M E M O R A N D U M

To: Medicaid Research File

From: Lovingood McGuffey, P.C.

Date: May 4, 2011

Re: Medicaid – Personal Care Contracts and Fair Market Value

Note: This memorandum may NOT be relied on as legal advice and is not a substitute for independent legal counsel. Review of this memorandum does not create an attorney-client relationship between you and Lovingood McGuffey, P.C.

As of May 5, 2011, Cover Letter 41 is the most recent update to the Economic Support Services Manual of the Georgia Department of Human Resources ("ESSM"), also known as the ABD Manual. It is anticipated that Transmittal 42 will include a rule change prohibiting partial penalty cures. Thus, assuming the rule change is implemented, if an agreement is deemed to represent a transfer for less than fair market value, the parties may or may not be able to modify the agreement retroactively to bring it into compliance.

Personal Care Contracts, which are a form of personal services agreement, are described in ESSM § 2349. These agreements allow individuals needing assistance with activities of daily living to purchase services that extend their independence. Care agreements may cover grocery shopping, house keeping, cooking, financial management, or may be designed to cover any other activity with which the individual needs assistance. In Medicaid planning, one purpose for using these agreements is to "spend down" countable assets prior to applying for Medicaid.

An issue that arises regularly is whether payments made under these agreements are subject to a transfer of assets penalty. Pursuant to 42 U.S.C. § 1396p(c)(1)(A), a transfer penalty is imposed "if an institutionalized individual or the spouse of such an individual ... disposes of assets for less than fair market value on or after the look-back date." Pursuant to Section 1396p(c)(2)(C)(i), a transfer penalty may not imposed if "the individual intended to dispose of the assets either at fair market value, or for other valuable consideration."

Medicaid's position is that family caregivers provide services out of love and affection and, therefore, the services rendered are not "legal consideration" that would support a promise to pay; thus, any payment made to the caregiver is a gift. Medicaid's position is premised on the legal presumption that a family member provides caregiver services

gratuitously.[1] This presumption may be rebutted with evidence that payment for services was intended. In *Guyton v. Young*, 84 Ga. App. 155 (1951), the Court stated: "In the absence of an express agreement, the key to the determination of the question whether one rendering services valuable to another is to be compensated therefor, is whether or not the services were gratuitously rendered, either by virtue of the presumption arising from the family relationship, or as a matter of fact."

ESSM § 2349 indicates that a personal care agreement is valid only if all of the following elements appear in the agreement:

- The personal care contract must be executed prior to the provision of services. The contract cannot be applied retroactively to pay for services that were provided prior to the agreement.
- The personal care contract must be in writing, signed, and dated by each party. The contract must be notarized.[2]
- The personal care contract must have been made by the applicant/recipient or a legally authorized representative such as an agent under a power of attorney, guardian or conservator. If a representative signs the contract on behalf of the applicant/recipient of the services, that representative may not also be a beneficiary of the agreement.[3]
- The personal care contract must specify the type, frequency, and number of hours spent for each service or assistance to be provided in exchange for the payment.

---

[1] In *Phinazee v. Bunn*, 123 Ga. 230 (1905), the Court stated: "Children being under a moral duty to nurse and care for their inform parents, a promise to pay is not implied from there mere fact of service, as in the case of strangers." Thus, absent evidence to the contrary, there is a presumption that services family members provide are performed due to filial affection. *See Hudson v. Hudson*, 87 Ga. 678 (1981); *Hudson v. Hudson*, 90 Ga. 581 (1892) ("where services in the nature of nursing, waiting upon and ministering to the wants and necessities of an infirm, diseased and aged father, are rendered by a son, the law presumes he did so from filial duty and affection, and not because of expected compensation for the same in money or property. Therefore, in order to authorize a recovery for such services, it must affirmatively appear either that there was an express contract to pay for the services, or that under the circumstances both the father and the son contemplated and intended that payment should be made."); *Jackson v. Buice*, 132 Ga. 51 (1909); *Murrell v. Studstill*, 104 Ga. 604 (1898); *Cooper v. Cooper*, 59 Ga. App. 832 (1939). *See also Alred v. Alred*, 36 Ga. App. 748 (1927); *Brooks v. Sims*, 54 Ga. App. 71 (1936); *Westbrook v. Saylors*, 56 Ga. App. 587 (1937); *Tatum v. Moss*, 58 Ga. App. 434 (1938); *Mathews v. McCorkle*, 111 Ga. App. 310 (1965); *Fortner v. McCorkle*, 78 Ga. App. 76 (1948); *McElroy v. Lambert*, 56 Ga. App. 127 (1937). However, where there is an agreement to pay, performance under the contract is a sufficient consideration to support payment. *Phinazee*, *supra*.

