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STATE OF MICHIGAN
IN THE SUPREME COURT

JEROME E. SIZICK, a protected individual, Plaintiff-Appellant,	Supreme Court No.: _____ Court of Appeals No.: 364321
v	
MICHIGAN DEPT. OF HEALTH & HUMAN SERVICES, Defendant-Appellee.	Saginaw County Probate Court No.: 21-141789-PO Honorable Patrick J. McGraw (P34430)

_____/

APPELLANT JEROME E. SIZICK APPLICATION

FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

Dated: April 10, 2024

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to grant an application for leave to appeal a decision of the Court of Appeals. MCR 7.305. The Court of Appeals in the case of In re Estate of Jerome E. Sizick, (Sizick II) Docket No. 364321 (unpublished) issued a decision on January 18, 2024 (Appendix 1). Appellant Sizick filed a Motion for Reconsideration with the Court of Appeals on February 8, 2024. The Motion was denied by the Court of Appeals on February 28, 2024.

The Saginaw County Probate Court issued an opinion orally on October 25, 2022. On December 13, 2022, the Probate Court entered an Amended Protective Order granting support to a dependent spouse by transferring the protected individual's assets and income to his dependent spouse (Appendix 2). The Court issued a second order granting retroactive application of the Amended Protective Order to June 21, 2021 (Appendix 3). Appellee filed a Claim of Appeal on December 28, 2022 involving the two Protective Orders issued under the Estates and Protected Individual Code (EPIC) at MCL 700.5401 et seq. and MCL 700.5408.

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STATEMENT OF ORDERS APPEALED FROM

On June 1, 2021, Janet Sizick filed a Petition for a Protective Order. On June 21, 2021, Judge Patrick J. McGraw of the Saginaw County Probate Court conducted an evidentiary hearing. On June 21, 2021, Judge McGraw issued a Protective Order granting support to the protected individual's spouse, transferring assets and income of the protected individual to the spouse, and granting expanded authority to conduct financial and property matters of the protected individual (Appendix 4). On July 12, 2021, DHS filed a Claim of Appeal. The Saginaw County Probate Court nor the Michigan Court of Appeals issued a stay of the Protective Order. On May 26, 2022, the Michigan Court of Appeals issued an unpublished decision in In re Estate of Jerome E. Sizick, Docket No.: 357785 (Sizick I) (Appendix 5). The appellate court affirmed the trial court's finding under MCL 700.5401(3)(a), vacated the finding under MCL 700.5401(3)(b) and remanded to the trial court for further findings under subsection (b) and to identify the property being transferred under MCL 700.5408. Id. at 7.

On August 25, 2022, Appellant Sizick filed a Petition to Conduct Evidentiary Hearing for the purposes of entry of an Amended Protective Order in light of the Court of Appeals decision to remand. Because of various adjournments and preliminary motions, Judge McGraw did not conduct an evidentiary hearing until October 25, 2022. On the record, the court issued an opinion on October 25, 2022 granting the Amended Protective Order and specifically approving the transfer of assets and income of the protected individual to his spouse. Amended Protective Orders were presented to Judge Patrick McGraw on November 1 and 4, 2022. Because of DHS' objections, Judge McGraw did not issue Amended Protective Orders until December 13, 2022 when he

granted the transfer of assets and income of the protected individual to the dependent spouse. In a second order, Judge McGraw approved granting retroactive application of the Amended Protective Order to June 21, 2021. DHS filed a Claim of Appeal.

On January 18, 2024, the Michigan Court of Appeals in the case of In re Estate of Jerome E. Sizick, Docket No.: 364321 (unpublished) (Sizick II) affirmed the Probate Court's findings with respect to MCL 700.5401(3)(a) but the Protective Order was vacated because the probate court applied the wrong legal framework in addressing MCL 700.5401(3)(b). Id. at 19. Appellant Sizick filed a Motion for Reconsideration with the Court of Appeals on February 8, 2024. The Court of Appeals denied the Motion for Reconsideration on February 28, 2024.

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STATEMENT OF QUESTIONS PRESENTED

1. Whether a petition for protective order for spousal support under MCL 700.5401 is premature and must be rejected unless a protected person has first qualified for the Medicaid program even if doing so nullifies the relief the protective order would otherwise provide?

   Court of Appeals says: Yes.

   Plaintiff-Appellant says: No.

   The Defendant-Appellee says: Yes.

2. Whether a probate court, in evaluating a petition for protective order of spousal support under MCL 700.5401, must disregard the Medicaid benefits available to a protected individual in measuring his needs and the amount of his assets and income available for the support of his spouse?

   Court of Appeals says: Yes.

   Plaintiff-Appellant says: No.

   The Defendant-Appellee says: Yes.

3. Whether MDHHS improperly manipulated the Court of Appeals' review of the protective order issued by Judge McGraw by refusing to process Jerome Sizick's Medicaid application within the 45-day standard of promptness required by federal law and MDHHS policy? Due to Jerome's application not being processed timely, that caused the Court of Appeals to vacate the protective order because Jerome experienced unmet needs he would have otherwise avoided. That in turn enabled MDHHS to take advantage of its unlawful action by rejecting Jerome's Medicaid application due to the absence of a protective order. None of this would have occurred if MDHHS had followed the law and processed Jerome's Medicaid application timely.

   The Court of Appeals did not answer this question.

   Plaintiff-Appellant says: Yes.

   The Defendant-Appellee says: No.

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STATUTES AND REGULATORY POLICIES INVOLVED

Medicaid

The Medicaid Program was established in 1965. It is a joint federal-state program in which the federal government reimburses the state for a portion of the cost for medical care for low-income individuals who are aged, blind, or disabled or who are members of families with dependent children. Harris v McRae, 448 U.S. 297 (1980); Cook v Dep't of Social Servs, 225 Mich App 318, 320 (1997). "Each participating state develops a plan containing reasonable standards…for determining eligibility for and the extent of medical assistance" within boundaries set by the Medicaid statute and the Secretary of Health & Human Services. Schweiker v Gray Panthers, 453 US 34, 36-37 (1981). At the federal level, Medicaid is administered by the Centers for Medicare & Medicaid Services (CMS) which is a part of the Department of Health & Human Services (HHS). HHS makes general policy and promulgates its position on Medicaid issues through the State Medicaid Manual and the Program Memorandum. In formulating these standards, States must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the secretary, available to the applicant." 42 USC 1396a(a)(17)(B). States electing to participate in the Medicaid Program are required to develop a respective plan which sets forth eligibility standards for those individuals seeking Medicaid. 42 USC 1396a(a). States choosing to participate in the Medicaid Program must meet a minimum federal standard threshold for eligibility which can be more expansive at the state's discretion. 42 USC 1396a(a).

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The Michigan Medicaid State Plan (MSP) is an agreement between the State of Michigan and the federal government which identifies the beneficiary eligibility policies in effect under Michigan's Medicaid policies. Michigan Medicaid State Plan is available online at www.michigan.gov/mdhhs.

> Although medically needy individuals meet the non-financial requirements under either the AFDC or the SSI programs, they become eligible for Medicaid Benefits only when their income and assets are reduced below certain established levels.

Hegadorn v DHS, 503 Mich 231, 247; 931 N.W. 2d 571 (2019).

> Michigan has elected to include this optional coverage for the medically needy in its State Medicaid Plan. Therefore, Michigan must comply with the requirements imposed by federal statute.

Hegadorn at 247. To qualify as medically needy for those over the age of 65, they must be eligible by income and resources below $2,000.00. Hegadorn at 247. The State of Michigan established its Medicaid Program under Title XIX as required by state statute. MCL 400.105. The Michigan Department of Health & Human Services (DHS) is authorized to implement and administer the Medicaid Program at the state level. MCL 400.1 et seq. Besides the Michigan Medicaid State Plan, DHS has also issued policies to administer the Medicaid Program which are found in BRIDGES Eligibility Manual (BEM) and BRIDGES Administrative Manual (BAM). These manuals are available online at www.michigan.gov/mdhhs.

In Michigan, a person who is applying for Medicaid Benefits who is identified as SSI-related (aged, blind, and disabled individual) are allowed to have no more than $2,000.00 in non-exempt assets. BEM 400; 42 USC 1382(a)(3). In determining the resources of an individual, certain assets are construed as exempt/excluded. BEM 400; 42 USC 1382b. Examples of excluded assets are the home including adjoining land;

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household goods and personal effects including furniture and furnishings, clothing, jewelry, and items of personal care; an automobile; and burial spaces including certain types of prepaid funerals.

