



BACH & JACOBS, P.A.

240 Pineapple Avenue, Suite 700
Sarasota, FL 34236
Phone: 941-906-1231
Fax: 941-954-1185
www.bachjacobs.com

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2012 ELDER LAW RETREAT IN MONTANA

LECTURE: Tax Issues – Personal Care Contracts and Irrevocable Personal Care Trust

MATERIALS: Prepared by Fredric C. Jacobs, Esq., Board Certified in Tax Law and
Babette B. Bach, Esq., Board Certified in Elder Law

DATE: July, 2012

1. General. Income payable to a Care Provider for personal services is ordinary income under Section 61 of the Internal Revenue Code. If payment is made in a lump sum, the entire payment is taxable in the year in which it is received.
2. Payroll Taxes and Withholding. Social Security and Medicare taxes are also payable on the income payable to a Care Provider for personal care services. Moreover, if the Care Provider is deemed to be the employee of the Care Recipient, the Care Recipient is required to pay the employer portion and withhold the balance of the applicable Social Security and Unemployment taxes. As to the withholding of the basic income taxes, while generally an employer must withhold the income tax from an employee's wages based on the employee's W-4, an employer is not required to withhold income taxes on wages paid for domestic services provided in the employer's home (Internal Revenue Code, Section 3401 (a) (3)).

If the Care Provider is deemed to be an independent contractor, rather than an employee, the Care Recipient does not have to pay or withhold any taxes and simply files and issues a 1099 to the Care Provider at the end of the year.

3. Employee/Independent Contractor Status. The issue of whether any person receiving compensation, including a Care Provider, is an employee or an independent contractor is often a contentious one.

Under Section 3121 (b)(3)(B) of the Internal Revenue Code, the term "employment" includes domestic services provided by a person over 21 for his or her mother or father. Domestic services are services of a household nature performed in the home, such as the services of cooks, housekeepers and "caretakers". There is even a Revenue Ruling (74-388) which indicates that a nursing home, hospital or other care facility can, under certain circumstances, be considered a private home for such purposes.

On the other hand, arguably, at least half or more of the services provided under a Personal Care Contract are provided outside of the Care Recipient's place of residence. Such outside services include consultation with physicians and other health care professionals, arranging for medical care, arranging for transportation for medical and other purposes, consulting with financial advisors, accountants and elder lawyers, receiving mail, paying bills, and so on.

Aside from Section 3121 (b)(3)(B), there are 11 principal factors which the IRS considers in determining whether an individual is an employee or an independent contractor. See IRS Publication 15A, which is easily accessed at IRS.gov. Generally, if the person or entity paying for the services controls when and where the work is to be done, gives instructions on how it is to be done, provides training and pays the expenses incurred by the worker in performing the services, an employer/employee relationship is indicated. If the worker's services are also available to others or if the worker is paid on a flat fee basis as opposed to an hourly rate, an independent contractor relationship may well exist.

In any case, if an independent contractor relationship is intended, language should be included in the personal care contract stating, among other things, that the Care Provider is an independent contractor, will exercise its own judgment as to the place, time and manner in which it will perform the services called for, is free to provide care services for other persons or entities and will pay its own expenses in providing the services.

4. Deferring Taxes on Lump Sum Payments Through the Use of a Third Party. The payment in a lump sum of compensation for personal care services is an accepted tool in Medicaid planning. However, the Care Provider, whether an employee or an independent contractor, may want to avoid the acceleration or bunching of the income resulting from the receipt of the lump sum payment. This may be accomplished by having the payment made to a third party, such as trust or escrow holder. In such cases, care must be taken to avoid the "economic benefit" and "constructive receipt" provisions of Section 83 and Regulation 1.451-2 under Section 451 of the Internal Revenue Code.

Section 83 provides that if cash, property or any other thing of value is transferred to any person other than the service provider, the fair market value of the transferred property is immediate income to the service provider unless (1) the service provider's actual receipt of the transferred property is subject to a substantial risk of forfeiture and (2) the service provider can not assign or transfer his or her right to receive such cash, property or other thing of value. If these two conditions are not met, the service provider is deemed to have received an immediate economic benefit and will be taxed on the value of the assets transferred to the third party.

The “constructive receipt” doctrine, now codified by Regulation 1.451-2, provides that if the service provider has the unilateral right to call for or postpone the receipt of the payments due him or her, such payments constitute income as soon as the right to receive the payments accrues. A service provider can not simply turn his or her back on income in order to delay the tax on such income.

It has been suggested by some financial advisors that in lieu of a direct cash payment for the services, or third party arrangement, the Care Recipient can simply purchase an annuity and transfer and assign the annuity to the Care Provider. It is further suggested that this would defer the recognition of the income by the Care Recipient until the Care Recipient receives the annuity payments. The problem is that the annuity contract itself has significant value, there is no risk of forfeiture and there would be no restrictions on the Care Provider’s sale or assignment of the annuity contract or the annuity payments, all of which run afoul of Section 83 and the Regulations under Section 451.

Applying these tax principals to personal care contracts (1) the lump sum has to be paid to an independent third party (i.e. not the Care Provider), (2) there has to be a substantial risk of forfeiture of the Care Provider’s right to receive the transferred property from the third party, such as a forfeiture caused by the Care Provider’s failure to provide the services called for by the personal care contract, (3) the Care Provider cannot have the right to assign its right to receive the property, and (4) the Care Provider can’t have the right to elect to receive or defer its receipt of the property from the third party. If the third party uses the lump sum to purchase an annuity to provide a convenient method to fund the payments due under the personal care contract, the ownership of the annuity contract must be retained by the third party and not transferred to the Care Provider, because of the economic benefit and constructive receipt doctrines.

5. Identity of the Third Party and Why a Trust? The independent third party can be an individual escrow holder, a bank, or a trust. So long as the third party or entity (including the trustees if a trust is used) is not controlled by or subordinate to the Care Provider, the third party arrangement should work from a tax standpoint.

A trust arrangement makes sense because of the flexibility it affords in drafting the trust instrument, such as including a requirement for accountings, providing for the disposition of any remaining funds, if any, after the death of the Care Recipient, and the ability to include spendthrift provisions. The use of a trust also enables the inclusion of tax and Medicaid specific language in the trust instrument. The tax specific language should include the forfeiture provisions if the services are not provided by the Care Provider and a prohibition against the Care Provider selling, assigning or encumbering its right to

receive the compensation payments from the trust. The Medicaid driven language should include the Care Recipient's inability to (1) access the income or principal of the trust for any reason, (2) become a trustee or change the trustee, (3) amend or revoke the trust or (4) have or receive any reversionary interest in the trust. The use of a trust vehicle also has the benefit of settled case law and Probate Code provisions concerning the fiduciary obligations of the trustees.

The Grantor of the Trust can be the children of the Care Recipient or an independent third party. Because of DCF scrutiny given to trusts created by the Care Recipient or to funds transferred by the Care Recipient to any trust created by the Care Recipient or the Care Recipient's spouse, it makes sense for the Care Recipient and the Care Recipient's spouse not to be the Grantor. As indicated above, the Trustee of the trust should be a third party or parties not subordinate to the Care Provider such as his or her spouse. The children of the Care Recipient, other than the Care Provider, are suitable as trustees from an income tax standpoint.

6. Suggested Terms and Provisions. The Personal Care Contract and the Personal Care Trust should provide that the Care Recipient will pay the lump sum into the trust and that the Care Recipient will only be paid by the trust as and when the personal services are rendered. If the Care Provider is unable or unwilling to provide the services, he or she will no longer be paid and a substitute Care Provider acceptable to the Care Recipient would be retained and paid by the trust. The documents should further provide that in the event the Care Recipient dies prior to his or her life expectancy, the trust will stop making the personal care payments to the Care Provider and will distribute any remaining funds as provided in the trust instrument. In the event the Care Recipient lives longer than his or her life expectancy and the trust funds are exhausted, the documents should provide that the Care Provider is nevertheless obligated to continue the personal care services for the remaining life of the Care Recipient.

As indicated above, for Medicaid purposes, the documents should also state that the Care Recipient has no interest in the income or principal of the trust, that neither the income or principal of the trust can be used for the benefit of the Care Recipient other than to pay for the personal care services, that the Care Recipient has no reversionary interest, and no right to access the funds in the trust for any reason, no right to alter, amend or revoke the trust, and no right to change the trustees of the trust or to become a trustee.

7. Income Tax Issues Relating to the Personal Care Trust. By its terms, the trust will be irrevocable. It should obtain its own tax ID number and file an income tax return if the income earned by the trust exceeds \$600 per year.

