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STATE OF MICHIGAN

IN THE SUPREME COURT

In re ESTATE OF JEROME E. SIZICK.

JEROME E. SIZICK, a Protected Individual,

Petitioner-Appellant,

v

DEPARTMENT OF HEALTH & HUMAN SERVICES,

Respondent-Appellee.

_____/

Supreme Court No. 166921

Court of Appeals No. 364321

Saginaw Probate Court
LC No. 21-141789-PO

BRIEF *AMICUS CURIAE* OF THE ELDER LAW AND DISABILITY RIGHTS SECTION OF THE STATE BAR OF MICHIGAN (ELDRS) AND THE MICHIGAN CHAPTER OF THE NATIONAL ACADEMY OF ELDER LAW ATTORNEYS (MI-NAELA) IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL

CHALGIAN & TRIPP LAW OFFICES PLLC
By: David L. Shaltz (P29330)
Counsel for ELDRS and MI-NAELA
1019 Trowbridge Road
East Lansing, MI 48823
517.332.3800
shaltz@mielderlaw.com

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STATEMENT OF QUESTION INVOLVED

MCL 700.5401 *et seq.* establishes the authority of probate courts to issue a protective order governing the use of a protected individual's estate for his dependents. For a protected individual who is married and is in nursing home care, a court order of spousal support can achieve two beneficial results. First, more of the married couple's financial resources can be preserved and used to meet the current and future needs of the spouse who continues living independently at home compared to the amount that is otherwise allowed under the Medicaid program. Second, the higher asset limit triggered by the court order of spousal support facilitates the protected individual's qualification for Medicaid to help pay his nursing home costs.

In the instant case the Court of Appeals ruled it is an abuse of discretion for a probate court to issue a protective order of spousal support unless a protected individual has first qualified for Michigan's Medicaid program. The practical effect of this decision is married couples in Michigan are blocked from using a probate court protective proceeding to access one of the spousal impoverishment protections guaranteed to Medicaid applicants in federal Medicaid law and Michigan Medicaid policy. It causes the loss of marital assets that would otherwise be preserved and used to pay the proven and legitimate current and future needs of a spouse to enable her to continue to living independently at home. It also delays the protected individual's qualification for the Medicaid program to help pay for his nursing home costs.

Is it an abuse of discretion for a probate court to consider how a protective order of spousal support will facilitate a protected individual's eligibility for Medicaid when it is shown by clear and convincing evidence it will avoid the loss of a married couple's financial resources, it will provide for the legitimate and proven current and future needs of a spouse who lives independently at home and it will allow the protected individual to qualify for Medicaid to help pay for his nursing home costs?

Petitioner - Appellant's answer:	NO
Respondent- Appellee's answer:	YES
The Court of Appeals answer:	YES
Amici Curiae answer:	NO

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INTRODUCTION AND STATEMENT OF INTEREST[1]

The Elder Law and Disability Rights Section of the State Bar of Michigan (ELDRS) comprises 1,075 members. Its activities include participating as *amicus curiae* in court cases of significant importance to older Michiganders and those with disabilities and advocating for fair and accurate application of the law affecting the clients it serves.

The Michigan chapter of the National Academy of Elder Law Attorneys (MI-NAELA) is a community of attorneys experienced and trained in working with the legal problems of aging Americans and individuals of all ages with disabilities. Its mission is to provide continuing legal education, advocacy and examination of public policy issues to enhance the quality of life for older adults and person with disabilities.

Most recently, both the ELDRS and MI-NAELA participated as *amicus curiae* before this Court in *Hegadorn v Dept. Of Human Servs Dir*, 503 Mich 231; 931 NW2d 571 (2019).

For many years, elder law attorneys regularly used probate court protective proceedings in appropriate cases as a lawful means of securing financial security for married couples in which one spouse faced the imminent need for admission to a nursing home. That all changed in the wake of the Court of Appeals decision in *In Re Estate of Schroeder,* 335 Mich App 107; 966 NW2d 209 (2020). As this brief shows, that decision was wrongfully decided because it misapplies the decision in *In re Estate of Vansach*, 324 Mich App 317; 922 NW 2d 136 (2018). Its effect is to block Michiganders from invoking the jurisdiction of the probate court to access one of the protections against spousal impoverishment established by the federal Medicare

[1] Counsel for *Amici Curiae* authored this brief in whole. No other counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than the amici curiae and their members, made a monetary contribution intended to fund the preparation or submission of this brief.

