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STATE OF MICHIGAN
IN THE SUPREME COURT

JEROME E. SIZICK, A PROTECTED PERSON,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.
_____/

Supreme Court No. 166921

Court of Appeals No. 364321

Saginaw County Probate Court
No. 21-141789-PO

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' BRIEF IN OPPOSITION TO JEROME E. SIZICK'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

This Court may grant appeal after a decision by the Court of Appeals. MCL 600.232; MCR 7.303(B)(1).

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Under the Estates and Protective Individuals Code (EPIC), the probate court is authorized to make a protective order of spousal support in relation to an individual's estate only if it finds that the petitioner has met both prerequisites for such an order. The Sizicks met only one of the prerequisites, yet the probate court nevertheless issued an order of spousal support. Did the Court of Appeals properly vacate the Sizick Order?

   Appellant's answer: No.

   Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Yes.

Controlling authority: MCL 700.5401(3)*; In re Estate of Vansach*, 324 Mich App 371, 400 (2018) and *In re Estate of Schroeder*, 335 Mich App 107, 117 (2020).

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CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

Const 1963, art III, § 2 Separation of powers of government

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

42 USC 1396a State plans for medical assistance

(a) A State plan for medical assistance must–

(1) provide that it shall be in effect in all political subdivisions of the State…

***

(3) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness;

***

(5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan…

***

42 USC 1396r-5 Treatment of income and assets for certain institutionalized spouses

(d) Protecting income for community spouse

(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 monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

***

(e) Notice and fair hearing

(2) Fair hearing

(a) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination …

***

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(i) such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(f) Permitting transfer of resources to community spouse

(3) Transfers under court orders

If a 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 order for the support of the spouse …

MCL 700.1201 - Purposes; rules of construction

This act shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:

(a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.
(b) To discover and make effective a decedent's intent in distribution of the decedent's property.
(c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors.
(d) To make the law uniform among the various jurisdictions, both within and outside of this state.

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MCL 700.5401 – Protective proceedings

(1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.

***

(3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
   (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
   (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support and that protection is necessary to obtain or provide money.

(4) The court may appoint a conservator in relation to the estate and affairs of an individual who is mentally competent, but due to age or physical infirmity is unable to manage his or her property and affairs effectively and who, recognizing this disability, requests a conservator's appointment.

MCL 700.5402 – Protective proceedings; jurisdiction

After the service of notice in a proceeding seeking a conservator's appointment or other protective order and until the proceeding's termination, the court in which the petition is filed has the following jurisdiction:
   (a) Exclusive jurisdiction to determine the need for a conservator or other protective order until the proceeding is terminated.
   (b) Exclusive jurisdiction to determine how the protected individual's estate that is subject to the laws of this state is managed, expended, or distributed to or for the use of the protected individual or any of the protected individual's dependents or other claimants.
   (c) Concurrent jurisdiction to determine the validity of a claim against the protected individual or the protected individual's estate and questions of title concerning estate property.

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MCL 700.5407 - Permissible court orders

(1) The court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure.

***

(2) The court has the following powers that may be exercised directly or through a conservator in respect to a protected individual's estate and business affairs:

(a) While a petition for a conservator's appointment or another protective order is pending and after preliminary hearing and without notice to others, the court has the power to preserve and apply property of the individual to be protected as may be required for the support of the individual or the individual's dependents.

***

(c) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to an individual for a reason other than minority, the court, for the benefit of the individual and members of the individual's immediate family, has all the powers over the estate and business affairs that the individual could exercise if present and not under disability, except the power to make a will. Those powers include, but are not limited to, all of the following:

(*i*) To make gifts.

(*ii*) To convey or release a contingent or expectant interest in property including marital property rights and a right of survivorship incident to joint tenancy or tenancy by the entirety.

(*iii*) To exercise or release a power held by the protected individual as personal representative, custodian for a minor, conservator, or donee of a power of appointment.

(*iv*) To enter into a contract.

(*v*) To create a revocable or irrevocable trust of estate property that may extend beyond the disability or life of the protected individual.

(*vi*) To exercise an option of the protected individual to purchase securities or other property.

