COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
C.A. No. 2084CV02374

AMERICAN NATIONAL INSURANCE COMPANY

vs.

JENNIFER BRESLOUF and
COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' / CROSS-CLAIMANTS' CROSS MOTIONS FOR SUMMARY JUDGMENT AND PLAINTIFF / COUNTERCLAIM DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Julius Breslouf bought an annuity contract issued by American National Insurance Company (American National) to make his wife, Suzanne Breslouf, eligible for MassHealth benefits to pay for her nursing home care. Julius[1] named the Commonwealth of Massachusetts as the primary beneficiary of the annuity in the event of his death and his and Suzanne's daughter, Jennifer Breslouf, as the contingent beneficiary. Julius died on April 24, 2020, before the end of the annuity period, and the Commonwealth and Jennifer made competing claims for the remaining proceeds. American National filed this interpleader action seeking a declaratory judgment as to who has the right to the proceeds of the annuity. Jennifer filed a crossclaim against the Commonwealth seeking a declaratory judgment that the Commonwealth is not entitled to any proceeds of the annuity and asserting a claim for violation of 42 U.S.C. § 1983. Jennifer also filed a counterclaim against American National alleging breach of contract and violation of G. L. c. 93A.

[1] Because all the individuals involved in this case share a last name, I will refer to them as Julius, Suzanne, and Jennifer.

The Commonwealth filed a Motion for Summary Judgment on the interpleader declaratory judgment claim and Jennifer's counterclaims (Commonwealth Motion). Jennifer cross-moved for summary judgment on all claims between her and the Commonwealth (Cross Motion). American National moved for summary judgment on Jennifer's counterclaims (American National Motion). After hearing and review and for the reasons stated below, the Commonwealth's Motion is **ALLOWED**; Jennifer's Cross Motion is **DENIED**; and American National's Motion is **ALLOWED**.

BACKGROUND

The following factual summary comes from the undisputed, admissible evidence in the summary judgment record with certain details reserved for later discussion. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 674, 680 (2016).

Jennifer is Julius and Suzanne's daughter. In July 2017, Suzanne, then 78 years old, was admitted to a skilled nursing facility for long-term care. Upon Suzanne's admission, Suzanne and Julius had approximately six hundred, ninety-nine thousand dollars in countable assets for Medicaid and MassHealth eligibility purposes.

In October 2017, Julius purchased an immediate, irrevocable annuity in the amount of $565,000 (Annuity) to spend down marital assets before Suzanne applied for MassHealth benefits. Julius was the sole annuitant with a monthly payment of $9,531.49 to run from November 18, 2017 to October 18, 2022, or for five years, which was Julius' actuarial lifespan at the time he purchased the Annuity. As the primary beneficiary of the Annuity, Julius named the "Commonwealth of Massachusetts as reminder [sic] beneficiary in first position for the total amount of medical assistance paid on behalf of the institutionalized individual pursuant to 130 CMR 520.007(J)(2)." Julius named Jennifer as the contingent beneficiary.

In early November 2017, Suzanne submitted a MassHealth Application for long-term benefits. The MassHealth Application required that applicants such as Suzanne

identify any annuity purchased by the applicant or their spouse and name the Commonwealth as a remainder beneficiary of any such annuity "for the total amount of medical assistance paid for the institutionalized individual." Suzanne was represented by counsel in connection with her application and Jennifer signed the application as Suzanne's attorney-in-fact. Suzanne disclosed Julius's purchase of the Annuity as part of her MassHealth Application and, as requested by MassHealth, provided MassHealth a copy of the Annuity contract. Suzanne's counsel stated in a cover letter submitted with the MassHealth application that the purchase of the Annuity was meant to spend down Julius and Suzanne's assets.

In November 2017, MassHealth requested that Suzanne complete and sign the Notice of Preferred Remainder Beneficiary ("ANN-3 Form"). Suzanne's application was denied on January 13, 2018 due to lack of verifications. Thereafter, Suzanne completed the ANN-3 Form identifying the Annuity, and certifying that failure to name the Commonwealth as a beneficiary would result in termination of her MassHealth benefits and, potentially, allow recovery by MassHealth of benefits paid while she was not eligible. MassHealth approved Suzanne's application on March 16, 2018.

In March 2020, Jennifer filed a renewal application on Suzanne's behalf for MassHealth benefits. The renewal application identified the Annuity and described it as a "Medicaid-qualifying annuity purchase." Suzanne remains in a skilled nursing facility and continues to receive MassHealth benefits.

Julius died on April 24, 2020. From October 2015 until January 2019, Julius paid approximately $5,745 per month to live at an assisted living facility. From January 2019 until his death, Julius lived in a skilled nursing facility and paid approximately $18,614 per month for his care. Julius never received any Medicaid / MassHealth benefits during his lifetime. As of the time of the briefing on the instant motions, the value of the Annuity was $270,000.

After Julius's death, Jennifer made a claim to the proceeds remaining on the Annuity. MassHealth also made a claim on the proceeds alleging that MassHealth had paid $98,745.15 in assistance for Suzanne's care through June 11, 2020.[2] After receipt of the competing claims for the proceeds of the Annuity, American National commenced this action to resolve the controversy as to whether the Commonwealth and / or Jennifer is entitled to be paid and the amount.

DISCUSSION

"Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Correia v. Fagan, 452 Mass. 120, 129 (2008). Where, as here, summary judgment turns on the interpretation of a statute, I must "give due deference to the underlying legislative intent as expressed by the plain language of the statute." Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 610 (2000), citing Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 247 (1993). In interpreting a statute, the court looks primarily to its language to ascertain the intent of the Legislature. Allison v. Eriksson, 479 Mass. 626, 633 (2018). The court gives the words used their ordinary and approved meaning, considering the cause of the enactment and the main object to be accomplished. Polanco v. Sandor, 480 Mass. 1010, 1011 (2018); Camargo's Case, 479 Mass. 492, 497-498 (2018).