[2] The initial requirement that the contract be in writing is consistent with that portion of *Hudson*, *supra*, that an express contract is usually required. The rule omits any reference to an oral agreement or a quantum meruit claim. In *Westbrook*, *supra*, the Court stated that recovery is possible if there is an express contract "or if the surrounding circumstances indicate that it was the intention of both parties that compensation should be made, and negative the idea that the services were performed merely because of that natural sense of duty, love and affection arising out of this relation." The remaining elements in ESSM § 2349 (e.g., the requirement that the contract be notarized) are not part of Georgia contract law.

[3] This portion of ESSM § 2349 incorporates a concept from agency law that, ordinarily, an agent owes his principal a duty of loyalty and cannot profit from the transaction. *See* O.C.G.A. § 10-6-24. Ordinarily, though, the contract should be voidable, not void, if the agent exceeds his or her authority.

The terms must be specific and verifiable. These services must be provided at market rate.[4]

- The personal care contract must provide for payment upon rendering the services or assistance, or within thirty (30) days thereafter and; must be supported by evidence that payments were made in accordance with the agreement.
    - Any payment(s) made prior to the date the contract was signed by all parties is considered an uncompensated transfer.
- The caregiver cannot be the spouse or parent of the applicant/recipient.
- The applicant/recipient or a legally authorized representative must have the power to modify, revoke or terminate the agreement.

The elements listed above indicate the Department of Community Health's perspective concerning what constitutes a valid contract. They may or may not be a reflection of the law, but any deviation would likely result in a denial of Medicaid eligibility and the necessity of a fair hearing. The Department's rule, though, misses the mark because it has no authority to determine what does, or does not, constitute a valid contract. The Department may, however, take issue with whether the contract represents a transfer for fair market value.

"Fair market value of property" means the amount a knowledgeable buyer would pay for the property and a willing seller would accept for the property at an arm's length, bona fide sale. O.C.G.A. § 48-5-2(3).[5] The definition used in the tax code is the price that a willing buyer would pay a willing seller, with both persons having reasonable knowledge of all relevant facts and neither person being under any compulsion to buy or to sell. *See* Treas. Reg. § 1.170A-1(c)(2) (1986); Priv. Ltr. Rul. 91-30-002 (Aug. 30, 1990). Generally, market value is established by opinion testimony. O.C.G.A. § 24-9-66. The law recognizes that some property is unique and that fair market value will not afford just and adequate compensation in the absence of a willing buyer or seller. In those cases, another standard must be used. *See Housing Authority of Atlanta v. Southern R. Co.*, 245 Ga. 229 (1980). Generally, though, since federal law indicates that fair market value is the standard, other valuation methods should not be used. Thus, if it is impossible to determine fair market value, then the transaction will likely be subject to a transfer penalty.

Georgia Contract Law:
A contract is an agreement between two or more parties for the doing or not doing of some specified thing. O.C.G.A. § 13-1-1. A valid contract includes the following elements: there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject-matter upon which it can operate. O.C.G.A. § 13-3-1. One of those elements, consideration, is significant when

---

[4] This portion of ESSM § 2349 relates to value.