(*vii*) To exercise a right to elect an option and change a beneficiary under an insurance or annuity policy and to surrender the policy for its cash value.

(*viii*) To exercise a right to an elective share in the estate of the individual's deceased spouse.

(*ix*) To renounce or disclaim an interest by testate or intestate succession or by inter vivos transfer.

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Bridges Addministrative Manual (BAM)

BAM 600 HEARINGS, page 5

Granting a Hearing All Programs MOAHR may grant a hearing about any of the following:

***

- Delay of any action beyond standards of promptness.
- Community spouse income allowance.
- Community spouse's income considered in determining the income allowance.
- Initial asset assessment (if an application for MA has been filed for the client).
- Determination of the couple's countable assets or protected spousal amount.
- Community spouse resource allowance.

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INTRODUCTION

Despite the application's numerous pages of Medicaid arguments, this is not a Medicaid case. The single issue is whether the Sizick Probate Protective Order of Spousal Support (Order) meets the requirements of the Estates and Protective Individuals Code (EPIC), at MCL 700.5401(3), to be a valid order. The Michigan Court of Appeals determined that it did not and vacated the Order. *In re Estate of Sizick*, unpublished opinion of the Court of Appeals, issued January 18, 2024 (Docket No. 364321) (*Sizick II*) (App'x 1 at 001-019). Although the Sizicks sought the order to impoverish Jerome to qualify him for Medicaid benefits, it is only the validity of the order itself, under MCL 700.5401(3), that is at issue before this Court.

EPIC grants the probate court the authority to issue an order of spousal support *only* if Janet Sizick, as Petitioner, demonstrates *both* MCL 700.5401(3) §(a); that Jerome Sizick is unable to make financial decisions and §(b); that Janet's needs are sufficient to warrant taking assets from Jerome. These must be met by clear and convincing evidence. MCL 700.5407. The plain language of the statute provides that if one of those two requirements has not been met, the court is not authorized to make the order. MCL 700.5401(3). The Court of Appeals properly held that Janet Sizick did *not* meet the requirement at MCL 700.5401(3)(b). *Sizick II*, unpub op at *10-16. (App'x 1 at 010-016.) The Order was therefore void and was correctly vacated for failure to meet the second requirement. *Id*. at *019. (App'x 1 at 019.) The Sizicks have no statutory basis for an order to impoverish one spouse solely to benefit the other. They seek this Court's endorsement of a Medicaid

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planning maneuver to retain assets without limit in order to receive Medicaid benefits they otherwise are not entitled to.

The decision of the *Sizick II* Court was a lucid and well-reasoned application of the facts of this case to the established law and was not clearly erroneous. The law is clear and this case does not resolve new issues or matters of public concern. In this case, of the validity of a protective Order of spousal support, the Sizicks are asking this Court to reverse not only *Sizick II*, unpubl, but also *Sizick I*, unpubl, issued May 26, 2022; two cases that followed the tradition of the published cases: *Vansach* and *Schroeder*, as well as a number of unpublished cases that followed their reasoning. (Referencing *In re Estate of Sizick*, unpublished per curiam opinion of the Court of Appeals, issued May 26, 2022 (Docket No. 357785) (*Sizick I*) (App'x 2 at 020-026.) This would effectively overturn both *Vansach* and *Schroeder*, established cases that have all provided a well-defined legal basis for issuance of these types of orders under MCL 700.5401(3).

The Sizicks have not demonstrated any of the grounds on which an application for leave to appeal should be granted. MCR 7.305(B). They do not question the validity of MCL 700.5401 and the public, who would be interested, are the Medicaid planners and their clients with too many assets to qualify, and for whom Congress did not intend Medicaid benefits. *Hegadorn v Dept of Human Servs Dir*, 503 Mich 231, 249 (2019). The *Sizick II* decision was correct and just and in accord with all the other cases directly on this issue, including the published *Vansach* and *Schroeder* cases. This application for leave to appeal should be denied.

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LEGAL FRAMEWORK

EPIC

EPIC is a comprehensive and long-standing body of law that, among other things, controls the management, protection, and distribution of estates for those who cannot manage their own financial affairs. MCL 700.1201; MCL 700.1302. EPIC governs issues related to the administration of estates of decedents and protected persons, like the orders in this case. MCL 700.1201; MCL 700.1302. The Probate Court has exclusive jurisdiction over these matters. MCL 700.1302.