Here, as between the Commonwealth and Jennifer, the issue is whether an annuity purchased for the benefit of a spouse not in need of Medicaid benefits, called a "community spouse," such as the one Julius bought to make Suzanne eligible for MassHealth benefits, must satisfy *both* 42 U.S.C. §§ 1396p(c)(1)(F) and 1396p(c)(2)(B)(1),

[2] Jennifer does not dispute that MassHealth made a claim for the proceeds of the Annuity, or that MassHealth paid for skilled nursing care for Suzanne, she disputes the amount paid. Further, MassHealth asserts the right to recover the total amount paid for Suzanne's care which continues to grow since Julius's death and since MassHealth submitted a claim to American National.

or *only* § 1396p(c)(2)(B)(1). If both provisions must be satisfied, then the Commonwealth would be entitled to the proceeds of the Annuity. If only section 1396p(c)(2)(B)(1) need be satisfied, then, depending on the Commonwealth's contractual argument that it is entitled to the remainder of the proceeds as a matter of contract law, see infra, Jennifer may be entitled to the proceeds of the Annuity.

As between Jennifer and American National, the question is whether, based on the material undisputed facts, Jennifer can establish that American National breached the Annuity or violated Chapter 93A when, instead of paying Jennifer on the Annuity, American National filed this action.

I. Jennifer's and the Commonwealth's Cross-Motions for Summary Judgment

A. The Medicaid / MassHealth System and Medicaid Planning

Medicaid is a joint federal-state program that provides medical assistance to eligible low-income people. See 42 U.S.C. § 1396-1; Moe v. Secretary of Admin. & Finance, 382 Mass. 629, 633 (1981). "Primary oversight of Medicaid is handled at the Federal level, but each State . . . administers its own Medicaid program." Law v. Griffith, 457 Mass. 349, 350 n.3 (2010). "Massachusetts has opted to participate in Medicaid via the establishment of a State Medicaid program known as MassHealth." Daley v. Secretary of Exec. Office of Health & Human Servs., 477 Mass. 188, 190 (2017). "Medicaid has become one of the largest programs in the Federal budget as well as a major expenditure for State governments, which must finance a significant portion of Medicaid benefits on their own." Id. "The demand for Medicaid long-term care benefits, which cover nursing home care as well as other forms of personal long-term care services, has grown steadily as a result of our country's aging population and the expense of paying privately for nursing homes or other long-term care." Id. at 191. Medicaid pays for the care of two-thirds of people in nursing homes in the United States. Id.

Because states are required to provide Medicaid benefits only to "individuals who are unable to cover the costs of their basic needs and who already receive or are eligible for certain forms of public assistance[,]" Daley, 477 Mass. at 190, citing Roach v. Morse, 440 F.3d 53, 59 (2d Cir. 2006), and there are limits on the assets that individuals and married couples may own and still qualify for Medicaid, many individuals and couples engage in Medicaid planning.[3] "Through 'Medicaid planning,' individuals attempt to transfer or otherwise dispose of their assets long before they need long-term care so that, when the need arises, they may satisfy the asset limit and qualify for Medicaid benefits." Daley, 477 Mass. at 192. However, when "affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children." Id., quoting H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985).

Congress has attempted to constrain Medicaid planning in some respects. Relevant here, Congress enacted the "look-back" rule which imposes a penalty if an individual or individual's spouse transfers an asset for less than fair market value within five years of the individual's application for Medicaid benefits. 42 U.S.C. § 1396p(c)(1)(A). Section 1396p(c)(1)(A) provides that the disposal of an asset for less

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[3] In Massachusetts:

> In order to qualify for Medicaid in Massachusetts, MassHealth requires that "[t]he total value of countable assets owned by or available to" an individual applicant not exceed $2,000. 130 Code Mass. Regs. § 520.003(A)(1) (2014). For a couple living together, the limit is $3,000. 130 Code Mass. Regs. § 520.003(A)(2) (2014). This asset limit often requires applicants to "spend down" or otherwise deplete their resources to qualify for Medicaid long-term care benefits when they enter a nursing home.

Daley, 477 Mass. at 191–192.

than fair market value after the five-year look back date by an institutionalized individual *or the spouse of an institutionalized individual* renders the individual ineligible for Medicaid for a period of time. More particularly, "[i]f *either* spouse tries to give away assets" for less than fair value during the look-back period, "the institutionalized spouse will be ineligible for Medicaid benefits for the length of time that those assets could have covered the spouse's medical costs." Hutcherson v. Arizona Health Care Cost Containment Sys. Admin., 667 F.3d 1066, 1069 (9th Cir. 2012) (emphasis added); see also Daley, 477 Mass. at 193, citing 42 U.S.C. § 1396p(c)(1)(E) ("In its present form, the 'look-back' rule provides that, if such a transfer occurs, the applicant is 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 home facility."); Hegadorn v. Department of Human Servs. Dir., 931 N.W.2d 571, 593 (Mich. 2019) (McCormack, J. concurring) ("[I]f either spouse disposes of assets for less than fair market value after the look-back date, the institutionalized spouse is disqualified from receiving financial assistance for a period that approximates the uncompensated value of the transferred assets."). "The effect is to treat couples who dispose of assets as if those assets were available to the couple to pay for medical care." Hutcherson, 667 F.3d at 1069.

