

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 VIVIVAN PILATO,

Appellant/Petitioner(s)

V.

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Appellee/Respondent(s).

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**APPELLANT'S INITIAL BRIEF**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>	
TABLE OF CONTENTS .....	i	
TABLE OF AUTHORITIES .....	ii	
INTRODUCTION.....	1	
STATEMENT OF CASE AND FACTS .....	2	
SUMMARY OF THE ARGUMENT .....	3	
STANDARD OF REVIEW .....	4	
ARGUMENT		
I. THE FAIR HEARING PROCEEDING WAS NOT CONDUCTED IN ACCORDANCE WITH THE LAW AND APPELLANT WAS NOT AFFORDED PROCEDURAL DUE PROCESS.....		5-8
II. THE DEPARTMENT ERRONEOUSLY FOUND THE DURABLE POWER OF ATTORNEY DID NOT AUTHORIZE THE PURCHASE OF A PERSONAL SERVICE CONTRACT.....		8-13
III. THE AGENCY ERRONEOUSLY CHANGED ITS POLICY AND DENIED MEDICAID BENEFITS TO APPELLANT .....		13-15
CONCLUSION .....	16	
CERTIFICATE OF COMPLIANCE .....	17	
CERTIFICATE OF SERVICE .....	18	

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<i>Alterra Healcare Corp v. Bryant</i> , 937 So.2d 263 (Fla. 4 <sup>th</sup> DCA, 2006) .....	12
<i>Brister v. Department of Children and Families</i> , 906 So.2d 1187 (Fla. 4 <sup>th</sup> DCA 2005) .....	4,8
<i>Courts v. Agency for Health Care Administration</i> , (Fla. 1 <sup>st</sup> DCA 2007).....	14
<i>Ellingham v. Department of Children and Family Services</i> , 896 So.2d 926 (Fla. 1 <sup>st</sup> 2005) .....	4
<i>Estate of Schriver v. Schriver</i> , 441 So. 2d 1105 (Fla. 5th DCA 1983) .....	12
<i>Gorlick v. DCF</i> , 789 So.2d 1247 (Fla. 4 <sup>th</sup> DCA 2001). .....	13
<i>Steward v. Dep’t of Children and Families</i> , 865 So.2d 528, 530 (Fla. 1 <sup>st</sup> DCA 2003).....	9
<i>Thomas v. DCF</i> , 707 So.2d 954 (Fla. 4 <sup>th</sup> DCA 1998) .....	10

**FLORIDA STATUTES**

709.08 .....	9, 11
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**FLORIDA’S ADMINISTRATIVE CODE**

65-A1.204.....	5
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## **INTRODUCTION**

The Appellant, Pamela Dean on Behalf of Vivian Pilato, will be referred to as “Pilato” The Appellee, The Department of Children and Families, will be referred to as the “Department.” References to the appendix will be made to the appropriate exhibit letter and number included in the appendix. References to the Record are abbreviated as follows:

(V.) = Volume

(R.) = Record on Appeal

(T.) = Transcript - refers to Administrative Hearing of March 6, 2007

(Supp.) = Supplemental Record – Application for ICP Assistance

## STATEMENT OF FACTS AND CASE

Appellant Vivian Pilato was admitted to a nursing facility at the beginning of September of 2006. (V. 1, R.2) Later that same month, a durable power of attorney (DPA) was established appointing John Pilato, Appellant's son and Carla Pilato, Appellant daughter-in-law as Vivian Pilato's attorney-in-fact. *Id.*<sup>1</sup> (V.1, R. 16) A Personal Service Contract was signed by the Appellant's son and daughter-in-law, pursuant to the provisions of the DPA. (T. 5)

Appellant, through her authorized representative, Pamela Dean, submitted an application for Institutional Care Program (ICP) Medicaid benefits in November of 2006, seeking retroactive eligibility for the month of October, 2006 for nursing care facility fees. (Supp. R. 1-8) In January of 2007, Appellee, the Department, denied the Medicaid benefits and stated the reason was Appellant possessed income that was greater than allowed for the program. (V.1, R. 10) On January 10, 2007 a request for a hearing was made on behalf of Appellant. (V.1, R. 9) The request was granted. *Id.* A hearing on the denial of Medicaid benefits was ultimately held on March 6, 2007. (T. 1-19). This is an appeal from a final administrative order, entitled "Final Order" rendered by the administrative hearing officer.