> Because spouses typically possess assets and income jointly and bear financial responsibility for each other, Medicaid eligibility determinations for married applicants have resisted simple solutions. Wisconsin Dept. of Health and Family Servs v Blumer 534 US 473, 479 (2002); Hegadorn at 247-248.
>
> Prior to 1988, to become eligible for Medicaid Benefits, a married individual who was admitted to a nursing home was required to "spend down" all of the assets jointly held with his or her spouse who remained in the marital home… Hegadorn at 247-48.

Married couples either had to spend down their assets to make them paupers or conceivably confront divorce. It meant complete financial devastation for the community spouse. Essentially, a spouse would have to choose between poverty and divorce if a spouse entered a nursing home.

Spousal protection from impoverishment was added to the Medicaid program by a bill entitled the "Medicaid Community Spousal Protection Act of 1987". It was later incorporated as an amendment into the "Medicare Catastrophic Illness Coverage Act of 1988" (MCCA). According to one of its co-sponsor senators, George Mitchell, the Medicaid program had the terrible effect of forcing couples to divorce:

> This amendment is intended and will put an end to elderly women being forced to divorce their husbands in order to sue for support payments.

133 Cong. Rec. 29357 (1987). In support of the amendment, Senator Grassley spoke of the "truly grotesque" problem that the Medicaid spenddown inflicted on the elderly and the spouse's difficulty remaining in the home:

> I believe it is widely understood that the spend-down phenomenon Medicaid and the related problems of spousal impoverishment constitute one of the truly grotesque problems faced by older people. Some of my colleagues have already

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> described in some detail the kind of experience that some older people have had to face when a spouse goes into a nursing home. Truly this is a problem we must address. This is primarily, although not always, a woman's problem, since they are more often than men remain in the community when their spouse goes into a nursing home. Id. at 29358.

When the House considered the bill, one of the driving motivations was to enable the spouse to save her marriage and remain living in her home:

> In this bill, we reduce the risk of financial devastation from nursing home care by providing that the Medicaid program allow the spouse of a nursing home resident to retain enough of the couple's income and resources to continue to live in the community. No longer will a wife be driven to choose between poverty and divorce if her husband enters a nursing home.

Kevin C. Kelly, Protecting Assets for the Community Spouse When Long-Term Care is Needed, 13 Probate & Property, Mar.-Apr., 62 (1999). The House Committee reported that one of the driving problems that the MCCA fixed was the fact that the Medicaid agency, HCFA (now known as Centers for Medicare & Medicaid Services (CMS)) was ignoring court orders of support just as Appellant would do here:

> In some cases, courts have issued orders against institutionalized spouses requiring them to make monthly support payments and certain amounts to their spouses in the community. The policy of the Health Care Financing Administration (HCFA) is that, notwithstanding such an order, the income of the institutionalized spouse is to be considered available to him for purposes of determining the amount of his contribution toward the cost of nursing home care. The only part of his income which HCFA policy acknowledges as available to the community spouse is the specified maintenance needs allowance (Emphasis added).

House Committee on Energy and Commerce on H.R. 2470, reprinted in 1988 U.S.C.C.A.N. 892 (1987). The Committee Report clearly stated the bill's purpose to allow a spouse to live with independence and dignity.

> The purpose of these revisions is to assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity.

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Id. The goal was to provide a national system of spousal protection not limited by state law:

> This bill establishes a uniform national spousal protection, policy that applies in all States, whether or not they are community property jurisdictions (Emphasis added).

Id.

Medicare Catastrophic Coverage Act of 1988 (MCCA) is codified at 42 USC 1396r-5. As the Supreme Court explained,

> ...the MCCA was enacted to "protect community spouses from "pauperization" while preventing financially secured couples from obtaining Medicaid", which is why "Congress installed a set of intricate and interlocking requirements with which states must comply in allocating a couple's income and resources". Hegadorn at 248 quoting Blumer at 480.

SPOUSAL INCOME ALLOWANCE

42 USC 1396r-5 governs the Medicaid Program's treatment of income and resources of certain institutionalized spouses. Michigan must comply with these requirements. In particular, the MCCA allows a community spouse to keep a portion of the institutionalized spouse's income instead of having to apply it to care costs. The law describes 3 separate and independent methods available to Medicaid applicants for establishing the community spouse allowance for income.

(1) Determination by DHS caseworker

42 USC 1396r-5(d)(2) and (3) describes the methodology states must use to compute a community spouse income allowance (CSIA). DHS' policy governing the calculations of CSIA is contained in BEM 546, Pages 4-6 (Appendix 6). It adopts the requirements in the federal law. This determination is done by the DHS caseworker.

The first step in this process is that DHS caseworker totals the community spouse's shelter expenses. These include mortgage/land contract payments, home equity lines of

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credit or second mortgages, rent, property taxes, assessments, homeowner's insurance, renter's insurance, and maintenance charges for a condominium or cooperative.

The second step is to add $537.00 (2021) to the total shelter expense to reflect the heat and utility allowance in DHS Policy.

The third step is to take the total of the shelter expenses and the heat and utility allowance and then deduct a monthly shelter standard which is presently $646.50 (2021). The result is called the "Excess Shelter Allowance".

The minimum monthly maintenance needs allowance is set by federal law. At the time of the Court hearing, it was $2,155.00 (2021). DHS calls this the "basic allowance". The excess shelter allowance is added to the MMNA to arrive at a "total allowance". DHS Policy does not allow the agency to grant a total allowance that exceeds $3,259.50 (2021).

The final step is to determine the community spouse's countable monthly income. This is calculated by deducting the community spouse's monthly income from the total allowance. The result is the CSIA (Community Spouse Income Allowance).

The CSIA is the amount of the institutionalized spouse's income that the community spouse may retain for her/his support instead of paying it to the nursing home/SNF for the nursing home spouse's care.

(2) Administrative Hearing

MCCA provides two paths to an administrative review of the CSIA. 42 USC 1396r-5(e). It establishes the right of a Medicaid applicant or the community spouse to request an administrative hearing to seek a revision to the CSIA. This is not the usual procedure for an administrative hearing to challenge an agency's determination. Rather, it is presented in the federal law's definition of Medicaid resource standards as (1) an

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independent alternative to the standard CSIA, (2) that is determined under a different standard, and (3) that it is determined by different personnel, i.e., an administrative law judge. DHS has defined this procedure in BAM 600, (40-42) (Appendix 7).

The most striking feature of this policy is the way the State of Michigan has chosen to define "exceptional circumstances resulting in significant financial duress" referenced in the federal law. 42 USC 1396r-5(e)(2)(B). BAM 600 (40-42) prohibits the use of the administrative hearing alternative to increase the CSIA to pay for "goods and services purchased for day-to-day living". This includes clothing, drugs, food, shelter expenses, telephone, trash pickup, doctor's services, entertainment, heat, utilities, taxes, car payments, car insurance and maintenance, fuel, bus fair, and employment expenses. For persons who need an increase in the CSIA to help pay for everyday living expenses, there is no remedy available through the administrative hearing system. The only example of "exceptional circumstances resulting in financial duress" in the DHS Policy is "the need for the community spouse to pay for supportive and medical services at home to avoid being institutionalized". The policy also says there is no "financial duress" if the community spouse could meet expenses using her/his assets.

(3) Increasing the spousal allowance by court order

In 42 USC 1396r-5(d)(5), Congress authorized a judicial mechanism for obtaining relief from the standard CSIA. It directs state Medicaid agencies to set the CSIA by using the amount transferred under a court order if that amount is greater than the amount resulting from DHS determination or the administrative hearing process, described above. It states:

> (5) COURT ORDERED SUPPORT. If a court has entered an order against an institutionalized spouse for monthly income for the support of the community

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> spouse, the community spouse's monthly income allowance or the spouse shall not be less than the amount of the monthly income so ordered.

