STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELSA PARNAU HUNT AND ERIC HUNT, INDIVIDUALLY, AS PARENTS OF ETHAN HUNT, DECEASED, AND AS CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF ETHAN HUNT,

Petitioners,

vs. Case No. 13-4684MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy, in Tallahassee, Florida, on May 13, 2014.

APPEARANCES

For Petitioners: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

For Respondent: Adam James Stallard, Esquire
Post Office Box 12188
Tallahassee, Florida 32317-2188

STATEMENT OF THE ISSUES

Whether a valid Medicaid lien exists, and, if so, what is the amount payable to Respondent pursuant to section 409.910(17),

Florida Statutes, in satisfaction of the lien from a settlement received by Petitioners from a third-party.[1/]

PRELIMINARY STATEMENT

On December 6, 2013, Petitioners filed a Petition to Determine Amount Payable to the Agency for Health Care Administration in Satisfaction of Medicaid Lien. The final hearing in this matter was originally scheduled for February 13, 2014. After a series of unopposed motions for continuance based upon Respondent's delay in timely responding to discovery, and the unavailability of witnesses and counsel, the final hearing was held on May 13, 2014.

Petitioners presented the testimony of two fact and expert witnesses, Robert Borrello, Esquire, and Herman Russomanno, Esquire. Petitioners' Exhibits 1 through 24, 26 through 29, and 32 were admitted into evidence. Respondent offered no witnesses or documentary evidence. The parties filed a Joint Pre-hearing Stipulation, and the facts stipulated therein are accepted and made a part of the Findings of Fact below. The Transcript of the final hearing, consisting of one volume, was filed June 9, 2014, and the parties timely filed proposed orders that have been carefully considered by the undersigned in the preparation of this Final Order.

At the request of both parties, official recognition was taken of pertinent legal authorities. Unless otherwise noted, all statutory references are to Florida Statutes (2013).

FINDINGS OF FACT

1. Ethan Hunt (Ethan), was born on January 7, 2003, and died on May 31, 2006, from complications arising from his birth-related catastrophic neurological injury and severe disabilities.

2. Petitioners, Elsa and Eric Hunt (the Hunts), individually, as parents of Ethan, and as the Co-Personal Representatives of the Estate of Ethan Hunt (Estate), brought a wrongful death lawsuit against the hospital where Ethan was born, a physician, and an Advanced Registered Nurse Practitioner (ARNP), to recover their individual damages as the surviving parents of Ethan, as well as the individual claim for damages of the Estate.

3. In accordance with the limitation on damages recoverable in wrongful death actions contained in section 768.21, Florida Statutes, the Hunts' wrongful death lawsuit specifically sought the individual damages of each parent for their "mental pain and suffering and loss of companionship" of their deceased son. Further, the wrongful death action sought, on behalf of the Estate, recovery of "medical and funeral expenses."

4. Ethan was a Medicaid recipient and a portion of his medical care was paid for by Medicaid. Respondent, Agency for

Health Care Administration (AHCA), through the Medicaid program, paid $315,632.17 in benefits on behalf of Ethan for medical benefits related to the alleged negligent medical care received by Ethan. Ethan first received medical treatments for which Medicaid was obligated to make payments on June 11, 2003, and AHCA, through the Medicaid program, made its last payment for Ethan's medical care on May 29, 2006.

5. As a condition of Ethan's eligibility for Medicaid, Ethan's right to recover from liable third-parties medical expenses paid by Medicaid was assigned to AHCA. See 42 U.S.C. § 1396a(a)(25)(H) and § 409.910(6)(b), Fla. Stat.

6. Pursuant to section 409.910(6)(c), Florida Statutes, AHCA's Medicaid lien attached and was perfected on June 11, 2003, when Ethan first received medical care for which Medicaid was obligated to make payments. On May 25, 2005, AHCA recorded in the Miami-Dade County public record its Claim of Lien and Notice of Assignment and Other Statutory Rights (Lien), Book 23409, pages 2856-2858. By letter dated May 28, 2008, to an attorney representing the Hunts and the Estate, from AHCA's contracted vendor, Health Management Systems (HMS), AHCA indicated that the Medicaid lien was in the amount of $315,632.17.