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<sup>1</sup> The DPA was found to be valid by the hearing officer. (V.1, R. 4)

## **SUMMARY OF ARGUMENT**

The administrative hearing was not conducted in accordance with the law and Appellant was not afforded procedural due process as the Notice of Case Action stated reasons for denial of Medicaid benefits that were incorrect and ultimately not the reasoning used in the order on appeal. Further, the Department interpreted the durable power of attorney and erroneously found that the durable power of attorney did not authorize the purchase of a personal service contract. Moreover, the hearing officer incorrectly interpreted the law. Finally, the Department, at the discretion of the hearing officer, inappropriately changed an existing policy regarding Medicaid benefits and durable powers of attorney, to an unauthorized policy denying Medicaid benefits, based on the fact that a durable power of attorney must specifically enumerate the purchase of a personal service contract. Thus, the order on appeal should be reversed.

## **STANDARD OF REVIEW**

Courts exercise a de novo review of the Florida Department of Children and Family services conclusions of law. *Ellingham v. Department of Children and Family Services*, 896 So.2d 926 (Fla. 1<sup>st</sup> 2005) Further, an agency's final order based on conclusions of law is subject to de novo review and where the issues involve the application of the law to the uncontested facts, appellate review is de novo. *Brister v. Department of Children and Families*, 906 So.2d 1187 (Fla. 4<sup>th</sup> DCA 2005)

## ARGUMENT

### **I. THE FAIR HEARING PROCEEDING WAS NOT CONDUCTED IN ACCORDANCE WITH THE LAW AND APPELLANT WAS NOT AFFORDED PROCEDURAL DUE PROCESS**

In its “Notice of Action,” the Department denied Appellant’s application for two reasons. The reasons stated on the Notice of Action were:

Reason: INCOME IS MORE THAN ALLOWED FOR THIS PROGRAM and

Reason: YOU DID NOT FOLLOW THROUGH WITH A REQUEST FOR

ASSISTANCE. (V.1, R. 10) To begin with, the stated reason that income is

greater than allowed for the program simply does not make sense, as Appellant’s

income was not greater than allowed for the program. (Supp. R. 1-8) Next, the fact

that Appellant did not follow through with a request for assistance is also

nonsensical. The Notice of Action sent to Appellant by the Department, states that

the law supporting this “action” is R65A-1.204. However, R65A-1.204 is a portion

of Florida’s Administrative Code which deals with rights and responsibilities. 65-

*A1.204, F.A.C.* The fact that Appellant made an application for benefits, which

was denied by the department, in and of itself could not be a reason that Appellant

did not follow through with a request for assistance.

Nevertheless, neither of the above reasons were the real and ultimate reason for the denial of the application. This fact became clear in during the administrative law hearing.

HEARING OFFICER: Okay? I want to take this time to remind everyone these proceedings are being recorded to become part of the permanent record. And at this time I need to establish the issue of today's hearing. I'm marking Respondent Exhibit 1, which is a copy of the Notice of Case Action that was mailed on January 3<sup>rd</sup>, 2007, indicating that an application for, uh—

MR. MAIKKULA: ICP—

HEARING OFFICER: -- for Institutional Care Program Medicaid was denied because the income was more than what was allowed by the program.

MR. MAIKKULA: That isn't really the issue, either. But it's, again, a computer issue but it – it deals with power of attorney and the setting up a personal service contract.

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HEARING OFFICER: Oh, so – it has to do with the power of attorney and –

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HEARING OFFICER: Okay. But the bottom line is an application was denied.

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HEARING OFFICER: Okay. And let me—and the date of the application was 11/8/06 - -

MR. MAIKKULA: It's actually retroactive benefits just for the month of October.<sup>2</sup>

HEARING OFFICER: -- wants retro 10/06. Okay. Because the department has denied the benefits, you have the burden. You'll proceed with your testimony first. Afterwards the department will present theirs. You can ask questions, so go right ahead, please.

\*\*\*\*

MS. VERDUIN: Had you received a copy of my evaluation of that?

MS. SIMPSON: NO.

MS. VERDUIN: Yeah. And we can put that into the record.---Okay. Here. This is what we've been talking about. You certainly may have that.

