STATE OF MICHIGAN
IN THE PROBATE COURT FOR COUNT OF BERRIEN

In the Matter of:	**File No.: 2013-0872CZ-N**
Estate of Alberta Ketelhut, a/k/a Alberta Ida Ketelhut, Deceased	**Hon. Thomas E. Nelson**
MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,	**OPINION RE: CROSS MOTIONS FOR SUMMARY DISPOSITION**
Claimant/Plaintiff,	
v.	
ESTATE OF ALBERTA KETELHUT,	
Estate/Defendant.	

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At a session of said Court held on August 5, 2014 in the City of St. Joseph
PRESENT: Thomas E. Nelson, Family Division Judge

OPINION

This matter came before the Court based on Defendant Estate of Alberta Ketlehut's (hereinafter referred to as "Estate") Motion for Summary Disposition under MCR 2.116(c)(10) and (c)(8) and Plaintiff Michigan Department of Community Health's (hereinafter referred to as "Department") Motion for Summary Disposition under MCR 2.116(c)(10). MCR 2.116(C)(8) provides for judgment if the Plaintiff's complaint fails to state a claim on which relief may be granted. MCR 2.116(c)(10) provides for judgment for either party based on there being no genuine issues as to any material fact, therefore, entitling the moving party to judgment in its favor as a matter of law.

Summary disposition may be granted under MCR 2.116(C)(10) where, viewing the evidence then before the court in the light most favorable to the party opposing the motion, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183;

665 NW2d 468 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Id*.

The Estate’s Motion raises three separate arguments. First, it contends that Department’s claim is invalid for failure to provide the statutorily required notice under MCL 400.112g(3)(e). Second, it claims the Department’s complaint should fail because the Department lacked the statutory authority to implement estate recovery at the time Defendant began to receive benefits. Third, Estate contends that it should be exempted from “estate recovery” due to falling within the hardship exemption provisions of MCL 400.112g(3)(e)(i).

The Department seeks summary disposition premised on its contention that Estate is subject to the “estate recovery program” provisions of MCL 400.112g. First, the Plaintiff argues that MCL 400.112g(7) does not condition the right to estate recovery on providing the Defendant any specific written information or notice. The statute itself provides that notice. Second, if such notice/information was necessary, it was provided to Decedent Alberta Ketelhut’s authorized representative, Stacy Lawson. The written information that Ketelhut’s estate was subject to “estate recovery” was afforded to Ms. Lawson in connection with Ms. Ketelhut’s annual Medicaid eligibility re-determination around November 1, 2012. Since Defendant continued to receive Medicaid long term care (LTC) benefits after that date, the Department maintains the Estate is subject to recovery for all of the deceased’s LTC services covered by Medicaid from December 2009 through her date of death in January 2013.

FACTS

On October 15, 2009, decedent Alberta Ketelhut applied for Medicaid benefits for her care in a long term care facility. At the time of that initial application, Ms. Ketelhut was not provided any written material describing the provisions of Michigan Medicaid Recovery Program. Neither did the application provide any such information.

In 2009, Michigan’s version of estate recovery (Public Act 74 of 2007, now MCL 400.112g) had already been enacted into law. While the Act was passed in September 2007, the estate recovery program could not be implemented until approved by the federal government. MCL 400.112g(5). That approval from the Federal Centers of Medicare and Medicaid Services (CMS) was finally granted on May 23, 2011. Under Federal law the effective date of Michigan’s “estate recovery” program was July 1, 2010. 42 CFR 447.256.

In October 2012, the deceased's authorized representative, Stacy Lawson, completed, signed and submitted information to secure Ms. Ketelhut's continued Medicaid coverage for LTC services. At that time, the application contained language that notified the deceased of the estate recovery program. Up until the 2012 re-determination of Defendant's Medicaid's eligibility, the deceased did not receive any individualized notice of that program, the details of "estate recovery" or a "hardship determination" other than that provided through the enactment of MCL 440.112g.

