

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO: 4D07-1275

L.T. No.: 07-262 F

PAMELA DEAN ON BEHALF OF VIVIAN PILATO,

Appellant/Petitioner(s)

V.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Appellee/Respondent(s).

_____ /

AMICUS BRIEF OF
ACADEMY OF FLORIDA ELDER LAW ATTORNEYS
(AFELA)
IN SUPPORT OF THE APPELLANT

Ellen S. Morris, FBN: 850306
Elder Law Associates PA
7000 W. Palmetto Park Rd., Ste 205
Boca Raton, FL 33433
Tel: 561-750-3850
Fax: 561-750-4069

Pamela M. Burdick, FBN: 295655
Pamela M. Burdick, PA
PO Box 11772
Fort Lauderdale, FL 33339
Tel: 954-765-3180
Fax: 954-760-4358

On behalf of AFELA

TABLE OF CONTENTS

TABLE OF CONTENTS.....2

TABLE OF AUTHORITIES.....3

IDENTITY AND INTEREST OF AMICUS.....4

SUMMARY OF THE ARGUMENT.....5-6

ARGUMENT

 I. The Department lacks authority to mandate terms in a Durable Power of Attorney.....7-9

 II. Fla. Statutes §709.08(7)(c) does not limit authority to execute a contract for personal services as the contract is separate, distinct and in addition to a grant of authority to make health care decisions10-11

 III. The Department must follow rule making procedures when making changes to the rules governing their programs.....12-13

 IV. Good public policy supports the use of Personal Service Contracts as they are often the only means of compensation for many families who provide long term care to the elderly at great personal and financial sacrifice13-15

CONCLUSION.....16

CERTIFICATE OF SERVICE.....17

CERTIFICATE OF COMPLIANCE.....18

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Blankfield v. Richmond Helthcare, Inc.</i> , 902 So 2d 296, (Fla 4 th DCA 2005).....	11
<i>De Bueno v. Castro</i> , 543 So. 2d 393 (Fla. 4 th DCA 1989).....	8
<i>Estate of Schriver v. Schriver</i> , 441 So. 2d 1105 (Fla. 5th DCA 1983).....	9
<i>Gorlick v. DCF</i> , 789 So.2d 1247 (Fla. 4 th DCA 2001).....	7, 10
<i>Thomas v. DCF</i> , 707 So.2d 954 (Fla. 4 th DCA 1998).....	10
 Other Authorities	
State of Florida Department of Children and Families Office Of Appeal Hearings:	
Appeal No. 05F-6457.....	8
Florida Department of Children and Families ESS Program and Policy Manual Section 1640.0614.04.....	9
 Statutes	
Fla. Statute §120.52(15).....	10
Fla. Statute §120.54.....	11
Fla. Statute §709.08 (7) (a) and (c).....	7, 10
Fla. Statute §765.102 (1).....	11

IDENTITY AND INTEREST OF AMICUS

The Academy of Florida Elder Law Attorneys (AFELA), in existence since 1993, is a not-for-profit statewide organization part of the umbrella organization of The National Academy of Elder Law Attorneys. AFELA's members are attorneys who represent seniors and persons with disabilities and their families in a variety of practice areas, including navigating long term care benefits and services and Medicaid qualification. It is AFELA's mission is to support elder law attorneys in the provision of legal advocacy, guidance, and services to enhance the lives of people as they age and those with special needs.

AFELA has an interest in this case as their member attorneys must analyze the validity of durable powers of attorney already in existence and create new durable powers of attorneys for their clients that must conform to Florida statutes and case law. AFELA attorneys likewise analyze and create personal service contracts for their clients which also must conform to Florida law. Durable power of attorneys and personal service contracts are germane to the issues in this appeal.

SUMMARY OF THE ARGUMENT

The hearing officer erroneously found that the failure to enumerate a contract for personal services in the Durable Power of Attorney (DPOA) precluded the agent from entering into such a contract. The Department is without authority to object to the DPOA's sufficiency to enter into a specific type of contract, or to challenge the validity of a contract based on the failure of the DPOA to specifically enumerate it.