[5] This is the definition used in determining value for property taxation. Black's Law Dictionary defines "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." Black's Law Dictionary (7th ed), p 1549 (emphasis added). An "arm's-length" transaction, in turn, is defined as "relating to dealings between two parties who are not related . . . and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." Id. at 103.

examining personal care contracts since Medicaid takes the position that family support is provided for "love and affection," which (according to Medicaid) has no value.[6] O.C.G.A. § 13-3-41 provides that consideration can be "good" or "valuable." Good consideration is founded on natural duty and affection or on a strong moral obligation. Valuable consideration is founded on money or something convertible into money or having value in money. Where a contract is executed under seal, there is a presumption that the consideration recited in an agreement was paid. *Warthen v. Moore*, 258 Ga. 198 (1988).[7] *See also* O.C.G.A. § 13-3-40(b). Consideration may be either performance or a return promise which is bargained for and given by the parties. O.C.G.A. § 13-3-42. If the requirement of consideration is met, there is no additional requirement of a gain, advantage, or benefit to the promisor or of a loss, disadvantage or detriment to the promisee. O.C.G.A. § 13-3-43. Mere inadequacy of consideration alone will not void a contract. O.C.G.A. § 13-4-46.

In *Couch v. Bioust*, 222 Ga. 836 (1967), the Court decided a case where there was a demand for specific performance to require the conveyance of land in exchange for a personal services contract. The Court indicated that where the value cannot be readily computed in money, the petition must allege the value of the services to be rendered and the value of the property. Evidence necessary to establish the value of services rendered was established in *McRae v. Britton*, 144 Ga. App. 340 (1977) where the Court of Appeals reversed a directed verdict on a quantum meruit claim.[8]

In *Humphries v. Miller*, 66 Ga. App. 871 (1942), the Court reversed a ruling in favor of a caregiver nephew, not because the nephew's claim was invalid, but because the trial court gave an errant jury charge. There, the nephew alleged that:

> several years before his [uncle's] death [his uncle] had been paralyzed, helpless, and unable to walk or to get in and out of bed without assistance, services of a personal nature, such as nursing and looking after the deceased, administering to all his wants, washing his clothes and bed clothes, and in so doing performed services of a very disagreeable nature, which the plaintiff alleged were of the reasonable value of $ 2400. While there was alleged no express contract between the plaintiff and the deceased for payment for the alleged services, it was alleged that the deceased on a number of occasions

---

[6] In *Lee v. Green*, 217 Ga. 860 (1962), the Supreme Court refused to enforce an alleged agreement between a step-father and his step-children, premised on love and affection. There the Court found that, although the children remained in the home of their step-father and care for him after they became of age and for many years thereafter, such conduct did not ratify or confirm a contract that the step-father would adopt them.

[7] In *Zorn v. Robertson*, 237 Ga. 395 (1976), the Supreme Court affirmed a judgment in favor of the executrix of an estate where the deep recited consideration of $500, but where the decedent's husband (who was left out of a Will) claimed there was an oral agreement to reconvey the property to him if his wife predeceased him. The Court found that while consideration for a deed may always be inquired into, one party may not, under the guise of that inquiry, alter the terms of the instrument. Thus, where consideration is recited in a deed and there are no other purchase documents, it is critical to name the consideration given.

[8] Eula McRae provided personal services to Ernest Britton, who was an alcoholic, "utterly unable to take care of himself." Ms. McRae and eleven witnesses testified at length as to her extensive services and Mr. Britton's constant avowals that he would take care of her and see that she was compensated.

> expressed a willingness and intention to remunerate the plaintiff for such services, and to give the plaintiff certain property, which it does not appear the deceased ever did.
>
> While in cases between very near relatives, where one renders personal services to another who is sick and helpless, such as nursing and personal care, there does not necessarily arise a presumption that the services are to be paid for, yet, in the absence of an express contract between the parties for the payment of such services, there may arise an implied contract by which the person to whom the services are rendered shall pay the other for the services, where from all the facts and circumstances it can reasonably be inferred that it is in the contemplation of the parties that the services are to be paid for. In determining that in the contemplation of the parties such services are to be paid for, the degree of relationship between the parties, the nature of the services, including the fact that their performance is very disagreeable and obnoxious to the person performing them, that they are such as to indicate the relation of master and servant, or employer and employee between the parties, and such that the person performing them would not naturally do so without compensation and would not perform them solely for love and affection, and statements made by the person to whom the services are rendered of appreciation of the services and an intention to pay therefor, although not necessarily communicated to the person rendering the services, and the fact that the person to whom the services are rendered is financially able to pay therefor, and other facts and circumstances concerning the performance of the services, may be considered as authorizing the inference that it is in the contemplation of the parties that the services are to be paid for. *Murrell v. Studstill*, 104 Ga. 604 (30 S.E. 750); *Wall v. Wall*, 15 Ga. App. 156 (2) (82 S.E. 791); *Westbrook v. Saylors*, 56 Ga. App. 587, 590 (193 S.E. 371); *Tatum v. Moss*, 58 Ga. App. 434 (198 S.E. 814).

