

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
CIVIL ACTION NO: 1984CV02806B

EXECUTIVE OFFICE OF HEALTH AND
HUMAN SERVICES,

Plaintiff

v.

Laurie Schimmelfing, as Personal
Representative for the ESTATE OF KATHRYN
JOHNSTON,

Defendant

**PLAINTIFF MASSHEALTH'S MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT**

Introduction

This case arises out of receipt by the decedent, Kathryn Johnston ("the Decedent"), of benefits during her life from the Office of Medicaid (the "Agency," "MassHealth" or "EOHHS"), the single state agency charged with administering the Medicaid program, known as MassHealth. MassHealth is before the Court seeking summary judgment on the only count of its Complaint, which seeks to recover the assistance provided to the Decedent during her life by MassHealth from her estate. *MassHealth respectfully requests a hearing on this motion.*

Summary of Facts¹

The Decedent in this matter was an individual who received MassHealth benefits, in relevant part, from October 17, 2008 through November 18, 2018.

On or about June 4, 2019, EOHHS filed its Notice of Claim in the Probate and Family Court, Docket No. HS 19P0095EA, that the Decedent's estate was indebted to it in the amount of

¹ A full statement of undisputed facts in numbered paragraphs, referencing the Affidavit of Rhonda Macleod and Exhibits pursuant to Superior Court Rule 9A is included with this memorandum and referenced in the Appendix.

\$108,502.72. While in receipt of MassHealth's Claim, the Decedent's mother Mary Johnston, devisee of real property located at 186 Jackson Street in Northampton, MA, subsequently disclaimed her interest in the property by filing a "Disclaimer" with the Hampshire Probate Court on July 31, 2019. On August 5, 2019, EOHHS received Defendant's letter requesting a hardship waiver of the MassHealth's Claim. By letter dated August 14, 2019, counsel for Defendant sent additional information in support of the hardship waiver request. EOHHS responded by letter dated August 21, 2019 informing Defendant that the request for hardship waiver had failed to meet the legal requirements. As indicated in its Notice of Claim and prescribed by statute to commence an action following a denial of a waiver, the Agency filed suit to enforce its claim. *See* Mass. Gen. Laws ch. 118E, § 32(f) (2014).

Argument

Summary judgment is required when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Cassesso v. Commissioner of Correction*, 390 Mass. 419, 422 (1983); Mass. R. Civ. P. 56(c). The existence of disputed facts is consequential only if those facts have a material bearing on the disposition of the case. *Norwood v. Adams-Russell Co.*, 401 Mass. 677, 683 (1988). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the] motion for summary judgment." *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). Because construction of a statute is a question of law for the Court, whether Defendant is required to satisfy MassHealth's claim in accordance with Massachusetts law, can and should be decided on summary judgment. *See National Medical Care, Inc. v. Zigelbaum*, 18 Mass. App. Ct. 570, 575 (1984).

I. THE MEDICAID PROGRAM IS A JOINT FEDERAL AND STATE PROGRAM

Medicaid is a cooperative federal and state program, which not only provides payment for medical services to eligible individuals and families, but also requires that states recover the maximum amount of correctly paid benefits possible. 42 U.S.C.A. § 1396p(a)(1)(B)(i) (2010); *Haley v. Commissioner of Public Welfare*, 394 Mass. 466, 467 (1985). In order to receive federal funding, the state program must meet all the requirements of the federal act and related regulations. 42 U.S.C. § 1396a(a) (2014); *Sargeant v. Commissioner of Public Welfare*, 383 Mass. 808, 815 (1983). Consequently, the state Medicaid statutes and regulations are to be construed as showing a primary intent that the Agency comply with federal law in order to maximize federal financial reimbursement. *Youville Hospital v. Commonwealth*, 416 Mass. 142, 146 (1993); *Cruz v. Commissioner of Public Welfare*, 395 Mass. 107, 112 (1985). Accordingly, the statutes and regulations governing estate recovery must be interpreted so as to recognize that Medicaid is the payor of last resort. *Atlanticare Medical Ctr. v. Comm'r. of the Div. of Medical Assistance*, 439 Mass. 1, 11 (2003); *Schweiri v. Commonwealth*, 416 Mass. 385, 387 (1993).

II. MASSHEALTH IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN ACCORDANCE WITH CHAPTER 118E, § 31.

Defendant alleges affirmative defenses in her Answer, that the Defendant is exempt from recovery under federal and state law. Def.'s Answer, Affirmative Defenses 1-3. Defendant is incorrect; Plaintiff is entitled to judgment as a matter of law in accordance with M.G.L. c. 118E, § 31. Statutory interpretation is a matter for the court and thus appropriate for summary judgment. *National Medical Care*, 18 Mass. App. Ct. at 575. The language of a statute must be given its "usual and natural meaning." *Anderson Street Associates v. City of Boston*, 442 Mass. 812, 816 (2004). M.G.L. c. 118E, § 31, entitled "Adjustment or recovery of payments," governs

the recovery from a decedent's estate of Medicaid benefits correctly paid on the individual's behalf. The relevant provision states:

“(b) This subsection shall apply to estates of *individuals dying on or after April first, nineteen hundred and ninety-five*. There shall be no adjustments or recovery of medical assistance correctly paid except as follows:

...

