COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SJC-13439

MATTER OF ESTATE OF MASON

ON APPEAL FROM AN ORDER OF THE BARNSTABLE SUPERIOR COURT

BRIEF FOR
***AMICUS CURIAE*,**
MASSACHUSETTS CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
IN SUPPORT OF APPELLEE MARYANN FELLS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

QUESTIONS POSED BY COURT TO *AMICUS CURIAE* 4

RESPONSE OF *AMICUS CURIAE* 5

I. THE PLAIN LANGUAGE OF SECTION 31(B) ESTABLISHES THAT MASSHEALTH'S AUTHORITY TO ENFORCE MEDICAID LIENS TERMINATES UPON THE DEATH OF THE RECIPIENT. 6

II. THE FEDERAL MEDICAID STATUTE ACCORDS DISCRETION AND FLEXIBILITY TO STATE LEGISLATURES IN CREATING RECOVERY REGIMES. 9

III. CHAPTER 118E, INCLUDING THE SECTION AT ISSUE IN THIS CASE, IS ENTIRELY CONSONANT WITH THE FEDERAL STATUTE. 13

IV. MASSHEALTH'S REPLY BRIEF ADMITS THAT THE AGENCY EXCISED LANGUAGE FROM ITS REGULATIONS THAT HAD PREVIOUSLY TRACKED THE LANGUAGE OF M.G.L. C. 118E, § 31(D) 17

V. A FOURTH TRIAL COURT JUDGE HAS FOUND THAT MASSHEALTH LIENS DISSOLVE ON THE DEATH OF THE RECIPIENT. 19

CERTIFICATION 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

CASES

Casey v. Papamechail, 2021 WL 2201604 (Mass. Land Ct. June 1, 2021) 20
Dermody v. EOHHS, 491 Mass. 223 (2023) 6
Matter of Estate of Kendall, 486 Mass. 522 (2020) 13
Matveyev v. Rebelo, 2023 WL 4489659 (Mass. Land. Ct., July 12, 2023) 20
eVineyard Retail Sales–Mass., Inc. v. Alcoholic Beverages Control Comm'n, 450 Mass. 825 (2008) 7
Tartarini v. DMR, 82 Mass. App. Ct. 217 (2012) 19
Wells Fargo Bank, N.A. v. Green, 2020 WL 1903828 (Mass. Land Ct. Apr. 17, 2020) 20
Wolfe v. Gormally, 440 Mass. 699 (2004) 6

STATUTES

42 USC § 1396p 9, 12, 14, 16
M.G. L. c. 118E, § 34 ..... 14, 15
M.G.L. c. 118E § 31(d) 5, 7, 18
M.G.L. c. 118E, § 31(b) 14

QUESTIONS POSED BY COURT TO *AMICUS CURIAE*

1. Whether a lien recorded by MassHealth on real property owned by a Medicaid recipient who is institutionalized, pursuant to G. L. c. 118E, § 34, dissolves automatically on the recipient's death by operation of G. L. c. 118E, § 31 (d).

2. Whether the three-year limitations period provided in G. L. c. 190B, § 3-108, applies retroactively to bar MassHealth's claim against the estate of a decedent who died before the effective date of the Massachusetts Uniform Probate Code, where probate was commenced more than three years after that effective date.

RESPONSE OF *AMICUS CURIAE*

Amicus curiae the Massachusetts Chapter of the National Academy of Elder Law Attorneys ("MassNAELA") responds herein to the Court's first question only, and hopes this will still be helpful to the Court.[1] *Amicus*, in support of appellee Maryann Fells ("Ms. Fells"), believes that this question turns entirely upon the plain language of the following phrase from M.G.L. c. 118E § 31(d):

> The division is also *authorized during an individual's life* to recover all assistance….if property [subject to] a lien or encumbrance under section 34 is sold.

(Emphasis supplied.) Unambiguously, this language divests appellant MassHealth of any authority to execute or recover upon a Medicaid lien post-death. Regardless of whether the lien technically "dissolves," the result is functionally the same, leaving MassHealth

[1] MassNAELA is non-profit organization whose resources are membership-driven, and are limited with respect to *amicus* briefs. The organization ultimately deemed that resources were sufficient only to answer the first question, particularly since the second question appears to relate to, among other things, Legislative history and Enabling Acts that are not readily accessible on legal research databases.

with authority only to release such liens post-death, and not to execute upon them.

Such a result is impelled by this Court's well-established rules of statutory interpretation, which construe facial language in the context of an overall statutory scheme. Such a result is also entirely consonant, as discussed further below, with the broader context of the recovery regime created by the Legislature, and with Congressional requirements.