Congress also has attempted to constrain the ability of wealthy married couples to shift assets to or from each other to obtain Medicaid benefits. Prior to 1988, "[u]nique problems arose regarding Medicaid eligibility for spouses given that they generally share income and assets." Hutcherson, 667 F.3d at 1068. "For example, states generally considered income from either spouse and jointly-held assets in determining the Medicaid eligibility for the institutionalized spouse, but did not consider assets held solely in the name of the community spouse." Id. "As a result, some community spouses were left destitute so that the institutionalized spouse could qualify for Medicaid assistance, while some wealthy couples were able to qualify for assistance by simply holding their assets solely in the name of the community spouse."

Id. See also Morris v. Oklahoma Dep't of Hum. Servs., 685 F.3d 925, 928–929 (10th Cir. 2012) (discussing the "unintended consequences" of the system of transferring assets to a community spouse to obtain Medicaid eligibility) (citations omitted). "Congress responded to this problem by passing the Medicare Catastrophic Coverage Act of 1988 ("MCCA"), which had the dual aim of ending the 'pauperization' of community spouses and preventing wealthy couples from qualifying for Medicaid assistance by sheltering their assets." Hutcherson, 667 F.3d at 1068; see also Morris, 685 F.3d at 929, quoting H. R. Rep. No. 100–105, pt. 2, at 65 (1987) ("By passing the MCCA, Congress intended to 'protect community spouses from "pauperization" while preventing financially secure couples from obtaining Medicaid assistance.'").

To prevent wealthy couples from sheltering assets, "after subtracting the [community spouse resource allowance], Medicaid administrators must count all remaining 'resources held by either the institutionalized spouse, community spouse, or both' as 'available to the institutionalized spouse.'" Morris, 685 F.3d at 929, quoting 42 U.S.C. § 1396r–5(c)(2)(A); see also 130 Code Mass. Regs. § 520.003(A)(2). In Massachusetts, after subtracting the community spouse resource allowance of $128,640, the maximum value of countable assets a couple may own to qualify for Medicaid benefits is $3,000. 130 Code Mass. Regs. §§ 520.003(A)(2), 520.016(B)(2). If the community spouse's resources exceed the allowance, the "institutionalized spouse is ineligible for Medicaid benefits until the excess resources are depleted." Lopes v. Department of Soc. Servs., 696 F.3d 180, 182 (2d Cir. 2012), citing 42 U.S.C. §§ 1396r–5(c)(2)(B), 1396r–5(f)(2)(A). On the other hand, to protect community spouses and avoid their pauperization, a community spouse's income, subject to limited exceptions that are inapplicable here, is not "deemed available to the institutionalized spouse." 42 U.S.C. § 1396r-5(b)(1) ("During any month in which an institutionalized spouse is in

the institution . . . no income of the community spouse shall be deemed available to the institutionalized spouse.").[4]

B. Sections 42 U.S.C. §§ 1396p(c)(1)(F) and 1396p(c)(2)(B)(i)

An annuity is a contract consisting of a "a sum of money payable yearly or at other regular intervals." Annuity Definition, https://www.merriam-webster.com/dictionary/annuity (last visited May 28, 2021). Put elsewise, the purchase of an annuity is a way to turn an asset – a sum of money – into income. In 2005, Congress passed the Deficit Reduction Act ("DRA"), which addressed the use of annuities in connection with Medicaid planning and excepted certain types of annuities from the look-back rule. See Hutcherson, 667 F.3d at 1069. As the Ninth Circuit described:

> The DRA added several requirements that must be met before an annuity is exempt from the [look-back] transfer penalty. For instance, the annuity must (i) be irrevocable and nonassignable, (ii) be actuarially sound, and (iii) provide for payments in equal amounts with no deferral and no balloon payments. [42 U.S.C.] § 1396p(c)(1)(G)(ii). In addition, and of particular relevance to this case, the DRA originally provided that the purchase of an annuity is allowable only where "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 *annuitant.*" 42 U.S.C. § 1396p(c)(1)(F)(i) (2005) (emphasis added).
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> In 2006, Congress amended the language of § 1396p(c)(1)(F)(i). Under the amended language, 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.*" 42 U.S.C. § 1396p(c)(1)(F)(i) (2006) (emphasis added); see also Tax Relief and Health Care Act of 2006, Pub. L. No. 109–432, 120 Stat. 2922, 2998 (2006).

Id. at 1069-1070.

[4] Certain specified assets, such as the couple's home and one automobile, do not count against the eligibility of the institutionalized spouse. 42 U.S.C. § 1382b(a).

Thus, in the 2005 and 2006 revisions to the DRA, Congress inserted two subsections into the section of the Medicaid law dealing with the look-back penalty, 42 U.S.C. §§ 1396p(c)(1)(F) and (G), that exempt from the look-back penalty any annuity purchased by the institutionalized individual or their spouse that satisfies the requirements set forth therein. Although those subsections do not specifically address annuities in which the annuitant is the community spouse, the language of § 1396p(c)(1)(F), particularly in view of the 2006 revision to that subsection, applies where the community spouse is the annuitant. By changing "annuitant" to "institutionalized individual," Congress accounted for the fact that the institutionalized individual may not be the annuitant. Congress also passed 42 U.S.C. § 1396p(e), which provides that states must require applicants for Medicaid assistance to (i) disclose "any interest the individual *or community spouse* has in an annuity . . . regardless of whether the annuity is irrevocable or treated as an asset" and (ii) acknowledge that the "State becomes a remainder beneficiary under such an annuity . . . by virtue of the provision of such medical assistance." 42 U.S.C. § 1396p(e)(1) (emphasis added). Section 1396p(e) also requires that when an applicant makes a disclosure concerning an annuity under "subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual." Id. § 1396p(e)(2)(A); see also 130 Code Mass. Regs. § 520.007(J)(2).

