COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SJC-13179

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES,

vs.

LINDA MARIE MONDOR & OTHERS (AND TWO COMPANION CASES)

ON A REPORT WITHOUT DECISION AND A FINAL JUDGMENT OF THE SUPERIOR COURT

BRIEF FOR
AMICUS CURIAE,
MASSACHUSETTS CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
IN SUPPORT OF APPELLEES
LINDA MARIE MONDOR, LAURIE A. DERMODY AND ANOTHER

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys ("MassNAELA") is a non-profit organization that was incorporated in 1992 to serve the legal profession and the public with the following mission:

- To provide information, education, networking, and assistance to Massachusetts attorneys, bar organizations, and other individuals or groups advising elderly clients, clients with special needs and their families;
- To promote high standards of technical expertise and ethical awareness among attorneys, bar organizations and other individuals or groups engaged in the practice of advising elderly clients, clients with special needs and their families;
- To develop public awareness and advocate for the benefit of the elderly, those with special needs and their families, by promoting public policies that support our mission; and
- To encourage involvement and enhance membership in, and to promote networking among members of the National Academy of Elder Law Attorneys.

MassNAELA is a voluntary association whose members consist of a dedicated group of elder law and special needs attorneys across the Commonwealth of Massachusetts.

RULE 17(C)(5) DECLARATION

Amicus curiae and their counsel declare that they are independent from the parties and have no economic interest in the outcome of this case.

None of the conduct described in Mass. R. App. P. 17(c)(5) has occurred:

(A) No party or party's counsel authored this brief in whole or in part;

(B) No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;

(C) No person or entity—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief; and

(D) No amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues; no amicus curiae or its counsel was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

ISSUES ADDRESSED BY AMICUS CURIAE

Amicus curiae MassNAELA offers the following views in support of Appellees Linda Marie Mondor ("Mondor") and Laurie A. Dermody ("Dermody"), as well as the other appellees in these consolidated cases.

MassNAELA fully endorses the view, set forth in the Mondor and Dermody briefs, that a spousal annuity which satisfies 42 U.S.C § 1396p(c)(2)(B)(i) ("the Sole Benefit Provision") need not also satisfy 42 U.S.C § 1396p(c)(1)(F)(i) ("the Beneficiary Provision" or "(c)(1)(F)").[1]

According to this view, the Beneficiary Provision is not implicated when a community spouse ("CS") converts spousal assets into an immediate, irrevocable, actuarially sound annuity ("Annuity"), for purposes of having an institutionalized spouse

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[1] The Beneficiary Provision states that the purchase of an annuity shall be a disqualifying transfer of resources, for purposes of a Medicaid application, unless: "(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual…."

("IS") qualify for Medicaid. MassNAELA fully agrees with this view.

However, MassNAELA emphasizes that even if the Beneficiary Provision is applicable, MassHealth still did not acquire any enforceable beneficiary rights in the Annuities, for several reasons:

1. There is no basis for concluding that the term "institutionalized individual" in the Beneficiary Provision refers to the spouse currently on Medicaid, as opposed to the community spouse.

The beneficiary designations in these cases arose solely because MassHealth required those designations, as a condition of Medicaid eligibility, ostensibly to comply with the Beneficiary Provision. However, the key phrase of the Beneficiary Provision – "institutionalized individual" – does not precisely identify either the IS or the CS. Thus, the designations in the Annuities, even if they tracked the statute (which they did not), would be insufficient to give MassHealth any enforceable beneficiary rights.

Congress, if it wished, could tweak the statute to be consistent with MassHealth's view; that is, the amended language could refer to "services provided *to either spouse*," or "services provided to *any currently institutionalized spouse*." Either would more clearly support the outcome desired by MassHealth, assuming the applicability of the Beneficiary Provision in the first place.

However, there is little basis for concluding that Congress would act in MassHealth's preferred manner. Rather, through the 1988 Medicaid Catastrophic Care Act ("MCCA"), 42 U.S.C. § 1396r–5, Congress demonstrated a clear intent to protect community spouses and allow them to retain unencumbered assets, without any reimbursement obligation to the state. The law allows this for a primary residence owned by the community spouse, income-generating promissory notes, assets comprising the statutory community spouse resource allowance, and certain irrevocable trusts. There is no reason to conclude that the Beneficiary Provision, as applied to spousal annuities, should operate in any other manner.

