreasonable. The district court relied on the analysis in *Reed v. Missouri Dep't of Soc. Serv.* (193 S.W.3d 839, Mo.App E.D. 2006).

The Court of Appeal discussed several Medicaid concepts, including valuable consideration and compensation. The Louisiana Medicaid Eligibility Manual discusses personal services contracts, and the "value of the compensation is the gross amount paid or agreed to be paid, and is based on the agreement, the expectation of the parties at the time of the transfer, and the form of compensation." Family members are among those permitted to be compensated for the care they provide. The affidavits provided by the providers revealed that they spent many hours rendering services to the Brewtons, as well as in preparing the home for sale. They provided services that were not duplicative of nursing home services, such as replacing clothing lost in the laundry, providing a phone and phone service, and obtaining several hearing aids for Mr. Brewton. They visited regularly to make sure Mr. Brewton cooperated with the staff, attended periodic conferences regarding the Brewtons' ongoing care, and made funeral arrangements for the couple at their request. They purchased a stereo and radio, found CDs and other music, and ordered cable television. They moved furniture from the home into the Brewtons' room, rode in the nursing home van to the Brewtons' various appointments, provided holiday gifts, brought a pet to visit upon request, and dealt with Medicaid personnel. The appellate court found the reasoning in the *Reed* case to be persuasive, as the providers here performed services similar to the ones that the plaintiff's daughter performed in *Reed*. The court in *Reed* stated, "We find that these services, among others, support Reed's independence, autonomy, well-being and care in ways that the facility's services do not. They enhance Reed's life in ways that the facility does not, and are above and beyond the care provided by the facility." The Louisiana Court of Appeal agreed with this rationale and affirmed the judgment of the district court.

Although the decision of this court is not binding, it makes a persuasive case for using personal care service contracts, even if the recipient is in a nursing home. The attorneys at Oast & Hook can assist clients with long-term care and financial planning, and a personal care service contract can be a valuable planning tool.

### Oast & Hook

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