The dispute in this case arises because of 42 U.S.C. § 1396p(c)(2), which enumerates exceptions to the look-back provision of section 1396p(c)(1). Among other things, it 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 . . . ." 42 U.S.C. § 1396p(c)(2)(B)(i). Jennifer argues that because the Annuity was a transfer of assets to another—American National—for the sole benefit of Julius, then the annuity

provisions of the look-back rule simply do not apply, even though Julius named the Commonwealth as the primary remainder beneficiary. In other words, according to Jennifer, as an annuity that falls under one of the exceptions listed in subsection (c)(2), an annuity for the sole benefit of a community spouse is not subject to the beneficiary naming requirements of subsection (c)(1)(F).

C. Caselaw and HHS Guidance

Only two Federal Circuit Courts of Appeal have addressed precisely this issue—whether an annuity purchased for a community spouse must comply with 42 U.S.C. § 1396p(c)(1)(F) by naming the state as a beneficiary entitled to recover the amounts paid for the institutionalized spouse.

In Hutcherson, the Ninth Circuit held that the "2006 amendment to 42 U.S.C. § 1396p(c)(1)(F)(i) creates a right in the State to recover as a remainder beneficiary against a community spouse's annuity for an institutionalized spouse's medical costs." Hutcherson, 667 F.3d at 1067. Hutcherson is factually on all fours with this case. There, the daughter of a couple that had purchased an annuity for the benefit of the community spouse and who was named as the second remainder beneficiary after the Arizona Medicaid agency (the Arizona Health Care Cost Containment System Administration [AHCCCS]), filed suit after her father, the annuitant and community spouse, passed away. Hutcherson, 667 F.3d at 1067. The daughter sought to recover the remaining proceeds of the annuity and argued that AHCCCS had no right to recover from the community spouse's annuity at all or, alternatively, had no right to recover for any costs incurred for the care of the institutionalized spouse received after the community spouse's death. Id. at 1068.

In reaching its conclusion that section 1396p(c)(1)(F) applied to the annuity, the Hutcherson Court carefully considered the interrelationship between assets and income, and the need to protect a community spouse from pauperization. The Court wrote:

> [T]he provisions regarding transferring assets were tailored to balance Congress's desire to avoid impoverishment of the community spouse, on the one hand, and closing loop-holes that allowed wealthy couples to game the system, on the other hand. The annuity payments to AHCCCS as a beneficiary functioned precisely the way the statute was intended to work. The Hutchersons were able to qualify [the institutionalized spouse] for Medicaid assistance, while ensuring that [the community spouse] did not become impoverished. As part of that balance, AHCCCS was named as the primary remainder beneficiary of John's annuity so that it could recoup its costs for the medical care that [the institutionalized spouse] received in the event that [the community spouse] died before the annuity had run its course.
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> Accepting Appellant's position that the state should not recover and, instead, she should inherit what remained in John's annuity would frustrate the purpose of the Medicaid statute. As we have noted above, Congress prevents the community spouse from disposing of assets that would otherwise be available to pay for the institutionalized spouse's medical care. For instance, if [the community spouse], instead of purchasing the annuity, attempted to transfer funds to Appellant, [the institutionalized spouse] would have been ineligible for Medicaid for the approximate length of time that the funds could have covered [the institutionalized spouse's] medical costs. By purchasing an annuity, [the community spouse] avoided this transfer penalty. Consistent with the Medicaid Act's objective of protecting the community spouse from destitution, [the community spouse] was entitled to collect monthly payments from the annuity for as long as he lived. When [the community spouse] died before the annuity ran its course, however, funds remained in the annuity that could have otherwise been used to pay for [the institutionalized spouse's] medical care.

Hutcherson, 667 F.3d at 1071–1072. The Hutcherson Court did not address the interplay between § 1396p(c)(1)(F) and § 1396p(c)(2)(B). But neither have other Courts that have considered the requirement that a community spouse's annuity must name the state as the contingent beneficiary pursuant to § 1396p(c)(1)(F). See, e.g., Carlini v. Velez, 947 F. Supp. 2d 482, 486 (D.N.J. 2013) (allowing preliminary injunction to Medicaid applicant and holding that spouse's annuity did not constitute an improper transfer of assets where annuity named state as remainder beneficiary "in accordance with § 1396p(c)(1)(F)").

The Sixth Circuit reached a different conclusion, albeit in a different factual scenario. In Hughes v. McCarthy, the Ohio Medicaid agency penalized an institutionalized individual under the look-back provision based on the purchase of an annuity by a community spouse. 734 F.3d 473, 474-475 (6th Cir. 2013). "Because the transfer occurred before the Ohio agency determined that Mrs. Hughes was eligible for Medicaid coverage and § 1396p(c)(2)(B)(i) permits an unlimited transfer of assets 'to another for the sole benefit of the individual's spouse,'" the Sixth Circuit reversed. Id. at 475. In Hughes, the community spouse had not died, and the first remainder beneficiary of the annuity was the institutionalized spouse and the second was the Ohio Medicaid agency. Id. at 477. Thus, the annuity in Hughes did not provide for the transfer of some or all the spousal assets to an heir or third party. Compare Hutcherson, 667 F.3d at 1067 (annuity purchased for benefit of community spouse named his daughter as remainder beneficiary).