2. By ratifying the Annuities, and approving Medicaid applications without requiring compliance with the language of the Beneficiary Provision, MassHealth failed to perfect any enforceable remainder beneficiary rights in the Annuities. Even if the Court were to find that the statute applies to the Annuities, and also that "institutionalized individual" means the spouse currently on Medicaid, MassHealth still has no enforceable rights in the Annuities. This is because none of the beneficiary designations in these cases are consistent or compliant with the Beneficiary Provision in the first place.

Further, in at least two of the cases at bar, and probably many others, MassHealth has exploited the statute's ambiguities – and has employed its coercive powers – to potentially seek overbroad, unlawful recovery of assets. That is, the agency has required annuitants to make the Commonwealth the general beneficiary of spousal annuities (as a condition precedent to eligibility) in a manner that is untethered to the cost of Medicaid services provided to either spouse. Whether the result of

overreach or simply bureaucratic breakdown, this is entirely inconsistent with the statute.

3. MassHealth's policy arguments are misplaced and should be disregarded. Finally, the Court should reject MassHealth's premise that long-term care planning by elders is "abusive." It should also dispense with the agency's mythology concerning a general intent in the Medicaid scheme to inhibit the passing of assets to adult children who, in some circumstances, face having one parent in a nursing home, the other in an assisted living facility, and both in poor health.

Indeed, either expressly or by implication, MassHealth characterizes the annuitants in these cases, and their family members, as persons trying to game the system. In fact, community spouse annuitants are usually just seeking ways to support themselves or meet their own medical needs that are not covered by Medicaid.

Take Robert Hamel, the CS in *Dermody*. He was not living lavishly off of his spousal annuity, but rather was a "community spouse" in name only, and resided modestly at Apple Valley

Center, an assisted living facility in Ayer, MA, for which he paid $6,527.60 per month out-of-pocket, without governmental assistance. He was not a figure of baronial wealth, but was variously a youth boxer, a Korean War Veteran, and a 37-year employee of the Colonial Gas Company in Lowell.[2] The annuity he purchased was for just $172,000.

His wife, Joan Hamel, was alone in a nursing home, with her health deteriorating, when she applied for Medicaid. Joan and Robert hid no assets nor engaged in any legal sleight of hand; instead, they dutifully did all that MassHealth asked.

As for Robert, he died at Apple Valley less than 18 months after purchasing the five-year annuity. Neither he, Joan, nor their daughter Laurie Dermody did anything unlawful or untoward in this case. Nor did any of them, contrary to the implications of MassHealth, get rich.

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[2] *Obituary of Robert Hamel*, LowellSun.com, Dec. 27-28, 2016 (Addendum, page 36).

ARGUMENT

A. There is No Basis for Concluding that the Beneficiary Provision Refers to the Spouse Currently on Medicaid, Given the General Congressional Intent to Let Community Spouses Retain Unencumbered Assets.

MassHealth's argument rests on an assumption that the operative language in the Beneficiary Provision refers to an IS presently receiving Medicaid benefits. However, even assuming that the Beneficiary Provision is applicable to the Annuities, the term "institutionalized individual" is insufficiently precise to have allowed MassHealth to perfect any enforceable beneficiary rights in the Annuities.

According to MassHealth's current position, the Commonwealth must be the remainder beneficiary of an annuity purchased by a CS to the extent of Medicaid services being provided to a *currently institutionalized spouse*. Yet, the agency acknowledges that the statute simply says "institutionalized individual" and refers to no "spouse," whether institutionalized or otherwise.

The ambiguities in the statute have begat results that are, not surprisingly, ambiguous. In fact, neither federal Circuit Court judges, Massachusetts Superior Court judges, U.S. Health and Human Services officials, MassHealth officials, annuitants, or annuity companies have been able to reach a common or consistent interpretation of what the Beneficiary Provision means. Rather, efforts to apply the statute have resulted in (1) a myriad of shifting views and policies on the part of MassHealth itself; (2) similar vacillations by the federal government; (3) dueling opinions by federal courts concerning the Beneficiary Provision; and (4) similarly opposite holdings by Massachusetts Superior Court judges. Not surprisingly, there has also been a proliferation of litigation on this precise issue: as MassHealth acknowledges in its brief, there have been nearly two dozen Superior Court lawsuits since 2017 over this single provision. *See MassHealth Brief*, page 59, n. 20.