If desired, the trust instrument can contain grantor trust provisions, which would result in the trust's income being taxed directly to the Grantor or Grantors.

Since the trust is only an intermediary or independent escrow holder, the 1099 or W-2 and other reporting forms should be issued in the name of and with the tax ID number of the Care Recipient and not the trust.

Conceivably, the IRS could take the position that the trust arrangement is a matter of form over substance, designed and used only to defer the payment and collection of the taxes due on the lump sum. The response is that the touchstone for sustaining any tax treatment is that the transaction is driven by a legitimate business purpose, rather than tax avoidance or deferral. In the case of the personal care contract, the Care Recipient wants to make sure that the personal care services, paid for up front with a lump sum, will in fact be provided and that the Care Provider will not simply take the lump sum and fail to provide the services. The Care Provider, on the other hand, wants to make sure that in the absence of a lump sum payment paid directly to the Care Provider, there is nevertheless, a funding mechanism to assure that the Care Provider will be paid as the services are rendered. Thus the third party personal care trust has a legitimate purpose and achieves an arms length mutually acceptable business arrangement between the Care Recipient and the Care Provider.

Another attack could be that the receipt of the lump sum payment by the trust is itself income to the trust and currently taxable. In such case, no tax is deferred and all that has been accomplished is transferring the lump sum tax liability from the Care Recipient to the trust. The answer is that neither the trust nor any other third party escrow holder has contracted to provide the personal care services and the lump sum payment received by the trust or other third party escrow holder is not payment for its promise to provide such services. The trust is in fact a mere intermediary acting to insure that the Care Recipient receives the services contracted and paid for and that the Care Provider can be assured of payment when and as the personal services are rendered.

8. Citations, Forms and Caveats. We are attaching copies of the statutes , regulations and rulings cited above, pertinent Medicaid materials and sample forms for a personal care contract and a personal care trust containing the language suggested above. The forms are for illustrative purposes only and are not intended for use or copying by any practitioner. Additionally, we have not obtained any private letter rulings from the IRS nor any opinions from the Florida Department of Children and Families concerning the matters discussed in this Memorandum. We are only setting forth our thinking concerning these matters and we do not intend to give any tax, Medicaid or other legal advice in this

Memorandum and it may not be used to for the purpose of avoiding any tax, interest or tax related penalties under the Internal Revenue Code.

BACH & JACOBS, P. A.

Babette B. Bach, C.E.L.A.
Board Certified in Elder Law

Fredric C. Jacobs
Board Certified in Tax Law

BIOGRAPHY OF BABETTE B. BACH, ESQUIRE
2012

Babette Bach is a Florida Board Certified Elder Law attorney and the founder of BACH & JACOBS, P.A. Her practice specializes in the legal needs of the mature or disabled client, including Medicaid planning, Probate and Estate Planning, Disability Planning, Guardianships and Special Needs Trusts. Babette is also nationally certified as an Elder Law Expert by the National Elder Law Foundation.

She has been selected for inclusion on the Florida Super Lawyers from 2010 through 2012 and she is an AV rated attorney by Martindale Hubble. Babette has been recognized by the members of the Florida Bar and featured in Florida Trend magazine as a Florida Legal Elite honoree.

Babette is the Past Chair of the Elder Law Section of the Florida Bar (2009-2010) and a past board member of the Gulf Coast Chapter of the Alzheimer's Association (2005-2011). She was the co-chair of a joint committee of Health Law attorneys and Elder Law attorneys studying the Obama health law reforms of 2010 (Affordable Care Act).

This July, Babette filed a class action law suit as co-counsel against Bank of America for unlawful banking practices on behalf of a class of all individuals in the State of Florida having a mortgage with an escrow account with Bank of America for the years 2007 to 2012. The matter is now pending in the 12th Judicial Circuit. In 2003, Babette was co-counsel in *Gerkin v. Reiger/Levine*. This was a landmark civil rights class action lawsuit in Federal District Court, Middle District, Florida. As a result of this lawsuit, the State of Florida was forced to change the Medicaid policy in 2004 to provide for coverage of all uninsured medical benefits to over 45,000 Medicaid recipients residing in nursing homes. This new benefit was funded by the Florida legislature with an appropriation of 52 million dollars in 2004. The program has remained funded continuously since 2004.

Her community service includes a lifetime commitment to improving access to health care and legal services. She helped found the Michael C. Bach, M.D. Treatment Center for the care and treatment of indigent AIDS patients in Manatee County and the AIDS Project in Portland, Maine. Babette is fluent in French.

Babette continues to actively lecture and publish in her fields. She loves her work.

BACH & JACOBS, P.A.
240 South Pineapple Avenue, Suite 700
Sarasota, Florida 34236
Telephone: (941)-906-1231
e-mail: babette@sarasotaelderlaw.com
www.bachjacobs.com

BIOGRAPHY OF FREDRIC C. JACOBS, ESQUIRE
2012

Fredric C. Jacobs is a Partner in Bach & Jacobs, P.A., Sarasota, Florida. He is Board Certified in Taxation in Florida and is an Adjunct Tax Law Professor at Stetson Law School. He received an LLB from Villanova Law School in 1965 (Law Review and Corporation Law Prize) and an LLM in Taxation from Temple University Law School in 1976. He is admitted to practice in Florida and Pennsylvania and before the United States Tax Court and the United States Claims Court. He is engaged in the private practice of law (Pennsylvania 1965-2006) and Florida (2006 to date) specializing in Federal and State taxation, real estate , securities and corporate law, banking and general business law.

BACH & JACOBS, P.A.
240 South Pineapple Avenue, Suite 700
Sarasota, Florida 34236
Telephone: (941)-906-1231
e-mail: babette@sarasotaelderlaw.com
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26 USC § 61 - GROSS INCOME DEFINED

USC-prelim US Code Notes Updates Authorities (CFR)

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Current through Pub. L. 112-123. (See [Public Laws for the current Congress.](#))

(a) General definition

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
- (2) Gross income derived from business;
- (3) Gains derived from dealings in property;
- (4) Interest;
- (5) Rents;
- (6) Royalties;
- (7) Dividends;
- (8) Alimony and separate maintenance payments;
- (9) Annuities;
- (10) Income from life insurance and endowment contracts;
- (11) Pensions;
- (12) Income from discharge of indebtedness;
- (13) Distributive share of partnership gross income;
- (14) Income in respect of a decedent; and
- (15) Income from an interest in an estate or trust.

(b) Cross references

For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

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Current through Pub. L. 112-123. (See [Public Laws for the current Congress.](#))

(a) Wages

Inc. tax withholding from wages

For purposes of this chapter, the term "wages" means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include remuneration paid—

- (1) for active service performed in a month for which such employee is entitled to the benefits of section 112 (relating to certain combat zone compensation of members of the Armed Forces of the United States) to the extent remuneration for such service is excludable from gross income under such section; or
- (2) for agricultural labor (as defined in section 3121 (g)) unless the remuneration paid for such labor is wages (as defined in section 3121 (a)); or
- (3) for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or
- (4) for service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is \$50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if—
 - (A) on each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or
 - (B) such individual was regularly employed (as determined under subparagraph (A)) by such employer in the performance of such service during the preceding calendar quarter; or
- (5) for services by a citizen or resident of the United States for a foreign government or an international organization; or
- (6) for such services, performed by a nonresident alien individual, as may be designated by regulations prescribed by the Secretary; or
- [(7) Repealed. Pub. L. 89-809, title I, § 103(k), Nov. 13, 1966, 80 Stat. 1554]
- (8)

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• 1954, Social Security Amendments of 1954 (P.L. 761, 83rd Cong.)

P.L. 761, 83rd Cong., §204(a), (b):

Substituted “\$4,200” wherever it appeared in paragraph (1) for “\$3,600”, added subparagraph (C) to paragraph (7), inserted “(A)” after “(8)” in paragraph (8), added subparagraph (B) to paragraph (8), and amended subparagraph (7)(B). Effective 1-1-55. Prior to amendment, subparagraph (7)(B) read as follows:

“(B) cash remuneration paid by an employer in any calendar quarter to an employee for domestic service in a private home of the employer, if the cash remuneration paid in the quarter for such service is less than \$50 or the employee is

not regularly employed by the employer in such quarter of payment. For purposes of this subparagraph, an employee shall be deemed to be regularly employed by an employer during a calendar quarter only if—

“(i) on each of some 24 days during the quarter the employee performs for the employer for some portion of the day domestic service in a private home of the employer, or

“(ii) the employee was regularly employed (as determined under clause (i)) by the employer in the performance of such service during the preceding calendar quarter.