The State Medicaid Plan, Attachment 2.6-a, Page 5a, Part 7.a.1 says that Michigan sets maintenance standards used to calculate monthly income based on the formula contained in Section 1924(d) of the Social Security Act (Appendix 8). Section 1924(d)(5), 42 USC 1396r-5(d)(5), requires that CSIA for the community spouse not be less than the amount of the monthly income ordered by a court for the support of a community spouse. As previously discussed, the legislative history of MCCA shows that Congress recognized that the standard CSIA would correct an injustice in some cases. Court ordered support option is presented in the federal law's definition of Medicaid resource standards as (1) an independent alternative to the standard CSIA or the administrative hearing for revision of the CSIA, (2) that is determined under a different standard, and (3) that is determined by a different personnel, i.e., the Courts.

The State Medicaid Plan as cited above and DHS Medicaid Policy in BEM 546, Page 6 reflect the same federal law requirements without restriction:

> **Exception:** Use Court-Ordered Support as the community spouse income allowance if:
>
> - The L/H patient was ordered by the Court to pay support to the community spouse **and**
> - The Court-Order amount is **greater** than the result of step 5.

In this policy, "Step 5" refers to the standard CSIA. "L/H Patient" refers to the nursing home spouse. Both the federal law and DHS Policy explicitly acknowledge the authority of a State Court to enter an Order of Support as a lawful alternative for setting spousal income allowance in Michigan's Medicaid program. In Re Vansach Estate, 324 Mich App 371 (2018) decision specifically acknowledges that probate courts have authority to

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enter orders requiring an institutionalized spouse to provide support for a community spouse.

COMMUNITY SPOUSE RESOURCE ALLOWANCE

When Congress enacted MCCA, it also created a set of intricate and interlocking Medicaid eligibility requirements for allocating a married couple's assets when one spouse applies for Medicaid to help pay the cost of long-term care services. 42 USC 1396r-5. Resource allocation is controlled by 42 USC 1396r-5(c) and (f). Michigan must comply with those requirements. In particular, MCCA allows a community spouse to keep a portion of the total countable resources instead of having to apply it to the cost of care for the institutionalized spouse. The law describes 3 distinctive methods available for a Medicaid applicant for establishing the dependent's resource allowance.

1. Determination by DHS caseworker

For purposes of establishing the institutionalized spouse's Medicaid eligibility, a portion of the couple's assets is reserved for the benefit of the community spouse. 42 USC 1396r-5(c)(2). To determine the reserved amount (the community spouse resource allowance) (CSRA), the total of all of the couple's countable resources (whether owned jointly or separately) is calculated from the date the institutionalized spouse started a period of at least 30 consecutive days where s/he is in the institutional setting such as a hospital and/or a SNF/nursing home. DHS policy for this methodology is set forth in BEM 402 (Appendix 9). It is often referred to as the Initial Assessment. As previously discussed, some assets are exempt such as the home and its adjoining land, 1 family vehicle, term life insurance, personal property and household belongings, and cemetery lots. 42 USC 1382b; 42 USC 1396r-5(c)(5). The DHS caseworker then divides 1/2 of the couple's countable assets. See 42 USC 1396r-5(f)(2). Accordingly, the protected community

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spousal resource amount equals 1/2 of the total countable assets not to exceed $130,380.00 (2021) but assures a minimum resource amount to the community spouse of $26,076.00 (2021), whichever is greater. The DHS caseworker makes this determination according to BEM 402(9).

2. Administrative hearing

MCCA provides that an institutionalized spouse or a community spouse may request an administrative review of the CSRA under 42 USC 1396r-5(e). It specifically allows either spouse to establish that the CSRA is inadequate to raise the community spouse's income to the Minimum Monthly Maintenance Needs Allowance and allows the community spouse an increased CSRA which will provide a Minimum Monthly Maintenance Needs Allowance as defined by the federal law. BEM 402 allows for an Administrative Hearing as defined by BAM 600 (40-42). It is found under the community spousal income allowance section. According to BAM 600 (41),

> The ALJ may also grant a greater protected spousal amount when necessary to raise the community spouse's income to the total allowance for the community spouse. The community spouse's income for this purpose includes the maximum amount the long-term care facility and/or hospital (L/H) client could make available to their community spouse per BEM 546.

This administrative remedy is a very limited exception under administrative review.

3. Increasing the resource allowance by court order

Finally, 42 USC 1396r-5(f)(3) allows transfer under a Court Order

> **Transfers under Court Orders**
>
> If the court has entered an order against an institutionalized spouse for the support of the community spouse, Section 1396p of this title shall not apply to amounts of resources transferred pursuant to such orders for the support of the spouse or a family member (as defined in Subsection (d)(1)).

Section 1396p addresses liens, adjustments and recoveries, and transfers of assets. It discusses, at length, Trusts and Annuities. BEM 402 (10) states the following:

> 3. The amount of assets transferred to the community spouse by the client pursuant to a court order requiring the client to:

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- Pay support to the community spouse, and

- Transfer assets to the community spouse for the support of the community spouse or a family member. Family member is defined under family allowance in BEM 546.

SSI-R Related MA Only

If a Court has ordered a transfer of assets to a spouse for the spouse's support, use the value of the assets transferred by the Order as the Protected Spousal Amount…

Congress and the House Committee on Energy and Commerce recognized that the administrative forum may not be the best place to determine the "special circumstances affecting a particular community spouse."

> The committee recognized that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affecting a particular community spouse. The bill therefore provides that, if a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse's monthly income allowance must be at least as great as the amount of the income order to be paid.

1988 U.S.C.C.A.N. 892 (1987). The three part solution that MCCA provides comports with the role of administrative agencies in our law. The power of the agency to determine spousal need is strictly limited. Where discretion is needed to make that determination, Congress left that to the court system with its hundreds of years of experience in matters of domestic relations. Congress put an end to the Medicaid Agency ignoring court orders; and spouses were no longer forced to face the indignity of divorce or being forced to move from their familial home. The State Medicaid Manual as previously cited states that the State of Michigan will comply with the federal standards in providing a resource to the community spouse. Supplement 13 to Attachment 2.6-A.

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INTRODUCTION AND REASONS FOR GRANTING APPLICATION

Michigan Department of Health and Human Services (MDHHS) policy, the Michigan State Medicaid Plan and federal law all recognize court orders of spousal support as a legitimate means of facilitating a married couple's eligibility for the Medicaid program to cover the cost of long-term services. However, the Court of Appeals has interpreted the part of the Estates and Protected Individuals Code (EPIC) governing protective orders to effectively block married couples in Michigan from obtaining a probate court order of spousal support to preserve a family's financial resources and facilitate a protected individual's eligibility for the Medicaid program. The Court's restrictive interpretation of MCL 700.5401(3)(b) reflects a misunderstanding of how the Medicaid program works in Michigan and is grounded on considerations not contained in EPIC nor in Michigan case law. The Court should grant this application because:

- The issue has significant public interest to all Michigan citizens needing long-term care services and it involves the Michigan Department of Health and Human Services, one of the state's agencies.

- The issue involves legal principles of major significance to the State's jurisprudence is of great importance to Michigan and its citizens. Its resolution will inform Michigan citizens and local probate courts on whether and how protective orders under MCL 700.5401 may be issued to provide support for a protected individual's spouse while facilitating his ability to qualify for the Medicaid program to help pay for long-term care services.

- The Court of Appeal's decision and the prior Court of Appeals decisions on which it relies are clearly erroneous and will cause material injustice.

This case is a good vehicle for deciding the questions presented because it is typical of the facts and issues presented in petitions for protective orders of spousal support filed in local probate courts throughout Michigan as part of a married couple's plan to secure Medicaid benefits to help pay for a protected individual's long-term care costs.

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STATEMENT OF FACTS AND PROCEEDINGS

Jerome Sizick is presently 85 years old. He suffers from Alzheimer's type dementia. He is wheelchair bound. He suffered a heart attack and a mild stroke. He is unable to write checks, take care of his banking accounts, take care of his home, or handle any other financial affairs. See Estate of Jerome E. Sizick, (Mich Ct App) Docket 357785, May 26, 2022 (unpublished) (Sizick I) P1-2, 4.

Jerome is married to Janet Sizick who is presently 81 years old. They have been married for 63 years. Tr31.

Jerome worked 38 years at General Motors as an hourly employee. Tr10-11, 33. Janet had an agreement with her husband that she would stay at home to raise the four children. Tr33, 7. When the youngest was attending school all day, Janet started working part-time. Tr33. When all of the children had graduated school, she went to work full-time. Tr33-4. However, she never acquired a pension, a 401k, or any retirement plan. She retired when she was 62. Tr34.

