COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUFFOLK SUPERIOR COURT
DOCKET NO. 1984CV02806

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES

Plaintiff,

v.

LAURIE SCHIMMELFING, as Personal Representative of the ESTATE OF KATHRYN JOHNSTON

Defendant

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The Executive Office of Health and Human Services (EOHHS), in violation of federal and state statutes and state regulations, is seeking to recover MassHealth benefits from the Estate of Kathryn Johnston. If EOHHS is successful, a disabled, low-income young man will be forced from the only home he has ever known. This is precisely the result which Congress intended to avoid when it enacted the relevant provisions of the Medicaid statute. It is also the result which is avoided under the correct application of the state statutes and regulations which were enacted and promulgated to carry out Massachusetts' obligations under federal law. For these reasons,

the Personal Representative now opposes EOHHS Motion for Summary Judgment and cross-moves for Summary Judgment in her favor, including her counterclaim for EOHHS' violation of rights guaranteed by federal law.

STATEMENT OF FACTS

Kathryn Johnston, a single mother of two young children, moved into her home in Northampton in 1993. She was able to do so with financial assistance from her mother, Mary Johnston. When Kathryn made a will in 1994, she left the house to her mother and, if the mother predeceased her, to the Philip R. and Mary H. Johnston Trust, which had been established by her parents. (Ex. 7) The beneficiaries of the Trust are Mary and her husband, both now in their mid-nineties. Upon the death of the survivor of Mary and Philip, the trust is to terminate and the assets to be distributed among their four children, or the descendants of any deceased child. Kathryn never changed that will. (Ex. 4.2, Ex. 7)

Kathryn worked part-time as a van driver for school children. (Ex. 7) She received MassHealth from 2008 until her death in 2018. (Ex. 2, Ex. 6) Meanwhile, her children became adults. Her son, Akeen, who is now 26 years old, has always lived in the house. Akeen suffers from a disability, and receives Social Security benefits as the disabled adult child of a deceased wage earner (his mother) in the amount of $945 per month. (Ex. 4.11, Ex. 7) After Kathryn's death, Mary, at an advanced age and living in her own home in upstate New York, concluded that it made much more sense for the house to go into the Trust, the assets of which would eventually be distributed to her children (or grandchildren, as the case may be). She therefore disclaimed her inheritance under her daughter's will. (Ex. 4, Ex. 7)

Laurie Schimmelfing, Kathryn's sister, became the Personal Representative (PR) of the estate. (Ex. 4) The estate consisted of the house, assessed at $202,300 by the City of Northampton (http://northampton.ias-clt.com/parcel.detail.php?id=18C-113-00101; last visited 11/21/2019), a 2013 car and less than $7000 in cash. (Ex. 4.1) MassHealth filed a Notice of Claim seeking to recover $108,502 which it claimed had been paid on behalf of Kathryn from October 17, 2008, when she reached age 55, to her death. The PR, through counsel, notified the MassHealth Estate Recovery Program (administered by EOHHS) that the estate met all of the statutory and regulatory conditions for a "hardship waiver" of the recovery claim. (Ex. 4) EOHHS, without citing any reason for its decision, denied the waiver. (Ex. 5) The same letter which notified EOHHS of entitlement to a waiver also notified it that the circumstances were such that recovery from the estate was required to be deferred because of the existence of a disabled child. (Ex. 4) EOHHS ignored this information completely, and began this action, filing a complaint which similarly fails to offer any reason for its decision.

ARGUMENT

I. THIS ESTATE MEETS ALL REQUIREMENTS FOR A "HARDSHIP WAIVER" OF MASSHEALTH RECOVERY

Since 1993, states have been *required* to seek to recover from the estates of certain Medicaid recipients (in general, recipients of nursing facility and other long-term care services) and *permitted* to seek to recover from the estates of a broader category of Medicaid recipients (persons who received Medicaid in the community after age 55). 42 USC §1396p(b). Massachusetts has chosen to implement the permitted broader recovery program. The federal provision for estate recovery has always been an exception to the general rule that no recovery of correctly paid benefits may be made, and for that reason authorization for estate recovery must

be narrowly construed. Dept. of Public. Welfare v. Anderson, 377 Mass. 23, 27 n.3 (1979). Further, in enacting these provisions, Congress sought to balance the goal of enhancing the fiscal position of Medicaid through estate recovery with the protection of low-income family members of Medicaid recipients, surviving spouses and minor and disabled children. To do this, Congress forbade **any** recovery while there is a surviving spouse or minor or disabled child of the deceased Medicaid recipient (42 USC§1396p (b)(2)(A)) (which is discussed in Point II below)