The deceased continued to receive Medicaid for her LTC continuously from December 2009 through her death on January 14, 2013. Following her death, this Estate was opened. Thereafter, Department brought a claim for estate recovery pursuant to the requirements of federal law (42 USC 1396p) as incorporated through MCL 400.112g, the Michigan State Medical Plan (MSMP) as amended (SPA) and the Department's policy (Bridges Administrative Manual [BAM]) for long term care.

On December 20, 2013, the Estate's co-personal representatives filed a joint application for "hardship" waiver. That application was denied after pre-hearing briefing by the co-personal representative applicants, a telephone administrative hearing and a recommended decision dated April 14, 2014 which was entered as a Final Order on June 12, 2014 by Plaintiff's Director James K. Haveman. That Order has not been appealed through an administrative process under the Michigan Administrative Procedures Act [MCL 24.201 et seq.] including filing an appeal with the Circuit Court.

ISSUE #1—Are Estate's probate assets exempted from "estate recovery" due to falling within the "hardship exemption" provisions of MCL 400.112g(3)(e)(i) thus entitling Defendant to summary disposition under MCR 2.116(c)(8)?

The Estate filed a joint application for a "hardship waiver" in connection with the Department's request for Estate recovery under MCL 400.112g. That application was fully litigated through the Michigan Administrative Hearing System (MHAS) and resulted in Plaintiff Director's June 12, 2014 Final Order denying Plaintiff's "hardship waiver". That Order was not appealed to Circuit Court as provided by the Administrative Procedures Act. MCL 24.301.

The Estate is barred by *collateral estoppel* from litigating the issue of the "hardship waiver" given that that issue was fully addressed through the MHAS. In order for *collateral estoppel* to apply, a question of fact must have been actually litigated and determined by a valid and final judgment. In addition, the same parties must have had a full opportunity to litigate the issues and there must be mutuality of estoppel." *Storey v. Meijer*, Inc. 431 Mich 368, 373 n 3 (1988). (emphasis added).

As pointed out by the Department in its July 10, 2014 Response to Estate's Motion for Summary Disposition, "the administrative decision dealt squarely with whether the Estate qualifies for a hardship exemption from estate recovery under the theory that Ketelhut's home was 50% or less of the average prices of homes in the county where the home was located—Berrien County." Department's Response to Plaintiff's Motion for Summary Disposition at 13. MCL 24.281 afforded the Estate the opportunity to field exceptions to the April 14, 2014 Proposal for Decision upholding the Department's denial of the "hardship exemption" before the June 12, 2014 Final Order was entered. The Estate did not do so. Nor did the Estate take an appeal of that Final Order. Thus, that matter was fully litigated in the administrative venue. And the Estate was given a full opportunity to do so. Accordingly, finality to that decision is warranted.

And, although the Estate failed to provide its exceptions to the April 14, 2014 Proposal for Decision or take an appeal of the June 12, 2014 Final Order, it nevertheless had that opportunity to litigate through MHAS and to Circuit Court.

Finally, both parties (the Defendant Estate and Plaintiff Department) are before this Court with regard to the same issue as address in the MHAS, there is mutuality.

Thus, Defendant Estate is *collaterally estopped* from pursuing this claim once again in this Estate proceeding. Accordingly, summary disposition on this basis is **DENIED** to Defendant and **GRANTED** to the Plaintiff under MCR 2.116(C)(10).

ISSUE #2—Should the Department's claim fail because the Department lacked the statutory authority to implement estate recovery at the time Alberta Ketelhut began to receive benefits?

Federal law required each State to implement an estate recovery program in order to continue to receive federal funding for its Medicaid program. 42 USC 1396p, Section 1917(b)(1). Until Michigan's state plan (SPA) was approved and effective, there could be no recovery of Medicaid benefits paid to enrollees since that recovery needed to follow the provisions of the SPA. MCL 400.112g(5).

Michigan's SPA did not receive federal approval until May 23, 2011. However, that SPA was effective July 1, 2010 (see Ex 9 of Plaintiff's June 27, 2014 Motion for Summary Disposition and Brief). Ms. Ketelhut began receiving Medicaid benefits for her LTC prior to the effectiveness of Michigan's SPA and beginning in December 2009. Thus, only beginning with Medicaid payments made after July 10, 2010 could the Plaintiff seek recovery for Defendant under the SPA approved pursuant to MCL 400.112g.

