COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX, SS.

A.C. NO. 2021-P-0853

LAURIE DERMODY

Plaintiff-Appellee

V.

EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES, and NATIONWIDE FINANCIAL INSURANCE COMPANY

Defendants - Appellants

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF MASSACHUSETTS

APPLICATION FOR DIRECT APPELLATE REVIEW BY PLAINTIFF-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11, the Plaintiff, Laurie Dermody ("Plaintiff" or "Laurie"), requests direct appellate review to resolve a question of first impression in Massachusetts. Specifically, this case raises the issue of whether the Federal Medicaid statute requires an actuarially sound annuity purchased by a "community spouse" to provide reimbursement to the Commonwealth for an "institutionalized spouse's" nursing home care costs.[1]

Recognizing the need to resolve this issue, the Court just granted a joint application for direct appellate review in the matter of Executive Office of Health and Human Services of the Commonwealth of Massachusetts v. Linda Marie Mondor & others, 2021-P-0632, DAR-28415, SJC-13179 (the "Castle-Mondor cases"). This application presents a substantially similar legal question to that in the Castle-Mondor cases. See Castle-Mondor DAR Application, DAR-28415, reproduced at Add. 55 ("Castle-Mondor DAR Application"). Moreover, the Castle-Mondor application explicitly noted that "it would be advantageous for this Court to similarly consider granting direct appellate review in . . . Dermody." Add. 67.

[1] As used in this petition, the term "institutionalized spouse" means an individual who is in a nursing facility and is married to a spouse who is not in a nursing facility. The term "community spouse" means the spouse of an institutionalized spouse. 42 U.S.C. § 1396r–5(h)(1)-(2).

As noted in the Castle-Mondor DAR Application, the Plaintiff's case was the first to challenge the Commonwealth's recovery claim against a spousal annuity in Massachusetts. Add. 72. Moreover, this case is one of the few cases that has proceeded to judgment by the Superior Court. Add. 72-73. With the Defendant's recent appeal of the decision, the Plaintiff's case is now running on a parallel track to that of the Castle-Mondor cases. Accordingly, granting the Plaintiff's application for Direct Appellate Review and placing the case on the same track as the Castle-Mondor cases is efficient, reasonable, and will facilitate a speedy final resolution for a Plaintiff, who has been litigating this matter since 2017. Therefore, in the interests of judicial economy and prompt dispute resolution, the Plaintiff respectfully requests that her petition for direct appellate review be granted.

STATEMENT OF PRIOR PROCEEDINGS

On January 16, 2020, the Essex Superior Court (Barrett, J.) granted summary judgment in favor of the Plaintiff declaring that she was entitled to the remaining balance of her father's annuity contract.[2] Add. 54. On May 14, 2020,

[2] In the same order, the Plaintiff was granted summary judgment on her breach of contract claim (Count 2) and denied summary judgment on her G.L. c. 93A and G. L. c. 176D, § 3(9) claim (Count 3). The Commonwealth's cross motion for summary judgment was denied, as was Nationwide's cross motion, with the exception of claims related to Nationwide's failure to acknowledge communications.

the Defendant, the Executive Office of Health and Human Services (the "Commonwealth"), filed a motion to report the summary judgment decision to the Appeals Court and stay the order, pursuant to Mass. R. Civ. P. 64 . Add. 31. Thereafter, on May 21, 2020, Nationwide Financial Insurance Company ("Nationwide") filed a motion to reconsider the grant of summary judgment in favor of the Plaintiff. Add. 31. Both motions were denied on July 22, 2020. Add. 31. On June 17, 2021, on agreement of the remaining parties, the court issued a final judgment. Add. 33. The Commonwealth then filed the underlying appeal. Add. 33.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues, which were properly preserved below, are raised by this appeal:

1. Is the purchase of an irrevocable, immediate annuity established for the sole benefit of a community spouse a countable asset, pursuant to 42 U.S.C. § 1396r–5(c)(2) and 130 CMR 520.016(B), or a disqualifying transfer, pursuant to 42 U.S.C. § 1396p(c)(1)(E) and 130 CMR 520.019(G), for purposes of determining an institutionalized spouse's MassHealth eligibility?

2. Does an annuity purchased by a community spouse that satisfies the "sole benefit" rule of 42 U.S.C. § 1396p(c)(2)(B)(i) also need to name the

Commonwealth as primary beneficiary pursuant to the requirements of 42 U.S.C. § 1396p(c)(1)(F)?

3. Where a community spouse's annuity contract limits the Commonwealth's recovery to the "extent benefits paid" and makes no reference to the institutionalized spouse, can the Commonwealth still recover against the contract?