Congress also required states to have procedures to waive estate recovery when it would work an "undue hardship". (42 USC§1396p (b)(3)(A)). While states have flexibility in their "hardship waiver" programs, 42 USC§1396p (b)(3)(A) requires that they be set up "on the basis of criteria established by the Secretary [of Health and Human Services]." In the State Medicaid Manual, the Secretary has said:

> "The legislative history of §1917 of the Act states that the Secretary should provide for special consideration of cases in which the estate subject to recovery is: (1) the sole income-producing asset of survivors (where such income is limited), such as a family farm or other family business; (2) a homestead of modest value; or (3) other compelling circumstances." *State Medicaid Manual, Part 3 – Eligibility, §3810.C.*[1]

Massachusetts' hardship waiver is provided for by G.L. c. 118E, §32(d) and the regulations at 130 CMR 515.011(D):

> "(D) Waiver of Estate Recovery Due to Financial Hardship.
>
> (1) For claims presented on or after November 15, 2003, recovery will be waived if

[1] The State Medicaid Manual "is an official medium by which the Health Care Financing Administration (HCFA) [now CMS] issues mandatory, advisory, and optional Medicaid policies and procedures to the Medicaid State agencies." State Medicaid Manual, Foreword. The Manual can be found at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927

(a) a sale of real property would be required to satisfy a claim against the member's probate estate; and

(b) an 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:

1. the individual lived in the property on a continual basis for at least one year immediately before the now-deceased member became eligible for MassHealth or other assistance from the MassHealth agency and continues to live in the property at the time the MassHealth agency first presented its claim for recovery against the deceased member's estate;

2. the individual has 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);

3. the individual is not being forced to sell the property by other devisees or heirs at law; and

4. at the time the MassHealth agency first presented its claim for recovery against the deceased member's estate, the gross annual income of the individual's family group was less than or equal to 133% of the applicable federal-poverty level income standard for the appropriate family size."

The parties agree that the property would have to be sold to satisfy the claim, that Akeen Johnston lived in the property at all relevant times, that no other devisees or heirs are forcing a sale of the property, and that Akeen Johnston's family group income is below 133% of the poverty level.[2] The only dispute is about condition (b)2, whether Akeen "received an interest in the property from the deceased member's estate".

Kathryn Johnston's will provides:

"I give and devise all my right, title and interest in and to the real estate located at 186 Jackson Street, Northampton, Massachusetts, to my mother, MARY H. JOHNSTON. In the event she predeceases me, I then give and devise said right, title and interest to the PHILIP R. AND MARY H.

[2] EOHHS never stated, either in its denial of the hardship request or its Complaint in this action, how the PR's request for a waiver failed to meet the conditions. The MacLeod Affidavit and EOHHS' Memorandum in support of Summary Judgment claim only that condition (b)2 is not met, and counsel for EOHHS stated in the Rule 9C conference that the plaintiff relies only on what was asserted in the MacLeod Affidavit and the Memorandum.

> JOHNSTON TRUST, for disposition in accordance with the provisions thereof." (Exhibit 4.2)

Mary Johnston disclaimed all rights to the real estate under the will. This was not, as EOHHS seems to suggest, some sort of nefarious scheme by the family to "transfer the property to the ...Trust and then to the son". It was the exercise of a perfectly legitimate, quite common, and entirely legal post-mortem estate planning decision. See, e.g. Whitehair, Andrew "Use of Trust Disclaimers in Estate Planning", https://www.journalofaccountancy.com/issues/2017/aug/trust-disclaimers-in-estate-planning.html (last visited 11/20/2019). Massachusetts' disclaimer statute is clear:

> "Except as provided in the preceding paragraph, and unless such a result would substantially impair the provisions or intent of any instrument, statute or rule of law relating to the interest in property being disclaimed, such interest shall pass in the same manner as if the beneficiary had died immediately preceding the event determining that he, she or it is the beneficiary of such interest and that such interest is indefeasibly vested.
>
> The interest in property being disclaimed shall never vest in the beneficiary." G.L. c. 190B, §2-801(g).