The Court found the evidence in *Humphries* was sufficient to authorize a jury to find that the services were rendered by the plaintiff to the deceased and that the deceased agreed to pay for those services. The case was reversed because the following charge was deemed to be a comment on the nephew's claim: "'I charge you, that in a meritorious case, and particularly where an uncle was afflicted and sick and where some particular nephew performed or rendered necessary services otherwise costing substantial sums of money, and who saved the uncle this expense, and if in this case enhanced the value of the uncle's estate, under such circumstances the jury is authorized to infer a legal intention between the parties that compensation should be paid for such services, and if you find such to be the facts in this case, then you would be authorized to find a verdict in favor of the plaintiff' an amount which the jury believed would be the reasonable value of the services."

In *Wynne v. Buyers*, 53 Ga. App. 660 (1936), the Court examined a "lifetime" services agreement, reversing the trial court for refusing to grant a new trial. The case was reversed, not because a lifetime services agreement is not valid, but because the case

was tried as if it were a quantum meruit claim, when both sides had stipulated that it was a suit at law for breach of contract. The proof, as well as the jury verdict, deviated from the terms of the contract which specified that plaintiff would receive "the best house and lot" owned by the care recipient "or a sum of money equal in value to the services performed." The plaintiff proved $1142.50 in services performed, which was agreed upon as correct by the care recipient. The value of the best house and lot was $2,000. The jury verdict was $300. Thus, the motion for new trial should have been granted because the plaintiff has the burden of proving by a preponderance of the evidence that there was a definite and certain contract which was performed.

If a contract is executed after a caregiving relationship is established, then it is likely that a confidential relationship exists between the care recipient and the caregiver. *See Bean v. Wilson*, 283 Ga. 511 (2008).[9] If assets are conveyed prior to death which are "potential" estate assets, then interested parties may bring an equitable claim to protect or pursue those assets if there is evidence of undue influence. *Johns v. Morgan*, 281 Ga. 51 (2006).[10] However, a mere opportunity to exert undue influence would not be sufficient to set aside a transaction. *Curry v. Sutherland*, 279 Ga. 489 (2005).

Medicaid Law:
Setting aside for a moment the elements of Section 2349, the test under the State Medicaid Manual, also known as "HCFA 64" ("SMM") is whether the individual making the transfer intended to dispose of his/her assets for fair market value or for other value consideration. *See* SMM § 3258.10.C. The State Medicaid Manual defines "fair market value" as "an estimate of the value of an asset, if sold at the prevailing price at the time it was actually transferred. Value is based on criteria you use in appraising the value of assets for the purpose of determining Medicaid eligibility." SMM § 3258.1.A.1. The State Medicaid Manual includes the following specific example which relates to personal care contracts:

> For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, the compensation received for the asset must be in a tangible form with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for fair market value. Also, while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback

---

[9] A Will was invalidated due to undue influence where a live-in caregiver was named as the decedent's heir and there was evidence of isolation.

[10] Equity was available to children who were excluded from a Will when a caregiver assisted decedent in executing a new Will, naming the caregiver as executor and sole beneficiary, and when caregiver assisted the decedent in selling property and conveying the proceeds two hours before his death. The children had an "interest in the estate" permitting them to file an equitable action in Superior Court seeking an injunction to protect the assets pending the outcome of the probate proceeding.

> arrangement had been agreed to in writing at the time services were provided.

ESSM § 2313 recognizes that the owner of an agreement has a resource. Implicit in this statement is the validity of the contract. The question then, is whether the contract (1) represent a fair market value exchange and (2) whether it is a countable resource for purposes of eligibility. Most personal services agreements are non-transferrable so they should not be "countable" since they cannot be liquidated within 20 days. Whether that restriction also causes them to be of questionable market value remains to be seen.