But EPIC does *not* control or make Medicaid decisions. Nowhere in EPIC is Medicaid even mentioned. Nevertheless, certain financial arrangements, including some made under EPIC statutes, like the Order at issue in this case, may be considered when a Medicaid determination of eligibility or benefits is made. These transactions can have an effect on a final determination of eligibility or benefits. But for Medicaid eligibility, financial arrangements such as annuities, trusts, notes, deeds, contracts, businesses, and support orders are evaluated under specific Medicaid statutes and regulations with very precise directions for their use.

Spousal support orders obtained under EPIC are evaluated for an individual's Medicaid eligibility under the specific provisions of 42 USC § 1396r-5 in the Medicaid Act. The Orders themselves do not command, or place any burdens on, the Michigan Department of Health and Human Services (Department), which is not a party to such Orders. It is not the Order itself, but its effect on an

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applicant's assets or income under the Medicaid Act, that determines eligibility or benefits.

MCL 700.5401, like other statutes that distribute marital assets, requires an equitable division for property. *In re Estate of Vansach*, 324 Mich App 371, 394–395 (2018). And there are two prerequisites that must be established by clear and convincing evidence before a court has the authority to issue a protective order: (a) the individual against whom the order is issued is in need of protection and is unable to manage his own finances and (b) that the petitioner truly needs the assets and is entitled to them despite the protected individual's greater needs. MCL 700.5401(3); *Vansach,* 324 Mich at 395-396. And pursuant to statute, the probate court directs only the protected individual's assets and income, not those of the community spouse. MCL 700.5401(3). The court's authority in making these orders is limited to benefitting the protected individual. MCL 700.5407; *Vansach*, 324 Mich at 384.

Probate courts are courts of limited jurisdiction, defined by statute. *In re Estate of Huntington*, 339 Mich App 8, 18 (2021), citing *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354-355 (2013). No law, regulation, or policy grants probate courts authority to make Medicaid decisions. In Michigan, pursuant to law, regulation, and policy, the Department is the Single State Agency authorized to make Medicaid determinations. 42 USC § 1396a(a)(5); 42 CFR § 431.10; MCL 400.6; and MCL 400.105(1). And this "shall be in effect in all political subdivisions of the State." 42 USC § 1396a(a)(1).

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Medicaid long-term care for an institutionalized individual and community spouse

Medicaid is intended for the truly needy who would otherwise go without medical care. *Harris v McRae*, 448 US 297, 301 (1980). That has always been its purpose and is why Medicaid is a means-tested program. *Cook v Dep't of Social Servs*, 225 Mich App 318, 320 (1997). Medicaid is intended to fairly distribute scarce medical care funds to individuals who are too poor to provide their own needs. *Wisconsin Dep't of Health & Fam Servs v Blumer*, 534 US 473, 480 (2002). "Congress has been particularly active in its efforts to prevent spousal pauperization while at the same time limiting the ability of wealthier individuals to shelter income and assets using estate planning tools." *Hegadorn*, 503 Mich at 249. Public funds are scarce, and Congress never intended to allow individuals to shield assets and use Medicaid to subsidize a lifestyle or preserve assets as an inheritance program. 42 CFR § 435.901.

Until 1988, individuals seeking long-term care were required to spend down all assets of both spouses to $3,000.00 and use the income of both spouses for the care of an institutionalized spouse before qualifying for Medicaid benefits. This generally left the community spouse almost destitute. This situation no longer exists. Congress resolved this problem in the Medicare Catastrophic Coverage Act of 1988 (MCCA). *Blumer*, 534 US at 480. "In the MCCA, Congress sought to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Id.*, citing H.R. Rep No 100-105, pt 2, p 65 (1987). "To achieve this aim, Congress installed a set of intricate and

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interlocking requirements with which States must comply in allocating a couple's income and resources." *Id.* The MCCA provisions, called the "Spousal Impoverishment Provisions," are codified at 42 USC 1396r-5. Assets over the prescribed upper limits must be spent down for allowable expenses and the institutionalized individual's care before benefits are available. 42 USC 1395r-5. Currently, a community spouse is permitted to keep up to $154,140.00 in countable assets, as well as the homestead, a vehicle, all personal and household items, prepaid funeral and burial plans, and certain insurance policies including annuities of any value. Department Bridges Eligibility Manual (BEM) 402- Special MA Asset Rules. The community spouse can also keep all of his or her own income and a portion of the institutionalized spouse's income, to raise it to $3,853.50 per month.