The property was never Mary Johnston's property, and there was no transfer to the Trust.

Once Mary Johnston disclaimed, it was as if she had died before the decedent; the Trust's interest arises directly under the will, *nunc pro tunc* to the date of death. EOHHS has conveniently ignored the statute because it does not like the outcome, but can cite no authority for the proposition that because the disclaimer was filed after the Notice of Claim it should be ignored. EOHHS claims that all conditions must be met at the time of the recipient's death. It may wish the regulation said that, but it does not. The regulation at 515.011(D) is very specific about when a condition must be met at a designated time: some conditions must be met as of the date of death, others at a prescribed time before death, others at the time the State presents its

claim. For others, including the requirement that the individual has inherited or received an interest in the property from the estate, there is no time specified. And even if EOHHS were right, the operation of the disclaimer statute is such that Akeen Johnston did, as a matter of law, have an interest as of the date of death.[3]

EOHHS appears to argue that Akeen does not have an interest because the only persons having an interest under the Will are Mary and the Trust, and Akeen is only a residuary beneficiary.[4] EOHHS appears either not to have read the hardship request or to fail to understand basic principles of the law of trusts and estates. Prior counsel for the estate, who filed the waiver request, articulated clearly the basis of Akeen Johnston's interest:

> "Akeen C. Johnston received an interest by will or intestacy from Ms. Johnston. Pursuant to Ms. Johnston's Last Will and Testament, Ms. Johnston devised all of her right, title and interest in the Property to her mother, Mary H. Johnston. ("Mary"). In the event Mary predeceased her, Ms. Johnston devised said right, title and interest to the "Philip R. and Mary H. Johnston Trust" ("Trust"), for disposition in accordance with the provisions thereof.
>
> "On or about July 22, 2019, Mary, acting pursuant to Massachusetts General Laws Chapter 190B, Section 2-801, forever renounced and disclaimed the interest in the property. By disclaiming said property, the interest in the Property passes to the Trust as if Mary H. Johnston had predeceased Ms. Johnston.
>
> "Pursuant to Clause 2(f) of the Trust, upon the death of Mary and Philip R. Johnston ("Grantors") all remaining property in the Trust shall be distributed to the Grantor's children equally. To the extent necessary, Mary has or will disclaim

[3] If Mary Johnston had in fact predeceased Kathryn Johnston, there would presumably be no question about Akeen Johnston's interest being "received from the estate" and thus satisfying the regulation. While she did not, the disclaimer statute explicitly makes the two situations legally equivalent.

[4] This is connected to an almost incomprehensible argument that appears to be that Akeen cannot have an interest because the will provides that debts are to be paid before the estate is distributed. The entire point of the hardship waiver is that the "debt" is waived under certain circumstances. This, like much of EOHHS' argument, is very vague, but it would appear that the logical extension of their theory is that there can never be a hardship waiver because the "debt" to the Commonwealth comes first. Such circular reasoning cannot be legally correct, as it would entirely eliminate the concept of waiver.

> any interest she may have as beneficiary of the Trust. Ms. Johnston was the daughter of the Grantors and a remainder beneficiary of the Trust; her children, including Akeen C. Johnston have assured (sic) her interest as a result of her death. Pursuant to Clause 2(f), Ms. Johnston's remainder interest in any and all trust property passed to her children.
>
> "As the Property is property of the Trust and as Akeen C. Johnston is a remainder beneficiary of said trust pursuant to Clause 2(f) (and current beneficiary with regard to the Trust ownership of the Property), Akeen C. Johnston received an interest in the Property from Ms. Johnston and satisfies the second requirement of the hardship waiver pursuant to 130 CMR sec 515.011(D)(1)." (Exhibit 3)

The only condition which EOHHS contests is clearly met.

In denying the application for the waiver, EOHHS proffered no reason. The Complaint in this action sets out no basis for the denial. Only the supporting Affidavit of Rhonda MacLeod makes the unfounded argument, dealt with above, that the disclaimer is ineffective because it came after the Notice of Claim. In its Memorandum, EOHHS seems to make one additional argument: that the request was untimely. This is another example of inability to discern the very plain meaning of a statute. EOHHS suggests that the waiver request must be filed within 60 days after the Notice of Claim. Again, it seeks to rewrite a statute to have it say what it would prefer. Section 32 provides that "[t]he personal representative shall have 60 days from the date of presentment to **mail** notice to the division ...." (emphasis added). The word "mailed" is used repeatedly throughout the subsection. If the General Court had wished the requirement to be one of receipt within 60 days, it would have said so. As set out in the Affidavit of Michael Simolo, prior counsel for the Estate, (Exhibit 8) the request was mailed on August 1, 2019, which is within 60 days after June 4, 2019, the date of the filing of the Notice of Claim.

