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STATE OF MICHIGAN
IN THE SUPREME COURT

JEROME E. SIZICK, a protected individual, Plaintiff-Appellant,	Supreme Court No.: 166921 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 REPLY TO

MICHIGAN DEPARTMENT OF HEALTH & HUMAN SERVICES

RESPONSE PER MCR 7.305(E)

Dated: May 29, 2024

Submitted By: Norman Harrison (P39814)
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REPLY

MCCA—Prevention of Spousal Impoverishment

One of the main goals with the enactment of the Medicare Catastrophic Coverage Act of 1988 (MCCA) was to prevent complete financial devastation for the community spouse when the other spouse entered a nursing home. The community spouse, typically a woman, confronted poverty for paying for the care of the spouse's nursing home coverage or choosing a divorce. The passage of MCCA enabled the community spouse to save her marriage while allowing her to live in her home. "Congress installed a set of intricate and interlocking requirements which states must comply in allocating a couple's income and resources" Hegadorn v DHS, 503 Mich 231, 248 (2019) quoting Wisconsin Dept. of Health and Family Servs v Blumer, 534 US 473, 480 (2002). These requirements are found at 42 USC 1396r-5. Appellant's Application outlines, in detail, the statutory and regulatory framework for the treatment of income and resources of institutionalized spouses. Michigan must comply with these requirements.

MCCA has a three-part solution for the allocation of income and resources of married couples. The power of an administrative agency, MDHHS, 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. 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.

Contrary to the law, MDHHS has argued that the Medicaid program is only for "the poor and truly needy". MDHHS has asserted that the protective order is "a Medicaid planning maneuver to retain assets without limit to receive Medicaid benefits". This is not

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an accurate dichotomy. For 36 years, Congress has been adapting the Medicaid program to accommodate the needs and interests of decidedly non-poor spouses of individuals who need long-term care. The provisions at issue here are part of that system, and their use, as sought by the Appellant's community spouse, is well within the range of options Congress offered a community spouse. Congress' goal has always been to protect the community spouse, not to create a mechanism for family wealth transfer.

Roadblocks for the use of a protective order

The Court of Appeals 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 the dependent spouse. The court's restrictive interpretation of MCL 700.5401(3)(b) rests on a misunderstanding of 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 from In Re Estate of Schroeder, 335 Mich App 371 (2020) and the 2 unpublished Sizick decisions, 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, the Sizicks had a huge nursing home bill while Mrs. Sizick had no economic security to assist her with her present and future care and expenses. Because of MDHHS'

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actions, she is in worse shape than she would have been if she had never petitioned for a protective order.

MCL 700.5401(3) and the interplay of Medicaid

When Mrs. Sizick petitioned for a protective order, she 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 cost. The two prerequisites that Mrs. Sizick needed to establish by clear and convincing evidence under MCL 700.5401(3) was

1. Jerome Sizick was unable to manage property and business affairs effectively due to mental deficiency, physical illness, or disability, etc…; and

2. Jerome Sizick's property would be wasted or dissipated unless proper management was provided, or money was needed for the support, care, and welfare of a dependent.

Contrary to MDHHS' assertions, the court found clear and convincing evidence that Jerome Sizick was unable to manage his property and business affairs due to mental deficiency and physical illness/disability. The court found overwhelming evidence that Mrs. Sizick was a spouse in need of support. The probate court understood that the request for a protective order was a plan to allow Mr. Sizick to qualify for Medicaid while preserving more of his family assets and income for the support of his dependent spouse who had extensive need in the community. Even under this plan, Jerome Sizick would continue to pay monthly income to the nursing home. Without a protective order, there was no point in applying for Medicaid because they would not qualify and the Sizicks would suffer severe economic losses that could otherwise be avoided.

Medicaid law and MDHHS' policy recognizes court orders of spousal support are a legitimate means of affecting the amount of the marital assets Mrs. Sizick could retain

without impairing Jerome's eligibility for Medicaid. No where in In Re Vansach Estate, 324 Mich App 371 (2018) does it require an equitable division of property. MDHHS has suggested that Vansach, citing to Page 384, limits the court's authority in making these orders for the benefit of the protected individual. Appellant agrees and states that a protective order must be in the best interest of the protected individual but certainly does not bar a probate court from issuing such an order to benefit the spouse who is in need. Again, Congress mandates that court orders of support affect how the Department makes Medicaid decisions. If the probate court issues a protective order on assets or income, MDHHS must follow the court order as required not only by its own policy manuals but the federal law.

The probate court did not abuse its discretion in factoring in how Medicaid eligibility would affect Jerome's needs. By acknowledging the cost of his healthcare needs would be covered by the Medicaid program, the probate court 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) and in Jerome's best interest. The Court of Appeals failed to understand the interplay between the protective order and the Medicaid application. Again, 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 in a timely manner (45 days). 42 CFR 435.912(c)(3); BAM 115 (15-16). By failing to review the probate court'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); and how it was wholly in Jerome's best interest, the Appellate Court has affectively deprived all Michigan citizens of the benefits of the federal law and state

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policy governing the use of protective orders to affect Medicaid eligibility. All MDHHS has to do is refuse to process the Medicaid application to show that the spousal support provisions of the protective order caused the protected individual's healthcare and living needs to be unmet.

Relief Requested

As previously stated, the Sizicks are not millionaires. They have been married more than 60 years. They have accumulated a very small nest egg. They are typical Michigan married couples 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 the application involve significant legal principles affecting how local probate courts may provide support for a protected individual's spouse while facilitating his qualifications for Medicaid to pay for long-term services. For the reasons stated, Plaintiff-Appellant respectfully requests that the Supreme Court grant the 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,

Dated: May 29, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply on behalf of the Plaintiff-Appellant, Estate of Jerome E. Sizick, contains 1,533 countable words.

Respectfully submitted,

Dated: May 29, 2024

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