I. The Plain Language of Section 31(b) Establishes that MassHealth's Authority to Enforce Medicaid Liens Terminates Upon the Death of the Recipient.

This Court has demonstrated that the labyrinthine aspects of Medicaid law need not be an impediment to the application of time-honored rules of statutory interpretation. As this Court observed in *Dermody v. EOHHS*, 491 Mass. 223, 230 (2023),"[w]hen interpreting statutory provisions, we begin, as always, with the plain language, keeping in mind that the fundamental goal is to discern the intent of the law-making body." *See also Wolfe v. Gormally*, 440 Mass. 699,

704 (2004) (statutes "must be construed so that effect is given to all of its provisions" . . . and "'must be viewed 'as a whole'") (internal citation and quotation marks omitted).

The dispositive language of M.G.L. c. 118E, § 31(d) is as follows:

> The division is also *authorized during an individual's life to recover all assistance*….if property [subject to] a lien or encumbrance under section 34 is sold.

(Emphasis supplied.)

The phrase "authorized during an individual's life" is crystal clear in limiting MassHealth's authority to recover based on real estate liens to the recipient's life only. Indeed, the language is not susceptible to any other plain meaning, either on its face or in the context of the relevant state and federal statutory regimes, as discussed further below. *See eVineyard Retail Sales–Mass., Inc. v. Alcoholic Beverages Control Comm'n*, 450 Mass. 825, 831 (2008) ("a statute is to be construed as written, in keeping with its plain meaning") (internal quotation marks omitted).

The specific question of whether the lien "dissolves" in this case is arguably less salient than whether, under the plain statutory language, the agency retains any power to execute upon real estate liens on the property of recipients after death. Relatedly, it is not uncommon for MassHealth to release such liens after a recipient's death; this is consistent with the notion that its authority to execute upon such liens dissipates upon death.

Many of MassHealth's arguments in this case amount to a strained effort elude the facial language of § 31(d). The agency, among other things, cites out-of-state cases and Massachusetts statutes that have nothing to do with Medicaid recovery, such as the Mechanic's Lien Statute. However, such ancillary sources are not relevant to an analysis of statutory language that is facially clear.

II. The Federal Medicaid Statute Accords Discretion and Flexibility to State Legislatures in Creating Recovery Regimes.

The context for the statutory provision at issue in this case is M.G.L. chapter 118E, as discussed further below. However, all state Medicaid recovery regimes, including the one created by the Legislature via that Chapter, are a response to requirements created by Congress via 42 USC § 1396p ("§ 1396p"). Many courts have fairly observed that the statute makes for cumbersome reading; nonetheless, the baseline requirements it establishes for state recovery regimes are reasonably clear.

If § 1396p were a classical music composition, it would largely demand strict fealty to its notes. But it would also contain passages marked *ad libitum*, allowing for instrumental improvision. Indeed, Congress, as the statute's "composer," created exactly such elements of restrictiveness and flexibility for state legislatures in their responses to the law.

§ 1396p simultaneously does three things: it (1) *prohibits* all but a few specific types of Medicaid recovery; (2) *requires* that, relative to some Medicaid recipients, some recovery efforts must

occur via real estate liens and/or estate recovery; and (3) *allows* states flexibility in their specific recovery efforts.

The four provisions of § 1396p that establish this structure are as follows:

Subsection (a)(1)(B). This subsection establishes a general prohibition on the use of real estate liens as a Medicaid recovery tool, while creating an exception: recovery for services provided to permanent nursing home residents who retain only minimal amounts of income after qualifying for services.[2]

Subsection (b)(1). As with (a)(1)(B), this subsection starts with language of prohibition. Specifically, it precludes states from recovering Medicaid payments except for certain categories of Medicaid recipients. Notably, however, states are *required* to engage in efforts to recover payments to recipients in such categories.

[2] Notwithstanding the references in the statute to the requirement of an applicant retaining minimal income, other portions of § 1396p allow states to condition Medicaid eligibility upon retaining minimal assets (rather than income). In event, both the "assets" and "income" portions of the statute embody the same permissive and mandatory elements as discussed in this brief, making any such distinction immaterial to this case.

Subsection (b)(1)(A). This subsection delineates one category of recipients for which state recovery efforts are required. Specifically, referring back to (a)(1)(B), this subsection requires recovery efforts relative to permanent nursing home residents retaining only minimal income. For such persons, a state "shall seek adjustment or recovery….from the individual's estate or upon sale of property [subject to a real estate lien]."

Subsection (b)(4). This subsection establishes that an "estate," for purposes of state Medicaid recovery efforts, must at a minimum be a "probate estate" as defined by state law. At a state's election, an estate can also include, for example, assets held in trust or through joint tenancies.

The following chart encapsulates these four provisions.