II. THE FEDERAL MEDICAID STATUTE PROHIBITS RECOVERY WHILE THERE IS A DISABLED CHILD OF THE DECEDENT

The other element of the Congressional balance between estate recovery and protection of Medicaid recipients' families is what is commonly called "deferral". For the hardship waiver, Congress left it to the states to craft their own procedures, subject to federal guidance. For deferral, Congress set out an unambiguous rule which states must follow:

> "(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time—
>
> (A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under subchapter XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1382c of this title;" 42 USC §1396p(b)(2)(A)

As relevant to this case, recovery may not be made when there is a surviving child who is disabled. Akeen Johnston is disabled.[5] "Recovery under paragraph (1)" references recovery from the estate of a deceased Medicaid recipient, exactly what is being sought in this case.

EOHHS' sole response to this is that "deferral" only applies to cases in which MassHealth had placed a lien on the recipient's real estate. This is incorrect. The meaning of the statute is plain. The reference in §1396p (b)(2)(A) to "paragraph(1)" is to paragraph (1) of that same subsection (b). EOHHS appears to confuse it with a reference to paragraph (1) of an entirely separate subsection, subsection (a), which deals with liens. The deferral provision is part of the subsection which deals with estate recovery; that it should only apply to recovery in lien cases, provided for under a separate subsection, is nonsensical. That EOHHS is mistaken about

[5] The State Medicaid Manual clarifies that this provision covers a blind or disabled child as defined in §1614 of the Social Security Act (42 USC§1382c). This is the definition under which Akeen Johnston was found to be disabled by the Social Security Administration

this is further shown by looking at §1396p (b) (2)(B), which does apply specifically to deferral in lien cases, and sets out slightly different standards for those cases.

EOHHS has cited no authority for its novel proposition, because there is none. The Secretary, in the State Medicaid Manual, has suggested no such limitation. Section 3810.A.5 repeats the unambiguous command of the federal statute; it then goes on, in the same paragraph, to describe the different requirements applicable in lien cases. The state regulation, at 130 CMR 515.011(C), provides for deferral, with no suggestion of a limitation only to lien cases. The next section, 515.012(D), has separate, and different, standards for deferral in lien cases. No commentator has ever suggested that the limitation argued by EOHHS is correct. Cases on deferral (which are relatively few) have treated the statute as meaning what it plainly says, and none has suggested any limitation only to lien cases. See, e.g. Dalzin v. Belshe, 993 F.Supp. 732 (N.D. CA 1997) (invalidating under the Supremacy Clause a California regulation which was more restrictive than 42 USC §1396p (b) (2)(A)). An article co-authored by counsel for EOHHS herself on the subject of MassHealth estate recovery makes no mention or suggestion of the limitation she now proposes.

> "MassHealth will not enforce an otherwise valid claim in certain situations: if the estate qualifies for (1) a deferral... A deferral temporarily postpones collection of the claim during the lifetime of a surviving spouse, during the lifetime of any surviving child who is blind or permanently and totally disabled, or, for any surviving minor child who is not blind or permanently and totally disabled, until the child reaches the age of majority." Belza, Schroffner and Taylor, "A Practical Guide to MassHealth Estate Recovery", Boston Bar Journal, Vol. 60, No. 1 (Winter 2016)

Finally, MassHealth's own Notice of Claim (Exhibit 2) used in this case, which is not a lien case, discusses deferral without reference to any limitation to lien cases.

Once again, in its zeal to subvert the Congressional goal of protecting disabled children of Medicaid recipients to its desire to collect, EOHHS has attempted to rewrite a statute whose meaning is plain, and to ignore its own regulations. The attempt to recover while Akeen Johnston is alive and disabled is forbidden by federal law and by seeking to do so EOHHS has violated rights guaranteed to his mother's estate and to him by the supreme law of the land.