The hearing officer also erroneously concluded that section 709.08 (7)(c) of the Florida Statutes requires an otherwise properly executed DPOA to include a specific power to make health care decisions in order for the agent to contract for personal services. An agent may hire health care aides; select a physician or contract for medical care in a nursing facility under a DPOA that does not include the power to make health care decisions. Section 709.08 (7)(c) refers to health care decisions in Chapter 765, the title of which is "Health Care Advance Directives".

The hearing officer improperly permitted the Department, in the absence of an enabling statute, rule or regulation, to create and implement a previously unauthorized policy to require a DPOA to enumerate the specific power to make a contract for personal services.

Finally, DPOAs must be written broadly in order to permit the agent to enter into all contracts the senior could have entered and to engage in contractual

obligations in the senior's best interest. As persons age, DPOAs created years before the senior was disabled will be used to enter all manner of contracts to protect seniors, including contracting for lifetime personal services and other contracts not yet conceived. Sound public policy suggests that families must not be discouraged or penalized for entering into personal services contracts with a disabled or frail elder person. The majority of long term care in America is provided by the disabled individual's families and done so without compensation and at a great personal and financial sacrifice. For some, the payment received under a personal services contract is crucial to their ability to provide the care and the seniors' lives are enhanced by family involvement. Therefore, public policy demands that the DPOA remain broad in scope in order to protect our Country's most vulnerable citizens.

ARGUMENT

I. The Department lacks authority to mandate terms in a Durable Power of Attorney

Section 709.08(7)(a), Florida Statutes (2006), provides that “Except as otherwise limited by this section, by other applicable law, or by the durable power of attorney, the attorney in fact has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the durable power of attorney.” There is no dispute that the Durable Power of Attorney in this matter authorized the Attorney-in-fact to exercise the broadest powers on behalf of the principal and to make and execute contracts on her behalf.

In spite of the law and these facts, the Department of Children and Families asserted below that Vivian Pilato’s failure to specifically enumerate the power to make or purchase a contract for personal services in the durable power of attorney (DPOA) left her agent without authority to make such contract. The Department’s assertion was made without reliance upon any supporting case law, rule, regulation or statute. Without requiring the Department to provide regulatory support or questioning the Department’s authority to examine the legality of the contract, the hearing officer found that the failure of the DPOA to enumerate a contract for personal services precluded the agent from entering into such a contract.

It is well established that the hearing officer’s conclusions must be supported by competent legal authority. In Gorlick v. Florida Department of Children and

Families, 789 So.2d 1247, 1248 (Fla.App. 4 Dist., 2001) this court found that “The hearing officer's conclusion that appellant's spouse was not a "valid representative because he has a vested interest" is unsupported by any statute, rule or precedent, which is probably the reason why the appellee has not filed a brief attempting to sustain the denial of benefits.” Similarly, the hearing officer’s conclusions in the instant case, are unsupported by any statute, rule or precedent.

In fact, when presented with a legally sufficient DPOA, executed with the requisite formalities, which includes a broad power to enter into contracts on the principal’s behalf, the Department is without authority to object to the document’s sufficiency to enter into a specific type of contract, or to require that the DPOA enumerate every conceivable type of contract for such contract to be valid. As recognized by the Hearings Officer in State of Florida Department of Children and Families Office of Appeal Hearings Appeal No. 05F-6457 (2006): “The only party asserting the breach (the Department) is not a party to the contract in question. The respondent’s role is limited to “examiner of eligibility” not as a judicial functionary deciding legal contractual issues.” [Parenthetical material added.]

"Generally, powers of attorney are strictly construed and will be closely examined in order to ascertain the intent of the principal." De Bueno v. Castro, 543 So. 2d 393, 394 (Fla. 4th DCA 1989). The DPOA in this case authorized the agent to:

exercise or perform any act, power, duty, right, or obligation whatsoever that I now have or may hereafter acquire ... relating to any person, item, transaction, thing, business, property ... or any matter whatsoever.” And further “to make, receive, sign, endorse, execute, acknowledge, deliver, and possess such applications, contracts, agreements, ... and such other instruments in writing or whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

As the Court stated in In re Estate of Schriver, 441 So.2d 1105, 1106-1107 (Fla. App. 5 Dist., 1983) “the statute is explicit in what cannot be done by the donee. It is not specific as to what can be done.” The Court goes on to say:

Of course, it does not say so in such words -- the words used are obviously meant to be all-inclusive to allow the donee to do any legal act the donor could do on her own. We interpret the statute and document to authorize the donee's signing documents which secure and protect any legal interest of the donor.

