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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
DOCKET NO. 1984CV2806-B**

Notice Sent
06.08.20 (NS)
UMSM/I.C.S.
CLP.B.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,

Plaintiff,

v.

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

Defendant

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Introduction

This case is about the tension between two public policies long acknowledged by both federal and state law: the recoupment of Medicaid payments from known assets of parties (in most cases, real estate); and the exception, or waiver, to that recoupment, when the real estate is occupied by an elderly or disabled family member in need of housing (hardship waiver). Here the Massachusetts Executive Office of Health and Human Services (EOHHS, MassHealth, or the Agency) seeks to recover payments made for the medical care of the now deceased Kathryn Johnston, by a Notice of Claim filed in Massachusetts Probate and Family Court dated June 4, 2019. Mrs. Johnston's Estate (the Estate) opposes that effort, on the grounds that Mrs. Johnston's son, Akeen Johnston, is an adult (age 26), disabled man who needs to continue to reside in the family home, as he has for his entire life.

The parties have filed cross-motions for summary judgment, each convinced that its own interpretation of state and federal law is the accurate and appropriate one. In brief summary, the arguments made by the pleadings are as follows. Plaintiff EOHHS maintains that: MassHealth is entitled to recover from the Estate pursuant to the terms of Mass. G.L. c. 118E, because Mrs. Johnston was over fifty-five years of age when she died on November 18, 2018; that the regulatory waiver requirements, set out at 130 CMR section 515.011(D), cannot be met by Mr. Johnston, for multiple reasons – estate recovery should not be waived for financial hardship; the deceased’s estate did not hold the property; the waiver was filed past the 60-day notice requirement; the conditions needed to meet waiver requirements were “created . . . after the fact”; and no written request for deferral was filed.

The Estate for its part asserts that any recovery is prohibited by federal law when there is undue hardship; that the Massachusetts financial hardship waiver requirements have been met, because MassHealth is misinterpreting the family’s estate planning and the law governing Mr. Johnston’s interest in the property; and that both federal and state law require, at the very least, a deferral of collection. By way of rebuttal, EOHHS argues that the Estate is relying on the wrong federal statutory provision, and that the hardship affidavits filed were insufficient.

At hearing on May 19, 2020, EOHHS waived all of its procedural challenges to the timing and documentation of the hardship waiver, and now relies exclusively on its argument that, pursuant to the terms of his mother’s will, Mr. Johnston does not possess a qualifying property interest sufficient to trigger waiver. For the reasons discussed below, I rule that the Estate has the better of the law. **Accordingly, EEOHS’s Motion for Summary Judgment**

(Paper 7) is DENIED as to current liability, and the Estate's Cross-Motion for Summary Judgment is ALLOWED.¹

Undisputed Facts of Record

With the exception of a dispute over the recoverable amount, there are no disputes of material fact.

Mrs. Johnston was eligible to receive, and did receive, MassHealth benefits from October 17, 2008 (the date she turned 55) until her death on November 18, 2018. The defendant Representative for the Estate, who is Mrs. Johnston's sister, filed a Petition for Probate in the Hampshire County Probate and Family Court, and was appointed April 1, 2019. The Estate consisted of the family home, a 2013 car, and less than \$7000 in cash. EOHHS filed its Notice of Claim, in the amount of \$108,502, on June 4, 2019.

Mrs. Johnston's 1994, operative will left her family home at 186 Jackson Street, Northampton, to her mother, and if her mother pre-deceased her, to the Philip R. and Mary H. Johnston Trust (the Trust), which had been established by her parents. The beneficiaries of the Trust are Mary and her husband, who are both now in their mid-nineties. Upon the death of the survivor of Mary or Philip, the Trust is to terminate, and the assets are to be distributed among Mary and Philip's four children, or the descendants of any deceased child.

Mrs. Johnston's son Akeem Johnston suffers from a disability and receives Social Security benefits as the disabled adult child of his mother, who was the wage earner. After Mrs. Johnston died, on July 31, 2019, her mother, Mary Johnston, filed with the Hampshire Court a Disclaimer of her inheritance interest under her daughter's will. By letter dated August 1, 2019 and received by EOHHS on August 5, 2019, Mr. Johnston requested a hardship waiver of the

¹ The proper recoupable benefit amount, i.e. damages, remains in dispute, as between approximately \$108,000 and approximately \$84,000, and cannot fairly be resolved on the record before me.

MassHealth claim. By letter dated August 14, 2019, counsel forwarded additional information in support of the waiver request. EOHHS denied the waiver by letter dated August 21, 2019.

The parties agree that: the family home would have to be sold to satisfy MassHealth's claim; that Akeem Johnston has lived there at all relevant times; that his income meets the statutory conditions for waiver; and that no other interested parties are seeking to force a sale of the property.