Therefore, Estate's Motion for Summary Disposition is **GRANTED** with regard to the Plaintiff's request for estate recovery for Medicaid benefits paid for the decedent's LTC prior to July 10, 2010 under MCR 2.116(C)(8).

ISSUE #3—Should Plaintiff Department's estate recovery request be denied for failure to provide notice to Defendant's decedent as required by MCL 400.112g(7)?

Pursuant to MCL 400.112g(1), the Plaintiff was required to work with appropriate state and federal departments and agencies to review options for development of a voluntary estate preservation program. In line with MCL 400.112g(3), the Plaintiff was directed to seek approval from the federal CMS for a number of elements in the approved SPA. Those provisions included:

> At the time an individual enrolls in Medicaid for long-term care services, the department of community health shall provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. MCL 400.112g(3)(e)

Furthermore, Michigan law also mandated that Plaintiff include a specific notice requirement in the SPA—

> The department of community health **shall provide written information to individuals seeking Medicaid eligibility for long-term care services describing the provisions of the Michigan Medicaid estate recovery program, including**, but not limited to, **a statement that some or all of their estate may be recovered**. MCL 400.112g(7). (**emphasis added**)

It is undisputed that the Department did not provide the Defendant Estate's decedent with the specific information required by either MCL 400.112(3)(g) or 400.112g(7) when she first applied for Medicaid in 2009. In fact, the SPA had not yet been approved by that juncture in order to provide the materials or the notice.

Nevertheless, the Department contends that the statute itself provided adequate notice to Defendant's decedent of the material and notice required by MCL 400.112g(3)(e) and MCL 400.112g(7), However, such a contention would render meaningless the specific directives of the statute. *Book-Gilbert v. Greenleaf*, 302 Mich App 538 (2013). Further, until July 10, 2010, the "provisions of the Michigan Medicaid estate recovery program" would not have been known in order to be provided to, let alone known by, the Defendant's decedent. Arguably, that information would not even have been available until the federal authorities approved the SPA on May 23, 2011 even though the SPA

became effective back to July 10, 2010. Thus, to suggest that the Estate's decedent or her authorized representatives from late 2009 through May 23, 2011 (when the CMS first gave its approval to Michigan's SPA) would have known of the details of the "hardship exemption" or the "estate recovery program" is clearly beyond reason.

In any event, suffice it to say that it is this Court's judgment that the statute itself did not provide the Defendant's decedent with the notice contemplated by MCL 400.112g(7) as contended by the Department.

The Department further suggests that Michigan's estate recovery system should be liberally construed to prevent what the Department claims the Estate is attempting to accomplish, specifically "that the taxpayers of Michigan should bear all of the costs of Ketelhut's care to pass on . . . accumulated wealth to the family". *Mackey v. Department of Human Services*, 289 Mich App 688, 693-94 (2010).

The April 30, 2012 decision of Clinton County Probate Judge Lisa Sullivan in *Michigan Department of Community Health v. Estate of Kathryn M. Salemka-Shire*, (Case No. 11-127599-CZ) and the April 17, 2012 decision of Gratiot County Probate Judge Kristin M. Bakker in *Michigan Department of Community Health v. Estate of Amy Grosskopf*, (Case No. 12-138-CZ) are each factually distinguishable from this case and of no precedential value. Nevertheless, they are both instructive on this issue.

Both cases suggest, as is the case here, that the Department's ability to recover from the decedent's Estate violates the provisions of Michigan's SPA and Michigan's estate recovery statute. In those cases, as here, the materials required to be provided to a LTC Medicaid applicant in Michigan by MCL 400.112g(3)(e) and the notice required to be given to that applicant by MCL 400.112g(7) were not provided to the Defendant at the time of Ms. Ketelhut's initial Medicaid enrollment. Clearly, they couldn't be because they were not yet solidified through the CMS vetting process outlined in MCL 400.112g.