Another permitted transfer under the Medicaid rules is payment of a valid debt. See ESSM § 2342-2. A judgment represents a valid debt. Thus, to the extent the terms of a contract are unclear, the parties to that contract should consider liquidating that debt in court prior to applying for Medicaid. If Medicaid is not a party to the litigation, then it is possible the judgment would be subject to attack, but that would likely require that Medicaid intervene in the original litigation and move to have the judgment set aside. Medicaid would then be forced to argue that the contract for services did not represent a fair market value exchange.

In *Austin v. Indiana Family and Social Services Administration*, 2011 Ind. App. LEXIS 713 (4/26/2011), a lifetime care agreement was executed on behalf of Lola Austin. Ms. Austin had no children. She was frail and in need of significant assistance. Her nephew, James Mack, together with his wife, provided for Ms. Austin's care. They moved her closer to themselves after she her investment advisor stole much of her savings, she was the victim of two burglaries and was the victim of battery. Apparently, the Macks owned the home Ms. Austin lived in and failed to charge her rent except for $6,500 which covered 2006. At some point in 2007, Ms. Austin was hospitalized and went into a nursing home. Also during 2007, James Mack, as Ms. Austin's attorney-in-fact, executed a personal care services agreement between himself (and his wife) and Ms. Austin. The agreement provided for an 15 hours of care per week, at $12 per hour, over the remainder of Ms. Austin's lifetime. The value of the caregiver agreement was $41,236. Since Ms. Austin only had $35,500, the payment was discounted to that price, which was paid to the Macks. When an application for Medicaid was filed, a transfer penalty was imposed on the transfer of $35,500.[11] The legal validity of the contract was not challenged; instead, the Department alleged that Ms. Austin did not receive fair market value in return for her payment. The penalty was affirmed by the ALJ at the fair hearing, was affirmed by the Department, was affirmed by the trial court. The case was then appealed to the Indiana Court of Appeals. There, the Court examined the agreement, finding that there is nothing, per se, improper with lifetime care agreements. It held that these cases are fact sensitive. In this case, though, the court found that the agreement covered services which were largely duplicative of those provided by the nursing home. There was a lack of evidence showing that the Macks provided services in excess of those provided by the nursing home. There was also a lack of evidence that the nursing home was not meeting Ms. Austin's needs. The court was also disturbed by Mr. Mack's execution of the agreement as attorney-in-fact, indicating that the agreement did

[11] No penalty was imposed for payment of rent.

not appear to be an arm's length negotiation and that is was a "classic example of self-dealing." Finally, the Court was troubled by the absence of any refund mechanism to prevent a windfall if Ms. Austin died prematurely. It also prohibits transfer if the Macks are no longer able to provide services.[12] While acknowledging that this kind of risk-taking may be appropriate in a private setting, the Court indicated that in the Medicaid context, where protection of taxpayer funds must be considered, permitting the possibility of a potential windfall to caregivers is inappropriate. The Court affirmed imposition of the penalty.

In *E.S. v. Div. of Med. Assist. & Health Servs.*, 990 A.2d 701 (N.J. Super. Ct. App. Div. 2010), a ninety-seven year old Medicaid applicant, E.S., appealed imposition of a transfer penalty after she entered into a lifetime care contract with her daughter. The issue was whether the payment uder the contract was for fair market value. The daughter, E.K., held a power of attorney for her mother. As agent, E.K. entered into the agreement on behalf of E.S. The daughter designated herself as caregiver and was to receive $56,550 using the following formula: $25 per hour x 15 hours per week x 52 weeks per year x. 2.9 years. E.K. alleged that the hourly rate was at the lowest end of the pay scale charged for comparable personal care services and 15 hours per week was the estimated amount of assistance needed. The Court affirmed the Department's finding that the care agreement had no fair market value. In part, this decision was premised on the prohibition on the transfer of the agreement. Given this restriction, the Court found that is has no determinable fair market value. The agreement also lacked value because it provided for payment to the caregiver regardless of whether services were actually rendered. Premature death of either the applicant or the caregiver results in the caregiver (or her estate) keeping the full $55,550. The Court agreed with the Department that few would enter into a contract that expressly allows an employee to tend to other professional and familial responsibilities at the expense of job performance. "The [agreement] is worthless on the open market; it is specious to suggest otherwise."