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Catastrophic Coverage Act of 1988[2] and in Michigan's Medicaid policy[3] designed to provide the spouse of a nursing home patient the means to continue living at home independently now and in the future. Without that benefit the institutionalized spouse who needs Medicaid to help pay his nursing home costs cannot qualify unless a large portion of the married couple's assets that would otherwise be saved to meet the current and future needs of the spouse at home are spent down.

In the application for leave to appeal, the Appellant provides the Court a thorough explanation of the protections against spousal impoverishment embedded in federal Medicaid law and Michigan Medicaid policy. That information is not repeated in this brief.

The Court of Appeals wholly relied on *Schroeder* for its decision *In re Sizick,* unpublished opinion of the Court of Appeals, issued January 18, 2024 (Docket No. 364321). The ELDRS and MI-NAELA seek to participate in this appeal to provide the Court with information and analysis which explains why that decision was wrongfully decided. The expertise and experience of the ELDRS and MI-NAELA members in probate and Medicaid law and procedure position them well to show why the Saginaw County Probate Court operated within the proper legal framework and did not abuse its discretion in granting Janet Sizick's petition for protective order.

The ELDRS and MI-NAELA believe this case presents a legal issue of major significance to the state's jurisprudence which affects the exercise of jurisdiction by all Michigan probate courts and for that reason, the Appellant's application for leave to appeal should be granted.

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[2] 42 USC 1396r-5.

[3] Michigan Department of Health and Human Services *Bridges Eligibility Manual* (BEM) 402 pertaining to assets of a married couple and BEM 546 pertaining to the Medicaid patient pay amount of the institutionalized spouse.

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STATEMENT OF FACTS

The ELDRS and MI-NAELA accept the statement of facts presented on pages 2-11 of the Appellant's application for leave to appeal.

ARGUMENT

I. The Appellant's application for leave to appeal should be granted because *Sizick* removes the jurisdiction of Michigan probate courts to issue a protective order affecting the estate of an individual in need of long term care who seeks access to one of the protections against spousal impoverishment in federal Medicaid law and Michigan Medicaid policy. *Sizick* involves a legal principle of major significance to the state's jurisprudence, is clearly erroneous and will cause material injustice.

A. Overview - The ramifications of *Sizick*.

The Appellant's application for leave to appeal presents the Court with a good explanation of the protections against spousal impoverishment in federal Medicaid law and Michigan Medicaid policy and how they intersect with court orders of support. It is not repeated in this brief. This brief does, however, aim to inform the Court's perspective on how *Sizick* affects Michiganders who seek protective orders of spousal support as a means of accessing those protections.

There is a key difference between a court order that prescribes how a protected individual's income is to be used for the support of a spouse and a court order that transfers a protected individual's assets for the support of a spouse. The former is not time sensitive. Regardless of whether a spouse petitions for a court order of income support before a Medicaid application is filed or after the protected individual qualifies for Medicaid federal Medicaid law and Michigan Medicaid policy require the Appellee (hereinafter "MDHHS", "the Department" or

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"the agency") to adjust the minimum monthly maintenance needs allowance[4] to which a spouse is entitled to reflect a court order of support when it is presented to the agency.

In contrast, a court order that transfers the protected individual's assets for the support of a spouse is time sensitive. It must be issued before a protected individual applies for Medicaid or during the Medicaid application process to affect the spouse's community spouse resource allowance.[5] Otherwise, the protected individual's Medicaid eligibility will be determined according to the default asset limit in Michigan Medicaid policy. The protected individual ends up spending down marital assets that otherwise could have been preserved for the support of the spouse at home by a protective order.