STATEMENT OF FACTS

I. ANNUITIES AND MASSHEALTH GENERALLY[3]

MassHealth provides, among other things, long-term care benefits for individuals in nursing homes whose assets and income fall below certain limits. Forman v. Director of Office of Medicaid, 79 Mass. App. Ct.218, 222 (2011). To qualify, an applicant must generally have $2,000 or less in "countable assets." 130 CMR 520.016(A). When an applicant is married and lives with their "community spouse," MassHealth will assess the total combined value of the "countable assets" owned by both spouses "regardless of the form of ownership between the couple." 42 U.S.C. § 1396r–5(c)(2); 130 CMR 520.016(B). From this combined amount, MassHealth will set aside a portion of the couple's

[3] The following section is copied, in large part, from the Castle-Mondor DAR Application.

assets—known as the community spouse resource allowance ("CSRA")—which the "community spouse" may use without affecting the Medicaid eligibility of the "institutionalized spouse." 42 U.S.C. § 1396r–5(c)(2), (f)(2)(A); 130 CMR 520.016(B)(2). If, after setting aside the CSRA amount, the couple's combined "countable assets" fall below the $2,000 limit, then the asset requirements for eligibility will be met. 130 CMR 520.016(B)(2).

These "countable asset" limits may lead applicants to "spend down" by "deplet[ing] their resources to qualify for Medicaid long-term care benefits when they enter a nursing home." Daley v. Secretary of Exec. Office of Health & Human Servs., 477 Mass. 188, 192 (2017). One common way in which married applicants may seek to spend down assets is through the purchase of commercial annuities. See Normand v. Dir. of Off. of Medicaid, 77 Mass. App. Ct. 634 (2010). Under 42 U.S.C. § 1396p(c)(1), G. L. c. 118E, § 28, and 130 CMR 520.018 - 520.019, MassHealth must review any transfers of resources (including the purchase of annuities) made by an applicant or their spouse during a five-year "look back" period prior to the applicant's application.

For any asset transfer that was made for "less than fair market value," subject to certain exceptions, MassHealth will impose a penalty: the applicant will be deemed ineligible for Medicaid benefits for a period of time determined by dividing the value of the transfer by the average monthly cost of the nursing

facility. 42 U.S.C. § 1396p(c)(1)(E); 130 CMR 520.019(G). One such exception to the asset transfer rules permits an institutionalized spouse to transfer assets to or for the sole benefit of the community spouse. 42 U.S.C. § 1396p(c)(2)(B)(i). This transfer exception, commonly referred to as the "sole benefit" rule, has been interpreted to mean that community spouse can utilize the couple's excess resources to purchase an actuarially sound annuity. Such an annuity does not need to reimburse the Commonwealth for the institutionalized spouse's care costs at the community spouse's death, because it exists to provide the community spouse with resources for the duration of his or her lifetime. Hughes v. McCarthy, 734 F.3d 473, 483-486 (6th Cir. 2013) (reproduced at Add. 179).

Federal Medicaid law and the MassHealth regulations contemplate that, in certain circumstances, an annuity must also name the state as a remainder beneficiary. 42 U.S.C. § 1396p(c)(1)(F); 130 CMR 520.007(J)(2)(A). It is important to note that these beneficiary requirements are present in the portion of the Medicaid statute which implements penalties for disqualifying transfers. The "sole benefit" rule, which exists at 42 U.S.C. § 1396p(c)(2) is an exception to the disqualifying transfer portion of the statute. Thus, the "sole benefit" rule is an exception to the remainder beneficiary requirements of 42 U.S.C. § 1396p(c)(1)(F).

MassHealth takes the position that all annuities purchased by a "community spouse," even those that comply with the "sole benefit" rule, must name the state as primary remainder beneficiary pursuant to 42 U.S.C. § 1396p(c)(1)(F). The Plaintiff takes the position that an annuity purchased by the "community spouse" need not name the Commonwealth as primary beneficiary for an institutionalized spouse's care costs as long as the annuity complies with the "sole benefit" rule, meaning that the annuity is actuarially sound in accordance with the community spouse's life expectancy. See, e.g., Hughes, 734 F.3d at 483-485.

