

MASSACHUSETTS Lawyers Weekly

SJC once again has MassHealth in its crosshairs

Annuity proceeds at issue in trio of cases

By: Pat Murphy January 28, 2022

After suffering a string of defeats in cases involving trusts, MassHealth once again finds itself before the Supreme Judicial Court, this time defending its claims to the remainders of annuities purchased to ensure institutionalized spouses' eligibility for long-term care.

On Feb. 2, the SJC is scheduled to hear oral arguments in *Executive Office of Health & Human Services v. Mondor*, *EOHHS v. Castle* and *EOHHS v. Dermody*.

Each of the cases raises the question of whether the state is entitled to thousands of dollars left in annuities purchased by the husband prior to his death in order to ensure his wife's eligibility for MassHealth long-term care benefits.

Last year, the SJC in *Guilfoil v. EOHHS* and *Fournier v. EOHHS* curbed MassHealth's efforts to limit trusts as a Medicaid planning tool. Elder law attorneys are hopeful the SJC sends a similar message to MassHealth on the question of annuities.

"This is the first time that the SJC is going to be looking at the annuity controversy that has been a decade in the making," said Wellesley attorney Patricia Keane Martin, who co-authored an amicus brief filed in the three cases on behalf of the Massachusetts chapter of the National Academy of Elder Law Attorneys.

Worcester attorney Lisa M. Neeley, who represents the family member beneficiary in *Dermody*, said the cases are important because the SJC "hopefully" will clarify that the state is not entitled to recover from the spousal annuities when a community spouse dies.

Brian E. Barreira is counsel for the individual family member-claimants in *Mondor* and *Castle*. Barreira said one of the things he tried to emphasize in his brief is the "inconsistency" in MassHealth's policies. The Plymouth lawyer said EOHHS's position is that it has been statutorily required to pursue collections against annuities purchased by community spouses since the passage of federal Deficit Reduction Act of 2005.

But according to Barreira, for the first decade following the passage of the DRA, the agency made no claims against annuities to recover MassHealth benefits provided to the institutionalized spouses.

"If it was mandatory, why didn't they enforce it?" Barreira said. "It's very hard for them to say it was mandatory, but we were flouting [the law]."

Common fact patterns

In 2006, Congress amended the language of §1396p(c)(1)(F)(i) of the Medicaid Act to provide that spouses may purchase an annuity to spend down their assets only if “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.”

On the other hand, 42 U.S.C. §1396p(c)(2)(B)(i) provides that “[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1) to the extent that … the assets were transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse.”

In claiming entitlement to the proceeds of annuities on behalf of clients, elder law attorneys argue that §1396p(c)(2)(B)(i) created an exception to §1396p(c)(1)(F)’s requirement that the state be designated remainder beneficiary for an annuity whenever the annuity is purchased for the “sole benefit” of a community spouse.

Each of the three cases before the SJC presents similar facts. Husbands purchased Medicaid-planning annuities to spend down assets in order to make their wives eligible for MassHealth long-term care benefits. These “community spouses” purchased the annuities with spousal assets. Pursuant to Medicaid law, the annuity contracts designated the commonwealth as the primary remainder beneficiary.

As the community spouses received payments under their annuities, their “institutionalized spouses” lived in nursing facilities with the assistance of MassHealth long-term care benefits.

However, the husbands passed away before the full term of their annuity contracts had expired, leaving proceeds left to be paid. MassHealth claims that since the commonwealth was designated in the annuity contracts as primary remainder beneficiary, the agency is entitled to the leftover funds to the extent of the MassHealth benefits paid for the institutionalized spouses’ long-term care.

In *Mondor*, the husband purchased a \$191,000 annuity with a four-year term. The annuity named the commonwealth as its primary beneficiary, without referencing any limitation to the amount of MassHealth benefits paid on behalf of the wife, the institutionalized spouse.

The husband died 22 months after purchasing the annuity, leaving \$98,000 in unpaid proceeds.

The community spouse in *Castle* was likewise the husband, who purchased an annuity with a five-year term for almost \$177,000. The annuity named the commonwealth as the primary beneficiary, without any language limiting the commonwealth’s beneficiary rights to the cost of services for either the husband or his institutionalized wife.

The husband in *Castle* died two years after purchasing the annuity, leaving \$110,000 in proceeds. Over the objections of the husband’s family beneficiaries, the insurer commenced making the contractual monthly annuity payments to the commonwealth as the named primary beneficiary.

