

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. – 3243288  
GLORIA GEORGE  
283 LINDEN ST  
ORMOND BEACH FL 32174-6041

**PROTEST OF LIABILITY  
DOCKET NO. 0024 2653 66-02**

**RESPONDENT:**

State of Florida  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
c/o Department of Revenue

**ORDER**

This matter comes before me for final Department Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated September 10, 2014, is REVERSED.

### JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 20<sup>th</sup> day of **May, 2015**.



*Magnus Hines*

Magnus Hines  
RA Appeals Manager,  
Reemployment Assistance Program  
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

*Shanendra Y. Barnes*

DEPUTY CLERK

5-20-15

DATE

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 20<sup>th</sup> day of May, 2015.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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GLORIA GEORGE  
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GUARDIAN  
283 LINDEN ST  
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State of Florida  
DEPARTMENT OF ECONOMIC OPPORTUNITY  
c/o Department of Revenue

**DEPARTMENT OF ECONOMIC OPPORTUNITY  
Reemployment Assistance Appeals  
PO BOX 5250  
TALLAHASSEE FL 32399-5250**

**PETITIONER:**

Employer Account No. - 3243288  
GLORIA GEORGE  
ATTN: MARTHA SMITH, PLENARY  
GUARDIAN  
283 LINDEN STREET  
ORMOND BEACH FL 32174-6041

**PROTEST OF LIABILITY  
DOCKET NO. 0024 2653 66-02**

**RESPONDENT:**

State of Florida  
DEPARTMENT OF ECONOMIC  
OPPORTUNITY  
c/o Department of Revenue

**RECOMMENDED ORDER OF SPECIAL DEPUTY**

TO: Magnus Hines  
RA Appeals Manager,  
Reemployment Assistance Program  
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated September 10, 2014.

After due notice to the parties, a telephone hearing was held on March 10, 2015. The Petitioner, represented by the Plenary Guardian, appeared and testified. An assistant to the Plenary Guardian testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor III, appeared and testified. The Joined Party appeared and testified.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

**Issue:**

Whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioner meets liability requirements for Florida reemployment assistance contributions pursuant to §443.036(19); 443.036(21); 443.1215, Florida Statutes.

**Findings of Fact:**

1. The Petitioner, Gloria George, is an individual who was declared to be incapacitated and placed in an assisted living facility by the State of Florida in 2011 as a result of Alzheimer's disease. She was in the assisted living facility for only a short period of time, was not happy in the facility, and wanted to return to her home.
2. The circuit court appointed Martha Smith as plenary guardian of the person and property of Gloria George on December 14, 2011.

3. One of the children of Gloria George, Thomas George, was very close to his mother and wanted her to be happy. He volunteered to relocate from Orlando and move into his mother's home so that she could return to her home where he would care for her twenty-four hours a day, seven days a week. He submitted a proposal to Martha Smith. Although he initially volunteered to care for his mother without payment for his time, he told Martha Smith that he needed to be paid \$700 per month. Martha Smith replied that the only way that she would agree to the proposal would be if Thomas George provided services as an independent contractor. Thomas George did not know what an independent contractor was and Martha Smith explained that it meant that he would be responsible for paying his own taxes at the end of the year. Thomas George just wanted his mother to be happy and agreed to provide services as an independent contractor. Thomas George and his wife moved in to Gloria George's home in January 2012.
4. Martha Smith did not tell Thomas George what he needed to do to care for his mother and did not tell him how to care for her. Since Gloria George was incapacitated she was not able to tell Thomas George what to do or how to do it.
5. Thomas George determined what needed to be done and how to care for his mother. He cleaned his mother's house, cooked her meals, and did the shopping. Whenever he left the house he took his mother with him.
6. Martha Smith, as guardian for Gloria George, paid for all of the household expenses from the bank account of Gloria George. Thomas George did not pay rent for living in his mother's home and did not have to provide anything at his own expense.
7. Thomas George was free to hire others to care for his mother.
8. Although Thomas George was living with his mother rent free, he still had expenses that he was responsible for. Before Thomas George relocated to care for his mother he lived in Orlando. He had mortgage payments which he continued to make while living with his mother. In July 2012 he requested a pay increase to \$800 per month. Although Martha Smith could have denied the request she realized that it would cost more to hire someone else to care for Gloria George. Therefore, she granted the pay increase. In September 2013, Thomas George requested a pay increase to \$1,100 a month which was also granted.
9. No taxes were withheld from the pay of Thomas George. At the end of each year Thomas George received a Form 1099-MISC reporting his earnings to the Internal Revenue Service as nonemployee compensation.
10. Thomas George continued to provide care for his mother in her home until May 2014. At that time Martha Smith determined that Gloria George's disease had progressed to the point that it was in the best interest of Gloria George to place her in a memory unit of a qualified care facility. Although Thomas George objected to placing his mother in a facility, the circuit court enforced the guardian's authority.
11. Thomas George filed a claim for reemployment assistance benefits. When Thomas George did not receive credit for his earnings an investigation was assigned to the Department of Revenue to determine if Thomas George performed services as an employee or as an independent contractor. The investigation consisted of providing Form RTS-6061, *Independent Contractor Analysis* to both the Petitioner and the Joined Party. The Joined Party did not complete and submit the Form RTS-6061. Martha Smith returned the Form without answering any of the questions on the Form. The Department of Revenue determined that while performing services as a "caregiver" the Joined Party was a statutorily covered domestic employee. On September 10, 2014, the Department of Revenue notified the Petitioner that the Joined Party performing services as a "caregiver" was a statutorily covered employee and that the Petitioner was responsible for payment of reemployment assistance taxes retroactive to January 1, 2013. The Petitioner filed a timely protest by mail postmarked September 25, 2014.