Only one Federal circuit court has directly considered the issue of whether the "sole benefit" rule exempts community spouses from having to comply with the beneficiary designation requirements of 42 U.S.C. § 1396p(c)(1)(F), and such decision issued in favor of the Plaintiff's position in this case. See Hughes, 734 F.3d at 483-485 (community spouse annuity not required to name the state as remainder beneficiary). In a decision that predates Hughes, another Federal circuit court also considered the annuity beneficiary naming requirements, but did not opine on the "sole benefit" rule. Hutcherson v. Arizona Health Care Cost Containment Sys. Admin., 667 F.3d 1066, 1067-1070 (9th Cir. 2012) (reproduced at Add. 193) (community spouse annuity required to name the state as remainder beneficiary). The two Massachusetts Superior Court decisions to have considered this issue have also reached conflicting results. Compare Dermody v. Executive

Office of Health & Human Servs., No. 1781CV02342, 2020 WL 742194 (Middlesex Super. Jan. 16, 2020) (reproduced at Add. 35) (community spouse annuity not required to name the state as remainder beneficiary), with American Ntl. Ins. Co. v. Jennifer Breslouf, et al., No. 2084CV02374, 2021 WL 2343024 (Suffolk Super. June 3, 2021) (reproduced at Add. 200)(community spouse annuity required to name the state as remainder beneficiary).

II. THE HAMEL ANNUITY

On July 7, 2015, the Plaintiff's father, Robert Hamel ("Robert") purchased a single premium immediate annuity contract ("annuity contract" or "contract") from Nationwide Financial Insurance Company ("Nationwide") in the amount of $172,000. Add. 35. Robert was the named owner and annuitant of the contract. Add. 34. Robert designated the "State of MA Medicaid Per Application" as the primary beneficiary of the annuity contract but limited the Commonwealth's status as a beneficiary to the "Extent Benefits Paid." Add. 36. Robert designated his daughter, Laurie, as the contingent beneficiary. Add. 36. It is undisputed that Robert never applied for or received MassHealth benefits during his lifetime.

On December 23, 2016, Robert died, leaving $118,517.50 in residual benefits under the annuity contract. Add. 36. Although Robert never received MassHealth benefits, the MassHealth Estate Recovery Unit sent a letter on June 27, 2017 demanding that Nationwide pay MassHealth the balance of the

contract to reimburse for care costs paid by the state on behalf of Robert's institutionalized spouse, Joan Hamel ("Joan").[4] Id. Nationwide remitted $118,517.50 to MassHealth on July 7, 2017. Add 36.

On July 13, 2017, counsel for Laurie contacted Nationwide and demanded that it refrain from issuing payment to the Commonwealth. Add. 36-37. Nationwide responded that it had already processed the Commonwealth's request and distributed the funds accordingly. Add. 37. As a result, Laurie, as contingent beneficiary, brought the underlying action against the Commonwealth. Add. 37. Laurie subsequently contacted Nationwide to alert it of the dispute. Add. 37. When Nationwide responded once again that it had already processed the Commonwealth's claim, Laurie sent Nationwide a G.L.c. 93A demand letter. Add. 37. After Nationwide did not respond to the letter, Laurie amended her complaint to add Nationwide as a defendant and bring forth claims for breach of contract and violations of G.L. c. 93A against the insurance company. Add. 37.

In a decision on cross-motions for summary judgment, the Superior Court (Barrett, J.) concluded that Laurie was entitled to the balance of the proceeds in Robert's annuity contract as contingent remainder beneficiary. Add. 54. The

[4] Joan applied for MassHealth benefits to cover long-term care in a skilled nursing facility on July 23, 2015. She subsequently received long-term care benefits which were retroactive to June 2015. Her application was approved with no disqualifying transfer penalty period imposed.

Court considered, and then rejected, MassHealth's argument that the Federal statute required the Commonwealth to be designated as primary beneficiary of an annuity contract purchased by a community spouse for his or her "sole benefit." Add. 44-48. The Court, in line with the Hughes decision, concluded that in order for a spousal annuity to satisfy the Federal Medicaid statute, it had to either meet the "sole benefit" rule or name the state as primary beneficiary, but not both. Add. 47. The Court also determined that Laurie prevailed under basic principles of contract interpretation, regardless of the statutory interpretation question, because Joan was not referenced or named anywhere in Robert's contract. Add. 48. Therefore, Nationwide committed a breach of contract when it reimbursed the Commonwealth for Joan's care costs from Robert's contract when no such recovery right was provided in the contract or by statute. Add. 49. Nationwide stipulated to this breach of contract in the agreement for judgment that entered on June 17, 2021. Add. 175.

SUMMARY OF ARGUMENT

The issues surrounding the interplay between spousal annuity contracts and Medicaid statutes are issues of first impression in the Commonwealth. To resolve these issues, the Court must determine whether a spousal annuity that satisfies the "sole benefit" rule at 42 U.S.C. § 1396p(c)(2)(B)(i), must also name the Commonwealth as remainder beneficiary pursuant to 42 U.S.C. § 1396p(c)(1)(F).