Critically, the provision does not exist in a vacuum, but is part of a much larger scheme governing Medicaid eligibility. The Beneficiary Provision states that the purchase of an annuity shall

be a disqualifying transfer of resources unless: "(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the *institutionalized individual*…." (Emphasis supplied.) *42 U.S.C § 1396p(c)(1)(F)(i)*. If a transfer is deemed "disqualifying," a Medicaid applicant will receive no benefits for a penalty period commensurate with the size of the transfer. In short, the statute has tremendous coercive power, and allows state agencies to deny Medicaid applications unless certain actions are taken. This is all the more reason to construe the statute strictly, instead of resolving its ambiguities against Medicaid applicants and spouses who acted in good faith to navigate a complicated bureaucracy and to diligently comply with MassHealth's requirements.

There are numerous things Congress could have done – and can do – to rectify any ambiguities in the statute. It could require that states be the beneficiaries of annuities to the extent of "services currently being furnished to any institutionalized spouse." Or, even more clearly, it could use the term "either spouse."

In the absence of such language, MassHealth asks this Court to pick up the draftsman's pen and to append the missing words. But this Court has historically shied away from finding language in statutes by implication, particularly in its recent elder law jurisprudence. *See Matter of Estate of Kendall*, 486 Mass. 522 (2020) (declining to find by implication an exception that would give MassHealth the ability to make a claim beyond the statute of repose).

Nor, frankly, is it reasonable to assume that Congress would change the statute in the manner MassHealth would hope; in fact, it might well do the opposite. Indeed, the federal statutory framework for Medicaid eligibility, taken as a whole, demonstrates a clear Congressional intent to allow CS to retain unencumbered assets, and to allow unlimited interspousal transfers. The key phrase in (c)(1)(F) should be construed not in isolation, but in harmony with the overall statutory scheme. *See Kendall*, 486 Mass. at 528 ("[w]e ordinarily construe statutes to be consistent with one another, [reading them as a harmonious

whole] so that effect is given to every provision in all of them.") (Internal quotation marks omitted.)

Congress addressed the treatment of spousal assets, and created the community spouse resource allowance ("CSRA"), in 1988 via the Medicaid Catastrophic Care Act, 42 U.S.C. § 1396r–5. The MCCA also created the so-called "sole benefit rule," which provides that any transfers of assets between spouses does not give rise to any transfer penalty.

Notably, the MCCA also placed no limitation on the amount of *income* that could be received by the CS without impacting the Medicaid eligibility of either spouse. Therefore, it became not uncommon for CS to convert assets that exceeded the spousal allowance into income through the purchase of annuities, exactly as has occurred with the cases at bar. Then, in 2005, with the passage of the Deficit Reduction Act ("DRA") and its amendments to 42 U.S.C. § 1396p, Congress expressly ratified the use of this practice, while placing conditions upon it.

Importantly, Congress has enshrined various other protections for spousal assets which contain no reimbursement

requirements for services being provided to the IS. As detailed in the Dermody brief, these include actuarily sound sole benefit trusts, income streams created through the use of promissory notes, the assets comprising the CSRA, and primary residences in the name of the community spouse. These provisions demonstrate that Congress' intent was frequently to allow community spouses to retain unencumbered assets and to have income to pay for their own care. And Congress did not seek, with respect to these provisions, to restrict the testamentary disposition of remainder assets by CS. Thus, it should hardly be presumed that Congress intended something entirely different for spousal annuities.

B. MassHealth Failed to Perfect Any Enforceable Remainder Rights in the Annuities, Because the Designations Do Not Comply With the Statute.

The genesis of each of the matters before the Court was the act of a spouse in applying for nursing home benefits. The Beneficiary Provision (assuming its applicability in the first place) allowed MassHealth to condition approval of an application upon disclosure of any annuity purchased by the CS, as well as upon the designation of MassHealth as the first remainder beneficiary.