Discussion

Applicable Legal Standards

Medicaid is a cooperative federal and state program. In addition to the goal of providing payment for medical services to eligible individuals and families, both authorities require states to recover the maximum amount possible of correctly paid benefits. 42 U.S.C. section 1396p(a)(1)(B)(i) (2010); Lopes v. Commonwealth, 442 Mass. 170, 172 (2004). To receive the federal funding, states must demonstrate compliance with federal statutes and regulations. 42 U.S.C. section 1396a(a) (2014); Youville Hospital v. Commonwealth, 416 Mass. 142, 146 (1993); Haley v. Comm'r of Public Welfare, 394 Mass. 466, 467 (1985); Needham v. Director of the Office of Medicaid, 88 Mass.App.Ct. 558 (2015). Plaintiff EOHHS reasons from this authority that Mass. G.L. c. 118E, section 31, captioned "Adjustment or Recovery of Medical Assistance Correctly Paid," entitles it to recovery in this case as a matter of law, simply because Mrs. Johnston's account meets the basic statutory requirements. That is correct so far as it goes.

However, the Code of Massachusetts Regulations, Title 130 section 515.011(D)(1) indisputably provides for a financial hardship waiver, as follows:

- (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.

EOHHS's position is that Mr. Johnston's waiver request cannot meet the second requirement in clause (b), because he has not "inherited or received an interest in the property from the deceased member's estate."

As described above, it is undisputed that the will as written divided the estate interests between mother Mary Johnston and the Trust. It is also undisputed that Mary Johnston has disclaimed her independent interest, thereby leaving the full estate to the Trust. It is also undisputed that Mr. Johnston, as the surviving child of Kathryn Johnston, is a remainder beneficiary of that Trust.

EOHHS's primary argument is that it "cannot recognize the validity of the attempt by the Decedent's family to create the conditions needed to meet waiver requirements after the fact. . . . By disclaiming the property devised by the Decedent's will, her family attempted to transfer the property to [the Trust,] then to the son . . . [which] would create an unfair loophole which would allow estate recovery to be avoided in many future cases." Plaintiff's Memorandum of Law in Support, at pages 6-7. EOHHS also argued at hearing that Mr. Johnston's interest has not yet vested, and is therefore potentially revocable. I respectfully disagree.

Mary Johnston's Disclaimer appears proper on its face pursuant to Massachusetts probate law, and EEOHS offers no authority for its position that, because the Disclaimer was filed after its Notice of Claim, improper or unfair "after the fact" estate planning has occurred. It is

obvious from the record presented that the Johnston family, with advice of probate counsel, was merely attempting responsibly to provide for Mr. Johnston following the loss of his mother, and I so find. The intent of the family, to provide a home for a disabled member who could not otherwise afford it, is not in the least nefarious. Rather, it is entirely in keeping with the intent and public policy behind the waiver provision.

Moreover, the proposition that Mr. Johnston's remainder beneficiary interest in his mother's property is not a valid, recognizable interest "inherited or received" for purposes of the regulation is unpersuasive as a matter of the usual and natural meaning of the words. Mr. Johnston has "inherited" his interest, even though he has yet to "receive" it. I agree with the Estate that EEOHS's apparent argument, that no hardship waiver can be recognized under these facts because the debt to the Commonwealth preempts the inherited interest, is circular and not in keeping with the public policy of providing housing to people in Mr. Johnston's precise position.

My reading of this record is that these unique facts distinguish this case from all of the others cited by the parties, and detract from EOHHS's argument that a floodgate of "loophole" cases will be opened. I have considered and given appropriate deference to the Agency's interpretation of its own regulation, but nonetheless find that interpretation wanting in this case, as a matter of both fact and law.²

Any other arguments raised by the parties in their pleadings which were either waived at hearing, or are unnecessary to the court's ruling, have not been reached.

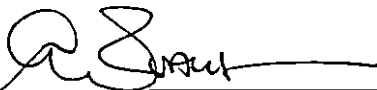
² Because I agree with the Commonwealth that the Estate's pleaded affirmative defense pursuant to 42 U.S.C. section 1396p(b)(2) is misplaced, I do not rely on that argument in any fashion here. That section of the federal statute, and its provision for "deferral," governs situations in which a lien is placed on a Medicaid recipient's property while the recipient is still alive; that did not happen here. Accord, EEOHS v. Larareo, Suffolk Superior Court No. 15-02893-G (2016)(Ullman, J.); G.L. Chapter 118E section 31(d).

Conclusion

For the reasons stated, Plaintiff EOHHS's Motion for Summary Judgment (**Paper 7**) is **DENIED**, and the Defendant Estate's Cross-Motion for Summary Judgment (**Paper 10**) is **ALLOWED**, as to liability only. The court makes no determination as to the (disputed) amount of recovery owed, should the conditional waiver provided by regulation lapse for any reason, so that limited portion of plaintiff's request for relief is **DENIED WITHOUT PREJUDICE**.³

SO ORDERED.

Dated: June 5, 2020


Christine M. Roach

³ Pursuant to subsection (2) of section 515.011 (D), "[t]he waiver will be conditional for a period of two years," subject to certain conditions, before it "becomes permanent and binding." 130 CMR section 501.013(C)(2)(d).