FEDERAL PROVISIONS		
STATUTE	**MEANING**	**OPERATIVE LANGUAGE**
42 USC § 1396p(a)(1)(B)	Prohibits liens against real property of recipients, except for permanent nursing home residents retaining minimal income.	"**No lien** may be imposed against the property of any any individual prior to his death on account of medical assistance **except** [for permanent nursing home residents retaining minimal income]"
42 USC § 1396p(b)(1)	Prohibits states from recovering Medicaid payments for services except under specific circumstances that require states to seek recovery.	"**No** adjustment or recovery of ….may be made, **except** that the State **shall seek** adjustment or recovery…."
42 USC § 1396p(b)(1)(a)	Requires states to seek recovery for services to permanent nursing home residents retaining minimal income via real estate liens or estate recovery.	"The State **shall seek** adjustment or recovery….from the individual's estate or upon sale of the property [subject to a lien]"
42 USC § 1396p(b)(4)	Requires that an "estate" must include probate assets, but may include certain other types of assets.	""[E]state'….(A) shall include all…assets included within the individual's estate, as defined for purposes of State probate law; and (B) may include…any other real and personal property and other assets…"

As this Court has observed, the federal statute "requires that States establish an estate recovery system to recoup benefits paid to members during their lifetime, but provides flexibility with regard to how States enact and run their estate recovery programs, including respect for State probate laws." *Matter of Estate of Kendall,* 486 Mass. 522, 533 (2020). As detailed further below, that is exactly what the Legislature did in enacting Chapter 118E.

III. Chapter 118E, Including the Section at Issue in this Case, Is Entirely Consonant with the Federal Statute.

Chapter 118E is a clear and comprehensive response to the restrictions, requirements, and permissive elements of § 1396p. Contrary to MassHealth's positions, the Legislature promulgated a limited species of Medicaid recovery, making a narrow reading of section 31(b) far more appropriate than the expansive view argued for by the agency.

The following provisions of chapter 118E represent the overall framework of Medicaid recovery in Massachusetts:

Chapter 118E, § 31(b). In language that parallels 42 U.S.C § 1396p(a)(1), this statute prohibits Medicaid recovery efforts except under specific narrow circumstances.

Chapter 118E, § 31(b)(1). In language that significantly parallels 1396p(a)(1)(B), this subsection allows recovery for services provided to permanent nursing home residents.

Chapter 118E, § 31(c). This subsection limits estate recovery to probate estates, consistent with the authority of § 1396p(b)(4).

Chapter 118E, § 34. This section establishes that no real estate liens may be recorded except in conformity with federal law, which again is in harmony with § 1396p(a)(1).

The following chart encapsulates these four state statutory provisions.

STATE PROVISIONS		
STATUTE	**MEANING**	**OPERATIVE LANGAUGE**
M.G.L. c. 118E § 31(b)	Prohibits recovery for Medical assistance except under specific circumstances.	"…There shall be no Adjustments or recovery…. except as follows…"
M.G.L. c. 118E § 31(b)(1)	Allows estate recovery for assistance provided to permanent nursing home residents.	Allows for "recovery….from the estate of…a [permanent] inpatient in a nursing facility…."
M.G.L. c. 118E § 31(c)	Limits estate recovery To probate estates.	"'[E]state' shall mean.. the decedent's probate estate…."
M.G.L. c. 118E § 34	Prohibits real estate lien recovery except as permitted under federal law.	"No lien or encumbrance… except as may be permitted by the Secretary, shall be required from or imposed against the property of any individual prior to his death because of Medicaid benefits paid…"

Notably, as with key provisions of 42 U.S.C. § 1396p, critical elements of the state regime begin with the language of prohibition. Section 31(b) provides that "[t]here shall be **no** adjustments or recovery ….except as follows…" Structurally, this parallels § 1396p(a)(1)(b), which provides that "**[n]o lien** may be imposed…except for [permanent nursing home residents with minimal income]." Stated another way, the "**no/except**" structure – featuring prohibitive language followed by specific exceptions – is a defining feature of both the federal and state regimes.

Relying on the elements of flexibility in § 1396p, the Legislature – despite adopting both lien recovery and estate recovery – enacted a narrow form of Medicaid recovery overall. First, it selected the narrowest definition of "estate" permitted by § 1396p, thereby limiting recovery to probate estates. The Legislature did so emphatically, overwhelmingly overriding a gubernatorial veto when enacting this provision in 2004.

MassHealth appears to argue that a narrow interpretation of Section 31(d) would run afoul of federal law. In truth, the state recovery regime, including the specific subsection at issue here, is

entirely in harmony with the mandatory and permissive elements of § 1396p. There is nothing for this Court to "correct" in terms of harmonizing section 31(d) with federal law; nor was there any basis for MassHealth to use regulatory fiat to correct what it perceives as defects in section 31(d), as the agency largely admits to doing.