The allowances may not appear generous to some, but Medicaid is for the poor, and limited resources must be carefully allocated to ensure care for as many needy individuals as possible at a cost that the public can afford. "The Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the states." *Ronney v Dep't of Social Servs*, 210 Mich App 312, 319 (1995); see also *Vansach*, 324 Mich App at 398.

Equitable spousal support orders that fairly meet the requirements of EPIC rarely create problems with Medicaid policy. But court orders using inflated or incorrect values cause conflict with the Medicaid eligibility process. *In re Estate of Schroeder*, 335 Mich App 107, 124 (2020). The amounts cannot be reconciled with

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those reported and verified on the Medicaid application, making it is impossible to process the Medicaid determination. *Id*.

Medicaid treatment of spousal support orders

For Medicaid eligibility determinations, all amounts must be verified and entered as exact amounts for Medicaid determinations. Since Medicaid is intended for the poor, this is not generally an onerous task. 42 USC 1396r-5 gives clear directions for calculations of assets and income for eligibility and benefits.

Blumer, the seminal case explaining the Spousal Impoverishment Provisions of the MCCA, explains that "Medicaid eligibility determinations for married applicants have resisted simple solutions." 534 US at 479, citing *Schweiker v Gray Panthers*, 453 US 34, 44-48 (1981). Medicaid uses gross amounts for income and assets, and transfers between spouses can result in double counting. The "court ordered support" provisions at 42 USC § 1396r-5(f)(3) (for assets) and 42 USC § 1396r-5(d)(5) (for income) were Congress's "fix" for the problem.

Congress made two separate sections for support orders. They are not identical, and the distinct wording is significant for the correct treatment. 42 USC § 1396r-5(f)(3), for asset eligibility, uses "the amount *transferred* pursuant to such order." The applicant must report and document the amounts transferred before the Department can calculate the Protected Spousal Amount (PSA) to determine asset eligibility. The income calculation, however, uses the specific *amount of monthly income as ordered by the court* in the order, but only if it is higher than the amount otherwise calculated under policy. 42 USC § 1396r-5(d)(5).

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The protected person in this case, Jerome Sizick, was born March 23, 1939. Janet Sizick is his community spouse and attorney-in-fact under a power of attorney dated 5/10/2021. *Sizick I*, unpub op at *1 (App'x 2 at 020). Jerome resided at St. Francis nursing home. *Id.* (App'x 2 at 020.)

Janet Sizick petitioned the probate court for an Order of spousal support, which was granted on June 21, 2021. The Department appealed the protective Order. The Court of Appeals (in *Sizick I*) affirmed it in part, vacated it in part, and remanded the case to the probate court for further proceedings. *Sizick I* (App'x 2). On remand from *Sizick I*, the probate court signed two Orders on December 13, 2022 – an Amended Order (App'x 3 at 027-029) and a second Order to make the Amended Order retroactive to June 21, 2021. (App'x 4 at 030-033.) The Department appealed these two Orders. The Court of Appeals in *Sizick II* affirmed in part, and vacated the Orders and is the basis for Petitioner's application for leave to appeal in this Court. (App'x 1 at 001-019.)

6/21/2021 First Hearing on Petition for Protective Order

Janet Sizick filed the first Petition with the Saginaw County Probate Court on May 28, 2021, seeking a protective Order of spousal support in anticipation of applying for Medicaid benefits to pay Jerome's nursing home expenses. (App'x 5 at 034-036.) Janet submitted a list of her monthly expenses and anticipated her expenses. (App'x 6 at 037-044.) The Supplement for Petition requested a support Order transferring "100% of the assets and property that Mr. and Mrs. Sizick have accumulated all of their lives be transferred to Mrs. Sizick for her support and an

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Order to increase her spousal income allowance monthly to $2000." (App'x 6 at 043.) Following the hearing, the probate court signed the Sizicks' proposed Order on June 21, 2021. (App'x 7 at 045-047.)