HOSPITALIZATION/NURSING HOME PLACEMENT

On March 5, 2021, Jerome was hospitalized. Tr12. On the same date, his wife, Janet, was also hospitalized due to sepsis and the inability to walk. Tr12-13, Tr31. On March 13, 2021, Jerome and Janet were each discharged to a nursing home for rehab. Tr13, 31. On March 18, 2021, Jerome suffered a heart attack resulting in being re-hospitalized. Jerome was discharged from the second hospitalization to a nursing home where he remained until April 19, 2021 when he suffered a seizure and mild stroke requiring additional hospitalization. On April 26, 2021, Jerome was discharged from the hospital to the nursing home where he remains a patient resident today. See Petition to Conduct Evidentiary Hearing, P4 (Appendix 10).

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Janet remained in a nursing home from March 13 until April 2, 2021. Tr13. In order to make her home suitable for her return, over $6,000.00 was spent in renovating the bathroom and making other accommodations to the house. Tr13-14, Ex3. She initially paid for professional home health care services until family members began providing assistance and care she required. Tr14. On May 14, 2021, insurance coverage to pay for Jerome's nursing home care ended; and the Sizick family started paying privately for his nursing home care. Supplement to Petition for Protective Order (Supp) P5-6 (Appendix 11).

PROBATE PETITION/MEDICAID APPLICATION

On June 1, 2021, Janet filed a Petition for a Protective Order under MCL 700.5407 and 700.5408. Prior to the court hearing, on June 16, 2021, Janet submitted an Initial Assessment to the Saginaw County Department of Health & Human Services (DHS). Tr40-1, Ex14. The purpose of filing an Initial Assessment was to declare the countable assets that Jerome and Janet owned (individually and jointly) on the date Jerome was first admitted to a hospital for continuous care (a/k/a the "snapshot date"). Supp P9-10, Tr40-1. Per Medicaid policy, some assets are exempt such as their home, personal property, household items, 1 family vehicle, term life insurance, and cemetery lots. BRIDGES Eligibility Manual (BEM) 400 & 402; Supp P10. All assets were clearly identified as a part of this process.

Based on the information provided by Janet on the Asset Declaration, on June 17, 2021, DHS issued an Initial Asset Assessment Notice determining that the Sizicks had $203,027.54 in countable assets. Tr41-3, Ex16. Per Medicaid policy, this determination would establish a so called "protected spousal amount" for Janet of one half that figure, or $101,513.77 subject to a court order establishing an alternate amount. BEM 402(10).

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On June 18, 2021, Mrs. Sizick, acting as Power of Attorney for her husband, submitted a Medicaid Application. Tr43-4, Ex15.

Janet's Petition for Protective Order was filed in Saginaw County Probate Court on June 1, 2021 seeking to establish an alternate protected spousal amount of $203,027.54 in accordance with BEM 402. Janet's Petition alleged the threshold jurisdictional allegations that Jerome was an adult unable to manage his property and business affairs because of mental deficiency and/or physical illness/disability; and that as a result, his property would be wasted or dissipated unless proper management was provided; and/or the adult or his dependent were in need of money for support, care, and welfare and the protection was necessary. See Supplement. P4. Because some financial institutions, including GM Benefits & Services Center and Prudential Insurance Co. would not honor her authority under the Durable Power of Attorney (DPOA), Tr24, 26, Janet petitions also requested that the Court validate the DPOA that Mr. Sizick executed on May 10, 2021 designating her as his Agent; as well as granting her expanded authority to conduct all financial matters utilizing the Protective Order. Tr24, Ex27, Supp P7. Finally, Janet also requested a Protective Order directing that Jerome's and Janet's accumulated assets be transferred to Janet and that a portion of Jerome's monthly income be assigned to her for support.

ZOOM HEARING HELD ON JUNE 21, 2021

To support her request to transfer assets and provide income from Jerome, Janet prepared a detailed budget of all of her monthly expenses which was submitted to the Court and made part of the record. Supp P3, Tr14-16, 34. At the hearing, Janet and one of the Sizick's children testified that they spent hours developing this detailed monthly budget which indicated that Janet needed $3,426.00. Janet testified that the income

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would be needed for a variety of expenses including funeral arrangements, additional renovations to the house, out-of-pocket medical expenses, and on-going legal fees. Tr13-16, Supp P4. Without contribution from Jerome's income, Janet's sole source of monthly income was a net Social Security Benefit of $682.00. Tr9, Ex1. Evidence presented showed that, at the time, Jerome's net monthly Social Security Benefit was $1,600.00 and monthly General Motors Pension Benefit of $1,349.29. Tr9, 11, Ex1 and 2.

A Guardian ad Litem (GAL) appointed by the Court met with Jerome to advise him of his rights and issue a Report. The GAL met with Jerome twice within a week. Initially, Jerome vacillated before telling the GAL that he agreed to the Petition. Sizick I, P4.

The Attorney General filed an Appearance at the hearing and verbally objected on the record. After finding that the Court had jurisdiction and venue, the Sizick I Appellate Court noted in its decision,

> ...Sizick suffers from multiple health conditions that require continuous nursing care, making it unlikely that he will ever return to independent living. In light of the fact that witness testimony and the GAL's Report were unchallenged regarding Sizick's health issues, the trial court did not err in determining Sizick was unable to manage his property or business affairs because of mental deficiency and physical illness under MCL 700.5401(3)(a). Sizick I, P4-5.

The Probate Court determined that the adult had dependents in need of money for support, care, and welfare and protection was necessary to obtain that money and property. Tr39-41 (6-21-2021 Hearing). The Court acknowledged the information it received from testimony regarding the Sizick's assets and income and also acknowledged that this property and income was accumulated during their marriage. Id. The Court also examined Janet's extensive need and her desire to continue to pay various expenses associated with her husband. Id. Examining the Vansach equities, the

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Court assigned Janet a Support Order of $2,318.00 monthly from her husband's monthly income. The Court further issued a Protective Order on June 21, 2021, pursuant to EPIC and federal statute, transferring 100% of the countable assets to Janet as support. The Court also validated the DPOA and gave Janet expanded authority to conduct financial affairs of Jerome.

PROCEEDING ON APPEAL/DELAYED IN PROCESSING MEDICAID APPLICATION

On July 12, 2021, DHS filed a Claim of Appeal. No Stay was entered by either the Probate Court or the Michigan Court of Appeals. Tr51. On July 28, 2021, a copy of the Protective Order was forwarded by Sizick to the DHS caseworker. Tr44-5, Ex17. Through the expanded authority granted in the Protective Order, an additional value was discovered in Jerome's life insurance policy. It increased the Sizicks' countable assets to approximately $213,500.00. Ex18. On August 6, 2021, this information with a completed Medicaid application was given to DHS to process so the Medicaid case could be opened. Tr45.

According to DHS BRIDGES Administrative Manual (BAM) 115 (15-16), the Medicaid Application was to be processed within 45 days. Tr47, Ex21 (Appendix 12). Furthermore, BAM 600 (42-3) specifically mandates DHS to implement the hearing decision pending a court appeal unless a court issues a stay. Despite the specific mandate, attorneys in the Bureau of Legal Affairs for DHS, in conjunction with the Assistant Attorney General, sent an email to the DHS caseworker:

> **Please do not process the case, we need to ensure the Department does not have a determination because (for a lack of a better phrase), that will mess up our Appeal…**

Tr45-7, Ex19 (Appendix 13). Based on these instructions, the DHS caseworker never processed the Medicaid Application submitted to DHS. Tr45-7.

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The Michigan Court of Appeals issued its unpublished decision in Sizick I on May 26, 2022 in which it affirmed the Probate Court's Order finding under MCL 700.5401(3)(a), vacating the finding under MCL 700.5401(3)(b), and remanding to the trial court for further findings under subsection (b) and to identify the property being transferred under MCL 700.5408. Sizick I, P7. Specifically, the Appellate Court found that the Probate Court did not err in finding clear and convincing evidence that Jerome Sizick was an adult who was unable to manage his property and financial affairs because of mental deficiency and physical illness/disability. However, the Appellate Court "reluctantly agreed" that the Probate Court erred in making a determination of need in the absence of a final Medicaid determination as required by In Re Estate of Schroeder, 335 Mich App 107 (2020). As the Court noted, "there is no cited authority for Schroeder's assertion that 'there must actually be a Medicaid determination regarding eligibility and patient-pay amounts'". The Sizick I panel was bound to follow Schroeder. MCR 7.215(J)(1). The Court of Appeals also stated that the Probate Court erred by failing to identify and value the assets being transferred in the Protective Order as required by Schroeder. Sizick I, P5-6.