Sizick ruled that as a matter of law, it is an abuse of discretion for a probate court to issue an order of spousal support *before* a protected individual has applied for Medicaid and has been determined eligible for that program. *Sizick* relied on *Schroeder* for this proposition. *Sizick* at 12-13. The practical effect of this decision is to arbitrarily bar Michigan citizens from Medicaid benefits to which they are entitled under 42 USC 1396r-5(f)(2)(A)(iv) and (f)(3) and Michigan Medicaid policy in BEM 402 which require the amount of resources transferred under a court order to be used as the protected spousal amount in the eligibility determination.[6] For the Sizicks, this means the absence of a protective order causes them to lose more than $100,000 of

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[4] In Michigan Medicaid policy this is called the "community spouse income allowance" or "CSIA". It is described in *Bridges Eligibility Manual* (BEM) 546.

[5] In Michigan Medicaid policy, this is referred to as the "Protected Spousal Amount" or "PSA". It is described in BEM 402.

[6] The Michigan Medicaid State Plan (MMSP) is an agreement between the State of Michigan and the federal government which identifies the beneficiary eligibility policies in effect under Michigan's Medicaid program. In Supplement 13 to Attachment 2.6-A of the MMSP the State of Michigan has certified its Medicaid resource eligibility policies used "to determine eligibility for institutionalized individuals who have spouses living in the community are consistent with Section 1924." Section 1924 of the Social Security Act is 42 USC 1396r-5.

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their marital assets that would otherwise be preserved to support the proven needs of Janet Sizick to enable her to continue living independently at home.

Moreover, the bright line *Sizick* and *Schroeder* have drawn between pre-Medicaid protective orders and post-Medicaid protective orders is arbitrary and capricious. It does not square with the extensive analysis in *Vansach* of the probate court's jurisdiction to issue protective orders in the Medicaid context. Instead of applying the standards in *Vansach* describing considerations which should affect a probate court's exercise of its jurisdiction to make protective orders of spousal support in the Medicaid context, *Sizick* and *Schroeder* avoid them altogether and outright repudiate that authority when it comes to pre-Medicaid petitions for protective order of spousal support.

The balance of this brief discusses more fully why *Sizick* and *Schroeder* were wrongfully decided and should be reversed. A careful reading of those decisions reveals the Court of Appeals did not have an accurate understanding of how Medicaid eligibility rules and the Medicaid application process work in Michigan. That misunderstanding affected their analyses of whether a protective order could provide for the needs of both spouses in a married couple in which one spouse lives at home (the "community spouse") and the other spouse lives in a nursing home (the "institutionalized spouse"). The ELDRS and MI-NAELA suspect one factor that contributed to this was neither of the parties seeking protective orders in *Schroeder* were represented by legal counsel in the Court of Appeals.

B. *Sizick* is incompatible with the analysis in *Vansach* of the probate court's jurisdiction to issue protective orders of spousal support in the Medicaid context.

Sizick reached its conclusion that it is an abuse of discretion for a probate court to issue an order of spousal support affecting the estate of a protected individual unless that person has first qualified for the Medicaid program based on the *Schroeder* panel's interpretation of

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Vansach. *Sizick* at 12-13. However, neither *Sizick* nor *Schroeder* consider the discussion in *Vansach* of the probate court's jurisdiction as it intersects with federal Medicaid law and Michigan Medicaid policy.

In *Vansach*, the Department challenged the jurisdiction of probate courts to enter protective orders in cases involving a community spouse's efforts to obtain additional income from an institutionalized spouse. The agency argued that probate courts lack authority to make Medicaid determinations or to affect a community spouse's Medicaid community spouse income allowance because MDHHS is charged with exclusive jurisdiction for administering the Medicaid program in Michigan. After analyzing Medicaid's spousal impoverishment provisions and support orders under EPIC, *Vansach* concluded "the federal Medicaid statutes plainly acknowledge that courts may have jurisdiction to enter a support order and this support order will affect the calculation of the CSMIA." *Vansach*, 324 Mich App at 387. *Vansach* also concluded the Department's jurisdictional arguments were without merit because " . . . the probate courts clearly have subject-matter jurisdiction to enter a protective order directing the distribution of a protected individual's income 'to or for the use of . . . any of the protected individual's dependents or other claimants." *Vansach*, 324 Mich App at 389. There is nothing in *Vansach* that supports the premise of *Sizick*, i.e., it is an abuse of discretion for a probate court to issue an order of support that affects a Medicaid spousal income or asset allowance unless a protected individual has first qualified for Medicaid.