On July 12, 2022, the Department filed its appeal of right related to the 6/21/2021 Sizick Protective Order of Spousal Support.

5/26/2022 Determination of the Court of Appeals (*Sizick I*)

On May 26, 2022, the *Sizick I* Court issued its decision determining that the probate court did not clearly err in finding that Jerome was unable to manage his property and business affairs. *Sizick I*, unpubl at *3. (App'x 2 at 022.) The *Sizick I* Court held that the probate court erred, because regarding transfers, it made only "conclusory assertions" and "there was little to no evidence supporting or identifying these countable assets, real property, and personal property." *Id.* at *5. (App'x 2 at 021.) The *Sizick I* Court, thus affirm[ed] the trial court's "order finding under MCL 700.5401(3)(a), vacate[d] the finding under MCL 700.5401(3)(b), and remand[ed] to the trial court for further findings under subsection (b) and to identify the property being transferred under MCL 700.5408." *Id.* (App'x 2 at 021.)

10/25/2022 Probate Court Hearing on Remand

On August 25, 2022, Janet 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. (App'x 8 at 048-057.) This Petition for an amended protective order sought transfers of 100% of the Sizicks' marital assets and to grant Janet spousal income from Jerome of $2,318.00 monthly. Janet also

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requested that the Order be issued effective as of June 21, 2021. (App'x 8 at 055.) The probate court approved and signed the Sizicks' proposed Amended Order (App'x 3 at 027-029) and a second proposed Order, the "Retro Order" which granted nunc pro tunc status and retroactive application back to June 21, 2021, to the Amended Order. (App'x 4 at 030-033.) The Department appealed by right the orders signed on December 13, 2022.

1/18/24 Determination of the Court of Appeals (*Sizick II*)

On January 18, 2024, the *Sizick II* court issued its decision affirming the portion of *Sizick I* relating to MCL 700.5401(3)(a), but again held that the probate court abused its discretion by applying the wrong legal framework to MCL 700.5401(3)(b). *Sizick II*, unpubl at *9-10. (App'x 1 at 009-010.) *Sizick II* held that despite holding two evidentiary hearings, the probate court's record did not contain any evidence identifying Jerome's needs. *Id*. at *14. (App'x 1 at 014.) Finally, *Sizick II* held that, based on established caselaw, "the probate court must identify the *current* interest being transferred and the *current* value of those interests," which it again failed to do. *Id*. at *16-18. (App'x 1 at 016-018.) The *Sizick II* Court vacated that portion of the Orders and remanded the case to the probate court for further proceedings. *Id*. at *19. (App'x 1 at 019.)

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STANDARD OF REVIEW

A probate court's factual findings are reviewed for clear error and its "dispositional rulings, including a decision to enter a protective order, are reviewed for an abuse of discretion." *Vansach*, 324 Mich App at 385. A probate court's failure to operate within the correct legal framework is an abuse of discretion. *Id.*

Questions of statutory interpretation are reviewed de novo. *In re Guardianship of Redd*, 321 Mich App 398, 404 (2017). "An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63 (2002). The first criterion in determining intent is the specific language of the statute. *Id.* "If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written." *Id.*, citing *People v Stone,* 463 Mich 558, 562 (2001). Adherence to these principles will limit the chances "that a court will impermissibly substitute its own policy preferences." *People v McIntire*, 461 Mich 147, 153 (1999); see also *Cady v Detroit,* 289 Mich 499, 509 (1939) ("Courts cannot substitute their opinions for that of the legislative body on questions of policy.").

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ARGUMENT

I. The Court of Appeals properly vacated the Sizick 12/13/2022 Order because the probate court abused its discretion by finding that the requirements of MCL 700.5401(3)(b) were satisfied.

The plain language of the statute under which this Order was sought requires that *both* prerequisites, MCL 700.5401(3)(a) and (b), be established by clear and convincing evidence before such an Order can issue. MCL 700.5406(7). The Court of Appeals reviewing this Order explained in great detail the failures of the Sizicks to meet the second requirement necessary before an Order could issue. *Sizick II* at *10-16. (App'x 1 at 010-016.) Without *both* prerequisites, the probate court lacked the authority to issue the Order. MCL 700.5401(3). The Order was properly vacated, and this Court's review is not warranted. The Court should deny the application for leave to appeal.