The Sixth Circuit went on, however, to address the Ohio Medicaid agency's alternative arguments, including that the annuity must nonetheless comply with § 1396p(c)(1)(F). The Court reasoned as follows:

> Although "it is axiomatic that a general provision yields to a specific provision when there is a conflict," Reg'l Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 716 (6th Cir.2006), there is no inherent conflict between the two provisions, and each provision is specific in its own way. Section 1396p(c)(1)(F) purports to govern all annuities through the imposition of a transfer penalty under paragraph (1) if the annuity does not satisfy certain rules. On the other hand, § 1396p(c)(2)(B)(i) carves out an exception to paragraph (1)'s transfer penalties. The language of § 1396p(c)(1)(F) limits its annuity rules "[f]or purposes of this paragraph." The language of § 1396p(c)(2)(B)(i) provides that "[a]n individual shall not be ineligible for medical assistance by reason of paragraph (1)" if a transfer satisfies, in relevant part, the sole-benefit rule. The two provisions complement rather than contradict one another. Section 1396p(c)(1)(F) is not rendered illusory. It applies to all annuities not excepted by another provision such as § 1396p(c)(2)(B), including annuities benefiting non-exempt children or a spousal annuity that is not actuarially sound.

Hughes v. McCarthy, 734 F.3d at 485. Thus, the Court held that, "an annuity that satisfies § 1396p(c)(2)(B)(i) need not satisfy § 1396p(c)(1)(F)." Hughes, 734 F.3d 484. Because the Court found the statutory language clear, it held that the evidence of Congressional intent—that the "DRA was enacted to close loopholes related to the purchase of annuities"—was "unavailing." Hughes, 734 F.3d at 486.

While there is no controlling precedent in the Commonwealth, a Superior Court, faced with a similar scenario, agreed with the reasoning of the Sixth Circuit, which it found "highly persuasive." Dermody v. Executive Office of Health & Human Servs., No. MICV2017-02342, 2020 WL 742194, at *5-*6 (Mass. Super. Jan. 16, 2020) ("[A]ny transaction that satisfies the sole benefit rule is exempt from the transfer penalty set forth in paragraph (1), including the annuity rules in subparagraph (F)").[5]

Also relevant here is the position of the Secretary of the Department of Health and Human Services (HHS), the federal agency that oversees Medicaid, on this statutory interpretation question.[6] HHS submitted an amicus brief to the Sixth Circuit

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[5] The Commonwealth cites to cases which, it argues, are to the same effect as Hutcherson. See Comm. Br. at 20. Having reviewed those cases, I disagree as to their relevance to the issue before me. While some obliquely address in dicta the issue of whether an asset transfer to an annuity that satisfies 42 U.S.C. § 1396p(c)(2)(B)(1) must also satisfy § 1396p(c)(1)(F)—see Lancashire Hall Nursing & Rehab. Ctr. v. Department of Pub. Welfare, 995 A.2d 540, 543 (Pa. Commw. Ct. 2010) (affirming application of look back penalty to community spouse's purchase of annuity that "did not designate the Commonwealth of PA as the remainder beneficiary"); Hegadorn v. Department of Human Servs. Dir., 931 N.W.2d 571, 595 (Mich. 2019) (McCormack, J. concurring), citing 42 U.S.C. 1396p(c)(2)(B)(i) and (ii) ("The purchase of a community-spouse annuity that satisfies the requirements of 42 U.S.C. 1396p(c)(1)(F) and (G)—a 'qualified' community-spouse annuity—will not trigger a divestment penalty, because the transfer is for 'the sole benefit of' the community spouse.")—most were not analogous at all.

[6] Persuasive HHS guidance on the federal Medicaid statutes is entitled to respect under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). See also Daley, 477 Mass. at 200.

in connection with the Hughes case providing its interpretation that an annuity for a community spouse must name the state as a contingent beneficiary to avoid the look back rule. According to HHS, "[t]he transfer of a community resource to purchase an actuarially sound annuity for a community spouse that provides payments commensurate with the community spouse's life expectancy, *and* that designates the institutionalized spouse as the primary remainder beneficiary and the state as the contingent beneficiary, is a transfer 'for the sole benefit of the individual's spouse' under 42 U.S.C. 1396p(c)(2)(B)(i)." Brief for the U.S. Dep't of Health and Human Servs. at 14, Hughes v. McCarthy, 734 F.3d 473 (6th Cir. 2013) (No. 12-3765), 2013 WL 3366469 (emphasis added). Further, HHS argued that:

> Section 1396p(c)(1)(F), added in the 2005 DRA, imposes an additional requirement (on top of the requirements that apply to transfers of assets in general) for annuities purchased for the sole benefit of a spouse, to ensure that those annuities do not confer a remainder benefit to *any party* other than a community spouse, a minor or disabled child, or the state (as specifically provided in the statute). Under this provision, if the state is named as a remainder beneficiary in the first position or in the second position after a community spouse or a minor or disabled child, the purchase of that annuity is not considered a transfer of assets for less than fair market value. This provision ensures that if either an institutionalized or community spouse annuitant does not survive the annuity's terms, the state, rather than a third-party beneficiary or heir, other than those specified in the preceding sentence, will be paid the remaining annuity payments up to the total amount of Medicaid assistance paid on behalf of the institutionalized spouse.

Id. at 19-20 (emphasis added). HHS also noted that, because in the Hughes case the annuity named the institutionalized spouse as the first beneficiary and the state Medicaid agency as the second, which did not strictly comply with the provisions of § 1396(c)(1)(F), the state would "benefit regardless" because "the remaining value of the annuity transfers from the deceased community spouse to the surviving institutionalized spouse and will affect the institutionalized spouse's Medicaid eligibility." Id. at 20.