It is clear that Ms Pilato intended her DPOA to be likewise all-inclusive giving her donee the broadest powers to contract on her behalf. It was improper for the Department to argue that the personal services contract should be invalidated for failure to specify it in the DPOA. It was error for the hearing officer to be convinced to do so in the absence of any supporting law, and contrary to precedent in his own department.

II. FLA. STATUTES §709.08(7)(C) DOES NOT LIMIT AUTHORITY TO EXECUTE A CONTRACT FOR PERSONAL SERVICES AS THE CONTRACT IS SEPARATE, DISTINCT AND IN ADDITION TO A GRANT OF AUTHORITY TO MAKE HEALTH CARE DECISIONS.

The hearing officer reached an erroneous conclusion in holding that Section 709.08 (7)(c) Florida Statutes requires that a DPOA, which contains broad powers to make contracts on behalf of the principal, must include the specific power to make health care decisions before the agent may enter into a personal services contract that includes services related to overseeing health care. Again, the hearing officer's conclusion is unsupported by any statute, rule or precedent.

The hearing officer would require a DPOA to include a specific power to make health care decisions in order for an agent to act in any manner remotely connected with health care, such as hiring health care aides, selecting a physician or contracting for medical care in a nursing facility. Section 709.08 (7)(c) provides:

If such authority is specifically granted in the durable power of attorney, the attorney in fact may make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765.

The provision clearly intends to limit only such health care decisions contemplated by Chapter 765, which deals with advance directives, refusing medical treatment, and end of life decisions. No such powers or services were

contemplated in the personal services contract herein. The intent is clear from Section 765.102 “Legislative findings and intent”:

(1) The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.

The services in the instant personal services contract are not at all what were intended by Section 709.08 (7)(c).

Just as a health care proxy does not have the authority to bind the principal to a contract for admission to a nursing home because such a contract is not a health care decision, neither is the contract to provide personal services a health care decision. *See Blankfield v. Richmond Helthcare, Inc.*, 902 So 2d 296, 299-300 (Fla 4th DCA 2005) Rather, such a contract is clearly within the scope of the authority granted in the DPOA in this case. A review of the personal services contract in this case demonstrates further that no specific grant of the right to make health care decisions was required. The services include health monitoring, hiring care providers, securing nursing home and rehabilitation treatment, visitation, entertainment, purchasing clothing and personal effects, travel, funeral arrangements, investing, and bill payments.

III. THE DEPARTMENT MUST FOLLOW RULE MAKING PROCEDURES WHEN MAKING CHANGES TO THE RULES GOVERNING THEIR PROGRAMS.

The hearing officer states that there are rules, Federal regulations and state statutes that that must be adhered to when applying for Medicaid benefits. Indeed there are also rules that must be followed by the Department when approving applications for Medicaid. Those rules are found in the Department's ESS Program and Policy Manual. Section 640.0614.04 of the Department's own manual specifies the rules for Compensation in Support or Services. The department has not required a specific power to be enumerated in a Durable Power of Attorney to create a Personal Service contract ever before. In fact, this Court has upheld the validity of Personal Service Contracts when executed by an agent under a general Durable Power of Attorney and also ruled that a hearing officer cannot come to a conclusion that is unsupported by any statute, rule or precedent. *See Gorlick v. DCF*, 789 So.2d 1247 (Fla. 4th DCA 2001) and *Thomas v. DCF*, 707 So.2d 954 (Fla. 4th DCA 1998).