“As used in this subparagraph, the term ‘domestic service in a private home of the employer’ does not include service described in subsection (g)(5).”

[Sec. 3121(b)]

(b) EMPLOYMENT.—For purposes of this chapter, the term “employment” means any service, of whatever nature, performed (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen of the United States [a citizen or resident of the United States (effective for remuneration paid after December 31, 1983)] as an employee for an American employer (as defined in subsection (h)), or (C) if it is service, regardless of where or by whom performed, which is designated as employment or recognized as equivalent to employment under an agreement entered into under section 233 of the Social Security Act; except that such term shall not include—

(1) service performed by foreign agricultural workers lawfully admitted to the United States from the Bahamas, Jamaica, and the other British West Indies, or from any other foreign country or possession thereof, on a temporary basis to perform agricultural labor;

(2) domestic service performed in a local college club, or local chapter of a college fraternity or sorority, by a student who is enrolled and is regularly attending classes at a school, college, or university;

(3)(A) service performed by a child under the age of 18 in the employ of his father or mother;

(B) service not in the course of the employer's trade or business, or domestic service in a private home of the employer, performed by an individual under the age of 21 in the employ of his father or mother, or performed by an individual in the employ of his spouse or son or daughter; except that the provisions of this subparagraph shall not be applicable to such domestic service performed by an individual in the employ of his son or daughter if—

(i) the employer is a surviving spouse or a divorced individual and has not remarried, or has a spouse living in the home who has a mental or physical condition which results in such spouse's being incapable of caring for a son, daughter, stepson, or stepdaughter (referred to in clause (ii)) for at least 4 continuous weeks in the calendar quarter in which the service is rendered, and

(ii) a son, daughter, stepson, or stepdaughter of such employer is living in the home, and

(iii) the son, daughter, stepson, or stepdaughter (referred to in clause (ii)) has not attained age 18 or has a mental or physical condition which requires the personal care and supervision of an adult for at least 4 continuous weeks in the calendar quarter in which the service is rendered;

(4) service performed by an individual on or in connection with a vessel not an American vessel, or on or in connection with an aircraft not an American aircraft, if (A) the individual is employed on and in connection with such vessel or aircraft, when outside the United States and (B) (i) such individual is not a citizen of the United States or (ii) the employer is not an American employer;

(5) service performed in the employ of the United States or any instrumentality of the United States, if such service—

(A) would be excluded from the term “employment” for purposes of this title if the

(I) if an individual performs to the performance of such service less than 366 consecutive days, reg or after December 31, 1983, then su

(II) if an individual performs to the performance of such service to the organization as described in of title 5, United States Code, or in the service performed for that orga subparagraph (A),

(III) if an individual perform reemployed or reinstated after bei accepting employment with the A section 3310 of chapter 48 of title formed for that Institute shall be ce

(IV) if an individual perform to the performance of such servi uniformed service (including, for Guard and temporary service in restoration or reemployment rights States Code, then the service so f shall be considered service describ

(V) if an individual perform to the performance of such service which section 105(e)(2) of the In service performed for that tribal or in subparagraph (A); or

(ii) is receiving an annuity from t or benefits (for service as an employee) a law of the United States for employ members of the uniformed service);

except that this paragraph shall not apply with r any date on which such individual performs—

(C) service performed as the President (D) service performed—

(i) in a position placed in the Exec of title 5, United States Code,

(ii) as a noncareer appointee in th ber of the Senior Foreign Service, or

(iii) in a position to which the in designee) or the Vice President under s title 3, United States Code, if the maxi above the rate for level V of the Executi

(E) service performed as the Chief Jus the Supreme Court, a judge of a United St district court (including the district court of Federal Claims, a judge of the United Stat United States Tax Court, a United States n States bankruptcy judge,

(F) service performed as a Member, D Congress,

(G) any other service in the legislati service—

(i) is performed by an individual v 83 of title 5, United States Code, or to a the United States for employees of the the uniformed services), on December 3



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26 USC § 83 - PROPERTY TRANSFERRED IN CONNECTION WITH PERFORMANCE OF SERVICES

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(a) General rule

If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of—

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture.

(b) Election to include in gross income in year of transfer

(1) In general

Any person who performs services in connection with which property is transferred to any person may elect to include in his gross income for the taxable year in which such property is transferred, the excess of—

(A) the fair market value of such property at the time of transfer (determined without regard to any restriction other than a restriction which by its terms will never lapse), over

(B) the amount (if any) paid for such property.

If such election is made, subsection (a) shall not apply with respect to the transfer of such property, and if such property is subsequently forfeited, no deduction shall be allowed in respect of such forfeiture.

(2) Election

An election under paragraph (1) with respect to any transfer of property shall be made in such manner as the Secretary prescribes and shall be made not later than 30 days

after the date of such transfer. Such election may not be revoked except with the consent of the Secretary.

[LII]

(c) Special rules

For purposes of this section—

(1) Substantial risk of forfeiture

The rights of a person in property are subject to a substantial risk of forfeiture if such person's rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual.

(2) Transferability of property

The rights of a person in property are transferable only if the rights in such property of any transferee are not subject to a substantial risk of forfeiture.

(3) Sales which may give rise to suit under section 16(b) of the Securities Exchange Act of 1934

So long as the sale of property at a profit could subject a person to suit under section 16(b) of the Securities Exchange Act of 1934, such person's rights in such property are—

- (A) subject to a substantial risk of forfeiture, and
- (B) not transferable.

(4) For purposes of determining an individual's basis in property transferred in connection with the performance of services, rules similar to the rules of section 72 (w) shall apply.

(d) Certain restrictions which will never lapse

(1) Valuation

In the case of property subject to a restriction which by its terms will never lapse, and which allows the transferee to sell such property only at a price determined under a formula, the price so determined shall be deemed to be the fair market value of the property unless established to the contrary by the Secretary, and the burden of proof shall be on the Secretary with respect to such value.

(2) Cancellation

If, in the case of property subject to a restriction which by its terms will never lapse, the restriction is canceled, then, unless the taxpayer establishes—

- (A) that such cancellation was not compensatory, and
- (B) that the person, if any, who would be allowed a deduction if the cancellation were treated as compensatory, will treat the transaction as not compensatory, as evidenced in such manner as the Secretary shall prescribe by regulations,

the excess of the fair market value of the property (computed without regard to the restrictions) at the time of cancellation over the sum of—

- (C) the fair market value of such property (computed by taking the restriction into account) immediately before the cancellation, and
- (D) the amount, if any, paid for the cancellation,

shall be treated as compensation for the taxable year in which such cancellation occurs.

(e) Applicability of section

This section shall not apply to—

- (1) a transaction to which section 421 applies,
- (2) a transfer to or from a trust described in section 401 (a) or a transfer under an annuity plan which meets the requirements of section 404 (a)(2),
- (3) the transfer of an option without a readily ascertainable fair market value,

(4) the transfer of property pursuant to the exercise of an option with a readily ascertainable fair market value at the date of grant, or

(5) group-term life insurance to which section [79](#) applies.

(f) Holding period

In determining the period for which the taxpayer has held property to which subsection (a) applies, there shall be included only the period beginning at the first time his rights in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier.

(g) Certain exchanges

If property to which subsection (a) applies is exchanged for property subject to restrictions and conditions substantially similar to those to which the property given in such exchange was subject, and if section [354](#), [355](#), [356](#), or [1036](#) (or so much of section [1031](#) as relates to section [1036](#)) applied to such exchange, or if such exchange was pursuant to the exercise of a conversion privilege—

(1) such exchange shall be disregarded for purposes of subsection (a), and

(2) the property received shall be treated as property to which subsection (a) applies.

(h) Deduction by employer

In the case of a transfer of property to which this section applies or a cancellation of a restriction described in subsection (d), there shall be allowed as a deduction under section [162](#), to the person for whom were performed the services in connection with which such property was transferred, an amount equal to the amount included under subsection (a), (b), or (d)(2) in the gross income of the person who performed such services. Such deduction shall be allowed for the taxable year of such person in which or with which ends the taxable year in which such amount is included in the gross income of the person who performed such services.

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26 CFR 1.451-2 - CONSTRUCTIVE RECEIPT OF INCOME.

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§ 1.451-2

Constructive receipt of income.