In *Reed v. Missouri Department of Social Services, Family Support Division*, 193 S.W.3d 839 (Mo. Ct. App. 2006), Eileen Reed was denied Medicaid because she had entered into a care agreement with her daughter, Sandra Teson. The contract defined Teson's duties as:

---

[12] As a general rule, personal services contracts terminate upon the death of one of the parties. *See Wallis v. B&A Construction Co.*, 273 Ga. App. 68 (2005). Frequently, personal services contracts are not assignable, but in some cases they may be. In *West Coast Cambridge, Inc. v. Rice*, 262 Ga. App. 106 (2003), a non-compete agreement was found to be assignable by the company since it had no outstanding obligations under the agreement which would impair its ability to assign it. Duties are not delegable where performance by the delegate would materially vary from the performance required by the original obligor. Thus, certain classes of contracts are inherently non-assignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications. However, in *Gold Kist v. Wilson*, 227 Ga. App. 848 (1997), the Court found that production contracts were unassignable due to a confidential relationship between the parties. "Contract rights involving a relationship of personal confidence between the parties cannot be transferred by one of the parties to the contract without the consent of the other."

> preparation of nutritious, appropriate meals, house cleaning and laundry; assistance with grooming, bathing, dressing, and personal shopping, including purchase of clothing, toiletries and other personal items; assistance with purchasing hobby, entertainment or other goods for Reed's use and enjoyment, taking into account Reed's ability to pay for such items; monitoring of Reed's physical and mental condition and nutritional needs in cooperation with health care providers; arranging for transportation to health care providers and to the physician of Reed's choice, as well as arranging for assessment, services and treatment by appropriate health care providers for Reed; assisting Reed in carrying out the instructions and directives of Reed's health care providers; arranging for social services by social service personnel as needed; visiting at least weekly and encouraging social interaction; arranging for outings and walks, if reasonable and feasible for Reed; and interacting with and/or assisting any agent of Reed in interacting with health professionals, long-term care facility administrators, social service personnel, insurance companies, and government workers in order to safeguard Reed's rights, benefits, or other resources as needed.

The contract called for a lump sum payment of $11,000, which was approved by the Court with jurisdiction over Reed's conservatorship. The $11,000 was paid, and two days later an application for Medicaid was filed. The Department determined that the $11,000 payment was a transfer for less than fair market value and imposed a penalty. The ALJ and the Department agreed with that determination. The trial court reversed that decision, after which the Department appealed. In affirming the trial court's determination that no transfer penalty could be applied, the Court found that Teson provided substantial services which were not duplicated by the nursing home. In particular, Teson served as a communication link, which was necessary because Reed was a stroke victim, had difficulty with communication and was withdrawn. Reed also had trouble eating due to her stroke and Parkinson's disease. While the staff could not spend lengthy amounts of time teaching Reed to eat, Teson did. Teson also purchased substantial items for Reed, such as a wheelchair, from the money she received. She purchased new clothes, shoes and other garments. Teson traveled 60 miles, round trip, three or four times per week to perform her duties. "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. As such, we conclude that the services provided by Teson under the Contract constitute valuable consideration for the $ 11,000.00 payment made by Reed to Teson." Further, the Court expressly found that Reed received fair and valuable consideration for her payment to Teson.

In *Brewton v. State Dep't of Health & Hosps.*, 956 So.2d 15 (La. Ct. App. 2007), Mary Dancy Brewton's application for Medicaid was denied. Brewton was admitted to a nursing home in Janaury, 2003. Her husband continued residing at home until April, 2003, when he was also admitted to the nursing home. The family home was placed on the market in July, 2003. In August, 2003, the Brewtons entered into a person care service agreement with three relatives who agreed to provide services for the remainder the Brewton's lifetimes. The agreement provided for a lump sum payment of $150,000

when the home sold. Medicaid became aware of the agreement when Mr. Brewton applied for Medicaid. It denied eligibility for both Mr. and Mrs. Brewton, alleging a transfer for less than fair market value. The Department claimed the agreement was "not actuarially sound" because the recipients were unable to receive the agreed upon services due to their nursing home admission. The penalty was split between the Brewtons.[13] The penalty was affirmed by the ALJ and the Department. The trial court, however, rejected the Department's conclusion that any personal care services rendered to a nursing home resident are of no value. Affidavits were provided by the caregivers; the caregivers were available as witnesses and the Department failed to question them. The affidavits indicated that the caregivers spent:

> many hours were spent rendering services to the Brewtons, which included taking care of regular financial arrangements as well as dealing with the sale of the home. For example, much time was spent cleaning, repairing, inspecting, and arranging for professional inspections prior to sale. Although it appears DHH allowed for monies actually expended, there is no indication in the record that it allowed for the actual work done by these relatives. Many other services were performed which are not duplicative of nursing home services: they replaced clothing lost in the home's laundry, provided a phone and phone service [Pg 8] for the Brewtons, and obtained several hearing assistance devices for Mr. Brewton, who apparently had a problem keeping track of his hearing aids. They visited regularly to ensure that Mr. Brewton cooperated with the nursing staff, as he had some mental deterioration. On one occasion, Mr. Brewton checked himself out of the hospital where he was being treated and had to be physically returned, by the Cheatwoods, for continuation of necessary hospital care. They attended periodic conferences at the nursing home concerning the Brewtons' ongoing care. They made funeral arrangements for the Brewtons at their request.

The evidence provided by the caregivers was not refuted. Thus, on the record before the Court, it concluded that the services were valuable consideration for the transfer of funds. The Court relied on *Reed*, *supra*, in reaching its conclusion.

In *Mackey v. Dep't of Human Servs.*, 2010 Mich. App. LEXIS 1656 (9/7/2010), the Court of Appeals reversed a trial court's finding that a transfer penalty was improperly imposed. While this is not a case involving a personal care agreement, it does discuss fair market value. An LLC was established and a Medicaid applicant's cash was transferred to the LLC. A child held a nominal membership interest so the entity was not a single member LLC. The LLC was structured to prevent any transfer of membership interests for two years. During that two year period, a 2% return on investment was guaranteed. The Department took the position that this structure was a divestment for less than fair market value because it eliminated the applicant's control over her money. The applicant countered, arguing that the transaction was for value due to the guaranteed rate of return.

---

[13] Mrs. Brewton's penalty was later reduced after the Department found that $17,638.84 was spent on non-Medicaid covered services.

On appeal the Court noted that the Michigan rules do not define the phrase "fair market value." They did, however, state that "[l]ess than fair market value[,] means the compensation received in return for a resource was worth less than the fair market value of the resource" and elaborates that compensation must have "tangible form" and "instrinsic value."" The Court found it hard pressed to determine that an investment that would increase the value of the original investment was not a transfer for fair market value. Nonetheless, that alone was simple one factor to be considered. The Court also found that the following significant: (1) the transaction was unsecured, (2) the LLC was operated exclusively by her daughter (and her attorney-in-fact), (3) it was not an approved investment vehicle under PEM 405, (4) the shares were unavailable in the open market and are nonassignable, (5) there was no evidence of actuarial soundness, (6) there were no monthly distributions during the two-year period, and (7) the purpose of the transaction was to make petitioner eligible for Medicaid rather than a transaction made on the open market. The Court found that a willing buyer could not acquire such an asset on the open market, in an arm's length transaction and, therefore, the transaction was for less than fair market value.

The lesson in this case is akin to the lesson in *E.S.*, *supra*. If the transaction is not one that could be purchased on the open market, or readily compared to one available on the open market, then its value is subject to challenge.

Conclusion

Federal law does not permit States to alter contract law as part of its Medicaid review. Thus, to the extent that ESSM § 2349 purports to define what does, or does not, constitute a valid contract, it likely oversteps the State's authority. Instead, federal law focuses on whether a transfer is, or is not, for fair market value. Implicit in this determination is the presumption that a contract is enforceable so State contract law must be observed.

The consideration paid, under Medicaid law, must be fair market value. Thus, a valid agreement that does not represent a fair market value exchange is subject to a transfer or resources penalty. Proof of value is a fact sensitive inquiry. Where value cannot be proven, then the Department will likely impose a penalty. Since the burden is on the applicant to establish eligibility, it is crucial that contracts be drafted in a manner that permits value to be established. The conduct of the parties as they perform under the contract must also be determinable as the performance, or lack thereof, would be evidence of value.