Attorneys, seniors, families and representatives of seniors rely on the Department's ESS Program and Policy Manual and established rules and procedures to determine whether the senior will meet the criteria for Medicaid benefits. The Department's counsel stated that a requirement of specificity has not been mentioned in past cases. By denying Medicaid eligibility on the basis that the

DPOA did not specifically authorize an agent to enter into a Personal Service Contract, the Department has illegally enacted a new rule. The definition of an agency “Rule” is found in Fla. Statute §120.52(15) and states in part:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule.

Fla. Statute §120.54 prescribes the procedures the Department must follow when making or changing one of their rules. The Department has always allowed an agent acting under a *general* and *broad* Durable Power of Attorney to enter into a Personal Service Contract as long as the contract was for fair market value. There is no dispute as to the fair market value of this contract, thus the order on appeal should be reversed.

IV. GOOD PUBLIC POLICY SUPPORTS THE USE OF PERSONAL SERVICE CONTRACTS AS THEY ARE OFTEN THE ONLY MEANS OF COMPENSATION FOR MANY FAMILIES WHO PROVIDE LONG TERM CARE TO THE ELDERLY AT GREAT PERSONAL AND FINANCIAL SACRIFICE.

Human life span has increased as medical science advances have conquered some deadly diseases. However as we live longer, we are afflicted with other “aging” diseases that present a challenge to the senior citizen population and a long term care crisis in this country. Medicaid is the only government benefit which helps pay for ever escalating long term care costs and is often insufficient as

the means for care. For example, in Florida, a Medicaid Waiver program is the only source for benefits which may help a senior remain in their own home by providing an aide, but the hours the benefit provides are often less than an hour a day. Therefore, children and relatives of seniors who require assistance must often make up the time difference in providing the care. They do so at great personal sacrifice such as time away from their own family, reduced hours at their job, loss of a job, increased stress and giving many hours of their own time. Even if the senior is placed in an institutionalized facility and Medicaid is the payor, there are additional costs and time required of the family member. Payment under a personal service contract alleviates financial stress of the care giver, and as result the senior is better cared for, emergent situations which cost Medicaid more money may be avoided and the senior has a higher quality of life.

The Durable Power of Attorney is an ages old established vehicle to allow an agent to enter into a contract on behalf of a principal and is specifically unaffected by the principal's subsequent incapacity. Often the Durable Power of Attorney is executed years before it is actually needed and when it is needed, the senior is often then incapacitated. The broad nature of a Durable Power of Attorney is crucial to allow it to work as it was meant to. It is impossible for a principal to anticipate all types of contracts which may arise during a long life span. Furthermore, disparate treatment of the poor or unsophisticated principal

would result if a document created by a sophisticated attorney who knows to include specific contractual powers would allow the personal service contract and a document created by the principal themselves would not. Personal Service Contracts are vehicles of good public policy and this Court should uphold the power to create them under a general power to contract in a Durable Power of Attorney and thus the order on appeal should be reversed.

CONCLUSION

Based on all of the foregoing arguments, Amicus respectfully requests that this honorable Court reverse or remand the administrative “Final Order” of the hearing officer.

Respectfully submitted,

ACADEMY OF FLORIDA
ELDER LAW ATTORNEYS

Ellen S. Morris, FBN: 850306
Elder Law Associates PA
7000 W. Palmetto Park Rd., Ste. 205
Boca Raton, FL 33433
Tel: 561-750-3850
Fax: 561-750-4069
emorris@elderlawassociates.com

Pamela M. Burdick, FBN: 295655
Pamela M. Burdick, PA
PO Box 11772
Fort Lauderdale, FL 33339
Tel: 954-765-3180
Fax: 954-760-4358
burdick@medicaidlawyer.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth by this Court's local rules. This brief contains Times New Roman, 14 point typeface.

By: _____
Ellen S. Morris

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished this 26th day of October, 2007 by U.S. mail to Colleen Farnsworth and Terry Verduin, counsel for Appellee, 111 South Sapodilla Avenue, Room 201, West Palm Beach Florida, 33401, and Robin Bresky, counsel for Appellant, 595 S. Federal Highway, Ste. 600, Boca Raton, FL 33432.

Ellen S. Morris
Fla. Bar No. 850306