A. The probate court abused its discretion by finding that the requirements of MCL 700.5401(3)(b) were satisfied.

Janet and Jerome Sizick had too many assets to qualify Jerome for Medicaid Assistance for Long-Term Care (MA-LTC) to pay for his nursing home expenses. *Sizick II* at *2. (App'x 1 at 002.) Rather than spend them down as required by policy, they sought a probate Order of spousal support, hoping to use it with a Medicaid application to obtain benefits he could not otherwise qualify for. Janet sought the probate court Order under MCL 700.5401(3) in EPIC, but she did not meet the statutory requirements that would permit the court to issue such an

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Order. The probate court may issue such orders under MCL 700.5401(3) only if the petition meets both prerequisites (a) and (b) by clear and convincing evidence.

"The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245 (2019). "If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written." *In re Estate of Weber*, 257 Mich App 558, 561 (2003).

MCL 700.5401 provides in pertinent part:

> (1) Upon petition and after notice and hearing in accordance with this part, the court may … make another protective order for cause as provided in this section.
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> ***
>
> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs *if* the court determines *both* of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. [Emphasis added.]

All findings under MCL 700.5401(3) must be established by clear and convincing evidence. MCL 700.5406(7).

As a prerequisite to entering protective Orders, "the probate court must make a finding of 'cause' as provided in MCL 700.5401." *Vansach*, 324 Mich App at 383.

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Before the probate court can issue a protective order of spousal support, "[t]he spouse requesting support must make a showing of need—not merely a desire to maintain a current standard of living without regard to the other spouse's circumstances." *Id.* at 396. And unless the institutionalized individual has *already* been granted Medicaid benefits, Medicaid coverage to pay expenses cannot be used as a reason to distribute an inequitable amount to the community spouse. *Schroeder*, 335 Mich App at 122–123. The *Vansach* Court declared that

> a probate court's consideration of the couple's circumstances in light of Medicaid cannot involve a fallacious assumption that the institutionalized spouse should receive 100% free medical care under Medicaid or an assumption that a community spouse is entitled to maintain his or her standard of living. 324 Mich App at 397.

To obtain the Order she sought, Janet was required to demonstrate not only that the money is not "needed for [Jerome's] support, care, and welfare" but also that she is "entitled" to that support. *Vansach*, 324 Mich App at 396; MCL 700.5401(3)(b). And that entitlement is contingent on the spouse having "sufficient financial ability to provide that assistance." *Id.* at 395.

Before finding that Janet is entitled to support, the court is required to consider not only Janet's expenses, but also Jerome's needs and circumstances. *Id.* And although "probate courts have authority to enter orders requiring an institutionalized spouse to provide support for a community spouse…. EPIC does not give probate courts unfettered discretion to enter an order allowing the community spouse to maintain his or her current lifestyle without regard to the institutionalized spouse's needs and patient-pay obligations." *Id.* at 401-402; MCL

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700.5401(3). But that is what happened in the Sizick Order as issued by the probate court.

1. Because Janet Sizick did not meet the requirements of the second prong of MCL 700.5401(3)(b), the Court of Appeals properly vacated the Order.

Janet and one of her children "spent hours developing [her] detailed monthly budget" which indicated that Janet needed $3,426.00 per month for her expenses. (*Sizick* Brief, p 4.) This "budget" was simply a list of all the expenses that she was accustomed to spending. There was no consideration of the fact that if Medicaid took over the payment of Jerome's expenses, she would now have all the income and assets that before supported both spouses. She was actually requesting an increase in her lifestyle. And she offered no opinion about how Jerome would manage once he was impoverished. *Sizick II*, unpubl op at *13. (App'x 1 at 013.)