If the agency deemed an annuity non-compliant, it had a clear remedy: to treat the annuity as a transfer for less than fair market value, and to impose an eligibility penalty on the applicant. *See Carlini v. Velez*, 947 F.Supp.2d 482, 486 (D.N.J. 2014) ("when an annuity fails to name the State as a remainder beneficiary in accordance with § 1396p(c)(1)(F), an otherwise eligible Medicaid applicant must face a penalty period before receiving benefits").

However, the Beneficiary Provision, on its face, does not give MassHealth any rights beyond requiring the designation, and denying applications in the absence of a designation. Stated another way, the statute does not give MassHealth an inherent, unrestricted right to the remainder proceeds, and is not a free-standing vehicle for estate recovery.

Self-evidently, if MassHealth had approved the applications without requiring any beneficiary designation at all, it would have no remedy today. But, just as fatally, none of the beneficiary designations in *Mondor*, *Castle*, or *Dermody* are consistent with the statute, leaving MassHealth without any enforceable rights.

See Metropolitan Life Ins. Co. v. Parker, 436 F.3d 1109, 1114 (9th Cir. 2006) (reference to "As Indicated In My Will" on form was too ambiguous under circumstances to designate legally valid beneficiary).

Further, none of the annuity contracts, nor the applications themselves, make any express reference to an "institutionalized spouse," let alone a "current institutionalized spouse," which is a reflection of the ambiguity in the statute itself. And absent clarity in the operative contractual terms, MassHealth again failed to acquire contractual rights. *See Gelschus v. Hoge*n, 2021 WL 4462097, *5 (D. Minn. 2021) (finding provision in beneficiary designation disclaiming "all right, title and interest" in retirement account to be ambiguous).

MassHealth tellingly lays out the history of the Annuities in each of the consolidated cases on pages 27-33 of its brief. It is undisputed that in each of the cases, the applicant/IS disclosed the existence of the CS's annuity in compliance with the statute. However, in none of these cases did MassHealth require

designations that complied with the statute, meaning that the agency cannot now claim rights in those contracts.

The *Mondor* case. The Mondor annuity was purchased for about $191,000 for a four-year term. The annuity named the "Commonwealth of Massachusetts" as its primary beneficiary. But nowhere does the designation reference "the total amount of medical assistance paid on behalf of the institutionalized individual," let alone any "institutionalized spouse." Nor does it reference either Elda Mondor (the IS) or Edward Mondor (the CS) by name. In short, even assuming that the statute was sufficiently precise to allow MassHealth to perfect contractual rights, the agency failed at the outset to enshrine those rights in the manner it claims the statute allowed.

However, the agency did do something that the statute most certainly did not allow: It required, as a condition of approving Elda's benefits, that the Commonwealth become the general beneficiary of the annuity, to its full extent and without reference to any benefits being received by anyone.

Edward died in April 2021, about 22 months after purchasing the annuity. Elda had received services for about the same period. On Edward's death, about $98,000 of annuity proceeds remained to be paid. However, in light of the breadth of the designation, the Commonwealth could have received a massive, unlawful windfall under different facts. For example, Edward could have died one month into the annuity term. On its face, the beneficiary designation would then have potentially entitled the Commonwealth to about $183,000 in remainder payments, with Elda having received only a month of benefits. Such grave anomalies would be a direct result of MassHealth coercing applicants, and their annuitant spouses, into making designations far broader than what the statute permits.

MassHealth's brief notes that Elda also submitted a completed ANN-3 form which referred to "the total amount of medical assistance paid on behalf of the individual." However, this additional papering of the file would have been cold comfort to Edward's beneficiaries if – as is certainly possible – the annuity

company had simply mailed a check to the Commonwealth based on the broader designation.

MassHealth's recounting of the history of the *Mondor* annuity includes a revealing detail. MassHealth points out that "the form application used by Elda Mondor, the IS, directed applicants to the MassHealth Senior Guide as to the *require[ment] to name the Commonwealth as a remainder beneficiary*." *MassHealth Brief,* page 28. (Emphasis supplied.) The Brief quotes language from the Senior Guide which references the Commonwealth being the beneficiary *"for the total amount of medical assistance paid for the institutionalized individual*." *Id.* at 28-29. (Emphasis supplied.)