The Commonwealth, through the Office of Medicaid (MassHealth) of the Executive Office of Health and Human Services, also has consistently interpreted § 1396p(c)(1)(F) to mean that annuities purchased with the community spouse as the annuitant must name the state as a remainder beneficiary to the extent of payments made on behalf of the institutionalized spouse. Those conclusions of the federal and state agencies charged with interpreting and applying the Medicaid law are entitled to deference. See Shelales v. Director of Off. of Medicaid, 75 Mass. App. Ct. 636, 640, (2009) (agency's interpretation of statute and regulations afforded "'considerable leeway' . . . unless the statute unambiguously bars the agency's approach.") (citations omitted).

D. Analysis

Julius bought the Annuity to spend down his and Suzanne's assets and make Suzanne eligible for Medicaid. Consistent with 42 U.S.C. § 1396p(c)(1)(F)(i) and the applicable Massachusetts regulations, Julius named the Commonwealth as a remainder beneficiary for the total amount of medical assistance paid on behalf of Suzanne, the institutionalized individual. After careful review, I agree with the Commonwealth that the 2006 amendment to the DRA was intended to allow states to reach community spouse annuities and, therefore, community spouse annuities must comply with 42 U.S.C. § 1396p(c)(1)(F)(i).

Although the Hutcherson Court did not discuss 42 U.S.C. § 1396p(c)(2)(B)(i), which I will address further below, I agree with the Hutcherson Court's reasoning.[7]

[7] I disagree with Jennifer's argument that, because Hutcherson did not address the sole benefit exception of section 1396p(c)(2)(B)(i), it is not on point and not persuasive. As noted, the facts in Hutcherson are squarely on point and the sole benefit provision pre-existed the enactment of the annuity rules in section 1396p(c)(1)(F). Further, I find Hughes, on which Jennifer relies, to be distinguishable. There, the community spouse had not died, the issue before the Court was the application of the look-back provision to the purchase of the annuity, the remainder

Allowing Jennifer to inherit what remains in the Annuity would frustrate the Medicaid statute. Julius would not have been permitted to transfer $270,000 in cash to Jennifer while Suzanne was institutionalized without triggering the look-back penalty and should not be able to do so now, via the Annuity, simply because he died before the expiration of the Annuity term. That there is no limitation on the amount of assets that can be placed in a community spouse's annuity further undercut's Jennifer's argument. In other words, taking Jennifer's argument to the logical extreme, there would be no reason that a community spouse could not put millions of dollars into an annuity and name the couple's children as beneficiaries as long as it was irrevocable and actuarially sound, i.e., the annuity payments would equal or exceed the purchase price. Then, if the community spouse died before the end of the annuity, the married couple would have been able to shield assets for the benefit of their heirs and to the detriment of the state, which had been and was still paying for the institutionalized spouse's care. Such a result would utterly frustrate the widely understood purpose of the MCCA, which was to prevent wealthy couples from qualifying for Medicaid assistance by sheltering their assets. Here, allowing Jennifer to take the $270,000 remaining in the Annuity—which was a spousal asset at the time Suzanne applied for MassHealth benefits—without recompense to MassHealth for the benefits provided to Suzanne frustrates the MCCA.

The "sole benefit" provision of 42 U.S.C. § 1396p(c)(2)(B)(i) does not alter my conclusion. That the transfer of assets from one spouse to the other or to a third party

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beneficiaries on the annuity were the institutionalized spouse and the state, and thus the state would, in any scenario, recover for the institutionalized spouse's care, and the Court did not need to but chose to address the issue of the applicability of section 1396p(c)(1)(F) to "promote finality in this litigation, as the issues require no further factual development and have been sufficiently presented for our review." Hughes, 734 F.3d at 481; see also 478-479.

for the "sole benefit" of the other spouse would not trigger the look-back penalty provision contained in section 1396p(c)(1) makes perfect sense where Congress provided that *all* of the resources of both spouses, however titled or held, would be considered to determine Medicaid eligibility of the institutionalized spouse. See 42 U.S.C. § 1396r–5(c)(2)(A); see also Hegadorn, 931 N.W.2d at 594 (McCormack, J. concurring) ("[I]n plainer terms: there is no reason to penalize an interspousal transfer of assets because resources belonging to both spouses are combined in determining an applicant's *eligibility*. Because spousal resources are accounted for in the Medicaid eligibility process no matter which spouse holds them, there is no need to penalize a transfer from one spouse to the other."). Section 1396p(c)(2)(B)(i) simply makes clear that a transfer of assets to or from a spouse will not trigger the look-back period. It says nothing about the purchase of an annuity for a spouse naming an heir or other third party as the remainder beneficiary.

Although, section 1396p(c)(2)(B)(i) provides an exception to the look-back contained in subsection (c)(1), I do not believe Congress intended to immunize community spouse annuities entirely from the requirements of section 1396p(c)(1)(F). Permitting a community spouse to purchase an annuity—thus spending down assets to create Medicaid eligibility for the institutionalized spouse—but name a third party as the beneficiary of the annuity in the event the community spouse's death would allow the community spouse potentially to shelter those assets without limitation, a result directly contrary to the purposes of the MCCA and the DRA. Certainly, the third-party beneficiary would recover nothing if the community spouse were to live his or her actuarial lifespan, but that does not change the very real potential that wealthy individuals could create the possibility of a large transfer of wealth to their heirs to the detriment of the state that is paying for the institutionalized spouse's care.

I agree with the Commonwealth that there is no conflict between the two provisions because the purchase of an annuity that provides for a beneficiary other

than the state is not an asset transfer for the "sole benefit" of the community spouse.[8] Thus, even though section 1396p(c)(2)(B)(i) is an exception to the look-back and annuity provisions contained in subsection (c)(1), it is not applicable to this situation, where a community spouse transfers assets to an annuity that provides for the possible transfer of those assets to the couple's heirs or another third party. Such an annuity is not for the "sole benefit" of the community spouse.

