

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEBRA L. SAVASUK AND TERRY
SAVASUK, AS DULY APPOINTED
GUARDIANS OF THE PERSON AND
PROPERTY OF TAYA ROSE SAVASUK-
MALDONADO, A MINOR,

Petitioners,

vs.

Case No. 13-4130MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

On December 16, 2013, a final administrative hearing was held in this case by video teleconferencing, with sites in Fort Myers and Tallahassee, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elizabeth Minor van den Berg, Esquire
Goldstein, Buckley, Cechman,
Rice and Purtz, P.A.
1515 Broadway
Fort Myers, Florida 33901

For Respondent: Adam James Stallard, Esquire
Xerox Recovery Services Group
2316 Killearn Center Boulevard
Tallahassee, Florida 32309

STATEMENT OF THE ISSUE

The issue in this case is the amount of the Petitioners' personal injury settlement required to be paid to the Agency for Health Care Administration (AHCA) to satisfy its Medicaid lien under section 409.910, Florida Statutes (2013).

PRELIMINARY STATEMENT

On October 18, 2013, the Petitioners filed a Petition to Determine Medicaid Lien. The parties filed a Joint Pre-hearing Stipulation, and a hearing was held on December 16, 2013. At the hearing, the Petitioners called two witnesses, Debra Savasuk and David Goldberg, Esquire, and Petitioners' Exhibit A was received in evidence. Pertinent legal authorities were officially recognized.

The Transcript of the final hearing was filed, and the parties filed proposed orders that have been considered.

FINDINGS OF FACT

1. The Petitioners are the grandparents and legal guardians of Taya Rose Savasuk-Maldonado, who is 11 years old.

2. On October 2, 2010, Taya and six family members were involved in a horrific car crash. The driver of another car (the tortfeasor) failed to stop at an intersection and slammed into the family van, which rolled over, ejecting three passengers, including Taya and her great-grandparents. The great-grandparents died on the pavement next to Taya, and Taya suffered

severe injuries, including a skull fracture, pancreatitis, bleeding in her abdomen, and severe road rash that required multiple skin graft surgeries and dressing changes so painful that anesthesia was required. Taya has significant, permanent scarring, which has left her self-conscious and unwilling to wear any clothing that exposes her scars, including bathing suits and some shorts. Taya's emotional injuries include nightmares and grief over the loss of both great-grandparents. Other family members also suffered injuries.

3. Taya required emergency and subsequent medical care that has totaled \$257,567 to date. It is not clear from the evidence how much, if any, of that total was reduced when providers accepted Medicaid. Future medical expenses are anticipated, but there was no evidence as to the amount of future medical expenses.

4. The tortfeasor had a \$100,000/\$300,000 Hartford insurance liability policy on the car he was driving at the time of the accident. Hartford agreed to pay the policy limits. The injured family members agreed that \$200,000 of the policy limits should be paid to Taya. On October 14, 2013, Hartford and the Petitioners agreed that the Petitioners would release Hartford, the tortfeasor and his wife (the other owner of the car) in return for payment of \$200,000 to be held in trust by the Petitioners' attorneys for distribution as follows: \$60,000 to

be paid to the Prudential Assigned Settlement Services Corporation to fund future payments to Taya beginning in year 2020; up to \$84,095 to lienholders in amounts to be determined; and the balance to the Petitioners' attorneys. The parties to that agreement, which did not include AHCA, agreed that \$51,513 of the \$200,000 should be allocated to payment of Taya's medical bills, with the rest allocated to claims other than medical expenses. There was no evidence that anything has been paid to AHCA towards its Medicaid lien, or that anything has been paid into an interest-bearing trust account for the benefit of AHCA pending the determination of the amount of its Medicaid lien, which at the time was claimed to be \$55,944.

5. The owner of the family van involved in the accident had a \$10,000/\$20,000 GEICO underinsured motorist policy, which also paid the policy limits. Although the evidence was not clear, the Petitioners appear to concede that all \$20,000 was recovered by them for Taya's benefit. There was no evidence as to when the family's claim against the GEICO policy settled, or as to any agreement how the \$20,000 should be allocated between medical expenses and other kinds of damages. There was no evidence that any of the \$20,000 was paid to AHCA towards its Medicaid lien, or into an interest-bearing trust account for the benefit of AHCA pending the determination of the amount of its Medicaid lien.

6. In addition to the insurance policy settlements, the owners of the other car paid the family approximately \$250,000 from their own assets, which the family members agreed to apportion among themselves in a manner that was not disclosed by the evidence. There was no evidence as to when those funds were paid to the family, or when any of those funds was paid to Taya's benefit, if any. The evidence was not clear whether any of those funds was paid towards Taya's medical expenses that were not paid by Medicaid. The evidence suggested that some of the \$250,000 was paid towards Taya's medical expenses to date, but it is possible that some of those expenses were reduced when providers accepted Medicaid. There was no evidence that any of those funds was paid to AHCA towards its Medicaid lien claim, or into an interest-bearing trust account for the benefit of AHCA, pending a determination of the amount of its Medicaid lien.

7. A personal injury lawyer, who also was Taya's guardian ad litem, testified that the value Taya's claims against the owners of the other car was approximately \$1.4 to \$1.8 million. He did not testify as to the amount future medical expenses would contribute to the total value he estimated.

8. AHCA has paid \$55,710.98 in Medicaid benefits to treat Taya for her accident injuries. (The Petitioners stipulated to this amount.)