(a) General rule. Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions. Thus, if a corporation credits its employees with bonus stock, but the stock is not available to such employees until some future date, the mere crediting on the books of the corporation does not constitute receipt. In the case of interest, dividends, or other earnings (whether or not credited) payable in respect of any deposit or account in a bank, building and loan association, savings and loan association, or similar institution, the following are not substantial limitations or restrictions on the taxpayer's control over the receipt of such earnings:

- (1) A requirement that the deposit or account, and the earnings thereon, must be withdrawn in multiples of even amounts;
- (2) The fact that the taxpayer would, by withdrawing the earnings during the taxable year, receive earnings that are not substantially less in comparison with the earnings for the corresponding period to which the taxpayer would be entitled had he left the account on deposit until a later date (for example, if an amount equal to three months' interest must be forfeited upon withdrawal or redemption before maturity of a one year or less certificate of deposit, time deposit, bonus plan, or other deposit arrangement then the earnings payable on premature withdrawal or redemption would be substantially less when compared with the earnings available at maturity);
- (3) A requirement that the earnings may be withdrawn only upon a withdrawal of all or part of the deposit or account. However, the mere fact that such institutions may pay earnings on withdrawals, total or partial, made during the last three business days of any calendar month ending a regular quarterly or semiannual earnings period at the applicable rate calculated to the end of such calendar month shall not constitute constructive receipt of income by any depositor or account holder in any such institution who has not made a withdrawal during such period;
- (4) A requirement that a notice of intention to withdraw must be given in advance of the withdrawal. In any case when the rate of earnings payable in respect of such a deposit or account depends on the amount of notice of intention to withdraw that is given, earnings at the maximum rate are constructively received during the taxable year regardless of how long the deposit or account was held during the year or whether, in fact, any notice of intention to withdraw is given during the year. However, if in the taxable year of withdrawal the depositor or account holder receives a lower rate of earnings because he failed to give the required notice of intention to withdraw, he shall be allowed an ordinary loss in such taxable year in an amount equal to the difference between the amount of earnings previously included in gross income and the amount of earnings actually received. See section 165 and the regulations thereunder.

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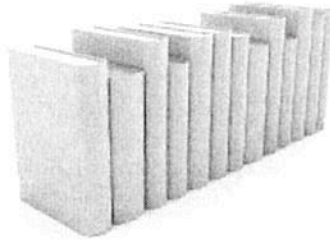
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(b) Examples of constructive receipt. Amounts payable with respect to interest coupons which have matured and are payable but which have not been cashed are constructively received in the taxable year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. Dividends on corporate stock are constructively received when unqualifiedly made subject to the demand of the shareholder. However, if a dividend is declared payable on December 31 and the corporation followed its usual practice of paying the dividends by checks mailed so that the shareholders would not receive them until January of the following year, such dividends are not considered to have been constructively received in December. Generally, the amount of dividends or interest credited on savings bank deposits or to shareholders of organizations such as building and loan associations or cooperative banks is income to the depositors or shareholders for the taxable year when credited. However, if any portion of such dividends or interest is not subject to withdrawal at the time credited, such portion is not constructively received and does not constitute income to the depositor or shareholder until the taxable year in which the portion first may be withdrawn. Accordingly, if, under a bonus or forfeiture plan, a portion of the dividends or interest is accumulated and may not be withdrawn until the maturity of the plan, the crediting of such portion to the account of the shareholder or depositor does not constitute constructive receipt. In this case, such credited portion is income to the depositor or shareholder in the year in which the plan matures. However, in the case of certain deposits made after December 31, 1970, in banks, domestic building and loan associations, and similar financial institutions, the ratable inclusion rules of section 1232(a)(3) apply. See [§ 1.1232-3A](#). Accrued interest on unwithdrawn insurance policy dividends is gross income to the taxpayer for the first taxable year during which such interest may be withdrawn by him.

[T.D. 6723, 29 FR 5342, Apr. 21, 1964; as amended by T.D. 7154, 36 FR 24997, Dec. 28, 1971; T.D. 7663, 44 FR 76782, Dec. 28, 1979]

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Rev. Rul. 1974-388

REVENUE RULINGS

Internal Revenue Service
Revenue Ruling

Rev. Rul. [74-388](#)

1974-2 C.B. 325

IRS Headnote

Private duty hospital attendant. Whether services of a domestic nature performed by a private attendant, who is not a registered nurse or a licensed practical nurse, hired by a patient to provide care in a nursing home, convalescent home, or hospital may be considered "domestic service in a private home" for purposes of the FICA, FUTA, and income tax withholding depends on a complete analysis of such factors as the nature of the patient's illness, physical condition, length of confinement, and social or economic status; Rev. Rul. [68-398](#) modified.

Full Text

Rev. Rul. [74-388](#)

Advice has been requested whether services of a domestic nature that are performed in a nursing home, convalescent home, or hospital may be considered domestic service in a private home for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

Section 3121(a)(7)(B) of the Federal Insurance Contributions Act provides, in part, that cash remuneration paid by an employer to an employee for domestic service in a private home of the employer is excepted from "wages" in calendar quarters when such remuneration is less than \$50.

Section 3306(c)(2) of the Federal Unemployment Tax Act provides an exception from "employment" for domestic service in a private home, and section [3401\(a\)\(3\)](#) of the Code provides a similar exception, from "wages," for remuneration paid for such services, for purposes of income tax withholding.

Sections [31.3121\(a\)\(7\)-1\(a\)\(2\)](#), [31.3306\(c\)\(2\)-1\(a\)\(1\)](#), and [31.3401\(a\)\(3\)-1\(a\)\(1\)](#) of the Employment Tax Regulations define a private home as a fixed place of abode of an individual or family.

DRAFT REVISIONS TO FLORIDA ADMINISTRATIVE CODE 5/10/2004

Personal Services Contract Policy

(c) Compensation received in the form of a personal services contract will be evaluated according to the following criteria to determine if the individual will receive fair compensation:

1. The contract is legally binding under the Laws of Florida; and
2. The contract will provide compensation within the individual's lifetime as set forth in life expectancy tables promulgated in Rule 65A-1.716; and
3. The contracted services do not duplicate services available through Medicaid, Medicare, private insurance, or other legally obligated third parties to fund or provide such service; and
4. The contracted services are in a tangible nature with intrinsic value and not services normally provided out of love and consideration for the individual; and
5. The actual cost to deliver services is computed in a manner that clearly reflects the actual number of hours to be expended and the contract clearly identifies the specific service and the average number of hours of service to be delivered each month; and
6. The hourly rate for each contracted service is equal to or less than the amount normally charged by a professional who traditionally provides the same or similar services; and
7. The contracted services are provided on a prospective basis only. The contract may not reimburse for services provided in the past, whether or not a financial liability was incurred.

The department will evaluate what reasonable compensation will be received by considering provisions 3 through 7 for each contracted service. If the department determines the value of the service is less than indicated in the contract, the department will compute a new value. The department will add the reasonable value of each service in the contract to determine if the individual will receive fair compensation.

If the individual is approved for Medicaid, the provider of services will be required to annually present to the department a sworn statement in which the provider documents the actual specific services rendered monthly, the actual hours expended per service and the actual monthly cost per service for the prior year.

If the department suspects that services as specified in the contract are not rendered, a referral will be made to Adult Protective Services for investigation of possible exploitation and to the Benefit Recovery Unit for evaluating possible overpayment of Medicaid funds.

When the value of a bond will affect eligibility, the bond's owner must request a waiver of the retention period due to hardship (for example, need to receive public assistance or enter a nursing home). If evidence indicates the waiver was denied, the value of the bond is considered unavailable and not counted as a resource until the month after the mandatory retention period expires. If the waiver is granted, the amount of funds an owner receives or can receive by cashing in the bond early is considered as a countable resource.

1640.0576.01 Trusts (MSSI, SFP)

A trust is a right of property held by one party for the benefit of another. The term "trust" also includes any legal instrument or device that is similar to a trust. It does not cover trusts established by will. It can include (but is not limited to) escrow accounts, investment accounts, pension funds, and other similar devices managed by an individual or entity with fiduciary obligation.

The trustee is the individual who holds the legal title to and manages property for the benefit or use of another. The beneficiary is the individual for whose benefit the trust is created.

A trust is considered revocable if the trust can be dissolved; it is considered irrevocable if it cannot be dissolved.

It is important to understand other terms used in reference to trusts:

1. Grantor (Trustor/Settlor) - Sets up the trust.
2. Trustee - Manages the trust.
3. Beneficiary - Receives benefits from the trust.
4. Corpus/Principal - Assets or income used to establish the trust.
5. Distributions/Disbursements - Money or assets paid out of the trust (either from the corpus or income produced by the corpus).

Refer to policies in 1640.0576.02 through 1640.0576.11 to determine how to consider trust funds.

1640.0576.02 How to Analyze Trusts (MSSI, SFP)

How to count funds held in a trust, whether as income or assets, depends on several factors:

1. who created the trust;
2. when it was created;
3. whether the trust is revocable or irrevocable; and
4. the conditions and terms of the trust.