In *Vansach*, the Department's second challenge to the probate court's jurisdiction to issue a protective order of support that triggers certain of Medicaid's spousal impoverishment provisions was its claim the exercise of that authority under EPIC was preempted by federal Medicaid law because it "eviscerates the intent of the spousal-impoverishment provisions of

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§1396r-5." *Vansach*, 324 Mich App at 390. The Court found no merit in this argument because contrary to the Department's assertions, "EPIC's provisions allowing the probate court to enter support orders are consistent with Congress's objectives and purposes in enacting Medicaid and the spousal impoverishment provisions." In this regard, the Court quoted *James v Richman*, 547 F3d 214, 219 (CA 3, 2009):

> "Indeed if the use of state court support orders for the calculation of CSMIAs is inconsistent with the overarching goals of Medicaid and the spousal impoverishment provisions, Congress created the inconsistency, and it is certainly not our role to ignore the text of the Medicaid statutes or to 'create rules based on our own sense of the ultimate purpose of the law being interpreted . . .'" *Vansach*, 324 Mich App at 391, Footnote 10.

Again, there is nothing in *Vansach* that supports the premise of *Sizick*, i.e., it is an abuse of discretion for a probate court to issue an order of support that affects a Medicaid spousal income or asset allowance unless a protected individual has first qualified for Medicaid. Also, there is nothing in the spousal impoverishment provisions in federal Medicaid law or in Michigan's Medicaid policy limiting their application to post-Medicaid qualification scenarios.

C. *Sizick* relied on the finding in *Schroeder* it is "problematic" to assess a nursing home spouse's need when no Medicaid eligibility determination was made at the time a probate court issues a protective order of spousal support. That finding is erroneous because it is not applicable to a petition for protective order made to facilitate Medicaid eligibility for the protected individual while providing for the needs of the community spouse.

In *Schroeder*, the Court said:

> "We find problematic the probate court's determination of Medicaid and patient-pay amounts in assessing need when no Medicaid-eligibility and patient-pay amounts had been made at the time of the court's ruling." *Sizick* at 12.

Why is it "problematic"? The Court said:

> "We understand and appreciate that patient-pay amounts can be estimated before the submission of a Medicaid application and a Medicaid-eligibility determination. But in assessing the 'need' for money for a person's care and support under MCL 700.5401(3)(b) on the basis of Medicaid-related

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> circumstance, there must actually be Medicaid determinations regarding eligibility and patient-pay amounts." *Sizick* at 12-13.
>
> How did *Schroeder* come to the conclusion? It said:
>
> "Indeed, the *Vansach* panel stated that '[i]n cases in which an institutionalized spouse is receiving Medicaid benefits, weighing *both* spouses' needs and circumstances requires consideration of those needs and circumstances as they actually exist under Medicaid.' *Vansach*, 324 Mich App at 396." *Sizick* at 13.

These excerpts from *Schroeder* reveal the Court's misunderstanding of how Medicaid works. When a protective order is presented to MDHHS as part of a Medicaid application or during the Medicaid application process, the amounts set by the probate court for the amount of the nursing home spouse's income to be used for the support of the community spouse and the amount of the marital assets to be transferred for the support of the community spouse are the same numbers the Department must use to determine eligibility. The probate court knows the numbers in the protective order of spousal support will be used by MDHHS to establish Medicaid eligibility and to set the patient pay amount because that is what the law and the Department's policy require. There is no speculation or uncertainty about the protected individual's "need" for money for care and support. The needs and circumstances of both spouses as they actually exist under Medicaid are known when the protective order is issued.