This language from the Senior Guide does in fact directly track (c)(1)(F). But MassHealth's reference to this language proves too much, and serves only to illuminate that it is asking the Court to cobble together the CS annuity contract, Elda's application, the Senior Guide, and also an ANN-3 form she submitted, in order to create a supposedly enforceable remainder right to the annuity proceeds. In short, MassHealth's recounting

of the *Mondor* annuity simply underscores the agency's non-compliance with the statute when Elda's application was approved, and the absence of key terms from the annuity contract.

The *Castle* case. In the *Castle* case, the CS, James, purchased an annuity with a five-year term for almost $177,000. It named "the Commonwealth of Massachusetts" as the primary beneficiary. When the IS, Carol, applied for MassHealth benefits, she submitted a copy of the annuity. Its language says nothing about any "institutionalized individual," and, as in *Mondor*, does nothing to track the language of the statute that supposedly authorized the inclusion of this language in the first place. And here again, without any language limiting the Commonwealth's beneficiary rights to the cost of services for either spouse, the agency was potentially positioned for a massive windfall that Congress had never intended or authorized.

The *Dermody* case. In *Dermody*, the CS, Robert, purchased an annuity for $172,000 with a five-year term. The first beneficiary was designated as "State of MA Medicaid Per Application." Meanwhile, the application of the IS, Joan, disclosed

the annuity and stated that the primary beneficiary would be "Commonwealth of MA the Extent Benefits Paid" [sic].

Neither the application nor the annuity contract casts any light on *who* would be receiving the benefits referred to in the contract. Was it Robert, or Joan? Neither of these documents reference either of them, let alone any "institutionalized individual." And the contract was between Robert and the annuity company, without referencing Joan or any "institutionalized individual."

In short, the designation in *Dermody* was ambiguous, having been based on an ambiguous statutory term. Not surprisingly, the annuity carrier, Nationwide Financial Insurance Company, itself became confused. As discussed in the Dermody brief, Nationwide sent a letter to the Commonwealth inquiring as to whether the Commonwealth should be paid to the extent of benefits received by *Robert*, not by Joan. The Commonwealth didn't write back for six months, but then demanded payment to the extent of services received by Joan. Nationwide complied.

Laurie Dermody, the second remainder beneficiary, was informed of none of this. And although the *Dermody* designation did have language limiting the Commonwealth's rights to "the extent [of] benefits paid," this sequence of events demonstrates the danger of open-ended designations, like those in *Mondor* and *Castle*, where an annuity company easily could have paid over the entire balance.

Remarkably, between 2007 and 2016 MassHealth did not enforce the Beneficiary Provision at all relative to spousal annuities, on the assumption that the statute referred not to benefits being received by the IS, but rather to any future benefits they were to receive if the CS were to become institutionalized. Suddenly, in 2016, MassHealth changed its interpretation of existing law and began to require the CS to designate the Commonwealth of Massachusetts in the first position as a general, unlimited beneficiary of all annuities, whether purchased by the applicant or spouse, as a condition of granting eligibility for coverage of nursing home care.

There is one more dimension of these cases which underscores the ambiguities in both the statute and the beneficiary designations. MassHealth's brief, on page 34 and footnote 14, references the sums expended on Joan Dermody's care since the death of Robert. It appears that MassHealth's position, and desired outcome in these cases, is that it will remain the first remainder beneficiary of an annuity for an indefinite period, as long as the IS remains alive. This position implicates another potential ambiguity in the statute: does the phrase "benefits paid" refer to benefits paid as of the date of death of the CS/annuitant, or does it extend to future benefits provided to the IS? Adding the phrase "and benefits to be paid" would clarify the matter to an extent. But Congress did not include these words, and MassHealth is again asking the Court to fill in the breach.

C. MassHealth Unfairly and Baselessly Casts Opprobrium Upon Entirely Lawful Efforts by Community Spouses to Provide for Their Own Care.

Against the backdrop of the weaknesses in its positions, MassHealth resorts to skewed policy views and normative criticism of spouses who, like those in these cases, seek to avoid impoverishment and the encumberment of their assets in a manner that Congress has expressly allowed.

These cases do indeed involve efforts by elders to plan for uncertain and sometimes fraught futures. However, "Medicaid planning," the term MassHealth uses to describe such efforts, contains an unfair pejorative ring. Long-term care planning, broadly stated, involves efforts by individuals to make future care available for their spouses and themselves. Thus, an important goal is to preserve assets to allow a CS to meet their own medical and living expenses, including assisted living care. Indeed, it is very common for a CS to need funds for such care, particularly when that person's most obvious caregiver – the IS – is no longer able or present to help.