7. On July 11, 2008, the Hunts, on behalf of themselves and Ethan's Estate, submitted to all defendants in the wrongful death action, Plaintiffs' Proposal for Settlement to All Defendants

(Proposal). The Proposal offered a settlement of $7,250,000.00 to be allocated as follows:

Elsa Hunt	$3,300,000.00	45.5%
Eric Hunt	$3,300,000.00	45.5%
Estate of Ethan Hunt	$650,000.00	9.0%

8. The Hunts' July 11, 2008, Proposal was rejected, and a mediation of the wrongful death lawsuit was held on May 12, 2009.

9. By letter dated May 4, 2009, to HMS, the attorney representing the Hunts in the wrongful death action notified AHCA's designated vendor of the May 12, 2009, mediation and provided a copy of the notice of mediation. AHCA did not attend or participate in the mediation.

10. A global settlement was reached at the May 12, 2009, mediation for the total amount of $1,800,000.00. As part of the mediated settlement, the parties made an allocation of the settlement proceeds between individual claims of the surviving parents and the individual claim of the Estate. This allocation was memorialized in the Addendum to Mediation Settlement Agreement Allocation of Settlement (Addendum). Each parent was allocated a total amount of $819,000.00 "in satisfaction of their individual claims for mental pain and suffering and loss of companionship." The Estate was allocated a total of $162,000.00 "in satisfaction of its claims for medical expenses and funeral

expenses." The parties allocated these amounts in accordance with the percentages as presented in the prior Proposal.

11. By letter dated May 20, 2009, AHCA received notice that the case settled at the May 12, 2009, mediation and of the intent to issue a dismissal of the defendants in the case.

12. On June 9, 2009, the court entered a Final Judgment of Dismissal with Prejudice.

13. AHCA took no action to intervene in the wrongful death action or to seek relief from the settlement reached by the parties.

14. Upon receipt of the settlement proceeds, the amount of $315,632.17 was placed into a trust account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constitutes "final agency action and notice thereof" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

15. Pursuant to 42 U.S.C. section 1396a(a)(25)(A), (B), and (H), section 1396k(a), and section 1396p(a), AHCA may only assert a lien against, and seek recovery from, the portion of a Medicaid recipient's settlement representing the Medicaid recipient's compensation for medical expenses paid by Medicaid.

16. The Hunts requested that AHCA calculate the amount owed in satisfaction of the lien pursuant to the statutory formula set forth in section 409.910(11)(f).[2/] The Hunts requested that this

calculation be based on the Estate's recovery of $162,000.00, minus the Estate's share of attorneys' fees and the Estate's $15,559.01 share of the litigation costs (which represents the Estate's 9% proportionate share of the gross $172,877.87 in litigation cost).

17. AHCA refused to calculate the amount payable to AHCA in accordance with section 409.910(11)(f), Florida Statutes, and continues to seek payment of its full $315,632.17 Lien from the gross settlement award, including those funds allocated to the parents for their individual claims.

18. Pursuant to section 409.910(6)(c)9., a Medicaid lien exists for seven years after it is recorded, and the lien may be extended for one additional period of seven years by AHCA recording a Claim of Lien within the 90-day period preceding the expiration of the original lien.

19. In the instant case, AHCA recorded its Lien on May 25, 2005. By operation of law, this Lien ceased to exist on May 25, 2012 (seven years after it was recorded on May 25, 2005). AHCA did not extend the existence of the Lien by again recording it within the 90-day time period preceding its expiration on May 25, 2012. Accordingly, AHCA's Lien no longer exists.

20. In addition to the Lien, AHCA has subrogation and assignment rights to collect third-party benefits for the amount of medical assistance provided by Medicaid. § 409.910(6)(a)

and (b), Fla. Stat. Actions to enforce the rights of AHCA must be commenced within five years after the date a cause of action accrues, with the period running from the later of the date of discovery by AHCA of the case filed by recipient or his or her legal representative, or of discovery of any judgment, award, or settlement contemplated in the section, or of discovery of facts giving rise to a cause of action. § 409.910(11)(h), Fla. Stat.