This Court should consider whether language in a private spousal annuity contract can preclude the Commonwealth from demanding recovery for an institutionalized spouse's care costs where no such right is provided in the contract.

ARGUMENT

I. THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION IN MASSACHUSETTS

The instant case, like the Castle-Mondor cases, presents complex issues for which there is no Massachusetts appellate guidance. As discussed more thoroughly in the Castle-Mondor DAR Application, the few decisions rendered on this issue – whether by Federal circuit courts or Massachusetts Superior Courts – have reached inconsistent conclusions. See Add. 78-80. To prevent further litigation, payment delays, and inconsistencies, appellate guidance is necessary to resolve the issues surrounding MassHealth's claims to residual annuity benefits where the community spouse has never received MassHealth benefits.

This case questions whether an annuity contract which lists "State of MA Medicaid Per Application" to "Extent Benefits Paid" as a primary beneficiary for residual benefits requires that the benefit be paid to the Commonwealth where it is undisputed that the sole annuitant named in the contract never applied for or received MassHealth benefits. The Commonwealth is expected to argue that the Federal statute requires the Commonwealth to be named the beneficiary of a

spousal annuity contract as reimbursement for benefits paid on behalf of an institutionalized spouse. The Commonwealth is also expected to argue that the court should interpret a private annuity contract that makes no reference to an institutionalized spouse as nonetheless requiring reimbursement to the Commonwealth for benefits paid on behalf of the institutionalized spouse.

However, Laurie, like the beneficiaries in the Castle-Mondor cases, rejects this position. As a preliminary matter, Laurie contends that a community spouse, like her father Robert, is not required to name the Commonwealth as beneficiary for an "institutionalized spouse's" care costs if the spousal annuity satisfies the "sole benefit" rule, meaning that the term of the annuity is actuarially sound in accordance with the community spouse's life expectancy. See 42 U.S.C. § 1396p(c)(2)(B)(i) and 130 Code Mass. Regs. § 520.019(D)(1) and (2). As State and Federal laws recognize, where a transfer of assets is made for the sole benefit of the community spouse, no penalty period is imposed for an institutionalized spouse seeking MassHealth benefits. See 42 U.S.C. § 1396p(c)(2)(B)(i); 130 Code Mass. Regs. § 520.019(D)(1) & (2). Accordingly, a transfer of assets to an actuarially sound annuity for the sole benefit of the community spouse need not comply with the beneficiary naming provisions in 42 U.S.C. § 1396p(c)(1)(F), as it meets the "sole benefit" rule. See 42 U.S.C. § 1396p(c)(2)(B)(i); 130 Code Mass.

Regs. § 520.019(D)(1) & (2). Only spousal annuities which do not satisfy the "sole benefit" rule must name the Commonwealth as beneficiary.

Furthermore, in the absence of a statute allowing the Commonwealth to recover against spousal annuities regardless of the contract language, the plain language of the contract must govern the payment of benefits. Because Robert's annuity contract makes no reference to Joan, either by name or as an institutionalized spouse, the plain reading of the contract is that MassHealth is the beneficiary to the extent benefits were paid on behalf of Robert. Where it is undisputed that Robert neither applied for nor received MassHealth benefits during his lifetime, Laurie contends that the Commonwealth has no entitlement to the annuity's remainder.

As discussed in greater detail in the Castle-Mondor DAR Application, these conflicting legal interpretations and the resulting confusion affect a wide range of individuals and entities throughout the Commonwealth. See Add. 81-82. Family members, like Laurie, face substantial costs in challenging payments made to the Commonwealth. Courts must use valuable time and resources analyzing the interplay between Medicaid statutes and contract law with no binding precedent. Institutionalized individuals and community spouses face uncertainty when considering purchasing annuities to assist with Medicaid eligibility. Attorneys

who provide Medicaid-planning advice are unable to give informed legal advice to clients considering purchasing annuities.

In view of the arguments on both sides, the split in both Federal case law and Superior Court decisions in the Commonwealth, and the far-reaching effects of uncertainty upon individuals and entities within the Commonwealth, final appellate resolution is necessary. Such resolution will not only prevent litigation but will expedite the process by which remainder benefits are paid, inform community spouses of their obligations when purchasing an annuity contract, and will allow for greater certainty when advising or receiving advice on Medicaid planning. Accordingly, Laurie joins the parties to the Castle-Mondor DAR Application in requesting direct appellate review on this matter.