Also, *Schroeder* erred in relying on *Vansach* in this regard. In footnote 14 of *Vansach* the Court acknowledged:

> "We emphasize that the petitions in this case were made after the initial Medicaid determinations had been made and the petitions were premised on the assertion that additional income was needed to 'support' Beverly and Ramona, presumably because § 1396r-5(d)(5) recognizes court orders 'for the support of the community spouse.' Thus, our analysis is focused on the issuance of orders for support under EPIC **after** an initial Medicaid eligibility determination has been made; **we are not concerned with** gift-giving beyond what is needed for support, or other **attempts to use protective proceedings, *before* the initial Medicaid determination for Medicaid-planning purposes.**" (Emphasis added). *Vansach*, 324 Mich App at 394

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Vansach addressed how a probate court must evaluate a petition for a protective order of spousal support which seeks a change in an established patient pay amount[7] by allocating more of the nursing home spouse's income for the support of the community spouse. In this respect, *Vansach* weighed the needs and circumstance of the community spouses and the nursing home spouses "as they actually exist under Medicaid" because those were the facts before it.

Vansach did not opine on how a probate court must evaluate a petition for a protective order, the aim of which is to facilitate a nursing home spouse's ability to qualify for Medicaid by allowing more of a couple's **assets** to be allocated to meet the needs of the community spouse in accord with federal Medicaid law and Michigan Medicaid policy. Also, it did not rule that under EPIC, probate courts lack jurisdiction to make that determination. Unlike the protective orders in *Vansach*, the issuance of a protective order affecting the amount of assets to be transferred for the support of a community spouse is time sensitive. If it is not issued before or during the Medicaid application process, it cannot result in a higher asset limit than is otherwise available under MDHHS policy and it is useless.

Sizick and *Schroeder* were wrongly decided because they arbitrarily cut off a Medicaid applicant's ability to access one of the protections against spousal impoverishment in federal Medicaid law and Michigan Medicaid policy. *Schroeder* stated:

> "The probate court here, however, considered needs in the context of Medicaid-related circumstances even though Mr. Schroeder and Mr. Almay were not receiving Medicaid benefits and were awaiting Medicaid-eligibility determinations." *Schroeder*, 335 Mich App at 123 quoted in *Sizick* at 13.

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[7] A "patient pay amount" or "PPA" is the amount of a Medicaid recipient's monthly income paid to a nursing home as the patient's share of his care costs. It is based on a formula in MDHHS policy in BEM 546 which allows part of the nursing home spouse's income to be set aside for the support of the community spouse. The formula recognizes that a court order of support affects that determination.

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This passage illustrates the Court's misunderstanding of the Medicaid eligibility rules and the Medicaid application process. It shaped its peculiar view that because *Vansach* happened to address a set of facts in which a nursing home spouse had already established eligibility for Medicaid that means a probate court may not consider a petition for a protective order of spousal support unless Medicaid eligibility has already been established. That conclusion is baseless. As noted above, *Vansach* expressed no opinion on protective proceedings used in the Medicaid context before an initial Medicaid determination.

The Court's misunderstanding of Medicaid in *Schroeder* creates a Gordian knot. On the one hand the reason a spouse of a community spouse files a petition for a protective order of spousal support in probate court is to access the Medicaid program's provision for setting aside more of the married couple's financial resources to be used to enable her to continue to live at home independently now and in the future. That happens when the court order of spousal support is presented to MDHHS as part of the Medicaid application process. On the other hand, *Schroeder* prevents issuance of a protective order of spousal support until the nursing home spouse qualifies for Medicaid, thereby blocking Michigan residents from reaching the benefits conferred on them by federal Medicaid law and MDHHS Medicaid policy.