21. By May 20, 2009, at the latest, AHCA was aware of the settlement between the Hunts and the Estate, with Ethan's physician, ARNP, and the hospital at which he was born. As of the date of the final hearing, May 13, 2014, AHCA had not exercised any subrogation or assignment rights. Accordingly, AHCA's ability to pursue subrogation and assignment rights has expired.

22. Based on the undersigned's finding that no enforceable Lien exists, and that AHCA's subrogation and assignment rights are extinguished, as discussed more fully in the Conclusions of Law, there is no need to address any of the other factual contentions of the parties.[3/]

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings (DOAH) has jurisdiction over the subject matter and the parties in this case, and final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes.

24. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. See Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). To secure reimbursement from liable third parties, the state must require a Medicaid recipient to assign to the state his right to recover medical expenses from those third parties. In relevant part, 42 U.S.C. section 1396a(a)(25) provides:

> (H) that to the extent that payment has been made under the State Plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State Plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

25. To comply with this federal mandate, the Florida Legislature enacted section 409.910, Florida's Medicaid Third-Party Liability Act. This statute authorizes and requires the State, through AHCA, to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590, 590 (Fla. 5th DCA 2009).

26. Sections 409.910(6)(a), (b), and (c), Florida Statutes, provide AHCA with three means of recovery for the full amount of medical assistance paid by Medicaid: subrogation, assignment, and an automatic lien on any judgment or settlement for the medical assistance provided by Medicaid.

27. Section 409.910(11) provides:

> The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as a lien holder of the collateral. (emphasis added).

28. These recovery rights are not without limitation. Section 409.910(11)(h) states:

> Except as otherwise provided in this section, actions to enforce the rights of the agency under this section shall be commenced within five years after the date the cause of action accrues, with the period running from the later of the date of discovery by the agency of a case filed by a recipient or his or her legal representative, or of discovery of any judgment, award, or settlement contemplated in the section, or of discovery of facts giving rise to a cause of action under this section. Nothing in this paragraph affects or prevents a proceeding to enforce a lien during the existence of a lien as set forth in subparagraph (6)(c)9. (emphasis added).

29. Section 409.910(6)(c)9. provides:

> The lien created by this paragraph is a first lien and superior to liens and charges of any provider, and shall exist for a period of seven years, if recorded, after the date of

> recording; and shall exist for a period of seven years after the date of attachment, if not recorded. If recorded, the lien may be extended for one additional period of seven years by rerecording the claim of lien within the 90-day period preceding the expiration of the lien.

30. AHCA recorded its Lien on May 25, 2005. The Lien expired seven years later on May 25, 2012, by operation of law when AHCA failed to timely rerecord it.

31. A review of the parties' Joint Pre-hearing Stipulation and AHCA's Proposed Final Order indicates that AHCA does not contest that the Lien expired. Rather, AHCA asserts that DOAH lacks jurisdiction to determine anything other than the recoverable amount of the lien from Petitioners' settlement.

32. Additionally, AHCA alleges that the expiration of the Lien is a non-issue because it contends its rights of subrogation and assignment are not affected by the extinguishment of the Lien, and AHCA has no obligation to take affirmative action to enforce these rights.

33. The extent of DOAH's jurisdiction is set forth in section 409.910(17), which provides:

> (b) 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). The

> petition shall be filed with the Division of Administrative Hearings. For the purposes of chapter 120, the payment of funds to the agency with the placement of the full amount of the third-party benefits in the trust account for the benefit of the agency constitutes final agency action and notice thereof. Final order authority for the proceedings specified in the subsection rests with the Division of Administrative Hearings. This procedure is the exclusive method for challenging the amount of third-party benefits payable to the agency. 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.

34. It is axiomatic that every court has judicial power to hear and determine the question of its own jurisdiction, both as to the parties and as to subject matter, and necessarily does so by proceeding in the cause. State ex. rel. BF Goodrich Co. v. Trammel, 140 Fla. 500 (Fla. 1939); Sun Ins. Co. v. Boyd, 105 So. 2d 574 (Fla. 1958)(a tribunal always has jurisdiction to determine its own jurisdiction).