ON REMAND

On June 8, 2022, the DHS caseworker issued a Notice of Case Action denying the Medicaid case in which she stated that the value of the countable assets exceeded the Medicaid resource limit. Tr47, Ex24. More than 261 days elapsed before a decision was made. The Protective Order was never considered as part of the Medicaid determination. Janet filed a Petition to Conduct Evidentiary Hearing for the purposes of an Amended Protective Order in light of the Court of Appeals' decision to remand for further findings. That petition was filed on August 26, 2022, but because of various

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adjournments and preliminary motions, the Court did not conduct its evidentiary hearing until October 25, 2022. The Court heard testimony from Janet; Julie Gries (child of the Sizicks); the DHS caseworker assigned to the Medicaid case; and a financial representative of the nursing home where Jerome is a patient resident. The Court also admitted 27 Exhibits into evidence without objection.

Janet attended the hearing in a wheelchair and was using supplemental oxygen. Tr27-9. Extensive testimony was provided by Julie Gries and Janet as to why Janet was a dependent spouse in need of support. This included the fact that Janet had fallen several times since the last hearing and had several visits to the Emergency Room. Tr27-8. Also placed on the record was the fact that since the last hearing, Janet has had to hire chore/attendant care, 2-3 hours daily, at an hourly cost of $20.00-$25.00. Tr35-6. In addition, evidence was presented that additional renovations were needed to the house in order for Janet to continue to live safely and independently. Tr35.

Janet also testified that since the last hearing and in reliance on the Court's order, she spent approximately $28,500.00 for funeral and cemetery expenses for her and her husband. Tr15-7, 27 Ex25. She also stated that she continues to make payments to enhance his on-going life. Tr7-27. Janet also testified that she is paying approximately $100.00 monthly for out-of-pocket medical and drug expenses not covered by Jerome's insurance. Tr36.

Evidence was presented that, due to inflation, Janet's monthly expenses had increased to $3,800.00. Tr15-34. Details of the budget were previously outlined in the Supplement to the initial Petition presented to the Court. To comply with the instructions of the Appellate Court, extensive testimony was presented regarding the Sizick's assets, the value of those assets, and the identity of the owner. Tr17-27, Ex4-13.

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The representative from the nursing home testified that Janet paid Jerome's May 2021 nursing home bill of $4,405.00. Tr62-3, Ex26; and that starting in June, 2021 and every month thereafter in 2021, Janet paid $573.00 to the nursing home. Tr63, Ex26. Starting in January of 2022, Janet paid $654.00 monthly to the nursing home. Tr63, Ex26. The fact that these payments accurately and completely satisfied Jerome's obligations based on the prior order of the Saginaw County Probate Court was not disputed. Regardless, because the Medicaid application was never processed, there remained an outstanding balance to the nursing home through October of 2022 $134,669.00. Tr63-4, Ex26.

In the Court opinion and in the Order, the assets were summarized:

> Specifically, they jointly own a house…with a value of $100,800.00. Janet Sizick is a tenant-in-common with 3 other siblings in real estate…having a value of $40,000.00. There were 7 joint accounts held in credit unions amounting to approximately $144,366.00. Jerome Sizick owned 63 shares of Prudential Stock equaling $5,712.00 and he was the owner of a life insurance policy with a cash value of $10,500.00. These values were based on information as of March of 2021. Finally, Mr. Sizick owned 2 vehicles that had an approximate value of $40,000.00.

After hearing extensive testimony, the Court reviewed the Sizick I Appellate Court's decision in issuing its initial opinion. The Probate Court stated:

> [t]he remand affirmed the Court's findings under 700.5401(3)(a), that is that Mr. Sizick is unable to manage his property and business affairs effectively for reasons of mental deficiency and physical illness or disability. That has not changed here today and, in fact, the Court affirmed that.
>
> The Court vacated the findings under 700.5401(3)(b) and remanded for further findings under subsection (b), meaning they vacated my findings but remanded for me to make further findings indicating, and in my comment here, that they did not vacate my entire Order nor vacate the Order for purposes of letting this go on.

Tr69. The Court then noted that the Sizick I Appellate Court distinguished itself from other cases by not vacating the entire Order and

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> ...they were very careful in what they did on affirming the finding under 5401(3)(a) and vacating the finding under 700.5401(3)(b) for further findings, in my opinion, because they felt it was probably met at this hearing and that they also added quote, "to identify the property of Mr. Sizick being transferred under 700.5408---to identify the value of the assets being transferred in the Protective Order...," and citing 5408, "...that if it is established in a proper proceeding that a basis exists as described in Section 5401 for affecting the property and business affairs, the Court may direct, authorize, or ratify transactions necessary or desirable to achieve ...a care arrangement meeting with the protected individual's foreseeable needs...
>
> The Court also on remand, as it felt it did initially, must now consider Mrs. Sizick's needs and resources as well as Mr. Sizick's needs and, quote, "circumstances," unquote. It isn't defined as needs. It's defined as quote, "circumstances" in Vansach at 395 and 396. So I need to consider Mr. Sizick's needs, the interest of his creditors and the interest of Mrs. Sizick.

Tr69-71.

The Court thoroughly examined witnesses and reviewed the evidence related to Janet's monthly budget. Tr72-4. The Court held that Janet did not need to get her hair done, did not need to read the newspaper or other magazines, did not need to recreate, contribute to her church, or have money to purchase clothes or shoes. Tr73.

> ...however, those would be overrun by chore providers that she now needs which we heard were $75.00 a day and medical drugs for her husband which are running $100.00 a month at this point in time.

Tr73.

The trial court also carefully analyzed all of the assets which had been presented by testimony and exhibits. Tr73-4. The Court reaffirmed that clear and convincing evidence had been established to satisfy MCL 700.5401(3)(a) which the Court of Appeals had previously acknowledged. The Probate Court then noted that its previous findings under MCL 700.5401(3)(b) had been vacated and remanded for further findings in order to identify the property being transferred under MCL 700.5408.

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> ...I have identified all of the property that they between the two of them, who owns it and what is owned. As a result of that, the Court is going to issue an Amended Protective Order in which the Court will transfer 100% of the assets of Jerome Sizick accumulated during their lifetime to Janet Sizick. The Court will order spousal income from Jerome of $2,318.00 per month. ...The Court believes that because they did not vacate the entire Order but only vacated the findings that I made at time of value without identifying whose was whose, that the Order would be effective as back to June 21, 2021, and will issue an Order back to that date.

Tr75.

Although the Orders were presented to the Court on November 1 and 4, 2022, the Court did not conduct a hearing on the objections by DHS on the Amended Protective Orders until December 13, 2022. The Court stated in granting the Amended Protective Orders that

> [T]he Court has reviewed its file once again and my position is the same...except it may be making a comment that if this was a new Order they wanted, why would they [appellate court] remand for further findings because further findings require that I make findings on something that already existed.
>
> As I explained in the prior hearing, that they did vacate findings under 700.5401 and remand it for further findings under subjection b which wanted me to continue. They did not vacate my entire Order or vacate the Order for purposes of letting this go on. And, as I have indicated, all of the other cases...vacated the whole Order, this case they did not, and that was for the reason that they wanted it to come back and just make little bit more specific findings. Maybe, they did not understand that I had at that point but I did and submitted the same findings again with some exhibits so they could continue the needs and resources of both parties.

Tr11-12. Accordingly, the Court entered its Amended Protective Orders and issued them effective as of June 21, 2021. DHS filed a Claim of Appeal.

SIZICK II

The decision in the Estate of Jerome E. Sizick, (Mich Ct App) Docket No.: 364321 (unpublished) was issued January 18, 2022 (Sizick II). Citing to Schroeder, the Appellate Panel concluded that because there was no Medicaid determination, the

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Probate Court failed to operate under the correct legal framework when addressing MCL 700.5401(3)(b). Id. at 19. The Court also concluded that the Probate Court failed to comply with the standards as set forth in Vansach. They concluded that the Probate Court failed to consider Jerome's needs and circumstances in rendering its opinion. Accordingly, the Sizick II appellate court set aside the Probate Court Orders. In dictum, the Appellate panel concluded that the Probate Court must use "current information about the value of Jerome's assets and Jerome's interest in those assets". Id. at 19.