The "Medicaid-related circumstances" in *Vansach* were different from the ones in *Sizick* and *Schroeder*. In the former, the Court was presented with patient pay amounts which were already established by MDHHS for the nursing home spouses in those cases. There were no requests for the transfer of additional assets to the community spouses. The burden of proof for the petitioners was to provide the probate court clear and convincing evidence that the needs of the nursing home spouse and the needs of the community spouse would be met by the protective order. *Vansach* was also different from *Sizick* and *Schroeder* because the nursing home spouses

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in *Vansach* were already having their needs met by the Medicaid program because they had spent down their countable assets to a level at or below the applicable Medicaid asset limit. In contrast, the "Medicaid-related circumstances" in *Sizick* and *Schroeder* were the petitions for protective orders were submitted to the probate courts for the purpose of facilitating Medicaid eligibility for the nursing home spouses by increasing the community spouse resource allowances. The petitioners knew that without court orders of spousal support, qualification for Medicaid was impossible without first spending down a large portion of the couple's countable assets. The loss of those assets would compromise the ability of the community spouses to meet their current and future living needs and to continue living independently in their homes.

Because the support the petitioners sought in *Sizick* and *Schroeder* included the transfer of marital assets that would allow the nursing home spouses to have their needs met by qualifying for Medicaid, they are distinctly different from *Vansach*. *Sizick* and *Schroeder* were wrongly decided because they arbitrarily preclude a probate court from granting relief which allows Michigan citizens to secure the protections against spousal impoverishment in federal Medicaid law and Michigan Medicaid policy. There is no basis for the view of the Court of Appeals that it is an abuse of discretion *per se* for a probate court to analyze evidence of how a protective order of spousal support in a pre-Medicaid context will affect both the community spouse and the nursing home spouse and on that basis, grant relief. After evaluating the evidence, the probate court in *Sizick* concluded the transfer of all the marital assets to the community spouse was necessary to meet her proven needs and to enable her to continue living independently at home. The court's analysis of the circumstances included its recognition that the issuance of the protective order would mean its presentation to MDHHS in the Medicaid application process would allow the nursing home spouse to qualify for Medicaid and thereby

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have his needs met. The probate court also determined the community spouse did not need all of the nursing home spouse's income for her support. Its protective order allowed the nursing home spouse to retain part of his income to pay toward his care costs. The Court of Appeals did not find fault with the probate court's evaluation of the evidence and its conclusions. Rather, *Sizick* rejected them based on its position it was an abuse of discretion for the probate court to make those determinations before the nursing home spouse's eligibility for Medicaid was determined.

Finally, the error in how *Schroeder* construed *Vansach* is shown by the following sentences:

> "A nursing home resident who does not qualify for Medicaid coverage will certainly owe considerably more money to the nursing home than a patient-pay amount in a Medicaid setting. The idiom putting the cart before the horse is aptly applicable to the probate court's analysis. Therefore, reversal is necessary. [*Schroeder*, 335 Mich App at 123.]" Quoted in *Sizick* at 13.

What *Schroeder* failed to recognize is the reversal of the protective order in that case caused the very problem the Court identifies. Because the nursing home spouses did not have protective orders to support their applications for Medicaid, they did not qualify and had to "pay considerably more to the nursing home" than if the protective orders remained intact. The Court's use of the "cart before the horse" idiom confirms it did not properly differentiate how *Vansach* instructs probate courts to evaluate a petition for protective order which modifies a patient pay amount after Medicaid eligibility is established from the situation in *Schroeder* and *Sizick* in which a petition for protective order is filed in probate court to meet a nursing home spouse's needs by facilitating his eligibility for Medicaid while transferring assets and income to meet the needs of the community spouses. In *Schroeder* and *Sizick*, the protective order is the mechanism which enables the horse to pull the cart over the finish line of Medicaid eligibility.

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D. *Sizick* relied on the finding in *Schroeder* it is "imperative" for a probate court to identify the interests being transferred from a nursing home spouse and the value of those interests. That finding is erroneous because it has no relevance to a protective order of spousal support made to facilitate a nursing home spouse's eligibility for Medicaid.

Starting on page 16 of *Sizick* the Court discusses how a protective order of spousal support must account for the transfer of assets between a nursing home spouse and the community spouse. Once again, *Sizick* relies on *Schroeder* for its analysis. The following passage from *Schroeder* is quoted:

> "When a probate court acts to transfer property upon satisfaction of the prerequisites in MCL 700.5401, it is imperative for the court to identify the interests being transferred and the value of those interests. Although there is no specific language in EPIC demanding that information, when a court is examining the financial needs of spouses and orders transfers on the basis of those needs, a valuation of the assets or interests therein is an inescapable and necessary component of the analysis. [Schroeder, 335 Mich App at 125.]" *Sizick*, quoted at 16.