(3) Recovery from Persons Age 55 and Over for Post-October 1, 1993 Medicaid: *From the estate of an individual who was fifty-five years of age or older when he or she received such assistance, where such assistance was for services provided on or after October first, nineteen hundred and ninety-three*. Any recovery may be made only after the death of the surviving spouse, if any, and only at a time when he or she has no surviving child who is under age twenty-one or is blind or permanently and totally disabled. The division shall waive recovery if such recovery would work an undue hardship, as defined by the division in its regulations.

...

(c) For purposes of this section, "estate" shall mean all real and personal property and other assets includable in the decedent's probate estate under the General Laws.”

M.G.L. c. 118E, § 31 (emphasis added). The statute sets forth a clear mechanism by which MassHealth is entitled to recover from an estate the amount paid out in benefits for services provided on or after October 1, 1993, when the recipient was age fifty-five or older. *See id.* Thus, in order to recover from the estate of a deceased Medicaid recipient under this statute, the Agency must show that: (1) the deceased recipient died after April 1, 1995; and (2) the recipient was fifty-five years of age or older when he or she received such assistance. *Id.*

The undisputed facts in this case clearly show that the Decedent died on November 18, 2018, well after April 1, 1995 [Affidavit of Rhonda MacLeod in Compliance with M.G.L. c. 231, §13(B) filed with the Complaint (“MacLeod Aff.”), Exhibit 1]; that she received Medicaid assistance from October 17, 2008 through November 18, 2018, in the amount of \$108,502.72, as shown in the detailed Medicaid Billing History of payments [MacLeod Aff., Ex. 6]; that the Decedent was over age fifty-five when she received said assistance, as indicated by her death certificate, attesting that she was 65 years of age as of her date of death, which means that she

turned fifty-five on October 17, 2008. MacLeod Aff., Ex. 1. MassHealth plainly meets the statutory requirements for recovery and there exists no material issue of fact; therefore MassHealth is entitled to summary judgment. *See* M.G.L. c. 118E § 31; *Cassesso* 390 Mass. At 422.

III. DEFENDANT'S POSITIONS MUST FAIL.

The positions set forth in Defendant's Answer lack merit and are not supported by the facts.

Defendant alleges as an affirmative defense that estate recovery must be waived in this case due to "financial hardship," as satisfying the Plaintiff's claim would require the sale of the Decedent's home. Def.'s Answer, First Affirmative Defense. However, this affirmative defense is without merit as the waiver requirements were not met in this case and did not exist at the time of the MassHealth member's death. Title 130 of the Code of Massachusetts Regulations, § 515.011(D) provides in pertinent part:

(1) For claims presented on or after November 15, 2003, recovery will be waived if: (a) [a] sale of real property would be required to satisfy a claim against the member's probate estate; and (b) [a]n individual who was using the property as a principal place of residence on the date of the member's death meets all of the following conditions: (i) the individual lived in the property at least one year immediately before the now deceased member became eligible for MassHealth ... and continues to live in the property at the time the MassHealth agency first presented its claim for recovery; (ii) the individual inherited or received an interest in the property from the deceased member's estate as defined in 130 CMR 501.013(A)(2) and 515.011(A)(2); (iii) the individual is not being forced to sell the property by other devisees or heirs at law; and (iv) at the time the MassHealth agency first presented its claim for recovery ... the annual income of the person's family group was less than or equal to 133 percent of the applicable poverty level income standard.
130 CMR 515.011(D) (1).

Per state regulation, all of the circumstances and conditions must exist at the time of the application for the hardship waiver. MassHealth rejected the Defendant's request as it did not

meet the necessary condition concerning the “interest in the property from the deceased member’s estate” by the Decedent’s son, Akeen Johnston. *Id.* at § 515.011(D)(1)(b)(ii). According to the second paragraph of the Decedent’s will, dated February 9, 1994, only the Decedent’s mother and the Philip R. and Mary H. Johnston Trust held the right, title, and interest in the subject real estate. *See* Affidavit of Rhonda MacLeod in Compliance with M.G.L. c. 231, § 13(B) filed with the Complaint (“MacLeod Aff.”), Exhibit 4. The preceding paragraph directs all of the Decedent’s debts, charges, and expenses to be paid in accordance with the laws of the Commonwealth of Massachusetts. Further along as delineated in the third paragraph, the Decedent’s son is only entitled to the residue of the estate after all of the Decedent’s debts are paid to MassHealth. *Id.*