STANDARD OF REVIEW

Jurisdictional questions are reviewed de novo by the Court. L&L Wine & Liquor Corp v Liquor Control Comm., 274 Mich App 354, 356; 733 NW 2d 107 (2007). In Cruz v State Farm Mut Auto Ins Co, 466 Mich 388, 399; 648 NW 2d 591 (2002), the Supreme Court ruled that issues of statutory construction are reviewed de novo and the primary rule is to give effect to the intent of the legislature. The court must begin its analysis by "examining the plain language of the statute". Driver v Naini, 490 Mich 239, 246-247; 802 NW 2d 311 (2011).

A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning" Krohn v Home-Owners Ins Co, 490 Mich 145, 156; 802 NW 2d 281 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written". Puhutski v City of Allen Park, 465 Mich 675, 683; 641 NW 2d 219 (2002) (quoting DiBenedetto v West Shore Hosp, 461 Mich 394, 402; 605 NW 2d 300 (2000)). Only when the statutory language is ambiguous may a court consider evidence outside the words of the statute to determine the legislature's intent. Sun Valley Foods Co v Ward, 460 Mich 230, 236; 596 NW 2d 119 (1999). "An ambiguity of statutory language

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does not exist merely because a reviewing court questions whether the legislature intended the consequences of the language under review. An ambiguity can be found only where the language of a statute, as used in its particular context, has more than one common and accepted meaning." Papas v Gaming Control Board, 257 Mich App 647 658; 669 NW 2d 326 (2003).

Appeals from a probate court decision are on the record, not de novo. In Re Temple Marital Trust, 278 Mich App 122, 128; 748 NW 2d 265 (2008). The Appellate Court will review a "trial court's factual findings for clear error, In re Townsend Conservatorship, 293 Mich App 182, 186; 809 NW 2d 424 (2011), while its dispositional rulings, including a decision to enter a protective order are reviewed for an abuse of discretion". In re Bittner Conservatorship, 312 Mich App 227, 235-236; 879 NW 2d 269, 274 (2015); In re Vansach Estate, 324 Mich App 371, 385 (2018). Citing to Bittner, supra, the Vansach court stated that "a finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made even if there is evidence to support the finding. An abuse of discretion occurs when court's decision falls outside the range of reasonable and principled outcomes. Vansach, supra at 385.

ARGUMENT

The Court of Appeals recitation of the facts of this case ignores the context in which Jerome Sizick applied for the Medicaid program to help pay for his nursing home costs and in which Janet Sizick petitioned the probate court for a protective order of spousal support. It was in Jerome's best interests to use a lawful Medicaid planning option created by Congress and recognized by the Michigan Department of Health and Human Services (MDHHS) in its official policies for securing Medicaid eligibility to help pay for his nursing home costs while preserving more the couple's financial resources than would otherwise be

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available to meet Janet's living needs in the community for the rest of her life. In evaluating whether Judge McGraw abused his discretion in issuing the protective orders in this case, the Court of Appeals ignored the interplay between the petition for protective order and Jerome's application for Medicaid benefits. It treats the two as if they are unrelated. In doing so, the Court's opinions create and exacerbate the real harm to Jerome in which the protective orders were designed to avoid. They also effectively bar all Michigan citizens from using this legitimate means of securing Medicaid eligibility on favorable terms.

I. The interplay between a protective order of spousal support and a couple's eligibility for Medicaid to help pay for long-term care services.

A. The legal base for Michigan's Medicaid program.

In 1965 Congress established the Medicaid program to provide federal and state funding of medical care for individuals who satisfy certain eligibility criteria. Pub. L. No. 87-97, Stat. 386, 343-352, codified at 42 USC 1396-1396w-5. At the federal level, Medicaid is administered by the Secretary of Health and Human Services who in turn exercises her authority through the Centers for Medicare and Medicaid Services (CMS). In Michigan, the Medicaid program is administered by MDHHS.

To implement Medicaid in Michigan, the State Medicaid Plan was developed. It contains standards for determining eligibility and the extent of medical assistance available within the parameters set by the federal Medicaid law. MDHHS also issues its Medicaid eligibility policies and procedures in its BRIDGES Eligibility Manual (BEM) and its BRIDGES Administrative Manual (BAM).

In 1988 Congress enacted the Medicare Catastrophic Coverage Act (MCCA). It created a set of intricate and interlocking Medicaid eligibility requirements for allocating a married couple's income and assets when one spouse applies for Medicaid to help pay the

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cost of long-term care services. Hegadorn at 248 quoting Blumer at 480. Section 1924 of the Social Security Act, 42 USC 1396r-5, is the federal statute governing the Medicaid program's treatment of income and resources of certain institutionalized spouses. Michigan must comply with those requirements.

B. The Medicaid program's treatment of the countable assets owned by the Sizicks.

As the Court's recitation of the facts of this case shows, the Sizicks owned approximately $213,500.00 in countable assets when Jerome entered nursing home care. Jerome received gross monthly income of approximately $3,100.00 in Social Security and pension benefits. Janet received gross monthly Social Security of $830.50.

If Janet had not requested a protective order of spousal support from the probate court in June 2021 while Jerome's application for Medicaid was being processed by MDHHS, the application would have been denied due to excess assets. The federal law governing how a married couple's countable assets are treated by the Medicaid program is 42 USC 1396r-5(c). The corresponding MDHHS policy is in the MDHHS BRIDGES Eligibility Manual (BEM) 402. The formula for calculation of a couple's asset limit for Medicaid coverage of nursing home costs is no mystery. In 2021, Sizicks could own:

- 1/2 of their countable assets as of the date Jerome entered long-term care,
- up to a maximum of $130,380.00,
- plus $2,000.00 for Jerome's personal Medicaid asset limit.

Applying this formula to the Sizicks means that in order for Jerome to qualify for Medicaid, they could own no more than $108,750.00 ($213,500.00 x .5 + $2,000.00) in countable assets. Before Jerome could qualify, the couple would be forced to dispose of almost half of their assets. Bluntly, this result is unjust and nonsensical when one

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considers that under the Medicaid rules, a couple owning more assets than the Sizicks would be allowed to retain a higher amount of their assets and qualify for Medicaid. (For example, in 2021, a couple owning $260,000.00 would retain $132,000.00 ($260,000.00 x .5 (subject to a cap of $130,380.00) + $2,000.00). BEM 402(9-10)). As the petition for protective order and the testimony supporting it showed, their assets that exceeded $108,750.00 were needed for Janet's support. Without it, she faced the prospect of impoverishment later in life. Moreover, if Jerome was forced to forego coverage of his health care costs that was otherwise available through Medicaid, he would realize no personal benefit from having to use the couple's assets to pay for his nursing home costs.

MDHHS policy and federal Medicaid law provide the Sizicks an opportunity for relief under these circumstances. With respect to a couple's assets, 42 USC 1396r-5(f)(2)(A)(iv) allows a couple to retain a higher amount of assets than that available by application of the statutory formula for a "community spouse resource allowance" (CSRA) if a court has entered an order against an institutionalized person for support of his community spouse. This same requirement is in MDHHS policy in BEM 402, (9-10). It quantifies this amount as:

> "The amount of assets transferred to the community spouse by the client pursuant to a court order requiring the client to:
>
> - Pay support to the community spouse, and
> - Transfer assets to the community spouse for the support of the community spouse…"

If MDHHS had honored Judge McGraw's protective order as federal law and the agency's own policy require it to, Jerome's Medicaid application would have been

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approved because the Sizicks owned no countable assets in excess of the values identified in the protective order.

C. The Medicaid program's treatment of Jerome's monthly income.

With respect to Jerome's monthly income, Janet requested the probate court to order him to pay her $2,318.00 per month for her support, leaving him with approximately $738.00 of his income. This amount of income support would result in a higher Medicaid "community spouse income allowance" (CSIA) that Janet would receive if the standard formula in federal Medicaid law and MDHHS policy for calculating this allowance were applied to the couple's circumstances. However, as shown by the facts supporting the petition for protective order and the testimony before Judge McGraw, Janet needed an amount of Jerome's income higher than what is available under the standard formula to meet her necessary living needs. Federal Medicaid law and MDHHS policy provide the Sizicks an opportunity for relief under these circumstances.

