COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SJC-13514

HOLLY T. FREINER, PERSONAL REPRESENTATIVE OF THE ESTATE OF COSTA TINGOS & another vs. MARYLOU SUDDERS & another

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ON APPEAL FROM ORDERS OF THE SUFFOLK SUPERIOR COURT AND DECISIONS OF THE OFFICE OF MEDICAID BOARD OF HEARINGS

BRIEF FOR
***AMICUS CURIAE*,**
MASSACHUSETTS CHAPTER OF THE
NATIONAL ACADEMY OF ELDER LAW ATTORNEYS
IN SUPPORT OF APPELLANT HOLLY T. FREINER

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IDENTITY AND INTEREST OF *AMICUS 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 *amicus 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.

QUESTION POSED BY COURT TO *AMICUS CURIAE*

Whether 42 U.S.C. § 1396r-5(c)(3) and 130 Code Mass. Regs. § 517.011 permit MassHealth and the Commonwealth's Office of Medicaid Board of Hearings to deny long-term care benefits to an institutionalized spouse, who has assigned to MassHealth his rights to support from a community spouse, on the basis of a determination that the community spouse's refusal to cooperate is not genuine.

RESPONSE OF *AMICUS CURIAE*

Neither 42 U.S.C. § 1396r-5(c)(3) nor 130 CMR § 517.011 allow MassHealth or the Office of Medicaid Board of Hearings ("the "Board") to deny benefits to an applicant who has assigned spousal support rights, on the grounds that a community spouse's refusal to cooperate with the applicant is not genuine.

This case turns on this Court's rules of strict statutory construction, as applied to the Medicaid statute as recently as in *Matter of the Estate of Mason*, 222 N.E.3d 1082 (Mass. 2023). As this Court has repeatedly found, Medicaid provisions and procedures at the state level must comply with federal law. In this case, the Board's conduct of the hearings, and its decision based on a purported genuineness test, exceeded the Board's mandate and discretion under the Medicaid Act.

The Act requires Medicaid eligibility standards to be applied systematically, transparently, and in compliance with federal due process protections. By contrast, the present case was ultimately decided idiosyncratically based upon the hearing officer's personal opinion – one that was not informed by any special experience or

technical expertise – about whether Mrs. Tingos' cooperation with her husband's application was genuine. This was permitted neither by federal law nor MassHealth's own regulations. The Board's decision was thus a clear abuse of discretion and was also arbitrary and capricious under the Massachusetts Administrative Procedures Act, M.G.L. c. 30A, § 14.

I. The Board's Conduct of Fair Hearings and its Decision-Making are Governed by Federal Law.

At root, Medicaid application procedures and fair hearings are governed by federal law. *Mason*, 222 N.E.3d at 1088 ("[t]he [Medicaid Act], and regulations promulgated under it by the United States Department of Health and Human Services (HHS), set parameters that States participating in Medicaid must follow"). The Massachusetts Legislature expressly requires, via M.G.L. c. 118E, § 9, that MassHealth operate "pursuant to and in conformity with the provisions of [federal law] . . . ." *See also Haley v. Comm'r of Pub. Welfare*, 394 Mass. 466, 472 (1985) ("the Legislature intended the [State Medicaid] benefits program to comply with the Federal statutory and regulatory scheme"). This Court has made clear that "[w]hen there is a conflict between State and Federal regulations, the

Legislature intended that [MassHealth] comply with the Federal rule." *Mason*, 222 N.E.3d at 1088 (internal citations omitted).

The proceedings in this case are themselves a creature of federal law; 42 U.S.C. § 1396a(3) requires "an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied …." Federal regulations expressly provide that due process protections attach in Medicaid fair hearings, which requires conformity to specific decisional law of the U.S. Supreme Court. *42 CFR § 431.205(d)* ("[t]he hearing system must meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970)…."); *see also 42 CFR § 431.205(f)* ([t]he hearing system must comply with the United States Constitution ….)."

Likewise, MassHealth's own regulations require that Board decisions "must be rendered in accordance with…the state and federal constitutions, statutes, and duly promulgated regulations, as well as decisions of the state and federal courts." *130 CMR 610.082(C)(1).*

II. This Court, Applying a *De Novo* Standard of Review, Strictly Construes the Plain Language of Applicable Statutes and Regulations In Medicaid Cases.

In addition to implicating the primacy of federal law relative to the Medicaid Act, this case also turns on this Court's well-established canons of statutory construction, which have been frequently applied relative to the Medicaid Act and the state provisions that flow from it.