In sum, the notion of a CS enjoying a lavish lifestyle based on annuitized assets is misplaced. For aging couples, it is certainly not uncommon for a CS to need assisted living or substantial home care even as the other spouse needs nursing home care. Most assisted living facility care is not covered by Medicaid because of strict income limits. Thus, a community spouse may be, like Robert Hamel, struggling to cover his assisted living facility ("ALF") costs even with the aid of annuitized assets.

According to Genworth's 2020 Annual Care Survey, the monthly cost of an ALF in Boston, MA was $6,100.00 for that year.[3] Thus, a married couple even with the seemingly substantial sum of $366,000 in assets would generate only five years of ALF costs via a spousal annuity.

In short, the vast majority of persons who face the loss of their life savings in order to qualify for Medicaid are functionally middle class. Such long-term elder planning benefits countless

[3] Addendum, page 38.

persons of limited means who have inherited nothing and built modest nest eggs, some against long odds.

Despite these realities, the notion that long-term care planning is "abusive" is nonetheless a linchpin of MassHealth's argument. For example, on page 17 of its Brief, MassHealth contends that "Congress has enacted various limitations to curb *abusive forms of Medicaid planning*…." On page 59, it contends that "[t]he purpose of the DRA generally was to close down *abusive Medicaid spend-down loopholes*, especially loopholes related to annuities." On page 60, it claims that Appellees' position "would turn the point of the DRA on its head, taking a set of provisions designed to limit *abusive Medicaid planning annuities* and, instead, interpreting them to allow *abusive annuities* to proliferate unchecked." (All emphases supplied.)

In fact, it is MassHealth that has "turn[ed] the point of the DRA on its head." The DRA did not characterize long-term care planning, nor the use of annuities, as "abusive." Rather, in recognition of the need to avoid spousal impoverishment, it expressly allowed the practice of annuitizing assets that exceed

the community spouse resource allowance, with certain limitations placed on annuities purchased within the lookback period.

MassHealth also ranges well beyond the plain text of the bill to make its arguments, but does so again in a misleading manner. MassHealth points out that then-President George W. Bush extolled the bill as a means of curbing waste, but it leaves out criticism from future president Barack Obama, who opposed the DRA along with every other Senate Democrat, thus forcing Vice President Dick Cheney to cast the tie-breaking vote. MassHealth cites the words of warm approval from Iowa Senator Chuck Grassley; it omits the strident opposition of Massachusetts Senator Edward Kennedy, who castigated the DRA on the Senate floor as a law that "Scrooge would love," and that would force "the neediest members of our society [] to tighten their belts."[4] MassHealth's selective references to the history of the bill are

[4] 151 Cong. Rec. (Senate), pages 30556-30651.

telling, and of a piece with the agency's overall effort to portray long-term care planning as insalubrious.

Finally, the Court should disregard MassHealth's assertions, made across many briefs in eligibility cases, that Congress has restricted Medicaid planning to prevent the passing of assets to family members. As a practical matter, it is likely not common for people to go to great lengths to qualify for Medicaid simply to pass on money to others. Medicaid typically pays only for semi-private rooms at pre-negotiated rates, leading to circumstances that few would consider opulent. All told, long-term care planning typically involves not herculean measures to accumulate assets, but instead fairly modest efforts to ensure that income is available to meet present and future care needs.

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In significant part, these cases are about MassHealth's inconsistency in many areas – the language of the beneficiary designations it has required, the manner in which it has interpreted statutes and its own regulations, and the positions it has taken in litigation over these very questions.

To resolve these questions, MassHealth also asks the Court to find words in statutes that are not there, and to recognize Congressional intentions that are not express. But in the end, it relies on (1) a provision that some courts have found does not apply at all; (2) key language in that provision that has spawned further ambiguity; and (3) upon beneficiary designations that the agency failed, at the outset, to make consistent with that statute. These tripartite problems in its position ultimately leave MassHealth without a sustainable claim to the proceeds of the annuities in these cases.

Thus, based on the foregoing, MassNAELA believes that the Court should find for appellees in these matters, and also find that MassHealth has failed to perfect any beneficiary rights in any actuarially sound spousal annuities that it approved prior to the Court's ultimate resolution of the matters at bar.