35. Here, AHCA contends that section 409.910(17) provides DOAH the limited jurisdiction to decide how to apply the statutory formula for determining the appropriate amount of reimbursement AHCA may receive from a settlement with the third-party tortfeasor. AHCA argues that the undersigned has no

authority to decide whether any recovery rights exist at all--only the amount of such recovery rights.

36. This is similar to the argument considered and rejected by the Florida Supreme Court in Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 948 So. 2d 705 (2007). The issue in that case was whether an Administrative Law Judge (ALJ), when considering a claim under the Florida Birth-Related Neurological Injury Compensation Act (NICA), section 766.303(2), Florida Statutes (1997), had jurisdiction to determine whether or not a healthcare provider complied with the "Notice to Obstetrical Patients of Participation in the Plan" as required by section 766.316, Florida Statutes (1997).[4/]

37. When an infant suffers what may be a birth-related neurological injury, NICA provides that the claimant, usually the infant's parent, must file a claim for compensation under the NICA Plan with the Florida Birth-Related Neurological Injury Compensation Association. The claim is then reviewed by a medical advisory panel which makes a written recommendation as to whether the claim is compensable under the NICA Plan. After the panel makes its recommendation, the claim is heard and determined in an administrative hearing before an ALJ. The ALJ must consider, but is not bound by, the recommendation of the medical advisory panel.

38. The 1997 NICA statute explicitly required the ALJ to make three independent findings based upon all available evidence. First, the ALJ was required to determine whether the claim was a birth-related neurological injury. Second, the ALJ was to determine whether the injury was caused by a participating healthcare provider as defined by the statute. Finally, if the first and second requirements were met, the ALJ was required to determine the amount of the award without any regard for fault. If the ALJ determined that the claim was compensable, compensation under the NICA Plan became the claimant's exclusive remedy. The claimant could not bring or maintain a civil suit in violation of NICA's exclusive remedy provision.

39. There was a condition precedent to NICA's exclusivity. Pre-delivery notice of the healthcare provider's participation in the NICA Plan was required to be given as required by the statute. The 1997 statute was silent regarding an ALJ's jurisdiction to determine, as a preliminary matter, whether appropriate pre-delivery notice was provided.

40. In two cases before the Second District Court of Appeal, the parents of injured children alleged, in the administrative proceeding, that the applicable notice had not been provided, and, therefore, they could elect to pursue an administrative NICA claim or a medical malpractice action in circuit court, and the ALJs agreed. The Second District reversed

the ALJs' orders because it determined that NICA did not expressly give an ALJ jurisdiction to make findings regarding notice. These decisions were in conflict with decisions from the Third, Fourth, and Fifth District Courts of Appeal.

41. In resolving the conflict between the district courts, the Supreme Court reasoned:

> In order to "hear and determine" a claim, an ALJ must, almost of necessity, decide whether notice was given, because if no notice was given, the exclusivity provision of the statute does not apply. Further, an ALJ has "exclusive jurisdiction" to determine whether a claim is compensable under the NICA Plan. In the absence of notice, the Plan does not apply. Given these provisions, we are led to conclude that an ALJ has jurisdiction to determine whether notice is given. As established law provides, an ALJ must have jurisdiction to determine whether the ALJ has jurisdiction (citing Sun Ins. Co. v. Boyd, 105 So. 2d 574, 575 (Fla. 1958)).

Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 948 So. 2d 705, 715 (2007).

42. Similarly, in the instant case, in order to make a determination regarding the amount of Petitioners' settlement which is recoverable as reimbursement for medical expenses paid by Medicaid, the undersigned must preliminarily determine that in fact, AHCA has any recovery rights pursuant to a lien, subrogation or assignment.