HEARING OFFICER: One moment. I have Respondent Exhibit 4, which is a December 21, 2006 memo or notice – not a notice, just a memo—resolving the issue of whether a personal service contract would be viable for the application. (T. 3-5, 15-16)

Florida law is clear that the individual is to receive a fair hearing based on an *appeal of case action*. (Emphasis added)

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<sup>2</sup> The Notice of Case Action states: "Your MEDICALLY NEEDY APPLICATION dated 11/08/006 has been denied for the month of 12/2006."

(2) The individual has the right of confidentiality in accordance with subsection (3) of this rule, to receive prompt action, equitable treatment, *notification of any case action taken and to receive a fair hearing due to an appeal of case action.*

Department form CF-ES 2064, Your Rights and Responsibilities, October 2002, (incorporated by reference) explains these and other rights and responsibilities. This form is given to each payee individual receiving or applying for assistance. *Emphasis added.*

65- A1.204, F.A.C

(3) All individuals have the right to a confidential relationship with the department pursuant to the following federal regulations, federal statutes and Florida Statutes: for the food stamp program, Title 7 USC s. 2020(e)(8) (incorporated by reference), 7 CFR s. 272.1(c) (incorporated by reference), Section 414.295, F.S., Section 414.31, F.S.; for the Medicaid program, Title 42 USC s. 1396a(a)(7) (incorporated by reference), 42 CFR ss. 431.300-431.306 (incorporated by reference), Section 409.902, F.S., Section 414.295, F.S.; and, for the cash assistance program, Title 42 USC s. 602(a)(1)(A)(iv) (incorporated by reference), 45 CFR s. 205.50 (incorporated by reference), and Sections 414.106 and 414.295, F.S. Information obtained by the department is considered confidential state agency material and is not subject to the Freedom of Information Act.

*Id.*

It is clear that Appellant did not have proper notice of what the fair hearing was going to entail. According to the above transcripts of the hearing, Appellant did not receive the internal memo of December 2006. Further, the Department knew that the reason for the denial of benefits was a different issue than those that were listed on the “Notice of Case Action.”

MS. VERDUIN: Okay. Basically, the reason that I rejected this under 709.08, a durable power of attorney needs to be specific. It says in Section 7, “Except as otherwise limited by this section by other applicable law or by the durable power of attorney.” The attorney, in fact, has the full authority to perform without prior court approval every act authorized and specifically enumerated in the durable power of attorney.

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In the instant case, the Department had a reason separate from what was listed on the “Notice of Case Action.” Appellant was not given appropriate notice of the Department’s real reason for denying benefits. Further, the fair hearing did not address the case action listed in the “Notice of Case Action,” and thus the administrative appeal should have been granted and referred back to Department of Children and Families in order for the Department to give the Appellant the correct reason for the denial. Finally, benefits were actually denied for December of 2006, and not for October of 2006 as stated in the Final Order on appeal. (V.1, R. 10) (V. 1, R. 1) It is clear that no case action was even taken on ICP benefits applied for by Appellant in October of 2006. Thus, because the hearing was not conducted in accordance with the law and Appellant was denied procedural due process, the administrative appeal should have been granted.

## **II. THE DEPARTMENT ERRONEOUSLY FOUND THE DURABLE POWER OF ATTORNEY DID NOT AUTHORIZE THE PURCHASE OF A PERSONAL SERVICE CONTRACT**

The administrative hearing officer erred when he held that he agreed with the Department’s actions, thus asserting the denial of Medicaid benefits to Appellant was appropriate because the purchase of a personal service contract was not specifically enumerated in the DPA. Appellate courts may reverse any erroneous interpretation of the law, whether or not the error rises to a level of materiality, so long as the correct interpretation compels particular action. *Brister*

*v. Department of Children and Families*, 906 So.2d 1187 (Fla. 4<sup>th</sup> DCA 2005) citing *Steward v. Dep't of Children and Families*, 865 So.2d 528, 530 (Fla. 1<sup>st</sup> DCA 2003) In the instant case, the Final Order should be reversed based on the erroneous interpretation of the law.

For support of the hearing officers “conclusion of law,” that the purchase of a personal service contract was not specifically enumerated in the DPA, the hearing officer stated: “As required by (7)(c) there must be a granting of the DPA to make all health care decisions on behalf of the principal. This is not enumerated in the DPA.” (V.1, R.4) Further the hearing officer found that the Durable Power of Attorney was not specific as to the exercise of making health care decisions or specific in allowing for the purchase of a personal service contract. (V.1, R.4) Although the statute states that health care decisions must be specifically granted, it does not state that purchasing a personal service contract must be specifically enumerated.