In *Dermody*, the husband died approximately 18 months after purchasing a \$172,000 annuity with a five-year term. At the time of death, the remaining proceeds in the annuity amounted to \$118,000. The annuity contract named the state the primary beneficiary.

MassHealth sought to enforce its claims against the remainder of the annuity, citing the primary beneficiary status afforded by its payment of long-term care benefits for the husband's institutionalized wife.

"MassHealth repeatedly uses this 'scare tactic,' portraying [these spouses] as rich people trying to qualify for Medicaid or somebody trying to preserve assets and not pay the nursing home," Martin said. "The facts of the cases don't show that to be true."

In 2020, [Superior Court Judge C. William Barrett](#) ruled that the Dermodys' daughter, as named contingent beneficiary of the annuity, was entitled to residual benefits pursuant to the terms of the contract, notwithstanding the state's asserted entitlement to reimbursement for the institutionalized spouse's long-term care benefits.

However, a split in the lower courts was created in 2021 when a Suffolk Superior Court judge ruled in [American National Insurance v. Breslouf](#) that the state was entitled to the residue of an annuity purchased by a husband prior to his death to make his wife eligible for MassHealth nursing home care benefits, over the claims of a family member named as a contingent beneficiary.

Mondor, *Castle* and *Dermody* reached the SJC on grants of direct appellate review.

Medicaid planner objections

The attorneys for the family beneficiaries in the three cases raise similar arguments as to why MassHealth cannot recover the remainders of the annuities.

"Under the Medicaid statute, these spousal annuities don't have to reimburse the state for institutionalized spouses' care costs," Neeley said. "It's just not what the statute says."

According to Neeley, the plain language of §1396p(c)(2)(B)(i) makes clear that transfers made for the sole benefit of a community spouse are exempt from the transfer penalties contemplated by §1396p(c)(1) and, accordingly, from the beneficiary requirements of §1396p(c)(1)(F).

"The sole benefit rule is there for a reason," Martin said.

In the *Mondor* and *Castle* cases, Barreira likewise argues that, under the sole benefit exception, community spouses are not required to name the state as a beneficiary.

However, Barreira further argues that EOHHS lacks the authority under state law to make recoveries against annuities.

According to Barreira, G.L.c. 118E, §§31 and 32, only empower EOHHS to recover against the probate estate of a deceased MassHealth participant to the extent that benefits are expended for their benefit. That means MassHealth's recovery is limited to the probate estate of the recipient

of long-term care benefits and does not extend to allow recovery against the estate or assets of a community spouse, he said.

Martin pointed out that the family member beneficiaries in the three cases may also have an argument based on contract, noting that the annuity contracts are given MassHealth's implicit stamp of approval as part of the processing of a spouse's application for benefits.

"Contractually, [MassHealth inserts itself] between an individual and the insurance company and holds those annuities hostage in cases where the beneficiary designation is clear," Martin said.

"The cases before the SJC have a variety of beneficiary designations, but there are multiple cases where the beneficiary designation is absolutely clear and yet MassHealth still claims, in violation of the contract, that they have a claim."

It will be important for the SJC to address the contract issue, Neeley said.

"That is the critical question that MassHealth has to answer," she said. "They have approved these contracts [in connection with the spouse's application for benefits]. Now they're trying to reach in and grab the proceeds anyway, without any due process to the contingent beneficiaries."

MassHealth stakes its claim

MassHealth declined to comment on the pending appeals. But the agency in its brief before the SJC relies on three basic arguments leading to the conclusion that the agency is entitled to the residues of the annuities in dispute.

First, according to MassHealth, the federal Medicaid statute required the community spouses in each case to name the commonwealth as remainder beneficiary to the extent of the benefits paid for their institutionalized spouses.

Second, the agency refutes the family beneficiaries' argument that a "sole beneficiary" exception altered that outcome.

"[T]he very existence of beneficiaries in the Mondor, Castle, and Dermody Annuity Contracts — who are intended to benefit from the annuity at some time in the future in the event that the annuitant dies before the end of the annuity's term — precludes the annuities from falling within §1396p(c)(2)(B)'s 'sole benefit' exception," the agency's brief states.

Third, MassHealth argues that its recovery is not barred by the Medicaid Act's estate recovery provision. Pursuant to 42 U.S.C. §1396p(b), "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual ... may be made, except that the State shall seek adjustment or recovery" from an "individual's estate" for "nursing facility services."

According to MassHealth, the estate recovery provision "only places limits on efforts to recover *directly* from the institutionalized individual — it places no limits on efforts to collect on contracts with third parties."