IV. MassHealth's Reply Brief Admits that the Agency Excised Language from Its Regulations that Had Previously Tracked the Language of M.G.L. c. 118E, § 31(d)

This Court need not necessarily reach the question of whether MassHealth's positions on lien recovery amount to regulatory and executive branch overreach. However, MassHealth's briefing in this case virtually admits to something along these lines. Glaringly, the agency's Reply Brief, page 18, acknowledges forthrightly that the agency changed its regulations to avoid the impact of the plain language of the relevant statute:

> …MassHealth revised 130 CMR § 515.012(B) in 2021, deleting the phrase "during the member's lifetime" to clarify the agency's longstanding view that it may enforce a TEFRA lien any time a liened property "is sold."

This alteration to the regulation is directly inconsistent with M.G.L. c. 118E, § 31(d) which states that "[MassHealth] is also

authorized d*uring an individual's life* to recover all assistance….if property [subject to] a lien or encumbrance under section 34 is sold." The Reply Brief states openly that the agency cut the parallel phrase "during the member's lifetime" from its regulations to create the authority that is expressly missing from the statute. As a basis for this, MassHealth points merely to its "longstanding view." *Reply Brief*, page 18.

Relying on this putative basis for changing the regulation, MassHealth also asserts that "[t]Probate Court simply failed to observe that § 515.012(B) was subsequently amended and, indeed, its decision cites to the wrong regulation." *Reply Brief*, page 18. This amounts to a further assertion that the agency, simply by amending its regulations, can trump statutory authority and in essence compel particular judicial results.

MassHealth's admission arguably reflects a *prima facie* example of an agency creating regulations that exceed the scope of a statute. *See Tartarini v. DMR*, 82 Mass. App. Ct. 217, 220 (2012) ("[w]e hold that this is the rare case where the departmental

regulation is invalid because it is inconsistent with the legislation that authorized it").

Relatedly, there is no indication whatsoever in the relevant statutes that the Legislature wanted the agency to nip and tuck at the recovery regime enacted overwhelmingly by elected representatives. As detailed above, the Commonwealth's recovery regime constituted a comprehensive Legislative response to equally comprehensive Congressional enactments. Under these circumstances, regulatory interference with a meeting of the minds between Congress and the Legislature is even less appropriate.

V. A Fourth Trial Court Judge Has Found that MassHealth Liens Dissolve on the Death of the Recipient.

As reflected in the parties' briefs, two Land Court decisions – *Wells Fargo Bank, N.A. v. Green*, 2020 WL 1903828 (Mass. Land Ct. Apr. 17, 2020) and *Casey v. Papamechail*, 2021 WL 2201604 (Mass. Land Ct. June 1, 2021) – concluded or observed that MassHealth liens dissolve on an applicant's death. Meanwhile, in the period since the parties' briefs were filed, another Land Court judge has reached the same conclusion in *Matveyev v. Rebelo*, 2023 WL 4489659 (Mass.

Land. Ct., July 12, 2023). Thus, four Massachusetts trial court judges (including the Probate and Family Court in the instant case) have essentially rejected the analysis that MassHealth continues to advance.

Despite this, MassHealth's briefs are heavily critical of the courts in question, asserting among other things that the Probate Court here engaged in "an impermissible exercise" of statutory interpretation. *MassHealth Brief*, page 43. Judge Roberts in *Wells Fargo* is charged with misconstru[ing] TEFRA…so as to render its triggering clause meaningless." The Reply Brief escalates this rhetoric, calling Judge Roberts' analysis an "idiosyncratic misreading of federal law." The views of Land Court Chief Justice Piper in *Casey* are dismissed as "*dicta*," despite having been subsequently referenced with favor in *Matveyev*.

While the views of this Court are of course determinative, the fact that four trial judges have reached essentially the same conclusion on these issues is notable. While the view of *amicus* is that this case can be decided upon an analysis of the statutory language only, the additional authorities consulted in those cases

likewise support the view that MassHealth cannot execute upon its liens after the death of the Medicaid recipient.

CONCLUSION

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 appellee Maryann Fells in this matter.

Respectfully submitted,

MassNAELA,

By its attorneys,

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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.

/s/ C. Alex Hahn, Esq.

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C. Alex Hahn, Esq.

Dated: August 17, 2023

CERTIFICATE OF SERVICE

I, C. Alex Hahn, Esq., hereby certify that I served the foregoing pleading upon all counsel of record in this matter via EFileMA, the Commonwealth's electronic filing system.

/s/ C. Alex Hahn, Esq.

_____
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Dated: August 17, 2023