II. TO PREVENT FURTHER LITIGATION AND INCONSISTENT RESULTS, A RESOLUTION OF THE ISSUE PRESENTED REQUIRES CONSIDERATION OF VARYING BENEFICIARY DESIGNATION LANGUAGE

Direct appellate review on the instant case – in addition to the Castle-Mondor cases – is necessary to resolve issues relating to varying beneficiary designation language within annuity contracts. In this case, like in the Castle-Mondor cases, the annuitant never personally received MassHealth benefits. In the Castle-Mondor cases, however, each annuity contract named "THE COMMONWEALTH OF MASSACHUSETTS" as the primary beneficiary.

Unlike the Castle-Mondor cases, the primary beneficiary designation in this case contains a limitation that the remainder be paid to the "State of MA Medicaid Per Application" to the "Extent Benefits Paid."

As this Court has recognized, "[l]anguage in an insurance contract 'is no different from ... [language in] any other contract, and we must construe the words of the policy in their usual and ordinary sense." Dorchester Mut. Ins. Co. v. Krusell, 485 Mass. 431, 437 (2020), quoting Metropolitan Life Ins. Co. v. Cotter, 464 Mass. 623, 634-635 (2013). Where the issue presented straddles both statutory interpretation and contract law, the precise language of the contract designating the Commonwealth as a beneficiary – including any limitations on such designation – is equally as important as important as determining the precise requirements imposed by 42 U.S.C. § 1396p(c)(1)(F), 42 U.S.C. § 1396p(e), and 130 CMR 520.007(J)(2)(A). Accordingly, any determination on the Commonwealth's entitlement to remainder benefits under an annuity contract would be incomplete without appropriate consideration of the contract language creating such entitlement. Moreover, without a determination as to the effect of varying beneficiary designation language and limitations, further disputes centering on contract language are inevitable, and appellate resolution is critical.

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

As further explained below, direct appellate review is appropriate in this case for the following reasons:

1. To decide, as an issue of first impression in Massachusetts, whether an annuity purchased by a community spouse that satisfies the "sole benefit" rule at 42 U.S.C. § 1396p(c)(2), also needs to designate the Commonwealth as a remainder beneficiary to the extent of any MassHealth benefits paid to their institutionalized spouse, pursuant to 42 U.S.C. § 1396p(c)(1)(F).
2. To decide, as a matter of considerable importance to many pending cases in the Superior Court and to the insurance industry's future performance of the terms of such annuities as a whole, how a community spouse's designation of remainder beneficiaries in annuity contracts is to be interpreted.
3. The Commonwealth – along with the beneficiaries in the Castle-Mondor cases – has agreed that "it would be advantageous for this Court to similarly consider granting direct appellate review in … Dermody, if and when those cases reach the Appeals Court and consolidating them with the present cases for purposes of argument." Add. 67. Accordingly, the Commonwealth is not only aware of the Dermody case but has consented to the case being taken on direct appellate review.

4. The Commonwealth's appeal in this case was entered in the Appeals Court on September 24, 2021. The Commonwealth's brief is due on November 3, 2021. Laurie's brief is due on December 3, 2021. The Commonwealth's appeal in the Castle-Mondor cases entered in the Supreme Judicial Court on September 16, 2021. Add. 211. The Commonwealth has already filed its brief in the Castle-Mondor cases and the appellee brief is due on November 8, 2021. Add. 211. Because the instant case is proceeding on a parallel track as the Castle-Mondor cases and the issues being briefed are substantially similar, the Castle-Mondor case and the instant case are conducive to consolidation.

CONCLUSION AND RELIEF REQUESTED

For these reasons, as well as additional reasons articulated in the Castle-Mondor Application for Direct Appellate Review, the Plaintiff, Laurie Dermody respectfully requests that this court grant direct appellate review and consolidate this case for argument with the Castle-Mondor cases.

LAURIE DERMODY
By her attorney

/s/ Lisa M. Neeley

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Dated: October 8, 2021

ADDENDUM

CERTIFICATE OF COMPLIANCE

I, Lisa M. Neeley, Esq., Counsel for the plaintiff/appellee certify pursuant to Rule 16(k) of the Mass. R. App. Pro. that this brief complies with all rules that pertain to the filing of applications for direct appellate review. This brief complies with the length limit of Rule 11(a) of the Mass. R. App. Procedure because the Argument Section contains 717 words in 14-point Times New Roman font.

/s/ Lisa M. Neeley
Lisa M. Neeley

Dated: October 8, 2021

CERTIFICATE OF SERVICE

I, Lisa M. Neeley, Esq., hereby certify that I have this day served a copy of this application by mailing a copy thereof, postage prepaid, to:

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