1640.0576.03 Trusts Set Up By Others (MSSI, SFP)

For trusts that are established by someone other than the individual, the individual's spouse or representative, the trust must be evaluated according to these SSI policies:

1. If the individual does not have authority to revoke or direct use of the trust, it is not considered an asset to him. Conversely, if the individual has the authority to revoke or direct use of the trust, the corpus of the trust is considered an asset to him.
2. Cash paid directly from the trust to the individual is unearned income.
3. Disbursements made by the trustee directly to a third party are not considered income to the individual.

The above policies also apply to trusts established by a will, regardless of the relationship of the now deceased grantor to the individual.

Refer to passages 1640.0576.04 and 1640.0576.07 for information on how to treat trusts established by the individual, individual's spouse or representative.

1640.0576.04 Medicaid Qualifying Trusts before 10/1/93 (MSSI, SFP)

The following policy applies only to those trusts established before 10/1/93:

A Medicaid qualifying trust is a trust or similar legal device (other than through a will) created by an individual, his spouse, or legal representative under which (a) the individual may be the beneficiary of all or part of the payments from the trust, and (b) the amount of the distribution is determined by one or more trustees who are permitted to exercise any discretion with respect to the amount to be distributed to the individual.

Note: The term "Medicaid qualifying trust" (MQT) must not be confused with the term "qualified income trust". The MQT refers to some trusts established prior to 10/1/93 which disqualified individuals for Medicaid, while the "qualified income trust" refers to certain income-only trusts permitted on or after 10/1/93 which allow individuals to qualify for ICP or HCBS.

If the trust meets the definition of a Medicaid qualifying trust, consider the maximum distribution that could be paid to the applicant/recipient by the trustee(s) as an available asset and income to the individual whether or not the distribution is made. These policies apply even if the trust is irrevocable, regardless of the purpose of the trust or whether or not the trustee(s) actually exercises their discretion.

If the trustee has no or limited discretion or ability to disburse funds to the individual, the amount that is unavailable must be considered a transfer of an asset without fair compensation and must be evaluated under transfer of asset policy if it was established within the applicable transfer look-back period.

1640.0576.05 Exceptions for Trusts before 10/1/93 (MSSI, SFP)

The following trusts are exempt from the Medicaid qualifying trust provisions:

1. Trusts set up by a family member (other than the individual or spouse) under the State of Florida Umbrella Trust Agreement for developmentally disabled or mentally ill individuals in accordance with Florida Administrative Code 65-19. Any money given to the beneficiary by the trustee would be considered as income.
2. "Individual trusts" when the beneficiary is a mentally retarded individual who resides in an ICF/DD, provided the trust or initial trust decree was established prior to April 7, 1986, and is solely for the benefit of that developmentally disabled or mentally ill individual.
3. Trusts established by will.

1640.0576.06 Undue Hardship/Trusts Set Up before 10/1/93 (MSSI, SFP)

If undue hardship exists, only the amount of the trust that is actually made available as income or assets is counted. Undue hardship is defined as any situation in which an individual may be forced to go without life sustaining services because the proceeds from a trust fund are not available to the individual. This may be due to legal restrictions or illegal actions by the trustee. All undue hardship decisions must be reviewed and approved by the eligibility specialist.

1640.0576.07 Trusts Established On or After 10/1/93 (MSSI, SFP)

The following policy applies to trusts established by an individual on or after 10/1/93.

An individual will be considered to have established the trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established the trust (other than by will):

1. the individual;
2. the individual's spouse;
3. a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or the individual's spouse; or
4. a person, including a court or administrative body, acting at the direction or upon request of the individual or individual's spouse.

If the trust was not established by one of the above individuals, refer to passage 1640.0576.03.

If the trust is **revocable**:

1. Consider the entire principal as an available asset to the individual.
2. Consider any payments which can be made as countable income to the individual.
3. Consider any other payments from the trust as assets disposed of by the individual without fair compensation.

If the trust is **irrevocable** and there are any circumstances under which payment from the trust could be made to or for the benefit of the individual:

1. Consider that portion of the principal that could be available, as an asset to the individual.
2. Consider payments from that portion of the principal which could be available as income to the individual.
3. Consider any other payment from the trust as a transfer of assets.

If the trust is **irrevocable** and no payment could be made from the trust under any circumstances:

1. Apply the transfer of assets policy to the individual's assets and income used to establish the trust. The transfer policy applies only to applicants or recipients of nursing facility services and HCBS.
2. The trust is not counted as an available asset.

The above policies apply without regard to:

1. the purpose of the trust;
2. whether the trustees have or exercise any discretion under the trust;
3. any restrictions on when or whether distributions may be made from the trust; or
4. any restrictions on the use of distributions from the trust.

For more information on transfer of assets for SSI-Related Medicaid, see passage 1640.0606.

PERSONAL SERVICE AGREEMENT

This Agreement is made on _____, 2012 by and between, _____, (hereinafter referred to as "CARE RECIPIENT"), and _____, (hereinafter referred to as "CARE PROVIDER").

It is the intent of the parties that the contracted services herein do not duplicate services available through other sources or providers, such as Medicaid, Medicare, private insurance, or another legally obligated third party.

1. DUTIES OF CARE PROVIDER.

CARE PROVIDER will provide care-giving services for CARE RECIPIENT as follows:

1.1 CARE RECIPIENT contracts to receive and CARE PROVIDER agrees to provide the following lifetime services on an "as needed" basis:

- (1) Attend to needs of CARE RECIPIENT, including shopping for supplemental food items, wardrobe, toiletries, and personal necessities; and purchasing aforesaid with funds made available by CARE RECIPIENT, taking into account CARE RECIPIENT's ability to pay for such items. ___ hours/week.
- (2) CARE PROVIDER shall provide transportation to/from visits with family. Note: socialization with family members is not included nor is it chargeable under this contract. ___ hours/week.
- (3) CARE PROVIDER shall provide transportation to CARE RECIPIENT regarding their medical care, to/from all doctors' appointments, including treatment and/or testing facilities on an as needed basis. ___ hours/week.
- (4) CARE PROVIDER shall periodically assess the personal needs and desires of CARE RECIPIENT as to social, physical, personal hygiene and grooming. (CARE PROVIDER shall care for or arrange CARE RECIPIENT's grooming needs, such as cosmetics, pedicures and hair dressing. ___ hours/week.
- (5) CARE PROVIDER shall also provide for appropriate spiritual, physical, social or companionship needs of CARE RECIPIENT. CARE PROVIDER will arrange for outings and visitations; and supervise and encourage CARE RECIPIENT to socialize. Note: socialization with family members is not included nor is it chargeable under this contract. ___ hours/week.
- (6) CARE PROVIDER shall monitor CARE RECIPIENT's physical and mental condition and nutritional needs on a regular basis in cooperation with health care providers and personnel and staff at CARE RECIPIENT's place of residence. ___ hours/week.

- (7) CARE PROVIDER will also arrange for assessment, services and treatment by appropriate health care providers, including but not limited to, physicians, nurses, physical therapists, and mental health specialists for CARE RECIPIENT, as needed, and shall attend any care plan meeting at CARE RECIPIENT's facility of residence. ___ hours/week.
- (8) CARE PROVIDER shall collect CARE RECIPIENT's mail, pay CARE RECIPIENT's bills, and handle all financial matters and shall assist CARE RECIPIENT in daily money management to the extent funds of CARE RECIPIENT are available and to the extent CARE PROVIDER may have access to such funds to accomplish such services. ___ hours/week.

The CARE PROVIDER shall provide a total of ___ hours per week services to CARE RECIPIENT.

2. DURATION.

The services indicated above shall be provided to CARE RECIPIENT by CARE PROVIDER on a month-to month basis, for the remainder of CARE RECIPIENT's life. No services provided by any long term care facility shall be duplicated or required of CARE PROVIDER.

3. COMPENSATION.

The parties stipulate that as of the execution of this Agreement, CARE RECIPIENT is ___ years of age. CARE RECIPIENT agrees to pay, and CARE PROVIDER agrees to accept, in payment for the aforesaid services to be rendered by CARE PROVIDER, the compensation set forth below, which compensation the parties stipulate and agree to be fair and reasonable and commensurate with the quality and extent of the services and their fair market value.