In 42 USC 1396r-5(d)(5), Congress authorized a judicial mechanism for obtaining relief from the standard CSIA. It directs state Medicaid agencies to set the CSIA by using the amount transferred under a court order if that amount is greater than the amount otherwise available to a Medicaid application. It states:

> "(5) COURT ORDERED SUPPORT. If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse's monthly income allowance or the spouse shall not be less than the amount of the monthly income so ordered."

Michigan's State Medicaid Plan and DHHS Medicaid policy in BEM 546(6) reflect the same federal law requirement without restriction:

> "Exception: Use court-ordered support as the community spouse income allowance if:

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- The L/H patient was ordered by the court to pay support to the community spouse, **and**

- The court-ordered amount is **greater** than the result of step five."

In this policy, "step five" refers to the standard CSIA. "L/H patient" refers to the nursing home spouse. Both the federal law and MDHHS policy explicitly direct the agency to acknowledge the authority of a state court to enter an order of support as a lawful alternative for setting the CSIA.

What is the practical effect of setting a CSIA by use of the amount of spousal support designated in a protective order? It means that more of Jerome's income may be retained by Janet to meet her necessary living needs and Jerome pays less in his contribution to his nursing home costs, i.e., the Medicaid "patient pay amount". In the absence of a protective order providing spousal support, Jerome pays more of his income to the nursing home but realizes no personal net benefit from doing so. Janet's financial resources are depleted faster and her future economic security is compromised.

D. The Big Picture.

By filing the petition for a protective order, Janet was availing herself of a lawful opportunity to preserve more of the family assets and more of Jerome's income for her support while securing the benefit of Medicaid coverage of his nursing home costs. The probate court understood this plan. Judge McGraw knew that issuance of a protective order was a precondition for making this plan work. Without a protective order, there was no point in applying for Medicaid because they would not qualify and the Sizicks would suffer economic losses that could otherwise be avoided.

Judge McGraw did not abuse his discretion in factoring in how Mediacid eligibility would affect Jerome's needs. By acknowledging the cost of his health care needs would

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be covered by the Medicaid program, Judge McGraw was able to make a more accurate assessment of Jerome's needs and those of his spouse which was fully consistent with MCL 700.5401(3)(b) and in Jerome's best interests. The Court of Appeals failed to understand the interplay between the protective order and the Medicaid application. It also failed to acknowledge the only reason the Medicaid plan did not work was because MDHHS violated federal regulations and its own policy requiring the agency to process Jerome's Medicaid application within 45 days. 42 CFR 435.912(c)(3); BAM 115 (15-16). If it had done so, MDHHS would have approved the application based on the content of the protective order, Jerome's needs would have been met, and Janet's future economic security would be served. Instead, MDHHS, by and through its attorneys, instructed its staff at the local MDHHS office processing the application to do nothing on it because that would "mess up" the agency's appeal. By doing so, MDHHS manipulated the facts that were presented in its appeal of the protective order. Instead of looking at the protective order through the prism of Jerome's needs being met by his qualification for Medicaid, the Court evaluated the protective order based on the absence of Medicaid coverage for Jerome. When the protective order's findings were vacated almost a year after it was issued, MDHHS then moved forward with processing the application and denied it based on the excess resource—more than 261 days past the deadline for processing the application. The result is the MDHHS created Jerome's unmet needs that are the focus of the Court of Appeals in its decisions in this case.

As Judge McGraw stated in his order of December 13, 2022:

> But for DHS own actions not to process the Medicaid application, Jerome Sizick would have been deemed eligible for Medicaid.

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P4 of Order Granting Retroactive Appliaction dtd. 12-13-2022; Sizick II P7. By failing to view Judge McGraw's decision from the perspective of how the protective order facilitated the Sizicks' Medicaid plan; how it satisfied the requirements of MCL 700.5401(3)(b); and how it was wholly in Jerome's best interest, the Appellate Court has effectively deprived all Michigan citizens of the benefits of the federal Medicaid law and state policies governing the use of protective orders to affect Medicaid eligibility. All MDHHS has to do is refuse to process a Medicaid application to show that the spousal support provisions of the protective order cause the protected individual's health care and living needs to be unmet. The Court should reject MDHHS's unlawful manipulation of the Medicaid application process to defeat the legitimate use of protective orders of spousal support for Medicaid planning purposes.

II. The Court erred in relying on dicta in the Vansach and Schroeder decisions to conclude the probate court did not adequately consider Jerome's needs and circumstances.

On P10-16 of its decision, the Court of Appeals discusses its finding that the probate court did not adequately consider Jerome's needs in issuing the protective orders at issue in this case. Specifically, the Court focuses its analysis on whether the spousal support in the protective orders leaves Jerome "impoverished" and "entirely destitute and unable to meet his or her needs". That analysis is faulty. It is premised on two different propositions.

A. The Court erred in relying on the Schroeder decision to conclude Judge McGraw could not adequately consider Jerome's needs without his application for Medicaid being approved.

In its opinion, the Court of Appeals cites In re Estate of Schroeder, 335 Mich App 107; 966 NW2d 209 (2020) to support its conclusion that "the court cannot consider whether Medicaid will cover the institutionalized spouse's needs if the institutionalized spouse has yet to qualify for such benefits." This statement reveals the Court's disregard

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of the relationship between a protective order of spousal support and how it affects a Medicaid eligibility determination. Having a protective order of spousal support in place is a precondition for securing the favorable treatment of assets and income described in the preceding section of this brief. Requiring that a determination of Medicaid eligibility be in place before a probate court consider a petition for a protective order of spousal nullifies that remedy. It effectively bars Michigan citizens from using protective orders to tap the benefits of federal Medicaid law and MDHHS policy for enabling community spouses to secure an enhanced level of financial support to avoid impoverishment. Qualifying for Medicaid without a protective order of spousal support means the Sizicks would first need to spend down just under 50 percent of their countable assets. It also means there would no longer be any way to preserve them for Janet's future living needs. A protective order serves no purposes in this circumstance.

Likewise the Court relied on Schroeder for its conclusion that Judge McGraw could not know Jerome's Medicaid patient pay amount without an actual Medicaid determination. This is untrue. The calculation of a Medicaid patient pay amount is no mystery. There is no speculation involved. It is a math problem. The formula is set forth in BEM 546. The elements of the formula applicable to Jerome's circumstances are:

	Institutionalized spouse's gross monthly countable income ($1,748.50 Social Security + $1,351.29 Pension = $3,099.70)
minus	
	$60.00 patient allowance
minus	
	Community spouse income allowance ($2,318.00 Protective Order Amount)
minus	
	Health insurance premiums ($148.50 Medicare Part B Premium)
equals	
	$573.20 Medicaid Patient Pay Amount

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Because $2,318.00 was the level of spousal support in the protective order, it left Jerome with $781.70—enough to pay for his patient pay amount and Medicare Part B premium with $60.00 left over for his personal needs. Contrary to the Court of Appeals surmise, Judge McGraw adequately considered Jerome's needs in setting the level of his income to be set aside for the support of his spouse.

Finally, in support of its conclusion that Judge McGraw did not consider Jerome's needs in issuing the protective order, the Court notes that Jerome's private pay costs at his nursing home are $265.00 per day and they have accumulated over time to comprise arrearages well in excess of $100,000.00. What the Court fails to acknowledge is that MDHHS created this "need" by failing to process Jerome's Medicaid application within the 45-day standard of promptness required by federal Medicaid regulations and the agency's own policy governing the standard of promptness for processing Medicaid applications. If the Medicaid application had been processed timely, Jerome would not be in this situation. The analysis underlying Judge McGraw's protective orders was sound because it was based on a reasonable conclusion about Jerome qualifying for Medicaid and MDHHS following its own rules in processing the application timely. The protective order created a community spouse resource allowance that put the Sizicks' assets below the Medicaid asset limit according to MDHHS policy. The amount of Jerome's income that was ordered for Janet's support left him with adequate income to pay for his Medicaid patient pay amount according to MDHHS policy and his other monthly personal needs. Contrary to the Court of Appeals' conclusion, Jerome's needs were properly considered and under the circumstances, he was not impoverished. It was the unlawful action of the MDHHS that cause the protective order to fail and in the end,

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will cause Jerome's destitution and Janet's impoverishment unless this Court issues reversal of these decisions.