This Court "exercise[s] *de novo* review of legal questions … and we must overturn [administrative] agency decisions that are not consistent with governing law." *Fournier v. MassHealth*, 488 Mass. 43, 50 (2021) (reversing MassHealth's denial of services application based on finding that certain property was a countable asset) (internal citations omitted); *Guilfoil v. MassHealth*, 486 Mass. 788, 793 (2021) (Court found, based on *de novo* review, that Board of Medicaid Hearings erred in denying MassHealth application by finding that property was a countable asset)*; see also Mason*, 222 N.E.3d at 1087 (rejecting MassHealth's interpretation of regulation, noting that "this court will not hesitate to overrule agency

interpretations of statutes or rules when those interpretations are arbitrary or unreasonable").

This Court has rigorously applied the doctrine that "[i]n construing a statute, we begin with its plain language." *Mason*, 222 N.E.3d 1082 at 1087. *Mason* also reiterated that "[w]e construe [a] properly promulgated regulation . . . in the same manner as a statute." *Id.* (internal citation and quotation marks omitted). Applying these canons of interpretation, this Court has declined to find implicit language or exceptions in plainly written statutes. *See Matter of the Estate of Kendall*, 486 Mass. 522, 530 (2020) ("[t]here is no exception for MassHealth in § 3-108 (4), the provision addressing late and limited probate proceedings").

III. Neither 42 U.S.C. § 1396r-5(c)(3) nor 130 CMR § 517.011 Authorize the Genuineness Test Applied by MassHealth and the Board in this Case.

This Court, in the related circumstance of MassHealth's estate recovery efforts, recently construed the manner in which both Congress and the Massachusetts Legislature expressly cabin the authority of state agencies via prohibitive language. *Mason*, 222 N.E.3d at 1087 ("[u]nder the Medicaid Act…a State plan's recovery

efforts are strictly circumscribed; *tellingly, in detailing the conditions that permit recovery, the act starts with language of prohibition*"). (Emphasis supplied.)

42 U.S.C. § 1396r-5(c)(3), the specific provision of the Medicaid Act at issue in the present case, also employs prohibitive language, providing that "[t]he institutionalized spouse *shall not be ineligible* by reason of resources determined…to be available for the cost of care where—(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse." (Emphasis supplied.)

Under this Court's *Kendall* doctrine of strict statutory construction, 42 U.S.C. § 1396r-5(c)(3) can mean only one thing: By its plain terms, MassHealth may not deny applications where the applicant assigns his spousal support rights. Indeed, the phrase "shall not be ineligible" is an unambiguous Congressional restriction on the authority of state agencies such as MassHealth to deny applications. *See Mason*, 222 N.E.3d at 1094 ("[b]oth the Medicaid Act and Massachusetts's statutory recovery schemes are crafted in restrictive terms . . ."). And in this case, it is undisputed that Mr.

Tingos satisfied this federal statute *in toto* by assigning his support rights to MassHealth.

Importantly, the element of spousal non-cooperation does not exist at all in 42 U.S.C. § 1396r-5(c)(3); rather, that element was added by MassHealth itself via 130 CMR 517.011. In the present case, the Superior Court (Mulligan, J.) found, based almost entirely on *Morenz v. Coker*, 415 F.3d 230 (2d Cir. 2005), that the silence of the federal statute concerning spousal non-cooperation allowed the agency to add this element. Going even further, Judge Mulligan found that the agency and the Board appropriately considered the genuineness of Mrs. Tingos' non-cooperation because "the federal statute does not prevent MassHealth from considering these issues under its regulation…."

As an initial matter, Judge Mulligan overlooked that 130 CMR 517.011 is captioned "Assignment of Rights to Spousal Support," and thus treats assignment as the central element in the same manner as the federal statute. Because it is undisputed that Mr. Tingos satisfied the assignment criterion, this easily could have been the

end of the Superior Court's inquiry, a grounds for reversing the Board.

Even assuming that MassHealth did not exceed federal law in adding a non-cooperation element, the agency's *ad hoc* creation of an additional genuineness test for spousal cooperation is consistent neither with 42 U.S.C. § 1396r-5(c)(3) nor even with 130 CMR 517.011 itself, both of which treat the assignment of spousal support rights as their central element. The unenumerated genuineness test, which Mr. Tingos supposedly failed to satisfy, swallowed whole the explicit element of the statute and regulation that he did satisfy – that is, the spousal support assignment element.

The assignment element, by its plain text in 42 U.S.C. § 1396r-5(c)(3) and 130 CMR 517.011, creates a binary, yes/no structure – an applicant either assigns his spousal support rights, or does not. There is no basis in federal or state law for MassHealth to apply the non-cooperation element in an entirely different manner which forces an applicant to authenticate, via affirmative evidence, the community spouse's refusal to cooperate.