9. Lee Memorial Hospital provided medical services for Taya and claims that it is owed \$38,317.05, for which it appears to claim a statutory lien. The evidence was that Lee Memorial refused to accept Medicaid in payment for those services. If Medicaid were accepted, the amount of AHCA's lien would be more than \$55,710.98, but probably not \$38,317.05 more.

CONCLUSIONS OF LAW

10. Section 409.910(11)(f), Florida Statutes (2013), provides essentially that AHCA is entitled to payment for all medical assistance it provides for a Medicaid recipient who suffers a tort injury, up to 37.5 percent of benefits recovered from third parties. Assuming that Taya received no third-party recoveries other than the \$200,000 from the Hartford settlement, the statutory cap would be \$75,000, which exceeds the amount of AHCA's Medicaid lien claim.

11. Subsection (17)(b) of that statute provides in part:

A recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula specified in paragraph (11)(f) by filing a petition under chapter 120 within 21 days after the date of payment of funds to the agency or after the date of placing the full amount of the third-party benefits in the trust account for the benefit of the agency pursuant to paragraph (a).

Paragraph (a) of subsection (17) states:

A recipient or his or her legal representative or any person representing, or acting as agent for, a recipient or the recipient's legal representative, who has notice, excluding notice charged solely by reason of the recording of the lien pursuant to paragraph (6)(c), or who has actual knowledge of the agency's rights to third-party benefits under this section, who receives any third-party benefit or proceeds for a covered illness or injury, must, within 60 days after receipt of settlement proceeds, pay the agency the full amount of the third-party benefits, but not more than the total medical assistance provided by Medicaid, or place the full amount of the third-party benefits in an interest-bearing trust account for the benefit of the agency pending an administrative determination of the agency's right to the benefits under this subsection.

12. In this case, the parties stipulated that the only issue to be determined is whether the Petitioners met their burden of proof under paragraph (b) of subsection (17), which is the equivalent of a stipulation that the requirements of paragraph (a) were met.

13. Paragraph (b) of subsection (17) goes on to say:

In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

The Petitioners submit alternative theories why AHCA's Medicaid lien claim should be reduced under this provision of the statute.

14. Under their first theory, the Petitioners would reduce the \$51,513 that was allocated by the parties to the \$200,000 Hartford settlement agreement to payment of Taya's past medical bills by a 27-percent recovery cost (which is the attorneys' contingency fee percentage), resulting in a net allocation of \$37,604. They would then apportion the \$37,604 between the AHCA Medicaid lien claim and the Lee Memorial lien claim, resulting in a payment of \$22,284 to AHCA for its Medicaid lien.

15. The Petitioners' first theory is rejected for several reasons. First, in effect, it would bind AHCA to the \$51,513 allocation made by the parties to the Hartford settlement. AHCA was not a party to that agreement and is not bound by it. Second, the Hartford agreement made the \$51,513 allocation without respect to any recovery fee, and there is no basis in the statute for reducing the allocation by the attorneys' contingency fee. Third, there is no basis in the statute for reducing the allocation because of Lee Memorial's lien claim. Fourth, the theory ignores the \$20,000 GEICO recovery and does not address the \$250,000 paid by the tortfeasors to the injured family members.

16. Under their second theory, the Petitioners would reduce AHCA's \$55,710.98 Medicaid lien in proportion to the 14-percent

ratio that Taya's \$220,000 recovery from the two insurance companies bears to the full value of her claim, which they assert is \$1.6 million, resulting in a payment of \$7,794 to AHCA for its Medicaid lien.

17. The Petitioners' second theory also is rejected for several reasons. For one thing, it ignores the \$51,513 allocation to past medical expenses made by the parties to the Hartford settlement, which is only approximately \$4,000 less than AHCA's Medicaid lien claim. This agreement is an admission as to the Petitioners, but not as to AHCA, which was not a party to the agreement.

18. Disregarding their admission to the \$51,513 allocation to past medical expenses, the Petitioners did not prove by clear and convincing evidence that Taya did not recover more than \$220,000 from third parties. They also did not prove by clear and convincing evidence that the total value of Taya's claim for damages against the tortfeasors was \$1.6 million. Even assuming that those facts were proven, the second theory ignores Lee Memorial's lien, and there was no evidence as to what portion of the total value of Taya's claim for damages should be attributed to future medical expenses.

19. For these reasons, the Petitioners did not prove by clear and convincing evidence that less than AHCA's \$55,710.98 Medicaid lien should be allocated as reimbursement for past and

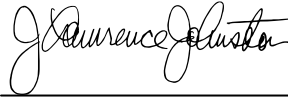
future medical expenses under paragraph (b) of subsection (17) of the statute.

20. Citing Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006), and Wos v. E.M.A. ex rel. Johnson, __ U.S. __ , 133 S. Ct. 1391, 185 L. Ed. 2d 471 (2013), the Petitioners contend that unless the Florida Statutes are interpreted and applied so as to reduce AHCA's Medicaid lien claim in accordance with one of their two theories, those statutes are preempted by federal law that prohibits states from imposing a lien against the property of a Medicaid recipient prior to the death of the recipient. To the contrary, under those decisions, the federal anti-lien law does not preempt the Florida Statutes because they provide the required evidentiary procedure to determine what portion of the Medicaid recipient's total recovery should be allocated as reimbursement for past and future medical expenses.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is DETERMINED that the amount of AHCA's Medicaid lien payable from the Petitioners' \$200,000 Hartford settlement is fixed at \$55,710.98, as claimed by AHCA.

DONE AND ORDERED this 29th day of January, 2014, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
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this 29th day of January, 2014.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.