- 3.1 The parties stipulate that court-appointed family guardians, who render the aforesaid services in this county, generally receive \$30 per hour under Court order. Professional Nurse (RN) typically receives \$40 per hour for performance of the services noted above. The parties stipulate and agree that the CARE PROVIDER shall receive \$30 per hour.
- 3.2 The parties agree and stipulate that CARE PROVIDER shall furnish the services set forth on a month-to-month basis, over the lifetime of CARE RECIPIENT on an "as needed" basis. Therefore, the parties understand that the hours expended in performance of said services will fluctuate over said lifetime according to CARE RECIPIENT's needs. There may be periods where more than ___ hours per week may be required. Conversely, there may be intervals when the services require less time.

The parties agree that over the lifetime of CARE RECIPIENT, CARE PROVIDER expects to expend, on average, ___ hours per week or more. In any event CARE PROVIDER agrees to provide a minimum of ___ hours per week in consideration for this contract. CARE PROVIDER agrees to keep a record of the date, time and description of weekly hours spent as a record of the services provided.

3.3 The parties agree and stipulate that CARE RECIPIENT is ___ years of age and her date of birth is _____. Based on the actuarial tables contained in Social Security Administrative Tables, the life expectancy of CARE RECIPIENT is ___ years. This Agreement is for the duration of CARE RECIPIENT's life, regardless of its length. Although CARE RECIPIENT may live beyond said life expectancy or survive for a shorter duration, the parties agree and stipulate that compensation to the CARE PROVIDER be based upon said life expectancy of ___ years.

3.4 The parties, therefore, agree and stipulate that compensation to the CARE PROVIDER shall be computed as follows:

\$30/hour x ___ hours/week = \$___ per week

\$___/week x ___ weeks/year = \$___ /year

\$___/year x ___ years (life expectancy) = \$_____

PAYMENT

3.5 The parties agree that as full compensation for the services contemplated hereunder, CARE RECIPIENT shall deposit a lump sum of \$_____ (based on the \$_____ yearly payment for the remaining life expectancy of CARE RECIPIENT) to an irrevocable Trust dated _____, 2012 established by _____ (hereinafter referred to as the "PERSONAL CARE TRUST").

3.6 CARE RECIPIENT shall have (1) no interest in the income or principal of the PERSONAL CARE TRUST; (2) no revisionary interest therein; (3) no right to nor access to the funds in the PERSONAL CARE TRUST for any reason; (4) no right to alter, amend, or revoke the terms of the PERSONAL CARE TRUST; nor (5) the right to change the Trustees of such Trust. The purpose of the PERSONAL CARE TRUST is to pay the monthly personal care compensation to CARE PROVIDER for so long as such services are provided in accordance with the terms of this Agreement. In the event CARE PROVIDER is unable or unwilling to provide the personal care services provided for in this Agreement, the PERSONAL CARE TRUST shall pay the monthly compensation to an alternate personal care provider acceptable to CARE RECIPIENT. The purpose

of the PERSONAL CARE TRUST is to (1) ensure the CARE RECIPIENT that the services and care called for by this Agreement will be provided to CARE RECIPIENT in the event CARE PROVIDER is unable or unwilling to do so for any reason; and (2) to ensure CARE PROVIDER that funds are available for the compensation of CARE PROVIDER so long as he provides the services called for by this Agreement.

- 3.7. CARE PROVIDER shall have no right to assign his rights to receive any payments called for by this Agreement, except, with the written consent of CARE RECIPIENT, to an alternate care provider acceptable to CARE RECIPIENT. CARE PROVIDER shall forfeit his right to receive the compensation provided for herein in the event he is unable or unwilling to provide the services provided for in this Agreement. CARE PROVIDER agrees to accept the compensation provided for herein even if at some future date CARE PROVIDER believes, based on economic or other conditions then prevailing, that the monthly compensation provided for herein is less than the fair market value of the services then being provided by CARE PROVIDER.

4. VISITORS AND COMMUNICATIONS.

- 4.1 CARE PROVIDER shall periodically visit with CARE RECIPIENT, wherever CARE RECIPIENT shall be, to the extent practical. The normal socialization with a family member is not chargeable under this contract. CARE RECIPIENT shall be encouraged to visit with family members and friends, to use the telephone in privacy and to send and receive mail.

5. OBLIGATION OF CARE RECIPIENT

- 5.1 CARE PROVIDER shall **NOT** be responsible or liable for any expenses incurred, or debt or obligation of any nature contracted by CARE RECIPIENT on his own account.

6. NON-ASSIGN ABILITY.

Except as provided in paragraph 7 below, this agreement is for services unique to CARE RECIPIENT. CARE PROVIDER agrees to personally perform the above services. CARE PROVIDER shall have no obligation to render services or otherwise be liable to any other person or entity.

7. DELEGATION OF SERVICES AND COMPENSATION

CARE PROVIDER understands that he shall receive and report as taxable income, the compensation provided for herein and shall be obligated to perform the duties described in paragraph I above. THE _____ PERSONAL CARE TRUST SHALL ISSUE A 1099 TO CARE PROVIDER AT THE END OF EACH CALANDER YEAR IN WHICH COMPENSTAION IS PAID.

Upon prior written approval from CARE RECIPIENT (or Power of Attorney), one or more of such duties may be delegated to a competent appropriate care provider at the expense of CARE PROVIDERS.

8. LIABILITY.

Medical care is to be provided at the expense of CARE RECIPIENT. CARE PROVIDER shall not be liable for the cost of CARE RECIPIENT's care. CARE RECIPIENT agrees to reimburse CARE PROVIDER for any reasonable out-of-pocket expenses incurred on CARE RECIPIENT's behalf.

9. EFFECTIVE DATE.

This Agreement shall take effect and be binding on the parties hereto upon execution of this agreement regardless of whether payments have begun.

10. ARBITRATION CLAUSE.

The parties agree that any dispute between them regarding the services under this Agreement or any other aspect of this Agreement will be determined by submitting it to arbitration under the laws of the State of Florida, rather than by a lawsuit through the court process.

11. INDEPENDENT CONTRACTOR STATUS

The parties agree and acknowledge that CARE PROVIDER is not an employee of CARE RECIPIENT. CARE PROVIDER shall be acting as an independent contractor. CARE PROVIDER shall exercise his own independent judgment as to the time and manner in which CARE PROVIDER performs the services called for by this Agreement. There shall be no set hours of work, the full time of CARE PROVIDER is not being provided, and CARE PROVIDER shall be free to provide services to other persons or entities so long as they do not interfere with CARE PROVIDER's obligations under this Agreement. Accordingly, the parties agree that CARE PROVIDER will not be treated as an employee of CARE RECIPIENT for any

reason, including withholding and payroll tax purposes.

12. **MISCELLANEOUS.**

- 12.1 This Agreement contains the entire Agreement and understanding between the parties, surpassing all prior communications, either written or oral, concerning the subject matter of this Agreement. This Agreement may be changed only by a written instrument executed by both parties hereto. If any portion of this Agreement is held by a Court to be invalid, void or inconceivable, the remaining provisions shall nevertheless continue in full force and effect.
- 12.2 This Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

END OF TEXT

THIS IS A LEGALLY BINDING AGREEMENT. EACH PARTY HAS READ THE ABOVE AGREEMENT BEFORE SIGNING IT. EACH PARTY UNDERSTANDS THE AGREEMENT HE OR SHE IS MAKING, HAVING HAD THE OPPORTUNITY TO ASK TO HAVE EACH TERM THAT THE PARTY DOES NOT UNDERSTAND FULLY EXPLAINED.

IN WITNESS WHEREOF I subscribe my name on _____, 2012.

CARE RECIPIENT

**STATE OF FLORIDA
COUNTY OF SARASOTA**

The foregoing instrument was acknowledged before me on _____, 2012, by _____, **CARE RECIPIENT**, who is personally known to me or has produced _____ as identification.

Name:

Notary Public, State of Florida

Commission Expires:

Commission No.:

IN WITNESS WHEREOF I subscribe my name on _____, 2012.

CARE PROVIDER

**STATE OF FLORIDA
COUNTY OF SARASOTA**

The foregoing instrument was acknowledged before me on _____, 2012, by _____, **CARE PROVIDER**, who is personally known to me or has produced as identification.

Name:

Notary Public, State of Florida

Commission Expires:

Commission

NAME RECIPIENT PERSONAL CARE TRUST

I, **NAME GRANTOR** (*NOTE: Grantor can not be the CARE PROVIDER. While I prefer not to name the Care Recipient as the Grantor, it should work. This is because it is a transfer for fair market value and therefore there should be no transfer penalty Any third party, spouse or child who is not a care provider can be a Grantor as well*), as Grantor, hereby create the **NAME RECIPIENT PERSONAL CARE TRUST** ("the Trust") on _____, 2012. **NAME TRUSTEE** (*NOTE: Trustee can not be the CARE RECIPIENT or CARE PROVIDER, it can be a third party. I would never name a well spouse as trustee, too risky for both the IRS and Medicaid.*), is the Trustee of this Trust and, in that capacity, she and any of her successors are referred to in this Trust as the "Trustee."

