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## PERSONAL SERVICE CONTRACTS AFTER BARBATO

By The personal service contract (“PSC”) is a written agreement between a Medicaid applicant/recipient (“Medicaid A/R”) and one or more caregivers, typically relatives or close friends. Under the agreement, the caregivers agree to provide the Medicaid A/R personal and geriatric care, financial management, and related services over the statistical life expectancy of the Medicaid A/R in return for fixed compensation, often paid in a lump sum. Under New York regulatory guidance, when properly designed and executed, a PSC rebuts the presumption that services provided by family caregivers are provided out of “love and affection,” thereby providing a basis for demonstrating a fully compensated transfer of assets for fair value that is not subject to a Medicaid transfer penalty.

Local Departments of Social Services (“DSS”) use guidance issued in GIS 07 MA/019 for evaluating PSCs to assess whether the payment of funds under the PSCs are deemed to be compensated transfers for Medicaid eligibility purposes. GIS 07 MA/019 states that if the Medicaid A/R is faced with a transfer penalty, the transfer penalty amount must be reduced “for the value of services actually received from the time the personal service contract was signed and funded through the date of the Medicaid eligibility determination,” provided DSS has credible documentation (for example, care logs specifying dates, hours, and nature of services), and a reasonable wage scale for caregiver services is used (with particular reference to U.S. Department of Labor statistics). Unfortunately, in practice the regulations pertaining to PSC’s are not necessarily applied as one would expect.

For example, many fair hearing decisions did not uphold PSCs challenged by DSS on grounds that they did not effectively rebut the presumption that caregiver services were provided out of “love and affection.” However, in *Matter of Barbato v. New York State Department of Health*, the fourth department appellate division reviewed and modified five such fair hearing decisions in a manner consistent with GIS 07 MA/019, remanding the cases back to DSS to take into account the fair market value of services rendered between the date on which each PSC was executed and the date of the Medicaid eligibility determination. The Barbato court ordered that caregiver logs be used to identify which services were not duplicative of those provided (or to be provided) by the nursing homes under New York regulatory operating standards. It also held that transfers of assets for services to be rendered from the date of the Medicaid eligibility determination, through the remainder of the lifetime of the Medicaid A/R, should be valued at less than fair market rates because the PSCs contained language inconsistent with the guidance set forth in GIS 07 MA/019. Accordingly, New York case law provides firm support for the general

proposition that PSCs are valid for Medicaid purposes. Even in cases when PSCs were executed in nursing homes and shortly prior to Medicaid applications, and therefore deemed to be more suspect on fair hearing, the Barbato court directed the local DSS to recognize, up to the time of the Medicaid eligibility determination, the fair market value of services provided under the PSCs as compensated transfers. The key issue for a Medicaid A/R that enters a nursing home (whether before or after executing the PSC) is whether the services provided are nonduplicative of those provided by the nursing home. In advocating a client's position, it is important to review New York regulatory operating standards for nursing homes and the Medicaid A/R's comprehensive care plan with the nursing home to understand how services provided by caregiver children can fill the gap. To date, there is no clear judicial guidance on whether financial services or one-on-one companionship is considered to be non-duplicative. However, it is clear from fair hearing decisions that it is not compelling to argue that caregiver children have provided services that nursing homes should be providing in accordance with operating standards, but in fact are not providing. 7 The validity of transfers of assets under PSCs for fair value after the date of the Medicaid eligibility determination also is open to question after the Barbato court decision. In our opinion, a properly drafted PSC should not include language considered to be subjective for purposes of determining fair value. That is, if the PSC specifies the hours of care to be provided, contains a provision rebating excess funds to the estate should the Medicaid A/R die before the stated life expectancy, and otherwise is consistent with the standards set out in GIS 07 MA/019, a court is more likely to uphold the validity of the PSC for services rendered after the date of the Medicaid eligibility determination than if subjective language is used. Again, if the Medicaid A/R enters the nursing home, it is essential that the attorney drafting the PSC surmount the hurdle of establishing that the services are not duplicative of those provided by the nursing home, if the PSC is going to withstand DSS scrutiny.

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