**Conclusions of Law:**

12. Section 443.1216, Florida Statutes, provides in pertinent part:
  - (6) The employment subject to this chapter includes domestic service performed by maids, cooks, maintenance workers, chauffeurs, social secretaries, caretakers, private yacht crews, butlers, and houseparents, in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of at least \$1,000 during a calendar quarter in the current calendar year or the preceding calendar year to individuals employed in the domestic service.
13. Thomas George was engaged to provide care for his mother in her home so that she would not need to be placed in an assisted living facility. Although he provided some domestic services such as cleaning and cooking, he was not engaged to be a maid, cook, maintenance worker, chauffeur, social secretary, caretaker, private yacht crew member, butler or houseparent. As determined by the Department of Revenue Thomas George was a "caregiver" which is not the same as a "caretaker." A caregiver is an individual who provides direct care to another individual. A caretaker is an individual who is responsible for the care of property.
14. Since Thomas George was not a statutorily covered domestic employee it is necessary to determine if the facts of this case reveal that Thomas George performed services for his mother as an independent contractor or whether the services which he performed for his mother constitute employment subject to the Florida Reemployment Assistance Program Law.
15. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.
16. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).
17. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987). In Brayshaw v. Agency for Workforce Innovation, et al; 58 So.3d 301 (Fla. 1st DCA 2011) the court stated that the statute does not refer to other rules or factors for determining the employment relationship and, therefore, the Department is limited to applying only Florida common law in determining the nature of an employment relationship.
18. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.
19. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
  - (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.
  - (2) The following matters of fact, among others, are to be considered:
    - (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
    - (b) whether or not the one employed is engaged in a distinct occupation or business;

- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - (d) the skill required in the particular occupation;
  - (e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - (f) the length of time for which the person is employed;
  - (g) the method of payment, whether by the time or by the job;
  - (h) whether or not the work is a part of the regular business of the employer;
  - (i) whether or not the parties believe they are creating the relation of master and servant;
  - (j) whether the principal is or is not in business.
20. Comments in the Restatement explain that the word “servant” does not exclusively connote manual labor, and the word “employee” has largely replaced “servant” in statutes dealing with various aspects of the working relationship between two parties.
21. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1<sup>st</sup> DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1<sup>st</sup> DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often can not be answered by reference to “hard and fast” rules, but rather must be addressed on a case-by-case basis.
22. Neither Gloria George nor Thomas George operate a business. Thomas George merely proposed to the court appointed guardian to care for his mother in her home so that she could be released from the assisted living facility. Initially, Thomas George offered to provide care without compensation but it was decided that the guardian would pay Thomas George an agreed upon monthly sum. There was no written agreement or contract between Thomas George and his mother.
23. The proposal submitted by Thomas George to the guardian did not state whether he was proposing to perform services as an employee or as an independent contractor. When the guardian explained what an independent contractor was, Thomas George agreed to perform services as an independent contractor. These facts reveal that it was the intent of the parties to establish an independent contractor relationship.
24. Thomas George proposed both the method of pay and the rate of pay. It was the clear understanding of both parties that taxes would not be withheld and that Thomas George would be responsible for paying the taxes at the end of the year. Thomas George provided care twenty-four hours per day, seven days per week. Although payment was made on a monthly basis, Thomas George was paid by the job.
25. Neither Gloria George nor the guardian exercised any control over Thomas George concerning how he provided care for his mother. Thomas George determined what needed to be done, when to do it, and how to do it. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.
26. It is determined that services provided by Thomas George for his mother do not constitute insured employment.



**Recommendation:** It is recommended that the determination dated September 10, 2014, be REVERSED. Respectfully submitted on April 13, 2015.



R. O. Smith, Special Deputy,  
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd ken z jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.

*Shanendra Y. Barnes*

SHANEDRA Y. BARNES, Special Deputy Clerk

**Date Mailed:**  
**April 13, 2015**

Copies mailed to:  
Petitioner  
Respondent  
Joined Party

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