Notwithstanding the fact that the waiver had been filed past the 60 day notice requirement, the request still failed as MassHealth cannot recognize the validity of the attempt by the Decedent’s family to create the conditions needed to meet waiver requirements after the fact. Before probate assets that are listed in probate can be transferred to anyone else, the MassHealth debt must first be paid out of the assets that were listed as estate assets in the probate. While in receipt of MassHealth’s Notice of Claim filed in the probate estate and docketed on June 13, 2019, the Decedent’s mother subsequently filed a qualified disclaimer on July 31, 2019.² By disclaiming the property devised by the Decedent’s will, her family attempted to transfer the property to the “Philip R. and Mary H. Johnston Trust,” then to the son, Akeen Johnston. If MassHealth were to recognize the waiver as valid, it would allow Defendant to circumvent reimbursements to the Commonwealth for Medicaid benefit payments provided by MassHealth on behalf of the Decedent. This in turn would create an unfair loophole which would allow estate

² *See* MacLeod Aff., Ex. 4 (each of the affidavits in support of the request for hardship waiver acknowledges MassHealth’s Notice of Claim dated June 4, 2019 and the subsequent disclaimer resulting in the transfer of the Decedent’s home pursuant to the Decedent’s will to her parents’ trust in July, 2019).

recovery to be avoided in many future cases. Therefore, it would be arbitrary for MassHealth to grant such requests where it was clear that the requirements had not been met, as in this case prior to the filing of the Disclaimer.

Further, Defendant alleges in her Answer, as an affirmative defense, that the Estate is entitled to deferral of recovery under state regulation. Def.'s Answer, Second Affirmative Defense. This affirmative defense is also without merit. If, assuming *arguendo*, Defendant could be deemed to suggest that the estate is entitled a deferral of recovery because, the Decedent has a living son who is disabled under 130 CMR 515.011(C), Defendant would still fail as a matter of law to meet the requirements set forth in M.G.L. c. 118E, §32(d). 130 CMR 515.011(D) is subject to the provisions set forth in M.G.L. c. 118E, §32(d), which states in relevant part:

The personal representative shall have 60 days from the date of presentment to mail notice to the division by certified mail of one or more of the following findings . . . (3) circumstances and conditions where the division will waive recovery for undue hardship under its regulations exist. *A notice under clause (3) shall state the specific circumstances and conditions which exist and provide supporting documentation satisfactory to the division . . . Failure to mail notice under clause (3) shall be deemed an admission that the circumstances and conditions for the division to waive recovery for undue hardship under its regulations do not exist.*

M.G.L. c. 118E, §32(d) (emphasis added).

Applying the above-quoted statute to the facts, it is clear that, first, as personal representative of the Decedent's estate, the Defendant only had sixty days from the date of presentment of the claim by the Agency to request a deferral of recovery. *Id.* In addition to the late request, when EOHHS received mail notice for a hardship waiver on August 5, 2019, the Defendant did not include a written request for deferral. By statute, this was an admission that the circumstances and conditions requiring the deferral of recovery did not exist. *Id.* Pending litigation, EOHHS received a letter from the Defendant on October 23, 2019 making a formal

request for deferral pursuant to 42 U.S.C. § 1396p(b)(2), M.G.L. c. 118E, § 32(d), and 130 CMR 515.011(C). However, not only was this request incorrectly sought, the Defendant has claimed that the letter of August 14 accompanied by documents in support of the hardship waiver suffices as notice to MassHealth and satisfies the requirement for a deferral when no such request had been made before this action. Because the Defendant failed to comply with the applicable statute, the Defendant must admit that the conditions for a deferral do not exist. *Id.*

Finally, Defendant asserts that the Federal Medicaid statute prohibits estate recovery at any time when there is a child of the decedent who is disabled. 42 U.S.C. § 1396p(b)(2). This affirmative defense is without merit as the Defendant is mistaken about this statute being applicable. Said Federal statute refers to Medicaid liens placed on a Medicaid recipient's property during the lifetime of the Medicaid recipient. Here, not only did MassHealth place no such lien on the property during the Decedent's life, but MassHealth is seeking estate recovery against property in the decedent's probate estate, which is governed by 42 U.S.C. § 1396p(b)(1)(B), a different section of the statute. The so-called deferral that Defendant seeks to claim under the Federal statute, while ignoring the applicable state statutes, M.G.L. c. 118E, Sections 31 and 32 only applies "in the case of a lien on an individual's home." *Id.* at § 1396p(a)(1)(B). Here, as no such lien was placed, the statute cited is inapplicable.

Conclusion

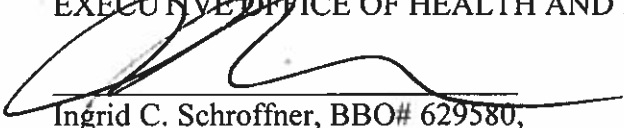
Wherefore, Plaintiff Agency respectfully requests that this Court enter an order granting it summary judgment and entering judgment in its favor in the amount of \$108,502.72 with statutory interest, and grant such other and further relief as the Court deems appropriate.

Respectfully Submitted,

By its attorneys,

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,

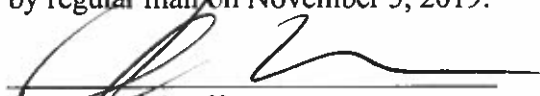
Dated: 11/5/19



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel for the defendant by regular mail on November 5, 2019.



Ingrid C. Schroffner