As an initial matter, I give CMS's interpretation of what constitutes "sole benefit" substantial deference. CMS has consistently interpreted "sole benefit" to prohibit transfers that provide the potential for funds to pass to contingent remainder beneficiaries. Indeed, the CMS State Medicaid Manual provides:

> A transfer is considered to be for the sole benefit of a spouse . . . if the transfer is arranged in such a way that no individual or entity except the spouse . . . can benefit from the assets transferred in any way, whether at the time of the transfer or at any time in the future.

Transmittal 64, § 3257(B)(6). I do not agree with the Sixth Circuit's analysis in Hughes. Although it recognized that neither the statute nor federal regulations define the term "sole benefit," 734 F.3d at 481, the Hughes concluded that an annuity is for the "sole benefit" of the community spouse if it is actuarially sound. That conclusion improperly collapses two concepts—actuarial soundness and sole benefit. Actuarial soundness is not the same as sole benefit and the terms are used differently in different parts of 42 U.S.C. § 1396p. Compare 42 U.S.C. §§ 1396p(c)(1)(G)(ii), (c)(1)(I)(i) and 42 U.S.C. § 1396p(c)(2)(B)(i). See also Mohamad v. Palestinian Auth., 566 U.S. 449, 456 (2012) ("We generally seek to respect Congress' decision to use different terms to describe different categories of people or things."). As noted, CMS has concluded that "sole benefit" means no one else may benefit from the asset transfer. Actuarial

[8] As a result, Jennifer's textual argument—that section 1396p(c)(1)(F) is limited to "this paragraph"—is not relevant.

soundness, on the other hand, as applied to annuities, refers to whether "the individual's life expectancy is commensurate with or coincides with the annuity term," and is used to discern whether the annuity was an abusive asset shelter. Zahner v. Secretary Pa. Dep't of Human Servs., 802 F.3d 497, 516 (3d Cir. 2015) (internal quotation marks and alterations omitted). As stated in the CMS State Manual:

> Annuities, although usually purchased in order to provide a source of income for retirement, are occasionally used to shelter assets so that individuals purchasing them can become eligible for Medicaid. In order to avoid penalizing annuities validly purchased as part of a retirement plan but to capture those annuities which abusively shelter assets, a determination must be made with regard to the ultimate purpose of the annuity (i.e., whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound.

Transmittal 64, § 3258.9(B). Thus, actuarial soundness is a necessary attribute of an annuity that is for the sole benefit of the community spouse but is not alone a sufficient attribute. As set forth above, an annuity for the sole benefit of the community spouse must also be arranged so that if the annuitant passes away before the end of the term, the only party that stands to benefit from the remaining balance is the state.

Further, as noted, the Hughes court was not presented with a situation where spousal assets were sheltered from the state via the annuity. That is because the first named beneficiary was the institutionalized spouse. See Hughes, 734 F.3d at 477. As a result, after the community spouse died, the amount remaining in the annuity would not have been placed out of reach of the state for purposes of Medicaid. Whether the institutionalized spouse received the income stream or the entire remaining value of the annuity, those funds would offset Medicaid eligibility in whole or in part. Hughes

simply did not address the situation here, the potential transfer of assets, via an annuity, to an heir.[9]

Put concretely, before Julius purchased the Annuity, he and Suzanne had slightly more than a half a million dollars, which they were required to use to pay for Suzanne's nursing home care. Rather than use those funds for Suzanne's care, Julius purchased the Annuity to remove half a million dollars from his and Suzanne's countable assets to make Suzanne eligible for MassHealth and have the Commonwealth pay for her nursing home care. That was permissible only so long as the annuity was irrevocable, actuarially sound, *and* the Commonwealth was the named remainder beneficiary pursuant to 42 U.S.C. § 1396p(c)(1)(F).

I further conclude, consistent with the reasoning in Hutcherson, that the Commonwealth's recovery is not limited to the amounts paid for Suzanne's care up to the date of Julius's death. See Hutcherson, 667 F.3d at 1072 ("To limit AHCCCS's recovery to the medical expenses incurred before [the community spouse's] death would allow the [couple] to keep money and transfer money that would have otherwise made them ineligible for Medicaid. The Medicaid Act, through the transfer penalty and the DRA amendments to the annuity provision, reflect a clear intent to prevent individuals from sheltering funds in this manner.").

Finally, if I am wrong on the statutory interpretation question, Julius designated the Commonwealth as the remainder beneficiary "for the total amount of medical assistance paid on behalf of the institutionalized individual pursuant to 130 CMR 520.007(J)(2)." Jennifer argues that the term "institutionalized individual" refers not to Suzanne but to Julius. Read without reference to the Medicaid statutory scheme, the language "institutionalized individual" is, at best, ambiguous. Based on the undisputed record, it is evident, and I find, that Julius intended "institutionalized

[9] The DRA provides for the possibility of preserving some assets for minor or disabled children. See §§ 1396p(c)(1)(F)(ii) and (c)(2)(A)(ii).

individual" to refer to Suzanne. As noted, (i) Suzanne identified the annuity as a Medicaid qualifying annuity for *her* benefit; (ii) Julius was not a Medicaid applicant nor an institutionalized individual at the time he purchased the Annuity; (iii) Suzanne acknowledged that Julius's failure to keep the Commonwealth as a "beneficiary of the annuity in the proper position" would result in the termination of *her* MassHealth benefits; and (iv) Jennifer does not dispute that Julius bought the Annuity in connection with the Medicaid application process for Suzanne. Accordingly, there is no evidence whatsoever that the term "institutionalized individual" referred to Julius rather than Suzanne. See Nadherny v. Roseland Prop. Co., 390 F.3d 44, 49 (1st Cir. 2004), quoting Boston Five Cents Sav. Bank v. Secretary of Dep't of Hous. and Urban Dev., 768 F.2d 5, 8 (1st Cir. 1985) (court may resolve contract ambiguity on summary judgment where there is undisputed extrinsic evidence that resolves the ambiguity as a matter of law or the extrinsic evidence is "so one-sided that no reasonable person could decide to the contrary."). Cf. Hershman-Tcherepnin v. Tcherepnin, 452 Mass. 77, 87 (2008) (resolving ambiguity in will on summary judgment record where "no party raise[d] a genuine dispute of material fact about the extrinsic facts surrounding the making of the will that would warrant a trial.").