CONCLUSION

Amicus Curiae the Massachusetts Chapter of the National Association of Elder Law Attorneys respectfully offers the foregoing views and analysis as *amicus curiae* in this matter in support of Appellees Lisa Marie Mondor, Laurie Dermody, and the other beneficiaries in these consolidated cases.

Respectfully submitted,

MassNAELA,

By its attorneys,

/s/ C. Alex Hahn, Esq.

_____

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Dated: January 9, 2022

ADDENDUM

Obituary of Robert E. Hamel

Robert G. Hamel
Beloved Father and Grandfather

BILLERICA -- Robert G. Hamel, 81, a longtime resident of Billerica, and recently of Langdon Place of Nashua, died peacefully Thurs., Dec. 23, 2016, at Apple Valley Center in Ayer, MA.

He was the beloved husband of Joan (O'Loughlin) Hamel to whom he was married for 60 years.

Born in Lowell on Jan. 6, 1935, he was the son of the late Frederick and Louise (Pelletier) Hamel. Robert graduated from Lowell High School in 1954 and was a Veteran of the Korean War. Mr. Hamel was employed by the Colonial Gas Company in Lowell for 37 years before retiring in 1995. He was an avid sports fan and enjoyed watching the Patriots, Red Sox, and high school football games. His love of sports made him a great competitor. In his youth, he boxed competitively and was a member of Lowell High School's football and baseball teams. At age 81, he competed in the Senior Olympics to take the gold medal in Bowling.

His greatest love was family. He enjoyed being surrounded by his wife, children and grandchildren, whether he was cooking the perfect steak on the grill, or enjoying a day on the golf course with friends.

His charisma and generosity will be remembered by all who knew him.

He is survived by his wife, Joan, two daughters and sons-in-law, Donna and John Huntley of Enfield, NH and Laurie and Michael Dermody of Groton, MA; four grandchildren Rachel, Jacob, Alana, and Robert; his sister-in-law, Laura Hamel; his nieces and nephews, Debbie Ramsden and her husband, Charlie, Dottie Moloney and her husband, Joseph, Frederick Hamel, Jr. and his wife, Eileen, and Richard Hamel and his wife, Lisa; also several great nieces and great nephews.

Robert was the brother of the late Frederick A. Hamel who died November 30, 2006.

Genworth Care Survey
(Assisted Living Care Cost, Boston Area, 2020)

Cost of Care

Genworth

Boston Area, MA

Monthly Cost	2020
Home Health Care	
Homemaker Services	$5,720
Homemaker Health Aide	$5,720
Based on annual rate divided by 12 months (assumes 44 hours per week).	
Adult Day Health Care	
Adult Day Health Care	$1,782
Based on annual rate divided by 12 months.	
Assisted Living Facility	
Private, One Bedroom	$6,100
As reported, monthly rate, private, one bedroom.	
Nursing Home Care	
Semi-Private Room	$13,383
Private Room	$14,509
Based on annual rate divided by 12 months.	

The information shown above is based on a specific scenario generated by the Genworth 2020 Cost of Care. Future years are calculated by assuming an annual 3% growth rate. For more information and location comparison, visit genworth.com/costofcare.

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CERTIFICATION

I, C. Alex Hahn, Esq., certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P.16 (a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21(redaction).

Compliance with the applicable length limit of Rule 20(a)(2) was ascertained as follows. Century Schoolbook, a proportionally-spaced font, was used. The portions of this Brief that are required by Rule 16(a)(5)-(11), including headings, footnotes, and quotations, contain fewer than 7,500 words.

Pursuant to Rule 16(a)(8), in light of the Argument section of this brief being less than 4,500 words, a Summary of Argument was not included in this brief.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

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C. Alex Hahn, Esq.

Dated: January 9, 2022

CERTIFICATE OF SERVICE

I, C. Alex Hahn, Esq. hereby certify that I have this day caused a copy of this pleading to be served on all counsel of record via efilema, the efiling portal for the Massachusetts Appeals Court.

Signed under the pains and penalties of perjury,

/s/ C. Alex Hahn, Esq.

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C. Alex Hahn, Esq.

Dated: January 9, 2022