Although time was spent discussing Janet's budget and expenses, there was never any inquiry into Jerome's current or future needs. In the hearing on the first Order (*Sizick I*), "there was virtually no evidence presented to the probate court about what Jerome's needs were." *Sizick II*, unpubl op at *14. (App'x 1 at 014.) "[O]n remand, the probate court did not receive much additional evidence about Jerome's needs. Rather, the hearing focused almost exclusively on Janet's needs." *Id.*

"In the probate court's oral ruling, it recognized that it needed to consider Jerome's needs, but it never did so." *Id.* The probate court did not address Jerome's circumstances or consider his ability to meet his own considerable needs if he were

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stripped of all assets and income. *Id.* at *14-15. (App'x 1 at 014-015.) The *Sizick II* Court held that "On the basis of the evidence before the probate court and its stated findings, it is plain that the probate court failed to consider Jerome's needs." *Id.* at *15. (App'x 1 at 015.)

Janet Sizick could not provide an explanation of how Jerome could manage to care for himself and his needs because she was asking the probate court to transfer 100% of the couple's assets and almost all of his income to her, which would clearly pauperize him. According to *Vansach*, Janet may not show entitlement to support under MCL 700.5401(3)(b), when the Order would leave Jerome "entirely destitute and unable to meet his own needs." *Vansach*, 324 Mich App at 396. "Yet that is precisely what the probate court's order did in this case, and it did not provide any explanation for why." *Sizick II*, unpub op at p *16. (App'x 1 at 016.)

Although Janet's needs were discussed at length, no explanation for how Jerome would manage was offered except that he would apply for Medicaid. *Id.* at *2. (App'x 2 at 002.) But, unless the protected person under MCL 700.5401 is *already* a Medicaid recipient, Medicaid, or the hope for it, can play *no* part in meeting the requirements for a valid Order under MCL 700.5401(3). *Schroeder*, 335 Mich App at 122-123; citing *Vansach*, 324 Mich App at 394. Because Jerome had not qualified for Medicaid benefits, such benefits could not be used to prove that he had no need for his own assets.

The *Sizick II* Court correctly concluded that the probate court abused its discretion by applying the wrong legal framework. *Sizick II,* unpub op at *16.

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(App'x 1 at 016.) *Sizick II* held that Janet Sizick had not met the requirement under MCL 700.5401(3)(b) and vacated the Order. *Id.* (App'x 1 at 016.) Without the Order, the Sizicks cannot make transfers that could qualify Jerome for Medicaid.

2. The Sizicks' application offers no legal, statutory, or factual basis or to show that Janet Sizick met the statutory requirement in MCL 700.5401(3)(b) or that the Order should not have been vacated.

The *Sizick II* opinion did not rule on a Medicaid issue. The decision that the Sizicks seek to appeal is the failed spousal support Order, vacated because Janet did not meet one of the statutory prerequisites before such an Order could be issued. MCL 700.5401(3). To succeed on appeal, the Sizicks would have to prove that, notwithstanding the *Sizick II* Court's thorough explanation of its exhaustive review of the facts and the record in this case, the Court of Appeals erred in finding that the needs and circumstance of both spouses had not been considered.

The Sizicks do not base their appeal on an explanation or construction of the Order that would make it valid. Nor do they produce facts that would bring the decision of the *Sizick II* opinion into question. Janet cannot show that any realistic review of Jerome's needs was ever made, and without that, she cannot demonstrate that she met the requirements of MCL 700.5401(3). The Sizicks ask this Court to accept that their interpretation of the Federal Medicaid Act requires a favorable Medicaid eligibility result for Jerome and anyone with access to a probate court

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willing to write spousal support orders, without review of needs, and regardless of how much money they have.

But Medicaid law and policy have no bearing on whether an EPIC Order is valid under the clear instructions of MCL 700.5401(3), a Michigan law. Although the Sizicks hoped the spousal support Order would increase the PSA that Janet could keep and still qualify Jerome for Medicaid benefits, that can only be accomplished with a valid order. An order that does not comply with Michigan law is invalid and can have no effect.

The Department is not a party to a Sizick spousal support Order. Such Orders have no provisions that place duties on the Department or require it to grant Medicaid when eligibility has not been demonstrated. Any effect on Medicaid eligibility would be based not on the Order itself, but on the result of the Order on Sizicks' assets. Any effect for Medicaid or Jerome's eligibility for benefits would be based only on the reported "amounts of resources transferred pursuant to such order for the support of the spouse …" 42 USC 1396r-5(f)(3). And there would be no transfers without a valid order.