43. The plain language of section 409.910(6)(c)9. makes clear that a lien must be properly recorded within seven years

and thereafter timely renewed in order for AHCA to maintain its recovery rights pursuant to the lien. Further, the plain language of section 409.910(11)(h) requires that actions to enforce the subrogation or assignment rights of AHCA must be initiated within the applicable five-year statute of limitations. In this case, AHCA failed to do either. Accordingly, by operation of law, no enforceable lien exists, and AHCA's subrogation and assignment rights are extinguished.

44. The undersigned rejects AHCA's argument that its May 25, 2005, filing of the Claim of Lien and Notice of Assignment and Other Statutory Rights is sufficient, in and of itself, to allow AHCA to receive a determination in this proceeding of the amount of its entitlement to reimbursement from the Petitioners' settlement. AHCA's argument erroneously presumes that assignment and subrogation rights are somehow self-enforcing or that the May 25, 2005, filing was sufficient "enforcement" action within the five-year statute of limitations to protect its rights to subrogation and assignment.

45. As explained in Cramer v. John Alden Life Insurance Co., 763 F. Supp. 2d 1196 (D.C. Mont. 2011), there is a substantive distinction between "asserting" a right of subrogation, which was done by the insurance company during the course of pre-litigation correspondence and by sending a "Notice of Subrogation" in Cramer, and "going so far as to 'enforce' a

right of subrogation by initiating a judicial proceeding." Id. at 1211, 1213. The Court held that the insurance company did not wrongfully and prematurely "enforce" a right of subrogation in the absence of any judicial action whatsoever to enforce its right of subrogation.

46. Cramer argued that her insurance carrier's correspondence regarding its final lien amount and "Notice of Subrogation" constituted an "enforcement" of the subrogation claim because it prohibited her counsel from distributing the claimed funds from a third-party tortfeasor until the existence or amount of the claim lien or subrogation claim could be resolved. See Id. at 1213.

47. In rejecting Cramer's argument, the Court held that Cramer's reading of the word "enforced" is "so broad as to be unreasonable." Id. The Court reasoned that the correspondence simply reflects that the parties were embroiled in a dispute as to whether Cramer had been made whole and whether the insurance company would be entitled to subrogate.

48. Judicial proceedings, initiated within the applicable statute of limitations, are a necessary prerequisite to "enforcing" a right of subrogation or assignment. To hold otherwise would render the five-year statute of limitations provision contained in section 409.910(11)(h) meaningless. AHCA's decision to only record the Lien, take no affirmative

action to timely rerecorded it, or to "institute, intervene in, or join any legal or administrative proceeding in its own name" results in its rights of subrogation and assignment to be extinguished in this case.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is DETERMINED that the amount of AHCA's Medicaid lien, subrogation, or assignment rights, payable from Petitioners' settlement, is ZERO.

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

MARY LI CREASY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of July, 2014.

ENDNOTES

[1/] In the Joint Pre-hearing Stipulation, the parties agreed that this case "involves the determination of the amount payable to AHCA in satisfaction of its Medicaid lien." However, in their proposed final orders, both parties also addressed whether AHCA has recovery rights against Petitioners' wrongful death settlement through subrogation or assignment. Accordingly, these arguments are addressed herein.

[2/] Section 409.910(11)(f) provides in part that:

> Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third-party in which the recipient or his or her legal representative is a party which results in the judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.
>
> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25% of the judgment, award, or settlement.

[3/] The testimony and evidence at final hearing primarily addressed the issue of whether the allocation made in the addendum for reimbursement of medical expenses was fair and appropriate. Because the undersigned finds there is no existing lien, subrogation, or assignment right of AHCA, no findings of fact are made as to the appropriate allocation of the settlement funds.

[4/] NICA was revised by the Legislature in 2003 and 2006 to explicitly provide that the ALJ has exclusive jurisdiction to

determine whether appropriate notice was provided to parents regarding whether their medical providers participate in the NICA program. Additional references to the language and obligations of NICA are to the 1997 and 1998 versions in effect prior to revision.

COPIES FURNISHED:

Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

Adam James Stallard, Esquire
Post Office Box 12188
Tallahassee, Florida 32317-2188

Elizabeth Dudek, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308

Stuart Williams, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

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.