In *Sizick* the protective order issued by the probate court said:

> "IT IS HEREBY ORDERED that Jerome E. Sizick is to transfer 100% of Mr. Sizick's assets including real estate, credit union accounts, financial investments, and insurance as identified in the hearing to Janet A. Sizick as support." [Appendix 2 of Appellant's Application for leave to appeal.]

The Court of Appeals rejected this language and stated:

> " . . . the probate court erred because the list is not an accurate representation of 'the interest being transferred and the value of those interests,' as required by Schroeder, 335 Mich App at 125. We agree." *Sizick* at 17.

The observations and conclusions in *Schroeder* are not germane in the context of the protective order of spousal support in *Sizick*. Regardless of a married couple's circumstances, the one constant in Medicaid eligibility is the nursing home spouse may own no more than $2,000 in countable assets. If after examining a community spouse's needs and the value of the assets reported in the petition for protective order, a probate court determines it is necessary for

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all the assets to be transferred to the community spouse to enable her to continue to live independently at home, it does not matter whether the ownership of those assets is identified and valued in a protective order. It is sufficient to order the transfer of ownership of all the nursing home spouse's interest in the marital assets to the community spouse. That serves the purpose of facilitating the nursing home spouse's qualification for Medicaid because the order of support affects the asset limit used to determine eligibility in the Departments Medicaid application process. Under the agency's policy in BEM 402, the couple has up to one year after the month the Medicaid application is processed in which to actually get the assets transferred to the ownership of the community spouse. Nothing more is necessary in the protective order to serve the best interests of both spouses.

E. *Sizick* was wrongfully decided because the Department unlawfully manipulated the issue presented in its appeal.

As discussed earlier, one premise of *Sizick* is it is an abuse of discretion for the probate court to issue a protective order because the nursing home spouse's needs could not have been considered in the absence of a Medicaid determination. The facts presented in the Appellant's application for leave to appeal show how the Department's actions stood in the way of an eligibility decision being made on Jerome Sizick's Medicaid application and prevented his needs from being met.

Once the Sizick Medicaid application was filed on June 18, 2021, the Department had an obligation to determine his eligibility for Medicaid within a 45-day standard of promptness.[8] The June 21, 2021 protective order which was presented to the Department should have been used to make the eligibility determination and Sizick should have qualified for Medicaid by August 2,

[8] Federal regulations governing the Medicaid program at 42 CFR 435.912(c)(3)(ii) and MDHHS *Bridges Administrative Manual* (BAM) 115, page 15.

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2021. Both the needs of the nursing home spouse and the community spouse would have been met.

The Department knew this. It decided to take no action on the Medicaid application. After it received the protective order, it did not seek a stay of the protective order after filing its claim of appeal[9]. Instead of accepting the court order of support as required by agency policy, it ignored it.

Appendix 13 of the Appellant's application for leave to appeal shows an attorney in the MDHHS Operations and Assistance Legal Division, Bureau of Legal Affairs, advised the local caseworker at the Saginaw County MDHHS office to do nothing on the application:

> "Thank you for the chat earlier. I just spoke with AAG Geraldine Brown and she confirmed that we now have filed an appeal with the Court of Appeals.
>
> Please do not process this case. **We need to ensure the Department does not have a determination because (for lack of a better phrase) that will mess up our appeal."** (Emphasis added.)

If the Department had processed the application in accord with federal Medicaid regulations and its own policies and it had used the protective order to determine Jerome Sizick's eligibility for Medicaid, his application would have been approved and his needs would be met. The Department's arguments to the Court of Appeals about Jerome's needs not being met would have been moot. The agency would then have been relegated to questioning whether the probate court abused its discretion in setting the amount of assets and income the protective order

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[9] Pursuant to MCL 600.867(1), after an appeal of right from an order of the probate court is filed, "all further proceedings in pursuance of the . . order . . .are stayed for a period of 21 days or, if a motion for stay pending appeal is granted, until the appeal is determined . . .". In the instant case, the Department filed it claim of appeal of the protective order on July 12, 2021. The 21-day statutory stay of the protective order ended on August 11, 2021. No motion for stay pending appeal was filed with the Court of Appeals and the protective order was in effect on August 12, 2021 and because the Department had not made an eligibility decision then it should have been used to make that determination.