In their application, the Sizicks argue that the Department wrongly refused to process the Medicaid application. (Sizick Brief, p 6.) The Sizicks submitted an application that had clear information of too many assets to qualify. (Sizick Brief, p 6.) To raise the PSA amount so that Medicaid would ignore more of their assets, they sought a protective order of spousal support. (Sizick Brief, p xix.) The PSA *can* be raised by "the amount of assets transferred to the community spouse by the

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client pursuant to a court order." (Sizick Brief, pp xix-xx, quoting BEM 402, p 10.) But the Sizicks' attempt was flawed because the Order itself did not provide useful information for transfers that could possibly affect a Medicaid determination.

All Medicaid determinations require that assets and income be reported in exact amounts and be verified. It is not the spousal support order that raises the PSA; it is the reported and verified transfers made pursuant to a (valid) court order. Here, the Department was unable to use the information in the Order because as the *Sizick I* Court explained:

> As a result, it is unclear what assets or property are included in the trial court's countable assets calculation, whose ownership interest is included in the trial court's calculation or petition, and whether the trial court's order transferred property independently owned by petitioner. [*Sizick II*, unpub op at *4-5, citing and quoting *Sizick I*, unpub op at *7.]

The Sizicks did not obtain a valid probate Order and did not report and verify any transfers by the institutionalized spouse to the community spouse made pursuant to the Order. And until both were completed, the Department never had a completed application that it could process to determine if Jerome was eligible for MA-LTC. For public benefits like Medicaid, the burden is always on the applicant to demonstrate his entitlement to the benefits by demonstrating that he meets the standards and can qualify under policy. *Lavine v Milne*, 424 US 577, 582-583 (1976) ("As with any other welfare scheme, … applicants for Home Relief bear the burden of showing their eligibility in all respects."). See also *Boyes v Secretary of Health & Human Servs*, 46 F3d 510, 512 (6th Cir 1994) ("Claimant bears the burden

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of proving his entitlement to benefits," citing *Halsey v Richardson*, 441 F2d 1230 (6th Cir 1971).).

Thus, although it is possible under 42 USC 1395r-5(f)(3) to increase the PSA by the amount of assets transferred by the institutionalized spouse to the community spouse pursuant to court order, it is not a guarantee of Medicaid eligibility. Before it can happen, the applicant must have a valid order.

Although Medicaid law and policy have timeliness and standards of promptness provisions, the Department is never required to grant benefits before an application is complete and the applicant has demonstrated that he is entitled to them. The Department is not required to make a determination when it "cannot reach a decision because the applicant…delays or fails to take a required action." 42 CFR 435.912(e)(1). In this case, as explained by the Court of Appeals, the information in the Order as issued was not current or correct and was unclear about ownership and what could be transferred. *Sizick II*, unpub op at *4-5; 17-18. (App'x 1 at 004-005 and 017-018.) The Department was required to wait until the Sizicks provided accurate and verified information about the amounts that had been transferred from the institutionalized spouse to the community spouse pursuant to the court Order. 42 USC 1396r-5(f)(3).

The Sizicks also argue that "BAM 600 pp 42-43 mandates DHS to implement the hearing decision pending a court appeal unless a court issues a stay." (Sizick Brief, p 6.) This is a misreading of policy. BAM 600 policy refers only to the decisions of the Department's administrative fair hearings.

And, for cases with spousal support Orders seeking to increase the PSA so that the applicant can qualify for MA-LTC, the Department cannot process an application until all necessary information has been provided. In this case, the Sizicks needed to present a valid spousal support Order and the supporting documentation for the transfers made pursuant to that Order.

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CONCLUSION AND RELIEF REQUESTED

In *Sizick II*, the Court of applied the correct legal framework pursuant to MCL 700.5401(3) and correctly determined that the Sizicks' spousal support order was invalid and had to be vacated. This Court's review is not warranted.

The Department respectfully request that this Honorable Court deny the Sizicks' application for leave to appeal, or alternatively, uphold the opinion of the Court of Appeals in *Sizick II*.

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