Bringing the proceedings even further afield from the requirements of the Medicaid Act, the hearing officer used an alleged genuineness inquiry to disregard or discount evidence that Mr. Tingos adduced to satisfy the non-cooperation element. Far from being a routine exercise of discretion by an administrative tribunal, this represented the creation of a legal test that is entirely inconsistent with the Medicaid Act's prohibitive provisions concerning eligibility decisions.

On the one hand, the Board's decision acknowledges that Mr. Tingos had "presented additional evidence of his own attempts to access his spouse's financial information." The Board's decision also acknowledges Mr. Tingos' showing that he "may not be able to access his spouse's financial information." Neither was enough: "This conclusion, however, is not determinative of whether appellant's *spouse has truly refused to cooperate*." (Emphasis supplied.)

If the decision of the Board is to be upheld, this would mean, in effect, that MassHealth and the Board can by implication add the word "truly" into the regulation, so that it reads "[a]n institutionalized spouse whose community spouse *truly* refuses to

cooperate." This is, of course, entirely inconsistent with the strict construction rules of *Kendall* and other recent decisions of this Court. *See also Mason*, 222 N.E.3d at 1088 ("this court will not hesitate to overrule agency interpretations of statutes or rules when those interpretations are arbitrary or unreasonable"; an agency's interpretation of statutes or regulations is not given deference when the interpretation is contrary to the plain language of the law). And just as importantly, these factual and legal conclusions are inconsistent with Congressional legislation that prohibits administrative agencies from denying applications when an assignment of spousal rights has occurred.

Importantly, the general principle of deference to administrative tribunals is based on the ostensible expertise of hearing officers. *See M.G.L. c. 30A, § 14* (in judicial review of the final decision of a state administrative agency, "[t]he court shall give due weight to the experience, technical competence, and specialized knowledge of the agency…"). In this case, however, neither the genuineness test nor the officer's conclusions were based on any expertise or technical competence – rather, the hearing officer simply

exercised her personal judgment as to whether or not Mrs. Tingos "truly cooperate[d]." This idiosyncratic determination – to which "due weight" under M.G.L. c. 30A, § 14 is not warranted – exceeded federal law. *See G. L. c. 118E, § 9* (MassHealth must operate "pursuant to and in conformity with the provisions of [federal law]…"); *Haley*, 394 Mass. at 472 (Legislature "intended the [State Medicaid] benefits program to comply with the Federal statutory and regulatory scheme").

IV. The Plain Language of 42 U.S.C. § 1396r-5(c)(3) and 130 CMR § 517.011 Should be Construed in a Manner that Promotes Consistency, Reliability, and Predictability in Medicaid Law.

The estate planning and elder law attorneys who comprise the membership of *amicus* face inherent challenges in advising clients about a Medicaid statute that has been deemed as "among the most completely impenetrable texts within human experience." *Briggs v. Commonwealth*, 429 Mass. 241, 243 n.3 (1999) (internal citation omitted). When MassHealth employs subjective criteria such as the genuineness test used in this case, estate planners and their clients face the additional obstacle of not being able to ascertain the standards by which Medicaid applications will be judged.

These considerations are especially important when a person makes the profoundly consequential decision of assigning spousal support rights. Presumably, Congress did not consider this issue trivial when it enacted 42 U.S.C. § 1396r-5(c)(3), which again provides unambiguously that services may not be denied when an applicant assigns spousal support rights.

Relatedly, despite the complexity of the Medicaid Act, it also evidences a Congressional intent for eligibility proceedings and procedures to be systematic and based on ascertainable standards. Such standards give applicants fair notice of what is required of them, as is required by federal law. *See 42 CFR § 431.205(d)* (hearing system must satisfy due process requirements).

Amicus believes that members of the public, with or without the benefit of counsel, are entitled to a Medicaid eligibility system that is reasonably predictable and navigable. And fortunately, this is exactly what the applicable provisions in this case contemplate.

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 Appellant Holly T. Freiner.

Respectfully submitted,

MassNAELA,

By its attorneys,

/s/ C. Alex Hahn, Esq.

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Dated: January 13, 2024

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: January 13, 2024

CERTIFICATE OF SERVICE

I, C. Alex Hahn, Esq. hereby certify that I have this day caused a copy of this pleading to be served upon all counsel of record via electronic mail and/or EFileMA.

/s/ C. Alex Hahn, Esq.

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C. Alex Hahn, Esq.

Dated: January 13, 2024