III. THIS ESTATE MEETS ALL REQUIREMENTS UNDER STATE LAW AND REGULATION FOR DEFERRAL OF RECOVERY

Massachusetts has implemented the federal "deferral" requirement through state statute and regulations. To the extent that these provisions narrow the rights granted by the federal statute, such as by requiring notice within a 60 day period, they are invalid. [6] "It is well settled that '[s]tate regulations which are inconsistent with federal law are invalid under the Supremacy Clause.' Lewis v. Hegstrom, 767 F.2d 1371, 1375 (9th Cir.1985). When 'an act of Congress, fairly interpreted, is in actual conflict with the law of State,' the state law must yield.' Savage v. Jones, 225 U.S. 501, 533, 32 S.Ct. 715, 56 L.Ed. 1182 (1912)." Dalzin v. Belshe, supra, at 734. Because Massachusetts participates in the Medicaid program, it must do so in a manner consistent with federal law. Needham v. Office of Medicaid, 88 Mass. App. Ct 558 (2015).

But the Court need not reach the question of whether the state statute's requirements for deferral violate federal law because the Estate of Kathryn Johnston has in fact complied with the unduly onerous requirements of the state program. EOHHS argues that deferral is not required because Michael Simolo's letter of August 1, 2019 was untimely and did not "request" deferral.

[6] One hypothetical, not relevant to the facts of this case, illustrates how Massachusetts has improperly limited "deferral". The statute requires that notice of the conditions giving rise to deferral must be mailed within 60 days after the Notice of Claim. However, if a child of the deceased MassHealth recipient were born after the 60-day period, deferral would certainly be required by federal law. The 60-day limitation cannot stand.

Yet again, EOHHS has, whether carelessly or deliberately, misstated the law to this court. The statute requires that within 60 days the personal representative must **mail** notice to EOHHS that "circumstances and conditions where the division is required to defer recovery under section 31 exist." G.L. c. 118E, §32. The statute does not require that the notice be received within 60 days, and it does not require a "request". Michael Simolo's letter of August 1, 2019 was mailed within 60 days. (Exhibit 8) It states that Akeen Johnston receives Social Security Disability. The personal representative complied with the actual requirements of the statute, not those inaccurately stated by EOHHS.

As is true in all aspects of this case, EOHHS has quite shamelessly misrepresented both law and fact to this court. If the facts are tested against the actual statutory requirements, only one conclusion is possible.

IV. BY SEEKING TO RECOVER AT A TIME WHEN IT IS FORBIDDEN TO DO SO, EOHHS HAS VIOLATED RIGHTS GUARANTEED BY FEDERAL LAW, ENTITLING THE ESTATE TO EQUITABLE RELIEF

The Civil Rights Act of 1871, 42 USC §1983, creates a cause of action for the violation, under color of state law, of rights guaranteed by the Constitution or laws of the United States. The federal Medicaid statute guarantees to the estates of Medicaid recipients that there will be no recovery from the estate of a deceased Medicaid recipient at a time when she has a surviving child who is disabled. By bringing this action at a time when it was on notice that Akeen Johnston, son of the decedent, was disabled, EOHHS has violated the right to be free of recovery. The Estate is entitled to injunctive relief to protect it from the efforts of EOHHS to obtain recovery in violation of federal law, and to a reasonable attorney's fee for the enforcement of that right. 42 USC §1988.

V. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THE AMOUNT OF EOHHS' CLAIM

The Notice of Claim, the Complaint and the MacLeod Affidavit all assert that the Plaintiff paid Medicaid benefits in the amount of $108,502.72 on behalf of Kathryn Johnston. The itemized billing history attached to the MacLeod Affidavit as Exhibit 6, the only evidence proffered in support of Plaintiff's motion, lists benefit payments of $84,582.71. There is therefore a genuine issue of material fact as to the correct amount of the claim, which cannot be resolved without discovery.

CONCLUSION

The Estate of Kathryn Johnston exemplifies what Congress and the General Court had in mind when they enacted the "hardship waiver" and "deferral" provisions of the federal and state Medicaid statutes: the protection of a home of modest value occupied by a disabled child of the deceased Medicaid recipient. Because the undisputed facts show that an overzealous state agency seeks to ignore congressionally-mandated -- and state-implemented -- protections, summary judgment in favor of the estate is appropriate.

Respectfully submitted,

LAURIE SCHIMMELFING, as Personal Representative of the ESTATE OF KATHRYN JOHNSTON

By her attorney,

Dated: November 26, 2019

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