(c) 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.

Fla. Stat. 709.08

Moreover, the hearing officer, in the Final Order, does not reach the issue as to whether or not the personal service contract allowed for health care decisions.<sup>3</sup>

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<sup>3</sup> The Personal Service Contract was not put into evidence or relied on by the hearing officer in the Final Order.

However, this Court has already approved personal service contracts that allow a lifetime contract for the purpose of supervising health care and providing personal services in exchange for fair market value. *See Thomas v. DCF*, 707 So.2d 954 (Fla. 4<sup>th</sup> DCA 1998). Nevertheless, the Department contends that the issue of the denial of Medicaid services in the case was not based on the fact that the personal service contract allowed for health care decisions, but simply that the DPA did not give the power for the attorney-in-fact to purchase a personal service contract.

Ms. SIMPSON: (Unintelligible) reference to this. (Unintelligible) this was admitted but we do have a designation of health care surrogate where she does – I guess it's somewhat enumerated that her agent would have the authority to do all acts related to her personal care, residential placement, medical treatment and, um, there's some other paragraphs in here also that would probably be applicable that the agent would feel is necessary in order to, you know, carry out whatever health care and, um, personal care—

HEARING OFFICER: That's included in the power of attorney?

MS. SIMPSON: No.

HEARING OFFICER: That's separate?

MR. MAIKKULA: They just said they didn't even submit that at the time of application.

Mr. MAIKKULA: So it's not in our file.

MS. VERDUIN: However, that has to do with the, um, health care decisions for the person, not the management of the property.

Ms. SIMPSON: Okay, But I thought part of the –problem was the personal services contract.

MS. VERDUIN: NO.

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MS. VERDUIN: I didn't go there.

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MS. VERUDIN: That basically I didn't –I – because it wasn't necessary.

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MS. VERDUIN: The fact that the personal service contract wasn't specifically enumerated in the power of attorney making it—

MS. VERDUIN: -- something that the individual could not—did not have the authority to perform-

MS. SIMPSON: Okay.

MS. VERDUIN:--or to execute—

MS. SIMPSON: Okay.

MS. VERDUIN:--on Vivian Pilato's behalf, so I didn't go further than that.

MS. SIMPSON: Okay.

MS. VERDUIN: It was—it was just an aside.

It is clear that no law or regulation states the durable power of attorney must have a specific provision for purchasing personal service contracts. To the contrary, the powers of the durable power of attorney are broad. The statute provides in pertinent part:

(a) 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.

*Fla. Stat.* 709.08

In addition to the fact that there is no law that states the purchase of a personal service contract must be specifically enumerated in the DPA, in the instant case, the DPA provided language that encompassed the purchase of a personal service contract. The DPA in the instant case provides that John Pilato or Carla Pilato has the authority:

4. To conduct, engage in, and transact any and all lawful business of whatever nature or kind for me, on my behalf and in my name without limitations including, but not limited to existing Trusts of any kind or the establishment of Trusts of any kind.

(V.1, R. 16-17)

The DPA in the instant case also provides John Pilato or Carla Pilato the authority to act in a broad scope for Vivian Pilato on all matters including signing all contracts and agreements. (V.1, R. 16-19)

Furthermore, appellate courts have broadly interpreted the authority with regard to durable powers of attorney.

In *Estate of Schriver v. Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983), the appellate court interpreted a similar broad grant of authority in a durable power of attorney. *Id.* at 1106-07. The durable power of attorney in *Schriver* authorized the donor's daughter to "execut(e) . . . any instrument which may be requisite . . . to effectuate any . . . thing pertaining . . . to me." *Id.* at 1106. The court interpreted these words to be "all-inclusive to allow the donee to do any legal act the donor could do on her own." *Id.* at 1106-07. In *Schriver*, this meant the authority to sign documents which secured and protected any legal interest of the donor. *Id.* at 1107. The POA in the instant case contains a similar broad grant of authority. Accordingly, Mr. Bryant had the authority under the POA to agree to arbitration of any claims arising out of Mrs. Bryant's residency with Alterra.

*Alterra Healcare Corp v. Bryant*, 937 So.2d 263 (Fla. 4<sup>th</sup> DCA, 2006). In *Altera*, this Court implicitly found that a contract for admissions to a nursing care facility does not need to be specifically enumerated in a durable power of attorney.