B. The Court erred in relying on the Vansach decision to conclude Judge McGraw abused his discretion in issuing a protective order that would impoverish Jerome Sizick.

The second proposition on which the Court of Appeals bases its conclusions is dicta in In re Estate of Vansach, 342 Mich App 371; 922 NW2d 136 (2018), which suggests it is inappropriate for a probate court to evaluate Jerome's needs by taking into account the level of government benefits for which he may qualify. Id. at 396-399. The Appellant agrees with the Vansach decision that MCL 700.5401(3)(B) requires a probate court to carefully evaluate a community spouse's "need" in crafting the details of a protective order of support. However, Vansach also states the general guideline that a protective order of spousal support cannot impoverish the protected individual or leave him destitute "and unable to meet his or her own needs". Insofar as Vansach suggests that the availability of Medicaid benefits to pay for the protected person's health care expenses cannot be considered by a probate court in determining his needs and whether he will be able to meet his own needs, that decision is wrongly decided. This is an unworkable standard that has no basis in statutory or case law.

There is no way for a probate judge to make individual case-by-case determinations of the appropriate amount of spousal support to include in a protective order without also factoring in the Medicaid benefits available to meet the protected individual's medical needs. Pretending that coverage doesn't exist overstates the protected individual's actual needs and arbitrarily harms the community spouse by diminishing the level of support a probate court may otherwise order for her necessary living needs. Based on the information presented in the petition for protective order filed by Janet Sizick and the evidence that

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supported it, it was plain that the petition was based on Jerome's health care needs being met by the Medicaid program and the protective order being submitted to DHHS to accomplish that goal. If the law required Judge McGraw to ignore the availability of Medicaid benefits in evaluating Jerome's needs, the result would be dismissal of the petition because Jerome would need all of his income and the marital assets to pay for his nursing home costs. It would also mean Jerome and all Michigan citizens similarly situated are effectively barred from using the remedies specified in federal Medicaid law and MDHHS policy to preserve an adequate level of assets and income to meet a community spouse's necessary living needs.

III. Protection of the taxpayers is not a basis in MCL 700.5401(3)(b) for denying a protective order of spousal support.

The Vansach and Schroeder decisions appear to be based, in part, on the concern of the Court of Appeals that protective orders will enable a protected individual to more easily qualify for Medicaid at the taxpayer's expense. However, the criteria specified in MCL 700.5401(3)(b) do not require a probate court to factor into its decision making whether granting a protective order that otherwise satisfies those criteria should nevertheless be denied if the result is the protected individual qualifying for Medicaid when he could not do so in the absence of such an order. State legislatures have the ability to modify the jurisdiction of probate courts in this regard but Michigan has not done so in the 36 years since the enactment of the Medicare Catastrophic Coverage Act. For example, in Virginia, where the law circumscribes a court's ability to enter support order. Virginia Code, Title 20, Chapter 5, §20-88.02:1 (Appendix 14). Janet Sizick is entitled to her husband's support and as the petition for protective order and the evidence supporting it showed, money is needed

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for her support and welfare. A protective order is necessary to provide it. Judge McGraw did not abuse his discretion in issuing the protective orders in this case.

IV. The Probate Court complied with the instructions of the Appellate Court

In Sizick I, the Appellate Court vacated the findings under MCL 700.5401(3)(b) and remanded it to the trial court for further findings under subsection (b) and to identify the property being transferred under MCL 700.5408. MCR 7.216(A)(5) authorizes the Court of Appeals to "remand the case to allow additional evidence to be taken". In People v Kennedy, 384 Mich 339-343 (1971), the Supreme Court stated:

> On remand, the trial court may consider and decide any matters of open by the appellate court, and is free to make any order of direction in further progress of the case, not inconsistent with the decision of the appellate court as to any questions not presented or settled by such decision." 5 Am Jur 2d. Appeal and Error, §992, pp419-20.

Per the rule of mandate, the lower court must strictly comply with and not exceed the scope of a remand order. See International Business Machines v Department of Treasury, 316 Mich App 346, 891 NW 2d 880, 882-3 (2016). According to Sizick I, the protective order issued on June 21, 2021 was not vacated. Judge McGraw conducted a hearing, on remand, consistent with the instructions of the appellate court's decision. Specifically, making supplemental findings that supported granting the amended protective order and issuing it effective as of June 21, 2021.

An examination of the 2 probate court hearings, the cases were nearly identical. There was extensive testimony and evidence presented as to Janet Sizick's needs as a dependent spouse and her lack of resources and income. There was also extensive examination as to Jerome Sizick's needs and how an application for Medicaid to meet them was submitted but was purposely and unlawfully not processed by MDHHS in a timely manner. In compliance with the instructions of the appellate court, Judge McGraw identified

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and valued all property owned by Jerome. The Court then awarded the property and income, after evaluating both parties' needs, as outlined in this application. Judge McGraw knew that the issuance of the amended protective order was a precondition for making this Medicaid plan work to meet both Janice's needs and Jerome's needs. Without an amended protective order, there was no point in applying for Medicaid because they would not qualify and the Sizicks would suffer great economic loss that could otherwise be avoided. As the court noted in its application of the effective order to be applied to June 21, 2021, but for MDHHS' own actions in willfully refusing to process the Medicaid application timely, Jerome Sizick would have been deemed eligible for Medicaid and his needs would be met. The court rejected MDHHS' unlawful manipulation of the Medicaid application process. The trial court did not abuse its discretion in issuing the protective order or when making the decision effective as of June 21, 2021.

RELIEF REQUESTED

The Medicare Catastrophic Coverage Act of 1988 (MCCA) was enacted to protect community spouses from impoverishment while allowing married couples to seek assistance from the Medicaid program to cover the cost of long-term care services. MDHHS policy, the Michigan State Medicaid Plan, and the federal law all recognize that courts can issue orders of spousal support. However, the Court of Appeals has created a "catch 22" by requiring a protected individual to qualify for Medicaid before a protective order for spousal support can be sought. This effectively nullifies the benefit of a protective order. The Court of Appeals' interpretation of EPIC governing protective orders is effectively blocking married couples, in Michigan, from obtaining a probate court order of spousal support to provide needed benefits for a dependent spouse. As outlined in this application, the court's restrictive interpretation of MCL 700.5401(3)(b) rests on a misunderstanding of

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how the Medicaid program operates in Michigan and is not grounded on considerations contained in EPIC or Michigan case law. In addition to the roadblocks the Court of Appeals has imposed, the state agency administering the Medicaid program has intentionally manipulated the facts that were presented in its appeal of the protective order by not timely processing Jerome Sizick's application for Medicaid as mandated by federal regulation and the agency's own policy. Because of the agency's actions, Jerome has a huge nursing home bill while Janet has no economic security to assist her with her present and future care and expenses. Because of MDHHS's actions, she is in worse shape than she would have been if she never petitioned for a protective order.

The Sizicks are not millionaires. They have been married more than 60 years. Jerome worked as an hourly employee of General Motors; and Janet, after caring for 4 children, worked until she was 62. They accumulated a small nest egg. They are a typical Michigan married couple where one spouse needs nursing home care while the community spouse is in great need of spousal support for her care. The issues presented in this application involve significant legal principles affecting how local probate courts may provide support for a protected individual's spouse while facilitating his qualification for Medicaid to pay for long-term care services. The local probate court did not abuse its discretion in approving a protective order of support which would have allowed Jerome to meet his needs through the Medicaid program while providing for his dependent spouse's future economic security.

For the reasons stated, Plaintiff-Appellant respectfully requests that the Supreme Court grant this application for leave and peremptorily reverse the Court of Appeals' decisions issued on January 18, 2024 and May 26, 2022 by affirming the protective orders

issued by the Saginaw County Probate Court; or alternatively, grant further argument and/or briefing on the merits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Application for Leave to Appeal on behalf of Plaintiff-Appellant, Estate of Jerome E. Sizick, contains 8,506 countable words according to the Microsoft Word 7 program.

Respectfully submitted,

Dated: April 10, 2024

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