ARTICLE 1 PURPOSE

The purpose of this Trust is to act as an independent escrow holder to (1) assure that the personal services to be provided to **NAME CARE RECIPIENT** under the terms of that certain Personal Services Agreement dated the date hereof between **NAME CARE RECIPIENT** and **NAME CARE PROVIDER** (the "Personal Services Agreement") will be provided and paid for, and (2) assure **NAME CARE PROVIDER** and any other "Care Provider" under the terms of the Personal Services Agreement that funds will be available to compensate them for so long as they provide the services called for by the Personal Services Agreement,

ARTICLE 2 TRANSFERS TO TRUST

NAME GRANTOR hereby holds as Trustee Ten Dollars (\$10), which together with any assets later added to this Trust are referred to as the "Trust Estate." Any person may transfer assets to the Trust Estate, if the Trustee agrees to accept them. Unless otherwise specified in writing at the time of the transfer, those assets will be held as provided in this Trust. The Trustee accepts the responsibility of the Trustee, acknowledges receipt of the current Trust assets, and agrees to hold the Trust Estate as set forth in this Trust.

ARTICLE 3 IRREVOCABLE PROVISION

The Grantor declares that neither she nor any other person shall have the right to alter, amend, modify, or revoke this Trust.

ARTICLE 4 ADMINISTRATION DURING LIFETIME OF NAME RECIPIENT

The Trustee shall hold and administer the Trust Estate as follows:

4.1 Distribution of Income and Principal. In the event **NAME RECIPIENT** and **NAME PROVIDER** agree to a lump sum payment of \$_____ for the personal services to be provided by **NAME PROVIDER** to **NAME RECIPIENT** under the terms of the Personal Services Agreement, such sum shall be received and accepted in Trust by the Trustee as third party escrow holder. The Trustee shall invest and reinvest said sum in one or more investments, including annuities. The Trustee shall use all of the income earned by the Trust, and to the extent necessary, the principal, to pay to **NAME PROVIDER**, for so long as he provides the personal services to **NAME RECIPIENT** called for by the Personal Services Agreement, the sum of \$_____ per month. In the event **NAME PROVIDER** becomes unable or is unwilling to provide the personal care services called for by the Personal Services Agreement, the Trustee shall obtain the services of an alternate care provider and pay such monthly compensation to the alternate care provider. Any alternate care provider must be acceptable to **NAME RECIPIENT**.

NAME RECIPIENT shall have (1) no interest in the income or principal of this Trust, (2) no reversionary interest herein, (3) no right or access to the assets of this Trust, (4) no right to alter, amend or revoke this Trust, and (5) no right to become a Trustee or change the Trustee of this Trust.

NAME PROVIDER shall have no right to sell, assign, transfer or encumber his right to receive any payments due from this Trust. **NAME PROVIDER** shall forfeit his right to receive the monthly payments in the event he is unable or unwilling to provide the services called for by the Personal Services Agreement.

The Trustee shall have no right or discretion to use the income or principal of this Trust for any purpose other than to pay the persons who provide the personal services to **NAME RECIPIENT** required under the terms of the Personal Services Agreement. Accordingly, the assets of this Trust may not be used to supplant, replace or reimburse any benefits **NAME RECIPIENT** may receive or be eligible to receive from any federal, state or local government. For purposes of determining **NAME RECIPIENT**'s eligibility for such benefits, no part of the income or principal of this Trust shall be available to or be considered to be available to **NAME RECIPIENT**.

**ARTICLE 5
ADMINISTRATION AFTER DEATH
OF NAME RECIPIENT**

Upon the death of **NAME RECIPIENT**, the Trustee shall distribute all remaining assets of the Trust, if any, as follows:

**ARTICLE 6
SUCCESSOR TRUSTEES**

In the event of the death or disability of NAME TRUSTEE, _____ shall serve as Successor Trustee.

**ARTICLE 7
PROVISIONS GOVERNING TRUSTEE**

The following provisions apply to all Trustees appointed under this Trust:

7.1 Incapacity of Trustee. If any Trustee is adjudicated to be incapacitated or becomes unable to manage financial affairs properly because of mental or physical impairment (as evidenced by a written certificate signed by two physicians), he or she will immediately cease to act as Trustee.

(a) **Suspension.** For purposes of this Section, if a Trustee fails to sign a release of relevant medical information necessary to determine his or her capacity, that Trustee will be suspended 30 days after the request for such a release is delivered to him or her by the other Trustees.

(b) **Reinstatement.** If a Trustee who ceases to serve because of a disability, or who is suspended as provided above, thereafter recovers from that disability or consents to the release of relevant medical information, he or she may elect to become a Trustee again by giving written notice to the then serving Trustees.

7.2 Resignation. Any Trustee may resign by giving 30 days' written notice delivered personally or by mail to any then serving Trustee.

7.3 Powers of Successor Trustees. Successor Trustees will have all powers granted to the original Trustee. A Trustee ceasing to serve for any reason has the duties and powers necessary to protect the Trust Estate until it is delivered to a Successor Trustee.

7.4 Accountings. Unless waived, accountings must be given to Qualified Beneficiaries at least annually (quarterly if a Corporate Trustee is serving), as provided in Fla. Stat. §§736.0813 and 736.08135. The written approval by a beneficiary (individually or by representation) of an accounting will be final and binding upon that beneficiary and all persons represented by him or her as to all matters disclosed in that accounting. In any event, if a beneficiary (or his or her representative) fails to object to an accounting within six months of receiving it, that beneficiary's approval is conclusively presumed. A successor Trustee may require the prior Trustee to render a full and final accounting. The Trustee shall provide all other information required under Fla. Stat. §736.0813, unless waived as permitted in that section, and the limitations on proceedings against the Trustee as specified in Fla. Stat. §736.1008 will apply, despite any other provision of this section.

7.5 Acts by Other Fiduciaries. The Trustee shall take reasonable steps to compel a former Trustee or other person to deliver trust property to the Trustee, but otherwise is not

required to question any acts or failures to act of the fiduciary of any other trust or estate, and will not be liable for any prior fiduciary's acts or failures to act. The Trustee can require a beneficiary who requests an examination of another fiduciary's actions or omissions to advance all costs and fees incurred in the examination, and if the beneficiary does not, the Trustee may elect not to proceed or may proceed and offset those costs and fees directly against any payment that would otherwise be made to that beneficiary.

7.6 Court Supervision. Compliance by the Trustee with any law requiring bond, registration, qualification, or accounting to any court is hereby waived.

7.7 Compensation. It is the intention of the Grantor that the Trustee shall not receive any compensation for his or her services rendered in the administration of this Trust. Reasonable compensation for a Corporate Trustee, if any, will be its published fee schedule in effect when its services are rendered unless otherwise agreed in writing, and except as follows. Any fees paid to a Corporate Trustee for making principal distributions, for termination of the trust, and upon termination of its services must be based solely on the value of its services rendered, not on the value of the trust principal.

7.8 Indemnity. Any Trustee who ceases to serve for any reason will be entitled to receive (and the continuing Trustee shall make suitable arrangements to provide) reasonable indemnification and security to protect and hold that Trustee harmless from any damage or liability of any nature that may be imposed upon it because of its actions or omissions while serving as Trustee. This protection, however, does not extend to a Trustee's negligent actions or omissions that clearly and demonstrably result in damage or liability. A prior Trustee may enforce these provisions against the current Trustee or against any assets held in the Trust, or if the prior Trustee is an individual, against any beneficiary to the extent of distributions received by that beneficiary. This indemnification right will extend to the estate, personal representatives, legal successors, and assigns of a Trustee.

ARTICLE 8 FIDUCIARY POWERS

The Trustee shall have full power to deal freely with any property in the Trust. The Trustee may exercise these powers independently and without the approval of any court. No person dealing with the Trustee need inquire into the propriety of any of its actions or into the application of any funds or assets. The Trustee however, shall exercise all powers in a fiduciary capacity in good faith, as a prudent person would using reasonable care, skill, and caution, for the best interest of the beneficiaries of any trust created in this Trust. Without limiting the generality of the foregoing, the Trustee is given the following discretionary powers in addition to any other powers conferred by law:

8.1 Type of Assets. Except as otherwise provided to the contrary, to hold funds uninvested for such periods as the Trustee deems prudent, and to invest in any assets the Trustee deems advisable, including annuities, even though they are not technically recognized or specifically listed in so-called "legal lists", without responsibility for depreciation or loss on

account of those investments, or because those investments are non-productive, as long as the Trustee acts in good faith.