When strictly construed, the POA granted Mr. Bryant broad powers on behalf of the principal, Mrs. Bryant. The POA gave Mr. Bryant the authority to arbitrate claims in favor of or against Mrs. Bryant, and to execute and acknowledge all contracts "which may be requisite or proper to effectuate any matter or things pertaining to or belonging to" Mrs. Bryant. It gave Mr. Bryant the power to "take all other actions as may be necessary or appropriate for [Mrs. Bryant's] personal well-being and the management of [Mrs. Bryant's] affairs, as fully and as effectively as if made or done by

[Mrs. Bryant] personally." Further, the POA gave Mr. Bryant the authority to execute these powers, notwithstanding the fact that he may be acting individually. Thus, it appears that Mrs. Bryant's intent was to give her husband broad authority to effectuate her legal rights.

*Id.* Although the issue in *Alterra* was whether or not an arbitration clause could be enforced by the consent of the attorney-in-fact, it is clear that the attorney-in-fact had the appropriate authority, under the DPA, to sign the admissions agreement to the nursing care facility.

Similarly, as a contract for an admissions agreement to a nursing care facility does not need to be specifically enumerated in a DPA, a contract for personal services does not need to be specifically enumerated in a DPA. Finally, this Court has approved the fact that a properly executed power of attorney allows the attorney-in-fact the authority to apply for Medicaid benefits. *See Gorlick v. DCF*, 789 So.2d 1247 (Fla. 4<sup>th</sup> DCA 2001). The same situation has occurred in the instant case, but it was done through a personal service contract. Thus, because the hearing officer did not appropriately apply the law to the facts of the instant case and because there is not a provision in the law that a personal service contract must be specifically enumerated in a DPA, the order on appeal should be reversed.

### **III. THE AGENCY ERRONEOUSLY CHANGED ITS POLICY AND DENIED MEDICAID BENEFITS TO APPELLANT**

In the past, the Department has not denied Medicaid benefits based on the fact that a durable power of attorney did not specifically enumerate the purchase of

a personal service contract. Even the Department admitted that it is now creating a new policy.

Ms. VERDUIN: \*\*\* Now, that this has not happened on past cases may be answered by the fact that not all of the caseworkers send everything to District Legal. So it's –they now know I want the powers of attorney for the personal needs contracts because I want to see if there's specific authority. So they are now doing what they are supposed to, and this is one of those that I finally received. And that is why—and the statute is very specific. And when I rejected it I just basically said that under, uh, the Pilato's power of attorney of 9/28/06, the authority to create a personal services contract was not granted.

The agency can not change a non-rule based policy unless it explains its reasons for its discretionary action based on expert testimony, documentary opinions, or other appropriate evidence, or it implements changes in policy or interpretation by formal rule making. Courts v. Agency for Health Care Administration, (Fla. 1<sup>st</sup> DCA 2007) In Courts, a recipient of Medicaid benefits was a quadriplegic as a result of an automobile accident. For several years the recipient had been receiving fulltime companion care. The recipient was then advised that his plan did not comply with state Medicaid guidelines and he could only have six hours of companion care per day. The court found that the agency could not contend that its past interpretation was a mistake and to do so improperly changed the agency policy without explaining the basis for the rule change. *Id.*

Similarly, in the instant case, the Department's previous policy did not include the fact that a personal service contract had to be specifically enumerated

in the DPA in order to make the transfer of assets valid. Furthermore, the Department, in other decisions, has held that a personal service contract entered into by the attorney-in-fact, under a durable power of attorney, meets the requirements outlined in the department's policy manual to be an allowable transfer and thus denying benefits due to assets exceeding program limits is error. *See the State of Florida Department of Children and Families Office of Appeal Hearings Appeal No. 05F-6457 (Ex. A1-A8), Appeal No. 05F-6455. (Ex. B1-B9), and Appeal No. 06F-01328. (Ex. C1-C7).* Therefore, because the policy regarding denial of Medicaid benefits was changed at the discretion of the Department, without a basis of expert testimony, documentary opinion, or other appropriate evidence, or the benefit of formal rule making, the Final Order should be reversed.

## **CONCLUSION**

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

**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: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished this 16th 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 Ellen Morris on behalf of the Academy of Florida Elder Law Attorneys, 7000 W. Palmetto Park Road, Ste. 205 Boca Raton, FL 33433

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