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assigned to the community spouse.

The Department's unlawful actions were planned to enable it to present a false narrative to the Court of Appeals. As a result of its refusal to process the Medicaid application, the agency portrayed the protective order as depriving Jerome of the means by which to meet his needs as a nursing home resident who does not qualify for Medicaid. The Court of Appeals took the bait and evaluated the protective order from that perspective when it was clear that was not the purpose of the protective order. The petition and the supporting evidence submitted to the probate court made it crystal clear the protective order was designed to facilitate Jerome's eligibility for the Medicaid program and thereby meet his needs while preserving more of the marital assets for the support of his spouse, consistent with federal Medicaid law and the Department's own Medicaid policies. It was on that basis that the protective order was issued. *Sizick* was wrongfully decided because it was a material error to disregard the original purpose of the protective order and the unlawful actions taken by the MDHHS to undermine it. By turning a blind eye to this abuse of the agency's processes, the Court is sending the wrong signal to the Department and the public. The consequence of *Sizick* is to sanction the future use of these tactics by MDHHS to deny Michiganders the protections against spousal impoverishment in federal Medicaid law and the Department's own policies.

F. Summary and conclusion.

According to the U.S. Census Bureau, 18.7% of Michigan's population or just less than 1.9 million Michiganders are over age 65. 10.1% of the state's population is under age 65 with a disability or just more than 1 million Michiganders.[10] Increased age and disability correlate with

[10] U.S. Census Bureau, QuickFacts for Michigan, July 1, 2023 estimates at *https://www.census.gov/quickfacts/fact/table/MI,US/PST045223*.

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a higher dependence on long-term care services. For those married individuals needing long-term care who are unable to manage their property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or confinement, MCL 700.5401 provides protective proceedings as a means of providing money needed for a spouse's support. Probate court orders of spousal support in these proceedings are also a means by which these individuals can capture benefits to prevent spousal impoverishment made possible by federal Medicaid law and the Department's Medicaid policy.

Sizick and *Schroeder* were wrongfully decided because they do not account for the fact that by restricting the availability of protective proceedings to protected individuals whose eligibility for Medicaid has already been approved, Michigan citizens are barred from acquiring the enhanced benefits guaranteed by federal Medicaid law and state Medicaid policy which allow community spouses to retain more marital assets for their needs, enabling them to continue living at home independently now and in the future while meeting the needs of the institutionalized spouse by facilitating Medicaid eligibility.

Those decisions should be reversed because as this brief has shown, they arbitrarily deprive Michiganders of these rights under federal Medicaid law and state Medicaid policy, they are clearly erroneous because they rest on the false premise that the needs of a protected individual in nursing home care cannot be known until that person qualifies for Medicaid and they cause material injustice by blocking married Michiganders from using protective order proceedings as a lawful means of achieving their financial security.

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II. Relief.

The ELDRS and MI-NAELA respectfully request that this Court issue an order reversing the ruling in *Sizick* and *Schroeder* that qualification for Medicaid is a precondition for an order of spousal support from a protected individual in nursing home care and granting the relief requested on pages 27 and 28 of the Appellant's application for leave to appeal.

In the alternative, the ELDRS and MI-NAELA request that this court grant the Appellant's application for leave to appeal and allow them to participate as *amici curiae* on the merits of this case.

Respectfully submitted,

Amici Curiae
Elder Law and Disability Rights Section
of the State Bar of Michigan and the
Michigan Chapter of the
National Academy of Elder Law Attorneys

By: /s/ *David L. Shaltz*
David L. Shaltz (P29330)
Their Attorney
Chalgian & Tripp Law Offices PLLC
1019 Trowbridge Road
East Lansing, MI 48823
517.332.3800

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