When read against the backdrop of the Medicaid scheme, the meaning of the term "institutionalized individual" becomes clearer. See, e.g., Springfield v. Department of Telecomm. and Cable, 457 Mass. 562, 568 (2010), citing Restatement (Second) of Contracts § 202(3) (1981) (terms of art to be given technical meaning when used within specialized field); see also Normand v. Director of Office of Medicaid, 77 Mass. App. Ct. 634, 644 (2010) (justice requires consideration of intent as the "governing statute provides"). "The term 'institutionalized individual' is specifically defined by the statute to mean 'an individual who is an inpatient in a nursing facility, who is an inpatient in a medical institution and with respect to whom payment is made based on a level of care provided in a nursing facility, or who is described in

section 1396a(a)(10)(A)(ii)(VI) of this title.'" Hutcherson, 667 F.3d at 1070-1071, quoting 42 U.S.C. § 1396p(h)(3). Here, that definition captures only Suzanne.

Because I have held that the Commonwealth is entitled to recover on the Annuity for the amounts paid for Suzanne's nursing home care, Jennifer's 42 U.S.C. § 1983 claim fails as well. See McNamara v. Honeyman, 406 Mass. 43, 52 (1989) ("To establish a claim based on 42 U.S.C. § 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of State law and that the conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States."). Further, Jennifer's claim under 42 U.S.C. § 1983 fails because the Commonwealth is not subject to suit under that statute. See id. ("[T]he Commonwealth is not a 'person' under § 1983."); Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."); Canales v. Gatzunis, 979 F. Supp. 2d 164, 171 (D. Mass. 2013) ("It is well established, however, that neither states nor state officials sued in their official capacities for damages are 'persons' for purposes of § 1983.").

II. American National's Motion for Summary Judgment

Jennifer asserted counterclaims against American National for breach of contract and violation of G. L. c. 93A and c. 176D. When a dispute arose between the Commonwealth and Jennifer regarding the proper recipient of the remaining funds under the Annuity, American National appropriately filed a preemptive declaratory judgment action seeking clarification from the Court as to the rights and duties of the parties and appropriately brought an interpleader action pursuant to Mass. R. Civ. P. 22.

"General Laws c. 231A, § 1, allows courts to 'make binding declarations of right, duty, status and other legal relations sought thereby, either *before* or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen

and is specifically set forth in the pleadings.'" Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 705 (2002) (emphasis added), quoting G.L. 231A, § 1. "The purpose of this statute is to provide a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status, and other legal relations." Id. Disputes about contractual obligations are the quintessential subjects for declaratory judgment proceedings because parties to a contract can seek judicial resolution without potentially breaching the contract. See id. ("The determination of contractual rights is a proper subject of a declaratory judgment proceeding."). Finally, the purpose of interpleader "is to sort out the amounts and priorities of competing claims to a fund." National Lumber Co. v. Canton Inst. for Savings, 56 Mass. App. Ct. 186, 188 (2002).

Here, American National did not delay and did not take any steps to prejudice Jennifer. When confronted with the dispute over the proper recipient of the proceeds of the Annuity, American National took the appropriate and wise course, and that, by definition, cannot be a violation of G. L. c. 93A or 176D and does not constitute a breach of contract. See Rawan v. Continental Casualty Co., 483 Mass. 654, 663 (2019) (General Laws c. 176D and G. L. c. 93A prohibit "unfair claim settlement practices" by insurers, such as where an insurer refuses to pay a claim without having conducted an investigation and/or after "liability has become reasonably clear").

ORDER

For the foregoing reasons, the Commonwealth's Motion for Summary Judgment is **ALLOWED**; Jennifer Breslouf's Cross-Motion for Summary Judgment is **DENIED**. Judgment shall enter for the Commonwealth on the Interpleader and Declaratory Judgment Counts as follows:

The Court hereby **DECLARES** that the Commonwealth, the Executive Office of Health and Human Services and MassHealth properly interpreted 42 U.S.C. §

1396p(c)(1)(F) as applying to annuities for which the community spouse of an institutionalized individual is named as the annuitant.

The Court hereby **DECLARES** that the designation of the Commonwealth of Massachusetts as primary beneficiary to annuity proceeds in Annuity Contract No. 70010873, issued by American National Insurance Company, shall mean that the Commonwealth of Massachusetts is the beneficiary of such proceeds to the extent of total medical assistance paid by MassHealth on behalf of Suzanne Breslouf.

It is **FURTHER ORDERED** that for the remaining annuity benefit payments payable pursuant to Annuity Contract No. 70010873, issued by American National Insurance Company, American National Insurance Company shall direct such benefits to the Commonwealth of Massachusetts to the extent of the total medical assistance paid by MassHealth on behalf of Suzanne Breslouf.

The Motion for Summary Judgment of the Plaintiff and Counterclaim Defendant, American National Insurance Company is **ALLOWED**.

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Debra A. Squires-Lee
Justice of the Superior Court

June ___, 2021