Perhaps more importantly, constitutional due process requires that no person shall be deprived of life, liberty or property without due process of law. US Const. Am XIV, Const 1963, art 1, Sect. 17. Due Process requires notice and a meaningful opportunity to be heard when property interests are at stake. *Dusenberry v. United States*, 534 US 161, 122 S. Ct. 694, 151 L Ed 2nd 597 (2002) and *Dow v. State of Michigan*, 396 Mich 192 (1976). Arguably, the notice (and any materials) received by Estate's decedent's authorized representative in connection with her re-determination for Medicaid coverage in October 2012 complied with the above constitutional due process requirements. However, that notice and those materials could only give the decedent "due process" notice with regard to subsequently available Medicaid benefits received for Defendant's decedent's LTC after that application/re-determination was received and completed by Ms. Lawson in November 2012 (see Ex. 7 of Department's Response to Estate's Motion

for Summary Disposition). At that juncture, the Estate's decedent was provided adequate notice of the intent to seek reimbursement from the decedent's estate for benefits paid. See Plaintiff's June 27, 2014 Motion for Summary Disposition and Brief (Ex 7, "Information About Medicaid, Acknowledgements" #12). But, it would be fundamentally unfair to allow estate recovery other than with regard to those benefits received subsequent to the notice.

In other words, it would be clearly inequitable to consider that notice in late 2012 to be sufficient to allow the Plaintiff to seek to retroactively recover for those Medicaid LTC payments already made on Defendant Estate's decedent's behalf. That is especially true with regard to LTC benefits tendered before the SPA was approved in May 2011 or before actual notice of that potential recovery mechanism was provided in connection with the December 2012 re-determination. Due process is a fluid concept and its essence is fundamental fairness. *Bonner v. City of Brighton,* Ct. of Appeals # 302677 (____) citing *Reed v. Reed,* 265 Mich App 131, 159 (2005). Here, the Estate's decedent was entitled, at a minimum, to know the impact of the election to continue to receive Medicaid coverage for her LTC. And, even then, to put the decedent in an untenable position of electing to forego future benefits at the expense of having to become responsible for "estate recovery" of her prior benefits seems fundamentally unfair. More precisely, the individual who had already received significant benefits for care over a number of years, who is in a vulnerable state and living in a nursing home facility should not be faced with the draconian choice of being "put the street" or being forced to give up property rights for which she had no viable advance notice that those rights would be forfeited until her health was such that she really had no choice but to capitulate or sacrifice her Medicaid coverage.

Nevertheless, to allow the Estate to avoid estate recovery for benefits paid on the co-personal representatives' mother's behalf after that notice is given and, here, subsequent to November 2012 seems equally inequitable. To allow the Estate's beneficiaries to reap the benefit of payments made subsequent to notice of the estate recovery mechanism (provided in late 2012) would seem to be just that unfairness to the Michigan taxpayers and accruing to the benefit of decedent's family as expressed in *Mackey*, supra. See also Genesee County Probate Judge Jennie E. Barkey's decision in *Michigan Department of Community Health v. Estate of James Shanks*, (Case No. 14-197986-CZ) for a similar result.

Accordingly, Defendant's Motion for Summary Disposition is **GRANTED** with regard to the Plaintiff's request for estate recovery of Medicaid benefits paid for the decedent's LTC prior to November 2012 under MCR 2.116(C)(10) and (C)(10) and Plaintiff's Motion for Summary Disposition is **GRANTED** with regard to Plaintiff's request for estate recovery of Medicaid benefits paid for the decedent's LTC subsequent to November 2012 under MCR 2.116(C)(10).

The amount of that “Estate Recovery” is a factual determination to be made following an evidentiary hearing to be held at a date to be determined.

ORDER

IT IS ORDERED that the Plaintiff shall forthwith prepare an Order in conformity with this Opinion and submit it under MCR 2.602(B)(3) along with noticing a date for the evidentiary hearing as noted above.

Dated: August ___, 2014

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Thomas E. Nelson, Probate Judge