8.2 Tangible Personal Property. To receive and hold tangible personal property; to pay or refrain from paying storage and insurance charges for such property; and to permit any beneficiaries to use such property without either the Trustee or beneficiaries incurring any liability for wear, tear, and obsolescence of the property.

8.3 Financial Accounts. To deposit trust money in one or more accounts in regulated financial service institutions, including but not limited to banks, savings institutions, and brokerage houses, and to draw checks, drafts, or other forms of withdrawal, including electronic transfers, from those accounts.

8.4 Property Transactions. To buy, sell, pledge, exchange, or lease any real or personal property, publicly or privately, for cash or credit, without court approval and upon the terms and conditions that the Trustee deems advisable; to execute deeds, leases, contracts, bills of sale, notes, mortgages, security instruments, and other written instruments; to grant, acquire, or exercise options; to abandon or dispose of any real or personal property in the Trust which has little or no monetary or useful value; to improve, repair, insure, subdivide and vacate any property; to erect, alter or demolish buildings; to adjust boundaries; and to impose easements, restrictions, and covenants as the Trustee sees fit. An instrument described in this section will be valid and binding for its full term even if it extends beyond the full duration of the Trust.

8.5 Borrow Money. To borrow money from any source (including the Trustee in its nonfiduciary capacity), to guarantee indebtedness, and to secure the loan or guaranty by mortgage or other security interest.

8.6 Maintain Assets. To expend whatever funds it deems proper for the preservation, maintenance, or improvement of assets. The Trustee in its discretion may elect any options or settlements or exercise any rights under all annuity policies that it holds.

8.7 Insurance. To obtain property, casualty, liability or any other insurance for the Trust, including insurance for the Trustee and its agents against damage or liability arising from administration of the Trust.

8.8 Allocations to Income and Principal. To treat premiums and discounts on bonds and other obligations for the payment of money in accordance with either generally accepted accounting principles or tax accounting principles and, except as otherwise provided to the contrary, to hold nonproductive assets without allocating any principal to income, despite any laws or rules to the contrary. The Trustee in its discretion may exercise the power described in Section 738.104 of the Florida Statutes to adjust between principal and income, as appropriate, and, in addition, may convert any income interest into a unitrust interest, or a unitrust interest to an income interest, as it sees fit, all as provided in Section 738.1041 of the Florida Statutes, despite any provision of those sections to the contrary.

8.9 Loans; Advances. To make loans to anyone under commercially reasonable terms, and to make cash advances or loans to beneficiaries, with or without security. The Trustee may retain a lien on future distributions to a beneficiary to repay those loans.

8.10 Winding Up. On termination of a trust, to exercise the powers appropriate to wind up the administration of that trust and distribute the remaining assets to the persons entitled to them, and to retain a reasonable reserve for the payment of debts, expenses, and taxes.

ARTICLE 9 GRANTOR TRUST POWERS

The Grantor intends that she be treated as the owner of the Trust Estate (both income and principal) for income tax purposes under one or more of Sections 671 through 678 of the Internal Revenue Code. Accordingly, at any time, the Grantor may borrow the income or corpus of the Trust without adequate interest or security. This power may be exercised by the Trustee in a non-fiduciary capacity in addition to any general lending power of the Trustee. The Grantor shall have a substitution power or right to reacquire any assets of the trust by substitution of other assets of equivalent value.

ARTICLE 10 PERPETUITIES PROVISION

Despite any contrary provisions of this Trust, the share of each beneficiary will vest (in the beneficiary or his or her estate) immediately prior to the expiration of the longest fixed period allowed by the Florida Rule Against Perpetuities after the creation of this Trust.

ARTICLE 11 ADMINISTRATION AND CONSTRUCTION

11.1 Rules for Distributions. In making distributions under this Trust, the Trustee shall comply with the stated purpose of this trust as set forth in Article 1 above, and upon the death of NAME RECIPIENT, to make final distribution as provided under Article 5 above.

ARTICLE 12 APPLICABLE LAW; TRUST SITUS

All questions regarding the law to be applied or the appropriate situs of any trust will be governed by the terms of this article as follows:

12.1 Validity; Construction. All matters involving the validity, interpretation, construction, and meaning (or effect) of every trust created under this instrument are to be governed by the laws of Florida.

12.2 Principal Place of Administration. All matters involving the administration of the trust created under this instrument are to be governed by the laws of Florida, which is the initial principal place of administration (the "situs") of this trust. A Trustee may change the principal place of administration of any trust as provided below.

12.3 Determining Situs. The Trustee will have a continuing duty to administer the trust at a place appropriate to its purposes and its administration. In exercising this duty, the Trustee should consider the factors specified Fla. Stat. §736.0108 and the impact of a change to a different situs on the following: state and local taxes; compensation of fiduciaries; investment authority; duties, responsibilities, and liabilities of the Trustee; and any other factor appropriate to the new jurisdiction.

12.4 Transferring Situs. The Trustee, acting from time to time and without court approval, may transfer the situs of any trust to any jurisdiction within the United States, subject to the notice requirements contained in Fla. Stat. §736.0108(6).

12.5 Substitute Trustee. If the Trustee is unable or unwilling to serve in the new trust situs, the Trustee may: designate a substitute Trustee to act with respect to that property in the new situs; delegate to the substitute Trustee any or all of the powers given to the Trustee; elect to act as advisor to the substitute Trustee and receive reasonable compensation for that service; and remove any acting substitute Trustee and appoint another, or reappoint itself, if appropriate, at will.

ARTICLE 13 MISCELLANEOUS PROVISIONS

13.1 Definitions. As used in this Trust, the following terms have the meanings set forth below:

(a) **Corporate Trustee.** **Corporate Trustee** means a trustee that is a bank, trust company, or other entity authorized to serve as a trustee under the laws of the United States or any state thereof.

(b) **Internal Revenue Code Terms.**

(1) **Internal Revenue Code** means the federal Internal Revenue Code of 1986, as amended from time to time, or successor provisions of future federal internal revenue laws.

(c) **Other Terms.**

(1) Distributions that are to be made to a person's **descendants, per stirpes**, will be divided into equal shares, so that there will be one share for each living child (if any) of that person and one share for each deceased child who has then living descendants. The share of each deceased child will be further divided among his or her descendants on a per stirpes basis, by reapplying the preceding rule to that deceased child and his or her descendants as many times as necessary.

13.2 Notices. Any person entitled or required to give notice under this Trust shall exercise that power by a written instrument witnessed by two impartial persons and notarized, clearly setting forth the effective date of the action for which notice is being given. The instrument may be executed in counterparts.

13.3 Further Instruments. The Grantor shall execute such further instruments as may be necessary to vest the Trustee with full legal title to the property transferred to this Trust.

13.4 Acknowledgments. Acknowledgments of this trust agreement and matters affecting the administration of the Trust may be given for purposes of recording such instruments, but the absence of an acknowledgment does not affect the validity of those instruments.

13.5 Binding Effect. This trust agreement extends to and is binding upon the Grantor, her Personal Representative(s), successors, and assigns, and upon the Trustee.

13.6 Spendthrift Provisions. No beneficiary of the trust shall have the right to voluntarily or involuntarily assign or transfer any interest in the Trust. No beneficiary shall have any right to anticipate, sell, assign, mortgage, pledge or otherwise dispose of or encumber all or any part of the Trust estate. No part of the trust estate shall be liable for any debts or obligations of any beneficiary, including alimony and child support, nor be subject to any lien, garnishment, execution or other legal or equitable process.

Executed as of the effective date written above.

NAME GRANTOR

This instrument was signed, sealed, published, and declared by the Grantor as her Trust Agreement in our joint presence, and at her request, we have signed our names as attesting witnesses in her presence and in the presence of each other on the date first written above.

Name

Address

STATE OF FLORIDA
COUNTY OF SARASOTA

I, **GRANTOR'S NAME**, declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my Trust Agreement.

GRANTOR NAME

We, _____ and _____,
have been sworn by the officer signing below, and declare to that officer on our oaths that the Grantor declared the instrument to be her Trust Agreement and signed it in our presence, and that we each signed the instrument as a witness in the presence of the Grantor and of each other.

Witness

Witness

Acknowledged and subscribed before me by the Grantor, **NAME GRANTOR**, who is personally known to me or who provided _____ as identification, and sworn to and subscribed before me by the witnesses, _____ and _____, both of whom are personally known to me, and subscribed by me in the presence of the Grantor and the witnesses, all on _____, 2012.

Notary Public, State of Florida